OPRAH, BEYONCÉ, AND THE GIRLS WHO “RUN THE WORLD” – ARE BLACK FEMALE CULTURAL PROducers GAINING GROUND IN INTELLECTUAL PROPERTY LAW?

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I. INTRODUCTION – WHAT THE FOREMOthers OF TODAY’S BLACK FEMALE CULTURAL PRODUCERS HAD TO CONTENT WITH

African American women have been true innovators in fields as diverse as fiction and nonfiction writing, theater, music, and art. From “Empress of the Blues,” Bessie Smith, to Tony award-winning playwright, Lorraine Hansberry: “in the case of black women, the contributions to art and culture have been titanic.” This continues to be so, with R&B diva, Beyoncé Knowles, and media mogul, Oprah Winfrey, at the forefront of shaping popular culture today. Knowles, who was listed as number one on the Forbes Celebrity 100 list, earned $115 million in 2014. Although Winfrey followed in fourth place with $82 million in earnings, her net worth is estimated to be $2.9 billion. With her own cable TV channel, a twenty-five year reign

3 See generally BLACK WOMEN AND MUSIC: MORE THAN THE BLUES (Eileen M. Hayes & Linda F. Williams eds., 2007).
11 Id.
as queen of talk-show television,\textsuperscript{14} and so much influence on popular culture and society that there is now a term for it—the “Oprah Effect.”\textsuperscript{15}—Winfrey was also listed by Forbes as one of the top 100 most powerful women in the world in 2014.\textsuperscript{16}

The success of Winfrey and Knowles certainly gives credence to the lyrics of Knowles’ chart topping hit, “Girls Run the World,” which say: “Boy, you know you love it/How we’re smart enough to make these millions/Strong enough to bear the children/Then get back to business.”\textsuperscript{17} Often when celebrities attain this level of wealth and power, they become vulnerable to lawsuits brought by those seeking to cash in on their success.\textsuperscript{18} This has certainly been the case for both women, since each has been sued for copyright theft in recent years.\textsuperscript{19} Winfrey won her case,\textsuperscript{20} and Knowles’ considerable resources were used to sidestep the final decision with an out of court monetary settlement.\textsuperscript{21}

There was a time when the outcome of this kind of litigation would have been determined by the race, class, and gender of the women involved.\textsuperscript{22} As legal scholar K.J. Greene has observed, “[t]he history

\begin{itemize}
\item \textsuperscript{14} Id.
\item \textsuperscript{15} The Oprah Effect, CNBC, www.cnbc.com/id/29961298 (last visited Feb. 27, 2015).
\item \textsuperscript{17} Run the World (Girls) Lyrics, METROLYRICS, www.metrolyrics.com/run-the-world-girls-lyrics-beyonce.html (last visited Feb. 22, 2015). Beyoncé has been the subject of heated debates about the extent to which her songs represent a new kind of feminist celebration of women’s power and agency or simply cater to traditional stereotypes about women as sex objects. See Tamara Winfrey Harris, Actually, Beyoncé is a Feminist, SALON (May 22, 2013, 10:00 AM), www.salon.com/2013/05/22/actually_beyonce_is_a_feminist_partner/.
\item \textsuperscript{20} Winfrey, 2011 WL 1003807, at *5.
\item \textsuperscript{22} Greene, supra note 7, at 381 (“Bessie Smith, recognized as the greatest of blues singers, sold close to ten million records over the course of her career, but was duped of copyrights in compositions and royalties for record sales by record industry executives and managers. Similarly, Ma Rainey, who composed most of the songs
\end{itemize}
of black artists within U.S. IP law . . . has been one of appropriation, degradation, and devaluation beginning with the creation of the nation until the 1950s and ‘60s.”

For example, consider America’s first black female cultural producers (“BFCPs”), female slaves who were coerced into dancing and singing for their masters. “Owners believed that singing ‘livened them up’ . . . after the auctions, on forced marches to the plantation, drivers demanded songs of weary and footsore slaves.” The domination exerted by overseers was facilitated by laws that allowed masters to own slaves, the children they birthed, and any other property they produced, including artwork or music.

