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Parodies of Ownership

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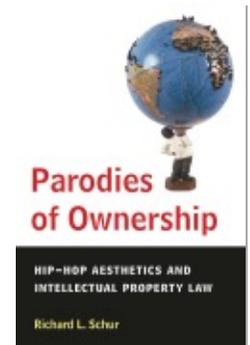
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Critical Race Theory, Signifyin', and Cultural Ownership

By the 1980s, Civil Rights–era strategies and reasoning no longer could respond effectively to evolving forms of racism. The impediments to equality and freedom had been altered from the physical violence of Bull Connor to the representational violence of the Reagan era. The post–Civil Rights era transformed the grammar and syntax of racism, racialization, and white supremacy. The success of the 1963 March on Washington and the “I Have a Dream” speech altered how Americans argued for a status quo where many African Americans (though not all) lived with de facto second-class citizenship. If political leaders previously relied on consciously racist language to keep African Americans “in their place,” the 1970s and 1980s saw a resurgence of property rights and state’s rights rhetoric that evaded overt references to race while tapping into racialized fears.

In legal discourse, *Arlington Heights* (1977) exemplifies the limits of Civil Rights strategies that rely on legal decision makers to remedy racial inequality. A housing developer wanted to change the zoning classification of a parcel of land so he could build apartment buildings for low-income families in a mostly white suburb of Chicago. At the zoning board hearings, some people objected to the possibility of poor African Americans moving from the city to the suburbs, but most focused on the potential change to “settled” zoning laws and the town’s strategy to create buffer zones between commercial and residential districts. The town refused to

change the zoning rules, and the developer filed suit. Because the record did not establish a clear and overt racial bias, the court found no discriminatory purpose in denying the zoning change. The town fought the construction of a low-income development probably due to racialized fears. Because it relied on the “color-blind” rhetoric of property rights, the court could not “see” the presence of race.¹

Radical legal scholars became concerned about the increasingly limited efficacy of legal discourse in remedying social problems. Weaving together strands of Marxist and postmodern thought, a movement of like-minded scholars created critical legal studies (CLS) to identify the contradictions of liberal legal thought that had created an impasse in the effort for meaningful social reform. Mark Kelman identified three main contradictions that CLS found in liberal legal ideology: (1) the contradiction between a commitment to “mechanical rules” and law’s claim to review all cases on their own merits; (2) the contradiction between liberal thought’s valuation of individual desires as the basis for social life and its appeal to universal reason and objective knowledge when it engages in legal reasoning; and (3) the implicit tension between trying to validate and respect personal choice and acknowledging how social forces shape individual lives.² Roberto Unger, one of the earliest proponents of what became CLS, concluded that “without a guiding vision, legal reasoning seems condemned to a game of easy analogies.”³ As a result, CLS focused on the crisis of legitimation in which legal discourse, because it contains a range of attitudes and perspectives, can be used to legitimate contradictory conclusions about a legal problem. As a postmodern legal movement, CLS focused on the language’s rhetorical slippage and the failure of reason to explain human behavior and legal decisions.⁴

From legitimation, CLS turned to its attention to power, especially as described by Michel Foucault in *Discipline & Punish* (1995) and *The History of Sexuality, Volume 1* (1990). Illustrative of these concerns, Peter Goodrich argued that law is concerned with “the transmission of power from person to person and from place to place by invisible means.” Goodrich argues further that “power is unseen, it can be imagined through the surfaces upon which it is inscribed.”⁵ To locate this unseen flow of power, scholars increasingly looked toward popular culture for the traces of law’s power. In the language of Foucault, these endeavors sought to map out the micro-physics of power. Rather than being means to develop strategies to end discrimination and oppression, textual indeterminacy and the sketching of cultural power soon became ends in and of themselves. CLS came to rep-

resent nihilism because it became identified with “trashing” law and liberalism due to its efforts to uncover the cultural biases of legal discourse but appeared to offer little hope about law’s utility for promoting cultural or social change.⁶

Initially, legal scholars of color supported the CLS movement, but they slowly grew disenchanted with the direction in which it was headed.⁷ Kimberlé Crenshaw invited a number of scholars of color, including Richard Delgado, Neil Gotanda, Mari Matsuda, Stephanie Phillips, and Kendall Thomas, to attend the first “Critical Race Theory” (or CRT) workshop in 1989. Crenshaw convened the meeting to discuss how lawyers could continue the work of dismantling racial hierarchy in the context of CLS’s growth in the legal academy.⁸ At the meeting, the participants organized their discussions around two common interests. First, they shared an understanding that white supremacy inhered in dominant and formally equal institutions as an endemic feature rather than as a deviation. They argued that lofty legal ideals, while in theory neutral and fair, have relied on unstated and unconscious racial assumptions. Thus, they expressed a certain amount of shared skepticism of legal principles such as the rule of law, objectivity, and equal protection as necessarily neutral. Second, they shared a commitment to altering racial hierarchy in the United States.⁹ While not all attendees shared a common perspective on how to accomplish their goals, all desired to use law to transform American culture. Other factors also shaped the birth of CRT. Its adherents were also concerned about the increase in urban violence, the “War on Drugs” and the incarceration of black men, chronic unemployment and underemployment, and white flight to the suburbs. The same factors that produced a shift in legal discourse also laid the foundation for the birth of hip-hop culture.¹⁰

