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COLOR OF CREATORSHIP - Author's Response

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THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS, by Anjali Vats. Stanford University Press, 2020. pp. 296, Hardcover, $90, Paperback, $28.

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When Stuart Hall wrote about encoding and decoding as distinct processes of communication,[1] he was highlighting an important fact about the nature of human interaction: texts, be they visual or rhetorical, exist in the eye of the beholder as much as they do in the eye of the creator. I am grateful for the labor and care that the authors of the reviews in this issue took in responding to THE COLOR OF CREATORSHIP. I am also mindful that their decoding is as much part of the metaphorical life of the book that I wrote as the text itself. A fellow scholar advised me before I had completed my book that I would know what it was about after I finished writing it. At the time, I could not make heads or tails of this wise statement. But, from my present vantage point, a year and a half after the book was released, I can appreciate that my colleague was pointing to a process of radical co-creation, what Hall refers to as "the articulation of

complex practices, each of which, however, retains its distinctiveness and has its own specific modality, its own forms and conditions of existence"[2] that gives life to the work that we do. Like Dr. Frankenstein's monster, books are *alive*, they are records of thoughts from a particular moment in time, hungry for engagement. Ideally, they continue to evolve, live, and breathe as they are taken up in reviews, interviews, podcasts, talks, and panels. They crystallize in some places, they disintegrate in others. We would not be human if our ideas did not develop, if we did not come to see our work in new lights as we learn and change. It is from this framework that I want to respond to the reviews that Professors Kevin J. Greene, Brian Frye, and Rebecca Tushnet have offered. Instead of responding to every idea in each review, I have chosen to take up three themes: 1) the strategy of selective storytelling inherent in longitudinal history as research agenda, 2) the White liberalism intertwined with doctrinal focus, and 3) and the utility of translation as intervention in scholarly research. In fleshing out these themes, I have responded to bits and pieces of the reviews contained herein. The rich reflections and additions that my colleagues have offered are worth meditating on for anyone interested in thinking through issues of race and intellectual property. They are part of an ongoing dialogue.

Several years before THE COLOR OF CREATORSHIP was published, I found myself presenting a chapter to a works-in-progress group. A senior scholar in the room, Professor Dale Herbeck, exclaimed: "This isn't a book, it's a research agenda that could span a whole career!" Prof. Herbeck was correct. I thought about that moment often while writing the book, how, as Professor Tushnet so accurately observes, "here is where a book series could answer questions that a single volume simply can't." Knowing going into a project that it cannot possibly cover all the ground it endeavors to tell a story about is strange and humbling, inevitable in some ways with any project, but perhaps particularly acute with longitudinal histories.

I, therefore, want to begin by framing these responses as evidence that there is much more work to be done at the intersections of race, nation, coloniality, and intellectual property, using a range of methodological approaches. My hope is that the work to come will continue to be in conversation with the complex arguments and historical records—such as the exchanges Benjamin Banneker and Thomas Jefferson engaged in about creativity and race that Professor Frye cites, and the negotiations Prince, James Brown, and Jimi Hendrix engaged in with their record companies that Professor Greene cites—that race and intellectual property scholars have made and continue to make. As a recent book review by Professor Janewa Osei-Tutu illustrates, the conversations yet to be had extend well beyond the book reviews including here, for instance, extending into consideration of theories of international intellectual property and colonialism, including TWAIL, or Third World Approaches to International Law.[3]

I want to take a moment to reflect on why I wrote the book that I did, knowing full well that it would necessarily be imperfect and incomplete, like all scholarship, but in some ways that were knowable up front. When I began writing, I was in the middle of completing a Ph.D. in communication, with a focus on

race and rhetoric. I was still integrating new theoretical languages, through which I found myself revisiting and rereading intellectual property cases that I had first encountered in law school. For me, the work of my race and intellectual property elders—Keith Aoki, Rosemary Coombe, Vandana Shiva, Margaret Chon, Kevin J. Greene, Madhavi Sunder, Anupam Chander, Lateef Mtima, Kara Swanson, Ruth Okediji, Sonia Katyal, Ernesto Hernández-López, Olufunmilayo Arewa, Adam Haupt, Rebecca Tsosie, Graham Dutfield, Kavita Philip, and so many others—represented fragments in a larger conversation that I was convinced needed to be had about the intellectual property law's sweeping and interlocking historical racial trends.[4] I wanted to understand for myself how racial categories evolved across purportedly distinct rhetorical and cultural legal spaces over time, in conversation with concepts that make America so very American with respect to race. Citizenship emerged as a throughline for doing so. But the book I wrote is necessarily constrained by the amount of time that it maps and the number of cases it considers. I understand these gaps as opportunities for further conversations, with many possible directions.