Also, consider twentieth century singers Bessie Smith and Ruth Brown, colonial American slave-poet, Phillis Wheatley, and nineteenth century sculptress—Edmonia Lewis. All of these women attained an unheard of level of acclaim in their times. Yet to quote

she recorded, ‘like most black musicians . . . was paid a flat fee for recording sessions, and she never received royalties’ for copyrighted compositions.”

Id. at 370.

HINE & THOMPSON, supra note 1, at 90 (note that Hine and Thompson include black female slaves and black male slaves in this discussion).

Id.

For a discussion on returning stolen and improperly owned property to slaves’ descendants, see Elizabeth Tyler Bates, Comment, Contemplating Lawsuits for the Recovery of Slave Property, 55 ALA. L. REV. 1109 (2004).

“Dave the Potter” is an excellent example of an expert black potter and slave who produced hundreds of now highly prized, expensive pieces of pottery that were owned by his white masters. Allison Eckardt Ledes, The Enigmatic Potter, Dave, 153 MAG. ANTIQUES 644–46 (1998). See also, Tony Horwitz, A Life Preserved in Clay, N.Y. TIMES (Nov. 5, 2009), www.nytimes.com/2010/11/07/books/review/Horwitz-t.html?_r=0 (quoting one of the inscriptions Dave wrote on a pot he made: “Dave belongs to Mr. Miles/where the oven bakes & the pot biles.”)

Bessie Smith was a famous 1920s blues singer; a poor, black preacher’s daughter that became known as the “Empress of the Blues.” Jules Becker, Bessie Smith: Empress of the Blues, BOS. BANNER, Nov. 24, 2011, at 12.


For an excellent biography of Wheatley, see VINCENT CARRETTA, PHILLIS WHEATLEY: BIOGRAPHY OF A GENIUS IN BONDAGE 165 (Univ. of Georgia Press 2011).


poet Langston Hughes, each woman’s life was “no crystal stair.”

Smith, the legendary singer who popularized the blues in the early twentieth century, and the fifties and sixties rock-and-roll pioneer, Brown, were both defrauded out of lucrative royalties in back room deals designed to take advantage of their trust. Even though it is true that many men of all colors have also been bilked out of royalties by record companies, it could be argued that black women as a group had the most to lose, at least in the early days of jazz and the blues, since they were the first to bring these innovative antecedents to today’s American popular music to a wider audience.

BFCPs of literature and the visual arts also faced many challenges historically. Their talents and intelligence were constantly being called into question by whites. Wheatley, arguably America’s first black media celebrity, had admirers as diverse as Voltaire and General George Washington. Yet she had to fight plagiarism charges because most whites did not believe a black woman was smart

33 Langston Hughes, Mother to Son, POETRY FOUND., available at www.poetryfoundation.org/poem/177021 (last visited Feb. 27, 2015).

34 For the definitive biography of Bessie Smith, see Chris Albertson, Bessie (Yale Univ. Press rev. and expanded ed. 2003)(1972).


37 Indeed, certain unethical record companies seem to be equal opportunity exploiters. See Chuck Philips, State Senate to Examine Music Firms, L.A. TIMES (Aug. 26, 2002), http://articles.latimes.com/2002/ aug/26/business/ft-music26 (discussing a California State Legislature industry wide investigation of these kind of practices in California, which affected a wide range of artists of all colors, including Luther Vandross, Meatloaf, Don Henley and the Dixie Chicks).

38 See generally Angela Y. Davis, I Used to be Your Sweet Mama: Ideology, Sexuality, and Domesticity, in Blues Legacies and Black Feminism: Gertrude Ma Rainey, Bessie Smith, and Billie Holiday (1998) available at www.nytimes.com/books/first/d/davis-blues.html (speaking about the 1920’s and 30’s, Davis says: “During this period, religious consciousness came increasingly under the control of institutionalized churches, and male dominance over the religious process came to be taken for granted. At the same time that male ministers were becoming a professional caste, women blues singers were performing as professional artists and attracting large audiences at revivals-like gatherings. Gertrude “Ma” Rainey and Bessie Smith were the most widely known of these women.”).