Frustrated with postmodern legal theory, Derrick Bell, then a professor of law at Harvard, began writing short stories to illustrate the limits of traditional formal legal analysis, how it failed to connect with the lived experiences of African Americans. Bell’s stories, which were collected in his *And We Are Not Saved* (1987), demonstrated that law produced and regulated racial identity and that racialized discourses constituted a necessary foundation for the efficient operation of legal reasoning.¹¹ Unlike their postmodern counterparts, Bell and other critical race theorists insisted that human beings have created the category of race to realize particular social and economic ends and that the social construction of race affects individual lives.¹² Patricia Williams, another founding member of CRT, wrote a book that blended legal critique, autobiography, and cultural commentary in order to demonstrate how cultural narratives influence the content of rights dis-

course.¹³ The work of Williams, Bell, and Richard Delgado, author of *The Rodrigo Chronicles* (1995), challenged not only the boundaries of law but also the proper writing style for legal scholarship. By penning short stories (Bell), neo-Platonic dialogues (Delgado), and legal autobiographies (Williams), these authors sampled various literary styles, layered different voices from within the African American community in their writing, emphasized the orality of African American culture and the practices of everyday life, and included moments of humor and irony in their writing. Much as hip-hop has been criticized as a dangerous nihilistic enterprise, CRT has been accused of attacking reason and engaging in a wholesale cultural war.¹⁴

Some CRT proponents, such as Richard Delgado, argue that the new grammar of race requires a shift in tactics away from formal civil rights or constitutional law to other areas such as tort law. Delgado urges courts to articulate “an independent tort for racial slurs” that “would protect the interests of personality and equal citizenship that are part of our highest political traditions and moral values, thereby affirming the right of all citizens to lead their lives free from attacks on their dignity and psychological integrity.”¹⁵ In his seminal article “Words That Wound,” Delgado announces both a return to a fundamental premise of the Civil Rights Movement (that the movement was an effort to demand that dominant culture recognize the humanity and subjectivity of marginalized people) and a shift in orientation. He goes beyond focusing on *where* African Americans could or should own property to explore how the next stage in the civil rights struggle requires a remapping of knowledge that can acknowledge realms or dimensions “unseen” by the majority. For Delgado and other critical race theorists, post-Civil Rights era discrimination is not labeled publicly or obviously, like the signage of the segregated South. Thus, it appears to be invisible for legal discourse. By recognizing a tort for racial epithets, Delgado, in effect, argues that cultural discrimination may not leave visible scars, but it nonetheless affects the psyche. In the vocabulary of Carl Gutiérrez-Jones, we need to develop a new rhetoric of injury that is capacious enough to capture those aspects of racism, such as hate speech, that the Civil Rights Movement could not address and that thus remain invisible to dominant culture.¹⁶

Henry Louis Gates and Signifyin’

Mark Anthony Neal observes that Henry Louis Gates “has positioned himself as one of the most prominent gatekeepers of black intellectual

property” in large part because his book *The Signifying Monkey* set the terms of the debate about African American literature during the culture wars of the 1980s and 1990s. Even more astutely, Neal observes that Gates, in his role as one of the “deans” of African American letters, has come to understand that “black intellectual thought and criticism are wed with the demands of the mainstream marketplace.”¹⁷ *The Signifying Monkey* sought to uncover or make visible the connections between black vernacular speech and the African American literary tradition.¹⁸ Gates is most clearly responding to the theoretical turn in literary studies during the 1970s and 1980s that emphasized importing French theories, especially Derrida, to counter the New Critics’ formalistic analysis of American literature, which attempted to stabilize the meaning and value of literary texts. *The Signifying Monkey* thus attempts to provide African and African American origins for debates about textual indeterminacy and the coherence of cultural traditions. Gates seeks to show how trickster figures from African and African Caribbean culture are transformed on the journey to America, not to establish rules or laws of historical development but to demonstrate the connection between African and African American cultural forms in the present day.

