2022

The Racial Politics of Fair Use Fetishism

Anjali Vats
University of Pittsburgh School of Law, asv34@pitt.edu

The Racial Politics of Fair Use Fetishism

Anjali Vats[*]

TABLE OF CONTENTS

ABSTRACT

This short essay argues that the sometimes fetishistic desire on the part of progressive intellectual property scholars to defend fair use is at odds with racial justice. Through a rereading of landmark fair use cases using tools drawing from Critical Race Intellectual Property ("CRTIP"), it contends that scholars, lawyers, judges, practitioners, and activists would be well served by focusing on how fair use remains grounded in whiteness as (intellectual) property. It argues for doing so by rethinking the *purpose* of the Copyright Act of 1976 to be inclusive of Black, Brown, and Indigenous authors.

When The 2 Live Crew ("2 Live Crew") triumphed in *Campbell v. Acuff-Rose* (1994), a copyright case that turned on whether their song "Pretty Woman" infringed on Roy Orbison's "Oh, Pretty Woman," many celebrated the victory for its contributions to fair use jurisprudence in the United States,[1] as well as its protection of a then emerging and now

---

* Anjali Vats is Associate Professor of Law at the University of Pittsburgh, with a secondary appointment in Communication. She wishes to thank Margaret Chon for her always incisive and generous comments and the Seattle University School of Law faculty writing group for taking up the piece. She expresses her appreciation to Deidre Keller for their unwavering support in thinking through the project of Critical Race Intellectual Property. And last but certainly not least, she is grateful to Akshat Agrawal for his enthusiastic comments and research assistance on the project. Any errors or omissions are the author's alone.

omnipresent musical form: hip hop.[2] The "transformativeness" standard that the Supreme Court adopted in finding the group's parody of "Oh Pretty Woman" to be fair use appeared to be full of potential, particularly with respect to radically innovative sample based music and art. After all, a mere three years earlier, in *Warner Bros., Inc. v. Grand Upright Music* (1991), Biz Markie had lost his battle claiming that his use of unlicensed samples was fair use.[3] "Thou shalt not steal,"[4] Judge Duffy wrote, breaking new ground by connecting copyright violations to criminality and morality.[5] Never before had copyright infringement been treated as an act of theft that justified criminal prosecution.[6] This call for the criminalization of copyright infringement emerged in tandem with the rise of racist fear of crime rhetorics and the weaponization of obscenity against music and art.[7] Black masculinity, compulsive theft, and hip hop were

---

1. *See e.g.* Anupam Chander and Madhavi Sunder, Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use, 95 CAL. L. REV. 597-626.

2. Kimberle Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, THE BOSTON REVIEW (1991), http://bostonreview.net/race-gender-sexuality/kimberle-w-crenshaw-beyond-racism-and-misogyny [https://perma.cc/6EZW-PNYE].

3. Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F. Supp. 182 (S.D.N.Y. 1991).

4. *Id.* at 183.

5. Rebecca Tushnet, in calling for "epistemological humility" with respect to fair use, once observed that: "the future of fair use as a formal doctrine in the United States depends on whether judges act like bad reviewers on Amazon.com, or whether they behave differently in interpreting challenged works than they do in almost every other aspect of judging." Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 LAW AND LITERATURE 20–32 (2013). In *Grand Upright Music* and since, judges have revealed themselves to be extremely bad reviewers of Black artistic works.

6. *See* e.g. Rudy Scott Jr. Hernandez, *I'm Talking about S-S-Sampling Records: A Glimpse into Digital Sampling, Copyright Law, and the Grand Upright Case Comment*, 1 FLA. ENT. ART & SPORT L.J. 21–24 (1993) writing that "prior to the Grand Upright decision, all suits had either been dismissed or settled before trial.") *Id*. at 21.

7. For a discussion of these attempts at criminalizing rap and hip hop and using lyrics as proof in court cases, *see e.g.* Anne L. Clark, *Nasty as they Wanna Be: Popular Music on Trial*, 65 N.Y.U. L. REV. 1481–1531 (1990); Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment through the War on Paradigm War On: The Fallout of Declaring War on Social Issues*, 15 J. GENDER RACE & JUST. 47–80 (2012); Erin Lutes, James Purdon & Henry F. Fradella, *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J.

treated as mutually constitutive categories requiring harsh retributive legal punishment and even censorship. *Grand Upright Music* was only one of many manifestations of the ferocious racialized culture war that was unfolding in the moment. Over the 1980s and 1990s, the Parent's Music Resource Center ("PMRC"), led by Democratic Second Lady Tipper Gore and other well-known politicos, organized a full scale attack on hip hop, deeming it threatening to the nation's (white) suburban youth.[8] As Luther Campbell explained in an interview on C-Span "a lot of these right wing organizations, uh, start like picking the album apart…and then they started suing."[9] President Bill Clinton's response to Sista Souljah's frustrated remarks about anti-Black police violence echoed the refrains of the PMRC, demonstrating that even allegedly progressive Democrats frequently embraced Reagan-esque "Tough on Crime" language instead of empathy in responding to the nation's race crisis and Black artistic responses to it.[10]

In this context, 2 Live Crew's win in the Supreme Court appeared to be a radical departure from the nation's antiblackness, one that even critiqued the "white bread original"[11] that Orbison penned. Yet transformativeness has not lived up to its potential as a mechanism for protecting innovative Black musical practices or encouraging the acceptance of sampling culture.[12] The broad reading of fair use that legal scholars hoped would emerge from *Campbell* has been supplanted by deeply racialized and capitalist licensing fees, as well as narrow readings

---

CRIM. L. 77-132 (2019); *see also* BRYAN J. MCCANN, THE MARK OF CRIMINALITY: RHETORIC, RACE, AND GANGSTA RAP IN THE WAR-ON-CRIME ERA (2017).

8. *Id*.

9. America and the Courts, Campbell v. Acuff-Rose Music, Inc., C-SPAN (November 6, 1993), https://www.c-span.org/video/?52141-1/campbell-v-acuff-rose-music-inc [https://perma.cc/JGZ5-NGF2].

10. Adam Howard, Sistah Souljah Compares Clinton to Slave Master's Wife, MSNBC (November 13, 2015) (explaining that "Souljah gave a Washington Post interview in the aftermath of the Los Angeles riots, in which she advocated killing white people. Clinton rebuked her publicly in front of a predominately black audience, comparing her to ex-KKK leader David Duke, in what was widely seen as a successful attempt to portray himself as a moderate Democrat who would not play nice with traditional liberal interest groups.").

11. Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569 (1994).