40 Carretta, supra note 30, at ix.

41 Id. at 165.
enough to author her own work.\textsuperscript{42} Born in Africa and forced into slavery at the age of seven, Wheatley’s benevolent master’s wife arranged for her to become a highly educated, literate woman.\textsuperscript{43} After being freed pursuant to her master’s will, however, she was unable to secure continued financial backing from the very white abolitionists who supported her work while she was a slave.\textsuperscript{44} Partly because of this, she died sick and poor at the tragic age of thirty three.\textsuperscript{45}

Lewis had to do her own carving to protect herself against accusations that it was she, and not her assistants, who created her masterpieces.\textsuperscript{46} Much of Lewis’ internationally recognized work celebrated the end of slavery, civil war heroes on the union side, and Native American folklore.\textsuperscript{47} Of her reasons for fleeing the U.S. to live in Europe, she explained: “I was practically driven to Rome in order to obtain the opportunities for art culture, and to find a social atmosphere where I was not constantly reminded of my color. The land of liberty had not room for a colored sculptor.”\textsuperscript{48}

Given how well Winfrey and Knowles are doing today, one wonders if race, gender and class still limit the success of America’s BFCPs as they did in the past. This article will explore this question by looking at how these two women fared as defendants in recent copyright infringement cases. The discussion will be enriched by the examination of perhaps less well-known, but equally important BFCP,

\begin{itemize}
  \item \textsuperscript{43} Rawley, supra note 42, at 667–68.
  \item \textsuperscript{44} CARRETTA, supra note 30, at 145 (quoting Wheatley, who wrote to a friend, “I . . . find exactly true your thoughts on the behaviour of those who seem’d to respect me while under my mistresses patronage: you said right, for Some of those have already put on a reserve.”).
  \item \textsuperscript{45} Id. at 189–90. I say “partly” because one writer has attributed Wheatley’s slide into poverty to the fact that many of her supporters either died or fled the country during the Revolutionary War. See KAREN A. WEYLER, EMPOWERING WORDS: OUTSIDERS AND AUTHORSHIP IN EARLY AMERICA 66 (Univ. of Georgia Press 2013).
  \item \textsuperscript{47} Smith, supra note 46.
  \item \textsuperscript{48} Favorite Quotations, EDMONIA LEWIS, www.edmonialewis.com/favorite_quotations.htm (last visited Feb. 24, 2015).
\end{itemize}
Alice Randall, in order to give an even more complete picture of the experiences of BFCPs with IP law. Randall’s ingenious parody-critique of white romanticization of the ante-bellum South found in the book, *Gone with the Wind* ("GWTW"), made her the subject of one of the most important “fair use” cases in copyright law. Using this law and society approach to assessing cultural phenomenon involves “a general commitment to . . . explain[ing] legal phenomena . . . in terms of their social setting.” Disputes like this therefore enable us to check the pulse of the culture in order to identify who gets to own and exploit the tools of intellectual property creation, and in so doing, learn who drives the creation of popular culture itself.

In Part One, I will introduce some analytical building blocks from the fields of critical race, feminist, and cultural production theory to create a theoretical framework for discussing these three lawsuits. Each theory encourages us to shed the naive view that the law is objective. Instead, we are called on to examine the structural inequities relating to race, gender, and class that are embedded in the legal system. In Part Two, I will apply these theories to the court cases mentioned to assess the extent to which gender, race, and class shaped their outcomes.

Finally, in Part Three, I will offer some concluding remarks about whether or not today’s BFCPs really do “run” the IP law world. My sense is that when women like Winfrey and Knowles reach a certain level of power, class, and wealth, these factors may trump their race and gender in the courts. And where less powerful, less wealthy women like Randall take a position on a topic that appeals to a broad range of multiracial stakeholders—in Randall’s case the topic was free speech—they can access the respective resources of those stakeholders by proxy to facilitate a favorable legal outcome. In pretty much every instance, however, none of this could have been accomplished without the help of a cadre of highly paid and connected white male lawyers expert in IP law.

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50 See *Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257, 1270 (11th Cir. 2001).
II. PART ONE – USING CRITICAL RACE, FEMINIST AND CULTURAL PRODUCTION THEORY TO LOOK AT BLACK FEMALE CULTURAL PRODUCTION AND THE IP REGIME

Article I, Section 8 of the U.S. Constitution grants Congress the power “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.” This is the legal basis for our copyright laws, which allows those who create original works a monopoly on the use of those works for a limited period of time. Copyright law proponents argue that the promise of monopolization motivates entrepreneurs and creative artists to develop innovative creative artifacts, products and services, which in turn benefit society in a wide variety of ways. Copyright law opponents argue that the law hinders innovation because core to the development of any new work is the absorption and sometimes exploitation of previous works. Without the ability to engage in this kind of exploitation, it is argued, economic development driven by innovation is hampered.

