

The Color of Creatorship

Intellectual Property, Race, and the Making of Americans

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INTRODUCTION

CREATING INTELLECTUAL PROPERTY, CREATING AMERICANS

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

—CLAUDIA RANKINE and BETH LOFFREDA,
“On Whiteness and the Racial Imaginary”

But you're a good girl! The way you grab me
Must wanna get nasty
Go ahead, get at me

—ROBIN THICKE, PHARRELL WILLIAMS, AND T.I.,
“Blurred Lines”

INTELLECTUAL PROPERTY LAW, the body of legal doctrine and practice that governs the ownership of information, is animated by a dichotomy of creatorship and infringement. In the most often repeated narratives of creatorship/infringement in the United States, the former produces a social and economic good while the latter works against the production of that social and economic good. Creators, those individuals whose work is deemed protectable under copyright, patent, trademark, trade secret, and unfair competition law, create valuable products that contribute to economic growth and public knowledge. Infringers, those individuals who use the work of creators without their permission, steal those valuable products and act as drains on economic growth and public knowledge. These narratives, while comforting, are frequently oversimplified in public cultural conversations, in ways that center and elevate Westernness and whiteness and obscure and replicate histories of race and (neo)colonialism.

The Color of Creatorship is a book about the historical and continuing relationships between race and (neo)coloniality in intellectual property law. In it, I join a respected and growing group of scholars in contending that intellectual property law is a set of rhetorics about citizenship. However, unlike those who have previously written about the relationships between intellectual property and citizenship, I focus on the latter as a discourse through which race and coloniality continue to structure doctrinal practices in copyright, patent, and trademark law. Citizenship in the United States was and continues to be a raced concept. More specifically, it is a concept constructed by and through constantly evolving public cultural conceptions of Americanness, white masculinity, property, racial capitalism, and labor.

I use the term “intellectual property citizenship” as an anchoring analytic for understanding how intellectual property and citizenship have evolved—and continue to evolve—in deeply intertwined and raced ways. Through a periodic analysis of American legal cases, political speeches, and cultural practices, this book shows that copyright, patent, and trademark regimes are imagined through always already racialized notions of citizenship that purport to be free of racial bias. Citizenship, while presumed to be race neutral, is frequently defined via shifting normative claims about race, gender, and class and implicit definitions of “good citizens.”¹

This book is more specifically about the complex ways that whiteness and its attendant property interests structure intellectual property law, often in the guise of equality and race neutrality.² Racial inequality is a continuing and persistent problem in intellectual property law, not because of legal happenstance, economic motive, or racial accident but because copyright, patent, and trademark doctrines are fundamentally prefigured through raced conceptions of citizenship. Intellectual property citizenship, then, is a “grid of intelligibility”³—a framework for understanding how power is organized—that reveals the racializing and colonizing principles around which familiar and repeated doctrinal standards in copyright, patent, and trademark law were and are structured.

The codified racial discrimination that made intellectual property law the purview of whites in the 1800s did not disappear. It persisted through the continuing racialized entanglements of the principles of Euro-American citizenship with the principles of Euro-American creatorship. Because conceptions of Americanness were and are structured through a trenchant “racial episteme,”⁴ a frame that a priori constrains possibilities for treating people of color as full persons, let alone full creators, the discourse of citizenship operates as a container for importing race into intellectual property law, even when the law itself purports to be colorblind. The continuing practice of thinking about copyright, patent, and trademark law through romanticized imaginings of American citizenship constrains the manner in which knowledge production/protection can be understood, managed, and adjudicated with respect to race. I do not claim that such racial investments explain the outcome in *all* intellectual property cases. However, I contend that intellectual property law is organized through a racial episteme that consistently protects the (intellectual) property interests of white people and devalues the (intellectual) property interests of people of color.