12. The Sixth Circuit's admonition to N.W.A. to "[g]et a license or do not sample" indicates as much. *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 657 (6th Cir. 2004).

of fair use.[13] As Peter DiCola and Kembrew McLeod demonstrate, these licensing fees would have made the production of some of the world's most highly regarded hip hop albums financially impossible.[14] Moreover, as Elizabeth L. Rosenblatt has pointed out, these licensing fees do not primarily benefit the musician – if the musician even owns the music in question. She explains that "many sample licensing fees are extracted from sampling artist's royalties in order to flow from one department at a corporation to another, essentially consolidating profit for the corporation at the expense of the sampler, with small portions eventually flowing to the artists whose works were sampled."[15] The "royalties" that she speaks of are earned through the monetization of the *musical compositions* and *sound recordings*, the rights to which are independent and assignable. Because music publishers, usually record companies and hedge funds, tend to accumulate large catalogues of sound recordings, a sizable percentage of royalties flow to them. Artists who sample must, in a post *Grand Upright Music* world, pay licensing fees to use samples of music in new artistic works. These licensing fees, the lion's share of which generally go to music publishers, come out of the royalties that artists who sample will earn from their new music. This extractive approach to sampling not only limits creativity, it punishes Black artists who pioneered one of the most lucrative forms of music in existence today. In addition to the economic issues it produces, the United States' licensing scheme, i.e. a practice that emerged due to the alleged bad faith of one musician, makes it all too easy to reproduce the deeply racialized and extractive *Grand Upright Music* framework that presumes that those who sampled without a license are criminal bad actors. While it's not clear why defendants in musical copyright cases have opted for what Edward Lee calls "fair use avoidance,"[16] the result is that very little case law suggests that the defense is productive for racial justice. In short, fair use has not offered the panacea

13. The test for fair use is outlined in the Copyright Act. Courts balance four factors – the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion of the copyrighted work used, and the effect of the use on the market for the underlying work. 17 USC § 107.

14. KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING (2011).

15. Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 UC DAVIS L. REV. 591–662, 636 (2019). For instance, George Clinton has vocally contested Bridgeport Music's control over his catalog. This parallel question of ownership of master records points to a need to ask who benefits from fair use.

16. Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1873–1932 (2018).

for musicians, particularly Black ones, that some had hoped post *Acuff-Rose* – or even a practical outlet through which they can creatively engage with existing artistic works. Some of this issue is rooted in culturally distinct orientations to creativity.[17] The extension of this argument that I will focus on here is that fair use is an inadequate, even counterproductive, tool for achieving racial equality. As such, progressive intellectual property scholars would be wise to invest their efforts in locating other paths through which to support Black musicians in making, protecting, and monetizing their music, especially if samples of existing music are involved.

This short essay contends that, while rewriting, remixing, and sampling known and unknown artistic works produces invaluable conversation within hegemonic popular cultural contexts, scholars and activists invested in protecting such works have become conceptually over reliant on fair use, particularly where Black musical innovation is concerned. The belief in fair use sometimes takes a fantasy turn, in which the legal doctrine is imagined to have powers beyond those that it has been empirically proven to possess. A great deal has been written about the possibilities and problems with the fair use doctrine, some of which this essay will consider in greater detail later in short order. However, the part of the debate that the essay focuses on relates to the fair use doctrine's practical and theoretical ability to address problems of musical racial justice, what Kevin J. Greene calls the "mass appropriation"[18] of the artistic works of Black musicians. Given the now abundant historical evidence of the use of contractual extraction and performative appropriation to steal the musical works of Black artists, fair use *cannot* provide *the* path out; it may not even be able to provide *a* path out. To quote Malcolm X: "One is a wolf, the other is a fox. No matter what they'll both eat you."[19] That is to say that just as (white) music industry executives

17. As David Hesmondhalgh puts it: "[Anglo-American copyright law] protects what it calls 'original' works against unauthorized copying (among other activities), whereas [African American and indigenous musical cultures involve] copying from another work to produce a 'derivative' product, raising issues of infringement of copyrights in both composition and sound recording." David Hesmondhalgh, *Digital Sampling and Cultural Inequality*, 15 SOCIAL & LEGAL STUDIES 53–75 (2006).

18. Kevin J. Greene, "Copynorms," Black Cultural Production, and the Debate Over African-American Reparations, 25 CARDOZO ARTS & ENT. L.J. 1179–1227 (2008).

19. Malcolm X at Columbia University, Malcolm X (November 20, 1963), http://malcolmxfiles.blogspot.com/2013/06/columbia-university-november-20-1963.html [https://perma.cc/R32M-BPTH].

could not be trusted to ethically compensate Black artists, (white) judges cannot be trusted to ethically remedy the harms that those music industry executives produced.[20] Addressing this reality is necessary. Part I of the essay, "Hip Hop, Sampling, and the Recognition of Black Brilliance" demonstrates why hip hop and sampling are, now more than ever, central to the legibility and recognition of Black brilliance. Part II "The Not So Promised Land of Fair Use," examines how and when fair use has failed to radically alter copyright practice. Part III "Reimagining the Legal Landscape of Race and Fair Use through Purpose," draws on contemporary conversations about race to encourage scholars, lawyers, and judges to rethink their readings of the purpose of the Copyright Clause in a manner consistent with evolving norms of social justice, in the music industry and in public culture writ large.

I. HIP HOP, SAMPLING, AND THE RECOGNITION OF BLACK BRILLIANCE AS ANTIRACIST PRAXIS

Hip hop, according to the Smithsonian's press kit for its new reader on the subject, is "a musical, political and social movement born more than 40 years ago that's become a global phenomenon in influencing every corner of our lives, from music and fashion to art and politics." Beginning in the late 1970s in the Bronx, hip hop emerged as an increasingly coherent set of subcultural practices among Black and Latinx youth. As Emmett G. Price III outlines in *Hip Hop Culture*, it was comprised of the DJ, graffiti, the b-boy or b-girl, and the MC.[21] Kool Herc, Grandmaster Flash, and Grand Wizard Theodore were the DJs who pioneered the foundations of digital sampling, through analogue production of "breakbeats," "mixing," and "scratching."[22] At the same time, visual artists tagged the urban landscape around them, in protest and rebellion, and b-boys and b-girls danced the night away while MCs rapped in increasingly impressive ways.[23] With the entrance of NWA, Public Enemy, and Afrika Bambaataa on the scene, protesting racist policies and policing as well as gaining "knowledge, culture, and overstanding" became important elements of hip

20. Ian Haney López's pathbreaking work discusses how "the law" is not a monolithic entity but a culturally and rhetorically constructed one, in which individual actors have the power to produce race. *Grand Upright Music* is an example of this. IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1997).

21. EMMETT GEORGE PRICE & JORGE IBER, HIP HOP CULTURE (2006).

22. *Id.* at 21-28.

23. *Id.* at 28-37.

hop culture.[24] By the 1990s and 2000s, hip hop had established itself as Black and Brown music and culture, that emerged from material conditions intended to subordinate and oppress people of color.[25] It grew out of oppression, only to be disciplined by moral panics and legal systems that sought to rein it in. Yet, hip hop found unlikely audiences in white suburban households, facilitating the utter backlash that Campbell described. I want to emphasize here, as Tricia Rose first did in her book, *Black Noise*, that hip hop was, definitionally, a music and culture of brilliance and innovation.[26] It emerged through the radical remaking of "white" music, which was in truth a retooling of Black sonic cultures, such as ragtime, blues, jazz, and rock.[27] This history, which is now essentially canonical amongst Gen Xers and Millennials, demonstrates the relentless counterhegemonic maneuvering through which Black and Brown people have ensured their survival, as well as their joy.

