

Created Differences:
Rhetorics of Race and Resistance in Intellectual Property Law

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ABSTRACT

Created Differences:

Rhetorics of Race and Resistance in Intellectual Property Law

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Intellectual property law, specifically that governing trademarks, copyrights, and patents, is increasingly dominated by a narrative of “theft” in which racialized thieves steal knowledge produced by white creators, disrupting global flows of information. Because of intellectual property’s increasingly important relationship to race and production and ownership of knowledge, trademarks, copyrights, and patents are important cultural texts through which racial formation unfolds and racial projects are carried out. In other words, racial categories are created and formed through intellectual property discourses and policies which reflect the racialized rhetorics of the legal regime used to shape policy. Yet, erased and silenced from racialized narratives of intellectual property infringement are the global inequalities which facilitate the private ownership of knowledge in the first place. As this project demonstrates, marginalized groups have recognized the problematic articulations of intellectual property rights with racial difference, finding rhetorical and performative ways to contest the racialized narratives of infringement that continue to justify Western intellectual property regimes.

This project develops *rhetorical disidentification*, a concept built on the work of performance and gender studies scholar Jose Esteban Muñoz, as a means of theorizing how marginalized subjects act resistively within the boundaries of intellectual property law to unmake the links between racial difference and intellectual property rights infringement. Rhetorical disidentification with intellectual property law involves simultaneously complying with and contesting legal discourses in a manner which forces the acknowledgement of otherwise invisible histories of race in defining the public domain and articulating processes of knowledge production. Through their disidentificatory acts, marginalized subjects confront racialized representations of infringement, casting white creators as thieves of indigenous knowledge and illegal occupiers of information that should be held collectively in the public domain. Rhetorically and performatively intervening to counter the racialized narratives that dominate intellectual property law is a resistive act which reconfigures understandings of trademarks, copyrights, and patents to account for histories of difference, asserts the agency of racial Others, and creates space for marginalized rhetors to speak back to legal regimes. While this project focuses on rhetorical disidentification within legal regimes related to knowledge production, the concept more broadly offers a theoretical and methodological tool for rhetoricians to study resistance by marginalized subjects that may not at first glance appear as resistance.

The concept of rhetorical disidentification is developed through three case studies, Andy Warhol's *Mammy*, Alice Randall's *The Wind Done Gone*, and India's Traditional Knowledge Digital Library (TKDL). In each case, marginalized subjects seize agency in areas of law in which their experiences are often unrecognized, using rhetorical and performative tactics to critique intellectual property law's core assumptions through the retelling of histories of race and coloniality. Through *Mammy*, jazz singer Sylvia Williams disidentifies with trademark law's history of protecting histories which valorize whiteness by enacting her objections to Quaker Oats' ownership and zealous enforcement of the Aunt Jemima logo. For Williams' the trademark unjustly asserts ownership over experience of black domestic servitude in the South through the metonymic symbol of a pancake maker. Simultaneously, Warhol disidentifies with consumer culture's often monolithic and unthinking representation of the past by collecting and displaying racist Americana. In *The Wind Done Gone*, Randall creates a disidentificatory parody of *Gone with the Wind* which, when ultimately deemed not to infringe the Margaret Mitchell estate's copyright in the legal case *Suntrust Bank v. Houghton Mifflin*, serves as a testament to the power of novels and public trials in reconstituting infringement and identities in the American South. Finally, through India's TKDL, a digital database of indigenous knowledge, Indian government officials, Indians, and Indian Americans disidentify with colonial systems of knowledge collection, asserting their authority as marginalized subjects to classify and organize information. The TKDL's resistive rewriting of colonial power structures contests grants of intellectual property rights in yoga and asserts the role of South Asians in the production of knowledge. Taken together, these case studies not only demonstrate how marginalized subjects confront intellectual property law's understandings of race but also open space for other rhetors to intervene in legal narratives about race and knowledge, creating productive spaces and alternatives for thinking about future understandings of trademarks, copyrights, and patents.

For Herbert Blau

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I owe a debt of gratitude to the exceptional faculty members on my dissertation committee for supporting me in the completion of this project. Their commitment to their scholarship and students is inspirational and without their rich and detailed feedback, this project would not be what it is today. Though at times I doubted the wisdom of building a six person, interdisciplinary committee, I can say now that doing so was one of the best choices I made in graduate school. I am lucky to have had each one of them guiding me.

My chair and advisor, Ralina Joseph, has been a truly phenomenal role model and mentor. Her rare combination of brilliance, fearlessness, warmth, insight, and supportiveness has helped me through the most trying moments of writing this document. She is not simply a supervisor but a mentor and friend. Ralina's astute observations on my work have helped me to find my own voice and center myself as a scholar. This is no doubt due in large part to her remarkable and innate ability to sense the conditions under which her students work and thrive. In my case, she advocated for daily and iterative draft writing, which I protested vehemently at first. Now, I cannot imagine working any other way. I am convinced that Ralina's superpower is performing Jedi mind tricks—every time I doubted my ability to complete this project this year, I thought of her telling me “you *will* finish, and I *will* hood you in June.” Through Ralina's steadfast guidance, her prediction, or perhaps declaration, has come to pass. In addition to being an incredible mentor, Ralina has been a steadfast friend. She has shepherded me into a community of wonderful scholars, provided emotional support through the most difficult moments of graduate school, and vested her trust in me. There are simply not words to express my gratefulness for all she has taught me about being a scholar, teacher, and person.

Leah Ceccarelli was the first to introduce me to rhetorical criticism in her first year graduate seminar. She helped me to untangle the puzzle that was my scholarly agenda—and it was certainly a confounding one—identifying possible areas of interest in rhetorical theory, helping me to design and independent study, and directing me to scholars whose work was instrumental in the development of my own. I am constantly inspired by Leah's ability to rapidly and deeply process arguments, reading them with laser precision and effortlessly grasping theories and methodologies that are not her own. Her feedback and comments are always precise, incisive, productive, and generous. Quite simply, Leah is a formidable scholar of the best kind. I am thankful for the encouragement and insight Leah provided in this project.

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experience on so many levels. It took us to Paris to present the work, given us a space to develop a collegial friendship, and taught me many valuable lessons about the research and writing process. I have parlayed many of those lessons into this project. I look forward to many more productive collaborations and conversations with her in the years to come.

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INTRODUCTION

Creatorship and the Articulation of Difference

China's push for domestic innovation in science and technology appears to be fueling greater appropriation of other [countries'] IP. The US-China Economic and Security Review Commission (China Commission) has cautioned that China's approach to faster development of sophisticated technology has included the aggressive use of industrial espionage. As the globalization and growth of multinational corporations and organizations blurs the distinction between government and commerce, it is difficult to distinguish between foreign-based corporate spying and state-sponsored espionage. Although most observers consider China's laws generally adequate for protection of IPR, they believe China's enforcement efforts are inadequate. Despite some evidence of improvement in this regard, the threat continues unabated.

Offenders in India are notable primarily because of their increasing role in producing counterfeit pharmaceuticals sent to consumers in the United States. Offenders in the tri-border area of South America are a noteworthy threat because of the possible use of content piracy profits to fund terrorist groups, notably Hizballah. The most significant threat to United States interests from offenders in Russia is extensive content piracy, but this is principally an economic threat as the pirated content is consumed domestically in Russia.

~ National Intellectual Property Rights Coordination Center¹

Whether in the most egregious and obvious form of race-based slavery or in subtler identifications of neighborhoods or even names making it more difficult to obtain mortgages or jobs because of their association with a certain race, the nature and value of property has long been influenced profoundly in and through its association with race.

~ Jonathan Kahn, Professor of Law²

In 2008, former US Attorney Michael Mukasey delivered a speech about the relationship between intellectual property rights violations, specifically the sale of trademarked, patented, and

¹ *Intellectual Property Rights Violations: A Report on Threats to United States Interests at Home and Abroad* (National Intellectual Property Rights Coordination Center, November 2011), iv.

² J. Kahn, "Mandating Race: How the USPTO Is Forcing Race into Biotech Patents," *Nature Biotechnology* 29, no. 5 (2011): 401–403.

copyrighted works by morally depraved pirates and global and domestic terrorists.³ His comments embody a narrative of intellectual property rights that is increasingly prevalent in American public culture. Encoded as a global epidemic of “theft” and “organized crime” carried out by “pirates” and “terrorists,” infringement of intellectual property rights, once treated as a largely victimless crime, become much more nefarious, implicating property damage and bodily harm, not just the unauthorized taking of creative works and inventions.⁴ Mukasey observes that “[w]hile it may be stating the obvious, it’s worth noting that patented inventions, copyrighted software code, and trademarks are precious commodities...counterfeiting and piracy generate huge profits, much of it flowing to organized crime.”⁵ His invocations of counterfeiting and piracy describe a disrupted economic relation, invoking images of marauders on the high seas interrupting the flow of knowledge-intensive products intended to move from their sites of production in the West outward to the rest of the world. The most dangerous intellectual property rights violators produce subpar imitations or copies of America’s most valuable products, using them to “present a real and direct danger to the public.”⁶ As Suzannah Mirghani argues, piracy, a term not typically used in intellectual property legislation, is an increasingly militarized “fear-inspiring discourse that is utilized by industries fighting to hold back the tide of already widespread, socially accepted, and normalized activities of everyday infringement.”⁷

³ Michael Mukasey, “Remarks Prepared for Delivery by Attorney General Michael B. Mukasey at the Tech Museum of Innovation,” *US Department of Justice*, March 28, 2008, http://www.justice.gov/archive/ag/speeches/2008/ag_speech_080328.html.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Suzannah Mirghani, “The War on Piracy: Analyzing the Discursive Battles of Corporate and Government-Sponsored Anti-Piracy Media Campaigns,” *Critical Studies in Media Communication* 28, no. 2 (2011): 127.

The process of intellectual property development that Mukasey describes also suggests the existence of a pattern of exchanging goods. In his story, trademarked products, copyrighted works, and novel inventions are produced through American ingenuity, then stolen by third-parties. Yet erased from Mukasey's story are the conditions under which trademarked, copyrighted, and patented goods are produced. Trademarks, copyrights, and patents are not created and traded on a level playing field, rather they often emerge from the appropriation of cultural knowledge and entrepreneurial activities of "Westerners with more knowledge and power."⁸ As Mukasey's speech suggests, the US is the most significant contributor to the knowledge and power regimes of intellectual property, often heavy handedly using its resources and influence to ensure favorable legal regimes. Disputes in the World Trade Organization over the Agreement on Trade Related Aspects of Intellectual Property rights, among other examples, demonstrates the lengths to which the US is willing to go to ensure strong control over copyrighted, patented, and trademarked works. TRIPs, like much of Western intellectual property law, is "based on the belief that only the knowledge and production of Western corporations need protection."⁹ Mukasey cites American efforts to "ensure strong enforcement worldwide" through "training and technical assistance to thousands of foreign prosecutors, investigators, and judges in more than a hundred countries,"¹⁰ demonstrating the commitment of the US to building a well-enforced infrastructure for policing intellectual property rights violations. Yet left out of his story is a mapping of the legal landscape which allows intellectual property to thrive, often at the expense of erasing the contributions of marginalized groups to

⁸ Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (New Haven: Yale University Press, 2012), 2.

⁹ Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (Boston, MA: South End Press, 1997), 81.

¹⁰ Mukasey, "Remarks Prepared for Delivery by Attorney General Michael B. Mukasey at the Tech Museum of Innovation."

intellectual property regimes and the inequities in access to information and consumer goods spurred by attendant trademark, copyright, and patent monopolies.

As evidenced by its elaborate framework for combatting infringement and vast and growing global anti-piracy network, the US will stop at nothing to protect the fruits of its intellectual labors, jealously guarding its “precious commodities” throughout the world in a manner paralleling the way colonizers protected their colonial empires. In Mukasey’s narrative, in a move reminiscent of that used to build the Coalition of the Willing in the War on Terror, those American allies who refuse to police intellectual property crimes are implied to be enemies—those who are not *with* the US are presumed to be *against* it. Dichotomous thinking prevails in Mukasey’s description of the enforcement of the legal regimes intended to protect authors and inventors of intellectual properties. Those who participate in and enforce US trademark, patent, and copyright law, including the creators of new works who avail themselves of intellectual property protections, are lauded for upholding American traditions of creativity, innovation, hard work, and helping to “ensure strong enforcement worldwide.”¹¹ Moreover, they are applauded for their contributions to global economic growth and development and ensuring that US intellectual property law’s neoliberal order, extends far beyond the nation’s borders.¹²

Less clear from Mukasey’s speech is the question of *who* poses a threat to American intellectual property hegemony. The perpetrators of intellectual property rights violations, however, are revealed in other texts, such as a 2011 report by the National Intellectual Property Rights Coordination Center (NIPRCC) entitled *Intellectual Property Rights Violations: A Report*

¹¹ Ibid.

¹² Keith Aoki, “Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection,” *Indiana Journal of Global Legal Studies* 6 (1998): 11–58. Aoki demonstrates the relationship between the intellectual property rights regime and neoliberal capitalism.

on Threats to United States Interests at Home and Abroad (Report on Threats). The NIPRCC is a US government agency tasked with addressing intellectual property rights violations, thus protecting “the public’s health and safety, the US economy and the war fighters.”¹³ The mission statement of the organization, echoing Mukasey’s speech, proclaims:

Intellectual property rights theft is not a victimless crime. It threatens U.S. businesses and robs hard-working Americans of their jobs, which negatively impacts the economy. It can also pose serious health and safety risks to consumers, and oftentimes, it fuels global organized crime.¹⁴

The NIPRCC’s “About Us Partners” page identifies objectives including the need to identify, disrupt, prosecute, and dismantle “criminal organizations involved in the manufacture and distribution of counterfeit products,” “keep counterfeit and pirated goods out of US supply chains, markets, and streets,” and address “threats to border security, national security, and US economic stability” arising from intellectual property rights violations.¹⁵ Through the Report on Threats, it becomes clear that the targets of these objectives are most often located in the developing world, not among white Westerners. China, India, South America are cited as “The Source of the Threat” from trademark, copyright, and patent infringement. China engages in industrial espionage, undermining US corporations, India’s fake pharmaceuticals threaten to make Americans deathly ill, and South America funds dangerous terrorist groups. Unlike its non-white counterparts Russia, who sells its infringing goods domestically, is posited as a rather innocuous economic competitor, distinguishing it from those who selfishly fuel their own technological development at the expense of Western nations and use their illegal activities to

¹³ “About Us Partners,” *National Intellectual Property Rights Coordination Center*, 2013, <http://www.iprcenter.gov/about-us>.

¹⁴ “Our Partner Agencies,” *National Intellectual Property Rights Coordination Center*, 2013, <http://www.iprcenter.gov/>.

¹⁵ “About Us Partners.”

create dangerous threats of bodily harm.¹⁶ Moreover, while “[o]ffenders in many countries pose a threat, but China-based offenders are the dominant threat and dwarf all other international threats.”¹⁷

A focus on racial Others more clearly emerges in the sections on “Criminal Enterprises” and “Organized Crime.” The Chinese MA Ke Pei and unnamed “Middle Eastern criminal enterprises” are named as threats to Americans. Similarly, organized intellectual property crime also largely originates outside the West, from the Chinese Yi Ging Organization, Lim Organization, Big Circle Boys, 14K, Sun Yee On triads and Mexican Los Zetas. The NIPRCC specifically dismisses threats originating with the Italian Camorra and the Russian Mafia, noting that they are not threats in the United States.¹⁸ While the Report on Threats asserts that “[t]here is little support for the claims that criminal enterprises and organized crime groups use profits from IPR violations to fund Other criminal activities,” it notes that “[t]errorist supporters have used intellectual property crime as one method to raise funds.”¹⁹ The Report on Threats naturalizes the link between intellectual property infringement and terrorism, arguing that the sale of counterfeit merchandise in South America, the Philippines, India, and Pakistan helped to fund Hizballah, al-Qaeda, LeT, and D-Company.²⁰ Through the discourses promulgated by the US government in texts such as Mukasey’s speech and the Report on Threats, the racialization of intellectual property rights violations is magnified through their association with piracy, theft, and terrorism, acts already often deeply intertwined with race in the American imaginary. Piracy, in a different but unavoidably associated sense, is often linked to blackness, particularly in recent years with coverage of Somalia and its links to fundamentalist

¹⁶ *Intellectual Property Rights Violations: A Report on Threats to United States Interests at Home and Abroad*, vi.

¹⁷ Ibid, iii.

¹⁸ Ibid, 38-39. The Report on Threats also notes that the Japanese Yakusa does not engage in intellectual property rights violations in the US but this dismissal of a threat associated with racial Others is certainly the exception, not the rule in the document.

¹⁹ Ibid, 40.

²⁰ Ibid, 41-42.

Muslim terrorism.²¹ Theft, particularly in the United States, has historically been linked to blackness, through racialized stereotypes about criminality.²² Terrorism, of course, is racially and ethnically charged as well, freshly so after the Boston Marathon Bombings. Moreover, developing nations are disproportionately identified as extreme threats to the United States, more so than Western ones whose intellectual property rights violations are minimized through their tendency to involve direct consumption of infringing goods as opposed to facilitating crimes and bodily harm.

Significantly, the identification of the need to protect against intellectual property threats originating in the developing world does not only represent a conservative Republican agenda or corporate interests. The Obama Administration continues the Bush Administration's policy of promising to protect intellectual property, the nation's "single greatest asset,"²³ from Asian infringers—particularly China and India—and preaches the role of trademarks, copyrights, and patents in reviving the once great American economy. According to President Obama, strict enforcement of intellectual property rights is necessary to ensure that "our companies know that someone else can't just steal that idea and duplicate it with cheaper inputs and labor."²⁴ The "someone" implicated by "cheaper inputs and labor" suggests the developing world, a place where low overhead and low wages facilitate easy duplication of ideas and goods produced by the great minds of the Western world. Infringement of intellectual property rights, according to

²¹ Martin N. Murphy, *Somalia, the New Barbary?: Piracy and Islam in the Horn of Africa* (New York: Columbia University Press, 2011).

²² Lovalerie King, *Race, Theft, and Ethics: Property Matters in African American Literature* (Baton Rouge: Louisiana State University Press, 2007), <http://public.eblib.com/EBLPublic/PublicView.do?ptiID=483264>.

²³ Barack Obama, "Remarks by the President at the Export-Import Bank's Annual Conference" (Omni Shoreham Hotel, Washington D.C., 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-export-import-banks-annual-conference>.

²⁴ Ibid.

Vice President Joe Biden is “theft, clear and simple.”²⁵ The illicit use of intellectual properties is “smash and grab, no different than a guy walking down Fifth Avenue and smashing the window at Tiffany’s and reaching in and grabbing what’s in the window.”²⁶ There is no moral gray area in their descriptions of infringement; it is a black and white issue which implicates economics and physical threats, not the global inequalities sparked by creating a Western monopoly on information as well as a system of intellectual property that is fundamentally neoliberal.

Taken together, these examples demonstrate that discourses of trademarks, copyrights, and patents are important spaces for contemporary processes of *racial formation*, the process through which racial categories and racial identities are rhetorically and performatively produced, transformed, and destroyed.²⁷ Over the course of the last decade, “the rise of intellectual property,”²⁸ a phrase popularized by Siva Vaidhyanathan, has dramatically altered not only the nature of knowledge production and the economy of information ownership but also the political rhetorics and performances through which American national and racial identity is constituted. Yet intellectual property’s influence on national and racial identity is not new—though the constitutive effects of trademarks, copyrights, and patents have evolved over the years, they have existed since the formation of America and the development of intellectual property itself. These examples are emblematic of intellectual properties’ constitutive and interpellative implications in the context of race. The problematic racial representations normalized by and

²⁵ Quoted in Jason Mick, “Obama Administration Announces Massive Piracy Crackdown,” *Daily Tech*, June 23, 2010, <http://www.dailytech.com/Obama+Administration+Announces+Massive+Piracy+Crackdown/article18815.htm>.

²⁶ Quoted in Ibid.

²⁷ Michael Omi and Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s* (New York: Routledge, 1994).

²⁸ Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2003).

through discourses of trademarks, patents, and copyrights structurally exclude marginalized groups, create the symbols through which racial Others are identified as inferior, and normalize racial difference as a means of social organization.²⁹ The problematic racial representations validated by and through discourses of trademarks, patents, and copyrights become justifications for exclusionary material realities, creating a feedback loop of exclusionary practices which naturalized racism and the promotion of unequal access to knowledge.

The identification of racial Others as agents of infringement and white Westerners as creators of intellectual property sets up a narrative that affirms the property relations created by trademarks, copyrights, and patents. The racialized binary between creator and infringer presumptively validates a legal regime which defines as legitimate the ownership of protected intellectual properties in the first place. It also works to erase and silence the histories of difference that situate knowledge production and the global inequalities promoted by the intellectual property regime. Instead of encouraging a transparent look at the genesis of knowledge production or the motives behind copying, the repeated identification in American political discourses of infringers—with no moral justifications for their actions—as racial Other presupposes the correctness of the legal order that defines those socially constructed crimes. It also affirms Western genealogies of knowledge, an important element in the persuasiveness of the global intellectual property regime, and renders problematic any type of copying. As the Report on Threats demonstrates, nations such as China and India who violate intellectual property rights, are represented as more interested in the immediate gratification of industrial espionage and pharmaceutical replication than they are in cultivating a spirit of innovation.

²⁹ Kevin 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): 365-385; Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998), 173; Kahn, “Mandating Race.”

Copying, a practice devalued by Western intellectual property regimes but not many other cultures, is transformed into a marker of laziness and inadequacy, not a culturally dependent value with multiple interpretations or a means of surviving monopolies which result in high pricing of goods. For instance, in a report on China's "copycat culture," the *New York Times* reported that despite Beijing's attempts to encourage independent production, a claim which would undoubtedly be met with a great deal of questioning and criticism by content owners, "[d]ishonest copiers move quickly to secure an advantage in a rapidly growing market, and their success, in turn, perpetuates China's copycat culture."³⁰ A *Forbes* piece proclaims that due to the practice of *shanzhai*, the imitation of designer goods, and a lack of individual rights, China will continue its "flagrant" copying. Even in highlighting the Chinese values that encourage copying, the article devalues them, identifying them as symbolic of a lack of emphasis on individual rights, the staple of Western democracy.³¹ The creator still emerges as superior to the infringer, whose actions are premised on a backwards system of values.

Racial formation in intellectual property discourse, however, does not connote a one-way process in which only would-be oppressors can exercise domination over non-white subjects. Rather, it is a hegemonic negotiation, in Gramscian terms, in which resistance can also occur.³² In other words, while trademarks, copyrights, and patents are racializing discourses, they are not totalizing ones. This project is concerned with theorizing how marginalized individuals, through their rhetorics and performances, contest the racialized creator/infringer narrative, creating space for unrecognized rhetors to speak and multiple histories of knowledge production. Using three

³⁰ Alexandra Harney, "China's Copycat Culture," *New York Times*, October 31, 2011, <http://latitude.blogs.nytimes.com/2011/10/31/chinas-copycat-culture/>.

³¹ Kenneth Rapoza, "In China, Why Piracy Is Here To Stay," *Forbes.com*, July 22, 2012, <http://www.forbes.com/sites/kenrapoza/2012/07/22/in-china-why-piracy-is-here-to-stay/>.

³² Antonio Gramsci, *Selections from the Prison Notebooks* (New York: International Publishers, 1971), 12-13.

legal cases studies—Andy Warhol’s *Mammy*, Alice Randall’s *The Wind Done Gone*, and India’s Traditional Knowledge Digital Library (TKDL)—this project maps resistance to intellectual property’s racialized narratives and mythologies, identifying moments of racial reformation within the liminal spaces of oppressive discursive structures.

The concept of *rhetorical disidentification*, which derives in part from the work of performance studies scholar Jose Esteban Muñoz, anchors this project. While Muñoz understands disidentification as a performative concept to theorize the resistive potential of drag performances and artistic works by queers of color, I reread it through the lens of rhetorical theory in order to identify and theorize generative rhetorical and performative possibilities within intellectual property law. Rhetorical disidentification occurs when marginalized individuals both refuse and comply with the imperatives of dominant ideology, crafting their own messages through their rhetorics and performances. The rhetorical redeployment of the concept arises through its inventive and persuasive nature. Using existing cultural formations against themselves, marginalized rhetors reinvent restrictive regimes through their own interventions, thus generating their own messages about those regimes. Rhetorical disidentification is thus a practice of engaging in rhetorical and performative practices which both embrace and reject dominant rhetorics, performances, and ideologies, using the language of contemporary power structures to resist and critique their oppressive discourses, make visible erased and silenced histories of race, and create space for the exercise of agency by marginalized subjects.³³

Just as queers of color abide by and defy social norms by performing new understandings of gender and racial identity, simultaneous compliance with and resistance to the discourses of trademarks, copyrights, and patents operates as a rewriting of intellectual property law. The

³³ Ibid, 8.

application of Muñoz's concept of disidentification to legal regimes facilitates greater understanding of how resistance unfolds in regimented spaces. By way of their rhetorical choices and actions as well as the texts they invent, marginalized individuals act upon legal systems, questioning their assumptions and boundaries. Through rhetorical disidentification, marginalized individuals, the texts they create, and audiences who interact with them open up space in public culture for the exercise of agency, confronting the erasures of histories of race that contribute to racialization. In this sense, rhetorical disidentification offers a race-focused reading of Kenneth Burke's concept of identification. While Burke focuses a great deal on consubstantiality between rhetor and audience, he does not take into account questions of difference: rhetorical disidentification offers a model for focusing on how marginalized subjects both identify with and reject the rhetorical arguments they are presented.

The three case studies presented here, while quite different, are emblematic of a strategy of rhetorical disidentification. They provide powerful examples of how the rhetorics and performance of marginalized groups operate to critique the racialized creation/infringement narrative of trademarks, patents, and copyrights. In particular, in each case study, the rhetorics and performances of marginalized rhetors work to reinvent the contents of intellectual property's "public domain," redefining key terms of art, such as "parody," "patentable," and "prior art," used in trademark, copyright, and patent discourses. The existence of the public domain is a necessary precondition for the creation of trademarks, patents, and copyrights because it defines the available "raw materials" from which new creative works and inventions can be constructed and dictates which of them can and cannot be owned.³⁴ As a result, contesting the landscape of

³⁴ Keith Aoki argues that even trademark law governs the "quasi-author" and thus requires the existence of a public domain. Keith Aoki, "Authors, Inventors and Trademark Owners: Private

the public domain by recasting of histories of race is a powerful act which alters the makeup of the set of information from which creators can pull. Through their rhetorics and performances, marginalized individuals assert individual agency and register dissent by making visible histories of race experienced by racial Others. They also, through of their interventions, open spaces for new modes of engagement with intellectual property and create emancipatory possibilities for rethinking knowledge production. In particular, Warhol's *Mammy*, Randall's *The Wind Done Gone*, and India's TKDL refute intellectual property's definition of the boundaries of the public domain, marking particular subjects unsuitable for private ownership. Read in this way, the concept of rhetorical disidentification makes an important contribution to conversations in rhetoric about how marginalized groups exercise agency in the face of oppressive conditions, facilitating greater nuance in reading seemingly monolithic conditions.³⁵

In a move analogous to what Lawrence Lessig describes as “remix,”³⁶ acts of rhetorical disidentification contest the racial mythologies and narratives of theft woven by contemporary discourses of trademark, copyright, and patent infringement, effectively reconstituting the core concepts in intellectual property law which facilitate racialization. Taken together, disidentificatory rhetorics and performances *remythologize* the racialization of infringement in intellectual property, claiming a place for the marginalized authors and inventors in history. Just

Intellectual Property and the Public Domain, Part I,” *Columbia Journal of Law and the Arts* 18 (1994): 4.

³⁵ Karlyn Kohrs Campbell, “Agency: Promiscuous and Protean,” *Communication and Critical/Cultural Studies* 2, no. 1 (March 2005): 1–19; Stacey Sowards, “Rhetorical Agency as Haciendo Caras and Differential Consciousness through Lens of Gender, Race, Ethnicity, and Class: An Examination of Dolores Huerta’s Rhetoric,” *Communication Theory* 20, no. 2 (2010): 223–247; Darrel Enck-Wanzer, “Tactics of Puerto Rican Cultural Production in East Harlem: Casitas, Gardens, Flags, Murals and Rhetorical Agency,” *Communication Theory* 21 (2011): 344–367.

³⁶ Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Books, 2009).

as remixing denotes the bricolage of fragments of public culture, remythologization suggests the manipulation of existing boundaries of intellectual property to create new understandings of the relationship between race and infringement. In the cases studied here, remythologization manifests in material forms in a bricolage of artifacts of Americana, legal filings, works of literature, and indexes of traditional knowledge. These objects are not only markers of the exercise of agency but rhetorical artifacts which ensure continued focus on erased histories. In each of these cases, collections, archives, or databases emerge as material rhetorical markers through which the silences and misrepresentations of histories of intellectual properties are memorialized. As a result, rhetorical disidentification is a productive tool for making visible and mapping racial and colonial histories, bringing them to the forefront of cultural consciousness in a process that Paul Gilroy terms a “historical ontology of races.”³⁷ It is also a powerful tool for identifying and reading the resistive rhetorics and performances of marginalized groups in a manner that opens new possibilities for undoing the law’s racial exclusions.

The “seductive mirage” and its racialization

“Intellectual property,” as Richard Stallman has argued, is deployed in public culture as an undifferentiated mass despite being comprised of distinct and developed bodies of law.³⁸ Far from being a singular legal regime, it includes the laws of trademarks (brands), copyrights (creative works), patents (inventions and designs), rights of publicity (use of celebrity likenesses), and trade secrets (valuable commercial information), among others. Accordingly, the very deployment of the concept of intellectual property is an ideological maneuver. As a mass noun, which obscures the details of individual areas of law, it facilitates the deployment of

³⁷ Paul Gilroy, *Postcolonial Melancholia* (New York: Columbia University Press, 2005), 7.

³⁸ Richard Stallman, “Did You Say ‘Intellectual Property’? It’s a Seductive Mirage,” GNU Project, 2010, <http://www.gnu.org/philosophy/not-ipr.html>.

rhetorical strategies that erase differences, addressing them all under a single umbrella term. Such discursive erasure stifles in-depth discussion and debate about the nuances of public policy in individual areas of law, facilitating the creation of narratives and mythologies around intellectual property as a single cultural object. Moreover, the term intellectual property “carries a bias that is not hard to see: it suggests thinking about copyright, patents and trademarks by analogy with property rights for physical objects.”³⁹ The association of intangible objects with real property makes coherent the notion of theft of non-exclusive information. It also renders criminalization of the act of taking trademarked, copyrighted, and patented works justifiable. The result of the use of the term intellectual property, then, is to ideologically tilt discussions in favor of content owners: through use of a seemingly-homogenous category, a justification for stricter penalties for infringement in one area of law can be translated to others. The lack of in-depth discussion about trademarks, patents, and copyrights and their association with exclusively owned property often results in public policy decisions which promote fear-mongering and err on the side of overprotection of intellectual property, a choice which benefits large, corporate content owners, as opposed to protecting the free-flow of information in the public domain. Linking intellectual property rights violations with terrorism, for instance, justifies heavy-handed penalties for trademark, copyright, and patent infringement even when the relationship between the individual areas of law and criminality is not proven. Consistent with Stallman’s critique, the case studies included here addresses one or more of the three primary areas of intellectual property law, i.e. trademarks, copyrights, and patents, teasing out their individual contours.

Nonetheless, there are important reasons to study how intellectual property is deployed as a single rhetorical object, especially as a tool for asserting ownership over creative works and

³⁹ Ibid.

inventions even in the face of protest. Applying Stallman's argument to understandings of the social construction of race reveals that the term intellectual property erases another kind of difference as well, namely that related to race. Mukasey's speech illustrates the relationship between the whole of intellectual property and its constitutive parts. His framing of intellectual property rights violations is marked by a tacking back and forth between the vague concept of "IP crime" and specific examples of trademark, patent, and copyright infringement. In discussing the links between intellectual property infringement and terrorism, the production of a fake designer purse, manufacture of unpatented AIDS medication, and copying of software are grouped into one category which is used to justify the categorization and criminalization of all types of intellectual property "theft." However, the types of "IP crime" that Mukasey identifies are in reality distinct and separable. Trademark law, governed by the federal Lanham Act, is intended to protect the good will of companies, ensuring that the images and texts used to identify their products retains their reliability as indicators of sources. As a result, trademark law is an unfair competition doctrine, intended to ensure that consumers are not confused by identifying marks that are overly similar. While Congress derives the power to regulate trademarks from the Commerce Clause, the authority over patents and copyrights is specifically mandated in Article I of the Constitution. It is the right and responsibility of Congress "To 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."⁴⁰ Thus, while jurisdiction over trademark law is shared between the federal government and states, only Congress has authority to regulate patents and copyrights. Patents and copyrights are not a means of ensuring fair competition but rather mechanisms for granting limited monopolies to

⁴⁰ U.S. Const. art. 1, § 8, cl. 8.

authors and inventors in order to promote innovation and the establishment of a rich public domain. Moreover, the legal issues that arise with respect to trademarks, patents, and copyrights often do not overlap or even necessarily implicate one another despite the grouping of all three areas of law into one reductive category of intellectual property.

Even with a basic understanding of the distinctions between trademarks, patents, and copyrights, it is easy to see why the lumping together of different types of infringement is susceptible to Stallman's critique. Not only are the economic implications of the infringement of trademarks, as opposed to copyright or patents, dramatically different but so are the acts of "theft." Trademark infringement consists in the use of an image, text, or combination thereof in order to invoke the sense of preexisting brand identification. Copyright infringement describes the unauthorized copying, distribution, and display of a protected creative work as well as the production of related derivative works. Patent infringement occurs at the unauthorized use of a protected invention. To label the unauthorized use of a trademark that resembles another trademark, the use of a creative work without permission, and the production of an invention that is already owned all as "theft" necessarily refuses distinctions between the value and nature of the commodities being circulated as well as the implications of their taking. As Stallman explains it, "specific issues raised by the various laws become nearly invisible...one issue relating to copyright law is whether music sharing should be allowed; patent law has nothing to do with this. Patent law raises issues such as whether poor countries should be allowed to produce life-saving drugs and sell them cheaply to save lives; copyright law has nothing to do with such matters."⁴¹ Nonetheless, this blending of commodity forms, laws, and values into one category is a powerful and effective maneuver, not only for persuading the public to take action

⁴¹ Stallman, "Did You Say 'Intellectual Property'? It's a Seductive Mirage."

against all types of “theft,” even if they are not related, but also to homogenize the perpetrators of those crimes. More often than not, those perpetrators are racial Others.

This is not to say that racialization does not occur within in the context of discussions of trademarks, patents, and copyrights individually. In fact, quite the contrary is the case.

Rosemary Coombe, for example, argues that federal trademark laws actually created the means by which marketing firms were able to construct the American consumer. Trademarks became the texts through which American identity and racial hierarchy were articulated.⁴² Indeed, trademarks operate as much more than markers of brand identity, as they “provide symbolic resources for the construction of identity and community, subaltern appropriations, parodic interventions, and counterhegemonic narratives.”⁴³ Trademark law developed, in part, as a means of creating an American identity, particularly one that normalized the superiority of whiteness and the inferiority of non-white Others. Images of Aunt Jemima, Uncle Ben, Black Sambo, and the Washington Redskins emerged as ways to both sell products and affirm the social significance of racial difference.⁴⁴ Moreover, trademark infringers are commonly described as parasites, feeding off of the reputations of well-known trademarks.⁴⁵ Kevin J. Greene reads copyrights as a means of excluding marginalized groups from access to the literal marketplaces of ideas, ensuring that only certain individuals, generally white, heterosexual males, are afforded access to the means of officially producing and protecting intellectual properties. For Greene, the very terms of trademark law are non-neutral, a “marketplace of racial

⁴² Coombe, *The Cultural Life of Intellectual Properties*, 173.

⁴³ *Ibid.*, 7.

⁴⁴ *Ibid.*

⁴⁵ Patricia Loughlan, “Pirates, Parasites, Reapers, Sowers, Fruits, Foxes...the Metaphors of Intellectual Property,” *Sydney Law Review* 28 (2006): 211.

norms” in which intellectual properties are protected along racial lines.⁴⁶ Copyright infringers are labeled as pirates and criminals, condemned for their anti-social behaviors.⁴⁷ Often they are represented as Asians who are represented as being unable to create, only steal.⁴⁸ Jonathan Kahn addresses the naturalization of race in the patent context, demonstrating persistent links between the scientific study of genetic differences, particularly with respect to disease etiologies, and the belief in race as a biologically and not socially constituted category. Race-specific patents for drugs speciously suggest that racial identities can be reliably identified and medically treated.⁴⁹ Moreover, patent infringers, like copyright infringers, are identified as imitators incapable of their own independent thoughts, calling upon Orientalist visions of China and India.⁵⁰

These examples, particularly when read in light of contemporary political rhetorics on trademarks, copyrights, and patents suggest that there is a *commonality* in the type of person that commits “IP crime”—the intellectual property infringer is associated with a constellation of negative characteristics, including laziness, dishonesty, immorality, and disregard for human life. Moreover, intellectual property functions structurally and through representations to create a presumption of race-neutrality that erases histories of race. Just as the grouping of intellectual property into one category has a strategic utility in the context of policy decisions—most often to justify increasingly draconian penalties for infringement—it has significant cultural implications for racialization and the perpetuation of racial stereotypes. Specifically, the homogenization of

⁴⁶ Greene, “Intellectual Property at the Intersection of Race and Gender.”

⁴⁷ John Logie, *Peers, Pirates, & Persuasion: Rhetoric in the Peer-to-Peer Debates* (West Lafayette: Parlor Press, 2006); Yar, “The Rhetorics and Myths of Anti-piracy Campaigns”; Gillespie, “Characterizing Copyright in the Classroom.”