The book does not, as a result of its breadth, unpack the case studies included in it with the depth necessary to answer all of the questions raised by the reviewers. For me, that is okay because, as Professor Willajeanne F. McLean so generously put it: "What makes Vats's perspective unique is that she focuses on how claims to citizenship structure the ways in which intellectual property is constructed…far from being race neutral, intellectual property law, ab initio, reifies and calcifies racial biases."[5] Professor McLean points to what I only fully appreciated after THE COLOR OF CREATORSHIP was published, i.e., why *citizenship* is a productive organizing concept for the book, even when "only" anchored through a close reading of a handful of historical moments. Case studies are touchstones in a larger metanarrative of race, not exhaustive examples of the argument being made. They must hold up, of course. But they operate as litmus tests for developing a theory of a longue durée. In this respect, Professor Greene's attentiveness to James Brown's and Jimi Hendrix's negotiations over their master records, which I take up in a forthcoming piece about Taylor Swift's rerelease strategy of ownership and the erasure of Black musical liberation struggles, is incredibly productive because it directs scholars to continually return to intellectual property's histories, in order to refine theory and praxis. Questioning whether Prince's music contracts were as emancipatory as I suggest is also valuable, because it sheds light on the limits of liberation under contemporary copyright law and contract law, both of which exist in the larger context of capitalism—and also serves a reminder of a sometimes-forgotten truth that people of color can read situations differently and validly even while agreeing that the big picture, here that racial inequality persists, holds.

That said, I do not actually think that Professor Greene and I disagree much, if at all. Before he published his review, I wrote an essay about Prince in which I consider the rock star's decision to change his name to the Love Symbol in the 1990s and his posthumous "performance" at the Halftime Show at the 2018 Superbowl.[6] Using theoretical frameworks drawn from Black Studies, I argue that, while Prince was able to change, in Christina Sharpe's words, the "microclimates" of race and intellectual property, even he could not alter the "weather"[7] produced by the structures, repetitions, and materialities that Sadiya Hartman

contends entrench the "afterlives of slavery." The essay is the beginning of what will become an entire book project about Prince, tentatively titled CREATING WHILE PURPLE: PRINCE, INTELLECTUAL PROPERTY, AND BLACK CAPITALISM. Without a doubt, there are more lessons to be learned, tensions to be explored, and theories to be developed, in engagements across areas of law. Scholars that are taking up these conversations now—Amaka Vanni, Matthew D. Morrison, Minh-ha Pham, Nora Slominsky, Betsy Rosenblatt, Sajjad Ali Malik, Ngozi Okidegbe, Hyo Yoon Kang, Larisa Kingston Mann, Tiffany Nichols, Akshat Agrawal, Olivia Bethea, and so many more—are doing discipline-shaping racial justice scholarship, using new and exciting concepts and methods. Moving between case studies and structural landscapes, in conversation with the social sciences and humanities, will remain important as these discussions develop in form and content.