To attempt to reduce hip hop into any simple definition is to miss important elements of it and diminish the experiential components that comprise it. Since its emergence in the 1970s, hip hop has become more than a set of musical and cultural practices. It is now a philosophical approach, a radical politic, and an emancipatory project that profoundly shapes global sounds, from India to the Caribbean, from Europe to Korea. Hip hop now informs education, transforming antiblack pedagogical models into a racially accessible set of practices. Moreover, hip hop, a once hypermasculine and male dominated space, has come to be a site of radical feminist praxis, including and celebrating the *pleasure* of Black femininity itself.[28] A far cry from much of the gangsta rap of the 1990s and 2000s, Black feminist hip hop pedagogies center female experience in all its radiant and celebratory manifestations. As Aisha Durham, Brittney Cooper, and Susana Morris write, "Newer studies in hip-hop feminism focus not only on text-based cultural criticism but also increasingly on

---

24. *Id.* at 37-38.

25. I focus on antiblackness here but note that other groups have been harmed by extractive racial capitalist practices and the overreliance on fair use as well. *See e.g.* Madhavi Sunder, *Bollywood/Hollywood*, 12 THEORETICAL INQUIRIES IN LAW 275-308 (2011).

26. TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA (1994).

27. *Id*.

28. Joan Morgan, *Why We Get Off: Moving Towards a Black Feminist Politics of Pleasure*, 45 The Black Scholar 36–46 (2015); Brittney Cooper & Treva Lindsey, *Love in a Time of Scandal*, THE FEMINIST WIRE (2013), http://www.the feministwire.com/2013/02/10180/ [https://perma.cc/Z5VL-KEGT].

performative, ethnographic accounts that describe hip-hop as embodied, lived culture."[29] They continue:

> We see hip-hop feminism as a generationally specific articulation of feminist consciousness, epistemology, and politics rooted in the pioneering work of multiple generations of black feminists based in the United States and elsewhere in the diaspora but focused on questions and issues that grow out of the aesthetic and political prerogatives of hip-hop culture. Thus, hip-hop feminism is concerned with the ways the conservative backlash of the 1980s and 1990s, deindustrialization, the slashing of the welfare state, and the attendant gutting of social programs and affirmative action, along with the increasing racial wealth gap, have affected the lifeworlds and worldviews of the hip-hop generation.[30]

In this sense, hip hop has progressed far beyond its original beginnings, which were both brilliant and innovative in and of themselves, while remaining true to their core. It is, more than ever, constitutive of a spectrum of Blackness, lived praxis through which politics and pedagogies are articulated and performed. Sampling, a central part of hip hop culture, has become synonymous with signifyin', which Henry Louis Gates describes as a particularly African American manifestation of trickster culture.[31] Recognizing the genius of hip hop, particularly through monetary compensation, is the floor, not the ceiling, of antiracist praxis. Doing so is necessary to *normalizing* Black brilliance instead of treating it as exceptional or rare. This is a project of *legibility* as much as *legality*. White scholars, lawyers, and judges must come to read Black brilliance, including in the context of music, with the same generosity of spirit that seems to mark their engagements with white "originality" and "transformativeness."

---

29. Aisha Durham, Brittney C. Cooper & Susana M. Morris, *The Stage Hip-Hop Feminism Built: A New Directions Essay*, 38 SIGNS: J. OF WOMEN IN CULTURE AND SOCIETY 721–737 (2013).

30. *Id*. at 722.

31. HENRY LOUIS GATES, THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM (1989), http://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=364423 [https://perma.cc/BBA8-WXW4] (last visited Feb. 19, 2022).

Recognizing and rewarding Black brilliance, a term with a long history,[32] is not a practice that US jurists have excelled at. Quite the contrary, American legal history is full of examples of moments of violence against Black people and their creative contributions. Intellectual property scholars and practitioners are at the forefront of engagement with Black brilliance, as demonstrated by cases like *Campbell.* It is, therefore, imperative that they understand copyright law, as well as its constitutive category of "originality," in Clair Spaulding, Jaminque Adams, Demaris C. Dunn, and Bettina L. Love, a manner that is grounded in epistemologies of Blackness. This is precisely what social media campaigns like #BlackBoyJoy and #BlackGirlMagic aim to accomplish, defining Black agency, confidence, and respect without reference to white meritocratic and experiential yardsticks. This is necessary because US curricula are "inextricably linked to centuries of conquering and domination."[33] As one group of scholar educators, Elizabeth put it: "In antiracist schools, educators see Black brilliance and center healing, healthy relationships, histories and herstories that exhume and affirm Black joy."[34]

A trio of mathematics scholars – Erika Bullock, Maisie Gholson, and Nathan Alexander – write in an essay on Black brilliance "we were unprepared for the intense and insidious gravity of our own deficit thinking, given we believed ourselves to be progressive thinkers, promising scholars, and Black nonetheless."[35] They challenge themselves and the educators with whom they are in community to take Black brilliance as "axiomatic"[36] and imagine how that might look. They conclude that "[a]n axiomatic stance of brilliance transcends the offensive position (e.g., proving Black children are brilliant) and defensive position (e.g., refuting Black children's illiteracy or inferiority) involved in framing and forecloses on the endless cycle of proving Black children's brilliance. A new axiom of Black brilliance signals a new set of research questions and a new approach…that [has] nothing to do with Black children's

32. Adrienne Maree Brown, *Ursula Le Guin's Fiction as Inspiration for Activism,* 12 Ada New Media (2021), https://adanewmedia.org/2017/10/issue12-brown/ [https://perma.cc/K7NF-B58D].

33. Justin A. Coles, *"It's Really Geniuses That Live in the Hood": Black Urban Youth Curricular Un/makings and Centering Blackness in Slavery's Afterlife,* 51 CURRICULUM INQUIRY 36 (2021).

34. Clair Spaulding, Jaminque Adams, Demaris C. Dunn, and Bettina L. Love, *Freedom Dreaming Antiracist Pedagogy Dreams*, 99 LANGUAGE ARTS 9 (September 2021).

35. Erika Bullock, Maisie Gholson & Nathan Alexander, *On the Brilliance of Black Children: A Response to a Clarion Call*, E. C. 8 (2012).

36. *Id*.

achievement, as their ability and potential is no longer in question."[37] Put differently: "Under the axiom of brilliance, teachers and scholars start from the assumption that students are highly capable, rather than beginning with low expectations and forcing students to prove that they can meet higher standards."[38] Hip hop pedagogy is one tool that aids in the project of reframing Black brilliance as epistemological given instead of a dubious premise. One aim of this paper is to identify how certain legal approaches are inconsistent with treating Black brilliance as axiomatic as opposed to a hard won victory in the face of presumptions to the contrary. Accordingly, it asks the reader to consider what it means to treat Black brilliance as axiomatic, as opposed to a hard won victory in the face of presumptions to the contrary, in the context of intellectual property, specifically copyright law.