⁴⁸ Madhavi Sunder, “Bollywood/Hollywood,” *Theoretical Inquiries in Law* 12, no. 1 (2011): 274–308.

⁴⁹ Dorothy E. Roberts, *Fatal Invention: How Science, Politics, and Big Business Re-create Race in the Twenty-First Century* (New York: New Press, 2011).

⁵⁰ Lawrence Liang, “Piracy, Creativity and Infrastructure: Rethinking Access to Culture,” *SSRN Electronic Journal* (2009).

“IP Crime” erases the individual relationships between copyrights, trademarks, and patents and race. As a result of this erasure, trademarks, copyrights, and patents receive the protection of a veil of race-neutrality, facilitating appeals to neoliberal economic principles of efficiency and profit maximization to judge the success of a policy proposal.⁵¹ Not only does this promote unjust distributions of access to information but also understandings of race.

The links between intellectual property infringement and racial difference in part derive from the relationship between trademarks, copyrights, and patents and Enlightenment thought and Western colonialism. James Boyle argues that the image of the “romantic author,” which originated with Enlightenment visions of progress, animates contemporary intellectual property law. Envisioned as the sole creator in a study or laboratory who, in a moment of creative genius, produces a new and masterful work of art or invention, the romantic author is the product of the Western imaginary.⁵² Trademarks gained popularity in America during a time of Westward expansion, as a means of solidifying white superiority.⁵³ Increasingly, then, discourses of trademarks, copyrights, and patents reinforce a dichotomy of creators and infringers, with the former being white Westerners perceived to be capable of producing new and innovative knowledge and the latter being associated with racial Otherness. Moreover, the association of intellectual property infringement with characteristics of racial difference often functions as a contemporary racial project, or attempt to deploy narratives of race in a manner that justifies the racialization of social structures, political organization, and distribution of resources.⁵⁴

Representations of race in the context of intellectual property discourses operate as a means of

⁵¹ Sunder, *From Goods to a Good Life*.

⁵² James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge: Harvard University Press, 1996).

⁵³ Coombe, *The Cultural Life of Intellectual Properties*, 185.

⁵⁴ Omi and Winant, *Racial Formation in the United States*, 56.

justifying structural decisions that negatively affect the material realities of marginalized groups and systematically demonize racial Others. To return to Mukasey's comments, the articulation of counterfeit "AIDS medicine" with "theft," "organized crime," and "terrorism" erases global inequalities in access to life-saving drugs. Moreover, racialized portrayals of infringement become a means of justifying the criminalization of intellectual property crimes, often to the detriment of marginalized groups and the neocolonial periphery. Representing the Chinese as dishonest and lazy works as a justification for cracking down on intellectual property rights violations, not searching for alternate conceptualizations of the problem. Intellectual property, as it is discussed in contemporary public culture normalizes a "racial common sense,"⁵⁵ or tacit understanding about racial difference, that presupposes the untrustworthiness, deviousness, and dangerousness of racial Others with respect to infringement of intellectual properties. The term "IP crime" systematically silences racial Others, using traits often associated with difference to justify the imposition of Western understandings of creation.

Racial common sense originates with mythologies which are circulated throughout public culture and come to be normalized and accepted. Myths are implicit and explicit archetypal narratives, rooted in historical experience and ritual, which guide the values and actions of society. Burke underscores the archetypal and prescriptive/proscriptive aspects of myth in *Language as Symbolic Action*, arguing that the creation myth, for example, is "a way of propounding 'principles of governance,' by translation into terms of narrative rather than as they might be formulated in philosophy, metaphysics, or theology."⁵⁶ Robert Rowland and David A.

⁵⁵ Stuart Hall, "The Whites of Their Eyes: Racist Ideologies and the Media," in *Gender, Race, and Class in Media: A Text Reader*, ed. Gail Dines and Jean McMahon Humez, 2nd ed. (Thousand Oaks: Sage Publications, 2003), 69.

⁵⁶ Kenneth Burke, *Language as Symbolic Action: Essays on Life, Literature, and Method* (Berkeley: University of California Press, 1966), 381.

Frank, like Burke, affirm the role of myth in guiding action. For them, myths “answer the basic questions of human life, setting forth the values in the form of sacred and transcendent stories that inform speech and induce action.”⁵⁷ In essence, then, myths come to guide thinking about the world, defining the boundaries of common sense. Omi and Winant maintain that racial myths are inherent to the American psyche and system of social order. Because they have become so common and embedded in national culture, they have become racial common sense:

The continued persistence of racial ideology suggests that these racial myths cannot be exposed as such in the popular imagination. They are...too essential, too integral to the maintenance of the US Social Order. Of course particular meanings, stereotypes, and myths can change, but the presence of a *system* of racial meanings and stereotypes, of racial ideology, seems to be a permanent feature of US culture.⁵⁸

In the context of intellectual property discourses, racial myths inform understandings of the identities of creators/infringers, “disseminating images of racial minorities which establish for audiences what people from these groups look like, how they behave, and ‘who they are.’”⁵⁹ Images of infringers define the “who they are” as chronic criminals, unable to control the impulses to steal the creative works of others and follow the morals established by society. These racialized understandings of infringement also suggest that racial Others are incapable of contributing to the public domain or processes of knowledge production.

Disarticulating race and infringement

The association of infringement of intellectual properties with race occurs through the consistent articulation of trademark, patent, and copyright violations with identities and characteristics understood as linked to racial Otherness. Resistance to racialization, then,

⁵⁷ Robert C. Rowland and David A. Frank, “Mythic Rhetoric and Rectification in the Israeli-Palestinian Conflict,” *Communication Studies* 62, no. 1 (January 31, 2011): 42.

⁵⁸ Omi and Winant, *Racial Formation in the United States*, 17.

⁵⁹ *Ibid*, 17.

requires disarticulating understandings of intellectual property infringement from those negatively racially-inflected traits and constructing new, racially emancipatory discourses around trademarks, copyrights, and patents. The process of disarticulation occurs through counterhegemonic practices which expose the internal contradictions within intellectual property's linking of race and infringement and reconceptualize the unauthorized use of creative works. While there are countless examples of moments of resistance occurring *outside* of that which intellectual property law deems legal, some of which Debora J. Halbert outlines in her book *Resisting Intellectual Property*, the examples I discuss unfold *within* existing legal structures, as legally protected, and even sanctioned, acts of protest.⁶⁰ Though the distinction between inter-legal and extra-legal forms of resistance is arguably, as Foucault would suggest,⁶¹ a non-existent one when conceptualized in biopolitical terms, in the context of intellectual property, it is theoretically useful to distinguish between those acts that attempt to build *alternatives* to intellectual property structures and those which culturally negotiate *existing legal structures*. The latter operate in the interstices of regimes of trademark, patent, and copyright, simultaneously using and deconstructing legal concepts to show the internal contradictions of intellectual property law. Examining inter-legal acts of resistance as an at least partially separable type of resistance offers a lens for closely scrutinizing and theorizing race and racial formation in the context of the laws of trademark, patent, and copyright.⁶²

Where Halbert urges that we “excavate the alternatives to intellectual property available to us” and “[reimagine] the extent to which copyright and patent law will govern creative and

⁶⁰ Debora J. Halbert, *Resisting Intellectual Property* (New York: Routledge, 2005).

⁶¹ Michel Foucault and Robert Hurley, *The History of Sexuality: An Introduction*. (New York: Vintage Books, 1990).

⁶² Indeed, Coombe points out that it is only at cultural studies conferences that scholars speak of “the law” as though it is a discrete object which has a “unified, canonical presence...and a singular, unambiguous voice” (Coombe, 1998a, p. 30).

innovative work”,⁶³ I focus on rhetorical resistance unfolding *within* the liminal spaces of intellectual property law, foregrounding rhetorical struggles over the meanings and histories of intellectual property law. The *within* here thus suggests a hegemonic struggle between groups who vie for control over the very meaning of the language, histories, and erasures of intellectual property. In the cases I consider, resistance often involves stepping outside of the *language* used by trademark, copyright, and patent law and “envisioning new ways to think and act to what we now call intellectual property.”⁶⁴ In other words, Warhol’s *Mammy*, Randall’s *The Wind Done Gone*, and India’s Traditional Knowledge Digital Library reshape the boundaries of intellectual property law through rhetorical practices which force acknowledgement of new meanings of the terms which undergird and define the boundaries of intellectual property law. Moreover, these case studies show how marginalized groups can reconstitute existing identity categories through their resistive acts, engaging in practices of “rhetorical revision” which alter the “very *boundary*” of intellectual property’s central figures, namely creators and infringers.⁶⁵ By and through the exercise of rhetorical agency in the face of intellectual property’s lawmaking imperative, marginalized groups confront the legal regime’s interpellative processes, articulating their own resistive identities. Such a reading is intended to move beyond simplistic essentialist/antiessentialist social constructionist accounts of identity formation. Instead, consistent with the work of Judith Butler, William Connolly, E. Patrick Johnson, and of course Muñoz, among others, “identity [is] produced at the point of contact between essential understandings of self (fixed dispositions) and socially constructed narratives of self.”⁶⁶ In this

⁶³ Halbert, *Resisting Intellectual Property*, 7.

⁶⁴ *Ibid.*, 7.

⁶⁵ Maurice Charland, “Constitutive Rhetoric: The Case of the Peuple Quebecois,” *Quarterly Journal of Speech* 73, no. 2 (1987): 136.

⁶⁶ Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*, 6.

context, the remythologization of intellectual property's racialization is a productive process through which new understandings of the interface between the legal regime and difference evolves and dominant narratives of identity are reconstituted.

My study of resistance and racial reformation draws upon emergent methods of critical rhetorics of race, Black cultural studies, and critical race theory. Underlying my methodological choice is the treatment of law not as an unalterable set of rules which cannot be changed but “a complex interpretive activity, a practice of encoding and decoding social meaning that merges imperceptibly with rhetoric, ideology, ‘common sense,’ economic argument...with social stereotype, narrative cliché and political theory of every level from high abstraction to civics class chant.”⁶⁷ The study of law, insofar as a discrete object which can be identified as legal in nature exists, is not simply about the rote application of black and white rules but the daily enactments of those words both within and outside of legal contexts. In other words, law, and intellectual property law in particular, is performatively constructed, shaped by the lived practices which animate it and give it substance. Far from being a set of regulations that can simply be applied, as Coombe argues:

Law also generates the signs and symbols—the signifying forms—with which difference is constituted and given meaning. It provides those unstable signifiers whose meanings may be historically transformed by those who wish to inscribe their own authorial signature on the people, the nation, the state—the official social text. It invites and shapes activities that legitimate, resist, and potentially rework the means that accrue to these forms in public spheres.⁶⁸

Like Coombe, I approach intellectual property law as a rhetorical, cultural, and performative object of study which is part of larger systems of power and hegemony.

⁶⁷ Boyle, *Shamans, Software, and Spleens*, 14.

⁶⁸ Coombe, *The Cultural Life of Intellectual Properties*, 29.

I also adopt the lens of critical rhetorics of race, presupposing the embeddedness and invisibility of race and racism in within cultural discourses, including legal ones. Stuart Hall refers to such subtle racial representations as “inferential racism,” which he defines as “those apparently naturalized representations of events and situations relating to race, whether ‘factual’ or ‘fictional,’ which have racist premises and propositions ascribed in them as a set of unquestioned assumptions.”⁶⁹ Michael Lacy and Kent Ono build on Hall’s identification of inferential racism and the subsequent creation of racist common sense in a rhetorical context arguing for the constitution of “a critical apparatus that can expose and interrogate racialized discourse as it changes and adapts to new cultural conditions”⁷⁰ In Lacy and Ono’s estimation, rhetoric is not simply a descriptor for written words. Instead, the invocation of a critical rhetorics of race calls upon Raymie McKerrow’s critical rhetorical project. Critical rhetorics of race are invested in the operation of racialized forms of power in the world and particularly how discursive fragments come together to produce racial ideologies. Critical rhetorics of race also foreground diverse rhetors, helping to diversify knowledge production.⁷¹ I adopt a similar methodology here, interrogating textual, visual, material, and performative rhetorical enactments of race, racial formation, and resistance to racial formation in the context of intellectual property discourses. In studying resistance to discourses of trademarks, patents, and copyrights, I employ two rich theoretical concepts, disidentification and agency. In applying these two theoretical lenses to intellectual property’s accepted legal discourses, I uncover practices which not only resist but also reformulate the racial representations within regimes of knowledge ownership. As

⁶⁹ Hall, “The Whites of Their Eyes: Racist Ideologies and the Media,” 69.

⁷⁰ Michael G. Lacy and Kent A. Ono, “Introduction,” in *Critical Rhetorics of Race*, ed. Michael G. Lacy and Kent A. Ono (New York: New York University Press, 2011), 6.

⁷¹ Ibid, 8.

a result, my work contributes to scholarly conversations about how rhetorics of race can circulate to counter racial formation, enacting racial reformation and facilitating the exercise of agency.

Disidentification as rhetorical theory

The primary tool through which I theorize the disarticulation of race and infringement is that of disidentification. Muñoz's theorization of disidentification draws upon Michel Pecheux's critique of Louis Althusser's theorization of interpellation, identifying the emancipatory practice as the middle path which is neither "identification" with dominant ideology nor "counteridentification" with that which is outside ideology. Disidentification is "a strategy that tries to transform a cultural logic from within, always laboring to enact permanent structural change while at the same time valuing the importance of everyday struggles of resistance."⁷² Pecheux's initial theorization of disidentification complicates the Freudian and Jungian account of identification as the uncritical processes by which subjects come to recognize and define their own identities and incorporate external persons and objects into their conceptions of self. Instead, "like a melancholic subject holding on to a lost object, a disidentifying subject works to hold on to this object and invest it with new life."⁷³ The primary difference between the traditional psychoanalytic account of identification and Muñoz's understanding, then, is that subjects can, consciously and unconsciously, choose to reject part of the persons and objects with whom they identify, negotiating their identities. The reading of psychoanalytic theory through the lens of ideology creates is a means of "teasing out the ways in which desire and identification can be tempered and rewritten (not dismissed or banished) through ideology" and understanding the complex negotiations that occur between subjects and their social worlds. Muñoz's approach draws inspiration from Diane Fuss' *Incorporation Papers*. Like Fuss's critique of Freud's

⁷² Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*, 12.

⁷³ Ibid, 12.

pathologizing of identification, Muñoz's rewriting of identification through ideology reconceptualizes processes of incorporation of external persons and others.⁷⁴

Rhetoricians usually begin analyses of identification with Kenneth Burke's work. For Burke, identification describes the process whereby an audience is persuaded through commonality with the rhetor. In *A Rhetoric of Motives*, he writes, "[y]ou persuade a man only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, *identifying* your ways with his."⁷⁵ While Althusser, Pecheux, and Muñoz define identification and counteridentification as the embrace or repudiation of ideology, Burke's definition describes an internal psychological process which results in a change in social relations by way of persuasion.⁷⁶ Burke's identification is not purely psychoanalytic, though it has obvious similarities with Freudian theory, positing a desire to become like the rhetor through agreement. He defines identification as a process for combatting the division that is inherent in human relations, particularly through the recognition of consubstantiality even in the face of differing substance.⁷⁷ In Burkean analyses, identification is the connection through which the audience is persuaded—through the recognition of consubstantiality with the rhetor, the audience internally affirms the speaker. However, as Krista Ratcliffe demonstrates, Burke's understanding of identification cannot account for "troubled identifications."⁷⁸ Because Burke understands persuasion as a result of the creation of common ground, his definition of identification disregards power differentials and the negotiation of difference in rhetorical situations. Specifically, Burke's concept of identification theorizes commonality "at the expense of

⁷⁴ Ibid, 15.

⁷⁵ Kenneth Burke, *A Rhetoric of Motives* (Berkeley: University of California Press, 1969), 55.

⁷⁶ Krista Ratcliffe, *Rhetorical Listening: Identification, Gender, Whiteness* (Carbondale: Southern Illinois University Press, 2005), 54.

⁷⁷ Burke, *A Rhetoric of Motives*, 22.

⁷⁸ Ratcliffe, *Rhetorical Listening*, 47.

differences [and]...demands that differences be bridged.”⁷⁹ Thus identification is not a simple process of persuasion but a process of assimilation that is complicated by power relations and subject positions, especially where marginalized subjects are involved. As Fuss puts it:

Fanon asks us to remember the violence of identification...that [transforms] other subjects into subjected others. Identification is not only how we accede to power, it is also how we learn submission...identification can operate...as the ontological privilege of the colonizer and the subjugated condition of the colonized. Racial identity and racist practices alike are forged through the bonds of identification.⁸⁰

Burke’s theory of identification also “does not address how to identify and negotiate *conscious* identifications functioning as ethical and political choices.”⁸¹ In other words, identification is not a one-way process effected by the rhetor upon the audience but a two-way one in which the audience chooses to accept or reject identifications, in whole or in part. The recognition of the possibility of intentionality on the part of the audience in rejecting identification adds an additional layer to the concept. Ratcliffe’s response to Burke’s lack of theorization of marginalization with respect to identification is to reread the concept through the lenses of postmodernism, via Fuss, and postcolonialism, via Trinh T. Mihn-ha, crafting a conceptual framework around rhetorical listening that is sensitive to issues of difference. Ratcliffe, like Muñoz, thus cultivates the “reformist potential” of identification through disidentification.⁸²

Like Ratcliffe, I seek to reread Burke’s understanding of identification. Rhetorical disidentification provides a revised account of the process of connection that Burke describes, accounting for the complexities faced by marginalized subjects in rhetorical situations. Muñoz helpfully describes the concept as “the hermeneutical performance of decoding mass, high, or any other cultural field from the perspective of a minority subject who is disempowered in such a

⁷⁹ Ibid, 53.

⁸⁰ Diana Fuss, *Identification Papers* (New York: Routledge, 1995), 14.

⁸¹ Ratcliffe, *Rhetorical Listening*, 48.

⁸² Fuss, *Identification Papers*, 6.

representational hierarchy.”⁸³ Understood in this way, rhetorical disidentification is a productive tool for a critical rhetorical project, particularly one centered on race. Reading rhetorical artifacts from the epistemological standpoint of the marginalized subject complicates the study of identification by considering the relationship between identity and persuasion. Calling upon a history of study of “revisionary identification,”⁸⁴ a rhetorical theory of disidentification permits rhetoricians to understand audience response to identification as a tactical process, akin to Chela Sandoval’s differential consciousness,⁸⁵ through which the audience negotiates ideology, identity, and social positioning when faced with a rhetorical text. Treating identification as a tactical choice in the face of ideology as opposed to an unconscious submission to commonality recognizes not only the rhetorical agency of the audience but the positionalities of marginalized subjects. Such conscious decisionmaking is possible precisely because power, specifically in the context of law and race, is not a monolithic structure but a porous one with liminal spaces and gaps in which resistance can be redeployed against itself and rewritten. Muñoz’s work reinforces this rereading of Burke, contrasting “passive subjects”⁸⁶ with “active participant spectators.”⁸⁷ Further, as David Wallace points out, disidentification can aid in formulating “alternative rhetorics” which broaden rhetorical conceptions of agency by combatting the very constraining conceptions of identity which fuel processes of racialization and marginalization.⁸⁸ Rhetorical disidentification, then, as I elaborate it here, offers a theoretical framework for

⁸³ Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*, 25.

⁸⁴ *Ibid.*, 26.

⁸⁵ Chela Sandoval, *Methodology of the Oppressed* (Minneapolis, MN: University of Minnesota Press, 2000).

⁸⁶ Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*.

⁸⁷ *Ibid.*, 29.

⁸⁸ D. L. Wallace, “Alternative Rhetoric and Morality: Writing from the Margins,” *College Composition & Communication* 61, no. 2 (2009): W19.

understanding how marginalized groups can refuse racist practices, refusing submission and rejecting processes of subjugation through their assertions of rhetorical agency.

The examples of rhetorical disidentification I examine in this dissertation are unified by their creations of alternative rhetorics of the public domain which contest intellectual property's neocolonially and racially inflected imaginings of that space. By alternative rhetorics, I do not mean the type of reconceptualization of intellectual property that Halbert suggests but rather a rethinking of the *boundaries* and *contents* of intellectual property's public domain as currently defined and articulated. The rhetorics and performances I focus on here facilitate that rethinking by reconstituting the public domain's construction of its own history by making visible the role of the experiences and histories of marginalized groups and neocolonial relations of domination in knowledge production. Often this reworking of the public domain occurs through the critique of intellectual property's core terms. Histories of race and marginalization become vehicles for pushing for critical reexamination, and sometimes legal redefinition, of the notions of infringement and legitimate ownership. While the rhetorical forms of these examples are in many ways quite different, each case implicates the need to rethink associations of race and infringement, by way of redefining dominant legal imaginings of the public domain.

Disidentification as reclamation of rhetorical agency

In the context of intellectual property law, marginalized groups are disempowered and silenced through their association with infringement, as embodiments of age-old narratives of race and unintelligence, criminality, and lawlessness. Would-be infringers are not treated as stakeholders in discussions of intellectual property but rendered objects in need of fixing, constraining their exercise of rhetorical agency and ability to engage in productive dissent. This project studies how marginalized groups take back agency that is lost through racialization and

racial formation. Disidentification is useful as a tool for theorizing the reclamation of agency because it facilitates the identification of moments of resistance that do not, on their face, appear to be transgressive. It also allows for the radical possibility that racial Others can constitute both their own identities in the face of powerful acts of social construction, as Muñoz argues, but also hold the power to revise the systems of power imposed upon them through their own rhetorical and performative enactments. The notion of “taking back” power to speak and using that newfound power to reform social categories is one that has generated much interest, within and outside of rhetorical studies. Before discussing the applications of disidentification for the discipline of rhetoric, however, it is useful to consider how emerging scholarship on agency frames questions of resistance, suggesting that, in many instances, marginalized groups must “take back” the ability to speak, finding new and innovative ways to participate in public culture and reconstitute the boundaries of their socially prescribed identities. It is within the context of these discussions of agency that disidentification becomes a powerful rhetorical concept, especially in its ability to point to previously unrecognized moments of confrontation with existing legal regimes as well as social, political, and economic norms.

An emerging body of rhetorical scholarship identifies everyday tactics through which marginalized groups exercise their agency in public culture, both through discursive acts and performative enactments.⁸⁹ Karlyn Kohrs-Campbell, for example, notes that agency is “polysemic and ambiguous, a term that can refer to invention, strategies, authorship, institutional

⁸⁹ Karlyn Kohrs Campbell, “Agency: Promiscuous and Protean,” *Communication and Critical/Cultural Studies* 2, no. 1 (March 2005): 1–19; Darrel Enck-Wanzer, “Tactics of Puerto Rican Cultural Production in East Harlem: Casitas, Gardens, Flags, Murals and Rhetorical Agency,” *Communication Theory* 21 (2011): 344–367; Ronald Greene, “Rhetoric and Capitalism: Rhetorical Agency as Communicative Labor,” *Philosophy and Rhetoric* 37, no. 3 (2004): 188–206; Stacey Sowards, “Rhetorical Agency as Haciendo Caras and Differential Consciousness Through Lens of Gender, Race, Ethnicity, and Class: An Examination of Dolores Huerta’s Rhetoric,” *Communication Theory* 20, no. 2 (2010): 223–247.

power, identity, subjectivity, practices, and subject positions, among others.”⁹⁰ Nonetheless, understandings of agency are united by their focus on “the capacity to act, that is, to have the competence to speak or write in a way that will be recognized or heeded by others in one’s community.”⁹¹ Agency is, therefore, a *necessary precondition* to public participation and resistance to existing social, political, and economic structures. Nonetheless, the refusal of dominant culture to grant agency does not mean that marginalized groups cannot speak in public culture. Rather, studying rhetorical expression is particularly important to theorizing the workings of agency for marginalized groups because, rhetoric is “always already a ‘political’ activity linked to the acquisition of agency...those who are able to read their world and then have voice within it are in positions to have a certain modicum of power within that world and over their destinies.”⁹² While marginalized groups frequently struggle to be heard, they can reclaim their agency through rhetorical expression as well as performative enactments.

Recently, rhetorical scholars studying race and gender have begun to take particular interest in *how* marginalized groups reclaim agency in contexts in which they are not treated as recognized rhetors. Marginalized groups, and women of color in particular, assert their voices as rhetors through use of contradiction and counter-imagination,⁹³ emotion, family, egalitarianism, and optimism,⁹⁴ and modification of the urban environment with murals, gardens, etc. to reflect cultural identity.⁹⁵ Daryl Enck-Wanzer’s study of Nuyorican culture in New York city reveals

⁹⁰ Campbell, “Agency,” 1.

⁹¹ Ibid, 2.

⁹² Gary A. Olson and Lynn Worsham, “Introduction,” in *Race, Rhetoric, and the Postcolonial*, ed. Gary A. Olson and Lynn Worsham (Albany: State University of New York Press, 1999), 1.

⁹³ Valerie R. Renegar and Stacey K. Sowards, “Contradiction as Agency: Self-Determination, Transcendence, and Counter-imagination in Third Wave Feminism,” *Hypatia* 24, no. 2 (2009): 1–20.

⁹⁴ Ibid.

⁹⁵ Enck-Wanzer, “Tactics of Puerto Rican Cultural Production in East Harlem.”

that agency has a “contextual and performative character”—altering the landscape is not only a tactical act which reclaims agency but a constitutive act which is “transformative of the rhetorical scene itself...making possible a ‘latinization from below’ that mobilizes residual culture into an emergent temporality.”⁹⁶ Enck-Wanzer encourages study of the relationship between *rhetorical form* and exercise of agency, thereby broadening the study of vernacular rhetoric.⁹⁷ In the cases that I examine, rhetorical form is often a complicated question which involves multiple forms of discursive, performative, and material acts.

Rhetorical disidentification offers an additional means of theorizing the process by which marginalized groups reclaim agency through a range of rhetorical forms. As originally conceived, the concept describes how flagrantly defiant public spectacles of queer drag “offer the minoritarian subject a space to situate itself in history and thus seize social agency.”⁹⁸ Building on Butler’s understanding of gender performativity as an iterative process through which social norms evolve, Muñoz study of disidentification describes how marginalized groups use confrontational public performances to redefine the identity categories which result in them being labeled as sexual Others. Drag performance, though it enacts traditional visions of femaleness, breaks with social norms by constructing a new category of femaleness in maleness. This generative queer identity simultaneously deconstructs normative understandings of female and male while offering opportunities for the invention of new understandings of gender. In disidentification “*the act of performing and theatricalizing queerness in public* takes on ever

⁹⁶ Ibid, 361.

⁹⁷ Ibid, 361; Ralina L. Joseph, “‘Tyra Banks Is Fat’: Reading (Post-)Racism and (Post-)Feminism in the New Millennium,” *Critical Studies in Media Communication* 26, no. 3 (August 2009): 237–254.

⁹⁸ Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*, 1.

multiplying significance.”⁹⁹ Indeed, both performance and publicness are at the heart of Muñoz’s conception of the resistive power of drag in confronting gender stereotypes: disidentification is not merely a “good-humored” reinterpretation of dominant culture, but a powerful “social critique” which expresses rage and refusal, functioning as “a bid to take space in the social that has been colonized by the logics of white normativity and heteronormativity.”¹⁰⁰ Disidentification is thus a powerful way of reinventing dominant culture in a manner that resists heterosexist norms and revises gender categories. A means of creating a middle ground between obedient “good subjects” and disobedient “bad subjects,” it is “the third mode of *engaging* dominant ideology, one that neither opts to assimilate within such a structure nor strictly oppose it. Disidentification is a strategy that works on and against dominant ideology,” creating a new positionality for the marginalized subject.¹⁰¹ Moreover, acts of disidentification performed by marginalized subjects also create space for audiences to respond and build community. As Muñoz writes, “performance permits the spectator, often a queer who has been locked out of the halls of representation or rendered a static caricature there, to imagine a world where queer lives, politics, and possibilities are representable in their complexity.”¹⁰²

While Muñoz understands disidentification as a means of theorizing emancipatory formations of gender performance, the concept is also useful in understanding resistive *racial* enactments. A rich and growing body of literature seeks to understand the disidentificatory subject position in the context of racial identity and culture, arguing that race, like gender, is a socially constructed category which is performed, contested, and appropriated, creating the

⁹⁹ Ibid, 1.

¹⁰⁰ Ibid, xi.

¹⁰¹ Ibid, 11.

¹⁰² Ibid, 1.

conditions for disidentificatory behavior.¹⁰³ E. Patrick Johnson, for example, deploys Butler's concept of performativity in the context of race, understanding blackness as a constantly negotiated category which is neither stable nor fixed despite the attempts of some to define its boundaries.¹⁰⁴ He uses the term "racial performativity" to refer to the process by which individuals are included and excluded from the category of blackness, denying and affirming one another's membership rights vis-à-vis their daily actions.¹⁰⁵ Johnson's discussion of race and performance demonstrates that being an "outsider-within," a concept drawn from Patricia Hill Collins,¹⁰⁶ provides a powerful tool for resisting socially imposed definitions of race.

Disidentification also has particular utility in discussing the development of resistive positionalities within law generally and intellectual property law specifically. In terms of hegemonic negotiation, legal discourses are spaces in which identities are contested and reconstituted. Muñoz understands disidentification to produce "identities-in-difference," or individuals who "emerge from a failed interpellation within the dominant public sphere."¹⁰⁷ Read vis-à-vis intellectual property, identities-in-difference are those which are in the process of formation, both through their newfound visibility within legal discourses and their recognition in majoritarian circles. They are "never complete, always in process, and always constituted within, not outside representation."¹⁰⁸ Through trademarks, copyrights, and patents, dominant groups and marginalized subjects battle over the nature of racial identity, the power of white

¹⁰³ Johnson, *Appropriating Blackness*, 105.

¹⁰⁴ *Ibid.*, 2.

¹⁰⁵ *Ibid.*, 9.

¹⁰⁶ Patricia Hill Collins, "Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought," *Social Problems* 33, no. 6 (October 1986): S14–S32.

¹⁰⁷ Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*, 7.

¹⁰⁸ Stuart Hall, "New Ethnicities," in *Black British Cultural Studies: A Reader*, ed. Houston A. Baker, Manthia Diawara, and Ruth H. Lindeborg, Black Literature and Culture (Chicago: University of Chicago Press, 1996), 210.

supremacy over the ownership of creative works and inventions, and the telling of stories of the law. Through battles over the nature of intellectual property's legal definitions and the cultural role of trademarks, copyrights, and patents, marginalized identities are constantly forged and reworked. Indeed, disidentification, like the taking back of agency that rhetorical scholars describe, describes a productive power in constant dialogue with majoritarian culture. Coombe provides one example of how identities-in-difference emerge within intellectual property law by chronicling drag's often campy reinterpretations of heavily regulated images of celebrity. Through drag, "the cultural politics of authoring social identities through the improvisational use of celebrity images"¹⁰⁹ becomes apparent. Intellectual properties provide the raw materials and symbolic language from which identities-in-difference emerge. The role of celebrity in the constitution of identities-in-difference demonstrates that law is "productive as well as prohibitive"¹¹⁰ and "plays a constitutive role in creating cultural spaces for politicization and community formation."¹¹¹ As a theoretical lens for reading resistance to racial formation in intellectual property, disidentification facilitates the thickening of rhetorical theories of agency, revealing the creative tactics marginalized groups use to contest the politics of dominant culture, particularly within legal regimes, and render visible erased histories of race and colonization.¹¹² It is with these applications of rhetorical theory that I use the term rhetorical disidentification.

Remythologizing race through the public domain

The primary issue at stake in this project is how marginalized groups reconstitute racial mythologies and narratives as well as their own individual and group identities in the face of racialized and exclusionary intellectual property discourses. One of the ways in which they

¹⁰⁹ Coombe, *The Cultural Life of Intellectual Properties*, 107.

¹¹⁰ Ibid, 124.

¹¹¹ Ibid, 124.

¹¹² Ibid, 109.

accomplish this task is by intervening in prominent racial mythologies that circulate around trademarks, patents, and copyrights. Hall explains the links between identity formation and mythmaking, pointing out that identities are “always constructed through memory, fantasy, narrative, and myth. Cultural identities are the points of identification, the unstable points of identification or suture, which are made within the discourses of history and culture. Not an essence but a *positioning*.”¹¹³ Rhetorical disidentification aids in performing the powerful function of altering the very terms by which identities are defined, rewriting the “memory, fantasy, narrative, and myth” that underlie contemporary intellectual property law. The rewriting of core concepts in trademarks, copyrights, and patents creates the possibility for new modes of positioning, reconceiving of the discourses of history and culture in ways that invite the formation of new identities. This, in turn, allows marginalized subjects to contest racial mythologies which permit the linking of race and infringement.

Like identities, racial myths are mutable and can evolve and change over time. In fact, myths may change by and through the evolution and rearticulation of identities. Moreover, racial myths can change and evolve through rhetorical interventions, particularly disidentificatory ones. In a contemporary study of mythic rhetoric, Robert Rowland and David Frank affirm the notion that myths can change, using the example of the Israeli-Palestine conflict. Calling for a diachronic, instead of synchronic, vision of myth, they argue that rhetorical scholars can study “the trajectories of myth as the meaning of sacred stories is altered and to account for changes in rhetorical situations, including the significant alterations in the ratios developed among the scene, actors, agency, etc.”¹¹⁴ In this project, I find that through the assertion of rhetorical agency in a variety of public modalities, marginalized groups speak back to the racial myths

¹¹³ Hall, “New Ethnicities,” 213.

¹¹⁴ Ibid, 42.

perpetuated by intellectual property discourses and particularly definitions of creators and infringers and the public domain. Acts of rhetorical disidentification operate as interventions into the rhetorical situations created by intellectual property law, remaking the landscape and context in which the rationales for trademarks, copyrights, and patents are advanced. By altering the context in which racialization unfolds, and acts of rhetorical disidentification permit the remythologization of sacred stories of race and knowledge production. The evolution of the racial myths associated with intellectual property is not simply a product of organic evolution but the result of the rhetorical interventions of marginalized groups. By questioning the contents of the public domain, contesting key terms upon which intellectual property is built, and making visible histories of race, marginalized groups intervene in ways that destroy the foundations of popular racial myths, short-circuiting the creation of racial common sense. Rhetorical disidentification can thus be understood as a kind of remythologization which appropriates and reinvents, and retells stories in an emancipatory manner, akin to Lessig's concept of remix.

Lessig develops his argument for the need for remix culture by explaining the difference between a Read Only culture and a Read/Write culture. A Read Only culture is one that is "less practiced in performance, or amateur creativity, and more comfortable...with simple consumption."¹¹⁵ On the other hand, in a Read/Write culture, reading is accompanied by "creating and recreating the culture."¹¹⁶ The concept of rhetorical disidentification facilitates the application of Lessig's theory of remix to the context of mythology. Just as Read/Write culture can be understood to apply to creative works, it can also have utility in the context of mythmaking. Remythologization, or remyth paralleling Lessig's terminology, as I develop it here, connotes a rewriting of cultural myths. In the context of intellectual property discourses,

¹¹⁵ Lessig, *Remix*, 2009, 28.

¹¹⁶ *Ibid*, 28.

the racial myths which link whiteness to creativity and innovation and Otherness to imitation and theft can be rewritten through the retelling of narratives of knowledge production. The case studies I investigate here are linked by the rewriting of racialized creation/infringement myths by way of rhetorically disidentificatory engagement with the concept of the public domain, a concept which has developed as a mythical romantic ideal. The public domain is understood as the space containing commonly held information which can then be transformed into private property. Put differently, it theoretically holds knowledge that is not owned but freely accessible and usable in the production of creative works. Though the term public domain is traditionally used in the context of copyright to describe creative works which are no longer protectable, trademarks and patents also have a public domain of sorts. Trademarks that were never protectable or become generic, for example, no longer have a source identifying function and, as a result, can be used by the general public without giving rise to a claim of infringement. Patents are only granted to “nonobvious”¹¹⁷ inventions so as to protect information that is already publicly accessible. All three areas of intellectual property, then, depend upon the existence and subsequent privatization of information which is held in common, i.e. a public domain.¹¹⁸

As a discursive field, the public domain has been dominated by Western conceptions of knowledge production and particularly concepts of creativity and originality. Though the public domain is now commonly theorized as the radical alternative to the propertization and ownership of information,¹¹⁹ recognizing that the concept is not a neutral one, especially with respect to marginalized groups, alters the contents of the categories of creator/infringer. Kathy Bowery and Jane Anderson point out that “[t]he ethos of freedom, public, openness and commons is

¹¹⁷ 35 U.S.C. § 101, 2012.

¹¹⁸ Aoki, “Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain, Part I.”

¹¹⁹ Boyle, *Shamans, Software, and Spleens*; Lessig, *Remix*.

problematic because *it does not properly deal with the baggage of the past*. For many Indigenous people across the globe, there is no fuzzy, warm glow that automatically accompanies western words like humanity, culture, progress, freedom, openness, knowledge.”¹²⁰ The idea of a shared public domain “fosters an historical amnesia about the knowledge accumulations of the past.”¹²¹ In essence, the public domain, as conceptualized in the American imaginary, erases the role of marginalized groups in knowledge production, allowing the unregulated use of indigenous knowledge. Central to the argument Bowrey and Anderson make is the question of who produced the public domain and who benefits from it. Indeed, the very concept of the public domain frequently facilitates the appropriation of indigenous information and mirrors colonialism. That which is in the public domain, including indigenous knowledge, ancient artifacts, and even land, is a metaphorical “raw material” subject to taking.¹²² Further, in most instances, it is Western scientists and scholars who build on the foundation of indigenous knowledge, not indigenous groups themselves: “The pattern is becoming depressingly familiar: resources flow out of the Southern regions and are transformed by Northern entrepreneurial authors and inventors into intellectual properties, which in many cases are priced so high that the people from whom such knowledge originated cannot afford to license them.”¹²³ The racialized implications of the public domain can be understood within the larger context of intellectual

¹²⁰ Kathy Bowrey and Jane Anderson, “The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?,” *Social & Legal Studies* 18, no. 4 (December 9, 2009): 480.