While we are careful not to define people's scholarship or allegiances, Deidré Keller and I contend in a book chapter that we wrote about race and intellectual property methodologies, that writing about doctrine, power, capitalism, or even inequality is not necessarily writing *about* race. [9] The distinction we make focuses on the object of analysis: asking how and why structural dispossession happens does not inherently address questions of racial identity. This is not a negative with respect to approach, only a difference therein. Still, I want to discuss the implications of focusing on doctrine without focusing on race. Writing about race, as through critical race studies, is an exercise in understanding structural *racial* power and identity, often in nexus spaces, including its historical trajectories, its material structures, and its stubborn persistences. Laying the groundwork to discuss race in the context of technical areas of law, such as intellectual property, can be a formidable task. Moreover, the resulting scholarship is not always legible across disciplinary boundaries if it emphasizes critical race studies-based concepts, theories, and methods. Property and propertization, which are inseparable from histories of settler colonialism, anti-Blackness, and anti-Asianness in the United States,[10] necessarily raise racial questions, that are shaped by what Natalia Molina describes as relational dynamics between racial groups.[11] Professor Tushnet writes that I am harder on Simon Tam than Marvin Gaye or Marshawn Lynch. In a literal sense, this is arguably true. But in a racial sense, the differences between the situations are stark. Neil Gotanda and Robert Chang speak of "racial triangulation"[12] as a method of dividing and conquering. That racial triangulation occurs in the context of (racial) capitalism, with some acts fracturing social justice movements more than others. The distinguishing factor between Tam and Gaye, Lynch, and Prince for me is the *racial cost* associated with their actions. I do not speak to Tam's character or critique the nature of his interventions. But Tam's *victories* come at the expense of Indigenous peoples, in a way that those of Gaye, Lynch, and Prince do not, at least in such a direct fashion. The ethical stakes of the cases are distinct as well, though perhaps not doctrinally so. I do not deny that Gaye, Lynch, and Prince entrench destructive systems as they struggle toward liberation. The concept of (de)propertizing disidentification recognizes the complexity of emancipatory praxis, that it is possible to simultaneously confront stereotypes and entrench them, unmake property and remake it. The purpose of (de)propertization as an analytic is not to offer concrete answers but to make visible the relational pushes and pulls that make pure counterhegemonic action impossible within a system of (racial) capitalism. In that framework, leveraging intellectual property law to make monetary

gains, as Greene notes, is not wrong. To quote Beyoncé, sometimes "best revenge is your paper." But all too often, the paper becomes an end in itself, without constant thoughtfulness about the consequences of attaining it. This is, I believe, a place where the epistemological nuance of Black Studies, Indigenous Studies, and Asian American Studies can aid in developing richer analysis of the cases.

While (racial) capitalism can improve the situations of some, operate as harm mitigation so to speak, it alone cannot, at least in its increasingly unregulated forms, produce equity of any type. In fact, the neoliberalism that Lauren Berlant argues anchors trademarks to nation *is* an integral part of the superstructure that produces inequity.[13] In this way, Professor Tushnet's observation that likelihood of consumer confusion is not connected to racialized outcomes is and is not true. On the one hand, she is correct that this is a place in which the argument of the book is underdeveloped, i.e. I do not delve into the cases through which race is mediated via "confusion." On the other hand, I maintain that the optics of racialization that I am attempting to pin down are built into the larger dynamics of trademarks. Professor Greene writes about how the doctrine of consumer confusion, beginning in the early 1900s, became a tool of (White) robber baron capitalism, shutting out competition in a cutthroat manner.[14] Rosemary Coombe shows this as well, by centering trademarks as important mediators for alterity.[15] In foundational scholarship on trademarks and coloniality, she shows how brand loyalty was a means of encouraging White consumers to invest in the nostalgic racial hierarchies that anchored the post-Emancipation world. I demonstrate how unfair competition cases that evolved into copyright and trademark doctrine, especially those involving Aunt Jemima, normalized White ownership of Black people and their likenesses.[16] Derogatory images perpetuated through (White) judicial interventions relating to consumer confusion were the currency of trademark law. The likelihood of consumer confusion was conceived and produced in a world of (racial) capitalist looking, sustained through the (White) judicial entrenchment of everyday violence. Thus though trademark owners may not be "authorial" or "inventorial" in a literal sense, they play a role in upholding a regime of what Michel Foucault would speak about as power/knowledge in which people of color are systematically diminished by trademarks as well as copyrights and patents. Similarly, as Richard Schur contends, the doctrine of dilution functions as a mediator of purity, one that frequently interfaces with fears of miscegenation. In this respect, dilution cases need not take on race in order to contribute to racial harm.[17] The mere rhetorical invocation of dilution, whether caused or embraced as a result of White racial anxieties, reinforces a fear of mixing that is embedded within narratives of race itself. Professor Tushnet and I seem to be in agreement that the moralization inherent in dilution law is problematic insofar as it adds a layer of potential cultural contempt over top economic concerns. In my mind, the array of issues that Professor Tushnet points to are important ones—but that fact mainly highlights that issues of race deserve more consideration.