For Gates, the central theoretical principle that unifies and explains the African American literary tradition is signifyin’. Adopted and adapted from scholarly literature in anthropology and linguistics, signifyin’, Gates concludes, “is a metaphor for textual revision.”¹⁹ It can appear in everyday parlance as “*talking shit, woofing, spouting, mucky muck, boogerbang, beating your gums, talking smart, putting down, putting on, playing, sounding, telling lies, shag-lag, marking, shucking, jiving, jitterbugging, bugging, mounting, charging, cracking, barping, rapping, bookooing, low-rating, hoorawing, sweet-talking, smart-talking*, and no doubt a few others that I [Gates] have omitted.”²⁰ In each of these versions, signifyin’ “depends on the success of the signifier at invoking absent meaning ambiguously ‘present’ in a carefully wrought statement” that playfully mines the indeterminacy of language to say one thing but mean another.²¹ Frequently, signifyin’ relies heavily on citing and rewriting well-known symbols, metaphors, or objects.

Because some have limited signifyin’ to the dozens, it has been wrongly reduced to a game of verbal aggression. However, Gates makes clear that signifyin’ cannot be reduced to the dozens because the practice, rightly understood, is simultaneously humorous and deadly serious, conveying meaning as much with style as with substance.²² It signals a “triumph of wit

and reason” based on verbal acuity.²³ According to Robin Kelley, signifyin’ is “an effort to master the absurd metaphor, an art form intended to entertain rather than to damage.”²⁴ Claudia Mitchell-Kernan clearly differentiates the insulting or verbally aggressive components of the dozens from its signifyin’ aspects. She argues that signifyin’ “incorporates essentially a folk notion that dictionary entries for words are not always sufficient for interpreting meanings or messages, or that meaning goes beyond such interpretations.”²⁵ While insults or verbal aggression can accompany signifyin’, they are not necessarily linked. To place signifyin’ at the center of African American literature is not to emphasize hostility or linguistic violence. Rather, such a focus emphasizes wordplay, textual revision, and metaphor.

Although he rarely directly states this, Gates seeks to infuse literary studies with an African American subjectivity. Signifyin’ stands in for a historically and culturally specific way of creating and understanding textual production, which Gates traces back to the late eighteenth century with the trope of the talking book. If postmodern literary theorists (the literary analog of CLS) sought to reframe literary analysis from the self-sufficient text assumed by the New Critics, Gates seeks to demonstrate that racial subjectivities shape how scholars read texts. Similar to critical race theorists, Gates wants to decenter the dominant cultural attitudes and narratives that have structured literary interpretation and limited the horizons of literary discourse. Following nearly identical paths, CRT and Gates both write over postmodern concerns about textual indeterminacy and the ubiquity of contradiction within acts of judgment to emphasize how the very discourses of law and literature themselves have been raced or racialized. Neither Gates nor CRT sees the gains of Civil Rights activists as being sufficient to transform social relations. Another step, one that recognizes how race unconsciously infects perception and judgments based on those perceptions, is needed.

A central element of Gates’s theory is that African American originality departs significantly from dominant notions of creativity. Gates succinctly notes that “the originality of so much of the black tradition emphasizes refiguration, or repetition and difference, or troping, underscoring the foregrounding of the chain of signifiers, rather than the mimetic representation of a novel content.”²⁶ In essence, Gates argues that the creativity of black vernacular speech emphasizes language use over language meaning. It matters not whether a speaker/writer first coined a phrase, idea, or expression; what matters is the art by which it is used to convey a new mean-

ing and make a new connection. Thus, the pleasure of a signifyin' text is how well it opens up the meaning of a seemingly well-defined and settled word or image.

A recent but excellent example of signifyin' occurs in Aaron McGruder's comic strip, *The Boondocks*. In one strip, Huey Freeman, a young radical African American boy, overhears several loud sounds outside his window as he reads the newspaper. When he goes outside, he sees Cindy, a white girl, with a football and Riley, Huey's "thuggish" brother, lying on the ground asking, "But how was I supposed to know she . . ." Throwing the newspaper at him, Huey interrupts and replies, "Read Dummy!"²⁷ In the strip, McGruder has refigured Charles Schultz's classic *Peanuts* situation where Lucy pulls the football away when Charlie Brown is attempting to kick it. At its most basic level, the strip signifies on Riley for not reading the newspaper, as "Read Dummy" is the slogan of Huey's radical newspaper, which Riley has never had time to read. If Riley did read Huey's or any other newspaper, he would know that in *Peanuts* cartoons, the girl always pulls the ball away from the boy. By framing this as an interracial encounter, McGruder reminds his readers that when African Americans trust whites, they tend to get fooled and wind up on their rear ends. It also suggests that black men should be careful in their encounters with white women, thus racializing the frequent instances of sexual tension that appear in comic strips. Lastly, it reinforces the unconscious norm of whiteness that underlies *Peanuts*, despite the occasional appearance of Franklin, and comic strips more generally.²⁸ Gates identifies this kind of textual revision, which emphasizes textual indeterminacy, as distinctive to African American art and culture.