¹²¹ Ibid, 481.

¹²² Ibid, 485-487.

¹²³ Keith Aoki, “How the World Dreams Itself to Be American: Reflections on the Relationship Between the Expanding Scope of Trademark Protection and Free Speech Norms,” *Loyola of Los Angeles Entertainment Law Journal* 17 (1996): 523–548.

property's tendency to dispossess marginalized groups of information and knowledge¹²⁴

Vandana Shiva, for example, underscores the need to prevent the displacement of indigenous systems of knowledge with Western ones. "The political implications of the dominant knowledge system are inconsistent with equality and justice," she writes.¹²⁵ Read in this way, the colonizing power of defining which knowledge and information resides in the public domain is significant. Asserting ownership to information in the public domain denies the right of marginalized groups to exercise control over their own histories and the universalizing Western legal definitions which underpin intellectual property and its racialized myths.

The creator/infringer binary is constituted through a mythologization of property rights that relies on the definition of commonly held information. Only when intellectual property is privately owned instead of being accessible to the public can a claim of unauthorized use can arise. The critique of the public domain explicitly and implicitly leveraged by marginalized subjects through acts of rhetorical disidentification, then, confronts erasures of race and racialization common in a public domain in trademark, patent, and copyright and permits a deeper understanding of how knowledge is created and exchanged along racialized lines. By interrogating the boundaries, contents, and histories of the public domain through acts of rhetorical disidentification, marginalized subjects and their audiences situate race and racial exclusion vis-à-vis knowledge production. Rhetorically disidentificatory rhetorics and acts by marginalized subjects not only question whether racial stereotypes should be privately owned and perpetuated but also presents counterhistories which contrast and deconstruct the racialized one represented by the logo. Rewriting histories of the public domain through rhetorical

¹²⁴ Anupam Chander and Madhavi Sunder, "The Romance of the Public Domain," *California Law Review* 92, no. 5 (2004): 1331–1373.

¹²⁵ Vandana Shiva, *Monocultures of the Mind: Perspectives on Biodiversity and Biotechnology* (London: Zed Books, 1993), 60.

disidentification brings to light the myths of whiteness/Otherness that undergird intellectual property's definitions of creation and infringement. For instance, rhetorically disidentifying with the Redskins trademark is a means of critiquing the exclusive ownership and protection of a particular and racialized image of Native Americanness in America. The trademark reinforces the notion of Native American as barbaric racial Other. Indeed the trademarked image derives much of its power from the belief that Native Americans are strong and ruthless. Intellectual property structurally protects whiteness by not revoking trademark protection for the Redskins.

In a direct response to Bowery and Anderson's criticism of the concept's "historical amnesia," *Mammy*, *The Wind Done Gone*, and the TKDL are the products of acts of rhetorical disidentification with the public domain's silence on issues of neocolonial and racial inequity as well as the appropriation of indigenous knowledge. Specifically, in demonstrating how dominant definitions of the public domain erase marginalized groups, the texts short circuit the logic of the articulation of intellectual property infringement with racial difference. They effect this critique through an inversion of the creator/infringer binary. Instead of accepting the dominant narrative which identifies racial Others as thieves of legitimately owned intellectual properties, the cases discussed here posit that white Westerners are neocolonial plunderers who assert invalid claims of ownership in a manner that erases the role of marginalized groups in knowledge production. In doing so, they reconstitute the very racialized identities that discourses of intellectual property perpetuate and offer counternarratives of ownership. The reformulation and critique of the public domain is significant precisely because of the concept's centrality in defining private property and identity—without the division between public domain and private property, there simply are no grounds on which to establish systems of real property and intellectual property or the identities constituted by those two areas of law. *Mammy*, *The*

Wind Done Gone, and the TKDL are thus examples of the power of disidentificatory rhetorics in questioning the underpinnings of intellectual property and indeed remythologizing it. These resistive enactments speak back to the regulatory boundaries of intellectual property, mapping new “cartographies for cultural agency”¹²⁶ and making space for new identities to thrive.

In the examples I examine in this project, rhetorical disidentification does not end with the rhetorics and performances of marginalized subjects. Instead, marginalized subjects, through their acts of rhetorical disidentification, leave behind physical objects, here collections, compilations, and archives, which continue to create space for the retelling of erased and silenced histories. The objects thus implicate two definitions of materiality, namely its description of the rhetorical capabilities of physical objects as well as the ability of discourse to constitute the social world.¹²⁷ In other words, I read the remnants, physical and ephemeral, of the case studies here as a means of understanding the implications of resistance to intellectual property and the importance of theorizing materiality. In the first case study, collected objects come together as a powerful interruption of the uncritical circulation of racial cultural objects in the nation. In placing them together, they serve as critiques of racialization and painful indicators of the need to closely examine racial politics. In the second study, archives, understood here as the spaces in which collective memories are recorded, are useful objects for constituting and reconstituting identity. As Barbara Biesecker notes, “[w]hatever else the archive may be—say, an historical space, a political space, or a sacred space; a site of preservation, interpretation, or commemoration—it is always already the provisionally settled scene of our

¹²⁶ Coombe, *The Cultural Life of Intellectual Properties*, 6-7.

¹²⁷ Jeremy Packer and Stephen B. Crofts Wiley, “Introduction: The Materiality of Communication,” in *Communication Matters: Materialist Approaches to Media, Mobility and Networks*, ed. Jeremy Packer and Stephen B. Crofts Wiley (London; New York: Routledge, 2011), 2-4.

collective invention, of our collective invention of us and of it.”¹²⁸ Finally, in the third case study, the database is an important cultural object, particularly when read in the context of colonial histories. Databases produced by marginalized groups have particularly important implications for rhetorical agency as they confront colonialist practices of identifying and categorizing knowledge, placing that power of knowledge production in the hands of the colonized. The examples I investigate here demonstrate not only the inventional power of the collections, archives, and databases, but also their importance as material markers of the seizure of agency and the reconstitution of legal regimes, in both senses of the term.

Materiality, as I define it, does not necessitate concreteness. Instead, drawing on recent innovations in materialist theory in communication, I conceptualize materiality as a means of thinking through how acts of rhetorical disidentification operate through bodies and later texts, then continue to operate on audiences to reconstruct social realities. In this sense, the version of materiality I adopt here is concerned with the physicality of objects as well as the tendency of those objects—and the rhetorics and performances which gave rise to them—to constitute social reality. The latter is reflected in the observations of Charles Morris III. In writing about queerness, he observes that “we must become the deftest *archivist-rhetors*, or *archival-queers*” in order to confront the silences in recorded histories.¹²⁹ While his “we” refers to the rhetorician, the sentiment can be understood more broadly as a to include both the marginalized subjects engaging in rhetorical disidentification and audience members, including rhetorical critics, reacting to the texts left behind by those rhetorics and performances. In essence, Morris’ statement suggests the need to take on an activist role with regards to the production and

¹²⁸ Barbara A. Biesecker, “Of Historicity, Rhetoric: The Archive as Scene of Invention,” *Rhetoric & Public Affairs* 9, no. 1 (2006): 124.

¹²⁹ Charles E. Morris, “Archival Queer,” *Rhetoric & Public Affairs* 9, no. 1 (2006): 147.

consumption of existing material objects precisely because of their constitutive functions. A commitment to collecting material objects which will make visible the erasures and silences within them. Reading texts with an eye for acts of rhetorical disidentification, then, is a continual process, involving historical reinvention on behalf of all marginalized groups, including racial Others. The material remnants of the acts of rhetorical disidentification I examine here also demonstrate that texts do not simply exist but are created by social agents, through acts of partial or complete resistance to cultural formations. Looking for documents created by a variety of rhetors is not only an important part of the project of critical rhetorics of race but also a means of diversifying rhetorical theory to include marginalized groups.¹³⁰

Collecting, compiling, and archiving have been historically associated with colonialist and racist epistemologies. Bowrey and Anderson, for example, raise a number of concerns about collecting, compiling, and archiving the knowledge of marginalized groups. Specifically, they note the role of the archive in colonial governance, stating that “[t]he archive, that primary state of monumentality, is the very institution that canonizes, crystallizes, and classifies the knowledge required by the state even as it makes this knowledge available to subsequent generations in the cultural form of a neutral repository of the past.”¹³¹ While they focus on the archive, the same argument can be made of colonial collections and databases as well. Yet Anderson points out that the question of authorship, i.e. who authored the amalgam of information in question, is a central one to understanding the power/knowledge nexus.¹³² Anderson observes that cataloging indigenous knowledge, especially when the creators of that knowledge do not have control over the use of that work, is yet another mechanism for asserting

¹³⁰ Lacy and Ono, “Introduction, 6.”

¹³¹ Bowrey and Anderson, “The Politics of Global Information Sharing,” 4.

¹³² Jane Anderson, “Anxieties of Authorship in the Colonial Archive,” in *Media Authorship*, ed. Cynthia Chris and David Wallace (New York: Routledge, 2012), 1.

power over marginalized groups.¹³³ However, while there is certainly truth to the claim that refusing rights of authorship to marginalized groups is a means of recreating colonial hierarchies within contemporary archives, rhetorical disidentification operates to redefining the author, empowering the Other as an agent of knowledge production. As Anderson suggests, “the historical subjects of the archive are contesting their status within it, and making forceful demands to be recognized as the legitimate ‘owners’ and ‘authors’ of the materials that document their lives, families, ceremonies and cultures.”¹³⁴ The examples I investigate here are noteworthy precisely because they can be read as breaking with historical deployments of collecting, compiling, and archiving, empowering marginalized subjects as creators, who both produce knowledge and act as the agents through which identities are reconstituted.

Chapter overview

The project unfolds in three chapters, each addressing one case study. Each example develops a different aspect of rhetorical disidentification, demonstrating the variety of rhetorical forms marginalized groups use to assert agency and resist intellectual property’s racialized norms. Taken together, the case studies demonstrate that rhetorical disidentification occurs in the context of trademark, copyright, and patent law. The examples are unified by their ability to speak back to racial mythologies of the public domain, demonstrating the need to make visible histories of exclusion and contesting the racialized identification of creator and infringer. The cases are also united by their material remnants. They each leave behind traces, physical and ephemeral, of their resistive interventions, creating records of the historical presence of marginalized groups and opening space for the continued rewriting of intellectual property law.

¹³³ Ibid, 2-3.

¹³⁴ Ibid, 2.

In Chapter One, I read Warhol's *Mammy* as a visual rhetorical appropriation of histories of southern domestic servitude. *Mammy*, a portrait of jazz singer Sylvia Williams, became a reality because Quaker Oats would not permit Warhol to use the famous image of Aunt Jemima. In agreeing to pose for Warhol's portrait, Williams took a defiant stance, through her own rhetorical demands and those of the image of *Mammy*, calling for public access to the history of slavery in the United States. Through her dialogue with Warhol and Quaker Oats, Williams weaves into Pop Art's largely univocal white ideology a vernacular multivocality. In doing so, she contests the very boundaries which define infringement and the infringer, suggesting that the intellectual property's pattern of racial appropriation is actually the reverse of that which is presented by intellectual property law: blackness does not illegally infringe upon rightfully owned intellectual properties through theft; rather whiteness illicitly occupies the histories of marginalized groups through trademarking history. Through her rhetorically disidentificatory rhetorics, she critiques Quaker Oats' claim to own Aunt Jemima and the images attendant histories. Warhol's collection of mammy cookie jars and his paintings become the objects which proclaim the need to rethink histories of race in America, especially vis-à-vis corporate culture.

In Chapter Two, Alice Randall's novel, *The Wind Done Gone*, a derivative work of Margaret Mitchell's *Gone With the Wind* told from the point of view of Scarlett O'Hara's black half-sister, Cynara, makes two similar interventions in the area of copyright. First, Randall disrupts copyright's historical tendency to deny the authorship claims of black writers as mere, unprotectable "ideas," acknowledging the ability of African Americans to "create" in the face of claims of copying. In addition, through *The Wind Done Gone*, Randall gives voice to Mitchell's mute Mammy, recasting the ownership of the history of white womanhood in the South, forcing the application of an exception to copyright infringement for items defined as "parody."

Randall thus reclaims the vantage point of black women in the American South and makes visible the history of a character that Mitchell rendered silent in her telling of the story of the O'Hara's life. Moreover, she reconstitutes American identity through the medium of the public trial. Through her parodic retelling of the story which Mitchell owns, Randall successfully asserts that the O'Hara does not and cannot loom so large in the American imaginary that she occupies all histories of white and black womanhood in the American South. Instead, in writing Cynara, she refuses Mitchell's claim to own O'Hara's world and demonstrates the creativity of her own thoughts, thereby combatting a central presumption of the racialized infringement narrative, i.e. that racial Others cannot have "original" thoughts. Randall's book as well as the archive of legal materials become material markers of the creative genius of African Americans and assertions of southern histories other than those of white womanhood.

Finally, Chapter Three examines India's response to the commodification of yogic knowledge. In an attempt to stop the litany of copyrights and patents on yoga and yoga-related items in the United States, the Indian government created the TKDL, a digital database of indigenous knowledge. By identifying and memorializing yoga's long history, India seeks to prevent the exploitation of centuries-old philosophies and ideas, countering the belief that yogic practice can be newly "invented" and owned as intellectual property. The Indian government's response to American-style corporatization and commodification of yoga and yoga-related products reclaims knowledge which has been colonized by and through Western theories of property rights. In an example of a move which redefines the very boundaries of what is and is not in the public domain, through the TKDL, those Indian government officials, Indians, and Indian Americans who object to the Western commodification of yoga assert the rhetorical agency and authority of marginalized groups to redefine "prior art," "patentability," and

“piracy.” In doing so, they assert that traditional knowledge, whether its history is recognized or not, is not exploitable because it is part of the public domain. Moreover, their response suggests the need to rethink core concepts in patent law vis-à-vis histories of racial inequality. In making rhetorical moves to invert piracy, using it to describe a neocolonial exploitation of information by the West, not by racial Others against civilized Western nations, those critiquing yoga’s privatization demonstrate that the image of the racialized infringer ignores questionable practices of privatizing the public domain. The TKDL, read as a digital database compiled by non-white authors, refuses the authority of the colonist to categorize, manage, and archive knowledge about the world. Indeed, this case study is emblematic of the globalization of intellectual property’s racialization and the pressing need for marginalized groups to seize even greater power over global systems of knowledge production through their own histories.

Together, these cases perform the important rhetorical work of confronting intellectual property’s racial histories, problematizing the tenets and assumptions that facilitate the treatment of histories and practices of Otherness as the basis for the public domain. Defiantly refusing accepted iconic texts, symbols, and systems of knowledge, they rewrite trademarks, copyrights, and performances through powerful acts of rhetorical disidentification. They make the case for understanding disidentificatory behavior as something that can occur with respect to identity categories other than gender, particularly those with socially constructed rules and norms. Viewing rhetoric, race, and law as mutually constituted in this way opens doors for new forms of transgression that not only assert agency for marginalized groups but also create spaces for vocal dissent of discourses that normalize white supremacy. The material and constitutive remains of these acts of resistance are important reminders of the power of memorializing histories of race in order to make visible the racialized and exclusionary tendencies of intellectual property law.

CHAPTER 1

Andy Warhol's *Mammy* and Resistive Rhetorics of Black Womanhood

In the United States, the history of pancakes is inextricably intertwined with the history of racism. The connections between the popular breakfast food and race, of course, begin and end with Aunt Jemima, a woman often imagined as a portly, colorfully-dressed black mammy who served as a loyal caretaker and cook to white children. Aunt Jemima, unlike the antecedent mammy who represented the Southern plantation system, retains significance in the American imaginary because she emerged as a symbol of post-Reconstruction nostalgia for slavery and evolving racial hierarchy in the North and the South.¹³⁵ She represented a modernization, not a mere replica, of the mammy: the humble pancake-maker conveyed the message that, even in post-emancipation America, black women were happy, even jubilant, to remain obedient caretakers, confined to the kitchen, looking after children other than their own. Aunt Jemima thus insidiously normalized the domestication and subservience of black women in the anti-slave North even as African Americans were advocating for progressive racial politics. For example, Kimberly Wallace-Sanders writes that at the 1893 Chicago World's Fair, Aunt Jemima—played by a short and heavysset black performer named Nancy Green—was being heavily promoted and popularized as a trademark for the Pearl Milling Company's pancake mix, over time “[t]his cozy racial nostalgia becomes magnified and extends an invitation for all Americans to remember a time when Aunt Jemima cooked for the national family...she is attributed with awakening a remembrance of southern domesticity.”¹³⁶ Aunt Jemima quickly became a symbol of black caretaking in the South, rendering material the longing for the loyal-to-a-fault black slave who

¹³⁵ Kimberly Wallace-Sanders, *Mammy: A Century of Race, Gender, and Southern Memory* (Ann Arbor: University of Michigan Press, 2008), 59.

¹³⁶ *Ibid.*, 62.

would never abandon her masters, despite President Abraham Lincoln's decision to free the slaves. In its earliest versions, from the late 1880s, the Aunt Jemima trademark depicts a black woman in a bright red bandana and polka dot scarf, the simple dress suggesting the figure's humbleness and readiness to tend the home. Her face is a scratch art caricature, with exaggerated features and the wide grin and garish lips characteristic of the blackface performances of the era. This version of Aunt Jemima was an amalgam of stereotypes and white desires. By 1893, Green had transformed the cartoon into a "real person," at least in terms of her facial features and body, but the stereotypical qualities of the figure remained. Aunt Jemima was a domestic servant eager to remain in the kitchen, serving white families her famous pancakes (Figure 1.1). Her images suggested a jubilation in her prescribed role.

Aunt Jemima still graces Quaker Oats' product labels even today, albeit in pearls and a white collar instead of a headscarf she retains the garish lipstick and wide grin like her antecedent. The Aunt Jemima image that the Pearl Milling Company—later the Aunt Jemima Mills Company—evolved into a post-civil rights era modern black woman, dressed to reflect her newly acquired rights to participate in the political and economic life of the nation. Yet the persistence of that version of the trademark even today demonstrates a more deep-seated prejudice amongst American consumers that black women have indeed not succeeded in achieving equality (Figures 1.2 and 1.3). The Aunt Jemima image still sells pancake mix because of an underlying belief that black women are particularly skilled in the kitchen, the domain in which they should remain. Further, as reflected by the Aunt Jemima product website, even the modern black woman still cares for white children: below the images of Aunt Jemima and a stack of pancakes is a young white girl in a purple hat enjoying the fruits of her symbolic caretaker's labors. The evolution of Aunt Jemima, then, demonstrates the continued resonance

not only of the mammy stereotype but also Aunt Jemima herself. Indeed, if there is a point of convergence in scholarship about Aunt Jemima specifically and mammyhood more generally, it is that the images are fluid and flexible ones which have changed and developed along with historical events and national identity. Micki McElya notes that, despite being a mainstay in the American imaginary, the mammy and Aunt Jemima display remarkable “malleability,” evolving to reinvent faithful slave mythology.¹³⁷ Wallace-Sanders calls the mammy, including Aunt Jemima, a “cultural force that influences and reflects a national consciousness.”¹³⁸ M. M. Manring notes Aunt Jemima’s “dramatic and sometimes subtle changes” as part of her staying power.¹³⁹ Aunt Jemima’s power to constitute and be constituted by American culture is important to uncovering her importance in sustaining and promoting racial inequalities in America. “Aunt” Jemima is neither a mother, because she must care for white children, nor a mammy, because such a term would be politically incorrect. Instead, she occupies the ambiguous space of aunthood, fulfilling the functions of her post-emancipation days in a palatable form. The persistence of the mammy in her myriad forms even in contemporary national discourses suggests that she is “an essential site for grappling with the meaning and burden of slavery for American capitalist democracy.”¹⁴⁰

¹³⁷ Micki McElya, *Clinging to Mammy: The Faithful Slave in Twentieth-Century America* (Cambridge, Mass: Harvard University Press, 2007), 17.

¹³⁸ Wallace-Sanders, *Mammy*, 12.

¹³⁹ M. M. Manring, *Slave in a Box: The Strange Career of Aunt Jemima* (Charlottesville: University Press of Virginia, 1998), 5.

¹⁴⁰ McElya, *Clinging to Mammy*, 13.



Figure 2.1 Original image of Aunt Jemima from 1889 (left) and Aunt Jemima after the hiring of Nancy Green circa 1893 (right)



Figure 2.2 Quaker Oats' current image of Aunt Jemima



Figure 2.3 Front page of the AJ Cornmeal website advertises Aunt Jemima products

In no small part because of their extreme tendency to limit the autonomy of black women, mammy and Aunt Jemima also became essential catalysts for *resistance*. Confronting the narrative of the faithful slave and responding to “the mammy problem” became an explicit and implicit part of the struggle for racial equality for African Americans, and black women in particular.¹⁴¹ As the historical contestation of the stereotype of the obedient black woman through small and large acts of defiance to employers suggests, resistance to the mammy stereotype emerged through performative acts which overtly and subtly defied the expectations of white men and women. Bodily politics in the workplace became central to the reconstitution of black identity. Even as black women performed their roles as menial laborers for white employers, they developed their own ways of simultaneously contesting their prescribed social identities. In this way, even seemingly stereotypical attributes can be read as a means of contestatory intervention. For instance, “[t]he mammy’s obliging attitude and behavior are part of a survivalist strategy...used by slaves to appease the master or to vent anger in a

¹⁴¹ Ibid, 223-237.

nonthreatening way, or even as a way to disguise an ulterior motive such as escape, murder, or some other form of revenge.”¹⁴² Read this way, the mammy has the potential to be a transgressive figure as well as a stereotypical one. E. Patrick Johnson demonstrates how his grandmother Mary, a black, Southern, domestic servant, simultaneously “performs and obliges”¹⁴³ the image of the mammy that is expected of her while contesting that same stereotype “by drawing on black cultural performance traditions that reposition and ground her authority as a ‘black’ subject.”¹⁴⁴ Strategically choosing when to speak up or remain silent was an important part of this transgressive performance. McElya traces similar forms of performative resistance, identifying the mass refusal of black women to be “live in” help,¹⁴⁵ the systematic rejection of the mammy title,¹⁴⁶ and the dominance of black domestic servants in the civil rights movement¹⁴⁷ as examples of the diversity of performative resistance to the stereotypes associated with the myths of mammydom and black labor more generally.

The purpose of this chapter is to examine in depth modes of resistance not only to the mammy stereotype and Aunt Jemima image but to the particularities of capitalism, namely the protection of trademark, which facilitated their perpetuation. The continued resonance of Aunt Jemima as pancake making icon is intertwined with the performance of race in America as well as the growth of image-based forms of consumption. Taking Andy Warhol’s *Mammy*, his collection of Americana, and the performative interventions of jazz singer Sylvia Williams as objects of study, I locate acts of rhetorical disidentification aimed at confronting the racial investments of trademark law. Warhol’s image, a portrait of a black woman with a brightly

¹⁴² Johnson, *Appropriating Blackness*, 106.

¹⁴³ Ibid, 129.

¹⁴⁴ Ibid.

¹⁴⁵ McElya, *Clinging to Mammy*, 211.

¹⁴⁶ Ibid, 230.

¹⁴⁷ Ibid, 243.

colored handkerchief covering her head and large hoop earrings, at first glance appears to fit the traditional stereotype of an overweight, smiling, obedient black woman. Posing for Warhol, arguably an icon for white capitalist exploitation himself, such an argument seems even more compelling. However, the image is much more complicated than is evident at first glance. As Kobena Mercer observes in his reading of Robert Mapplethorpe's erotic image of black masculinity, it is tempting to "simplify complex issues and polarize opinion, as if everything was a matter of black and white."¹⁴⁸ For Mercer, Mapplethorpe's images have different potentials for different audiences, particularly white ones and black queer ones. Similarly, *Mammy*, creates a potential for audience members to read beyond its stereotypical representation into its reclamation of histories of Southern black domestic servitude. This chapter opens the debate about the racial politics of Warhol's artwork, Williams' performance in posing for Warhol, and the representations of *Mammy*, particularly within the context of its placement in the portfolio *Myths*. Taken together, Warhol's work and Williams' intervention do not simply concede dominant racial meanings of the mammy and Aunt Jemima, they resist trademark law's attempts to create static and mythic caricatures of faithful slaves by foregrounding the fluidity of black womanhood as an identity category. Warhol, who produced *Mammy* after being refused the rights to reproduce Quaker Oat's famous Aunt Jemima, and Williams both operate within the system of intellectual property law, abiding by its mandates about property ownership, while simultaneously confronting it, critiquing the ability of one corporation to own the multifaceted history of black domestic servitude in the American South before and after emancipation.

¹⁴⁸ Kobena Mercer, "Just Looking for Trouble: Robert Mapplethorpe and Fantasies of Race," in *Black British Cultural Studies: A Reader*, ed. Houston A. Baker, Manthia Diawara, and Ruth H. Lindborg, (Chicago: University of Chicago Press, 1996), 279.

Warhol memorializes Williams' rhetorically disidentificatory interventions in *Mammy*. The piece functions both as an endorsement of the mammy stereotype and a "troubling vision," a double meaning that Nicole Fleetwood uses to describe the discomfort associated with visual representations of blackness and the process through which blackness interrupts white culture and creates possibilities for new forms of cultural and racial production.¹⁴⁹ *Mammy* is a troubling vision precisely because it transforms the purportedly comforting images of the faithful slave into a critique of the symbolic hegemony perpetuated by trademark law. In agreeing to pose for *Mammy*, Williams offered her own critique of trademark law, calling for collective ownership of the history of slavery and post-slavery servitude in the United States. In doing so, she injected her own narrative into Quaker Oats' telling of Aunt Jemima's history and affirmed the need for multivocality in the face of racialized trademarks. Williams' contestation of Quaker Oats' claim of ownership to the mammy figure through Aunt Jemima functions to redefine infringement and infringer, suggesting that trademark law's pattern of racial appropriation is actually often the reverse of that which is presented by intellectual property law. Marginalized subjects does not illegally infringe upon rightfully owned intellectual properties. Rather whiteness illicitly occupies the histories of marginalized groups. Williams' performance, as well as Warhol's rewriting of Aunt Jemima through Williams, disarticulates *Mammy* from the history of mammyhood in the United States while simultaneously affirming the multiplicity of the histories of the mammy. *Mammy* is thus an important image not only in understanding the rhetorical interventions through which trademark law is delinked from its racial associations and fashioned into new and liberatory constructions of identity but the mechanisms through which the doctrine occupies the histories and identities of marginalized groups.

¹⁴⁹ Nicole R. Fleetwood, *Troubling Vision: Performance, Visuality, and Blackness* (Chicago: The University of Chicago Press, 2011), 6.

Mammy, as rhetorically constructed by Warhol and Williams, contests trademark law's protection of Aunt Jemima as a means of blocking the retelling of histories of black domestic servitude, creating space for the constitution of new racial identities. In doing so, Warhol and Williams refuse the claim that Aunt Jemima belongs to any one entity but and assert that she resides in the public domain. There are three primary ways in which this reformulation of the mammy and trademark's public domain occurs. First, read in the larger context of Warhol's Pop Art, his orientation toward race, and his collections of racist Americana, *Mammy* operates as a critique of consumer culture's often uncritical acceptance of the state of racial politics in America. Second, Williams's rhetorical disidentification refuses Quaker Oats' claims of ownership over Aunt Jemima. Through her rhetorical disidentifications, which take the form of confrontational performances and a direct gaze, Williams interrupts the relationship between the Aunt Jemima image and national identity. Finally, Williams's physical occupation and subversive embodiment of Aunt Jemima sets the stage for future rhetorically disidentificatory occupations of the figure, opening space for the exercise of agency by other individuals. Reread through the lens of rhetorical disidentification, *Mammy* contests the relationship between racial difference and infringement, asserting that the history of African American domestic servitude and Aunt Jemima cannot and should not be privately owned. Indeed, it is only through intellectual property's amnesic definition of the public domain that the racial Other can be cast as infringer. Together, *Mammy* and Warhol's collection of racist Americana operate as material rhetorics which question the canon of recognized rhetors, affirm multiple histories of black womanhood, and problematize trademark law's attempts to occupy those histories.

Aunt Jemima as trademark icon

The figure of the mammy developed in the 1820s, in fragments, through a combination of radio, vaudeville, and minstrelsy acts, all amidst an internal struggle over the legality of slavery.¹⁵⁰ The mammy stereotype, as we understand it today, was not simply willed into existence. She was an amalgam of characters and real people, no doubt inspired by the black domestic servants that ran Southern plantations but transformed into a larger-than-life myth that evolved based on the needs of the nation through the works of authors, artists, and advertisers, among others. Over the years, the mammy fulfilled a number of national longings—she oversaw the end of slavery, Reconstruction, nostalgia for the Southern plantation, and the rise of Jim Crow. As a result, she developed a constellation of attributes. The mammy was the non-threatening counterpart to the sexualized Jezebel, unattractive and desexualized through obesity, stupidity, and overwhelming motherliness.¹⁵¹ Her loyalty was unparalleled and integral to the continued success of the plantation system. Mammy played the important social role of protecting and perpetuating white womanhood, both in serving as a faithful advisor to her white children but also in embodying the justification for the need for a system that valued and revered Southern feminine gentility. By the 1930s, the nation had embraced the mammy in a number of forms. Novels such as *Uncle Tom's Cabin* (1852), *The Clansmen* (1905), *Imitation of Life* (1933), and *Gone with the Wind* (1936) featured mammies, popularizing the image of the obedient black woman. The film versions of the last three books, *Birth of a Nation* (1915), *Gone with the Wind* (1939), and *Imitation of Life* (1934) solidified the mammy's centrality in the American imaginary, transforming the humble Southern domestic servant into a mythological

¹⁵⁰ Wallace-Sanders, *Mammy*, 2.

¹⁵¹ Patricia Hill Collins, *Black Sexual Politics: African Americans, Gender, and the New Racism* (New York: Routledge, 2004), 72-73.

symbol of domesticated black womanhood. From kitschy Americana to advertising, mammy images circulated throughout the nation, reinforcing the inferiority of black women. Indeed, Wallace-Sanders demonstrates the diverse manifestations of the mammy stereotype, pointing to everything from paintings to childrens' dolls as contributing to the myth of the figure.¹⁵²

The mammy Aunt Jemima, on the other hand, emerged much later, also reaching a height of popularity in the 1930s, not coincidentally as Jim Crow was flourishing. Originating with Billy Kersands' 1875 vaudeville song "Old Aunt Jemima," the fictitious character only became a trademark in 1889 after pancake mix seller Chris Rutt fortuitously—and unfortunately—saw the number performed.¹⁵³ In 1890, the Aunt Jemima Manufacturing Company hired Green to play the fictitious Aunt Jemima. Green quickly became an iconic representative for the burgeoning corporation. Green played Aunt Jemima until her death in 1923, when in a troubling mixing of real person and character, newspapers declared "Aunt Jemima Is Gone!"¹⁵⁴ Quaker Oats officially registered the trademark for Aunt Jemima in 1937, not long before the passage of the first incarnation of the Lanham Act in 1946 and nearly half a century after the United States Congress passed the first constitutional federal Trademark Act.¹⁵⁵ The Lanham Act expanded trademark law and further facilitated the rise of the American national brand. The rise of the trademark system in the United States and the growing acceptance of branding accelerated rapidly with the passage of federal trademark legislation. In the years following the Trademark Act of 1881, the number of federal trademark registrations exploded, rising from 100 in 1870 to

¹⁵² Wallace-Sanders, *Mammy*.

¹⁵³ Manring, *Slave in a Box*, 68.

¹⁵⁴ Ibid, 77.

¹⁵⁵ The first attempt to pass trademark legislation occurred in 1871 but was overturned by the Supreme Court in *The Trade-Mark Cases*. Prior to 1870, trademarks were protected at common law but not through federal legislation. The first Lanham Act, which governs federal trademark law today, was passed in 1946.

50,000 in 1920.¹⁵⁶ The growth of railroads facilitated the development of national brands as well as advertising—the popularity of Aunt Jemima had much to do with the historical moment in which she was created. Aunt Jemima quickly became an enduring piece of American history, a symbol not only of consistent and quality breakfast foods but also of a system of racial hierarchy for which the nation—or at least many of its white constituents—longed. That is not to say that the mammy’s look remained constant over time. As evidenced by the evolution of the trademarked image over the years, even the nationally branded Aunt Jemima changed her look gradually turning from antebellum caretaker into “modern” black woman. Her popularity was the outcome of the simultaneous need to reconstruct Southern life for a post-emancipation era and the rise of the trademark system. Nonetheless, throughout her many evolutions, Aunt Jemima remained a domestic servant, understood to be confined to the kitchen.

The rise of the brand in the 1900s was not a value-neutral process. Indeed, trademarks, as a category of images and texts, are much more than descriptive images that help consumers to identify the sources of products. They are constitutive objects, produced by and embedded within cultural processes and morays of the times. Trademarks interpellate subjects into the ideologies of their brands which are, in turn, shaped by the ideologies of the nation. Consequently, as Lauren Berlant argues, trademarks connect buyers with particularized understandings of identity and nation, creating a connection through which consumer goods acquire affective meaning. Indeed, by the 1900s, “product consciousness had become so crucial a part of national history and popular self-identity that the public’s relation to business took on a patriotic value.”¹⁵⁷ Coombe argues that during this important period in American national

¹⁵⁶ Manring, *Slave in a Box*, 73.

¹⁵⁷ Lauren Berlant, *The Female Complaint: The Unfinished Business of Sentimentality in American Culture* (Durham: Duke University Press, 2008), 116.

identity formation trademarks performed the important social task of normalizing racial hierarchies. From Little Black Sambo to Uncle Ben and Aunt Jemima to Mrs. Butterworth, trademarks did the cultural work of justifying the need for a social organization which continued to deny the egalitarian treatment of slaves.¹⁵⁸ Anne McClintock makes a similar argument in the British context, identifying links between the rise of advertising of soap and the maintenance of colonial and gender hierarchies in the Victorian era.¹⁵⁹

Trademarking and advertising, then, functions as an important form of racial and gender branding, in both senses of the term, creating identity categories and forcibly imposing representations of difference on marginalized groups. In the context of Aunt Jemima, the underlying image of the mammy played a powerful role in engendering the belief that black womanhood could be rendered non-threatening if embodied by an obese, jovial, dim-witted, and absurdly loyal individual contained in the kitchen. The popularization of Aunt Jemima is thus an important mechanism in not only establishing the role of trademarking stereotypes as a means of maintaining racial order but also racializing trademark law by foregrounding particular histories of difference and backgrounding others. In this case, the Aunt Jemima trademark foregrounded the antebellum South's understanding of black womanhood at the expense of the agency and self-determination of Southern domestic servants themselves. Trademark law's broad occupation of histories of difference is evident in litigation protecting Aunt Jemima. In a 1915 case, the owners of Aunt Jemima trademark sued a competing company, Rigney and Company, who made pancake syrup which the Aunt Jemima Mills Company deemed to be of "inferior

¹⁵⁸ Rosemary Coombe, *The Cultural Life of Intellectual Properties : Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998), 185.

¹⁵⁹ Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (Routledge, 1994).

quality.”¹⁶⁰ The court’s ruling resulted in the Aunt Jemima Doctrine, which significantly broadened the scope of trademark law. Prior to *Aunt Jemima Mills Co. v. Rigney and Co.* (1917), trademark infringement could only exist on the same good, not on related goods, even those to which the original trademark holder might reasonably expand. The case is notable in its demonstration of the popularity of mammy images and representations of black female domesticity but also in its grant of broad historical monopoly to the Aunt Jemima Mills Company. More specifically, the outcome of the case granted the Aunt Jemima Mills Company a virtually exclusive right to use the mammy image with respect to breakfast, establishing the company, and later Quaker Oats, as the keepers of narratives of black Southern domestic servitude in America. Trademark law, then, as well as individual brands, perpetuate and sustain racial hierarchies through the monopolization of the telling of history.

Race, Warhol, and Pop Art

Mammy, which Warhol presents in the larger narrative of American myths, on its face, appears as a continuation of the stereotypical racialized and gendered connotations of the mammy, marked by overlapping narratives of Pop Art’s racist tendencies, Southern identity, white superiority, and denigration of blacks. Moreover, the story is filtered through the lens of a white art icon, namely Warhol, an arguably quintessential representative of the racial exclusions of Pop Art. Muñoz, commenting on the relationship between Warhol and Jean-Michel Basquiat, observes that “there is still a pressing need to articulate a truism about Pop Art’s racist ideology: there are next to no people of color populating the world of Pop Art—either as producers or as subjects. Representations of people of color are scarce and more often than not worn-out

¹⁶⁰ *Aunt Jemima Mills Co. v. Rigney & Co.*, 247 F. 407 (2nd Cir. 1917).

stereotypes.”¹⁶¹ There is remarkably little scholarly discussion on the intersections between Warhol’s work and racial politics. Taro Nettleton makes the most adamant argument for reading Warhol’s work as a consolidation of whiteness. He argues that despite creating alternative counterpublics for queers, Warhol marginalizes race, “uncritically [reproducing] the ideological structure of our white, hegemonic, society.”¹⁶² Warhol’s persona overwhelmed his subjects serving as “the medium through which others took on a recognizable identity.”¹⁶³ For Nettleton, the artist’s seeming erasure of his own ethnic identity through the adoption of the name Warhol instead of Warhola and his sensitivity to Hollywood’s premium on whiteness are indicative of a choice to subordinate racial difference and identity to aesthetics and art. Warhol’s work on race suggests a “failure to critically engage such issues.”¹⁶⁴ Indeed, the most common critiques of Warhol revolve around his almost fanatical description of his art as apolitical, a claim supported by the artist’s controversial and much debated 1963 declaration “I want to be a machine.”¹⁶⁵

Unlike Nettleton, I read Warhol’s persona not as a medium through which racial identity is marginalized to his whiteness but as one through which racial politics in intellectual property, Pop Art, and society generally can be interrogated. I am not suggesting that Warhol necessarily had a political intent or even that his intent was a relevant factor in reading his images—I am suggesting that he complicates the visual field of race in popular culture, creating opportunities for marginalized subjects to intervene in ongoing deployments of racial stereotypes, seizing agency as rhetors even if through the medium of his persona. Even if Warhol arguably

¹⁶¹ Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*, 38.