Tracing “racial scripts” is a tangible method for understanding America’s racial episteme and how it informs citizenship and creatorship/infringement as discursive formations. Racial scripts are historically grounded and flexible racist logics about racial groups that can be accessed at any time to exclude the original or other people of color.⁵ They operate as shorthand mechanisms for calling upon dominant American ideals of national identity, patriotism, political economy, and personhood without necessarily explicitly invoking racial categories or colonial logics. In this way, racial scripts can be baked into the seemingly colorblind ideals of American citizenship that, in turn, inform intellectual property law. Examining how intellectual property law operates as a space of racial formation in which the meaning of racial categories evolves over time is a prerequisite to undoing entrenched white privilege and democratizing knowledge production and ownership.⁶

Intellectual property law is also a “racial project,”⁷ that reproduces particular racial orders, in which people of color are coded as lacking the capacity to create. Unspoken longings, fears, anxieties, and prejudices wrapped in economic and legal language move us to prefer certain intellectual property narratives over others, predictably to the detriment of people of color. When anti-racist, anti-colonial activists grapple with the racial episteme that structures intellectual property law, they can advocate for strategies that resist the underlying drivers of unjust copyright, patent, and trademark policies. While such resistive strategies may ultimately still provide only precarious and fleeting relief, as Derrick Bell famously argues, they confront the fears and anxieties that sustain racial and colonial knowledge hierarchies.⁸

This book contributes to a growing body of scholarship at the intersections of race and intellectual property law through its historically situated consideration of the links among race, coloniality, and knowledge governance.⁹ It traces evolutions in the racial rhetorics around copyrights, patents, and trademarks that unfolded in parallel with the economic and political turns of the nation. Such an inquiry is useful in contextualizing the increasingly important legal regimes governing knowledge that mark some bodies as not only inherently incapable of creatorship but also inherently undeserving of citizenship. As the racial rhetorics of intellectual property law have changed over time, in ways that are consistent with post–civil rights era colorblindness, they have come to exclude people of color in new and different ways.

Accordingly, addressing intellectual property law’s structural inequalities requires thinking about how these racial evolutions persist in a nation that claims to value all people equally. When marginalized groups are considered to be “aberrations from the ethnoclass of Man”¹⁰ contra a white ideal, as Alexander Weheliye writes, they cannot fully occupy the space of creatorship or (intellectual) property ownership until the nation attends to the contours of inequality and exclusion. While Weheliye is commenting on anti-Blackness, his statement is true for all those people of color who are considered outside of the ethnoclass of Man. In the so-called information economy, intellectual property justice is racial justice.

Working through key moments in intellectual property history in the period between 1790 and 2016 reveals that even as American understandings of creatorship/infringement have seemingly evolved, they have actually remained remarkably racially conservative and consistent over time. This book will not provide an exhaustive account of race, coloniality, and intellectual property law during that period. Such a project is neither possible nor desirable. Instead, it focuses on reading some of the most important and notable historical touchstones in copyright, patent, and trademark law as examples of the continuity of racial scripts and colonial relations of domination in the context of knowledge production.

INTELLECTUAL PROPERTY CITIZENSHIP

Intellectual property law is a set of rhetorics that governs knowledge production. These rhetorics interface with larger cultural narratives about national identity, citizenship, personhood, and economic production.¹¹ Copyright law, the law of creative works, affords a limited monopoly to authors and artists who create literary, dramatic, musical, artistic, and other intellectual works that are “fixed in any tangible medium of expression.”¹² Patent law, the law of inventions, affords a limited monopoly to inventors who create new and previously unknown technologies, which they disclose to the public. Trademark law, the law of identifying marks, affords a limited monopoly to trademark owners who use words, names, symbols, and designs to identify their goods and distinguish those goods from the goods of others.

These areas of law are distinct and different from one another, yet they are often lumped together in policy discussions because they govern knowledge production and knowledge protection. There is a strong argument for disentangling them when thinking about their respective cultural, economic, and political workings, as Richard Stallman argues.¹³ Yet it is also useful to think across them, in a categorical sense, in order to identify their central stakes and metanarratives. In asserting that intellectual property law is a rhetorical enterprise, I mean that copyright, patent, and trademark law, like all other legal regimes, are discursive formations shaped by culture, identity, and power. They are not a set of universal or immanent rules about knowledge governance that originate with an infallible authority. They are negotiations of social values and ethical mores and their practical implementations. Rhetorical study can reveal where and how race, a socially constructed category, moves in intellectual property law, particularly over time.