To illustrate how vernacular influences literary culture in *The Signifying Monkey*, Gates occasionally turns to the jazz music of Count Basie, Louis Armstrong, Duke Ellington, Jelly Roll Morton, and Charlie Parker, or the musical criticism of Ralph Ellison, Langston Hughes, and Zora Neale Hurston. Gates identifies John Coltrane's version of "My Favorite Things" as an exemplary instance of formal parody: it begins with the melody of the classic Julie Andrews version before veering off into a completely different direction.²⁹ Jazz has long constituted the soundtrack for African American culture, and Gates follows the standard scholarly approach of placing music at the center of African American cultural productions, with other arts, such as writing and painting, occupying a derivative or secondary status. Although Gates is first and foremost a literary scholar, he nonetheless recapitulates this historical ordering of African American culture.

Signifyin' and Hip-Hop

A hip-hop rereading of signifyin' may appear to follow this pattern. For example, Aaron McGruder's *Boondocks* updates John Coltrane's rewriting of "My Favorite Things" by providing hip-hop-based lyrics for the song.³⁰ If Coltrane signified on Julie Andrews and suggested that jazz was the new "Sound of Music," then *The Boondocks* writes over Coltrane's revision and announces that hip-hop is the new "Sound of Music." McGruder thus signifies on critics who use jazz as the quintessential African American art form, especially during the age of hip-hop. This parody also shows the limits of Gates's jazz-influenced construction of signifyin', which includes both pastiche and parody as central features of African American cultural production. Pastiche, which Gates describes as unmotivated revision, focuses on the form of a text and how literary history names itself. Parody, or motivated revision, infuses words—taken from another text—and provides them with a new context and subverts their apparent meaning.³¹ Because Gates relies on jazz as his musical basis and on literature written before 1982, his attempt to map out the contours of African American cultural production does not quite seem to align with the hip-hop aesthetic that was emerging as he wrote his groundbreaking work. Greg Tate goes so far as to argue that Gates's approach to signifyin' has cut Gates off from contemporary African American cultural styles and themes, including hip-hop.³² This book's examination of recent art and literature suggests that hip-hop aesthetics has emphasized parody over pastiche in its use of signifyin' primarily because the increased circulation of racialized texts and new technology has made sampling or cutting and pasting popular images, sounds, or texts easier than ever before. The "calling out of one's name" also appears to have more commercial appeal than the "naming" of a tradition, and it certainly provides grist for the advertising and publicity mills that rule mass culture.³³

During the culture wars, scholars and activists sought to revise the norms, values, and direction of American culture in accord with multicultural paradigms. Conscious or motivated efforts to revise canons, institutions, and culture exploded. Hip-hop music and the hip-hop aesthetics it spawned emphasized parodic forms because they echoed and reinforced ongoing dialogues about diversifying public life. Pastiche or unmotivated revisions that borrowed material without substantial modification appeared "old school," accommodationist, or simply not radical enough to face the challenges of the post-Civil Rights era. I want to emphasize that

pastiche as form of signifyin' did not disappear after the 1980s, as the endless samples from George Clinton and James Brown attest, but it becomes a residual or minority form within African American culture. Hip-hop aesthetics prefers parody or irony because it mocks dominant culture and expresses the disappointment and despair attendant to the breaking apart of the Civil Rights coalition.³⁴ It also enables African American cultural workers to foreground the irony of African American life in a formally color-blind society, but one in which race still shapes so much for so many. Parody, not pastiche, as motivated revision provides a form that matches the cultural ethos.³⁵

To explore the differences between hip-hop and earlier iterations of signifyin', I will briefly contrast Frederick Douglass's parody of the nineteenth-century hymn "Heavenly Union" with A Tribe Called Quest's "Can I Kick it?" Scholars frequently overlook that Douglass's first *Narrative* concludes with a note of parody. Douglass, whom Gates identifies as "a master Signifier," culminates his attempt to write himself into freedom by crafting new lyrics to a common church hymn.³⁶ In the "original," a nameless narrator describes how his/her soul is saved and he/she attains a "heavenly union" with Jesus. In Douglass's much longer version, he "borrows" lines and the rhythmic pattern from the hymn but transforms its meaning and criticizes the hypocrisy of American churches, which supported slavery. In the standard version, the opening stanza proclaims that God "gave" the singer a heavenly union, whereas Douglass's parody states that churches merely "sing" of it. The bloody "fire and brimstone" imagery of the original, describing hell and sin, is reworked to depict the brutality of African American slavery. If churchgoers sang of their aspirations to unite with Jesus, Douglass emphasizes how the nation, or the "union" of states, constitutes a parody of real heavenly union because it has failed to realize its lofty political and Christian ideals.³⁷ Douglass clearly mocks Christian apologists for slavery and reworks one of their own texts to demonstrate their hypocrisy. This is signifyin' par excellence.