¹⁶² *Ibid.*, 16.

¹⁶³ *Ibid.*, 19.

¹⁶⁴ Taro Nettleton, “White-on-White: The Overbearing Whiteness of Warhol Being,” *Art Journal* 62, no. 1 (2003): 23.

¹⁶⁵ G. R. Swenson, “What Is Pop Art? Answers from 8 Painters, Part I,” *Art News* 62, no. 7 (November 1963), 26.

represented Williams as a means to further his own Pop Art brand and foster discussion in the art community and perhaps even cared little for the agency of his models, his work is visually significant as a piece of art stemming from a rhetorically disidentificatory act. Reading *Mammy* as a representation constituted through acts of visual rhetorical disidentification requires grappling not only with Warhol's image but also with the context in which the image is produced, the particularities of its production, and its performative fluidity. As Fleetwood argues, understanding the performative aspects of visual representation "allows for the readings of embodied subjectivity and enactments in staged moments, in still images...and everyday engagements."¹⁶⁶ Reading Warhol's painting as an unstable image which creates the potential for multiple interpretations by viewers instead of fixed right or wrong representations of racial difference is a productive means of understanding the artist's racial investments. Doing so facilitates the development of new theories of resistance to problematic racial representations, particularly in the context of the cultural formation that is intellectual property law.¹⁶⁷ Interpreting *Mammy* as part of Warhol's larger portfolio and politics, delving into Williams' performance of Aunt Jemima, and considering the specific representations of the piece yields the opposite conclusion from Nettleton: Warhol and Williams center race and racial politics through their rhetorics and performances, creating images which promotes interrogation of social relations and stereotypes, including that of the mammy image, in the United States. Despite Warhol's non-marginalized status, his acts in creating *Mammy* are also resistive in the sense that they create possibilities for marginalized subject to be heard as rhetors.

Warhol's own penchant for collecting mammy-themed Americana, the material rhetorics of which are explored in greater depth at the end of this chapter, is a productive place for

¹⁶⁶ Fleetwood, *Troubling Vision*, 21.

¹⁶⁷ Wallace-Sanders, *Mammy*, 8.

understanding the artist's deployment of race. While these pieces of Americana can be easily read as a physical embodiment of his racial naiveté, or worse racism, The Andy Warhol Museum's *Possession Obsession* exhibition, a display of the extensive collection of kitsch from the artist's estate, suggest quite the opposite. Warhol, an avid collector of mammy figurines and cookie jars, amassed a number of racist imaginings of African Americans and particularly domestic servants. The catalogue for *Possession Obsession* aptly observes that these images cannot be taken at face value. Instead, "Warhol's collections, like his painting and films, invite us to re-examine the cultural values and hierarchies we've been taught, freeing us to re-order the world and its objects according to our individual tastes and desires."¹⁶⁸ Indeed, the power of Warhol's work derives from his ability to magnify, reorder, and reconstitute popular and consumer culture. Collecting functions as a material manifestation of interrogation and an invitation to critique, not simply acquiescence to racial representations.

Similarly, *Mammy*, unlike her counterpart on the Quaker Oats box, is an icon of rebellion as well as acquiescence and a visual text which operates to circumvent trademark law and draw attention to the mammy stereotype. Warhol said of *Myths* that "the best thing we decided to do is have people come and dress up in the costumes and...take pictures ourselves, because that way there's no copyright to worry about."¹⁶⁹ While on its face, Warhol's statement appears to be self-interested at best and irrelevant to the discussion here at worst, read in the context of his body of work, it embodies the Pop Artist's own rhetorically disidentificatory approach. Warhol

¹⁶⁸ John W. Smith et al., *Possession Obsession: Andy Warhol and Collecting* (Pittsburgh: The Andy Warhol Museum, 2002), 21.

¹⁶⁹ Andy Warhol and Pat Hackett, *The Andy Warhol Diaries* (New York, NY: Warner Books, 1989), 354. Warhol refers to copyright as an issue in this case but this is likely a misstatement of the legal issue here. Though Aunt Jemima is a visual work that could be copyrighted, she is registered as a trademark. Thus, while Warhol's wanton disregard for Quaker Oats' refusal of permission may have given rise to a copyright claim, it would have also given rise to a trademark claim, with the latter being more likely to be cognizable.

neither complies with nor contests intellectual property; he instead creates a “third mode” of operating within the boundaries of trademark law while contesting Quaker Oats’ fundamental claim to own Aunt Jemima. There is no doubt that, in the context of *Myths* and the other images surrounding her, *Mammy* conjures the image of Aunt Jemima, and perhaps even the question of why the Quaker Oats icon is not presented. Indeed, Warhol’s *non-presentation* of Aunt Jemima is powerful in itself: because he does not represent her, Warhol transforms Aunt Jemima from a mere replica of a corporate logo into a figure that, in the words of Muñoz, “disrupts the normative protocols of the commodity form.”¹⁷⁰ Warhol interrupts the mindless reproduction of Aunt Jemima, visually representing his embrace of a figure that is not quite myth or reality and calling attention to the workings of the intellectual property system. Warhol’s other work on race suggests that while he may not have sought to take a political stance on Aunt Jemima specifically or images of black women generally, his work provokes critical thought on the issue on the part of the viewer. Writing about Warhol’s famous *Birmingham Race Riot* (1964), which presents a famous photograph taken by Charles Moore and published in *Life* magazine, Ian M. Thom concludes that the artist is not merely an “idiot savant.” Rather, both Warhol and his audience were well-educated and sophisticated consumers and “they would have received a message from Warhol’s print” about racial politics in America.¹⁷¹

¹⁷⁰ Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*, 43.

¹⁷¹ Ian M Thom and Andy Warhol, *Andy Warhol: Images* (Vancouver: Douglas & McIntyre, 1995), 17.



Figure 2.4 Warhol's *Birmingham Race Riot* (1964) depicts Civil Rights era police brutality

Birmingham Race Riot is also compellingly read as a means of forcing deeper examination of race and racial discrimination in America (Figure 1.3). The piece brings the audience into uncomfortably close contact with racial violence, creating a voyeuristic experience in which the viewer must watch up close the repeated beating and attack of black protesters. A police officer's billy club centers the eye, backgrounding those lobbying for civil rights to the state. While this visual choice is the photographer's, Warhol exploits it through the use of black and white, enhancing the contrast between the protesters, whose dark skin fades into the background, and the police officer who visually dominates the left side of the image. Indeed, the only two visible faces in the piece are that of the police officer and the dog attacking a civilian. The brutality of the moment is simultaneously lost and eternalized in Warhol's dark and grainy image, blurred into history by Warhol's mechanistic mode of production and immortalized as myth through magnification. Yet *Birmingham Race Riot* is also important "not as picture, but as

idea.”¹⁷² Of the infinite subjects on which Warhol could have focused, he chose civil rights protests and, in particular, police brutality during the 1960s. Despite the issue of racial equality being unavoidable and “emphatically topical”¹⁷³ during the period, Warhol’s previous work largely focused on consumer objects and celebrity. Warhol’s series of deaths and disasters in America shifted that focus, providing an uncomfortably close look at violence, destruction, and morality in the United States. Regardless of Warhol’s intent, the *Birmingham Race Riot*, along with *Race Riot* (1963), *Mustard Race Riot* (1963), *Race Riot*, and *Red Race Riot* (1969), forced attention on the mechanistic nature of state control and the systematic repression of African Americans in the nation. Even as apolitical commentary on racial inequality in America, Warhol’s race riots suggest a desire to draw attention to the nation’s state of affairs.



Figure 2.5 Andy Warhol’s *Mammy* (1981) portrayed by Sylvia Williams from the *Myths* series (left) and *Ladies and Gentleman* (1975) (right)

¹⁷² Anne M. Wagner, “Warhol Paints History, or Race in America,” *Representations* no. 55 (1996): 100.

¹⁷³ *Ibid.*, 104.

Warhol's drag queen paintings, and specifically the series *Ladies and Gentlemen* (1974), also opens space for resistive exercise of rhetorical agency. In portraying men dressed in drag, Warhol presents "living testimony to the way women used to want to be, the way some people still want them to be, and the way some women still actually want to be."¹⁷⁴ His "living testimony," in the form of stylized portraits of drag queens, is unrepentant and brazen, offering a space not just for the negotiation of his own identity but also the identity of his models. The majority of the pieces in the *Ladies and Gentlemen* (1975) series depict drag queens staring into the audience, directly engaging the viewer (Figure 1.4). While these images are certainly mediated through Warhol's persona, they also unabashedly bring a range of gender identities to a large audience, asking for engagement with queerness just as *Birmingham Race Riot* did on the issue of race in America. These similar modes of engagement may theoretically belie Warhol's claim to political agnosticism and commitment to mass production of meaningless art, but in practice they open space for dialogue about race and identity in the United States.

Interestingly, Nettleton takes issue with *Ladies and Gentlemen*, reading it not as an emancipatory portrayal of black men in drag but a presentation of unnamed subjects who fail to achieve celebrity, remaining nameless "nobodies" in contrast to Warhol's other works and a rehashing of problematic blackface images and tortured lives. For Nettleton, Warhol does violence to his subjects through the use of dark colors, ripped paper, and illegible faces.¹⁷⁵ He concludes that "[i]t is as if the relative malleability of or freedom from embodied particulars comes to a grinding halt, once the register is shifted from gender and sexuality to race. Once racial difference becomes the subject, otherwise fluid categories coalesce into biological

¹⁷⁴ Andy Warhol, *THE Philosophy of Andy Warhol: From A to B and Back Again* (New York: Harcourt Brace Jovanovich, 1975), 54.

¹⁷⁵ Nettleton, "White-on-White," 19-20.

determinism.”¹⁷⁶ While I do not take issue with Nettleton’s reading of *Ladies and Gentlemen* per se, I disagree with his ultimate conclusion that Warhol does violence to his subjects. Warhol’s work, despite the artist’s claims to be apolitical, brings into focus gendered and raced injustices, forcing reevaluation of their representations by excising them from contexts in which they might not be noticed and magnifying them exponentially. Using dark faces, torn paper, and images fading into the background does not allow the viewer to simply accept the status quo’s treatment of racial difference but compels reconsideration of violence to the body and spirit, calling attention to race and its implications. Similarly, *Mammy* is not simply an unproblematic image—the piece calls to mind a plethora of troubling notions about black womanhood. Rhetorical disidentification operates through the simultaneous utilization and recreation of social norms. In this case, the mammy remains, but her meaning is revised. No longer the obsequious servant, she becomes a truly modern black woman through Williams’ performance.

***Mammy* and visual rhetorical disidentification**

Investigating the history of Warhol’s *Mammy* begins to uncover her complicated genesis and somewhat awkward fit within the *Myths* series as well as her function as an object of visual rhetorical disidentification with the public domain (Figure 1.4). *Mammy* was not originally intended to be a representation of any black woman fitting the mammy stereotype—Warhol intended to translate Aunt Jemima’s likeness into his pop style. Yet because Aunt Jemima was trademarked, Warhol could not create his screenprints without the permission of her owner, Quaker Oats. Quaker Oats not only refused to grant permission but also threatened to sue if Warhol used Aunt Jemima’s image. In order to work around Quaker Oats, Warhol asked black jazz singer Sylvia Williams to pose for him. Williams enthusiastically accepted, “incensed that

¹⁷⁶ Ibid, 20.

any company would claim to ‘own’ Aunt Jemima,” a historical figure in America and a well-known stereotype of blackness.¹⁷⁷ As a result, in 1981, Warhol released *Mammy* as part of a highly coveted series of screenprints entitled *Myths*. *Mammy* took her spot in the series with images of Mata Hari, represented by Greta Garbo, Uncle Sam, Superman, the Wicked Witch of the West, resembling Margaret Hamilton, Howdy Doody, Dracula, in the tradition of Bela Lugosi’s depiction of the character, Mickey Mouse, Santa Claus, and the Shadow, the last of which was Warhol himself (Figure 1.5). *Mammy*, like the other myths, resonates in the American imagination, playing upon the nation’s longings and fears. The image plays upon the truth of black domestic servitude embodied by the women that served as nannies and housekeepers in the antebellum South, bringing it together with the identity of the modern jazz singer to create a new subjectivity. Yet while Aunt Jemima, a made up character played by a black woman, would have more intuitively fit with the other myths, *Mammy* stands out. An amalgam of multiple real people and myths wrapped into one, she is only partially imagined.



Figure 2.6 Warhol’s *Myths* (1981) depicts larger-than-life American characters

¹⁷⁷ David Bollier, *Brand Name Bullies: The Quest to Own and Control Culture* (Hoboken, N.J.: J. Wiley, 2005), 52.

Warhol ultimately named the piece in which Williams is represented *Mammy* because “he concluded that the real myth he was painting was perpetuated not only in Quaker’s product but in the character of Mammy popularized through *Gone with the Wind*.”¹⁷⁸ The naming of a recurrent stereotype as opposed to a singular figure suggests a contrast with the rest of the myths in *Myths* which denote particular characters. *Mammy* is a metonym, a stand-in for racialized images of domestic servitude throughout society—and the visual rhetorics of the image represent this function. The image is a transmogrification of the mammies and Aunt Jemimas of the 1930s, marked by a performative rewriting of stereotype. Warhol’s refusal to comply with the intellectual property regime in combination with Williams’ reclamation of her heritage performs resistance, refusing and embodying the mammy. The finished piece interrupts the stereotype of the mammy, interjecting the thoughts and feelings of artist and subject. This interruption is possible precisely because of the circumscribed limits of intellectual property law.

In typical Warholian fashion, there are a number of versions of *Mammy*, reprinted in different colors, some offering a more realistic and defined but still colorful look at the face of the woman depicted in the image. In the most widely distributed portfolio version of the image, Williams’ eyebrows, eyes, and nose are drawn in a broken light green outline, creating strong visual contrast against the solid black background behind her. The woman’s face is framed by glitter, or diamond dust as Warhol refers to it, offset by slightly open, smiling lips covered in bright red lipstick, a bright red headwrap, roughly outlined blue and yellow eyes and eyelashes, and huge hoop earrings. In other prints, the image of the woman is clear and crisp, her red bandana and earrings standing out against the neon background, her expression, more visible without the black background behind her, one of self-confidence (Figure 1.6). The images can

¹⁷⁸ Ibid.

be read separately and together as disidentification with the very mythic figure of the mammy. In the dark version of the image, “the emphasis on eyes, lips, and hair (here a bandana) serves to almost obliterate the face.”¹⁷⁹ This “obliteration” is consistent with *Mammy*’s critique of race in America: the “garish and vulgar” outline of Williams’ face exists, the rest of her history fading into a background of black.¹⁸⁰ In effect, Williams’ identity is unimportant, at least in the eyes of American consumer culture. Under the dominant ideology, she represents a means of production, in this case of educated white bodies, a depersonalized form of labor, and an embodied form around which national unity coalesced—her individual identity is unimportant. On the other hand, in the second version of *Mammy*, Williams’ face is clear and sharp, her straight on gaze emphasizing her fearlessness and joy at “occupying” the mammy. The stark contrast between the two images operates to highlight the meaning of both: the mammy is both an anonymous figure in the American cultural imaginary with no name and no face and a specific subject comprised of black women who embody and resist the stereotype.



Figure 2.7 Another version of Warhol’s *Mammy* (1981).

¹⁷⁹ Thom and Warhol, *Andy Warhol*, 45-46.

¹⁸⁰ *Ibid*, 11.

When asked whether she would pose as Warhol's mammy despite the possibility of a lawsuit from Quaker Oats, Williams exclaimed "Are you kidding? You put *me* on the stand [in a court trial]! They cannot own my heritage!"¹⁸¹ Williams' defiance constitutes her rejection of not only Quaker Oats' ownership of Aunt Jemima and the mammy stereotype but also a reclamation of racialized and gendered content identified as within the public domain. Williams claims her "heritage," asserting her right to represent the Southern black domestic servant and negating the intellectual property right that prevents her from doing otherwise. Her rhetorical disidentification thus not only asserts the agency of marginalized groups to retell their own histories but contests the very notion that the infringement that Quaker Oats suggests is legitimate. It is through the questioning of Quaker Oats' very property right in the narrative of black domestic servitude that Williams reconstitutes the association of infringement and racial difference, proposing instead that the system which asserts ownership to the history of black servitude is a flawed one. Williams thus does much more than simply represent the mammy—she problematizes the stereotype that she represents and simultaneously performs her compliance and non-compliance with trademark law as a means of revealing oppressive Western ideologies of ownership. Though she complies with the letter of the law, Williams circumvents its spirit, enacting an oppositional historical narrative that militates against the very ownership of Aunt Jemima. Williams' *Mammy* is not simply "the faithful slave" but a subversive figure behind a smiling face that, like Johnson's once domestic servant grandmother, is a subversive trickster who "is able to covertly insert her own language (e.g. black vernacular) and pursue motives that are not necessarily those of her employer...the domestic bides her time until she finds an

¹⁸¹ Bollier, *Brand Name Bullies*, 52.

opportunity to dupe her employer.”¹⁸² Mary, Johnson’s grandmother, knows when to act the part of imagined mammy in order to ensure her own self-preservation, both in terms of keeping her job and protecting her family, and when to interject her own black vernacular into her speech and actions in a manner that intervenes in the stereotype imposed upon her. However, unlike in Johnson’s example, Williams’ employer, Warhol, is in on the joke.

Coombe points out, by way of the work of Michael Warner and Lauren Berlant, that trademarks are constitutive of the very identity of the nation, “constructing a common discourse to bind the subject to the nation and its markets.”¹⁸³ Rhetorical disidentification, on the other hand, involves the unmaking of the relationship between the subject, the nation, and its markets, a process that is discernible in Williams’ assertion of her heritage and the finished *Mammy*. Through *Mammy*, Williams and Warhol unmake the bonds between the subject, the nation, and its markets or, as Muñoz and Berlant understand the relationship, between trademark, consumer, and commodity. Through this disruption of triangulation, disidentification occurs: Williams undoes the relationship between African Americans and white superiority, carving out a space to exercise her agency as a rhetor and engaging in “transformative restructuration” of the mammy.¹⁸⁴ The mammy no longer simply stands for the passive, obedient black domestic servant. She instead takes the form of a strong black artist with a successful music career who gazes defiantly and joyfully directly at the camera. The absence of Aunt Jemima prevents the embodiment of the black woman in a single, reductive commodity form, opening space for alternative rhetorics of black womanhood and renarrating the treatment of property as the exclusive domain of predominantly white corporations. Indeed, the process of dematerialization

¹⁸² Johnson, *Appropriating Blackness*, 109.

¹⁸³ Coombe, *The Cultural Life of Intellectual Properties*, 170.

¹⁸⁴ Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*, 39.

of the body that occurs in the image is the opposite of the process Berlant describes. The representation of Williams instead of Aunt Jemima denies “the surplus corporeality of racialized and gendered subjects”¹⁸⁵ associated with the Quaker Oats brand, replacing it with a portrait of an actual woman. Indeed, in the image of *Mammy* contained in the *Myths* series, Williams’ image disappears into the background, fading into a series of squiggles and glitter, made obvious to the viewer only by the contrast of the stark red headscarf and lipstick on the mysterious figure. The mammy’s disappearance into the background not only marks the refusal of Quaker Oats to permit the recontextualization of its property but the breaking down of the singularity of the myth of black womanhood that Warhol and Williams invoke in and through the painting.

Warhol’s *Mammy* acquires much of its transgressive and resistive potential through the refusal of Quaker Oats to allow the use of the Aunt Jemima trademark and the resulting critique of the ideas of property and intellectual property. Warhol did not stop his project because of Quaker Oats’ prohibition. Rather, he sought out a black woman to serve as his model mammy. Williams’ agreement to be Warhol’s model not only resulted in the production of an image with a rich backstory but also affirmed the malleability of the mammy stereotype and the non-exclusivity of the mythic meaning of Aunt Jemima. King argues that that African American literature functions to critique the notion of exclusivity in American legal thought, demonstrating the absurdity of labeling African Americans to be thieves in an economy built on the exploitation of their labor.¹⁸⁶ In a similar vein, Schur develops a theory of “hip hop aesthetics,” arguing that inherent in African American culture is the impulse to add new meaning to an existing

¹⁸⁵ Berlant, *The Female Complaint: The Unfinished Business of Sentimentality in American Culture*, 112.

¹⁸⁶ King, *Race, Theft, and Ethics: Property Matters in African American Literature*.

representation and “write over an unjust distribution of intellectual and cultural resources.”¹⁸⁷

More specifically, “hip hop aesthetics, when read through [Henry Louis] Gates’ theory of signifyin(g), constitutes an outlaw practice because it values long-standing cultural practices over the recent expansion of intellectual property doctrines.”¹⁸⁸ Schur builds on the work of Sonia Katyal, who theorizes the ability of “semiotic disobedience,” a practice which “[involves] the conscious and deliberate recreation of property through appropriative and expressive acts that consciously risk violating the law that governs intellectual or tangible property.”¹⁸⁹ *Mammy* is emblematic of both hip hop aesthetics and semiotic disobedience—the image involves the palpable reimagining and reinvention of Aunt Jemima and the exclusivity of historical memory she represents. The portrait of Williams that Warhol creates through their acts of rhetorical disidentification resists the concept of property itself, suggesting that exclusivity of ownership of cultural myths is neither possible nor desirable, particularly for marginalized groups.

Williams’ assertion of ownership over her “heritage” exemplifies the deployment of vernacular rhetorics to bring to light, reclaim, and refigure racial histories through rhetorical disidentification. The invocation of heritage suggests that there is something significant in the image of the mammy for African Americans and that, in light of the history of slavery, the stereotype of black womanhood is one that should not be exclusively owned. Williams’ act of asserting her heritage rhetorically deconstructs that exclusivity, suggesting the presence of multiple histories of mammyhood as well as a reconstitution of legal discourses which constitute that figure. Williams is not reclaiming the mammy out of nostalgia for the white South but as a

¹⁸⁷ Richard L. Schur, *Parodies of Ownership: Hip-Hop Aesthetics and Intellectual Property Law* (Ann Arbor: University of Michigan Press : University of Michigan Library, 2009), 33.

¹⁸⁸ Ibid, 35.

¹⁸⁹ Sonia Katyal, “Semiotic Disobedience,” *Washington University Law Review* 84, no. 3 (2006): 493.

critique of the process of owning and selling stereotypical black identities. Williams' claim to protect her heritage thus serves to affirm the existence of multiple heritages and functionally deny Aunt Jemima's claim of ownership over a racist history. In a similar vein, Williams' portrait circumvents Quaker Oats' exclusive right to Aunt Jemima, suggesting that permitting the creation of alternative models of intellectual property ownership that Halbert discusses is not only necessary to open space for marginalized groups to speak in public settings but also to confront the tendency to obscure and ignore histories of race and colonialism in America.

The materiality of racial disidentification

Williams' performance, both in terms of asserting ownership over her heritage and posing defiantly for *Mammy*, is an embodied exercise of rhetorical agency which redefines the boundaries of black womanhood, particularly as imagined through the Aunt Jemima trademark. Embodied resistance connotes materiality, in the sense of "objects that signify not through language but through their spatial organization, mobility, mass, utility, orality, and tactility."¹⁹⁰ Bodies, of course, are a core part of the theorization of materiality as physicality. The performances and enactments of embodied agents function as rhetorical acts within larger systems of power. In the context of *Mammy*, Williams, like Johnson's grandmother, interjects her own being into the mammy stereotype, adding self-sufficiency, musical talent, outspokenness, and sensuality to the list of characteristics associated with the figure. These traits, of course, are not verbally communicated but are performed in acts which assert rhetorical agency, memorialized in a visual text. Williams' body is one that refuses to be disciplined by dominant imaginings of the Southern domestic servant—instead her performative engagements

¹⁹⁰ Barbara Dickson, "Reading Maternity Materially: The Case of Demi Moore," in *Rhetorical Bodies*, ed. Jack Selzer and Sharon Crowley (Madison: University of Wisconsin Press, 1999), 297.

with the mammy produce a new figure, one that concedes the social presence of mammyhood while rewriting it as an emancipatory category for identifying black women. The representation of Williams' embodied protest, namely *Mammy*, is an emancipatory visual rhetoric—and one through which the boundaries of trademarks are simultaneously accepted and challenged. Williams' body stands for the multiplicity of histories of mammyhood while refusing the property relationship through which the race relations associated with the mammy are normalized. The disruptive nature of *Mammy* does more than contest the racial stereotypes of black domestic servitude: it opens space for the audience and other rhetors to exercise agency and contest the hegemonies of trademarks and stereotypes of mammyhood. As an affirmation of multiple histories and historiographies, *Mammy*, as well as Williams' underlying performance, provide permission for marginalized rhetors to exercise their agency. Williams' embodied rewriting of Aunt Jemima and mammyhood is thus a compelling form of archival opening which offers a counterhistory as a justification to “locate silences...and expose silencing moves.”¹⁹¹

Similarly, Warhol's *Mammy* and his collections of racist kitsch operate as material records of the resistive potential of images of black women as mammies. Wendy Sharer, following the work of Barbara Biesecker on archives, observes that assembling historical records is, in itself, an act of power through which identities are made dominant and subordinate.¹⁹² Warhol's collections of mammies and racist Americana operate in direct contravention to accepted archives and “confound traditional notions of rhetorical texts.”¹⁹³ In selecting and reordering objects from Americana, Warhol assembles a new archive, specifically one which

¹⁹¹ Wendy Sharer, “Disintegrating Bodies of Knowledge: Historical Material and Revisionary Histories of Rhetoric,” in *Rhetorical Bodies*, ed. Jack Selzer and Sharon Crowley (Madison: University of Wisconsin Press, 1999), 139.

¹⁹² Ibid, 121.

¹⁹³ Ibid, 122.

simultaneously affirms and questions the nation's racist past. In doing so, Warhol builds on a history of resistance through the assembly of collections. For example, artist Emory Biko collects racist memorability in order to mark and critique histories of anti-blackness in America (Figure 1.7). "The Museum of the African's Experience in America," an assemblage of his creation, is a collection of over 13,000 objects amassed in accordance with his motto "I buy anything black." For Biko, "[c]ollecting informs both his art and his audiences about the African American experience and open up dialogue about slavery, race, and pop culture." Read through the lens of rhetorical disidentification, it is a radical political act which constructs material rhetorics which simultaneously memorialize and perform resistance to anti-blackness in America, ultimately asserting the subjectivity of the African American in history. The bringing together of disparate objects in order to create a new resistive object is a practice that exists at a more micro level as well. In one of the most famous reclamations of the mammy stereotype in existence, Betye Saar's *The Liberation of Aunt Jemima* (1972) creates a shadowbox filled with Aunt Jemima themed advertisements and a representation of the mammy imagined by white audiences contained within the belly of a larger, broom and rifle-toting black woman. Saar's amalgamation of mammy images is the basis for reconstructing a new black woman, one who refuses the loyalty and passivity demanded by white nostalgia and embraces her own power and subjectivity as a means of confronting inequality and asserting agency. Warhol, like Biko and Saar, deploys collecting as a means of bringing American culture under the microscope, bringing together pieces of racist kitsch to force the interrogation of daily representational practices.



Figure 2.8 Emory Biko's collection of racist American (circa 2002) (left) and Betye Saar's *The Liberation of Aunt Jemima* (1972)

Mammy cookie jars are just one exemplar of this simultaneous acceptance and rejection of America's racialized culture—they utilize the problematic imagery of the mammy while recontextualizing it in a manner that forces reconsideration of her as a racial caricature (Figure 1.8). Both the collections of Warhol and Biko represent the mammy in a larger-than-life format and place her, through the object's functionality, in the domestic space that she rules. Considering “the materiality of the objects from which we might derive ‘new’ knowledge, and the physical construction of collections containing these bodies of knowledge”¹⁹⁴ is an important mechanism for empowering marginalized groups as rhetorical agents—it is also a premise which urges the audience to interrogate the meaning of the cookie jars themselves. Warhol's McCoy mammy cookie jars are one of the most prominent material records of Southern domestic servitude in his collection. Not only do they occupy a significant amount of physical space, but they occupy a weighty cultural space as well, depicting a stereotypical black mammy reminiscent

¹⁹⁴ Ibid, 124.

of the earliest Aunt Jemima trademark. The figure depicted is grossly overweight, clothed in a non-descript white dress, and a bright red headscarf. Her dark, round face exaggerates her blackness and her almost vacant, wide eyes and red mouth bring to mind images of blackface minstrelsy. The word “Cookies” written at the bottom of the jar demarcates the mammy’s domain, relegating her to the kitchen. Chipped paint shows the age of the cookie jar, yet the woman depicted simultaneously feels frighteningly recent.



Figure 2.9 McCoy Mammy Cookie Jar from Warhol’s personal collection (Circa 1930)

Warhol’s cookie jars mark a historical period in which black women were forced into domestic servitude. They also exist in stark contrast to the image presented in *Mammy*.

Warhol’s obsession with collecting points to the need to think critically about the social morays that permitted the creation of the racist everyday objects he accumulated during his life. Contrast becomes a means of demonstrating the problems with mammy cookie jars. The sophisticated portrait of Williams, performed and represented in a defiant manner, brings into question the very existence of the mammy that McCoy depicts. The cookie jars and *Mammy* work together to

form a new collection, one which affirms the identities of marginalized groups as opposed to dominant ones. Evident in the contrast that Warhol creates through his collecting and painting is resistive potential: *Mammy* is a visual rhetorical act which rewrites the mammy of the cookie jars, updating her for a contemporary era. *Mammy*'s rewriting, of course, foregrounds the importance of the trademark and the consumer brand as mechanisms for consolidating racial stereotypes and affirming white supremacy. Though the McCoy cookie jars did not result in a long lasting trademark like Aunt Jemima, they were very much an integral part of the negotiation of race and national identity in the 1930s. The example of Warhol's *Mammy* thus highlights the constitutive—and reconstitutive—potential of racial stereotypes and the productive power of disidentification in generating new identities and opening space for new histories at the intersections of racial politics and consumer culture.

CHAPTER 2

Parodic Appropriation and the Public Trial in *The Wind Done Gone*

In December 1939, the United States was in a state of upheaval and uncertainty. Economic recovery after the Great Depression was still fragile, Southern blacks were moving north as the Great Migration continued, and President Franklin D. Roosevelt was contemplating intervention in World War II in Europe, which began with Adolph Hitler's invasion of Poland just a few months earlier.¹⁹⁵ It was in this historical moment that *Gone with the Wind* was released—perhaps predictably, Margaret Mitchell's epic love story was an immediate and overwhelming nationwide success. The black-and-white film, which was released 24 years after D. W. Griffith's *The Birth of a Nation*, was nearly as regressive as the tale valorizing the Ku Klux Klan and demonizing newly freed slaves. In his Preface to the text, Pat Conroy writes that *Gone with the Wind* "still stands as the last great posthumous victory of the Confederacy."¹⁹⁶ The novel's heroine, the young, naïve, selfish, and notably not beautiful yet still much desired Scarlett O'Hara, is an icon of white womanhood in the pre-Emancipation South. She lives a life of leisure on Tara, her beloved plantation home, making "the plans that a sixteen-year old makes when life has been so pleasant that defeat is an impossibility and a pretty dress and clear complexion are weapons to vanquish fate."¹⁹⁷ Then the Civil War intervenes. Conroy's commentary says as much about the mythology of Scarlett as the novel itself. The self-centered and strong-willed woman "rises to meet challenge after challenge as the war destroys the entire

¹⁹⁵ Gerald Wood, "From The Clansman and Birth of a Nation to Gone with the Wind: The Loss of American Innocence," in *Recasting: "Gone with the Wind" in American Culture*, ed. Darden Asbury Pyron (Miami: University Presses of Florida, 1983), 132-133.

¹⁹⁶ Margaret Mitchell and Pat Conroy, *Gone with the Wind* (New York: Scribner, 2011), 11.

¹⁹⁷ *Ibid*, 89.

world she was born into as a daughter of the South.”¹⁹⁸ Even as Scarlett’s heart is broken by love lost,¹⁹⁹ and Tara is threatened by the Union,²⁰⁰ her persistence and stubbornness is emblematic of “what the South will become.”²⁰¹ Scarlett is the matriarch of a generation of resilient, ruthless, and amoral women that will lead the South into a new era, defending its past honor while building a new path for its social and economic future. Yet she is never portrayed without flaws. Instead, her charm, determination, and self-reliance in a South in ruins excuse, even render acceptable her questionable actions. Scarlett’s scheming and lying is seemingly a prerequisite to her self-preservation in a postwar South left in a state of chaos.

Throughout her struggles, Scarlett’s black domestic servant, Mammy, remains loyal, never faltering even as a Northern victory in the Civil War offers the possibility of freedom. If Scarlett is the emblem of the determined but genteel Southern white woman, Mammy is the epitome of the poor and uneducated but loyal and industrious black domestic servant. After all, in both the book and film versions, *Gone with the Wind* portrays Mammy as an almost obsessively committed caretaker. Though Hattie McDaniel, who played Mammy in the film, went on to become the first black woman to win an Academy Award for her performance, the National Association for the Advancement of Colored People (NAACP), among others, criticized her for taking on a role which normalized racist beliefs.²⁰² The NAACP’s criticism was an apt one: *Gone with the Wind* played an integral role in the perpetuation of the mammy stereotype, which persists even today. Mammy is so stereotypical and exaggerated that she is

¹⁹⁸ Ibid, 13-14.

¹⁹⁹ Ibid, 130-131.

²⁰⁰ Ibid, 392.

²⁰¹ Ibid, 14.

²⁰² Jill Watts, *Hattie McDaniel: Black Ambition, White Hollywood* (New York: Amistad, 2007), 175-177.

“reduced to a comic caricature.”²⁰³ Moreover, *Gone with the Wind* played an important role in the development of American racial consciousness, particularly the valorization of white womanhood, the constraint of black subjectivity,, as well as the continued justification of racial hierarchies. The “faithful slave narrative”²⁰⁴ embodied by the archetypal character of the Mammy evolved into the “matriarchy crisis”²⁰⁵ of the 1960s and 1970s, as the *Moynihan Report* labeled black mothers who were previously loyal caretakers to their white families as inadequate and overbearing when parenting their own children, blaming them for the deterioration of the African American family.²⁰⁶ The “welfare queen”²⁰⁷ era of the 1980s and 1990s followed, as conservative discourses merged the “controlling images”²⁰⁸ of the mammy, sapphire, and jezebel with racialized narratives of laziness and opportunism.²⁰⁹ Indeed, if Warhol’s *Mammy* represents the emancipatory potential and multivocality of the black domestic servant, Mitchell’s Mammy is the demeaning and univocal stereotype against which Williams performs.

One literary work which directly confronts the version of American history memorialized in *Gone with the Wind*, and the focus of this chapter, is *The Wind Done Gone*. Published in 2001, by Houghton Mifflin, and written by then little-known former Nashville songwriter and novelist Alice Randall, the book retells *Gone with the Wind* from the vantage point of Scarlett’s

²⁰³ Wallace-Sanders, *Mammy*, 125.

²⁰⁴ McElya, *Clinging to Mammy*, 207.

²⁰⁵ Ibid, 256.

²⁰⁶ Robert Moynihan, “The Negro Family: The Case for National Action” (Office of Policy Planning and Research United States Department of Labor, 1965), <http://www.blackpast.org/?q=primary/moynihan-report-1965#chapter2>.

²⁰⁷ John Blake, “Return of the ‘Welfare Queen’,” *CNN.com*, January 23, 2012, <http://www.cnn.com/2012/01/23/politics/welfare-queen>.

²⁰⁸ Patricia Hill Collins, *Black Sexual Politics: African Americans, Gender, and the New Racism* (New York: Routledge, 2004), 72.

²⁰⁹ Carolyn M. West, “Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy,” *Psychotherapy: Theory, Research, Practice, Training* 32, no. 3 (1995): 458–466.

mixed-race half-sister, Cynara. Cynara's tale is centered by her feelings of jealousy resulting from the attention her half-sister receives from their shared mother, Mammy, and her eventual abandonment. In telling the story of being the half-sister of "the belle of five counties,"²¹⁰ Cynara reveals a number of details that are left out of *Gone with the Wind*'s narrative. She tells of Mammy's affair with Planter (Randall's parallel to Gerald O'Hara), her own marriage to R. (Randall's Rhett Butler) which results in a child, and the part black heritage of Other (Randall's counterpart to Scarlett) through her Haitian-born great, great grandmother, and Scarlett's untimely death.. These turns in *The Wind Done Gone*, which Randall describes as "a critique of *Gone with the Wind* in the form of a parody,"²¹¹ quite intentionally diminish "the posthumous victory" of *Gone with the Wind*, contesting Mitchell's ownership of histories of the South. Moreover, *The Wind Done Gone*, unlike the racially divisive *Gone with the Wind*, "unites the nation" through its identification of the part-blackness of many of Mitchell's characters.²¹² Alarmed by the relationship between the two books and as the rewriting of the racial, sexual, and historical relations among *Gone with the Wind*'s iconic characters, Mitchell's estate sued Houghton Mifflin and Randall, alleging copyright infringement. Randall asserted that she had not violated the Mitchell estate's copyright based on the doctrine of fair use: her book, she argued, is a parody of *Gone with the Wind* that does not infringe Mitchell's copyright.

Randall's claim of parodic fair use, however, was not an easy one to prove. Both legally and culturally, Mitchell's defense was held to a high burden of proof. Not only did Randall have to demonstrate that her work was fair use under a four factor legal balancing test but, historically

²¹⁰ Alice Randall, *The Wind Done Gone* (Boston: Houghton Mifflin, 2001), 1.