What happens when you take the above debates and frame them within the context of “Critical Legal Theory” (“CLT”)? CLT suggests that the law, both in its crafting and application, is not objective, but instead influenced by societal inequities relating to class, race, gender, sexuality and other identity categories. Today, there are a myriad of law scholars who apply this approach to everything, from Critical Race Theory (“CRT”) and LatCrit Theory to Feminist Theory (“FT”) and Queer Theory, to critique how the law is shaped and developed. I count myself among them.

52 U.S. CONST. art. I, § 8, cl. 8.
53 ROBERT A. GORMAN, FED. JUD. CTR., COPYRIGHT LAW 1, 2nd ed. (2006).
56 Lee, supra note 54.
58 See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED continued . . .
For instance, until recently, little or no attention has been paid to the impact that U.S. copyright law has on women. Feminist law scholar Ann Bartow urges us to explore how copyright law might reflect a stereotypical “male” perspective of the relationship between creativity and economic growth. Writer Dan Burk asserts that intellectual property law tends to support gendered hierarchical structures that largely devalue the work of women. Political science professor Debora Halbert shows how so-called “high art,” like sculpture and painting, is viewed worthy of copyright protection in a way that craft work, such as knitting, is not. She also explains that the idea of a unique and autonomous author deserving of copyright law protection derives from a fairly stereotypical male-focused tradition that favors individual creation over a more stereotypical “feminine” approach in which collectivity and mutual collaboration are valued.

There has been a long history of criticism of traditional white feminist thought, however, as being too focused on the impact of patriarchy on white women, as opposed to women of color. Many, including myself, have called for a more complex analytical approach that borrows from CRT and the work of black feminist writers like bell hooks and Kimberlé Crenshaw to examine how “the experiences of
women of color are frequently the product of intersecting patterns of racism and sexism, and how these experiences tend not to be represented within the discourses of either feminism or of antiracism.\textsuperscript{66} Perhaps the most important contemporary law scholar to write about the historical impact of IP law on BFCPs is law professor K.J. Greene.\textsuperscript{68} In his groundbreaking article on the historical exploitation of black female musical artists, he maintains “that rights governing cultural production did not arise in a social or cultural vacuum, but in a crucible of gender and racial subordination, the embers of which still burn today.”\textsuperscript{69}

I myself recently added to this list of critical theoretical IP law analysis in a 2014 article called, \textit{Blurred Lines – Where Copyright Ends and Cultural Appropriation Begins – The Case of the Estate of Marvin Gaye v. Robin Thicke}.\textsuperscript{70} This article examines the extent to which U.S. copyright law has been used to protect white performing artists who use the rhythms and style associated with African-American-created musical genres, such as R&B and soul, by looking at the recent controversy surrounding the Grammy-nominated song, “Blurred Lines.”\textsuperscript{71}

One thing that a lot of the above scholarship is lacking in is any extensive focus on the \textit{successes} of women in general, and BFCPs in particular in this area. Most feminists and CRT scholarship critiques how the legal system hurts marginalized groups.\textsuperscript{72} But what do these theories say when BFCPs actually do well, or at least \textit{seem} to do well on the surface? In such instances, CRT scholars would no doubt ask us to view that success within the context of overall black economic success.\textsuperscript{73} Greene has pointed out that “[w]hile individual black artists without question have benefited from the IP system, the economic effects of IP deprivation on the black community have been devastating.”\textsuperscript{74} Further, the late pioneering feminist writer, Shulamith Firestone, once said that women “are seldom as skilled as men at the


\textsuperscript{67} Id. at 358 (footnote omitted).

\textsuperscript{68} Greene, supra note 7, at 366.

\textsuperscript{69} Id. at 378–79.


\textsuperscript{71} Id.


\textsuperscript{73} See supra note 65–69 and accompanying text.