In many ways, A Tribe Called Quest follows the signifyin' ways of Douglass in its 1990 song "Can I Kick It?" which parodies and deconstructs Lou Reed's "Walk on the Wild Side." The song samples from and criticizes Reed's ode to sexual adventurism. In his song, Reed has "bitten," or stolen, African American R&B rhythms from the 1970s and exoticized black urban spaces through his sexualized lyrics. A Tribe Called Quest's parody, however, operates primarily through its samples, rather than the lyrics themselves. The samples rework Reed's song, deconstructing its references

to drug use, interracial sexuality, and societal rebellion. When he asks, "Can I Kick It?" Q-Tip of A Tribe Called Quest calls out Lou Reed for both identifying the location of his "walk on the wild side" as New York City and including African American girls within that walk.³⁸ Q-Tip questions Reed's ability to walk his streets or "hang" with A Tribe Called Quest. Although the lyrics do parody Lou Reed's, the group signifies on Reed primarily through the rhythm tracks and the melody. By reclaiming a stolen or bitten rhythm line, A Tribe Called Quest is engaged in a turf war with rock and roll. This battle is not about a physical space, but appropriated elements of intellectual property. Later in the song, Q-Tip asks David Dinkins, "Would you please be my mayor?" This references the election of the first black mayor of New York City and extends the parody and the claim of cultural ownership over New York City. A Tribe Called Quest calls out not only Lou Reed and rock and roll but the white political establishment that has attempted to dominate black urban spaces. "Can I Kick It?" simultaneously constitutes a parody of white popular culture and a demand for political and cultural freedom. The form of the music, although it shares some characteristics with Douglass's parody, also suggests a new use of signifyin' in the post-Civil Rights era.

Signifyin' functions like a trademark or copyright symbol. A successful instance of signifyin' constitutes an act of rhetorical ownership over an object, a text, or even an individual. For example, Douglass's parody demonstrated his moral superiority over Christian apologists through his verbal acuity, and A Tribe Called Quest asserts claims of cultural ownership over rock and roll and New York City. In both cases, African American cultural workers write over well-known texts. Signifyin', especially in the case of hip-hop, adds an "ironic spin" on the original, frequently "contradicting the original meaning."³⁹ The practice of signifyin' also refuses to acknowledge the seemingly settled distribution of property rights, which legal discourse purports to confer, and writes over them.⁴⁰ Although Gates does not call attention to this explicitly, he describes how signifyin' offers a method and a form to claim cultural and personal ownership over an object, sound, image, text, or trademarked logo. As a clandestine or alternative property-ownership system, signifyin' allows participants within African American culture to write over an unjust distribution of intellectual and cultural resources. This competing legal structure "allocates" rights over intangible objects within African American culture without following the requirements identified in copyright or trademark law. For popular and vernacular culture, law, as written in the statute books, is simply irrelevant.

Keith Aoki asserts that, especially during the formative years of blues and jazz, the lack of official copyright protection fostered creativity and innovation among African American musicians.⁴¹

Signifyin', as described by Gates, constitutes a second-level legal order. This legal order does not possess the *judicial* authority to adjudicate claims, levy fines, or order parties to desist from certain conduct, but it does possess *cultural* authority in conferring status, power, and authority within African American culture. Such recognition frequently can translate into market success within the white community.⁴² Eduardo Penalver and Sonia Katyal have argued, in the case of property law, that property outlaws or dissidents have been the catalysts for legal change.⁴³ Applying their analysis to the expansion of intellectual property law, Katyal argues that we have entered into a period of marked "semiotic disobedience," in which "social activism exposes the need for alternative political economies for information."⁴⁴ In many ways, I am arguing that Gates's description and canonization of signifyin' constitutes a strategy of semiotic disobedience.⁴⁵ This strategy may ultimately transform the definition and distribution of intellectual property rights.

Signifyin' and Copyright Infringement

Gates's theory of signifyin' does not explicitly purport to undermine the foundations of American jurisprudence, but it does, however, uncover a paradox or contradiction at the heart of liberal legal theory: the self-evident nature and meaning of cultural properties. Gates, along with a bevy of hip-hop artists and critical race theorists, arrives at similar criticisms about the role of subjectivity in shaping what an object or text means. Speakers, writers, artists, and viewers bring a set of narrative assumptions about the world when they interpret the meaning of a text. These narrative assumptions frequently are connected to their identity and their experiences. Texts, in and of themselves, may be indeterminate and open to endless deconstruction—an argument made by Derrida, his followers, and legions of postmodern thinkers. Hip-hop aesthetics, as articulated through Gates, and the rise of hip-hop respond to Derrida's call by demonstrating how cultural specificity works to create interpretative networks or lenses that simultaneously specify a determinate meaning and keep texts open for reinterpretation.⁴⁶ This paradoxical property of signifyin' produces an impasse—or *aporia*, in Derrida's vocabulary—for legal discourse. Intellectual

property law has increasingly protected copyright holders from any trespass, including those that might constitute fair use. Such borrowings, however, are fundamental to African American vernacular practices, especially as prescribed by Gates's theory of signifyin'.⁴⁷ The very boundaries that intellectual property law seeks to establish to protect intellectual properties directly conflict with how African American vernacular culture and hip-hop aesthetics operate. Thus, hip-hop aesthetics, when read through Gates's theory of signifyin', constitutes an outlaw practice because it values long-standing cultural practices over the recent expansion of intellectual property doctrines.⁴⁸