Intellectual property citizenship, as I use the term here, points to the seemingly permanent nexus of copyright, patent, and trademark law and citizenship, a concept that necessarily implicates race, coloniality, racial capitalism, and personhood. It is an analytical tool for understanding the structural complexities of the legal regimes that define the mass noun “intellectual property” and a frame for rendering visible the power structures that prevent racially equitable outcomes in intellectual property contexts. “Citizenship,” a term that is often considered for its formal legal properties, is also a culturally negotiated concept through which certain individuals are included/excluded from the body politic. When it intersects with intellectual property discourse, as it has for hundreds of years, citizenship operates as a discursive vehicle for excluding racially marginalized groups from legal practices of knowledge production and ownership.¹⁴

As Jessica Silbey contends, intellectual property’s narratives are really origin stories about the nation and its people, used to define and negotiate the boundaries of Americanness itself.¹⁵ Collective myths around intellectual property citizenship reinforce and update Euro-American ideals of Romantic authorship/Romantic inventorship,¹⁶ rendering them legible for the cultural politics of the era through evolving rhetorical constructions of hard work, innovation, ingenuity, and ruggedness. In the American imaginary, authors are creatives who produce valuable cultural works; inventors are geniuses who transform flashes of brilliance into practical inventions; trademark owners are producers of goods who protect hard-earned authenticity and quality.¹⁷ Intellectual property citizenship is a mythical ideal defined in part through its relation to these characteristics of individuals who attain the American Dream. Further, it helps to show that intellectual property is a racialized concept, which obscures whiteness and racial power through the mobilization of national feelings of hope, optimism, and pride, as well as fear, anxiety, and protectiveness.

Silbey emphasizes the qualities of Americanness that underlie and animate intellectual property in a mutually constitutive bond. However, she does not go so far as to unpack the *racial* meaning of such characteristics. Embedded in understandings of Romantic creatorship are intersectionally inflected racial and colonial presuppositions about the value of white male knowledge and the value of people of color knowledge.¹⁸ Intellectual property law, as a rhetorical enterprise that shapes Americanness, also constitutes racial and colonial difference in ideological and material ways. Just as “[I] aw constructs race,”¹⁹ intellectual property law constructs race.²⁰

NOTES

1. See Thy Phu, *Picturing Model Citizens: Civility in Asian American Visual Culture* (Philadelphia: Temple University Press, 2012).
2. In order to narrow the scope of the project, I have largely left trade secret and right of publicity law unexamined. However, there is much to be said about race in those two areas of law as well.
3. Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978–1979*, ed. Michel Senellart (New York: Palgrave Macmillan, 2008), 248.
4. Eduardo Bonilla-Silva, *White Supremacy and Racism in the Post–Civil Rights Era* (Boulder: Lynne Rienner Publishers, 2001), 73.
5. Natalia Molina, *How Race Is Made in America: Immigration, Citizenship, and the Historical Power of Racial Scripts* (Berkeley: University of California Press, 2014).
6. Michael Omi and Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s* (New York: Routledge, 1994), 55.
7. *Ibid.*