II. THE NOT SO PROMISED LAND OF FAIR USE

In their 2007 article *"*Everyone's A Superhero: A Cultural Theory of 'Mary Sue' Fan Fiction as Fair Use," Anupam Chander and Madhavi Sunder make the case for the importance of remaking existing copyrighted works in the service of anti-racist, anti-colonialist, and anti-misogynist dialogue with hegemonic popular culture from the margins. Highlighting the common fan fiction character of "Mary Sue," a genre of female character inserted into fan fiction and frequently critiqued for her flawlessness, they "rehabilitate Mary Sue as a figure of subaltern critique and, indeed, empowerment."[39] They go on to explain why and how rewriting well-known artistic works produces a counterhegemonic conversation, frequently to the benefit of those who lack power and authority. Their early defense of the social justice potential of fair use contends that: 1) authors should not "cease and desist" in the creation of fan fiction that may be protectable under fair use and 2) fair use ought to be interpreted broadly, through the doctrine of "transformativeness."[40] Chander and Sunder develop what is now a familiar narrative through discussion of parodic fair use in *Campbell* but also *SunTrust Bank v.*

37. *Id.* at 5-6.

38. Lisa DaVia Rubenstein, Charles B. Sandifer, and Robin Spoon, *Reimagining IDEA Using the Axiom of Black Brilliance,* 103 KAPPAN 22 (March 2022).

39. Chander & Sunder, *supra* note 1 at 599; *see also* Betsy Rosenblatt and Rebecca Tushnet, *Transformative Works: Young Women's Voices on Fandom and Fair Use*, in Putting Technology, Theory and Policy into Dialogue with Girls' and Young Women's Voices 385-409 (Jane Bailey and Valerie Steeves eds, 2015).

40. *Id.* at 601.

Houghton-Mifflin (2001), a high profile case that involved a copyright infringement lawsuit that Margaret Mitchell's estate initiated against Black author and cultural critic Alice Randall.[41] Randall's *The Wind Done Gone* rewrote the classic piece of Americana, *Gone with the Wind*, from the vantage point of the enslaved persons living on Tara. As such – and much to the chagrin of Southern conservatives – the novel did considerable work in retelling sentimental white nationalist histories and memories of the antebellum period. A number of African American scholars and activists, including Henry Louis Gates, Toni Morrison, and Lovalerie King joined in praising Randall's rewriting of the beloved literary work from the vantage point of Scarlett O'Hara's mixed race half-sister.[42] Ultimately, after the district court lamented the destruction of O'Hara's character and the Second Circuit held that the plaintiffs were unlikely to prevail on their claim for injunctive relief,[43] the parties settled. The settlement allowed publication of the book, presumably based on the doctrine of transformativeness, but resulted in it being classified as a *parody*.[44] This case, alongside *Campbell*, seemed to illustrate the potential for authors and artists to use "transformativeness" to cast a wide net with respect to remaking popular cultural texts.

Chander and Sunder make a compelling argument that fair use serves a necessary counterhegemonic function, i.e. it provides a mechanism through which authors and artists can speak back to cultural productions via existing characters and stories. However, over 25 years after *Campbell* and 20 years after *SunTrust Bank*, the limitations of fair use and transformativeness have become apparent. Courts have *not* universally embraced either wholeheartedly. Copyright remains a site of myriad fair use struggles – over access to knowledge, semiotic democracy, racial equity, and (post)colonial liberation – in which (white) industrial capitalists seem to continue to have the upper hand.[45] I would go so far as to argue that judicial approaches to fair use produce a category of second class creatorial citizenship, that trades on exceptions. Even Neil Weinstock Netanel in a *defense* of fair use's predictability reported:

---

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

42. Henry Louis Gates, *2 Live Crew, Decoded*, N.Y. TIMES, June 19, 1990, at 23; Toni Morrison, Decl. at 1; SunTrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357 (N.D. Ga. 2001); LOVALERIE KING, RACE, THEFT, AND ETHICS: PROPERTY MATTERS IN AFRICAN AMERICAN LITERATURE (2007).

43. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 at 1276-1277.

44. Reporters' Committee for Freedom of the Press, "*Wind Done Gone" Copyright Case Settled* (May 29, 2002), https://www.rcfp.org/wind-done-gone-copyright-case-settled/ [https://perma.cc/7YVF-F9BC].

45. *See e.g.* Rosenblatt, *supra* note 15.

"[n]umerous scholars have lambasted fair use doctrine. That includes me."[46] Among the critics of fair use's efficacy and predictability are intellectual property giants Lawrence Lessig and Barton Beebe.[47] Lessig, for instance, famously declared "I hate fair use. I hate it because it distracts us from free use,"[48] apparently leading the way in turning a considerable portion of a generation off to its possibilities. As Aram Sinnreich, Patricia Aufderheide, Maggie Clifford, and Saif Shahin maintain "many people who became familiar with fair use in the early aughts may have considered it as a hindrance to utopian goals."[49] Nonetheless, many progressive intellectual property scholars continue to seek to rehabilitate fair use as a necessary and useful tool for challenging overbroad copyright enforcement. This essay is a thought experiment in divesting from that project in favor of more robust, less equivocal claims to creatorship and (intellectual) property. [50]

Some might wonder why an article critiquing fair use as a tool of racial justice is necessary when so few scholars and activists make the explicit case for using the affirmative defense. From where I sit, the reason is structural. Continuing to put faith in fair use to support artists of color diminishes the value of their artistic works as standalone products of brilliance, especially given that fair use still tends to disproportionately benefit corporate entities over individual ones. Rosenblatt writes that "the framework of fair use is not a free-for-all."[51] I build on this observation about the limitations of fair use by showing how its mere rhetorical invocation can operate as a tool of racial and (post)colonial domination and distraction. At the heart of this claim are two arguments: that intensely focusing on fair use suggests that it can solve more problems of self-expression than it actually can, particularly vis-à-vis race, and that it is more than a fantasy script for creators of color. Embracing fair use as a concept without attending to its potentially detrimental impacts on cultural understandings of Black brilliance may indeed create more problems for the long term protection of innovative artistic works than it solves.

---

46. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 715 (2011).

47. *Id.* at 716-717.

48. *See e.g*. PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 66 (2011).

49. Aram Sinnreich et al., *Access Shrugged: The Decline of the Copyleft and the Rise of Utilitarian Openness*, 23 NEW MEDIA & SOCIETY 3466, 3481 (2021).

50. Some of its most ardent supporters include Peter Jaszi and Pamela Samuelson. *See e.g.* AUFDERHEIDE & JASZI, *supra* note 48.

51. Elizabeth L. Rosenblatt, *Fair Use as Resistance*, 9 UC IRVINE L. REV. 377, 390 (2018).

Rosenblatt's Bakhtinian reading of fair use gets at some of the implicit hierarchy established by fair use, e.g. that "an 'original' creator gets not only enhanced rights, but also enhanced stability."[52] David Hesmondhalgh's examination of Moby's *Play*, an album sonically marked by the sampling of audio recordings collected by folklorist Alan Lomax, suggests a similar argument in , highlighting how fair use necessarily cuts both ways by making it easier for white musicians to engage in sampling.[53] A CRTIP approach to thinking about fair use can sharpen conversations around copyright and infringement, as well as advance goals of racial justice. Such an approach also likely requires divesting from the doctrine and its remedial tendencies in favor of more radical interventions that center epistemologically inclusive notions of protectability, originality, and infringement. .