The initial question that drove my scholarship (and resulted in this book) is whether hip-hop's use of sampling constitutes copyright infringement.⁴⁹ In what follows, I hope to demonstrate that while hip-hop aesthetics fails to conform to legal fictions about cultural and property law boundaries, the result is not a pervasive, infringing cultural aesthetic. Rather, intellectual property law has failed to untangle abstract legal fictions about creativity from how ordinary people within a shared cultural system convey meaning through the reordering of signs, symbols, metaphors, and icons.⁵⁰ Copyright law reserves to bona fide intellectual property owners, not necessarily the artist who produced a work, the right to reproduce a work, create a derivative text of it, distribute it, perform it, or display it publicly.⁵¹ Copyright infringement is engaging in any of the aforementioned acts without the appropriate permission or license. What if these very acts of potential infringement follow established patterns of and attitudes about creativity and constitute a conscious attack on the limited (and racialized) assumptions of legal discourse? Should relatively recent changes in intellectual property law require a shift in longstanding practices of African American signifyin'? Do African American cultural workers need a license to signify now, even though signifyin' was "free" in the past?⁵² As the domain of intellectual property increases, does culture become a source of oppression, rather than a potentially liberatory force?⁵³ Does the growing epistemological violence of copyright law constitute a contemporary analog for establishing racial supremacy, as lynching and other racist practices did in an earlier era?

An examination of Robert Colescott's *Les Demoiselles d'Alabama vestidas* and *Demoiselles d'Alabama desnudas* illustrates all of the issues surrounding the question of whether signifyin' constitutes an act of copyright or trademark infringement. Colescott's work functions as a bridge between earlier African American artists and contemporary ones, who more fully develop

hip-hop aesthetics.⁵⁴ In a pair of 1985 paintings, Colescott signifies upon Picasso's *Les Femmes d'Alger (O. J. R. M.)* by re-visioning the scene and accentuating the racialized nature of art history, which looks to Europe for models and paradigms. The contents of the paintings serve as mirror images. In his *Les Femmes d'Alger*, Picasso depicts five naked (all ostensibly white) women, three with faces that stress their resemblance to their "real" faces and two with African-inspired masks or facades. The forms, borrowing on African-inspired aesthetics, incorporate Cubism and emphasize the women's angularity.

Colescott's pair of *Les Femmes d'Alger* paintings talk back to Picasso and art historians by rewriting Picasso's famous scene both to accentuate the unspoken racial gaze of art criticism and to focus on Picasso's own borrowings of African cultural practices and forms. The 1985 works invert the races of the women depicted in the original and emphasize the fullness of the women's forms, rather than relying on a sparse angularity. Colescott translates Picasso's image into black vernacular by transforming the three ostensibly white women into African Americans and changing the women with African-inspired masks for faces into white women. This color or race adjustment underscores how liberally Picasso borrowed from African sources to create a "radical" vision of art and works to reclaim cultural ownership of modernist techniques "stolen" from African culture. Colescott also provides a more curvaceous depiction of the women to demonstrate the differences between African American and dominant conceptions of beauty. For Picasso and by implication Western art, thin or angular white women have become the very definition of feminine beauty. Colescott's fuller women project an entirely different perspective on feminine beauty, one that resonates with dominant attitudes within the African American community.

While repainting Picasso's *Les Femmes d'Alger* in itself would constitute signifyin', Colescott multiplies the effect of his critique by replacing a singular image with a pair of paintings. One revision would be insufficient to respond to Picasso's image and his Cubist aesthetic. The difference in content between the two images focuses on the extent to which the painting "reveals" the truth of the women. By portraying clothed and nude women, Colescott parodies Picasso's reliance on African-inspired forms and images to reveal human nature. If anything, Colescott's paired critique emphasizes the play of absence and presence inaugurated by visual culture. Thus, Picasso's attempt to reveal the women of Avignon through the lens of primitivism merely recapitulates the masking of reality that he

attempts to uncover, even if the women appear to allow the artist view them in a natural state. The primitive or natural scene Picasso sought to capture constitutes nothing but a mask for Colescott, a mask whose existence he can highlight only by offering a pair of revisions. In addition to unmasking the fictitious foundations of art history that place Picasso within the pantheon of revered painters, Colescott also undermines the very ideal of romantic authorship, which has driven scholarship in both art history and legal theory. If Modernist primitivism itself had no choice but to rely on a “borrowed” cultural foundation to depict humankind’s natural core, then Colescott interrogates the foundations of both property and art because both discourses recognize Picasso as the owner and originator of certain conventions from African art. Colescott’s revision of Picasso certainly invites the question of cultural ownership because he interrogates how art history has identified Picasso as a genius, placed him at the center of twentieth-century art, and granted him ownership rights over certain African-influenced forms. What does Picasso or his estate own in regard to *Les Demoiselles*? What parts of it, if any, are available for the long-standing practice of signifyin’ within African American and African communities? What principles will courts rely on to determine and distribute ownership interests when a form of African American cultural dialogue depends on extensive citation as critical practice?⁵⁵