²¹¹ "Alice Randall, Author of 'The Wind Done Gone'," *CNN.com*, June 22, 2001, <http://archives.cnn.com/2001/SHOWBIZ/books/06/22/randall.cnn/>.

²¹² "Alice Randall, Author of 'The Wind Done Gone'," *CNN.com*, June 22, 2001, <http://archives.cnn.com/2001/SHOWBIZ/books/06/22/randall.cnn/>.

speaking, “[w]herever African American cultural expressions have been concerned, the standard for originality has been set rather high, resulting in a double standard that devalues the parodies of these cultural expressions as merely imitative and aesthetically inferior.”²¹³ As *Suntrust Bank v. Houghton Mifflin*, the lawsuit between the Mitchell estate and Houghton Mifflin and Randall, demonstrates, Randall’s ability to prove the creativity of her work was wrapped up in a very powerful memory of the American South, the sanctity of white privilege, and the battle over the right to write the past. In the end, Randall triumphed, at least in a sense, settling with Mitchell’s estate earning the right to sell “The Unauthorized Parody” of *Gone with the Wind*.²¹⁴ Critical race scholars such as Richard L. Schur, Kevin J. Greene, Lovalerie King, and Gene Andrew Jarrett have commented on copyright law’s propensity to systematically exclude African Americans from intellectual property ownership and entrench white supremacy.²¹⁵ Steven M. Best argues that the very emergence of intellectual property law can be traced to the theoretical justification for slavery, “the ongoing crisis in which persons are treated as things, and things as persons, one that lends historical depth and contour to the subordination...of personality to the property relation.”²¹⁶ Copyright law emerged as a means to protect the person—i.e. the slave—as a thing, eventually resulting in the protection of intellectual objects that stemmed from the interior of the human.²¹⁷ Part and parcel of this protection was the belief that slaves were not persons, only things, and thus incapable of producing creative works or inventions. As King

²¹³ Gene Andrew Jarrett, *Representing the Race: A New Political History of African American Literature* (New York: New York University Press, 2011), 132.

²¹⁴ *Ibid*, 130.

²¹⁵ Schur, *Parodies of Ownership*; Greene, “Intellectual Property at the Intersection of Race and Gender”; King, *Race, Theft, and Ethics: Property Matters in African American Literature*; Jarrett, *Representing the Race*.

²¹⁶ Stephen Michael Best, *The Fugitive’s Properties: Law and the Poetics of Possession* (Chicago: University of Chicago Press, 2004), 38.

²¹⁷ *Ibid*.

shows, *The Wind Done Gone*, as a literary text, contests the notion that African Americans can only steal, rewriting the narrative of racialized theft through the reclamation of black personhood, rendering human objectified subjects, and the affirmation of the creative potential of the non-white author.²¹⁸ The rewriting that occurs through *The Wind Done Gone* is not only through Randall's book. It also unfolds through resistive rhetorics and performances of copyright law, particularly those surrounding the public trial.

In this chapter, I read *The Wind Done Gone* and *Suntrust* as rhetorical and performative reworkings of copyright law's understandings of infringement and the public domain. Indeed, *Suntrust* is a notable case because it foregrounds the question of whether copyright law condones the parody of a copyrighted work—and in particular a copyrighted work written by a white woman and with significant interpellative and nostalgic value for many Americans—by a relatively unknown non-white author. A finding of parodic fair use, among other factors, generally includes a judgment of “transformation” of *Gone with the Wind*, and hence creative authorship on Randall's part. The positionality of the novelist is obviously an important issue here: as a black woman writing against *Gone with the Wind*'s legendary heroine and copyright law's historical refusal to recognize the creative works of non-white authors, Randall's parodic reinterpretation effectively resists both the mythologies of the Old South and one of the means through which copyright infringement is articulated with racial difference. *The Wind Done Gone* is emblematic of a collective desire to rework intellectual property's boundaries, reshaping it to account for the experiences of blackness. Schur speaks of the process of rewriting cultural texts—termed signifyin(g)²¹⁹ in Henry Louis Gates Jr.'s parlance—as “an act of rhetorical

²¹⁸ King, *Race, Theft, and Ethics: Property Matters in African American Literature*, 37.

²¹⁹ Henry Louis Gates, *The Signifying Monkey: A Theory of African-American Literary Criticism* (New York: Oxford University Press, 1989).

ownership over an object, a text, or even an individual.”²²⁰ The impulse to engage in signifyin(g) is emblematic of a larger “hip hop aesthetic” in African American culture which places a high value on parody, among other forms of appropriation.²²¹ As a rhetorical text, then, *The Wind Done Gone* is by its very definition resistive. It reimagines the history of the American South, making visible the realities of those racial Others who are silenced by *Gone with the Wind* and forces copyright law to respond to African American understandings of property ownership and evolve to account for differing cultural practices. The mere existence of Cynara forces the reader to rethink Scarlett’s status as the heroine of the novel and the gross structural inequities which facilitate her privilege. Through the creation of an ultimately legally sanctioned parodic novel, Randall reimagines social norms within the Old South and forces critical examination about beliefs in the non-creativity of black authors under copyright law, asserting her own agency and that of black Southerners as rhetors. Through Cynara, she makes visible the reality of sexual relations on a plantation, the fiction of pure whiteness, and the need to rethink copyright law’s racialized definitions of infringement as well as creatorship. In defending *The Wind Done Gone*, Randall asserts herself as an author in her own right.

The Wind Done Gone is embedded in a larger public trial, a rhetorical form in which Robert Hariman notes, “[t]he performance of the laws...becomes a singularly powerful locus of social control, for it is the very means by which members of the community know who they are.”²²² *Suntrust*, Randall enact a powerful counterhistory, performatively reclaiming space for alternate narratives of the American South and reconstituting copyright law through the parodic

²²⁰ Schur, *Parodies of Ownership*, 33.

²²¹ Ibid, 57.

²²² Robert Hariman, “Performing the Laws: Popular Trials and Social Knowledge,” in *Popular Trials: Rhetoric, Mass Media, and the Law*, ed. Robert Hariman (Tuscaloosa: University of Alabama Press, 1990), 17.

form. Through the text of the case itself—including the briefs of the parties, opinions of the federal court, and the affidavits of literary scholars such as Gates and Toni Morrison—copyright law is rearticulated and identities are rewritten. *The Wind Done Gone* is thus notable not only for its parodic content but also for its role in forcing the reconstitution of the intellectual property regime and American identity in rhetorical and performative legal spaces. Through *Suntrust*, parody, a previously recognized category of fair use, is articulated as a rhetorical and performative mechanism for disidentifying with history and the law. After *Suntrust*, American national identity and copyright law are forever changed by the parodic juxtaposition of Scarlett and her sister. Indeed, parody emerges as an important rhetorical and performative device for asserting the presence of unseen racial identities in the face of historical erasures. *The Wind Done Gone* and *Suntrust* are also reconfigurations of the very terms of copyright law, in this case parody. Through the rereading of parody as a political tool for African American empowerment, marginalized groups take on the role of creative authors instead of racialized infringers. Notably, in serving as a lightning rod for the redefinition of parody, *The Wind Done Gone* actually operates differently from *Mammy*. Where Warhol's painting contests the fundamental assumptions of trademark but does not change them, *The Wind Done Gone* forces a redefinition of parody in copyright law, redefining the boundaries of fair use.

Finally, as with *Mammy* and Warhol's collections, Randall's book and the documentary remnants of *Suntrust* constitute an archive of Randall's rhetorically disidentificatory project, marking myths about the South and identifications of copyright infringers as suspect concepts, contested through the unearthing of new histories. By and through the memorialization of histories of difference in *The Wind Done Gone* and *Suntrust*, a new understanding of the public domain emerges. Specifically, the public domain comes to include African Americans speaking

for *themselves* by disallowing the monopolization of history by African Americans *spoken for* by white Americans, in this case, white Southerners. Understood as part of a larger set of discourses from which knowledge is created and secondary histories are formulated, *The Wind Done Gone* and *Suntrust* mark the presence of marginalized groups and the need to protect and affirm their histories. Read together and counter to the mythologized history of Mitchell's work, *The Wind Done Gone* and *Suntrust* thus create the conditions of possibility for the creation of new subjectivities and formation of future histories through their affirmation of Southern blackness specifically but also marginalized groups more generally.

Scarlett, interrupted

Gone with the Wind, both in the book and the film version, is one of the most well-known and beloved romantic tales of the American South in existence. The film, released in 1939, followed quickly on the heels of Mitchell's 1936 book. Starring Clark Gable, Vivien Leigh, and McDaniel and supported by major publishers and filmmakers, it was an almost instant international success, which catapulted *Gone with the Wind* to its status as "one of the world's most valuable literary properties."²²³ In the first pages of the book, Mitchell introduces Scarlett as a Southern belle of French and Irish descent with "magnolia-white skin—that skin so prized by Southern women and so carefully guarded with bonnets, veils and mittens against hot Georgia suns."²²⁴ She enjoys privilege not only because of her race but also based on her class, being "born into the ease of plantation life."²²⁵ Scarlett is initially self-absorbed and unconcerned with "men's business"²²⁶ of war and secession, as "she could never long endure any conversation of

²²³ Ellen Firsching Brown, *Margaret Mitchell's Gone with the Wind: A Bestseller's Odyssey from Atlanta to Hollywood* (Lanham: Taylor Trade Pub, 2011), 2.

²²⁴ Mitchell and Conroy, *Gone with the Wind*, 25.

²²⁵ Ibid, 26.

²²⁶ Ibid, 27.

which she was not the chief subject.”²²⁷ Yet despite Scarlett’s status, she is not immune from life’s trials and tribulations, which grow as the novel continues: her teenage heartbreak stemming from falling in love with a soon-to-be-married man, Ashley Wilkes,²²⁸ soon gives way to the more serious concern of protecting herself and Tara, her family plantation, as Union troops and newly-freed slaves rampage through the South. Throughout Scarlett’s troubles, Mammy remains by her side. Scarlett observes early on in the book that “Mammy felt that she owned the O’Haras, body and soul, and their secrets were her secrets.”²²⁹ An overweight, uneducated woman who speaks in black vernacular, Mammy’s character revolves almost exclusively around the wants and needs of the O’Haras, and in particular being a “mentor”²³⁰ to the strong-willed Scarlett. Indeed, Mammy is “a composite character with almost all of the stereotypical mammy qualities”²³¹ and she lives to serve and protect her white masters with no concern for herself. Her loyalty is so strong as to span generations: Mammy ultimately cares for the children in which Scarlett has no interest,²³² sacrificing the possibility of her own motherhood for the O’Hara line.

It is not until Chapter Six of *Gone with the Wind* that Scarlett meets the infamous Butler for the first time. She associates his name with “something pleasantly scandalous,”²³³ describing him as “dark of face, swarthy as a pirate, and his eyes were as bold and black as any pirate’s appraising a galleon to be scuttled or a maiden to be ravished.”²³⁴ From Scarlett’s description, the dark-haired and dark-skinned Butler appears almost as racial Other, playing upon fantasies and fear of interracial sex. Scarlett joins Butler in Atlanta, caring for wounded soldiers despite

²²⁷ Ibid, 27.

²²⁸ Ibid, 42-43.

²²⁹ Ibid, 42.

²³⁰ Ibid, 76.

²³¹ Wallace-Sanders, *Mammy*, 125.

²³² Mitchell and Conroy, *Gone with the Wind*, 219.

²³³ Ibid., 110.

²³⁴ Ibid.

feeling “there was nothing romantic about nursing.”²³⁵ Eventually, after her first husband dies²³⁶ and Tara is nearly lost,²³⁷ Butler and Scarlett are married and have a child.²³⁸ Yet despite Butler’s abiding commitment to her, Scarlett remains in love with Ashley, who is happily married to Melanie Wilkes.²³⁹ Butler slowly goes mad with jealousy, seeking solace in alcohol.²⁴⁰ During the birth of her second child, after the death of Scarlett’s first child in a horseback riding accident²⁴¹ and subsequent miscarriage during an intense fight with Butler,²⁴² a dying Melanie begs Scarlett to take care of Ashley.²⁴³ Seeing the grief-stricken Ashley after Melanie’s death, Scarlett realizes that he only ever loved Melanie.²⁴⁴ She finally renounces her love for Ashley, professes her love for Butler who famously proclaims “[m]y dear, I don’t give a damn!” before leaving Scarlett.²⁴⁵ The still impetuous Scarlett vows to get Butler back, tomorrow when she can stand it, and restore Tara to its former glory.²⁴⁶ *Gone with the Wind*, on the other hand, seemed to never lose its glory. The book has sold 30 million copies since it was published in 1936 and the film version placed #6 on the American Film Institute’s 2007 100 Years...100 Movies,²⁴⁷ from #4 on the 1998 version of the list.²⁴⁸

²³⁵ Mitchell and Conroy, *Gone with the Wind*, 165.

²³⁶ Ibid, 139.

²³⁷ Ibid. 493, 549.

²³⁸ Ibid, 778, 827.

²³⁹ Mitchell and Conroy, *Gone with the Wind*, 270.

²⁴⁰ Ibid, 831, 848.

²⁴¹ Ibid, 917 .

²⁴² Ibid, 891.

²⁴³ Ibid, 934-935.

²⁴⁴ Ibid, 937-941.

²⁴⁵ Ibid, 945, 957.

²⁴⁶ Ibid, 959.

²⁴⁷ “AFI’S 100 Years...100 Movies - 10th Anniversary Edition,” June 20, 2007, <http://www.afi.com/100years/movies10.aspx>.

²⁴⁸ “AFI’s 100 Years...100 Movies,” *AFI.com*, June 1998, <http://www.afi.com/100Years/movies.aspx>.

The Wind Done Gone picks up one month after the end of *Gone with the Wind*, after R. leaves Tara to be with Cynara and Other “[runs] home to [Cynara’s] mother.”²⁴⁹ Cynara narrates the story. Her very existence is a commentary on *Gone with the Wind*: not only does it affirm the sexuality and subjectivity of Mammy but it recognizes the existence of interracial relations between slaves and their owners. Mammy’s affair with Planter is not simply one of power or convenience, but one that unfolds “in pleasure.”²⁵⁰ The relationship was a consensual one and Mammy, whose real name is Pallas, “gave him what he wanted in his bed...gave it so good, he never complained.”²⁵¹ The Mammy that was Planter’s lover was a slight, 100 pound woman with a sexual appetite—she became the figure portrayed in *Gone with the Wind* only after the rejection of Other.²⁵² Cynara herself is haunted by the preferential treatment Other’s whiteness earns her from Mammy. Before being sold to another owner and physically separated from Mammy at the age of thirteen, Cynara observes that “[Mammy] never called me soft or to her softness. She called me to do things, usually for Other, who she called Lamb.”²⁵³ Cynara’s resentment comes to a head when a dying Mammy asks her to go home. She observes, “Mammy is dying surrounded by homefolks. I got no feet to take me there. Mammy is dying and I don’t want to go home. No more than she ever wanted to see me under this fine roof.”²⁵⁴ Through Cynara, the complex social relations around slavery and the invisibility of blackness, which are omitted from Mitchell’s *Gone with the Wind*, come into focus. A number of startling pieces of information, at least for readers accustomed to the story told by Scarlett, come to light through Cynara’s tale. First, Cynara reveals her long love affair with Rhett Butler, or R., which includes

²⁴⁹ Randall, *The Wind Done Gone*, 20.

²⁵⁰ Ibid, 48.

²⁵¹ Ibid, 61.

²⁵² Ibid, 101.

²⁵³ Ibid, 5.

²⁵⁴ Ibid, 9.

the birth and death of their child, Precious, and a short-lived marriage.²⁵⁵ In contrast to the selfish and cold Other, Cynara is a giving and loving partner, which R. rewards by teaching her to write. While contemplating giving R. a gift, Cynara writes “[h]e’s used to buying women and ladies...I’m going to give him some of his own back. I like to give R. things. I like to give him what he’s used to paying for.”²⁵⁶ Unlike Scarlett, who is bound by customs of courtship and sexuality and unhindered by her own self-sabotage, Cynara is unrestricted in their passionate liaisons.²⁵⁷ She and R. kiss and embrace, make plans, and exchange gifts.²⁵⁸ For Cynara, she is the reason that R. will not return to Tara and his life with the needy Other.²⁵⁹

Cynara also reveals that the genteel O’Hara herself is part black, due to her great, great grandmother’s Haitian heritage.²⁶⁰ In this sense, *The Wind Done Gone* confronts fears of blackness by revealing invisible black heritages and embracing blackness as an embedded part of whiteness in America. This turn replaces the fear and fantasy of interracial love with the confirmation of both characters’ blackness. Perhaps most startling and upsetting to the Mitchell estate, half way through the novel, a smallpox-infected Other dies after a drunken fall down a staircase, in stark contrast to her open-ended future in Mitchell’s book and the film adaption of *Gone with the Wind*.²⁶¹ The tone of *The Wind Done Gone* is doubtlessly startling for many as well: dark and sexualized, sometimes uncomfortably so, it lacks the nostalgic reverence of the work it references. Ultimately, Cynara does not end up like other “tragic mulattas,” whose

²⁵⁵ Ibid, 78, 91.

²⁵⁶ Ibid, 12.

²⁵⁷ Ibid, 13.

²⁵⁸ Ibid, 29-30.

²⁵⁹ Ibid, 17, 167.

²⁶⁰ Ibid, 122-124.

²⁶¹ Ibid, 96.

mixed-race dooms them to a life of misfortune and despair.²⁶² Other is the one who meets a tragic end while Cynara comes to terms with her own life and past. She is eventually freed from her mother's neglect when Mammy dies, two hours before Cynara's arrival at Tara, and she performs the ritual of preparing her mother for burial.²⁶³ Despite Other's entrance into the room in which Mammy is laid out, Cynara stands her ground, almost taunting her sister with the statements "[m]y mother and I want to be alone...Captain R. sends his condolences, sho do."²⁶⁴ Cynara also leaves her marriage with R. to marry a charming African American congressman with whom she has a child and settles into a life of relative privilege.²⁶⁵ In *The Wind Done Gone*, Cynara is the heroine. Unlike Other, she overcomes obstacles—slavery, an inattentive Mammy who is more interested in her affair and a self-centered half-sister—to find happiness.

Copyright's racial exclusions

Houghton Mifflin did not seek the approval of Mitchell's estate, specifically the Mitchell Trusts which authorize derivatives of the tale of the Reconstruction South, before agreeing to publish *The Wind Done Gone*. Indeed, the Mitchell Trusts not only authorize derivatives, they determine O'Hara's fate, refusing to authorize writings which represent characters as multiracial or homosexual or dying.²⁶⁶ After all, Scarlett's very world is the valuable property and any perceived insult or injury to her would, by the Mitchell Trusts' logic, diminish her desirability in the marketplace. Independent of the racist and heterosexist logic of the Mitchell Trusts' policies as to derivative works, granting authors the right to closely police their characters begs important

²⁶² Ralina L. Joseph, *Transcending Blackness: From the New Millennium Mulatta to the Exceptional Multiracial* (Durham, NC: Duke University Press, 2013), 40.

²⁶³ Ibid, 42-43.

²⁶⁴ Ibid, 38-41.

²⁶⁵ Ibid, 205.

²⁶⁶ *Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001), 1282; Paul K. Saint-Amour, *The Copyrights: Intellectual Property and the Literary Imagination* (Ithaca, N.Y: Cornell University Press, 2003), 210.

questions about the nature of copyright law. As Paul Saint-Amour points out, the purpose of granting copyrights to estates is to continue to commemorate the author. However, “[w]hen such estates are in the position to authorize lucrative derivative works, their commemorative function is complicated by a policing function with high financial stakes...the purity of the cultural legacy, the financial health of the estate, and the surveillance of the intellectual property become mutually reinforcing.”²⁶⁷ The feedback loop that Saint-Amour identifies has particularly troublesome results when the underlying work is one that promulgates problematic representations of race, gender, class, and so on. The financial motive to enforce discriminatory mythologies becomes a barrier to equality and a mechanism for maintaining the power of whiteness. Indeed, absent intellectual property protection, *Gone with the Wind*’s occupation of histories of the South would be considerably less overwhelming and the American cultural landscape considerably more accepting of histories written by marginalized subjects.

The Mitchell Trusts predictably sued Houghton Mifflin, alleging copyright and trademark infringement, as well as unfair trade practices, and describing Randall’s book as “blatant and wholesale theft”²⁶⁸ in their summons and complaint. Given the manner in which those terms are construed in public culture, the references to “theft” and “copying” are anything but race-neutral—instead, they are consistently racially inflected, drawing upon Enlightenment notions of creativity and inventive genius. Holding Randall to a standard of creativity that privileges novelty over repetition, they decry her work as uncreative. Moreover, Jarrett suggests a secondary link between race and copyright infringement in this case, arguing that the Mitchell Trusts’ decision to sue Houghton Mifflin was as much about “the literary contamination of Scarlett’s racial genealogy” and “white supremacist ideology” as it was about the mere writing of

²⁶⁷ Saint-Amour, *The Copyrights*, 211.

²⁶⁸ Complaint at 2, *Suntrust Bank v. Houghton Mifflin*, 136 F. Supp. 2d 1357 (N. D. Ga.).

a profitable story involving Mitchell's characters.²⁶⁹ The concurrence to the Eleventh Circuit's opinion seems to share Jarrett's suspicions, stating that the Mitchell Trusts may not invoke copyright to preserve *Gone with the Wind*'s reputation or "protect the story from 'taint.'"²⁷⁰ The Mitchell Trusts requested an extreme remedy, an injunction preventing the publication of the book, in response to the alleged copyright infringement. The federal district court in Georgia granted the desired injunction, which prevented the publication of *The Wind Done Gone* until the Eleventh Circuit vacated the order.²⁷¹ Ultimately, however, the Eleventh Circuit only preliminarily ruled on the merits of the case and Randall and Houghton Mifflin opted to settle for an undisclosed amount of money, which was subsequently donated to Morehouse College, and presumably also add the statement on the cover of *The Wind Done Gone* that it is an "unauthorized parody."²⁷² Even though the Eleventh Circuit never definitively ruled on the merits of the case, only the appropriateness of injunctive relief, it nonetheless offered its opinion on the legitimacy of Randall's parody as a legal means of rewriting *Gone with the Wind*.

Central to my reading of *The Wind Done Gone* and *Suntrust* as rhetorical disidentification is the concept of parody. "[P]arody," Henry Louis Gates, Jr. writes in his Declaration in *Suntrust*, "is at the heart of African American expression, because it is a creative mechanism for the exercise of political speech, sentiment, and commentary on the part of people who feel themselves oppressed or maligned and wish to protest that condition of oppression or misrepresentation."²⁷³ Integral to parody's importance in African American expression is the

²⁶⁹ Jarrett, *Representing the Race*, 129.

²⁷⁰ *Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001) (Marcus, J., concurring), 1280.

²⁷¹ Ibid.

²⁷² Arguably the identification of the work as an unauthorized parody actually rendered it *more* marketable, especially given its somewhat scandalous subject matter.

²⁷³ Declaration of Henry Louis Gates, Jr. (2001), 1.

story of the trickster. In *The Signifying Monkey*, Gates traces the rich history of Esu Elegbara, the Yoruban signifying monkey that mediates between humans and gods, identifying a recurrent trope of signifyin(g) throughout African cultures and African American literature. The rhetorical and performative manifestations of the figure's prank-playing—including satire, parody, irony, ambiguity, and magic, form the backbone of the preservation of African American identity in the United States as well as a means of resisting dominant culture.²⁷⁴ Appropriative practices such as parody serve to decolonize white linguistic and representational structures, opening space for the use of trickery, lying, and indirect discourse as tools of persuasion and contestation in the face of oppressive conditions.²⁷⁵ Thus, the practice of parody is important not only as a recurrent theme in African American literature—it also operates as a means of preserving fragmented and transplanted African culture in the New World after the rise of slavery.²⁷⁶ Read in this cultural context, parody becomes a means of deconstructing dominant discourses. Speaking in the context of the rhetorical tradition, Hariman notes the parody's counterhegemonic power. Parody is important for the maintenance of democratic culture, traced through the Greeks. This deconstruction of dominant culture through parodic rewriting occurs through the process of juxtaposition: “[w]hen language is placed beside itself, limits are exposed. What had seemed to be serious is in fact foolish, and likewise the powerful is shown to be vulnerable, the unchangeable contingent, the enchanting dangerous.”²⁷⁷

In the context of copyright law, the lineages of parody as African American and Western cultural practice collide. While copyright law protects parody as a means of producing original

²⁷⁴ Gates, *The Signifying Monkey: A Theory of African-American Literary Criticism*, 5-6.

²⁷⁵ Ibid, 47-48.

²⁷⁶ Ibid, 4.

²⁷⁷ Robert Hariman, “Political Parody and Public Culture,” *Quarterly Journal of Speech* 94, no. 3 (2008): 251-253.

and non-infringing creative works, it is also works to “secure the logic of the European art/culture system”²⁷⁸ through strict regulation of parody. Though Hariman is correct that parody diversifies the public domain, it does so within a particular historical context that, as he shows, is derived through liberal democratic practice. In contemporary copyright contexts, parodies have been found to be fair use because they are “transformative” in character when considered under the first factor of copyright law’s four-part fair use test.²⁷⁹ In the seminal case of *Campbell v. Acuff Rose Music*, the Supreme Court explained that “[f]or the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on the author’s works.”²⁸⁰ As Greene notes, however, copyright law has been constructed to actively exclude African American practices of signifyin(g), creating structural barriers to the recognition of culturally specific forms of creativity, particularly with respect to musical and literary works.²⁸¹ Not only has the definition of creativity as an act of individual genius historically been a barrier to the protection of African American works under copyright, as in the context of jazz, but so too is the understanding of the author as an individual who produces something new.²⁸² Creativity, for the purposes of copyright law, is traditionally understood to exclude precisely the types of signifyin(g) that Gates identifies.

The structural workings of copyright law give rise to another exclusionary process. Creative works which are granted copyrights operate as rhetorical and cultural texts for the interpellation of subjects. Just as trademarks mark the boundaries of nation by circulating

²⁷⁸ Coombe, *The Cultural Life of Intellectual Properties*, 219.

²⁷⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 569 (U. S. 1994).

²⁸⁰ Ibid, 580.

²⁸¹ Greene, “Intellectual Property at the Intersection of Race and Gender.”

²⁸² Ibid.

particular representations, so too do copyrighted works. Books, art, films, and music define the boundaries of acceptability within the nation. Examples such as the banning of *The Adventures of Huckleberry Finn* to censorship controversies over Robert Mapplethorpe's work demonstrate that creative works play a central role in the construction and maintenance of national and regional identity and respectability in the US. *Gone with the Wind* certainly proves this argument. The fiercely defended tale of the South operates to create stereotypes, national and regional identities, and ultimately a very particular version of historical memory of the South. Indeed, these are common functions of literary and artistic works, to identify and bound identities within larger public spaces. However, structurally speaking, copyright privileges some representations over others through its structural exclusions, often favoring dominant groups in the production, dissemination, and ultimately the enforcement of copyrights. As Michael Kreyling argues, "[p]rivatized memory, like privatized property, can produce redoubts where the construction of history by social memory, bypassing the check-and-balance system of fantasy and 'proof,' supplies only one master narrative. To disentangle, if only partially, historical myth and historical reality is the work of postmodern parody."²⁸³ Through the process of protecting a copyrighted work, often through extralegal bullying that arguably goes beyond the scope of the rights afforded in the Copyright Act itself, particular memories are foregrounded at the expense of others, with others often being marginalized subjects. By playing with representation within the structures of copyright law through parody, *The Wind Done Gone* draws attention to the singularities, omissions, and erasures in *Gone with the Wind*, creating parallel stories and discourses. Many of these center on stereotypes—Mammy turns from an uneducated and unfeeling dispensary of wisdom to a sexual being who neglects her black child in favor of a her

²⁸³ Michael Kreyling, *The South That Wasn't There: Postsouthern Memory and History*, Southern Literary Studies (Baton Rouge: Louisiana State University Press, 2010), 160.

white one, only to be shunned by her favored child. Unlike Other who pathetically chases R. and dies from her own lack of control, Cynara walks away from the man, finding love with the Congressman, her dignity intact and the curse of the tragic mulatta broken.

***The Wind Done Gone* as parodic rhetorical disidentification**

In this framework, the creation of Randall's book is an act of rhetorical disidentification with the very boundaries of the law, a confrontation of African American cultural understandings of the creative with Western ones. *Suntrust* "led to a canonical redefinition of political parody...and a general understanding of how laws uphold political rights."²⁸⁴ By affirming the possibility that an African American author could produce an original parody and that there could be multiple cultural interpretations of the term, the Eleventh Circuit's opinion began the process of acknowledging the multiplicity of cultural definitions of the parodic even within the legal regime. Indeed, even though the Eleventh Circuit was only reviewing the reasonableness of the injunction that the federal district court had issued and offering a preliminary judgment as to whether Randall's book constituted fair use of *Gone with the Wind*, its 61 page opinion is arguably unnecessarily detailed and extensive, and very publicly acknowledges the cultural and political stakes of the case.²⁸⁵ Winding through a very detailed discussion of the purposes of copyright law and the four factors of fair use in the context of the case, the Eleventh Circuit finds that *The Wind Done Gone* is a humorous work of parody which transforms the original text in a manner that suggests comment and criticism, not copyright infringement. The opinion concludes, commenting on the federal district court's overexpansive understanding of copyright

²⁸⁴ Jarrett, *Representing the Race*, 130.

²⁸⁵ Injunctive relief is granted when the plaintiff, here the Mitchell Trusts, can show a substantial likelihood of success on the merits of the case. Here, the Eleventh Circuit reviewed the lower court's decision that the Mitchell Trusts were likely to succeed in their claim of copyright infringement, meaning that Randall did not engage in fair use but rather unjustifiably created a derivative work without permission from its owner.

protection, that “the issuance of the injunction was at odds with the shared principles of the First Amendment and copyright law, acting as a prior restraint on speech because the public had not had access to Randall’s ideas or viewpoint in the form of expression that she chose.”²⁸⁶

Suntrust is a rhetorical and performative negotiation of copyright law’s tendency to “monitor, enforce, or reject the political meaning of racial representation through its authority over the range and meaning of derivatives.”²⁸⁷ It also diversifies public discourses because “it counters idealization, mythic enchantment, and other forms of hegemony.”²⁸⁸ The power of the parody is magnified in the context of the public trial. Because public trials are a “genre of public discourse”²⁸⁹ which serves an important interpellative function, they define the contours of the body politic and the identities of those residing within the nation. Hariman writes:

As the trials offer a “performance” of the laws, they enact social knowledge in several senses: The trial is a recognizable social practice; it is constituted by social agreements, including the agreement to recognize voices other than one’s own; and it presents and authorizes particular beliefs. Furthermore, the popular trial fulfills an additional public function because it provides the social practice most suited formally to comparing competing discourses.²⁹⁰

In this instance, the negotiation that occurs is over who has the authority and ability to speak about memories of the American South, within the constraints imposed by copyright law.

Suntrust creates the opportunity for African American authors and scholars to engage in both rhetorical and performative disidentification with copyright law’s understandings of parody and, indeed, the Eleventh Circuit ultimately affirms the legality of that disidentification, creating a new, mutable, culturally cognizant definition of parody. “Thematically,” the majority opinion writes, “the new work provides a different viewpoint of the antebellum world...the story is

²⁸⁶ *Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001), 1277.

²⁸⁷ Jarrett, *Representing the Race*, 131.

²⁸⁸ *Ibid.*, 253.

²⁸⁹ Hariman, “Introduction,” 12.

²⁹⁰ *Ibid.*, 12.

transformed into a very different tale.”²⁹¹ Through the process of creating a novel which contests *Gone with the Wind*’s memory of the American South, the public scrutiny of that book under copyright’s existing rules of parody, and the ultimate rejection of Mitchell’s version of Scarlett’s tale as the only legitimate one, Randall and *Suntrust* craft a position for African American subjectivities, both in terms of the legality of parody and *Gone with the Wind* as a paradigmatic representation of the American South, within the confines of intellectual property law. In doing so, they implicitly critique copyright law’s long history of relying on modern Western understandings of creation and authorship, allowing the possibility for new legal interpretations and confronting copyright law’s tendency to allow the overexpansive enforcement of property rights. All of this is done in the setting of the public trial, a space which has traditionally been a locus of the oppression of marginalized subjects. The affirmation of *The Wind Done Gone*’s rhetorical and performative disidentification with parody, then, acknowledges the position of African Americans as authors and subjects, reconstituting the identity of the American public.

The performance of the laws in *Suntrust* implicates the very historical memory of race in the American South as well as the understanding of those who contest dominant representations. Before turning to the Eleventh Circuit’s opinion, it is helpful to consider the arguments of the Mitchell Trust in seeking injunctive relief and the decision of the federal district court in granting it, particularly insofar as race is concerned. The Summons and Complaint submitted in *Suntrust* alleges before its claims that “consumers will be confused into thinking that the Mitchell Trusts have sponsored or endorsed this unauthorized sequel.”²⁹² Not only is this language more typical of trademark law’s likelihood of confusion test than copyright’s fair use analysis but it becomes

²⁹¹ *Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001), 1270 (quoting *Suntrust Bank v. Houghton Mifflin*, 136 F. Supp. 2d 1357, 1367).

²⁹² “Summons and Complaint,” 3.

central to the Mitchell Trusts' thesis in the Summons and Complaint: allowing Randall to publish her book will tarnish Scarlett's lineage and reputation. The Mitchell Trusts claim, as they must in a copyright action, that Randall has copied substantial parts of *Gone with the Wind*, from its title to its core characters.²⁹³ In the second claim of the Complaint and Summons, which alleges trademark infringement, the Mitchell Trusts maintain that publishing *The Wind Done Gone* will cause them "immediate and irreparable damage to their business reputation and goodwill,"²⁹⁴ in essence undermining Scarlett's world of white privilege.

While these phrases might ordinarily be read as simple assertions of copyright and trademark, they take on a new meaning when read along with the federal district court opinion which ultimately concludes that the right to decide what happens after *Gone with the Wind* "legally belongs to Ms. Mitchell's heirs, not Ms. Randall."²⁹⁵ In finding *The Wind Done Gone* to be "substantially similar" to *Gone with the Wind*, and thus infringing, the federal district court refused the defendant's claim to represent in Cynara "the archetypal other person which is, in much conventional literature, the minority race."²⁹⁶ The rejection of the defendant's argument is not a race neutral one. Instead, seemingly concerned about the political implications of Randall's novel, it categorically denies the right of authors to create characters which contest dominant power structures if they are too similar to existing characters. The federal district court then turns to the issue of fair use, which operates as a defense against a finding of copyright infringement. The fair use test includes four factors, provided for in statute: (1) the purpose and character of the use of the copyrighted work, (2) the nature of the copyrighted work, (3) the amount and substantiality of the use of the copyrighted work, and (4) the effects on the value for

²⁹³ Ibid, 10.

²⁹⁴ Ibid, 16.

²⁹⁵ *Suntrust Bank v. Houghton Mifflin*, 136 F. Supp. 2d 1357 (N. D. Ga.), 1384.

²⁹⁶ Ibid, 1368.

the market of the copyrighted work.²⁹⁷ As to the first factor, for the federal district court, *The Wind Done Gone* is only a partially transformative parody because it draws too explicitly on *Gone with the Wind*'s characters and goes too far in commenting on race. Taking the stance, in contradiction to the Supreme Court's holding in *Campbell* that a parody must comment on the author's works at least in part, that Randall's desire to "comment upon the treatment of black Americans in the South" is simply too broad to constitute a completely transformative parody is a political maneuver which maintains the racial policing function of the legal system. The federal district court continues, "[p]arody has its place in copyright law, but the extent of the use of the copyrighted work and the purpose of the author's prose may limit the parodical effect and nullify the fair use defense."²⁹⁸ Read in conjunction with the admonishment to avoid commenting too broadly on Southern racism, the federal district court significantly limits the critical value of parody.²⁹⁹ The federal district court then goes on to address the remaining factors of the fair use test, finding that *The Wind Done Gone* has an explicitly economic purpose, *Gone with the Wind* is a highly protectable fictional work, *The Wind Done Gone* simply uses too much of the copyrighted work, and *The Wind Done Gone* will significantly hurt the market for *Gone with the Wind*.³⁰⁰ As a result, the opinion concludes that Randall did not create a non-infringing parody and largely closes the door on counterhegemonic works that either too specifically or too broadly comment on canonical and iconic literary texts through their overuse of the copyrighted work or their desire to speak broadly about general social and political climates.

The Eleventh Circuit reversed the federal district court's opinion, citing early on in its opinion the need to preserve the Statute of Anne's original purpose to "encourage creativity and

²⁹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 569 (U. S. 1994).

²⁹⁸ *Suntrust Bank v. Houghton Mifflin*, 136 F. Supp. 2d 1357 (N. D. Ga.), 1378.

²⁹⁹ *Ibid*, 1377.

³⁰⁰ *Ibid*, 1378-1381.

ensure that the public would have free access to information by putting an end to ‘the continued use of copyright as a device of censorship.’”³⁰¹ The Eleventh Circuit in this statement begins to reconcile the opposing histories of parody in the liberal democratic tradition, African American cultural practice, and intellectual property law. The Statute of Anne, instead of functioning as a gatekeeping device that privileges Enlightenment visions of creation, becomes a tool to politicize copyright law and allow space to criticize intellectual property’s racially exclusionary tendencies. The Eleventh Circuit then goes on to address the relationship between copyright protection and the public domain, stressing that authors are granted only a limited monopoly in order to encourage them to produce creative works.³⁰² After that monopoly expires, copyrighted works fall into the public domain, for access by the general public. While *Gone with the Wind* is still under copyright, the Eleventh Circuit makes clear the principle behind its ultimate decision: “copyright does not immunize a work from comment and criticism” that is protected by the First Amendment.³⁰³ While the Eleventh Circuit agrees with the federal district courts finding of substantial similarity between *Gone with the Wind* and *The Wind Done Gone* in characters and plot, it disagrees on the existence of fair use. Central to this conclusion is the finding that *The Wind Done Gone* is “highly transformative.”³⁰⁴ Recognizing the political nature of *The Wind Done Gone* the Eleventh Circuit explicitly responds to the federal district court, holding that:

Randall’s literary goal is to explode the romantic, idealized portrait of the antebellum South during and after the Civil War. In the world of *Gone with the Wind*, the white characters comprise a noble aristocracy whose idyllic existence is upset only by the intrusion of Yankee soldiers, and, eventually, by the liberation of black slaves...Mitchell describes how blacks and whites were purportedly better off in the days of slavery.³⁰⁵

³⁰¹ *Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001), 1260.