Racial injustice in the music industry, as Rosenblatt demonstrates with precision in her recent work, is distinct from fair use in other contexts, partly because hip hop itself is so closely associated with Blackness.[54] Copyright law, as a tool of enforcing antiblack racism and exploitation, is part of what Michel Foucault would call a "racial episteme,"[55] i.e. a framework through which race is constructed and imagined in America. Countless scholars have traced many ways that Black people have been structurally excluded from copyright law, including: racialized citizenship,[56] musical segregation,[57] problematic (white) co-authorship,[58]

---

52. *Id.* at 394.

53. Hesmondhalgh, *supra* note 17.

54. Elizabeth L. Rosenblatt, *Social Justice and Copyright's Excess*, 6 TEX. A&M J. PROP. L. 5–22 (2020).

55. *See* Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings, 1972-1977 (Colin Gordon ed., 1980).

56. *See e.g.* ROSEMARY COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW (1998); ANJALI VATS, THE COLOR OF CREATORSHIP: RACE, INTELLECTUAL PROPERTY, AND THE MAKING OF AMERICANS (2020). The conversation about the role of citizenship in intellectual property law extends far beyond race, as in Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319 (2007).

57. Greene, *supra* note 18 at 1189.

58. Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L J. 573 (2009); *see also* Hesmondhalgh, *supra* note 17.

unequal contracts,[59] property theft,[60] and legal exclusion.[61] Matthew Morrison goes back a step further to contend that the *architecture* of copyright law itself was built through the legal and performative dispossession of Black artists, through a practice, epistemology, and hermeneutic he calls "Blacksound". As he writes, "mostly white music industrialists capitalized upon the (unrecognized) performance property of black Americans, both in and out of blackface…this process helped to define and liberate imagined visions of whiteness through black popular aesthetics scripted into sheet music and other tangible forms subject to legal protection."[62] He shows, through meticulously assembled historical evidence, that certain particularities of the copyright regime, e.g. the non-protection of sound recordings until the 1970s, emerged from the need and desire of sheet music publishers and music producers to commodify Black music, in appropriative ways that were palatable to white people.

The consistency with which copyright law has been mobilized *against* people of color, particularly Black people, as a disciplinary and extractive mechanism, as well as the conservativeness with which courts have used it as a liberatory tool suggest the need for a critique of the white liberalism underlying fair use. I want to highlight three major ways that fair use *hinders* racial justice instead of facilitating progress toward it. These three arguments draw on the critiques of facial race neutrality that Critical Race Theory scholars such Derrick Bell, Cheryl Harris, and Kimberlé Crenshaw have made, as applied to intellectual property in the growing area of Critical Race Intellectual Property ("CRTIP").[63] In essence, they point to how even laws that appear equal at first glance can elide the histories of whiteness that led to their creation in the first place and their disparate impacts on people of color.[64] From this vantage point, fair use in all its applications can be read as a *minimally* remedial means of addressing the

---

59. *Id*.

60. King, *supra* note 42 at 2.

61. Brian L. Frye, *Invention of a Slave*, 68 SYRACUSE L. REV. 181 (2018); Kara W. Swanson, *Race and Selective Legal Memory: Reflections on Invention of a Slave*, 120 COLUM. L. REV. 1077 (2020).

62. Matthew D. Morrison, *Race, Blacksound, and the (Re)Making of Musicological Discourse*, 72 J. OF THE AM. MUSICOLOGICAL SOCIETY 781–823, 793 (2019).

63. Anjali Vats & Deidre Keller, *Critical Race IP,* 36 CARDOZO ARTS & ENT. L.J. 735 (2018).

64. *See generally* Derrick A. Jr Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1979). Bell posits that racial progress only occurs when it is in the interests of white people.

minimization of Black brilliance instead of a path to racial justice.[65] First, the commitment to fair use is embedded within the very strand of white liberal reformism that critical race theorists such as Bell critique, as opposed to a full embrace of Black humanity and Black epistemologies. Second, judges, steeped in Lockean understandings of (intellectual) property rights, have developed a narrow view of "transformativeness" that reinforces racially exclusionary notions of authorship and innovation, i.e. property rights vest in the "original" but rarely the "copy". Finally, fair use is structurally constructed as a *post facto* rejoinder, an affirmative defense in the face of claims of copyright infringement. This leaves the power to frame the conversation in the hands of more powerful actors. As I will demonstrate in the last section, contesting the very *purpose* of the Copyright Act of 1976, by recontextualizing the arguments made by the Framers of the Constitution through the lens of CRTIP is a preferable alternative to undoing the racial harms of copyright law than continuing to invest in the doctrine of fair use.

To say that the desire to defend fair use reflects white liberalism is to draw on the work of ardent critics of Euro-American political theory, such as Charles Mills. Mills uses the term "racial contract"[66] to describe the tacit political and civic agreement in Euro-American nations to center, value, and reward whiteness. This argument is a more philosophically grounded version of CRT's critiques of white liberalism, that focuses on the organization of civil society under Western rights based modes of governance. Cheryl Harris, for instance, explains that "[w]hiteness as property has taken on more subtle forms, but retains its core characteristic – the legal legitimation of expectations of power and control that enshrine the status quo as a neutral baseline, while masking the maintenance of white privilege and domination."[67] She makes this argument by tracing how property and whiteness have coevolved since Emancipation, in the service of white supremacy. The same argument can be made of fair use, a doctrine that subordinates Black brilliance to the whims of a white supremacist copyright system and a federal judiciary that reflects Euro-American notions of race and creatorship. Just as the shift from US practices of chattel slavery to claims of reverse racism allowed white people to maintain property rights in whiteness itself, the shift from US practices of formal exclusion to claims of outright theft allowed white

65. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049–1120 (1977). Freeman calls this the "perpetrator perspective."

66. Charles W. Mills, *Racial Liberalism*, 123 PMLA 1380–1397 (2008).

67. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1717 (1993).

people to maintain *intellectual* property rights in whiteness itself. For instance, *Grand Upright Music* makes implicit claims of "theft" based on the premise that, by virtue of their whiteness, musicians such as Gilbert O'Sullivan are *entitled* to a broad swath of copyright protection that extends to any use of their music. As countless historians of music and copyright have shown, this presumption does not cut both ways, as the work of Black musicians was not treated with equal ownership and dignity. That *Grand Upright Music* was the first attempt to criminalize sampling, a mundane and common practice in the music industry, illustrates the evolution of the racial politics that led to the restructuring of whiteness as intellectual property.

Harris contends that whiteness has evolved from color to race to *status property*, through property law and antidiscrimination law. She traces this evolution to *Dred Scott v. Sanford* (1857), in which the Supreme Court maintained that affording Dred Scott the privileges of whiteness would diminish the value of that identity. As she puts it, "[b]eing regarded as white, or the reputation of whiteness, represents a blending of the concepts of reputation as honor – that which is claimed by virtue of status – and reputation as property – that which has value in the market."[68] This same process, i.e. the blending of reputation, property, and value, is evident in the conversations around hip hop in the 1990s and 2000s.[69] Acuff-Rose, for instance, in suing 2 Live Crew, argued that the parody's lyrics were "disparaging and therefore not consistent with maintaining the value of the copyright."[70] This comment, seemingly made in the context of the fourth factor of the fair use test, is an example of a company attempting to expansively read the *purpose* of copyright law as a tool for protecting reputation as "value," when the Constitution and Supreme Court have repeatedly stated otherwise. On the one hand, Acuff-Rose's claim is understandable given the emphasis that creators seem to place on reputation even though intellectual property law rarely protects it.[71] On the other hand, the extent to which Blackness is articulated as a "threat" to reputation is troubling and merits attention.