This raises what I consider to be a central question in Critical Race Theory, namely the epistemological concern of how scholars ought to orient to doctrine in discussing structure. At times, deep focus on doctrine can be a distraction from structure, a means of looking away from cultural phenomena and legal

trends by homing in on the comfortable minutiae of statutes and cases. In some instances, a deep focus on doctrine can also become a way of watering down racial arguments, by hiding behind the safety of seemingly fixed rules through which White supremacy fluidly sustains and defends itself. The deradicalization of race occurs when doctrine becomes a be all end all, when fidelity to judicial rhetorics becomes a rhetorical constraint as well as a way of occluding racial inequality. Richard Delgado describes the process of producing "imperial scholarship" as a type of (White) doctrinal and interpersonal confirmation bias.[18] Sometimes this imperial scholarship revolves around the production of plausible deniability about the intent of lawmakers or deracialized methods for arguments with similar evasions of accountability. My suggestion, then, is that the doctrinal gaps in the COLOR OF CREATORSHIP and other works are opportunities for further curiosity about the *function* of doctrine with respect to race and "rhetorical culture,"[19] instead of moments for rehabilitating statutory interpretations that have consistently harmed people of color and entrenching narrow conceptions of legal practice as about the expertise in doctrine. Consumer confusion and dilution, after all, reproduce *cultural norms* that are far from emancipatory. Present racial struggles have persisted so long because trademark law became a tool for managing race through visual culture, the "scopic regimes"[20] that Judith Butler discusses. This is a reason to lean into critical race studies and the works of scholars of color, while deprioritizing doctrine, in essence making the familiar strange again.

Doctrine can, even if it is racially neutral on its face, operate as a mediator of public emotion, with different effects across populations.[21] Professor Greene highlights this in rereading the "Blurred Lines" controversy through the lens of Black rage, a public feeling that has very validly characterized the American landscape for some time.[22] Calling upon the barber shop, which has taken center stage as a site of community organizing in contemporary shows like *Luke Cage*, he stresses that negotiations *within* Black spaces structure larger responses to law.[23] Professor Greene's explanation does the same type of translational work that Elie Mystal recently did on Twitter, when he explained: "I know that this is going to be lost on a lot of white people and almost all white Republicans. But when you see Booker or Padilla getting emotional… I just don't think ya'll know how *hard* it is. For us. To get her." The "her" in question is Judge Ketanji Brown Jackson, whose confirmation hearing was a racial legal moment, emotionally akin to the OJ Simpson trial and the Clarence Thomas hearings. Doctrine implicates questions of musical origin—and the public emotions around discussion of those origins—as well. While I agree with Professor Greene's observations that Soul and hip hop are both heavily influenced by the Blues, I am less convinced that they are consistently treated, in musical or cultural contexts, as though their common origins merit equal respect. Generational conflicts over Soul and hip hop have reared their heads a number of times over the years, with emotionally intense disagreements about respectability politics often anchoring them.[24] Moreover, even if the majority of Black people were, as Prof. Greene argues, largely uninterested in punishing Pharrell Williams and T.I. for their copyright violations, their understanding of the situation was far from universal across racial identities. I observed a tendency in mainstream (White) media coverage to erase Pharrell Williams and T.I. as artistic contributors to the song in ways that struck me as epistemically violent. Recognizing that the song was a joint effort—and that Pharrell Williams authored or co-authored

its lyrics—may have opened the door to different responses, not based in litigation. But dominant imaginings of the popular song centered on Thicke as protagonist and target of feminist ire. Disposing of Pharrell and T.I. made it easy to rhetorically position Gaye as put-upon hero. Professor Greene and I are in agreement that "Blurred Lines" was a complex negotiation of victimhood, deeply intertwined with race and music. Finding satisfying solutions to thorny cases like this one is not an easy task. I note in a footnote in the book that I signed onto an amicus brief in the "Blurred Lines" case, though I felt ambivalent about doing so. This is the world in which we operate. No solutions are perfect or unanimous, even when they move the ball forward. Individuals, then, must decide how they will position themselves vis-à-vis incrementalism given the impossibility of ideal options. For better or worse, there is no "right" choice here; there is value even in taking utopian and pragmatic positions.