By emphasizing signifyin’ as the narrative center of his vernacular theory of African American literature and culture, Henry Louis Gates has apparently authorized and perhaps even encouraged others to continue engaging in signifyin’ practices. Who wins when cultural practices, described and endorsed by a major academic, potentially conflict with developments in legal theory? Do property or cultural rights triumph in this conflict? Many Civil Rights activists relied on rights discourse to argue for social change and civic recognition.⁵⁶ The Civil Rights generation’s progeny, however, have seen the limitations of that strategy and have deployed black vernacular practices to reframe freedom and equality in the language of property rights. Signifyin’, as it appears in contemporary African American art, music, and literature, constitutes a necessary complement to the political and social claims made by integrationists and the Black Power movement. The question is whether this challenge to property law will ultimately be recognized by legal discourse; cause a reconfiguration of intellectual property doctrine; and transform social, political, and economic relations. Can Gates’s turn to vernacular culture recenter literary discourse and redistribute property rights?

Sampling, Signifyin', and Copyright Law

By the late 1980s, hip-hop music's use of sampling had become the subject of numerous controversies. The first major case to consider hip-hop's use of samples was *Grand Upright Music v. Warner Brothers* (1991).⁵⁷ It involved Biz Markie's use of three words from a Gilbert O'Sullivan recording. The copyright owners of the song, Grand Upright Music, brought suit for copyright infringement against Biz Markie and his record company, Warner Brothers, for illegally copying the original recording in their song "Alone Again." The legal question the U.S. District Court for the Southern District of New York had to answer was whether the inclusion of a sample constituted a copyright infringement. Warner Brothers and Biz Markie argued that because sampling had become a common practice within hip-hop culture, the court should not consider it an infringing action. The court did not find Biz Markie's defense satisfactory. Judge Duffy began his opinion by quoting the Ten Commandments: "Thou shalt not steal." He continued: "The defendants . . . would have this court believe stealing is rampant in the music business and, for that reason, their conduct here should be excused."⁵⁸ In these opening comments, Judge Duffy reveals his assumption that property matters more than aesthetic or cultural considerations within his legal approach and his hostility toward hip-hop's use of sampling.

The court pointed to letters sent by Biz Markie and Warner Brothers attorneys to the copyright owners of the sampled material, requesting permission to sample. Judge Duffy argued that these letters demonstrate copyright infringement.⁵⁹ In my reading of these letters, it is clear that Warner Brothers sought to protect itself from how copyright law might be applied to the "new" aesthetic offered by hip-hop. A similar argument about legal uncertainty was made by the court on behalf of 2 Live Crew in *Campbell v. Acuff-Rose* (1994). This uncertainty arises from the application of intellectual property law not simply to new practices, but to a musical form that was linked to raced and classed bodies.⁶⁰ In the 1980s and 1990s, CRT explored how legal discourse operated in a racialized manner without ever mentioning race.⁶¹ In addition to his heavy-handed biblical opening, Judge Duffy included a curious footnote in his opinion: "The argument suggested by the defendants that they should be excused because others in the 'rap music' business are also engaged in illegal activity is totally specious. The mere statement of the argument is its own refutation."⁶² Duffy refuses to explore the artistry of hip-hop, its connection to jazz- and blues-

inspired creativity, or its legal and cultural criticisms. By stating without reason or argument that hip-hop clearly constitutes an illegal activity, Duffy relies on unspoken cultural narratives that both criminalize young black men and locate artistic genius and historical memory within white America. For Duffy, signifyin' is nothing more than stealing. Even though Gates and others had attempted to describe African American vernacular culture since the late 1960s, Judge Duffy felt empowered to regulate African American culture without any apparent knowledge of its operation. Although hip-hop does not necessarily denote race or social class, it has erroneously become synonymous with African American culture and has become a raced practice. As CRT has long noted, Judge Duffy or any other judge cannot accuse a person of being "criminal" because of their race. However, a color-blind liberal legal theory has permitted racialized music, clothing, or linguistic usage patterns as proxies for criminality.⁶³ Although this judicial opinion is relatively brief, it makes clear that the music itself is criminal because "we all know" that its performers are really just thieves.