8. Derrick Bell, *Faces at the Bottom of the Well* (New York: Basic Books, 1992), 12.
9. See Keith Aoki, "(Intellectual) Property and Sovereignty: Notes toward a Cultural Geography of Authorship," *Stanford Law Review* 48, no. 5 (May 1996): 1293–1355; Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998); Margaret Chon, "Intellectual Property and the Development Divide," *Cardozo Law Review* 27, no. 6 (April 2006): 2821–2912; Boatema Boateng, *That Copyright Thing Doesn't Work Here: Adinkra and Kente Cloth and Intellectual Property in Ghana* (Minneapolis: University of Minnesota Press, 2011).
10. Alexander G. Weheliye, *Habeas Viscus: Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (Durham: Duke University Press, 2014), 28. Here and throughout his book, Weheliye draws on the work of Black feminist scholars Hortense Spillers and Sylvia Wynter.
11. For a general discussion of law as rhetorical and narrative practice, see James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life," *University of Chicago Law Review* 52, no. 3 (Summer 1985): 684–702.
12. 17 U.S.C.S. § 102 (2018).
13. Richard Stallman, "Did You Say 'Intellectual Property'? It's a Seductive Mirage," *GNU Project*, 2010, <http://www.gnu.org/philosophy/not-ipr.html>.
14. A number of scholars across Critical Race Theory, international relations, cultural studies, and rhetoric have written about citizenship as cultural and discursive construction. See Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2008); Ian Haney López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 1996); Robert Asen, "A Discourse Theory of Citizenship," *Quarterly Journal of Speech* 90, no. 2 (May 2004): 189–211; Isaac West, *Transforming Citizenships: Transgender Articulations of the Law* (New York: New York University Press, 2014).
15. Jessica Silbey, "The Mythical Beginning of Intellectual Property," *George Mason Law Review* 15, no. 2 (Winter 2008): 319–81. See also Debora Halbert, Majid Yar, Tarleton Gillespie, John Logie, and Jessica Reyman, who explore the cultural and rhetorical constructions of creatorship/infringement. Debora Halbert, "Intellectual Property Piracy: The Narrative Construction of Deviance," *International Journal for the Semiotics of Law* 10, no. 1 (February 1997): 55–78; Majid Yar, "The Rhetorics and Myths of Antipiracy Campaigns: Criminalization, Moral Pedagogy, and Capitalist Property Relations in the Classroom," *New Media & Society* 10, no. 4 (2008): 605–23; Tarleton Gillespie, "Characterizing Copyright in the Classroom: The Cultural Work of Antipiracy Campaigns," *Communication, Culture & Critique* 2, no. 3 (September 2009): 274–318; John Logie, *Peers, Pirates, and Persuasion: Rhetoric in the Peer-to-Peer Debates* (West Lafayette: Parlor Press, 2006); Jessica Reyman, *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture* (New York: Routledge, 2010), 16. James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008).
17. Silbey, "The Mythical Beginning of Intellectual Property," 321.

18. Intersectional analysis calls upon the Black feminist framework that Kimberlé Crenshaw originally articulated as a means of understanding how oppression is necessarily shaped by multiple identity categories, including race, gender, class, sexuality, age, disability, and so on. Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," *Stanford Law Review* 43, no. 6 (July 1991): 1241–1299. Intellectual property's racial investments certainly call for intersectional analysis. See also Kimberlé Crenshaw, "Beyond Racism and Misogyny: Black Feminism and 2 Live Crew," *Boston Review*, December 1991, <http://bostonreview.net/race-gender-sexuality/kimberle-w-crenshaw-beyond-racism-and-misogyny>; Kevin J. Greene, "Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues," *American University Journal of Gender, Social Policy & the Law* 16, no. 3 (2008): 365–85. Though *The Color of Creatorship* does not centrally attend to intersectional axes around race, it engages them in as much depth as possible within the bounds of the project. The lack of consistent engagement with identity categories other than race is not intended to elide them but rather to center race and leave productive space for future scholarly works.

19. Haney López, *White by Law*, 113.

20. Coombe and Aoki lay the groundwork for exploration of this argument in their studies of the constitutive nature of intellectual property law, including with respect to race. Rosemary J. Coombe, "Marking Difference in American Commerce: Trademarks and Alterity at Century's End," *PoLAR: Political and Legal Anthropology Review* 19, no. 1 (May 1996): 105–16; Coombe, *The Cultural Life of Intellectual Properties*; Aoki, "(Intellectual) Property and Sovereignty."