³⁰² *Ibid*, 1261-1262.

³⁰³ *Ibid*, 1265.

³⁰⁴ *Ibid*, 1269.

³⁰⁵ *Ibid*, 1270.

Ultimately, *The Wind Done Gone*'s transformativeness, which weighed heavily in favor of fair use,³⁰⁶ is a direct result of Randall's reinvention of *Gone with the Wind*'s characters, plot, and treatment of blackness. In Randall's novel, "nearly every black character is given some redeeming quality that their *Gone with the Wind* analogues lacked."³⁰⁷

Understood within the larger context of copyright law's tendency to exclude racial Others and reinforce white privilege, the Eleventh Circuit's opinion is an embrace of counterhegemonic practices and, indeed, even a rewriting of copyright law to account for narratives of racial inequality. The opinion explicitly confronts *Gone with the Wind*'s racial agenda, making spaces for the recognition of new narratives of the American South and the politicization of copyright law. The Eleventh Circuit thus explicitly and implicitly endorses parody as an anti-racist device, a tool of transforming both the stories which inform our everyday racial common sense but also of critiquing the structural inequality that results from copyright law's links to Enlightenment thought. Given the intimate relationship between the Statute of Anne and contemporary American copyright law, the recognition that the latter actually justifies a ruling in favor of Randall is a potent one. In many ways, the Eleventh Circuit also undoes the normalization of racial privilege that occurs in the federal district court's opinion, using the structures of the law against itself. Making visible the racialized implications of the federal district court's opinion through the acknowledgement of *Gone with the Wind*'s power in structuring American social relations is an important first step in recognizing and ultimately reconfiguring copyright law's narrow and overly Western approach to knowledge production.

³⁰⁶ With respect to the remaining factors, the Eleventh Circuit holds that *Gone with the Wind*, as a literary work, deserves a high degree of protection, the degree to which Randall drew upon *Gone with the Wind* was not excessive, and does not affect the market for other *Gone with the Wind* derivative works. Ibid, 1271-1276.

³⁰⁷ Ibid, 1271.

Both *The Wind Done Gone* and *Suntrust* advance the goal of recognizing histories that are rendered invisible by dominant culture. They do so both through an independent process of rhetorical and performative disidentification with the tale told in *Gone with the Wind*. As Hariman's discussion of the parodic as counterhegemonic suggests, parody, by its very nature, is an act of rhetorical and performative disidentification. Through the creation and enactment of a new narrative of the American South and black domestic servitude, here the writing and defense of *The Wind Done Gone*, parody becomes a vehicle for creating new identities and placing them into conversation with existing understandings of historical memory. As Gates points out, "[p]arody does not exist without an extensive evocation of the original."³⁰⁸ As such, it is a dialogic practice, one which forcibly puts existing cultural objects into conversation with new ones. Similar to the examples of drag and camp Muñoz identifies, parody operates by recreating an original in a manner that is neither faithful nor completely dismissive. In the context of *The Wind Done Gone*, this manifests in the rewriting of *Gone with the Wind* from the vantage point of a completely different character, Cynara, who, according to the Eleventh Circuit, "acts as the voice of Randall's inversion of *Gone with the Wind*,"³⁰⁹ speaking vernacularly in diary form instead of in the flourished prose of the original that Randall parodies. Just as drag and camp involve the creation of new characters through which social norms and categorical boundaries are renegotiated, Randall and *Suntrust* engage in rhetorical and performative disidentification through which historical norms, cultural stereotypes, and legal boundaries take on new dimensions and depth. Specifically, *The Wind Done Gone* and *Suntrust* make visible slave histories in the South, identify new forms of creativity thus contesting the identification of racial Other as infringer and the renegotiation understandings of parody.

³⁰⁸ Declaration of Henry Louis Gates, Jr. (2001), 2.

³⁰⁹ *Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001), 1270.

Inventing the black author

Agency is, among other things, “‘invented’ by authors who are points of articulation” and “emerges in artistry or craft.”³¹⁰ Invention here implicates both rhetorical theory and intellectual property law: authors create the contexts which permit them to be heard and inject their own vantage points into copyright law. In a recent piece about Nuyorican culture, Darrel Enck-Wanzer points to a variety of physical manipulations of the landscape that assert agency in this way, finding voice within New York’s urban spaces. Randall’s book serves a similar purpose in the exercise of agency, identifying her as a “point of articulation” in discussions of the intersections of African American culture and intellectual property rights and functioning as a physical manifestation of her own “artistry or craft.” Relative to the first part of this claim, Randall’s retelling of the tale of the American South from Cynara’s point of view affirms the creative potential of the black female author while simultaneously opening space for the radical revision of understandings of Southern history. With respect to the second part of this claim, she invents possibilities for new constitutions of the African American writer, specifically the parodist, as creator instead of mere imitator. Nathan Stormer explains that “a point of articulation (or connection) defines parameters for enactment.”³¹¹ By virtue of writing a new history of the American South and retelling *Gone with the Wind*, Randall becomes a new “point of articulation,” producing possibilities for the exercise of agency by other marginalized groups and “creating new possibilities through mutual interaction of elements where none existed before, augmenting by factors rather than by linear accretion, or diminishing possibilities in ways

³¹⁰ Darrel Enck-Wanzer, “Tactics of Puerto Rican Cultural Production in East Harlem: Casitas, Gardens, Flags, Murals and Rhetorical Agency,” *Communication Theory* 21 (2011): 345.

³¹¹ Nathan Stormer, “Articulation: a Working Paper on Rhetoric and Taxis,” *Quarterly Journal of Speech* 90, no. 3 (August 2004): 264.

that defy rudimentary calculation.”³¹² In *Suntrust*, she and other African American authors and scholars enact their visions of parody and Southern history, publicly questioning the legal and political framework which does not allow the parodying of *Gone with the Wind*.

Cynara tells a story that invokes the experiences of many slaves and domestic servants in the American South. The daughter of a plantation-owner and a slave, she is anything but a historical anomaly. Her feelings of jealousy for Other and her sexual relationship with the sometimes cold and sometimes passionate R. also realistically speak to the era. While Cynara’s ultimate marriage to a congressman, a reference to Austin Stoneman’s mixed-race mistress, Lydia Brown, in *Birth of a Nation*, may not have been likely for the average freed slave, the vantage point from which she speaks offers a historically significant perspective that *Gone with the Wind* does not. Moreover, in Randall’s retelling, not even O’Hara’s life is sacrosanct; any and all parts of *Gone with the Wind* are subject to revision. Toni Morrison’s Declaration in support of *The Wind Done Gone* contextualizes Randall’s contribution, explaining “[t]he real point of the request to enjoin, the question that seems to me to underlie the debate is ‘Who controls how history is imagined?’ ‘Who gets to say what slavery was like for the slaves?’ The implication of the claims suggests a kind of ‘ownership’ of its slaves unto all future generations and keeps in place the racial structures *Gone with the Wind* describes, depends upon, and about which a war was fought.”³¹³ As Morrison suggests, Randall’s work creates a space within the public domain for African American agents and histories, narrowing an intellectual property right which has historically been used to exclude marginalized groups from speaking in public culture. Moreover, it does so by acting within the framework of plantation life set up by Mitchell and the understanding of parody advanced by copyright law.

³¹² Ibid.

³¹³ Declaration of Toni Morrison (2001), 2.

In his affidavit submitted to trial, Gates outlines the figure of creative author in opposition to the idea-stealing thief. He, in describing parody as a “creative mechanism” at “the heart of African American expression,” recasts the meaning of creativity, a term that is consistently mediated through white, Western ideologies of creation, as discussed in the first chapter of this project, and redefines the “outright theft” through copying outlined in the Mitchell Trusts’ summons and complaint.³¹⁴ Gates’ discussion of parody is rooted in African American history and culture—parodic imitation is not simply theft or copying but rather a radical statement against racist society. In a context in which outright rejection of white ideology was not permitted, parody “which imitates another work and in doing so comments on that work, usually in order to ridicule it or suggest its limitations” was a particularly original and inventive practice.³¹⁵ Morrison states in her Declaration in *Suntrust* that “[t]his process of being stimulated by one narrative into a writer’s own literary invention and creativity is virtually the history of literature.”³¹⁶ In explaining that the *Gone with the Wind* is the product of Mitchell’s “creative urges and abilities” and not labeled as a mere copy or derivative of “‘lavender-and-lace-moonlight-on-the-magnolias people’ of earlier novels,” Morrison implicitly critiques modern Western definitions of the creator.³¹⁷ She, in effect, argues that African Americans should be subject to the same standards of creation as their white counterparts and that all works are, though to greater or lesser degrees, derivative. Working within the confines of copyright law, she reconstitutes social norms through her rhetorical and performative resistance to the ownership of memory. Morrison explains that Randall, like Mitchell, should be able to write her impressions of the South “without securing permission or approval from the men, women, or

³¹⁴ Declaration of Henry Louis Gates, Jr. (2001).

³¹⁵ Ibid.

³¹⁶ Declaration of Toni Morrison (2001), 1.

³¹⁷ Ibid.

African Americans who might read her work.”³¹⁸ Morrison’s proclamation that permission is not required from “men, women, or African Americans” points to the inequalities within copyright law and the tendency for white men and white women to have privileged voices within that system. Morrison points to very real power differentials in the intellectual property regime revolving around the consistency of the definition of creativity and the identity of the arbiters of that definition. Through her critique, Morrison implicitly problematizes the notion of the infringer as racial Other, arguing for an equal playing field for all authors.

The words of Gates and Morrison assert the creativity and agency of African American authors while both affirming and redefining the meaning of parody as is has been enforced and performed within copyright law. They construct a vision of the African American author that is radically at odds with the one typically conjured in discourses surrounding intellectual properties—their image is of an individual who has both the voice and intelligence to use parody resistively, simultaneously operating within and confronting systems of power. It is this reconstitutive dimension of their rhetorical and performative acts that operates to assert agency and delink the infringer from racial difference, an act that the Eleventh Circuit ultimately performs through its linking of the Statute of Anne with racial critique of *Gone with the Wind*. Moreover, the concurrence to the Eleventh Circuit’s majority opinion embraces Gates’ and Morrison’ rereading of the author, stating that, through the finding of fair use in *Suntrust*, “authors and publishers will be encouraged to experiment with new and different forms of storytelling, [and] copyright’s fundamental purpose, ‘[t]o promote the Progress of Science and the useful Arts,’ will have been served.”³¹⁹ Randall’s novel thus is recast as creative form of

³¹⁸ Ibid.

³¹⁹ *Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001) (Marcus, J., concurring), 1283.

expression, protectable by copyright as opposed to a mere copy or imitation and affirming the history of African American parody Gates identifies. The ultimate settlement in the case suggests that the Mitchell Trusts, even if they thought that Randall infringed *Gone with the Wind*, conceded her position as an author with more than “ideas.” Thus, while the Eleventh Circuit may not have tried the merits of the case, as an act with social significance, the settlement affirms the appellate court’s opinion and Randall’s identity as a creator and her parody as a legitimate expression of African American writing practice within the context of copyright law, a legal regime all too frequently constructed on Western ideologies.

Archiving the loss of racial innocence

Randall’s book, as well as *Suntrust*, leave behind material remnants of their assertions of agency and renegotiations of copyright’s boundaries. These material remnants are significant not just because they are reminders of the struggle over the reconstitution of nation and identity that took place in *Suntrust* but more significantly as an archival record, available for examination and study as well as creation and recreation of American memories and myths of the South. Biesecker suggests the need to “write a different kind of rhetorical history,” one which understands how archival materials are revered and fetishized to the exclusion of understanding of how social practice construes them.³²⁰ Morris maintains that it is important to consider the contents of the archive, specifically its silences with respect to marginalized groups. Though he focuses on the need to find queerness within rhetorical archives, I am concerned here with other forms of alterity, specifically related to racial and cultural histories. The controversy surrounding *The Wind Done Gone* is helpful in illuminating the methods through which scholars can problematize the archive, particular in terms of considering how materials take on

³²⁰ Biesecker, “Of Historicity, Rhetoric,” 125.

authoritative evidentiary status and how that status can, in turn, operate to silence others who are not written into archival materials. In cataloging a larger process of rhetorical and performative disidentification with *Gone with the Wind* and copyright law's understandings of parody, creativity, and authorship, *Suntrust* and the *Wind Done Gone*, as textual objects of study, can be read as resistive cultural objects which embrace the lack of fixity of the archive as well as the identities it produces. Read in this manner, *Gone with the Wind*, *The Wind Done Gone* and *Suntrust*, together form a body of archival texts that speak to both the critiques of Biesecker and Morris. In essence, they are material markers of the need to consider and problematize archives in a manner which does not cede to them absolute authority over the fixity of memory and instead affirm the archive as a site of potentiality and becoming, especially with respect to marginalized groups. The effects of this (de)memorialization are significant for the public domain: the space that was once colonized by white understandings of the American South becomes a multivocal area. African Americans, as political actors, become agents of their own histories, able to speak for themselves as opposed to being spoken for by dominant groups.

Gone with the Wind, as a text that represents the South functions as part of a larger archive. That is, in the American memory, the story reflects the national memory of the South, the Civil War, and the social and cultural history of individuals in that war. The magnitude of Mitchell's tale cannot be underestimated: *Gone with the Wind* tells an iconic tale, one which resonates with Americans and frames the way they understand the history of the South. Understood in this sense, *Gone with the Wind* uncritically becomes an object worthy of study, fetishized for its embodiment of the spirit of the South. While Mitchell's story is not necessarily the prototypical "archive" that Biesecker identifies, it is a powerful archival object through which memory and myth is fixed, not made fluid, as well as an often-studied piece of literature

and film. Particularly as a copyrighted work protected by a very wealthy estate, the novel has become a behemoth in its own right, capable of asserting a history that is so repeated that it has become a kind of fictional truth. *Gone with the Wind*, supported by already structurally and culturally exclusionary copyright laws, becomes a mechanism for preventing inquiry into the social constructions, nuances, and gaps of the American South. This does not mean that no one has studied alterity in the pre-Emancipation era, far from it. Nonetheless, the tendency of *Gone with the Wind* is to halt critical evaluation of histories of Southern racism, privileging instead the rights afforded to private owners, at the expense of diverse public memories.

The *Wind Done Gone*, as an object that intervenes in the memory established by *Gone with the Wind*, pushes critical self-examination, opening space for the writing of a type of rhetorical history which understands the positionalities of marginalized groups in the pre-Emancipation South. Randall's rewriting of *Gone with the Wind* brings to light new subjectivities and rewrites that past in a manner that demonstrates precisely the tendency of archival objects to close discussions about the past instead of open them. Moreover, through the public spectacle of *Suntrust*, not only are new possibilities for identities revealed but the archive itself is performatively negotiated. Contesting the "sublime appeal of the archive"³²¹ established by *Gone with the Wind*, *The Wind Done Gone* establishes an archive which simultaneously highlights the gaps in the existing record that Morris mentions but also critiques the existing archive. Randall's novel rejects "the 'beguiling fantasy of self-effacement, which seems to promise the recovery of lost time, the possibility of being reunited with the lost past, and the fulfillment of our deepest desires for wholeness and completion.'"³²² The effect of the *Wind Done Gone*'s rhetorical and performative disidentification is thus productive not only because it

³²¹ Ibid, 126.

³²² Ibid.

leads to a redefinition of copyright law's understanding of parody, taking into account the experiences of African Americans, but also because it forces a critical look at the contents and nature of archival texts and myths about the American South. Together, these two processes make evident the creativity of African Americans, marking them not as infringers, but as authors whose have an equal stake in the creation and ownership of memory. Put simply, *Gone with the Wind* does not tell a singular, correct narrative of the American South but it is one version of the story, with omissions and gaps. The story it tells is one that is a part of the public domain and cannot be privately owned, particularly in the face of archives which recognize alterity.

CHAPTER 3

Yoga Piracy and the Resistive Politics of India's Traditional Knowledge Digital Library

In 2002, in a now infamous move, Bikram Choudhury, founder of the Bikram Yoga, College of India registered his choreographed, ninety minute sequence of twenty six Hatha Yoga poses, also called *asanas*, and the Bikram Yoga Dialogue used in his hot yoga classes.³²³ While he freely admitted that the yoga poses were in the public domain, he claimed that he was “the first to select and arrange this particular sequence of *asanas* in this particular way.”³²⁴ After filing his copyright, Choudhury began zealously enforcing his claim to ownership, sending over 100 cease-and-desist letters to competing hot yoga studios.³²⁵ In 2002, Choudhury filed his first lawsuit, against Prana Yoga, a studio run by former student Kim Schreiber-Morrison, alleging eight separate actions, including claims for copyright infringement.³²⁶ The case ultimately settled and the federal district court entered a permanent injunction barring Schreiber-Morrison from teaching Bikram Yoga.³²⁷ Soon after, the Bikram Yoga website announced that “[n]o one may teach Bikram Yoga unless he/she is a certified and licensed Bikram Yoga teacher. No one may teach or certify others to become Bikram Yoga teachers other than Bikram Choudhury. No

³²³ There is some ambiguity about whether the copyright registration occurred in 2002 or 2003. While the federal court reports 2002, the Bikram Yoga website gives a date of 2003 Jacob Reinbolt, “Bikram Obtains Copyright Registration for His Asana Sequence,” *Bikram Yoga*, July 30, 2003, <http://www.bikramyoga.com/press/press19.htm>. It is also noteworthy that Choudhury had copyrighted a book about his yoga practice in 1979, entitled *Bikram's Beginning Yoga Practice*, but did not separately copyright the asana sequence and the Bikram Yoga Dialogue until 2002 (*Open Source Yoga Unity v. Choudhury*, 2005, p. 3).

³²⁴ *Open Source Yoga Unity v. Choudhury*, 2005 U.S. Dist. LEXIS 10440 1 (United States District Court for the Northern District of California 2005), *3.

³²⁵ “Face Value: The Litigious Yogi,” *The Economist*, June 17, 2004, <http://www.economist.com/node/2765973>.

³²⁶ First Amended Complaint, Choudhury v. Schreiber-Morrison (United States District Court for the Central District of California Southern Division 2002), *1.

³²⁷ In addition, the court ordered Schreiber-Morrison to pay an undisclosed amount of money in licensing fees, never again teach Bikram Yoga, and apologize to the Choudhury. Reinbolt, “Bikram Obtains Copyright Registration for His Asana Sequence.”

one may offer obvious, thinly disguised copies of Bikram Yoga and represent to the public that it is ‘their’ yoga.”³²⁸ Choudhury’s mere assertion of a copyright in an *asana* series and his subsequent attempts to enforce that property right had a significant impact on global discussions of traditional knowledge. In particular, as this chapter will examine in significant detail, a large number of Indian government officials, Indians, and Indian Americans reacted strongly to the move to claim and enforce intellectual property rights in the sacred practice, protesting Choudhury’s ownership claims. The public outcry against Choudhury unfolded in a number of forums, from Indian and American newspapers to government offices, and in a number of mediums. At the heart of their objections was the belief that yoga is knowledge that should be owned by all, not privately branded and licensed by a single individual.³²⁹

Using the term “yoga piracy”³³⁰ to describe the actions of those attempting to commodify the ancient form of knowledge, and Choudhury in particular, many Indian government officials, Indians, and Indian Americans began considering systematic ways to stop proprietary claims over their culture, history, and traditional practices. The so-called “yoga wars”³³¹ were not the impetus for seeking such systematic protection, though they created a sense of urgency about the need to prevent the private ownership of traditional knowledge and seek attribution and recognition for India’s role in the production of global knowledge. Choudhury’s copyright registration came only a handful of years after the US Patent Office’s 1997 revocation of a patent it granted for the use of turmeric powder in wound healing. After the University of Mississippi

³²⁸ Ibid.

³²⁹ Kounteya Sinha, “Yoga Piracy: India Shows Who’s the Guru,” *The Times of India*, February 22, 2009, http://articles.timesofindia.indiatimes.com/2009-02-22/india/28017121_1_patent-offices-yoga-postures-patanjali.

³³⁰ Ibid.

³³¹ Jacob Goldstein, “Yoga Wars! India Blocks Patents On Poses,” *NPR: Planet Money*, August 23, 2010, <http://www.npr.org/blogs/money/2010/08/23/129381241/india-yoga-patents-html>.

Medical Center obtained the patent in 1993, an Indian scientist, Dr. R. A. Mashelkar, objected, compiling evidence of the use of turmeric for such purposes in India for centuries. In 1996, Vandana Shiva undertook a similar fight with respect to neem oil. The US Patent Office vacated the patent for “fungicidal uses of neem oil” soon after.³³² The comprehensive solution that emerged in response to the commercialization of Indian traditional knowledge is the Traditional Knowledge Digital Library (TKDL). The TKDL, an online searchable database created and endorsed by a group of Indian government officials, catalogs information related to traditional uses of potentially patentable inventions, thus demonstrating that there exists “prior art,”³³³ or preexisting and publicly available knowledge which places the subject matter of the patent in the public domain, functionally preventing private ownership (Figure 3.1).³³⁴

The scope of the TKDL is broad. It contains information about ayurvedic and unani medicines such as turmeric and neem oil but also about yogic philosophy. Not only does the digital database claim prior cultural ownership in such traditional knowledge but it also aims to prevent those outside of India from commercializing the information contained therein. Through the act of assembling and making accessible information about India’s use of patentable traditional knowledge, an act which implicates the power to produce and organize knowledge, the nation seeks to block or cancel patents on traditional knowledge by demonstrating that the information contained in them is not new. *The Hindu* reports that of the 278 patent cases in

³³² Shayana Kadidal, “Subject-Matter Imperialism - Biodiversity, Foreign Prior Art and the Neem Patent Controversy,” *IDEA: The Journal of Law and Technology* 37, no. 2 (1997 1996): 371.

³³³ 35 U.S.C. § 102 (2012)

³³⁴ Fish argues that the TKDL also speaks to patent law’s legal requirements of nonobviousness and usefulness as well as prior art. While this may be the case in certain instances, rhetorical confrontation over the meaning of prior art is central to India’s articulation of the purpose of the TKDL in protecting traditional knowledge. Allison Fish, “The Commodification and Exchange of Knowledge in the Case of Transnational Commercial Yoga,” *International Journal of Cultural Property* 13, no. 02 (January 30, 2007), 200.

which TKDL evidence has been submitted in the EU from the creation of the digital database until January 2012, 73 of them have been canceled or withdrawn. In the US, prior art documented in the TKDL has been submitted in 93 patent cases, with 4 cancellations or withdrawals, demonstrating the TKDL's efficacy against biopiracy.³³⁵ The TKDL's website clearly draws attention to its role in preventing biopiracy by placing the term in the menu on the left hand side of its home page as well as tracing outcomes in biopiracy cases.



Figure 3.1 Screenshot of the homepage of the TKDL

³³⁵ K. P. Prabhakaran Nair, "Safeguarding India's Ancient Wisdom," *The Hindu*, December 9, 2012, <http://www.thehindu.com/opinion/open-page/safeguarding-indias-ancient-wisdom/article4179011.ece>. Notably, the cataloging of traditional knowledge is not a guarantee of success in blocking or canceling a patent—the question of the validity of the patent is judged at a national level, by the laws and practices that govern patent examiners in each country.

Similarly, by publicly identifying and individuating yoga's long history, the Indian government seeks to prevent the exploitation of centuries-old philosophies and ideas, countering the belief that yogic practice can be newly "invented" and owned as intellectual property. The Indian government proceeds under the theory that all yogic knowledge is squarely located in the public domain, available to all, but nonetheless acknowledged to be created by yogis. However, while the Indian government's theory of documenting prior art is an effective one in relation to *patented* information, the same is not true for *copyrighted* information such as Choudhury's. Unlike patents, which can be blocked or canceled by prior art, copyrighted works require merely a minimal level of originality in creative expression, the subject matter protected by copyright. In Choudhury's case, the low bar for originality was met purportedly via the novel selection and arrangement of *asanas*. The federal district court in *Open Source Yoga Unity* found Bikram Yoga is potentially protectable because it takes 26 poses out of hundreds of thousands and places them in a particular order. In doing so, the opinion in *Open Source Yoga Unity* relies on a Supreme Court case on the copyrightability of phone books, which contain only facts which have been selected and arranged.³³⁶ Insofar as their arrangements and selections of information are original, phonebooks are afforded "thin" copyright, thus preventing others from reproducing them in their entirety but not prohibiting the use of the same factual information.³³⁷ Choudhury argued that his selection and arrangement of *asanas* was similarly copyrightable. Nonetheless, a very high percentage of the news articles which speak to the issue of India's response to Choudhury's proprietary claims make reference to his yoga *patent*. At the time of writing, no yoga *asana* or sequence of yoga *asanas* has been patented. The patents on yoga-related products

³³⁶ *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); *Open Source Yoga Unity v. Choudhury*, 2005 U.S. Dist. LEXIS 10440 1 (United States District Court for the Northern District of California 2005), *13.

³³⁷ *Open Source Yoga Unity v. Choudhury*, 2005, *13.

which do exist relate to items such as yoga mats and Lululemon yoga pants.³³⁸ While this misstatement of the Choudhury's proprietary interest makes sense given the Indian experience with turmeric and neem oil, it is important to recognize that the creation of the TKDL, insofar as it demonstrates that particular inventions have already been disclosed to the public but not that the selection and arrangement of yoga *asanas* is unoriginal, *does not* negate Choudhury's copyright claims. However, as I argue here, the TKDL and related discourses about the *non-patentability* of traditional knowledge, despite their inability to invalidate Choudhury's claims, offer a rhetorical and performative intervention into more global conversations about traditional knowledge. As a result, studying their geneses and propensity to resist yoga's propertization is important. In short, even though they do not legally invalidate Choudhury's copyright on Bikram Yoga, the TKDL and related objections to his intellectual property rights contest his ownership claims rhetorically and performatively.

While it is not entirely clear from the specific discourses of the outcry that the international news media or those speaking publicly about Bikram Yoga fully apprehend the virtual impossibility of patenting yoga *asanas*, which do not qualify as inventions under the US Patent Act and likely the patent acts of other nations, the TKDL is clearly crafted as a response to Choudhury's assertion of proprietary rights in yoga *asanas* as well as prior patents on traditional Indian medical remedies.³³⁹ Not only are Choudhury and the TKDL linked in the

³³⁸ Suketa Mehta, "A Big Stretch," *New York Times*, May 7, 2007, http://www.nytimes.com/2007/05/07/opinion/07mehta.html?_r=1.

³³⁹ Among other reasons, the Bikram Yoga sequence is not patentable because it is not an invention, which is defined as "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof," and the poses included therein have existed for thousands of years as the TKDL demonstrates. 35 U.S.C. § 101-102, 2012. For these reasons, Choudhury sought copyright protection for his selection and arrangement of the *asanas*. Interestingly, Choudhury uses the language of patent law in arguing that others cannot use his sequence of *asanas*. He claims that Bikram Yoga is *useful* in preventing medical conditions, an

news media but the TKDL includes yoga as one of the categories of information about which it catalogs knowledge.³⁴⁰ And while the specifics of the patent and copyright issues implicated in the case are often imprecisely described in the national and international news sources, there is no doubt that the commodification of yoga has been an important impetus to rethink the appropriation of traditional knowledge. Yoga is central to the discussion of traditional knowledge both because of its significance in Indian culture and religion and its astounding commercialization: as of 2007, the US Patent and Trademark Office and US Copyright Office had issued 150 yoga-related copyrights, many of which included methods of teaching *asanas*, 134 patents on yoga-related products, and 2,315 yoga trademarks.³⁴¹ Given the disconnect between the TKDL's theoretical purpose in preventing the exploitation of yoga and actual ability to only block patents, this chapter is most productively understood not as an analysis of the efficacy of the TKDL but as a reading of rhetorical and performative struggle over the ownership of yoga generally and the prospective, though also impossible, patenting of *asana* sequences, as well as the role of the TKDL in the struggle for recognition of non-Western narratives of creation. That is, I focus on the Bikram Yoga cases, TKDL and the related controversy as a means to discern how rhetorical and performative resistance to yoga unfolds, even when legal claims are misstated and misanalyzed. The resistance takes a variety of disidentificatory forms, including the historicization of yoga and the use of core terms in patent law against themselves. The vocal Indian and Indian American response to Choudhury's claims are thus important

argument which does not support a copyright claim. Kal Raustiala and Chris Sprigman, "Why Is It Easier to Copyright an Unhealthy Yoga Routine Than a Healthy One?," *Freakonomics*, December 8, 2011, <http://www.freakonomics.com/2011/12/08/why-is-it-easier-to-copyright-an-unhealthy-yoga-routine-than-a-healthy-one/>.

³⁴⁰ "Traditional Knowledge Resource Classification," 2013, <http://www.tkdil.res.in/tkdil/langdefault/common/TKRC.asp?GL=Eng>.

³⁴¹ Mehta, "A Big Stretch."

because it performs the important rhetorical work of rehistoricizing yoga and rewriting the definitions of, authorship, invention, and the public domain through the TKDL.

Accordingly, this chapter focuses on the decolonizing counternarratives to copyright law, patent law, authorship, and the public domain that emerge through the dispute over Bikram Yoga as a means of protecting traditional knowledge. The decolonial framework is a particularly helpful one for situating the disidentification that unfolds in legal and popular spaces because it embraces the potentiality of existing systems of knowledge while rewriting them from the vantage point of the colonial subject. As Walter Mignolo writes, “De-colonial projects dwell in the borders, are anchored in double consciousness, in mestiza consciousness (racial and sexual). It is a colonial subaltern epistemology in and of the global and the variegated faces of the colonial wound inflicted by five hundred years of the historical foundation modernity as a weapon of imperial/colonial global expansion of Western capitalism.”³⁴² Instead of conceding the terrain of intellectual property discourse completely, opposition to the commodification of yoga, injects decolonizing histories and mythologies into dominant definitions of key terms of art as a means of confronting the erasure of marginalized groups from global knowledge regimes. Public discussions about yoga as piracy as well as the creation of the TKDL operate as assertions of rhetorical agency and authorship which functionally redefine the public domain and its contents, identifying racial Others as creators equal in stature to their Western counterparts. Taken together, the responses of those members of the Indian government, Indians, and Indian Americans who oppose the commodification and propertization of yoga reclaim traditional knowledge which has been colonized by and through Western theories of property rights and systems of classification. The resulting rehistoricization of yoga redefines Indian national

³⁴² Walter Mignolo, “Introduction,” *Cultural Studies* 21, no. 2 (2007): 165. Mignolo also contextualizes the differences between postcolonial and decolonial projects.

identity, rendering visible the process of writing traditional knowledge and disrupts Western colonial understandings of intellectual property ownership. It also works as a type of deconstructive and reconstitutive “worldmaking,”³⁴³ which opens the door for alternate treatments of traditional knowledge under patent law and intellectual property. Simply put, the Indian government’s decision to create the TKDL is an act which seizes authority and authorship, effectively resisting the commercialization of yoga and forcing interrogation of regimes of ownership of intellectual property and classification of traditional knowledge.

Rhetorical disidentification emerges in the conflict over the commercialization of yoga in three primary ways. First, opponents of the Bikram Yoga copyright critique dominant definitions and conceptions of “piracy.” By identifying the taking of traditional knowledge as “piracy,” those resisting the commodification of yoga and Choudhury’s actions functionally describe a neocolonial process of intellectual property infringement by the West against developing nations, not racial Others against civilized Western nations. The creation of the TKDL thus demonstrates that representing the racial Other as infringer erases questionable Western practices of privatizing the public domain as well as the subjectivity of the racial Other. Second, objections to the ownership of yoga constitute a form of collective rhetorical disidentification through which the existence of group identity is used as means of disrupting intellectual property’s regime of ownership. The discourses surrounding the Bikram Yoga copyright assert the existence of Indianness and Hinduness as proof that yoga is not an ahistoric source of raw materials that developing countries can appropriate. Instead, it is a situated traditional knowledge, created and altered by groups with the power to invent and author. Third, India’s TKDL asserts the rhetorical agency of marginalized groups to redefine “prior art” and

³⁴³ Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*, 195.

“patentability” by demonstrating that traditional knowledge, whether its history is recognized or not, cannot be owned because it has already been discovered. This powerful redefinition of the contents of the public domain shifts the power to identify information available for discovery, propertization, and outright ownership from Western nations to developing ones.

Finally, the TKDL operates as a performative decolonial critique of the colonial database. Here, India’s enactment of the content of the TKDL is as important as its structure: unlike colonial knowledge structures which collect, classify, and organize information for the purposes of naturalizing racial hierarchies, the digital database emerges as an emancipatory material rhetorical artifact, constituted in a manner which affirms the availability of yogic knowledge for all individuals. The resulting digital database is a testament not only to the power of the organization of information to liberate but also a response to Choudhury’s claim that his selection and arrangement of *asanas* is copyrightable. Contrary to Western Enlightenment thought, which identifies the management of information as a means of categorizing and disciplining colonial subjects and naturalizing white supremacy, the TKDL performs the organization of information as a means of reclaiming histories of traditional knowledge and making visible the contributions of non-Western creators to global knowledge production.

Through the systematic historicization of traditional knowledge, the TKDL and the discourses surrounding its formation rhetorically and performatively assert the power of marginalized groups to redefine the contents of the public domain, a privilege generally reserved for Western nations. Doing so also reimagines dominant representations of “discovery,” locating inventorship and authorship in racial Others. This relocation of creative power is, in itself, an important decolonizing act. Far from resulting in the “provincialization of Indian knowledge and

unequal protection for subaltern authorial activities”³⁴⁴ that many argue is the result of identifying traditional knowledge as in the public domain, the TKDL authorizes non-Western creators, acknowledging their contributions to the public domain. In the TKDL’s retelling of the narrative of yoga, India does not recede into the background and quietly accept the colonial appropriation of its traditional knowledge, it creates a framework for claiming subject positions and rhetorical agency, proclaiming the value of the refusal to embrace intellectual property rights, and affirm the potential of the digital database as a liberatory space. Read together with the rhetorical and performative protests against Bikram yoga, the TKDL thus constitutes a new model of information classification which decolonizes the intellectual property regime and asserts the authority of the colonial subject as producer of knowledge and author.

Yogic practice as global commodity

Choudhury has perhaps always understood the potential for yoga to become a global phenomenon. Born in Calcutta in 1946, he began practicing yoga just four years later. He trained with Bishnu Ghosh, whose younger brother Paramahansa Yogananda is credited with popularizing yoga in the West.³⁴⁵ Choudhury did just that, publishing *Bikram’s Beginning Yoga Class* in 1978. The copyrighted book includes the 26 poses that later became Choudhury’s hot yoga class. Politicians and celebrities flocked to work with Choudhury in his four Los Angeles studios but it was not until 1994 that he began to expand his business as well as his ego—as of 2012, Choudhury had 330 US-based studios and 600 internationally-based ones (Figure 3.2).³⁴⁶

³⁴⁴ Allison Fish, “The Commodification and Exchange of Knowledge in the Case of Transnational Commercial Yoga,” *International Journal of Cultural Property* 13, no. 2 (2007): 193.

³⁴⁵ Bikram Choudhury, “Bikram Choudhury,” *Bikram Yoga*, 2012, <http://www.bikramyoga.com/Bikram/bikram.php>.

³⁴⁶ Rebecca Moss, “The Hot Yoga War,” *Villagevoice.com*, July 18, 2012, <http://www.villagevoice.com/2012-07-18/news/the-hot-yoga-war/>.

In 1996, in the midst of growing his yoga empire, he met Greg Gumucio, an inexperienced student who showed up at the intense, 8 week teacher training. Despite his inexperience and adversarial response from Choudhury, Gumucio quickly became the yogi's star student and close friend. In 2000, however, Gumucio met software mogul John McAfee, who practiced a different style of yoga than Choudhury's hatha-inspired *asana* series. Gumucio recognized the benefit in embracing multiple yogic styles and began diversifying his teaching practices. His decision, however, fractured the relationship with Choudhury whose characteristically extreme and sexualized response was "[y]ou cannot be a fucking prostitute. You cannot have your foot in two holes."³⁴⁷ Choudhury's statement is emblematic of a larger belief that he has created the ultimate form of yoga. Bikram Yoga is the only correct yoga practice, he claims, everything else is "shit."³⁴⁸ Together, Gumucio and McAfee created the collective Open Source Yoga Unity which, as its reference to the free and open source software movement suggests, soon became instrumental in questioning the validity of Choudhury's copyright claims. Gumucio's Yoga to the People, which he started in New York and expanded to several major cities in the United States, charges only \$8 per class for a hot yoga experience that is less strict than Choudhury's.³⁴⁹

The Yoga to the People mantra is easily read as a jab at Choudhury. It reads, in part:

There will be no correct clothes
There will be proper payment
There will be no right answers
No glorified teachers

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid. Two former students of Choudhury's recently accused him of rape and sexual harassment, which some say is an expected outcome given the sexualized nature of his 600 person teacher training retreats. "Rape Accusations Against Bikram Choudhury," *Yoga Journal*, May 9, 2013, <http://blogs.yogajournal.com/yogabuzz/2013/05/rape-accusations-against-birkram-choudhury.html>; Clancy Martin and Rebecca Greenfield, "The Overheated, Oversexed Cult of Bikram Choudhury," *Details.com*, February 2011, <http://www.details.com/culture-trends/critical-eye/201102/yoga-guru-bikram-choudhury?currentPage=3>.