---

68. *Id.* at 1747.

69. For a discussion of trademark dilution as an attempt to maintain whiteness as status property, *see* Richard Schur, *Legal Fictions: Trademark Discourse and Race*, *in* AFRICAN AMERICAN CULTURE AND LEGAL DISCOURSE 191–207 (Lovalerie King & Richard L. Schur eds., 2009).

70. Laurie Asseo, *2 Live Crew's Parody of Orbison is Key to Copyright Dispute, AP News* (March 29, 1993), https://apnews.com/article/6a1251feb7071269dee5450fe2c39b32 [https://perma.cc/5CL5-6375].

71. JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY (2015), 140.

Moreover, while the quote does not clarify why or how "Pretty Woman" is disparaging, read in the context of contemporaneous conversations about the obscenity of 2 Live Crew's work, it is apparent that race played a *central* role in Acuff-Rose's rhetorical construction of the song as vulgar. Race and hip hop were simply too intertwined in the "rhetorical culture"[72] of the moment to read the effects of this comment, even if well-intentioned, as harmless. Marcus Johnson and Ralina Joseph illustrate this in their analysis of Crenshaw's famous essay on the "obscenity" and misogyny of 2 Live Crew:

> "Crenshaw takes issue with the prosecution's racialized biases in categorizing what qualifies or does not qualify as obscene…Crenshaw draws attention to a *Newsweek* article written by journalist George Will condemning 2 Live Crew's disregard for Black women; in the article Will conjures images of the Central Park Jogger and concerns about smoking cigarettes receiving more attention than 2 Live Crew's lewd lyrics about Black women. This sleight of hand…removes Black women from view and replaces them with images…of a white woman. It is with this move that the stereotype of the Black hyper-sexualized and violent 'super predator'…emerges…In the end, Crenshaw determines that the obscenity case against 2 Live Crew was never about being sexually explicit, but about being Black."[73]

This is all to say that even if Acuff-Rose did not intend to raise the specter of race via its disparagement claims, it invariably did. The publishing firm not only centered the value of the "original," i.e. Orbison's "Oh, Pretty Woman," and thus the value of whiteness, but also asserted the need for the "protection" of a white man's creative work from the remixes of obscene Black men.[74] In this sense, *Campbell*, a case so often

---

72. Marouf Hasian, Jr., Michelle C. Condit & John Luis Lucaites, *The Rhetorical Boundaries of "The Law": A Consideration of the Rhetorical Culture of Legal Practice and the Case of the "Separate but Equal" Doctrine*, 82 QUARTERLY J. OF SPEECH 323–342 (1996) (in using this term, Hasian et al. "mean to draw attention to the range of linguistic usages available to those who would address a historically particular audience as a public.) *Id.* at 326. The rhetorical culture in the moment *Campbell* was decided linked race and criminality.

73. Marcus Johnson & Ralina L Joseph, *Black Cultural Studies is Intersectionality*, 23 INT'L J. OF CULTURAL STUDIES 833–839 (2020).

74. For a recent critique of double standards with respect to originality, *see generally* Rosenblatt, *supra* note 29; *see also* Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277–354 (2005). Arewa's analysis alerts the reader to the reality

lauded for its progressive vision of copyright, only made an incremental move within a larger system of racial liberalism. That incremental move had some positive effects but failed to support broader inclusivity goals. Instead, as evidenced by jurisprudence around fair use and transformativeness, those positive effects were limited by the narrowness of the holding and constrained by the expansive culture of white "racial plagiarism"[75] in music.

Mills and Harris lay the groundwork for thinking about how fair use perpetuates racist notions of "transformativeness." The Court in *Campbell* defined parody narrowly, as commentary on a specific text, person, or work, in opposition to satire, or commentary on culture writ large. At the time *Campbell* was decided, this was true across the board. *Rogers v. Koons* (1992), for instance, provided an example of the judicial refusal to extend fair use of satire to a white visual artist.[76] Yet two cases involving sampling in the context of visual art, *Blanch v. Koons* (2006) and *Cariou v. Prince* (2013),[77] seemed to afford white artists fair use and transformativeness latitude that was not extended to artists of color in the context of music.[78] Excitement about the possibilities of these cases

---

that fair use is available to white people even as a tacit norm but to Black people only if they create "transformative" work, as defined by white people. These are two of many examples of this originality double standard.

75. Minh-Ha T. Pham, *Racial Plagiarism and Fashion*, 4 QED: A J. IN GLBTQ WORLDMAKING 67–80 (2017) (Pham uses this term to add nuance to cultural appropriation and copyright infringement claims. She writes:

> Racial plagiarism highlights the racial relationships and inequalities that are obscured by terms like cultural appropriation, cultural appreciation, and piracy. In the fashion context, racial plagiarism occurs when a designer copies racial and indigenous styles, forms, practices, and knowledges without permission and without giving adequate (or any) attribution to the source model and community. As with other plagiarisms, racial plagiarism covers verbatim copying (or in fashion terms, the line-by-line copying of a racially marked garment) and unacknowledged paraphrasing (a reworked but still recognizable derivative model). *Id.* at 69.

76. *See generally* Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

77. Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006); Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

78. Richard Chused, *Brief Thoughts on Fair Use and Third-Party Harm: Another Reappraisal of Patrick Cariou v. Richard Prince*, 67 UCLA L. REV. DISCOURSE 103–120 (2019) (observing this racially problematic fair use claim Prince made and that the court ultimately found to be transformative:

revitalizing fair use embraces the well-intentioned but problematic progressive fantasy that I critique here, by eliding the larger structural realities of racial inequity in copyright law.[79] While these cases may suggest some liberalization of fair use, they also highlight how transformativeness disparately benefits white men, in the former example in appropriating the photography of a white photographer and in the latter example in appropriating images of non-consenting Rastafarians.[80] Despite conceding that he made only "minimal alterations"[81] to Cariou's work, the Second Circuit deemed his work to be "an entirely different aesthetic from Cariou's photographs."[82] This is a far cry from Judge Duffy's scolding in *Grand Upright Music* but not one that has measurably benefitted Black musicians. Moreover, it suggests a variation on Lockean labor analysis that privileges the creativity of white artists and musicians, such as Gilbert O'Sullivan and Richard Prince, despite sometimes minimal efforts, and diminishes the humanity of Black artists. In both cases, the originality and weightiness of the artistic works produced by these men, in the "original" in O'Sullivan's case and the "remix" in Prince's case, was deemed to create an entitlement to intellectual property rights. The sweat of the brain, so to speak, originates from what the Second Circuit perceives to be the innovativeness of the artistic works. The court's conception of transformativeness so deeply centers the artistic expression of Prince that it misses the context of the piece. Chused explains that the "transformation" in which Prince engaged was offensive, even

---

> Patrick Cariou befriended a largely isolated community of rural Jamaican Rastafarians, spent a great deal of time with them over a period of six years, "gained their trust, took an array of pictures with the consent of the community, and placed many of his austere, beautiful images in the 2000 volume YES RASTA." Richard Prince made copies of a number of images from the book, tore portions-mostly people-of some of the photographs from the compositions, blew up the torn out segments to very large sizes, placed them on an array of canvases, and interspersed them with blotches of color, musical instruments, or images of nude, often white, women. The canvases became part of Prince's *Canal Zone* series. *Id.* at 110.