\textsuperscript{74} Greene, supra note 7, at 369.
game of culture.” 75  And later, “women’s participation in culture has primarily been indirect and only direct if women act as men.” 76  If Firestone were alive today, she might say that successful BFCPs will only be successful if they adopt a fairly patriarchal, capitalist approach to building their brand without taking into account the impact this will have on others. Thus, at least in certain strains of feminists and CRT thought, a BFCP’s success should not be a reason for celebration unless it is a sign of across-the-board social change and is acquired ethically.

As to ethics, perhaps the most appropriate philosophical theory to apply to this situation would be that of Emmanuel Kant whose categorical imperative dictates that “we should never act in such a way that we treat Humanity, whether in ourselves or in others, as a means only but always as an end in itself.” 77 I will take up the issues of ethics further in Part Two.

As I said earlier, Debora Halbert observes that even if some women are not as collaborative as certain kinds of feminist utopias envision, there is still a “women’s way of knowing,” 78 which presumably means some kind of collaborative and mutually beneficial approach to IP development that can be generalized to women. This is in contrast to a male-centered view of creativity that focuses on “isolated, original, and individual works of authorship . . . .” 79 Such a stance, which finds its origins in the development of copyright law in the eighteenth and nineteenth centuries, frames “authorship as ownership . . . constructed in the masculine terms of territory and original male genius . . . .” 80

I have two responses to this last point. First, the downside to employing a more expansive view of authorship is that we may unfairly criticize BFCPs for acting in a stereotypical patriarchal manner simply because they have reached a pinnacle of success long denied their foremothers. Instead of mimicking traditional notions of authorship and control, they may instead be legitimately pulling themselves up out of the confines of misogyny and racism for

75 Halbert, supra note 62, at 436, n.23.
76 Id. at 435, n.18.
77 Robert Johnson, Kant’s Moral Philosophy, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr. 6, 2008), http://plato.stanford.edu/entries/kant-moral (“This is often seen as introducing the idea of ‘respect’ for persons, for whatever it is that is essential to our Humanity.”).
78 Halbert, supra note 62, at 442.
79 Id. at 447–48 (“As [of] the late eighteenth century . . . [a]rguments regarding the author as the creator of original works manifesting a unique personality were made to justify copyright ownership.”).
80 Id. at 449–50.
themselves and the greater good. Halbert anticipates my hesitation when she says: “[s]ome feminists find it suspicious that the idea of the author is lost just as women and people of color are arriving at legitimacy as authors.” This is especially true, since “the absence of an author allows for even greater profits for corporate entities that own copyrights.”

On the other hand, a more expansive interpretation of authorship can help us to engage in a richer analysis of the court cases under review here, since it will shine a brighter light on who and what are the true drivers of the creation and protection of the works in question. This is in keeping with a sociological approach to cultural production theory, which examines “how the symbolic elements of culture are shaped by the systems within which they are created, distributed, evaluated, taught, and preserved.” This framework can inspire us to turn our awestruck gaze away from the charismatic celebrity-aspects of the women under discussion here, their television shows, their top ten hits or best-selling books, even the final outcomes of the lawsuits to which they are parties, and instead focus on the various players and institutions responsible for creating, protecting and preserving the rights of these celebrities vis-à-vis those lawsuits.

I will draw on relevant aspects of the above approaches to examine the court cases that are the subject of this article next.

III. PART TWO: SUCCESS AT ANY COST – ONCE BLACK FEMALE CULTURE PRODUCERS RISE TO THE TOP, DO THEY REPLICATE OR REJECT A PATRIARCHAL APPROACH TO IP LAW?

As I said earlier, both Phyllis Wheatley and Edmonia Lewis had to develop anticipatory strategies to defend themselves against potential plagiarism charges. Even after Wheatley’s death, white racists spread rumors that she was incapable of penning her own poems, accusing her of being “ignorant . . . [and] desperate to ape her white contemporaries . . . .” Lewis did her own carving to head off accusations that she was just a front for anonymous, white, male sculptors. In both instances, detractors accused these women of passing off some white person’s work as their own.

\[81\] Id. at 458.
\[82\] Id.
\[84\] See Jones, supra note 42, at 508; Smith, supra note 46.
\[85\] Weyler, supra note 45, at 71.
\[86\] See supra note 46 and accompanying text.
Copyright theft accusations, and the underlying implication that BFCPs don’t have the ability or the right to generate innovative ideas, echo in the infringement cases to be discussed next, but with very different results. I will start with Winfrey’s lawsuit, *Harris v. Winfrey.*