No ego no script no pedestals
No you're not good enough or rich enough
This yoga is for everyone³⁵⁰

In 2005, in response to Choudhury's broad claims of proprietary rights in Bikram Yoga, Open Source Yoga Unity sued him, claiming that yogic knowledge should be freely available to the public.³⁵¹ The federal district court refused to grant summary judgment for Open Source Yoga Unity stating that Choudhury's copyright was valid despite affirming that "yoga is an ancient physical practice, and that the individual *asanas* that comprise the Bikram yoga sequence have been in the public domain for centuries."³⁵² The federal district court went on to explain that while "[o]n first impression, it thus seems inappropriate, and almost unbelievable, that a sequence of yoga positions could be any one person's intellectual property," the arrangement of information in the public domain can sometimes be sufficiently original to merit copyright protection.³⁵³ Through the application of the principle of arrangement and selection as a means of proving originality sufficient to give rise to a copyright, the judge in *Open Source Unity* rhetorically colonized the public domain, subjecting that which was repeatedly admitted to be freely shared information in India to a new reading through Western legal principles. The rich and diverse product of the work of thousands of Indian yogis was rendered secondary to new selections and arrangements approved by American courts. Moreover, through the reference to yoga as an "ancient spiritual practice," the opinion objectifies the living, breathing tradition, suggesting that it is something other than a continually evolving cultural formation, originating

³⁵⁰ "Mantra," *Yoga to the People*, 2011, <http://yogatothepeople.com/about-us/mantra/>.

³⁵¹ *Open Source Yoga Unity v. Choudhury*, 2005 U.S. Dist. LEXIS 10440 1 (United States District Court for the Northern District of California 2005), *1.

³⁵² *Ibid.*, *6.

³⁵³ Copyrightable arrangements of existing information receive only "thin" copyright meaning that the burden for showing infringement is very high. *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

from constantly changing peoples and cultures. Through its objectification, yoga is delinked from its South Asian roots and reconstituted as a postmodern practice that is discovered through ancient texts and then reconfigured and marketed for a contemporary audience. Yoga, as discussed by the opinion, is detached from its creators, posited as an object without a history and a text without authors. Representations such as these facilitate the commodification of traditional knowledge, backgrounding it as preexisting information from which “true” innovations are made. Within this framework, yoga becomes a mere thing to be perfected in its commodity form and transformed by those with expertise into saleable knowledge.



Figure 3.2 Bikram engaged in public speaking (left) and teaching a yoga class (right)

This is not to suggest that only Indians can contribute to the evolution of yoga or that all Indians seek to prevent the commodification of yoga. As Allison Fish recounts in her extensive ethnographic study of yoga in India, many of the Indian yogis she encountered were interested in the potential for using intellectual property law to protect their own unique styles of yoga. Fish concludes that there are simply some types of ownership of yoga that are deemed culturally

appropriate and others that are not.³⁵⁴ Despite being raised in India, Choudhury does not appear to have the backing of his home nation.³⁵⁵ While it is not clear whether Indian yogis whose interest is piqued by the idea of intellectual property protection understand it the same way as Choudhury, as a means for accumulating excessive wealth and exerting extreme control over teacher training and licensing, it is evident that Choudhury is often understood to be inappropriately capitalizing on his culture. Becoming a certified Bikram Yoga instructor, for instance, currently costs at least \$11,400, including hotel costs, payable directly to Choudhury.³⁵⁶ Bikram's classes average up to \$20-25 per session,³⁵⁷ bringing the yogi's net worth to at least \$7 million.³⁵⁸ Choudhury, who lives in an 8,000 square foot Beverly Hills home and owns dozens of Rolexes and expensive cars is certainly not living the life of an ascetic.³⁵⁹ "They ask me," he says, "'Bikram, now you are so rich. Why do you not live like the poor Indians?' I tell you why! Because I have been in that gutter! I have lived in the streets of Calcutta!'"³⁶⁰ Bikram's abrasive personality certainly does not help his cause in copyrighting yoga. Nonetheless, in many ways, the move to create the TKDL, a bigger issue than one man's abrasiveness or even the legal issues involved in the cases cited here, is as much about cultural and individual *attribution* and

³⁵⁴ Allison Elizabeth Fish, "Laying Claim to Yoga: Intellectual Property, Cultural Rights, and the Digital Archive in India" (University of California, Irvine, 2010), 149-158.

³⁵⁵ Mangala Hirwade, "Protecting Traditional Knowledge Digitally: A Case Study of TKDL" (presented at the National Workshop on Digitization Initiatives & Applications in Indian Context, Nagpur, India, 2010), <http://hdl.handle.net/10760/14020>.

³⁵⁶ "Admission Fees," *Bikram Yoga*, 2012, <http://www.bikramyoga.com/TeacherTraining/Admissionfees.php>.

³⁵⁷ Raustiala and Sprigman, "Why Is It Easier to Copyright an Unhealthy Yoga Routine Than a Healthy One?"

³⁵⁸ Emily Wax, "'Yoga Wars' Spoil Spirit of Ancient Practice, Indian Agency Says," *Washington Post*, August 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/22/AR2010082203071.html>.

³⁵⁹ Maureen Farrell, "Bikram Yoga's New Twists," *Forbes.com*, September 21, 2009, <http://www.forbes.com/forbes/2009/0921/entrepreneurs-franchising-bikram-yoga-new-twists.html>.

³⁶⁰ Martin and Greenfield, "The Overheated, Oversexed Cult of Bikram Choudhury."

confronting the erasure of Indianness and Hinduness from the history of yoga and claiming ownership over cultural property as it is about a general opposition to intellectual property rights and generating revenue.³⁶¹ As the Indian Supreme Court's recent refusal of pharmaceutical company Novartis' request for a patent on the drug Gilvec shows, India is more than willing to take a pragmatic stance on intellectual property issues in order to protect its own people, and indeed developing countries more generally, from Western exploitation and theft of traditional knowledge.³⁶² It is useful, then, to read Fish's findings through the lens of the public outcry against yoga ownership and India's practical stance toward the ownership of intellectual property: it is apparent that many Indians and Indian Americans still believe there is an important ideological contradiction between yogic knowledge and commodification. At a basic level, Choudhury's claim of ownership to the Bikram Yoga sequence belies India's still common understanding of yoga as spiritual and religious knowledge that ought to be available to all or, at the very least, not transmogrified, packaged, and commodified for a Western audience that fails to recognize its cultural significance and historical genesis.³⁶³

³⁶¹ Wax, "'Yoga Wars' Spoil Spirit of Ancient Practice, Indian Agency Says."

³⁶² Until 2005, India did not offer patent protection to drug companies, in part to facilitate the production of affordable generic compounds. The country's relatively new patent act, however, grants such protection provided that the drugs being patented are novel. The strict novelty provision is intended to prevent drug companies from seeking patents on "new" drugs which are only slightly different from existing ones. This practice, known as "evergreening," is arguably a means of circumventing prior art requirements. In 2006, Swiss company Novartis sought patent protection for the anti-cancer drug Glivec. After a series of appeals, the Indian Supreme Court ruled that Novartis' drug was not sufficiently different from an already patented product. "Novartis: India Rejects Patent Plea For Cancer Drug Glivec," *BBC.com*, April 1, 2013, <http://www.bbc.co.uk/news/business-21991179>.

³⁶³ Lindsay Clinton, "India Journal: Where Are the Entrepreneurs in Yoga and Ayurveda?," *Wall Street Journal*, June 14, 2010, <http://blogs.wsj.com/indiarealtime/2010/06/14/india-journal-where-are-the-entrepreneurs-in-yoga-and-ayurveda/>; Mehta, "A Big Stretch"; Fish, "The Commodification and Exchange of Knowledge in the Case of Transnational Commercial Yoga."

The rhetoricity and performativity of yoga

Yoga, like other types of artistic expression, is a complex cultural formation which mutates and evolves based on the action and interactions of teachers, students, and audiences in a global context. In other words, yoga is “subject to contestation and refiguration by complex interactions between private, legal, corporate, and state actors.”³⁶⁴ However, it is also a rhetorical and performative practice, which takes on persuasive and constitutive qualities when considered in relation to other social and cultural practices. Yoga can function as a locus for bodily discipline or emancipation, depending on the theories and practices through which it is defined. As an embodied practice, yoga is created through teacher/student relations, with each constituting a new part of the complex patchwork of yogic philosophy. Moreover, the discursive practices which contextualize the yogic body are also an important part of yoga’s rhetorical nature. As Jack Selzer writes, “nonliterate practices and realities—most notably, the body, flesh, blood, and bones, and how all the material trappings of the physical are fashioned by literate practices—should come under rhetorical scrutiny.”³⁶⁵ In this case, not only is the historical and contemporary enactment of yoga a space for rhetorical and performative inquiry but so too are the discursive systems which situate that practice. The invention of Bikram Yoga, the response to the contours of the practice, the rewriting of the nature of yoga itself, the outcry against Bikram Yoga, and the TKDL form the backbone of the discursive regime through which the social reality of yoga is constituted—and reconstituted—in law and culture. Moreover, the operation of yoga in a global marketplace is necessarily related to the economic manifestations of colonialism, especially in terms of the appropriation of traditional knowledge.

³⁶⁴ Fish, “The Commodification and Exchange of Knowledge in the Case of Transnational Commercial Yoga,” 190.

³⁶⁵ Jack Selzer, “Habeas Corpus,” in *Rhetorical Bodies*, ed. Jack Selzer and Sharon Crowley (Madison: University of Wisconsin Press, 1999), 10.

The word yoga derives from the Sanskrit root *yuj*, meaning both to concentrate and to join. It is most often defined as a process of “yolking the senses.”³⁶⁶ The practice of yoga has its roots in ancient Hindu, Buddhist, and Sikh sacred texts, including the *Vedas*, *Upanishads*, *Bhagavad Gita*, *Mahabharata*, and *Yoga Sutras of Patanjali*.³⁶⁷ The first three of these texts are Hindu scriptures while the fourth, a Buddhist treatise on the practice of yoga. Though yogic practices are as diverse as the yogis who teach and practice them, they are unified by a common goal of “[eliminating] the control that material nature exerts over the human spirit.”³⁶⁸ Through the training of mind and body, individuals can gain mastery over their thoughts, speech, and actions in the world.³⁶⁹ Given its textual origins and continued performative development, yoga simply cannot be understood as a static object—it is better treated as a constantly negotiated collection of embodied practices that emerges through the relationships between gurus and their students as well as the practice and its larger cultural context. Part of this cultural context is defined by religion and scripture. In each of the religious traditions within which it can be located, yoga is integral to a transcendence of the material, or the attainment of a higher “state of purity,”³⁷⁰ *samadhi*, through which liberation from the human condition of constant suffering, or *moksha*, is attained. In the *Yoga Sutras of Patanjali*, yogic practice is described in eight parts: *yama* (abstention), *niyama* (fixed observance), *asanas* (postures), *pranayama* (regulation of breath), *pratyahara* (retreat), *dharana* (concentration), and *dhyana* (meditation).³⁷¹ Though

³⁶⁶ Surendranath Dasgupta, *Yoga Philosophy: In Relation to Other Systems of Indian Thought* (Delhi: Motilal Banarsidass, 2005), 65.

³⁶⁷ Patañjali and Barbara Stoler Miller, *Yoga: Discipline of Freedom: The Yoga Sutra Attributed to Patanjali* (New York: Bantam Books, 1998), 1; Fish, “The Commodification and Exchange of Knowledge in the Case of Transnational Commercial Yoga, 191.”

³⁶⁸ Patañjali and Miller, *Yoga*.

³⁶⁹ B. K. S. Iyengar, *Light on the Yoga Sutras of Patanjali* (Harper Collins UK, 2012), 2.

³⁷⁰ Ibid, 5.

³⁷¹ Ibid, 140.

asanas are most frequently highlighted in Western practice of yoga, there are seven additional principles required for *moksha*. Similarly, yogic practice, despite its complexity, is just one part of Hindu, Buddhist, Sikh, and Jain theologies and religious practices.

Yogic knowledge, like dance and music in much of Asia, is passed down through master/disciple relationships, taking decades to learn and teach. Rigorous training creates lineages with venerable teachers at their ends. Far from being a static object without identifiable creators, yoga is defined by individual practice: it is impossible to contemplate yoga without invoking the image of the guru who trained from a young age, perfecting his practice under the tutelage of an even more practiced guru.³⁷² As a result, yoga is as much defined by embodied practice through which information is passed from teacher to student as the texts which describe it. Discipline and competitiveness are part of the Indian as well as the Western yogic experience. As Choudhury's own training demonstrates, demonstrating yogic competence through accolades earned in competition is an important part of yoga even in India. The heart of India's objection to an Indian-born yogi owning copyright in a series of *asanas*, then, is about much more than the simple question of cultural heritage. One reason for the objection to Choudhury's ownership claims despite his Indianness is the very nature of yoga itself: by virtue of its age and the philosophies which inform it, yoga is also embedded within the cultural norms and daily lives of South Asians. Like the religious texts in which it is named and developed, yoga is at least thousands of years old, dating back to before Jesus Christ. Accordingly, it has evolved as lived experience as well as strict training—a Hindu woman may practice *yama* as a weekly fast or *dhyana* as a daily prayer. Because yogic religions frequently empower their devotees to define their own religious practice through the daily fulfillment of *dharma*, it is impossible to separate

³⁷² Fish, "Laying Claim to Yoga: Intellectual Property, Cultural Rights, and the Digital Archive in India," 58-59

yoga from everyday living.³⁷³ Owning a practice which is fundamentally linked to the practice of embodied, everyday living is, at a very visceral level, a crass concept.

The commodification of yoga, which marks its circulation in the global economy, comes into conflict with the spiritual practice's philosophical underpinnings and embodied performances in two major ways. First, the ownership of yoga is a commodification of life and its daily practices. Emblematic of this fundamental disconnect is the claim by the Art of Living Foundation, a non-profit organization dedicated to teaching yoga, meditation, and breathing as forms of stress relief, that claims it holds a patent in *sudharshan kriya*, a calming breathing practice.³⁷⁴ Breathing is neither an invention under the terms of the US Patent Act—or presumably any patent act for that matter—nor is it an act that can reasonably be owned.³⁷⁵ Similarly, principles such as abstention and concentration are just that—acts of daily living, not patentable invention, which cannot legally or practically be owned. Second, claiming a proprietary interest in yoga is arguably antithetical to the practice's very philosophical foundations. The deployment of a practice which is intended to aid in the transcendence of the material temptations of life for the purpose of accumulating wealth is internally contradictory, if

³⁷³ Clinton, "India Journal: Where Are the Entrepreneurs in Yoga and Ayurveda?"

³⁷⁴ "Learn Sudarshan Kriya," *The Art of Living Foundation*, 2013, <http://www.artofliving.org/how-do-sudarshan-kriya>.

³⁷⁵ The obvious counterexample here is the patenting of gene sequences, which unlike breathing are protectable under patent law in some instances. However, without defending the ownership of the building blocks of life on Earth, I would argue there is a fundamental difference between the synthesis or purification of gene sequences in a lab, an inventive process, and taking a breath, an unavoidable biological act. The Art of Living Foundation's mere suggestion that it can hold a limited monopoly on breathing, even particular types of breathing, conjures absurd images of paying royalties for measured breathing during labor or being sued for taking a deep breath on a stroll in the woods in the middle of spring. Not only would such a system of ownership be unenforceable but it is also unsupported by patent law, which only affords legal protection to those inventions which are "manufactured" by humans, even in the sense of purifying or isolating natural substances as is often the case with patented gene sequences. *Diamond v. Chakrabarty*, 447 U.S. 303 (US Supreme Court 1980).

not outright sacrilegious. Together, these two reasons provide insight into why many Indians and Indian Americans were and continue to be outraged at Choudhury's claims.³⁷⁶ This outrage manifested itself in both the vocal outcry against the private ownership of yoga in the news media and on digital discussion boards as well as the creation of the TKDL, which I turn to in the remainder of the chapter.

Pirating yoga, creating authorship

The standard definition of piracy, according to Adrian Johns, is "the commercial violation of legally sanctioned intellectual property."³⁷⁷ We need only look as far as the latest edition of the *New York Times* in a local coffee shop to find a contemporary example of piratical activity. Indeed, the term pirate is used so often, so loosely, and over such a long period of time that it is difficult to pinpoint its meaning exactly. For my purposes here, a variation on the standard definition of piracy is useful: the pirate is an infringer of intellectual property rights, or the limited monopolies granted by governments to the creators of certain inventions and creative works. Though piracy has a long history that extends before the creation of digital technologies, the concept nonetheless remains inextricably linked to Enlightenment thought. After all, it is founded on a myth that privileges the moment of creation over the creative process. Lawrence Liang argues this Western conception of piracy "produces a series of anxieties."³⁷⁸ Among these is the linkage of piratical activity with anti-national and anti-democratic sentiment as well as anti-neoliberal excess. Pirates not only act contrary to the commercial interests of the nation, stealing valuable goods, but they also work against the fundamental values of innovation and

³⁷⁶ Clinton, "India Journal: Where Are the Entrepreneurs in Yoga and Ayurveda?"

³⁷⁷ Adrian Johns, *Piracy the Intellectual Property Wars from Gutenberg to Gates* (Chicago: University of Chicago Press, 2010), 6.

³⁷⁸ Lawrence Liang, "Piracy, Creativity and Infrastructure: Rethinking Access to Culture," *SSRN Electronic Journal* (2009), <http://www.ssrn.com/abstract=1436229>, 10.

creativity which center the American nation. The myth of the American Dream is based on entrepreneurialism, hard work, and ingenuity. Nonetheless, pirates can sometimes be redeemed, usually through proof of innovation and creative contributions—embodied by copyright law’s principle of transformation—as opposed to mere, mindless, exploitative copying. Embedded in the narrative of redemption, however, is a racial component. Liang continues, “[o]ne of the narrative [strategies] is then to redeem the acts of ‘ordinary’ American citizens, and what better way to do this, that through the discursive construction of an ‘other,’ in this case an ‘Asian’ other.”³⁷⁹ According to Liang, the assumption is that, unlike Westerners who value the hard work and innovation that goes into the production of knowledge, Asians simply do not possess the innovative and creative spirit to produce transformative works. They selfishly steal intellectual properties for their own benefits, engaging in simply unredeemable forms of piracy.

In response to Choudhury’s copyright claims, *The Times of India*, citing public outcry among the Indians it interviewed, began calling out for systematic protections in order to defend the nation against “yoga piracy.”³⁸⁰ The very coining of the term yoga piracy is an act of rhetorical disidentification. Though it still works within the frames of intellectual property rights and infringement, the idea that someone who is claiming exclusive ownership over yoga is pirating the centuries-old practices makes several ideological moves which confront Western understandings of knowledge creation and production. Just as with the term “biopiracy,” which Vandana Shiva first used to describe the patenting of already-discovered forms of medicine,³⁸¹ yoga piracy inverts dominant intellectual property relations, identifying those who claim ownership over non-Western knowledge as exploiters of that which has already been discovered

³⁷⁹ Ibid, 13.

³⁸⁰ Sinha, “Yoga Piracy: India Shows Who’s the Guru.”

³⁸¹ Shiva, *Biopiracy*.

as opposed to creators of that which did not previously exist. Inherent in this identification is the recognition of racial Others as subjects with their own epistemological standpoints. Indian yogis are transformed into creators of global culture and active rhetorical agents instead of mere practitioners without the powers of creation or unknown backgrounded figures. Creation, in this tradition, is a communal process, one that is contingent on the identity of the inventor or author, but nonetheless imagines the contributions of individuals to a body of knowledge. The use of the term yoga piracy thus not only implicates the West in the theft of traditional knowledge but humanizes racial Others in a manner that forces the acknowledgment of their histories and contributions to global knowledge production. Additionally, and perhaps more importantly, the term yoga piracy turns the oft repeated narrative that Liang traces on its head. Accepting, more or less, the notion of piracy as the unauthorized taking and use of intellectual properties, India rhetorically and performatively makes an argument for the creativity of its own works of invention and authorship. Put simply, the identification of piracy presupposes an act of invention or authorship that supersedes the rights of the party infringing on intellectual property rights. This move confronts the narrative that racial Others, and Asian Others in particular, are mere thieves whose steal the inventions and creative works of Westerners and cannot create their own knowledge. Moves by individuals to rhetorically and performatively identify yoga piracy are disidentificatory ones which aid in reconstituting the racial Other as creator with allegiance to nation, democracy, and economy instead of an infringer.

At a broader level, the narrative of yoga piracy I have outlined here interrupts one of the most powerful narratives of American colonialism, namely the Doctrine of Discovery. First year law students almost universally begin their study of property law with case of *Johnson v. M'Intosh*, in which Chief Justice John Marshall sets forth the prevailing theory of Western and

indigenous land ownership. The case involved a dispute between two men over the title to a tract of land in present day Illinois. Thomas Johnson had purchased the land from the Piankeshaw Indians while William M’Intosh had purchased it from the federal government. Upon discovering the double land ownership, Johnson attempted to enforce his title. Chief Justice Marshall wrote the opinion which unanimously found that indigenous peoples may not sell their lands because they do not hold title to it—as uncivilized peoples with no system of property ownership, they hold only a right of occupancy. Moreover, colonizers may assume title to any land they discover because “discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.”³⁸² There also exists an implicit corollary to the Doctrine of Discovery in the realm of intellectual property: traditional knowledge is perceived as unrefined and undeveloped information, not yet transformed into an intellectual work. Like land in which indigenous peoples only hold a right of occupancy, traditional knowledge is treated as a disorganized space which must be tamed and honed by Western science. The association of racial Otherness with disorder and chaos, of course, is a longstanding thread of colonial discourse which has historically justified violent and appropriate interventions. As Halbert writes, the encounters of Westerners with traditional knowledge were “quickly obscured by the fiction of colonial superiority and the original genius of the Western scientist and explorer.”³⁸³

The idea of yoga piracy moves beyond the realm of “scientific colonialism,”³⁸⁴ and biopiracy, focusing instead on forms of cultural knowledge which do not neatly fit into intellectual property’s preordained categories. In short, traditional knowledge extends far

³⁸² *Johnson v. M’Intosh*, 21 U.S. 543, 573 (1823).

³⁸³ Halbert, *Resisting Intellectual Property*, 136-137.

³⁸⁴ Johan Galtung, “Scientific Colonialism,” *Transition* no. 30 (April 1967): 10.

beyond the scientific and technical—the term yoga piracy forces contemplation, in specific terms, of the contributions of racial Others to the cultural and spiritual landscape of the world. Unlike the commonly used terms of art of “folklore” and “cultural property,” which refer to traditional music, dance, arts, history, mythology, designs and symbols, and traditional handicrafts, among other items, yoga piracy speaks in a parlance familiar to Western scholars, making an implicit claim of theft against a particular form of traditional knowledge. As Graham Dutfield of the International Center for Trade and Sustainable Development and United Nations Conference on Trade and Development observes:

In the West, folklore is understood differently, because traditional knowledge and art forms no longer constitute an integral part of most people’s lives, and may even be considered archaic...It may be difficult, then, for members of western (and westernized) cultures to appreciate the importance of folklore in the lives of indigenous peoples.³⁸⁵

A similar argument can be made for the concept of cultural property, which is analogous in its scope.³⁸⁶ Not only is the concept difficult to conceptualize within the rubric of Western beliefs and legal regimes but it is non-specific in a manner that makes it difficult to apprehend the harm of its exploitation. The concept of yoga piracy leaves little room for misunderstanding or interpretation: it implicates a specific conflict with particular facts. Moreover, it posits the existence of a creator, even one that affirms the communal and contingent nature of inventorship and authorship, while simultaneously recognizing the possibility of indigenous creation. As

³⁸⁵ Graham Dutfield, “Protecting Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formation” 4, *International Trade & Sustainable Development Series* (June 2003), 27.

³⁸⁶ While an in-depth discussion about folklore and cultural property is outside of the scope of this paper, there is nonetheless great potential in these terms as mechanisms for protecting traditional knowledge. Rosemary J. Coombe, “The Expanding Purview of Cultural Properties and Their Politics,” *Annual Review of Law and Social Science* 5, no. 1 (2009): 393–412.

such, it is a powerful means of rhetorically disidentifying with the histories and values of the intellectual property system through the use of its own language.

Indian identity and collective rhetorical disidentification

After Choudhury copyrighted the Bikram Yoga sequence, Indians, Indian-Americans, and officials in the Indian government expressed their outrage, offering a variety of strategies for reclaiming traditional knowledge. The objections of all three parties are evident in the news media: major Indian newspapers, US publications, and the statements by Indian government officials demonstrated significant criticism of yoga piracy specifically and biopiracy more generally. One example of this vehement outcry unfolded in the *Huffington Post*. In 2010, The Hindu American Foundation started a campaign called “Take Back Yoga,” focusing on the inherent links between yoga and Hindu identity and sparking a kind of global nationalism about the practices. Aseem Shukla, Co-Founder of the Hindu American Foundation, argues that “[t]he severance of yoga from Hinduism disenfranchises millions of Hindu Americans from their spiritual heritage and a legacy in which they can take pride.”³⁸⁷ Claiming that Hinduism suffers from “overt intellectual property theft, absence of trademark protections and the facile complicity of generations of Hindu yogis, gurus, swamis and others that offered up a religion's spiritual wealth at the altar of crass commercialism,” Shukla concludes that “Hindus must take back yoga and reclaim the intellectual property of their spiritual heritage--not sell out for the expediency of winning more clients for the yoga studio down the street.”³⁸⁸ His blog post elicited a vehement response from Oprah-endorsed new ager Deepak Chopra, who historicizes

³⁸⁷ Aseem Shukla, “On Faith Panelists Blog: The Theft of Yoga,” *Washington Post*, April 18, 2010, http://newsweek.washingtonpost.com/onfaith/panelists/aseem_shukla/2010/04/nearly_twenty_million_people_in.html.

³⁸⁸ Ibid.

yoga as before Hinduism and claims that “enlightenment has always been outside the bounds of religion.”³⁸⁹ While he respects the “Take Back Yoga” campaign as an “innocent attempt by the Indian diaspora to get some respect” he admonishes the Hindu American Foundation to “lighten up” because “Indian pride is getting more than its share of strokes.”³⁹⁰ Chopra embraces the Western practice of yoga as part of the globalization of the South Asian philosophy. Unlike those who seek acknowledgment of the origins and spiritual context of the practice, he is unbothered by the transformation of yoga into a new cultural form.

Together, the positions of the Hindu American Foundation and Chopra prompted hundreds of thoughtful comments from the public, including self-identified Indian nationals, Indian ex-pats, and Indian-Americans, igniting a dispute about the state of yoga in America. One yoga instructor proclaims that “[n]obody owns yoga”³⁹¹ while one Indian doctor comments that Shukla’s position is “characterized by a pseudo-nationalist claim to a non-existent purity of composite, often contradictory and disparate beliefs originally associated with people living on the banks of the River Indus (Sindhu in Sanskrit), now in Pakistan!”³⁹² Shukla fires back to Chopra’s response, calling him “a principle purveyor of the usurpation I sought to expose” and “the most prominent exponent of the art of ‘How to Deconstruct, Repackage and Sell Hindu Philosophy Without Calling it Hindu!’”³⁹³ Reports of comments of Indians in India were significantly more in line with Shukla’s than Chopras. Ashok Jain, a lawyer for the Indian Supreme Court, said “[t]he government of India should be filing for cultural patents...Why have

³⁸⁹ Deepak Chopra, “Who Owns Yoga?,” *Huffington Post*, December 1, 2010, http://www.huffingtonpost.com/deepak-chopra/who-owns-yoga_b_790078.html.

³⁹⁰ Ibid.

³⁹¹ Paul Vitello, “Hindu Group Stirs Debate in Fight for Soul of Yoga,” *New York Times*, November 27, 2010, Comment 156, <http://www.nytimes.com/2010/11/28/nyregion/28yoga.html?pagewanted=all>.

³⁹² Ibid.

³⁹³ Shukla, “On Faith Panelists Blog: The Theft of Yoga.”

we failed? The cost of filing patents is nothing. We must take action now. In 10 years, copyright will be a big issue.”³⁹⁴ Sudha Gopalakrishnan, the Mission Director for the National Mission for Manuscripts, said about indigenous knowledge that “[o]ur ‘intangible’ heritage is in grave danger and needs to be protected.”³⁹⁵ The end result of the debate was the creation of the TKDL, a digital database designed to catalog prior art in a manner that prevents the continued patenting of traditional knowledge.³⁹⁶ The database itself is a collection of information about over 1,500 asanas and ayurvedic treatments as well as their past and present histories in an attempt to prevent the appropriation of indigenous knowledge.³⁹⁷ Because both the US Patent Office and the European Patent Office agreed to recognize the contents of the database as proof of prior art, the cataloging of traditional knowledge in it offers a means of preventing the grant of patents on already-existing information.³⁹⁸ Though, as the conversation between the Hindu American Foundation and Chopra as well as Fish’s ethnographic research demonstrates, not all Indians or Hindus see eye-to-eye on the issue of the ownership of traditional knowledge. Nonetheless, the pushback against yoga’s commodification is real and significant.

In discussions about the ownership of yoga, assertions of Indian and Hindu identity perform two important rhetorically disidentificatory roles. First, individual acts of renaming reconceptualize copyright and patent law, prompting new conceptions of the fundamental

³⁹⁴ Nona Walia, “Kissa Copyright Ka,” *The Times of India*, July 9, 2004, <http://timesofindia.indiatimes.com/city/delhi-times/Kissa-copyright-ka/articleshow/771448.cms?>

³⁹⁵ Ibid.

³⁹⁶ Indeed, some estimates claim that 2,000 patents filed every year are based on Indian traditional knowledge. Mindy Fetterman, “Yoga Copyright Raises Questions of Ownership,” June 29, 2006, http://usatoday30.usatoday.com/tech/news/2006-06-28-yoga-usat_x.htm.

³⁹⁷ Mehta, “A Big Stretch.”

³⁹⁸ The agreement on the part of the US Patent Office is actually quite important—according to Section 102 of the US Patent Act, the existence of international prior art is generally not a bar for the purposes of patenting in the United States. 35 USC § 102 (2012). As a result, the TKDL is a significant victory for traditional knowledge advocates.

principles of the legal regime. Terms such as “cultural patents” and “intangible heritage” indict the boundaries of the intellectual property system, identifying its inability to account for the role of racial Others in knowledge production. In the spirit of disidentification, these rhetorical acts simultaneously deconstruct and critique the intellectual property system while engaging in reconstructive and reconstitutive acts of worldmaking.³⁹⁹ For Muñoz, the term worldmaking “delineates the ways in which performances—both theatrical and everyday rituals—have the ability to establish alternative views of the world...they are oppositional ideologies that function as critiques of oppressive regimes of ‘truth’ that subjugate minoritarian people.”⁴⁰⁰ In this case, positing alternatives to intellectual property law is an act of reimagining which conceives of a new regime for governing knowledge that considers and recognizes racial Others. Second, the desire to connect intellectual property with national identity acts as a mechanism for rethinking the world in a manner that recognizes marginalized groups. While the accuracy of the absolute link between Hinduism and yoga may be in doubt and the deployment of key concepts of intellectual property law, such as patent and copyright, inaccurate, the attempt to reclaim yoga’s heritage is a nationalistic maneuver which refuses the narrative of the practice as undifferentiated knowledge in the public domain, owned by no one. The assertion of national identity constitutes yogic knowledge, linking it with Indianness and Hinduness and refusing the narrative that there is a single, undifferentiated public domain in which individual contributions cannot be identified. Indeed, the prevailing narrative of traditional knowledge, which I discuss in greater depth in the following section, posits Western colonizers as the civilizing forces which refine and polish the haphazard mass of information that colonized peoples cluelessly possess.⁴⁰¹ Succinctly stated,

³⁹⁹ Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*, 195.

⁴⁰⁰ Ibid.

⁴⁰¹ Halbert, *Resisting Intellectual Property*, 136-137.

through the nationalistic discourses of the Bikram Yoga controversy, “a national identity for a new type of political subject was born.”⁴⁰² This political subject confronts the erasure of racial Otherness from the landscape of intellectual property, rendering visible the links between otherwise ahistoric raw materials in the public domain and particular social identities. Indeed, rhetorical disidentification renders visible racial histories in the manner Gilroy advocates, disallowing erasures of marginalized groups which make exploitation possible. Moreover, the historicized Indian subject is one capable of contributing to a global phenomenon—far from being powerless, the Indians and Hindus who contributed to yoga are forces to be reckoned with and the creators of an increasingly valuable commodity form.

The manner in which Indians and Indian Americans perform their discontent with the regime of ownership which governs yoga confronts the dehistoricization of the practice and forces consideration of the individuals who contributed to its creation, formation, and evolution. While Coombe identifies the circulation of racially derogatory trademarks as a way of constituting national identity, erasures of racial histories in discourses of invention is an equally important means of racialization. Refusing to acknowledge the contributions of marginalized groups and categorizing traditional information as “undiscovered” or an ahistoric part of the public domain effects the same type of constitutive process that occurs through trademarks. Moreover, the forced recognition of Indian and Hindu identity interrupts white and Western narratives of invention, particularly as they define the nation. American national identity is built around the inventor—from Benjamin Franklin to Thomas Edison, the American Dream is embodied by individuals who demonstrate the ingenuity of their inventive forefathers. This narrative is marked by the erasure of bodies of color and their labor. The linking of yoga and

⁴⁰² M. Charland, “Constitutive Rhetoric: The Case of the Peuple Quebecois,” *Quarterly Journal of Speech* 73, no. 2 (1987): 134.

Indian national identity operates as a counternarrative American-style objectification and commodification of yoga. The history of yoga told by some Indian government officials, Indians, and Indian Americans and foregrounded here demonstrates the myth of the originality of patented knowledge and makes visible the role of marginalized groups in the process of creation.

Patentability, prior art, and the public domain

Marginalized groups are rendered visible in the discussion of the ownership of traditional knowledge through the redefinition of the very landscape of copyright and patent law and the concomitant rewriting of the public domain.⁴⁰³ Dr. V. B. Gupta, Head of the IT Division of the Council of Scientific and Industrial Research and the creator of the TKDL, explains, “[y]oga was created in India as early as 2000 B.C. Copyright doesn’t exist on anything after 50 years, and it is in the public domain...So someone claiming yoga as their own and charging franchise money is not acceptable.”⁴⁰⁴ A recent research paper on the TKDL explained the topic similarly: “Once the traditional knowledge is recorded in TKDL, it becomes public domain knowledge. Under patent law, this means that it is considered to be prior art and hence is not patentable.”⁴⁰⁵ The statements of Gupta, Hirwade, Jain, and Gopalakrishnan and the actions of the Indian government intervene in a Western narrative of the public domain, recasting the concept to reflect knowledge and practices of those who are racially different. In doing so, they force rereadings of intellectual property’s most central terms from the vantage point of Otherness. In asserting the voice of the Indian people in constituting the public domain, contesting the meaning of prior art and patentable, the individuals cited here break the Western monopoly on defining

⁴⁰³ While the use of the term patent in the context of yoga is inaccurate, the discourses I identify here still prompt the reevaluation of patent law’s scope and relationship to traditional knowledge.

⁴⁰⁴ Susanne Hiller, “Hottest Yoga in Town: At 100 Degrees You Feel the ‘Bikram Glow.’ It’s Not Pretty,” *National Post*, March 12, 2003.

⁴⁰⁵ Hirwade, “Protecting Traditional Knowledge Digitally: A Case Study of TKDL.”

the boundaries of intellectual property. Moreover, they implicitly and explicitly demonstrate public domain's tendency to ignore questions of difference and erase racial histories, functionally critiquing the omissions of marginalized groups in the work of Lessig and other free culture advocates. As Kimberly Christen points out, Lessig, in particular, fails to acknowledge that "[i]ndividual creators are privileged even as they build on knowledge sets from the past and work from biased (not neutral) technologies, knowledge practices, and economic structures. The rhetoric of freedom—free of restrictions—replays the structure of enclosure, open for some closed for others."⁴⁰⁶ Gupta, Hirwade, Jain, and Gopalakrishnan direct attention to free culture's omissions, centering the concepts of patentable, prior art, and public domain on issues of race.

Technically speaking, the TKDL is a digital database which catalogs knowledge about Indian traditional knowledge, including Ayurveda and yoga, that would otherwise be largely inaccessible to a Western audience. It is the combined effort of the Council of Scientific and Industrial Research and the Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy. The digital database uses a "novel classification system" called the Traditional Knowledge Resource Classification that is modeled off of the International Patent Classification (IPC) designated by the World Intellectual Property Organization (WIPO), to create 207 subgroups of traditional knowledge for easier search and access to global patent offices and inventors.⁴⁰⁷ These subgroups are listed under four major categories: Ayurveda and unani, South Asian medical practices, and siddha and yoga, Indian yogic practices.⁴⁰⁸ By cataloging this knowledge, Gupta states that he hopes individuals in other nations will begin to recognize that traditional knowledge is collective and not privately owned. As of 2010, the TKDL contained

⁴⁰⁶ Kimberly Christen, "Gone Digital: Aboriginal Remix and the Cultural Commons," *International Journal of Cultural Property* 12, no. 03 (October 18, 2005), 333.

⁴⁰⁷ Nair, "Safeguarding India's Ancient Wisdom."