79. See e.g. Julian Azran, *Bring Back the Noise: How Cariou v. Prince Will Revitalize Sampling*, 38 COLUM. J. L. & ARTS 69 (2014). Azran's optimism at Cariou is understandable. However, six years since the publication of the essay and seven years since Cariou was decided, the case's progressive potential appears limited.

80. Chused, *supra* note 78.

81. *Cariou*, 714 F.3d 694 at 711.

82. *Id.*

sacrilegious. He concludes that it is "wildly inappropriate to think of Prince's work as anything like uses of preexisting copyrighted materials traditionally labeled as fair: historic commentary, aesthetic criticism, educational instruction or parody."[83] Indeed, Prince takes images that were never his to take and imposes his whiteness upon them, functionally exploiting and (re)colonizing a group of people that have never writ large benefitted from fair use. His reuse is thus qualitatively different from that of 2 Live Crew. Dehumanizing and distasteful expressions are distinguishable, particularly in the context of transformative works. The extractive form to which *Cariou* reduces fair use cannot be the basis of a racially emancipatory politic.

Perhaps predictably given existing sample licensing laws and racist double standards, as Lee's empirical study of fair use in musical infringement cases demonstrates, courts have decided no cases involving non-parodic copying and fair use since *Campbell.* Lee makes two observations: 1) at best, only one federal court has recognized non-parodic musical copying to be fair use,[84] and 2) very few musical infringement cases have involved discussions of fair use.[85] Still, he contends that the possibility for "copyright clutter,"[86] i.e. the functional occupation of musical material through ownership, requires (re)turning to fair use. While Lee makes a compelling case that fair use is theoretically helpful to musicians and ought to be used more frequently, these recommendations do not take into account racial justice – or the long gap during which artists were not offered a path for making winnable fair use claims. At best, asking Black artists to create work under the presumption of fair use, without licensing samples, creates unreasonable liability. At worst, it adopts a questionable ethical orientation toward historically oppressed groups. Black people would bear the risk of asserting fair use, as in *Campbell*, but with over two decades of silence that suggests, by mere omission, that it is not a workable defense in the face of existing licensing requirements. Lee's argument may very well be persuasive from a copyright clutter perspective. However, the risk involved in combatting copyright clutter, especially for Black artists, is unreasonable.

This is in part because fair use is a *post facto* rejoinder, an affirmative defense in the face of claims of copyright infringement. The concept of

---

83. Chused, *supra* note 78 at 116.

84. Lee says at best because the copyright infringement claim at issue was directed at Drake's "Jimmy Smith Rap," which Lee argues does not definitively constitute an example of *musical* copying. Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1873–1932 (2018).

85. *Id*.

86. *Id*.

fair use as affirmative defense can be traced back to *Folsom v. Marsh* (1841),[87] in which Judge Story named the concept for the first time. Though Lydia Pallas Loren contends that fair use should *not* be treated as an affirmative defense,[88] there is little evidence that her suggested approach has gained traction in courts. As a representational matter, Invoking the fair use defense in copyright proceedings is racially problematic because it reinforces stereotypical understandings of Black people as inherently criminal, insofar as they are conceding infringement, and it perpetuates a copyright system that was built around the financial gains of white people at the expense of people of color.

Lovalerie King demonstrates how Black people in America are presumed to be thieves, even when their own labor is necessary to produce purportedly "stolen" objects.[89] Fair use normalizes that presumption, by forcing Black musicians into a context in which they must admit to the "crime" of copying in order to subsequently defend themselves. As a racial presumption, this is troubling and leaves rhetorical space for journalists to report on cases in ways that replicate all too prevalent stereotypes about race. Fair use accepts the overarching framework of copyright infringement, even though it was produced through an epistemology of racial exploitation. Morrison "interrogates assumptions about the aesthetic legacy of blackface vis-à-vis notions of intellectual (performance) property and considers the ontological basis of property and identity that developed out of the aesthetics of racialized performances."[90] This argument about copyright law's origins in the desire for white industrial capitalists, such as sheet music owners and record company executives, as a tool to make money from the aesthetic innovations of Black people is an indictment of the legal regime itself. Fair use claims concede the epistemological racism of the copyright system while, in essence, asking for reprieve for particular instances of copying. They are also, by definition, ad hoc.

These racial problematics are amplified by the chilling effects of fair use. Deidre Keller and I have written about some of these in the context of education, in response to Jaszi. We note that copyright litigation is almost always expensive and copyright attorneys are almost always a risk averse lot. Relying on fair use to solve the problems of an overexpansive

87. Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841).

88. Lydia Pallas Loren, *Fair Use: An Affirmative Defense Symposium: Campbell at 21*, 90 WASH. L. REV. 685–712 (2015).

89. King, *supra* note 42.

90. Morrison, *supra* note 62.

copyright statute will necessarily result in at least some self-censorship.[91] These reasons, read in the aggregate, alongside strict liability and even *de minimis* approaches to copying, raise considerable questions about the ability of fair use to account for the full spectrum of Black brilliance and, indeed, serve racial justice goals at all, except in outlier cases. This conception of Black brilliance is necessarily exceptionalist, in a way that minimizes the work of Black artists.[92] Forcing Black people into frameworks in which they must defensively prove the reality of their brilliance is epistemologically violent and artistically disrespectful. As I will demonstrate in the last section, conceptualizing a purpose to copyright law that can embrace not only Black brilliance, but also Brown and Indigenous brilliance is an important first step toward racial equity.

III. REIMAGINING THE LEGAL LANDSCAPE OF RACE AND FAIR USE THROUGH PURPOSE

One question that law professors and lawyers tend to ask in the face of critiques of racial liberalism such as the one that I have offered here is "so what?" Legal and policy alternatives are the currency of the legal world, which does not often speak the language of epistemological critique or performative intervention. I often hesitate to offer legal and policy alternatives precisely because they can diminish the power of critique, by suggesting that the pragmatic can achieve the idealistic. Given the audience here, I will offer one concrete alternative: shift the site of racial contestation in copyright infringement cases from fair use to the Copyright Act. Given the results of Lee's empirical study, this has little cost, except perhaps to diminish the value of continuing conversations about reclaiming fair use in the context of music. Two essays, "Social Justice and Copyright's Excess" by Elizabeth Rosenblatt, and "*Et Tu*, Fair Use?" by Jonathan Tehranian, provide starting points for this argument, as well as articulate persuasive critiques of the Supreme Court's increasingly expansionist "natural law"[93] approach to thinking about copyright law's purpose. The argument in this essay, however, requires thinking beyond both of them, through the lens of critical race studies. I believe this is a more fruitful place to invest racial justice energy than contemplating the minutiae of judicial turns toward more expansive fair use policies. It is

---

91. Deidré A Keller & Anjali S Vats, *Centering Education in the Next Great Copyright Act: A Response to Professor Jaszi*, 54 DUQUESNE L. REV. 23 (2016).