### A. *Harris v. Winfrey, DBA Harpo Productions* 88

In 2000, a Philadelphia writer and entrepreneur, Charles Harris, filed a copyright application for a book called *How America Elects Her Presidents.* The book, which tried to teach young people about American history, included trivia about the nation’s presidents, specifically characterizing President William Howard Taft as the heaviest president. Probably hoping to get media exposure through the Oprah Book Club, Harris sent the book to the Oprah Winfrey Show, along with a cover letter stating that the book would encourage people to become more interested in Barack Obama’s 2008 presidential campaign. The show subsequently aired an episode on “The World’s Smartest and Most Talented Kids,” wherein Winfrey asked one of the children if she knew which president weighed the most. The child named President Taft. Harris then sued Winfrey and her production company for copyright infringement.

Winfrey hired a white attorney, William Hangley, founding partner in Hangley, Aronchick Segal Pudlin & Schiller, one of the east coast’s most well-known law firms, to launch her defense. A cum laude graduate of the University of Pennsylvania Law School, Hangley, who has a particular expertise in intellectual property and business law, has a distinguished career as a trial lawyer. Hangley and his team put together a tight defense, honing in on one of the main issues in copyright litigation—the extent to which a work in dispute is original and creative.

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88 Id.
89 Id. at *1.
90 Id.
93 Id.
94 Id.
95 Id.
97 Id.
98 See Winfrey, 2011 WL 1003807, at *3.
The U.S. Copyright Act states that only original and creative works are worthy of copyright protection, and that ideas are not copyrightable. Courts have also ruled that facts (as opposed to the creative arrangement or manipulation of facts) are not copyrightable. As the Supreme Court in the famous case Feist Publications v. Rural Telephone Service Co. said, “[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity.” Thus, if someone uses historical facts to write a book, like the name and date of an event, those facts are in the public domain, and anyone can use them without having to get permission from the original author who first referred to those facts.

The judge in the Winfrey case said that the main issue to be resolved was whether or not that portion of the plaintiff’s book used by the Oprah Winfrey Show was comprised of historical facts. He then determined that Taft’s weight was a historical fact and, therefore, in the public domain. Thus, it was irrelevant whether or not Winfrey got the idea for her show after reading Harris’ book.

Harris also argued that, because the facts in the book were framed in a particular way (i.e., in a game show format), the combination of facts and framing made the overall work creative. The judge, however, ruled that because Winfrey did not adopt the same approach to framing her questions on the show, she could not be held liable for using the subject of those questions in her own way. Hangley’s motion to dismiss the case on Winfrey’s behalf was therefore approved by the judge.

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101 See Feist Publ’ns v. Rural Tel. Serv. Co., 499 U.S. 340, 363 (1991) (ruling that a company’s republication of certain parts of the telephone company’s white pages phone directory did not violate copyright law because the parts that were republished were simply factual data about peoples’ addresses and phone numbers, as opposed to creative arrangements of that data).
102 Id. at 363.
103 Id. at 349.
105 Id.
106 Id. (asserting that the plaintiffs’ claim fails on the grounds that the infringement concerns only historical facts, thereby declining to discuss Oprah’s inspiration for the show).
107 Id.
108 Id.
109 Id.
While the judge in the Winfrey case did not say this overtly, one gets the impression that he thought Winfrey and her producers read Harris’ book and then decided to use the ideas covered in it without asking him first.\footnote{Id. at *5 (refusing to grant Federal Rule of Civil Procedure 11(b) sanctions because “plaintiffs’ claims were reasonable under the circumstances.”).}  While this behavior was ultimately rendered legal, it does not address the question of if it was ethical. With her amazing wealth, highly influential book club, and incredible resources, Winfrey and her co-producers could have acknowledged Harris’ book on her show and recommended it to others. Instead, they choose to ignore him. To make matters worse for Harris, Hangley also asked the judge to assess punitive damages against Harris for bringing a frivolous lawsuit.\footnote{Eriq Gardner, Oprah Escapes $100 Million Lawsuit over Question About Fattest U.S. President, HOLLYWOOD REPORTER (Mar. 28, 2011), www.hollywoodreporter.com/thr-esq/oprah-escapes-100-million-lawsuit-171866.} The judge refused because he felt the claim was brought in good faith.\footnote{Id. 111 112}