As conversations about race and intellectual property continue, my hope is that they will answer unanswered questions, including the ones raised here, by drawing upon existing research and new archives. The rapid speed with which intellectual property and digital technologies—both of which are increasingly at the center of political discourse—are moving means that novel issues will continue to emerge, often before problems with the previous ones have been addressed. Some of the same issues that I have written about will undoubtedly rear their heads again, in slightly different iterations. One of the most difficult tasks in having these conversations will be bridging the gaps between disciplinary spaces. While legal practitioners may find themselves erring on the side of policy over theory and humanities scholars may find themselves erring on the side of theory over policy, these two sets of conversations must engage with one another. Practice without theory risks ignoring the historical mistakes of intellectual property that seem to be repeating themselves. Theory without practice risks squandering the important lessons that have come out of humanistic investigations of racial inequalities. I often remind my students that meaningful disagreement with a theoretical position requires understanding and respecting its epistemological groundings. The challenge of the coming years will be in building widely accessible bridges and spaces in which conversations such as the one presented in this special issue can be had and solutions such as the ones suggested here can be imagined and implemented. I remain convinced that successful building is grounded in relationality, as well as an ethic of care for one another. I am grateful that the three brilliant scholars whose work I responded to today so generously engaged with my book. I hope that future conversations can be equally, if not more, generative in advancing social justice objectives related to race and intellectual property, in the United States and globally.

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1. Stuart Hall, Encoding/Decoding, in CULTURE, MEDIA, LANGUAGE: WORKING PAPERS IN CULTURAL STUDIES, 1972-1979, 117-127 Stuart Hall et al., eds. (Routledge, 1980). □
2. Id. at 117. □
3. Janewa Osei-Tutu, Denying Cultural Intellectual Property: An International Perspective on Anjali Vats's The Color of Creatorship, 55 New England L. Rev., 79-91 (2021). □
4. In rhetorical studies, we speak of texts themselves as fragmented, especially in an era of digital technologies. Rarely do audiences engage with complete texts. And when they do, they are still engaged in the process of decoding those texts by piecing together fragments of them with other texts that are contextually and personally important to them. Michael Calvin McGee, Text, Context, and the Fragmentation of Contemporary Culture, 54, WESTERN JOURNAL OF COMMUNICATION, 274-289 (1990); Darrel Allan Wanzer, Delinking Rhetoric, or Revisiting McGee's Fragmentation Thesis through Decoloniality, 15 Rhetoric of Public Affairs, 647-657 (2012). □
5. Willajeanne F. McLean, The Color of Creatorship: Intellectual Property, Race and the Making of Americans, 34 Intellectual Property Journal, 113-126 (2021). □
6. Anjali Vats, Prince of Intellectual Property: On Creatorship, Ownership, and Black Capitalism in Purple Afterworlds (Prince in/as Blackness), 30 Howard Journal of Communications, 114-128 (2019). The "performance" was actually a recording of Prince, projected onto the screens near Justin Timberlake. □
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9. Anjali Vats & Deidré A Keller, Critical Race Theory as Intellectual Property Methodology: Lenses, Methods, and Perspectives, in HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH: LENSES, METHODS, AND PERSPECTIVES, 777-790, Irene Calboli & Maria Lilla Montagnani, eds. (Oxford University Press, 2020). □
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14. Kevin J. Greene, Abusive Trademark Litigation and the Shrinking Doctrine of Consumer Confusion: Trademark Abuse in the Context of Entertainment Media and Cyberspace, 27 Harvard Journal of Law and Public Policy, 609 (2004); K. J. Greene, Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship, 58 Syracuse Law Review, 432 (2008). □
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19. 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 Journal of Speech, 323-342 (1996). ↩
20. Judith Butler, Endangered/Endangering: Schematic Racism and White Paranoia, in READING RODNEY KING/READING URBAN UPRISING, Robert Gooding-Williams, ed. (Routledge, 1993). ↩
21. See, e.g., Sara Ahmed, Affective Economies, 22 Social Text 117-139 (2004); Margaret Chon, Emotions and Intellectual Property Law, 54 Akron Law Review, 529-554 (2021). ↩
22. Soyica Diggs Colbert, Black Rage: On Cultivating Black National Belonging, 57 Theater Survey, 336-357 (2016). ↩
23. Quincy T. Mills, CUTTING ALONG THE COLOR LINE: BLACK BARBERS AND BARBER SHOPS IN AMERICA (University of Pennsylvania Press, 2013). ↩
24. See, e.g., Bakari Kitwana, Hip-Hop Studies and the New Culture Wars, 18 Socialism and Democracy, 73-77 (2004). Conversations about respectability, of course, extend far beyond the realm of music. ↩

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