92. Vats & Keller, *supra* note 63.

93. John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465.

also consistent with the advice that Jane C. Ginsberg offers to "rebalance the factors"[94] of fair use. The rest of the essay, then, imagines what it might look like to reframe the purpose of the Copyright Act of 1976, as interpreted by the Supreme Court, with an orientation toward antiracist and anticolonial praxis. Treating Black brilliance as axiomatic in copyright infringement cases is an approach to doing so, as is centering Black understandings of authorship.

In *Sony Corp. of Am. V. Universal City Studios, Inc.* (1984), The Supreme Court has articulated the purpose of the Copyright Act of 1976 as:

> "defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly."[95]

This purpose may result in "a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[96] The articulation of purpose is, of course, based on the Constitution itself, which states that the goal of copyright is "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[97] The Supreme Court has reaffirmed this purpose repeatedly over the years, sometimes also embracing curiously broad copyright protection while doing so.[98] In addition to raising inevitable questions about the length and scope of the copyright monopoly, this purpose invokes an imagined author. Based on the fair use cases discussed here, it is reasonable to conclude that the Copyright Act embraces the epistemological standpoint of the *white* author. The terms "progress" and "useful arts, for instance, are circumscribed by race, insofar

94. Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, SINGAPORE J. OF LEGAL STUDIES (2020).

95. Sony Corp. of Am. V. Universal City Studios, Inc. 464 U.S. 417, 430 (1984).

96. *Id*. at 432.

97. U.S. CONST. art. I § 8.

98. *See* e.g. Eldred v. Ashcroft, 537 U.S. 186 (2003).

as they are defined through particular sets of cultural norms. Similarly, "artistic creativity" is a term that is defined through a racial episteme that minimized the artistic and creative capacity of all people of color, particularly Black people. Decentering that whiteness requires conceptualizing both of these terms from the position of racial difference.

Tehranian's critique is helpful for thinking about fair use's relationship to the racialization and whitewashing of authorship as well as the purpose of the Copyright Act. Through a legal history of the anti-monopolistic goals of copyright law, he maintains that historic overreliance on fair use has actually led to overexpansive intellectual property rights by making problematic assumptions about the value of copyrighted works as property.[99] The critiques, of course, are the same ones that, read through a CRT lens, normalize the value of white creativity while simultaneously minimizing the value of people of color's creativity. This cannot produce intellectual property equity. He writes:

> "Far from protecting the public domain, the fair use doctrine has played a central role in the triumph of a natural-law vision of copyright that privileges the inherent property interests of authors in the fruits of their labor over the utilitarian goal of progress in the arts. Thus, the fair use doctrine has actually enabled the expansion of the copyright monopoly well beyond its original bounds and has undermined the goals of the copyright system as envisioned by the Framers of the Constitution."[100]

The critique of natural law justifications of copyright law pushes against the treatment of whiteness as intellectual property by questioning the extent to which authors are entitled to a compensation enhancing monopoly. As Tehranian puts it, Justice Story's articulation of fair use in *Folsom* "set into motion a striking departure from this original heuristic [that no interdiction precluded transformative uses of a protected work] by reintroducing long-spurned natural-law elements into the copyright calculus."[101] Far from accepting transformativeness as a panacea for all that ails copyright law, he notes that early U.S. jurisprudence treated works that built upon existing works as fundamentally "accretive"[102] and thus valuable. Returning to this concept of accretiveness can create legal and rhetorical possibilities for centering people of color in arguments about

---

99. *See generally* Tehranian, *supra* note 93.
100. *Id.* at 466.
101. *Id*.
102. *Id*.

copyright law's purpose. Indeed, Black musical innovation, even if it samples, is only *not* accretive through the lens of whiteness.[103]

Rosenblatt reiterates the legal fact that "copyright 'progress' is about promoting authorship, as opposed to (for example) providing morally appropriate compensation for labor, vindicating the personal connections between authors and their works, or promoting broad social justice."[104] From there, she makes the case that the "progress" part of the Copyright Act makes investment in social justice essential, not extraneous, to copyright law. She writes:

> One might argue that many of these considerations fall outside copyright's explicit priorities…I suggest that even within the narrow instrumentalist vision of copyright, a more complex definition of "progress" that takes into account authors' well-being and diversity reflects a more complete version of the "progress" that copyright should (but may not) serve…Promoting diversity in authorship – that is, promoting the creation of works by the widest possible array of authors – doubtlessly promotes the creation of more works, not to mention more diverse works. And perhaps more importantly, if we think that promoting well-being and diversity among authors would not promote progress, we should rethink our concept of progress.[105]

Rosenblatt articulates the need to emphasize purpose and progress as broad and inclusive concepts, reflective of the decolonial and post-#BlackLivesMatter moment in which we live. Even this shift, the one from treating social justice as incidental to essential to copyright law, can pay tremendous dividends for people of color. Moreover, it forces ethical confrontation with the consistent refusal of copyright law to recognize the creatorial personhood of Black people.[106]

To treat Black music as central to the accretive purpose of the Copyright Act is to decenter whiteness as the benchmark for (intellectual) property and originality. Starting from the presumption that Black music *is* valuable, a fact that has been proven time and time again by white

---

103. Independent of this, as Jessica Silbey's interview research has shown, copyright law consistently fails to meet the needs of creators themselves, by misunderstanding the authorial task and privileging corporate owners. Silbey, *supra* note 71.

104. Rosenblatt, *supra* note 51 at 11.

105. *Id.* at 11-12.

106. Vats & Keller, *supra* note 63 (arguing that people of color are denied status as persons for purposes of copyright).

appropriation of Black musical traditions, is to take Black brilliance as axiomatic. Indeed, imagining how *Grand Upright Music* may have unfolded in a world in which the judge treated Biz Markie's work as *per se* innovative demonstrates how centering purpose over fair use shifts the burden of proof in the case. When Black brilliance is treated as axiomatic, it is incumbent upon the party alleging copyright infringement to demonstrate that the work in question does *not* contribute to the wealth of artistry in the world, that there is some reason to place it, as Rosenblatt would contend, in a hierarchy below the work of the often white creator.[107] This reframing of the copyright conversation through the concept of purpose, I would contend, offers radical possibilities for embracing an array of artistic works, made by Black, Brown, and Indigenous musicians from a starting point other than a hermeneutics of suspicion. Under such a framework, infringement would become secondary to accretion, with attention to actual harm, present and historical. Indeed, each of these groups has faced struggles over racial plagiarism as well as the devaluation of their own artistic works and creative processes. I do not profess to lay out a blueprint for treating Black brilliance as axiomatic. I believe, however, that radicalizing the purpose of the Copyright Act through the rhetoric of accretion provides an important and novel alternative to fair use for making antiracist progress in the context of copyright law. Moreover, while this essay has focused on antiblack racism in the context of music, the arguments have broader applicability. Not only do they provide insights into how other people of color are excluded from equal access to copyright law, they also create possibilities for rethinking the colonial implications of fair use. These conversations, as scholars like Chander, Sunder, Greene, Rosenblatt, and others show, are the future of copyright.

107. Rosenblatt, *supra* note 51.