⁴⁰⁸ "Traditional Knowledge Resource Classification."

documentation for 900 poses, which were translated from Sanskrit to English, German, French, Spanish, and Japanese. As is the case with any such documentation project, not all information is represented. Gupta reported the need to downsize the 34 million page archive. With respect to yoga, yogis from nine schools are working to select and document *asanas*, ultimately memorializing the 250 most common poses in video form.⁴⁰⁹ As Geoffrey C. Bowker and Susan Leigh Star argue in *Sorting Things Out*, “[t]o classify is human.”⁴¹⁰ However, the process of classification, including the questions of who has the right to make classifications visible, define categories, and populate those categories are questions laden with power.⁴¹¹ At the most superficial level the Indian government, in creating the TKDL, is exercising its power to classify, thus asserting control over a knowledge classification process that has previously been reserved for colonial occupiers. Through the act of classifying, the TKDL emerges as a site for the negotiation not only of colonial hierarchies but also the right to create and negotiate categories of classification within a larger international framework.

Moreover, Gupta’s language, as well as the language of the others cited here, while operating within the existing framework for intellectual property law, asserts India’s agency in articulating the public domain and breaks the continuity of Western legal discourse. Because the public domain is integral in defining that which can be owned, i.e. that which is not already openly shared, by reasserting control over the concept of the public domain, the TKDL resistively redefines the very foundations of intellectual property law. In the context of patents, information in the public domain defines the prior art, or that which has already been invented. Thus, demonstrating that information is already in the public domain renders that information not

⁴⁰⁹ Wax, “‘Yoga Wars’ Spoil Spirit of Ancient Practice, Indian Agency Says.”

⁴¹⁰ Geoffrey C. Bowker and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (Cambridge, Mass.: MIT Press, 2000).

⁴¹¹ Ibid.

patentable, fundamentally reshaping the landscape of commodity ownership. Gupta's assertion of the public domain as a bar to claims such as Bikram's operate as "a strategy that tries to transform [the] cultural logic from within, always laboring to enact permanent structural change."⁴¹² The presents and futures that Gupta and others imagine situate infringement as a function of the definition of the public domain. They suggest that the theft and piracy that Western intellectual property law identifies are intimately related to definitions of core terms in patent law. They accordingly refer back to the need to invert the identification of racial Others as infringers, focusing instead on the means by which Western nations steal information from unrecognized creators, acting as pirates themselves.

In contrast to the court's opinion in *Open Source Yoga Unity* which presents Indian culture and history as an object with no creator and Choudhury's belief that he has perfected yoga through his self-created hatha yoga style, through the TKDL, the push to redefine patentable and prior art establishes yoga as a cultural process which is intimately linked to a nation of peoples with both histories and agencies. The rhetoric surrounding the TKDL constitutes yoga as a constantly changing body of cultural knowledge which, far from being removed from the Indian people, is fundamental to their very identities. As such, it recasts the Indian people as active agents capable of reclaiming histories which are erased from Western understandings of the public domain. Indian rhetorics of the TKDL directly respond to Bowery and Anderson's critique of the public domain as a space of historical erasure, asserting a present and past relationship to knowledge creation. As active agents, the Indian people are transformed into *curators* and *stewards* of yogic knowledge as opposed to members of a culture that once created yoga. That is not to say that all individuals are equally represented in the TKDL.

⁴¹² Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*, 11-12.

Indeed, one of Fish's critiques of the database is that its selection of content privileges some forms of yoga while ignoring others.⁴¹³ While it is true that the TKDL does not include all traditions of yoga, deprioritizing some yogis while prioritizing others, the power of creatorship that is vested in the Indian government instead of colonial powers is notable. The Indian government, no doubt, faces significant issues with respect to representation or lack of representation of marginalized groups. However, it privileges self-definition over imposed-definition and independence over colonization, refusing intellectual property's Western histories.

Read in the context of the rhetorically disidentificatory rhetorics of Gupta and other, India's actions become even more powerful, taking existing knowledge and refusing to cede authority over it to would-be colonizers. Here, the state's actions take on rhetorically disidentificatory potential as policies come to foreground the politics and histories of groups of marginalized subjects. A specific example of this refusal to cede authority occurred in 2009, when the Indian government and the European Patent Office entered into an agreement to share the information in the TKDL. The press release announcing the partnership states:

...the 30-million-page database will help to correctly examine patent applications relating to traditional knowledge. "With the TKDL, examiners have improved access to background information at an early stage of patent examination"...The process to challenge the granted patents proved lengthy and cumbersome as some traditional knowledge had only been documented in Sanskrit or other ancient writings and thus required extensive translation. With the advent of the TKDL however, the once onerous process has been transformed into an organized and objective system. The texts...offer extensive details about ancient medical practices and can now be accessed digitally.⁴¹⁴

What was once understood as information in the public domain but subject to Western legal doctrine has become "an organized and objective system" to be respected in defining the public

⁴¹³ Fish, "The Commodification and Exchange of Knowledge in the Case of Transnational Commercial Yoga," 201.

⁴¹⁴ European Patent Office, "India's Traditional Knowledge Digital Library (TKDL): A Powerful Tool for Patent Examiners," September 6, 2010.

domain. While on its face, the language of the European Patent Office (“EPO”) may appear to engage in the same objectification as the court in *Open Source Yoga Unity v. Choudhury*, the two texts have dramatically different implications. Here, the TKDL is recognized as an official source, implicitly acknowledging both the agency and creativity of its Indian creators. The EPO also admits its own deficiencies, specifically an inability to engage with “Sanskrit or other ancient writings.” The correctness of that knowledge and its usefulness in assuring the accuracy of Western knowledge is explicitly recognized and implemented in patent examinations.

While the EPO only recognized the effects of the TKDL on patentability, the United States has recently made a dramatic shift in position on yoga’s position in the public domain. In 2011, after Choudhury sued Yoga to the People for copyright infringement, the United States Copyright Office issued a statement clarifying the term “compilation authorship.” In a lengthy clarification in the *Federal Register*, the Copyright Office explained that yoga sequences are not copyrightable because they are not authored works but rather objects in the world. Specifically, “the Office will not register a work in which the claim is in a ‘compilation of ideas,’ or a ‘selection and arrangement of handtool’ or a ‘compilation of rocks.’ Neither ideas, handtools, nor rocks maybe protected by copyright (although an expression of an idea, a drawing of a handtool or a photograph of a rock may be copyrightable).”⁴¹⁵ Partially validating the continued confusion over whether Choudhury’s claims were copyrightable or patentable, it stated in response to Choudhury’s original claims that his yoga sequence was copyrightable because it was both aesthetically pleasing and beneficial to health, “[w]hile such a functional system or process may be aesthetically appealing, it is nevertheless uncopyrightable subject

⁴¹⁵ “Registration of Claims to Copyright,” *Federal Register* 77, no. 121 (June 22, 2012): 37605–37608.

matter...However, such a copyright will not extend to the movements themselves...⁴¹⁶ The Copyright Office concluded quite decisively that “the section 102(a) categories of copyrightable subject matter not only establish what is copyrightable, but also necessarily serve to limit copyrightable subject matter as well. Accordingly, when a compilation does not result in one or more congressionally-established categories of authorship, claims in compilation authorship will be refused.”⁴¹⁷ Nonetheless, the Copyright Office refused to revisit past cases, including those involving Choudhury, leaving the issue of the copyrightability of yoga *asana* sequences at least partially open.⁴¹⁸ Yoga to the People and Choudhury settled soon after and though the terms of the settlement were not public, Gumucio issued a statement on behalf of the studio noting that it had won the war against Choudhury and felt “fully confident that the sacred and traditional knowledge explored through yoga remains in the public domain, truly accessible to everyone.”⁴¹⁹ The use of the term “public domain” is consistent with the objections to Choudhury’s ownership practices that had unfolded over the years. Nonetheless, Gumucio, noting the all-consuming nature of the litigation he had been embroiled in, stated that Yoga to the People would cut ties with “Bikram the man and Bikram the yoga sequence.”⁴²⁰

At first glance, the comparison of yoga to hammers and rocks may seem to be the opposite of a decolonizing rhetoric. However, the analogy is an implicit endorsement of the histories of traditional knowledge and yogic knowledge in particular. The Western recognition of the materiality of yoga and its concrete existence in the world belies traditional practices of

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ Ibid.

⁴¹⁹ Greg Gumucio, “YTTP Open Letter to Students Re: Bikram” (Yoga to the People, December 3, 2012), <http://yogatopeople.com/wp-content/uploads/2012/12/Greg-Letter-Bikram-Settlement.pdf>.

⁴²⁰ Ibid.

colonialism which deny and discredit the existence of indigenous knowledge. The “thingification” of yoga actually serves the purpose of affirming the very reality of Indian yogic practice as something which cannot be “discovered,” “improved,” or “civilized,” even through selection and arrangement, turning Aime Cesaire’s reading of Karl Marx’s term as a reduction of the colonial subject into an object on its head.⁴²¹ Instead, yoga is transformed into a tangible practice, contrary to the intangible and legal noncognizable information that Gopalakrishnan mentions, compared to culturally embedded practices such as dance and sport.⁴²² Moreover, Choudhury’s act of merely selecting and arranging *asanas* is recognized as falling below the standard for authorship. Though it is certainly arguable that the responses of the European Patent Office and the United States Copyright Office merely bring yoga into the scope of biopolitical regulation, understanding yoga as an already highly controlled and commodified process is more accurate. Read in that light, the modification of the “compilation authorship” doctrine is a powerful example of the decolonization of an already colonized space. Moreover, like Williams’ *Mammy*, the TKDL is a material enactment of rhetorical agency that fills the empty space that masqueraded as yoga’s history. By translating ancient traditional knowledge into a variety of languages and memorializing the history of yoga, the TKDL works as “an

⁴²¹ Ania Loomba, *Colonialism/Postcolonialism*, 2nd Ed., The New Critical Idiom (New York: Routledge, 2005), 114.

⁴²² Notably, the Copyright Office writes that the underlying reason for the invalidity of Choudhury’s claim is that “[e]xercise is not a category of authorship in section 102 and thus a compilation of exercises would not be copyrightable subject matter.” “Registration of Claims to Copyright.” While this could incite a completely opposing reading of this case as a denial of the authorship of the colonial subject, i.e. Choudhury, it is better read as a recognition of the equality of the colonial and non-colonial subject. Yoga was a previously commodified practice, separated from its history that through the Copyright Office’s statement comes to be treated equal to recognized Western practices of dance and sport, not as an object to be owned.

explicit challenge to the revised conceptions of sovereignty that have been invented to accommodate the dreams of the new imperial order.”⁴²³

Despite the seemingly decisive statement by the Copyright Office, Choudhury continued to attempt to enforce his copyright. In late 2012, a federal district court decided the case of *Bikram Yoga College of India, L.P. v. Evolation Yoga, L.L.C.* Choudhury sued Evolation Yoga for the unauthorized use of the Bikram Yoga sequence in their yoga studio.⁴²⁴ Advancing the decolonial process started by the TKDL and the Copyright Office’s statement on the copyrightability of yoga, the federal district court held that Choudhury never held a copyright in his sequence, only the creative work that contained his sequence, i.e. the book he published in 1978. Moreover, the opinion goes on to explain that the Bikram Yoga sequence is neither a copyrightable compilation nor choreographic work. Instead, yoga poses are individual exercises that fall into the category of “facts and ideas”⁴²⁵ which cannot be owned. The very recognition of yoga poses as facts and ideas is a powerful decolonial end to this story: historically, colonial empires operated through the management of reliability, facts, and ideas, refusing to accept that colonial subjects possessed the intellectual capacity to create, manage, or organize such markers of scientific and social scientific process.⁴²⁶ While the power to authorize the existence of fact, as the federal district court does here, is part of the colonial project, given the complexity of the discursive backdrop that emerges relative to Bikram Yoga, that authority has, at least in part, been appropriated by those protesting the ownership of yogic knowledge. In India in particular,

⁴²³ Paul Gilroy, *Postcolonial Melancholia* (New York: Columbia University Press, 2005), 3.

⁴²⁴ *Bikram Yoga College of India LP v. Evolation Yoga, LLC*, 2012 U.S. Dist. LEXIS 177671 1 (United States District Court for the Central District of California 2012), *2-3.

⁴²⁵ *Ibid.*, *1, *9-14.

⁴²⁶ Christopher Alan Bayly, *Indian Society and the Making of the British Empire* (Cambridge: Cambridge University Press, 1988), 89; Zaheer Baber, *The Science of Empire: Scientific Knowledge, Civilization, and Colonial Rule in India*, SUNY Series in Science, Technology, and Society (Albany: State University of New York Press, 1996), 152.

“colonial knowledge generated ‘facts’ that constituted traditional India within a conceptual template that would be progressively theorized within modern world history.”⁴²⁷ Here, “facts and ideas” are reworked through the vantage point of Indian subjects, who refuse to cede authority over their creation, management, and organization to colonial powers. With the intervention of the TKDL not only has the contents of the public domain been redefined on behalf of traditionally marginalized and unheard rhetoric, but India has reconstituted the landscape of “invention,” both in the sense of knowledge-building and rhetorical production. Discourse surrounding the TKDL has reimagined the scope of the public domain and the place of Indian history within that public domain as well as multiple national intellectual property regimes. Moreover, the discourse surrounding the TKDL suggests the emergence of new avenues for the exercise of agency by the indigenous author: the public domain continues to expand to reflect the voices of indigenous peoples and their longstanding contributions to Western knowledge. The terms prior art and patentable have taken on new inflections and the copyright doctrine on which Bikram Yoga was created has been largely repudiated. Moreover, the TKDL creates space for new forms of rhetorical invention which, analogizing to Enck-Wanzer,⁴²⁸ also functions as an exercise of rhetorical agency. While the creation of new legal terms such as cultural patents and yoga piracy is an interesting rhetorical strategy, many critique such ideas for their inherent utopianism.⁴²⁹ On the contrary, in this case, the concept of the cultural patent is a way of critiquing copyright law’s failure to consider preexisting traditional

⁴²⁷ David Ludden, “Orientalist Empiricism: Transformations of Colonial Knowledge,” in *Orientalism and the Postcolonial Predicament: Perspectives on South Asia*, ed. Carol Appadurai Breckenridge and Peter van der Veer, South Asia Seminar Series (Philadelphia: University of Pennsylvania Press, 1993), 259.

⁴²⁸ Enck-Wanzer, “Tactics of Puerto Rican Cultural Production in East Harlem.”

⁴²⁹ Paul Heald, “The Rhetoric of Biopiracy,” *Cardozo Journal of International and Comparative Law* 11 (2004 2003): 519–546.

knowledge before granting property rights and appropriating a Western legal term for the purposes of effecting a decolonial project. Indeed, even in its misapprehension of the laws of copyrights and patents, the notion of a cultural patent forces consideration of possible similarities in the colonial functions of copyrights and patents as well as copyright's lack of concern for the ownership of centuries old traditional knowledge. And while there is no concrete evidence that India's push led to the Copyright Office's decision, anecdotally, the success of the TKDL in influencing grants of intellectual property rights and the timing of the Copyright Office's decision suggest that there is at least some link in the two occurrences. Further, redefining the public domain offers a promising mechanism for delinking intellectual property from its underlying liberal narrative and embracing alternative understandings of traditional legal concepts within intellectual property law.

Digital databasing as decolonizing practice

The digital database that came out of Indian objections to the copyrighting of Bikram Yoga sequence is a material assemblage which disidentifies with the colonial practices of collection, classification, and organization. Mignolo argues that control of subjectivity and knowledge, specifically epistemology, education, and formation of subjectivity, is a core part of the colonial project.⁴³⁰ Undoing colonial control over subjectivity and knowledge is, by corollary, an important part of the decolonial project. While in previous chapters I have focused on materiality as physicality and embodiment, the TKDL implicates different conceptions of the material and matter. As Packer and Wiley argue, "technologies—understood as technical media environments in which we are increasingly immersed—play a fundamental role in the composition of historical forms of sensation, cognition, experience, consciousness and

⁴³⁰ Mignolo, "Introduction," 156.

subjectivity.”⁴³¹ As such, they play “a constitutive role in the production of embodied experience.”⁴³² In this case, India’s performance of databasing, which privileges unread histories of traditional knowledge, contradicts dominant understandings of the origins of information, crafting new genealogies and lineages. In doing so, it links the embodied practice of yoga to otherwise invisible and even disregarded racial histories through the medium of the digital database. By advancing new forms of knowledge and forcing reconsideration of the cultural genesis of traditional knowledge, the TKDL confronts colonialism’s attempts to dehistoricize and appropriate yoga. The digital medium of the TKDL thus becomes a means for contextualizing bodies in space and time, tying them to cultural practices and identities, contesting globalized strategies for colonial knowledge ownership, and building an interconnected fabric of material and immaterial. Jennifer Daryl Slack uses the term assemblage to refer to such an amalgamation, defining the term as “an intermingling and arrangement of heterogeneous elements—structures, practices, materials, affects, and enunciation.”⁴³³ Through the TKDL, yoga becomes much more than the movement of bodies in space, it is a historically situated practice through which memory and identity are negotiated and decolonization effected.

Fundamental to this argument is the premise that collecting, classifying, and organizing information is not a neutral act but an ideological one which is intertwined with the project of colonialism. Bowker notes that act of memorializing knowledge in a record is a constitutive one which fundamentally shapes the scientific world. With the advent of systems of digital

⁴³¹ Packer and Wiley, “Introduction: The Materiality of Communication,” 11.

⁴³² Ibid.

⁴³³ Jennifer Daryl Stack, “Beyond Transmission, Modes, and Media,” in *Communication Matters: Materialist Approaches to Media, Mobility and Networks*, ed. Jeremy Packer and Stephen B. Crofts Wiley (London; New York: Routledge, 2011), 144.

information gathering, our past is “now malleable with a new viscosity.”⁴³⁴ The collection, classification, and organization of information is an act of memory through which new possibilities are created and eliminated.⁴³⁵ Of course, in the context of colonialism, such practices were used to create racial hierarchies. After European explorers “discovered” facts in the world, they organized them into, as Mary Louise Pratt calls them, “descriptive apparatuses.”⁴³⁶ The classification and organization of information became a central part of European worldmaking. Ordering the natural and racial world was imperative to ensuring the establishment of stability in an otherwise chaotic society.⁴³⁷ In India, “orientalists and missionaries fashioned a Hinduism largely in terms of their own conceptual frameworks, informed by such Enlightenment ideas as modernity, rationality, linear progress, and development, all being qualities which were seen to be deficient or lacking in Hinduism.”⁴³⁸ Indian traditional knowledge, then, is filtered through the lens of Western systems of ordering and arrangement, with legal, scientific, and philosophical concepts providing the frame through which they are memorialized—or not memorialized—and understood. Particularly in the context of intellectual property law, ceding the ability to define the scope of creation silences non-Western thought and practice, permitting it to be treated as mere raw material.

The TKDL interrupts Western attempts to impose order upon the racial Other, asserting rhetorical agency through the very affirmation of Indian ways of knowing, ordering, and remembering. Though the TKDL is certainly not exhaustive and privileges certain yogic

⁴³⁴ Geoffrey C. Bowker, *Memory Practices in the Sciences* (Cambridge, Mass.; London: MIT, 2008), 7.

⁴³⁵ Ibid.

⁴³⁶ Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation* (London; New York: Routledge, 2008), 15.

⁴³⁷ Sharada Sugirtharajah, *Imagining Hinduism a Postcolonial Perspective* (London; New York: Routledge, 2003), 71.

⁴³⁸ Ibid, xii.

practices over others, it is nonetheless an important attempt to center Indian voices in a domain otherwise dominated by Western thought and practice.⁴³⁹ The inclusion and exclusion of information in the TKDL is always already a political one through which history, authenticity, and identity are constitute and reconstituted. Nonetheless, the TKDL constitutes and organizes traditional knowledge, choosing four categories of medicinal and yogic knowledge that are appropriate to the information presented. Those four subcategories are further organized according to the type of information. For example, the Ayurveda category includes pharmaceutical preparations (kalpana), personal hygiene preparations, dietary preparations, and biocides and fumigatives (dhupana, krimighna). Combined with the letter code from the overarching four categories of Ayurveda, unani, siddha, and yoga, as well as the mode of preparation for the item results in a unique alphanumeric code.⁴⁴⁰ Bowker proclaims, “[p]erhaps the most powerful technology...in our control of the world and each other over the past two hundred years has been the development of the database.”⁴⁴¹ Indeed, the database is a central exemplar of the ordering practices through which colonization was effected and the memorialization of the European world enacted. The creation and subsequent ownership of databases is a means of restricting access to knowledge and controlling memory through infrastructure.⁴⁴² The contents and structure of the organization of information are integral to the process of remembering and the histories which are and are not filtered down to the masses. In the context of intellectual property, information is structured and managed, at least in the United States, by the US Patent and Trademark Office and the US Copyright Office. As arbiters of the

⁴³⁹ Fish, “The Commodification and Exchange of Knowledge in the Case of Transnational Commercial Yoga,” 201.

⁴⁴⁰ “Traditional Knowledge Resource Classification.”

⁴⁴¹ Bowker, *Memory Practices in the Sciences*, 108.

⁴⁴² Ibid, 116.

grant and enforcement of technical and creative information, they determine how traditional knowledge will and will not be seen and heard, especially vis-à-vis new intellectual property claims. At an international level, WIPO's IPC is an important site for the organization and dissemination of knowledge available to patent examiners worldwide in deciding whether to grant patents. While the TKDL is integrated into the IPC, it retains its own infrastructure and independent website. It is thus a hybrid space which both engages and sufficiently conforms to international standards to operate as a recognized source of knowledge but also preserves the specificities of Indian traditional knowledge categories. As such it is a decolonial project, which through the rhetorical disidentification of multiple actors, effectively resists exclusionary international and national enactments of patent law and foreground Indian histories.

The TKDL is, without a doubt, laden with its own implications for privileging some voices and ignoring others. Such choices are always inevitable in the collection of knowledge. However, the TKDL recenters power in the discussion over intellectual property rights, affirming the Indian government's role in producing and disseminating proof of its traditional knowledge. The mere force of recognizing the rhetorical agency of the racial Other cannot be underestimated. Former colonial powers permitting former colonies to shape the very databases through which memory is shaped is a meaningful act of decolonization in itself. The choices made in constructing the database are decolonizing ones as well. The TKDL is accessible from the internet—even from my living room, I am able to run a Google search and examine the contents of the database. The accessibility of the information provided suggests the need for transparency and dissemination of knowledge in the public domain, if for no other reason than to ensure the integrity of existing intellectual property regimes. The TKDL itself connects the embodied practice of yoga to the concept of traditional knowledge as well as the histories of

Indian and Hindu culture. Materially speaking, traditional knowledge is no longer ephemeral information kept in the heads of aged spiritual leaders but a contemporary practice which manifests on the World Wide Web. It is integrated into daily life, made visible through its accessibility, and marked as decolonial through its central display of the word “biopiracy.” The TKDL intervenes to prevent the ownership of cultural knowledge. Perhaps more importantly, it operates to create a decolonial fabric through which bodily practices are made to be a part of the world’s history and their creators recognized as indigenous peoples, not simply accepted as sufficiently original and entrepreneurial Westerners.

CONCLUSION

Remythologizing Infringement

At the end of his discussion of the links between intellectual property rights violations and terrorism, US Attorney Michael Mukasey advocates for legislation that would “equip law enforcement with the tools necessary to fight these crimes and protect property owners” as well as “toughen penalties for counterfeiting crimes that threaten public health and safety, and for repeat offenders.”⁴⁴³ Calling for the criminalization of even attempted copyright infringement and permission to wiretap, Mukasey’s linking of intellectual property rights violations to terrorism serves a very tactical purpose, namely to result in tougher penalties for the theft of intangible trademarks, patents, and copyrights as well as more invasive tools for searching out the suspected infringers that he has previously named. Moreover, Mukasey’s language evolves in a very important way at the end of his speech, also operating to justify the criminalization of intellectual property rights infringement. No longer referring to intellectual property rights, he merely refers to “property owners,” normalizing the view that real property and intellectual property can be equated. While the former always takes physical forms, the latter may be tangible or ephemeral. In a practical sense, this move erases the differences between concrete items such as objects and land and symbolic representations such as writings and images. Real property, however, is not the same as intellectual property, among other reasons, because it cannot be simultaneously used by one individual without encumbering the rights of another individual. In the most basic of examples, two individuals cannot wear the same pair of socks simultaneously. Intellectual property, however, describes information that can be shared, developed, and reappropriated. Nonetheless, the first part of Mukasey’s speech, which sets the

⁴⁴³ Mukasey, “Remarks Prepared for Delivery by Attorney General Michael B. Mukasey at the Tech Museum of Innovation.”

stage for his argument in favor of the expansion of intellectual property rights, ignores these distinctions, focusing instead on the intellectual property rights violator as a threat to life and limb. As William Patry argues, “[d]escribing someone as a thief or trespasser,” in this case also a murderous terrorist, “must be seen...as a metaphoric step in *gaining* property rights, and not as is usually thought, as a result of *having* intellectual property rights in the first place.”⁴⁴⁴ Indeed the image of the infringer justifies the creation of intellectual property policy.

Mukasey’s speech calls attention to another important issue as well: *who* is habitually cast as the infringer. As this project has demonstrated, racial Others are often represented as the intellectual property criminals against which the United States must defend itself, resulting in social structures and policies which systematically target non-whites domestically and internationally. The racialization of infringement quickly becomes a justification for the occupation and militarization of places in the world inhabited by the racial Others prone to steal intellectual property. As such, the racialization of intellectual property infringement quickly emerges as a racial project through which global imperial power structures are justified and expanded. Despite the fact that Mukasey’s assertion of the links between intellectual property rights violations and terrorism have been highly criticized, his rhetorical act of connecting trademark, copyright, and patent infringement with certain groups of individuals lingers, as evidenced by this project’s tracing of the racial logics of intellectual property. Intellectual property discourses are rhetorical spaces in which racial difference is naturalized and the belief that non-white Others are thieves is confirmed, affirming white supremacy. In an America that is often described as being post-racial and thus beyond the discriminatory use of racial categories

⁴⁴⁴ William F. Patry, *Moral Panics and the Copyright Wars* (New York: Oxford University Press, 2009), 87.

for such purposes, the racialization that unfolds in the discursive formations of trademarks, copyrights, and patents is particularly noteworthy and troubling.

However, as this project has shown, marginalized groups have recognized the problematic articulations of intellectual property rights with racial difference, finding rhetorical and performative ways to contest the racialization of the infringer and the whiteness of the creator. In particular, *rhetorical disidentification* emerges as a means of both working within the boundaries of intellectual property law and contesting its core assumptions in a manner that creates space for the histories of marginalized groups. While Muñoz theorizes disidentification as a means of understanding the manner in which drag performances resist existing gender norms,⁴⁴⁵ my examination of rhetorical disidentification examines the rhetorical and performative reconstitution of legal boundaries. This is not to suggest that rhetorical disidentification can only work an act of rewriting of the law itself but rather to emphasize that I have shown that legal regimes, like gender norms, are constantly evolving social formations that can be reformulated through rhetoric and performance. Instead, this concept can be understood as a method for closely examining the seemingly compliant acts of marginalized groups in several realms of human activity and developing nuanced theories about the nature of their expressions and enactments. Rhetorical disidentification with intellectual property law involves the simultaneous working within and rewriting of narratives of race and infringement, often recasting the latter as resulting from questionable claims of property ownership. While, as Patry argues, the representation of the figure I refer to as the infringer may work as a mechanism for justifying draconian intellectual property policies, the problematization of the public domain works as a means of reconstituting the definition of the infringer upon which those policies rely.

⁴⁴⁵ Muñoz, *Disidentifications: Queers of Color and the Performance of Politics*.

In essence, by contesting whether intellectual property rights are properly granted in the first place, the rhetorics and performances of marginalized groups remake the very assumptions upon which the laws of trademarks, copyrights, and patents rest. Rendering visible erased histories of marginalized groups serves the important function of problematizing claims of private ownership and forcing critical evaluation of whether material ought to be commonly held. Whether the assertion of agency within legal contexts results in the actual reconstitution of the law, it is nonetheless a resistive intervention which recasts the infringer not as racial Other but white subject. Each of the cases addressed in this project demonstrate, then, how the metanarrative of race which underlies intellectual property crime is underpinned by a belief in white supremacy.

The reformulation of the boundaries of intellectual property law takes a number of forms. Yet whether through the presentation of visual images, creative appropriation of existing texts, or compilation of indigenous knowledge, rhetorical disidentification functions to foreground gaps in racial histories and aid marginalized groups in finding new and productive ways to resist intellectual property law by using it against itself. The case studies examined here demonstrate that marginalized subjects use rhetorical disidentification to assert agency even in contexts in which that agency is forcibly silenced. The process whereby they seize social agency is a complicated one which is frequently mediated by the often stifling voices of majority culture and remnants of colonial frameworks. However, even considering those obstacles, the resistance is no less real. Marginalized subjects assert their agency in ways which are visible and tangible, effective in reviving histories of race and domination, and forcing the revaluation of Western legal standards. Through *Mammy*, even though it is narrated through the perspective of white artist Andy Warhol, Williams tells a story of race and reclamation that might not otherwise be heard. Through *The Wind Done Gone*, Randall revives lost agency through parody,

simultaneously demonstrating that racial others can be creators and not simply imitators. In creating the TKDL, a tool for reconsidering legal terms and forcing acknowledgment of the contributions of marginalized groups to global knowledge production, a vocal group of Indian government officials, Indians, Indian Americans, and ultimately the Indian state, take a powerful stance against Western commodification of indigenous knowledge, particularly yoga *asanas*. In each of these cases, the material remnants of the case, whether in the form of collections of Americana, novels and legal archives, or digital databases, serve as markers of the histories that are silenced and erased by intellectual property law and dominant culture.

Identification revisited

Identification, as Burke understands it, is a means of establishing not only commonality between the rhetor and the audience, but in part *becoming* the rhetor.⁴⁴⁶ In this sense, identification suggests an assimilation of the rhetor and unity of speaker and listener. When mapped onto the issue of race, however, Burke's understanding of identification becomes troubling, suggesting the replacement of all or part of the Other with all or part of dominant culture. Not only does this acknowledgement of only the assimilation of the racial Other into the rhetor as well as dominant culture do violence to the marginalized subject but it also suggests a fundamental deficit in rhetorical theory. Offering only a conceptual frame for understanding identification with the rhetor necessarily silences enactments of resistance by marginalized subjects. Identification is certainly a useful concept for theorizing persuasion through commonality but calls out for a supplement to its theoretical limitations. This project thus serves an important purpose in advancing studies of difference in rhetoric. While identification is productive in considering aspects of persuasion stemming from similarities between the rhetor

⁴⁴⁶ Burke, *A Rhetoric of Motives*, 22.

and audience, it cannot, by its very definition, access moments of dissent. Rhetorical disidentification permits consideration of the situation in which the listener rejects the message of the rhetor, seeking to reconstitute or redefine the message. Rhetorical disidentification provides a means of reading and engaging with moments of resistance that do not, at first glance, appear to be resistive. It allows for the consideration of tactical positioning, in Chela Sandoval's terms "differential resistance."⁴⁴⁷ In rhetorical disidentification as in differential consciousness, "it is the citizen-*subject* who interpellates, who calls up ideology, as opposed to Althusser's formulation, in which it is 'ideology that interprets the subject.'"⁴⁴⁸ Rhetorical disidentification is a willful choice to accept and reject dominant ideology, one through which "positions and beliefs are called up and utilized in order to constitute whatever forms of subjectivity are necessary to act in an also (now obviously) constituted social world."⁴⁴⁹

The case studies examined here show that subjects are not merely interpellated into the regulations and norms of intellectual property law. Rather, the rhetorics and performances of marginalized groups intervene in discourses of trademarks, copyrights, and patents, interrogating their foundational mythologies and forcing a rethinking of the presences and absences of marginalized groups within their boundaries. Williams' rhetorics and performances in the creation of *Mammy* are tactical engagements with trademark law which draws attention to the legal regime's erasure of marginalized subjects and overexpansive ownership practices. While Warhol is arguably not a marginalized subject under most definitions, he too confronts power structures through his creation of *Mammy*, specifically those related to copyright law. Randall's *The Wind Done Gone* deploys the parodic in a manner which forces the redefinition of

⁴⁴⁷ Sandoval, *Methodology of the Oppressed*, 30.1.

⁴⁴⁸ Ibid.

⁴⁴⁹ Ibid.

copyright's fair use doctrine, leveraging "the art form that under modernism mimicked the dominant order to challenge it."⁴⁵⁰ India's creation of the TKDL offers insight into the globalized nature of the intellectual property regime and the potential for rhetorical disidentification to operate not only at the individual level but at the national level as well. Through the construction of a digital database, the vocal opponents of Western-style commodification of yoga reject colonial forms of knowledge creation, preferring instead a mode of organization and classification which foregrounds its own histories. The materiality of these acts of opposition is noteworthy. *Mammy* and Warhol's collections, *The Wind Done Gone* and the records culled from *Suntrust Bank v. Houghton Mifflin*, and the TKDL are not mere ephemera which leave no trace of the histories of marginalized groups. Instead, they continue to exist as material markers of the need to acknowledge and render visible the histories and experience of marginalized groups within intellectual property law.

Dismantling infringement, reconstituting the public domain

At the heart of rhetorical disidentification is the notion of redeeming intellectual property, at least in part, by creating space for the voices of racial Others in its narratives. Kristen Carpenter, Sonia Katyal, and Angela Riley, in a piece entitled "In Defense of Property," argue for the need to rethink Western notions of property, embracing broad understandings of the concept which affirm the cultural identities of groups of persons instead of the atomizing philosophy of possession. Building on Margaret Jane Radin's argument that property which is linked to personhood is incommensurable, they argue that "some properties are so constitutive of one's identity that they demand treatment that transcends—and surpasses—that of an ordinary

⁴⁵⁰ Ibid, 18.9.

market transaction”⁴⁵¹ For them it is not only possible to deploy the undoubtedly problematic notion of property in an emancipatory manner but required: through property comes respect for peoplehood and thus the affirmation of the multiplicity of voices of Otherness. The examples of rhetorical disidentification discussed here similarly demonstrate the utility of property, or in this case intellectual property, as a means of exercising of agency and productively intervening in legal structures. Indeed, using the very social formations and discourses of intellectual property is one important way in which marginalized groups can “speak or write in a way that will be recognized or heeded by others in one’s community”.⁴⁵² The outsider-within who transgresses boundaries and reformulates legal concepts, power/knowledge dichotomies, and silences in the history of racial formation plays an integral role in bridging the gaps between old and new conceptions of property and intellectual property and acts as an agent who transforms existing legal structures in ways that produce emancipatory politics.⁴⁵³

The examples I discuss here suggest a rhetorical and performative corollary to Kimberley Christen’s idea of remix in an aboriginal context, which of course plays on Lawrence Lessig’s use of the term.⁴⁵⁴ She argues that emerging Warumungu archives, unlike the colonial databases which created social hierarchies based on race, actually give voice to aboriginal peoples and “redefine national and global debates concerning the preservation and production of indigenous traditional knowledge in the cultural commons.”⁴⁵⁵ I offer the term remythologization to describe the process of retelling of accepted narratives of race, power, and knowledge in ways that assert rhetorical agency for marginalized groups and make visible multiple histories of race.

⁴⁵¹ Kristen Carpenter, Sonia Katyal, and Angela Riley, “In Defense of Property,” *Yale Law Journal* 118, no. 6 (2009): 1022–1124.

⁴⁵² Campbell, “Agency,” 2.

⁴⁵³ Johnson, *Appropriating Blackness*, 109.

⁴⁵⁴ Christen, “Gone Digital.”

⁴⁵⁵ *Ibid.*, 317.

Remythologization suggests constant evolution of racial mythologies in a manner that integrates and rewrites the very cultural assumptions which animate them. Moreover, the notion of remythologization suggests the retelling of history through the eyes of marginalized groups, foregrounding, as Gilroy advocates, lost memories of race and coloniality.⁴⁵⁶ Remythologization highlights the disparities in regimes of copyright, patent, and trademark ownership. That is, through rhetorical disidentification, the tendency of intellectual property law to privilege the majority at the expense of marginalized groups becomes visible.

Through Williams' rendition of the *Mammy*, as memorialized by Warhol, the corporate ownership of racial histories, in this case the image of the mammy becomes evident as does the relationship between the Aunt Jemima brand and national identity. Williams' rhetorics and performances confront Quaker Oats' monopolization of the history of domestic servitude in the South, effectively rewriting it. Through *The Wind Done Gone* and *Suntrust*, the very text of a novel and the legal compilation in which it resides become a tangible marker of new histories. In the context of the TKDL, the past of yoga, and hence the status of South Asians as creators of knowledge, becomes evident. These three examples demonstrate how remythologization is a means of deconstructing "[t]he ideological and conceptual residue of colonial assemblages that once haunted archiving work are being appropriated and being mixed in (up) with indigenous sets of motivations."⁴⁵⁷ In the context of intellectual property law, then, rhetorical disidentification is a tool for seizing social agency in part because it illuminates the inequities and absences in copyrights, patents, and trademarks, and revises existing legal concepts.

The role of resistance, rhetorical disidentification, and remythologization in transforming intellectual property law from a space of dispossession of marginalized groups to emancipation

⁴⁵⁶ Gilroy, *Postcolonial Melancholia*.

⁴⁵⁷ Christen, "Gone Digital," 319.

is significant. Rhetorical disidentification not only offers a way of theorizing the incremental change of intellectual property law from within but it complicates the relationship of the marginalized subject with the law, recognizing the possibility of contesting and appropriating legal discourses against themselves. Because racial formation is an ongoing process, driving by the constant negotiations and articulations of race within society, rhetorical disidentification can have tangible implications for intellectual property law, as demonstrated here. The case studies examined in this project, with varying degrees of explicitness, draw attention to the ways in which the nation, its laws, and its ideologies have *not* become post-racial or colorblind. They fundamentally critique the denigration of racial difference through intellectual property discourses, pushing instead for a confrontation with the ideological assumptions of trademarks, copyrights, and patents. And while these case studies demonstrate that race is an ongoing part of negotiations of law, power, and knowledge, they also highlight the power of rhetorical disidentification as a tool for reimagining creation and infringement in egalitarian ways and constituting new and emancipatory relationships between race and intellectual property law.

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