Following *Grand Upright Music*, copyright owners asked courts to determine how much and what kind of sampling constitutes copyright infringement. In *Jarvis v. A&M Music* (1993), a court found that sampling even short nonverbal sounds could constitute copyright infringement.⁶⁴ Some courts have found that "fragmented literal similarity," or distorting the original, is not actionable,⁶⁵ nor is borrowing a note.⁶⁶ More recently, the Sixth Circuit held that any copying, no matter how small, could constitute a copyright infringement.⁶⁷ This ruling, however, appears to conflict with an earlier Seventh Circuit decision that allows for complementary copying but not substitutional copying.⁶⁸ In other words, this court wanted to consider whether the "copied" item would directly affect the sales of the original one. Although it is generally clear that producers must clear samples, the kind of sampling that triggers this requirement is ambiguous.

The U.S. Supreme Court, in *Campbell v. Acuff-Rose* (1994), explored parody and how it fits within copyright and fair-use jurisprudence. This case involved 2 Live Crew's use of lyrics and music from Roy Orbison's "Oh, Pretty Woman" in its song "Pretty Woman." Tracing the origins of parody to ancient Greece, the court found that this hip-hop parody constituted a fair use of a copyrighted text.⁶⁹ Applying the four-part balancing test for fair use, the court determined that hip-hop parodies were unlikely to serve as "market substitutes" for the original.⁷⁰ Even though 2 Live Crew sold many copies of its song, the Supreme Court found it sufficiently

critical of Orbison's to warrant a "fair-use" defense against copyright infringement.⁷¹ Although it took several cases, lawyers began to see that characterizing hip-hop aesthetics as parody (not signifyin') allowed them to deploy fair use to defend some claims of copyright infringement.

What remains unspoken or unseen within the courts' stated reasoning is the role race plays in legal thinking. Except for a footnote defining rap as "black American pop music," the decision omits all discussion of race.⁷² The races of Luther Campbell and Roy Orbison are also omitted. The case report, as written, exemplifies liberal legal theory's commitment to color-blind jurisprudence. The court only invoked the culture of ancient Greece to demonstrate the "timelessness" and potentially "civilized" origins of parody. Did race, however, shape how the court applied fair-use doctrine to hip-hop? While no direct evidence exists to answer this question, the decision in *Rogers v. Koons* suggests that racial considerations do matter when applying the rules of fair use.⁷³ In that case, Art Rogers, a photographer, sued Jeffrey Koons because he had transformed one of his photographs of a couple holding several puppies into a parodic or satirical sculpture mocking the original photograph's sentimentality. The court had to determine whether Koons's self-described parody constituted fair use. Unlike in *Campbell*, the court in *Rogers* found that Koons had, in fact, infringed on Rogers's copyright because he had borrowed too much from the photograph, and the resulting sculpture was merely satirical of sentimentality in general, rather than specifically commenting on or criticizing Rogers's picture. Koons had attempted to defend his actions under the rubric of appropriation art, but the court found this to be merely an indication that marketability, not artistry, had determined Koons's choice of subject matter.

Comparing *Campbell* and *Rogers*, one notable difference between the two cases is race. In *Campbell*, the court did not state, but clearly knew, that Orbison was white and Campbell was African American. By contrast, in *Rogers*, both were deemed white. Race matters when applying the "fair-use" doctrine because Campbell could claim an implicit racial critique of Orbison. Koons had no such claim against Rogers. Campbell could also rely on the academic authority of Henry Louis Gates because Gates had testified on 2 Live Crew's behalf in its obscenity trial.⁷⁴ As part of his defense of 2 Live Crew, Gates argued that the group's use of obscene language followed patterns of African American vernacular culture, also known as signifyin'. Although signifyin', as an African American vernacular practice, failed to be mentioned in *Campbell*, its omission probably

might have allowed 2 Live Crew to emerge victorious in its case. Signifyin' necessarily involves borrowing, appropriation, and inversion, but those critical practices, even if part of an artistic tradition, frequently appear as copyright infringement within intellectual property law. The Supreme Court's omission of signifyin' and thus of the specificity of African American cultural production simultaneously ignores race in "good" color-blind fashion and allows race to retain its unspoken and unconscious force in liberal legal theory.

Gates's articulation of signifyin' clearly differentiates African American cultural texts. African American cultural workers' reliance on mimicry and appropriation as aesthetic principles produces a conflict between cultural theory and intellectual property law.⁷⁵ Hip-hop's expansion of signifyin' in an age of increasing copyright protections only deepens the crisis. Ironically, hip-hop's popularity has caused African American writers and visual artists to develop hip-hop aesthetics further and create a potentially unbridgeable rift between African American culture and intellectual property law. The unspoken legal context of Gates's theory of signifyin' presents both a potential legal liability for African American artists and an opportunity to realize critical race theory's mission to produce a color-conscious jurisprudence.