Perhaps the request for punitive damages was simply an attempt by Hangley to recoup the sizeable legal fees Winfrey incurred as a result of the case.\footnote{See generally What Is the AVERAGE Cost to Litigate A Patent or Copyright Infringement Case, for A Small Entity?, AVVO, www.avvo.com/legal-answers/what-is-the-average-cost-to-litigate-a-patent-or-c-411859.html (last viewed Mar. 1, 2015) (demonstrating that cases like Oprah Winfrey’s incur sizeable legal fees).} Since copyright law allows plaintiffs to recover damages if they win, but does not require them to pay the defendant’s costs if they lose,\footnote{See Ben Depoorter & Robert Kirk Walker, Copyright False Positives, 89 NOTRE DAME L. REV. 319, 343–44 (2013).} this is understandable. Or perhaps it was part of a strategy to send a message to anyone else contemplating bringing a lawsuit that they should think twice before doing so. Regardless of the reasons, the decision ended up totally devaluing Harris’ work and shifting the focus away from the actions of Winfrey and her co-producers.

The kind of behavior just outlined above does not reflect Halbert’s theory about women’s way of knowing, which “emphasizes the relationships built, rather than dominion over others.”\footnote{Halbert, supra note 62, at 440.} Winfrey’s rags-to-riches rise to success is well known.\footnote{See Oprah Winfrey: Biography, BIO., http://www.biography.com/people/oprah-winfrey-9534419 (last visited Mar. 1, 2015).} Born poor and subjected to multiple incidents of childhood sexual abuse, she has risen to become one of the most respected, popular and wealthy
women in the world.\textsuperscript{117} Winfrey is especially known for her many philanthropic activities, especially on behalf of women and girls.\textsuperscript{118} Even though I said earlier that it is unfair to automatically equate successful BFCP behavior with what some writers have characterized as an 18th century white male quest for authorial control and recognition, on closer inspection, this may be in large part what motivated Winfrey and her co-producers.

If Winfrey and her team had employed a more relational approach, they might have mentioned Harris’ book on the air or asked him to appear on the show. Surely, this would not have cost them anything, since they had no legal obligation to do so. Instead they adopted a stance usually associated with the kind of power and privilege not generally enjoyed by BFCPs in the historical past.\textsuperscript{119} Assuming the judge’s assumptions about the sequence of events that led to the development of the show were correct, applying Kant’s ethics theories to the situation, Winfrey and her producers treated Harris as a means to their own ends, not as an end in and of himself worthy of respect and inclusion.\textsuperscript{120}

Beyoncé Knowles, the other members of Destiny’s Child (“DC”) and their co-producers,\textsuperscript{121} also seem to have had a fairly entitled mindset when they co-penned a song that was similar to a song written previously by someone else.\textsuperscript{122} When the songwriter sued them, they attacked him on the grounds that his work was neither original nor creative as well.\textsuperscript{123}

\textbf{B. Allen v. Destiny’s Child}\textsuperscript{124}

The song tells the story of someone who wants to “relieve the stress of a significant other while ‘catering to’ his or her needs and desires.”\textsuperscript{125} The lyrics also give examples of how that stress could be relieved (i.e., a hot bath, massages, etc.).\textsuperscript{127} Allen said he sent the song to Knowles’ producers, who in turn gave it to her and the other two DC members.\textsuperscript{128} For the purposes of determining whether or not to grant a motion for summary judgment in the case, the judge allowed Allen’s version of events to prevail.\textsuperscript{129}

After receiving the Allen song, DC’s co-writer/producer, Rude, supplied what the judge called the “musical bed” to Knowles and the other DC members.\textsuperscript{130} “Musical bed” refers to the harmony, rhythm, and overall style and vibe of the song.\textsuperscript{131} There is a tendency in the courts to ignore a song’s musical bed and treat it as part of the public domain, especially in black popular music.\textsuperscript{132} All three DC members then added a melody and lyrics to go along with the musical bed.\textsuperscript{133} The DC song shares the same subject matter as Allen’s song (i.e., the singer’s desire to relieve their lover’s stress),\textsuperscript{134} as well as a three-note motif or “hook” using a falling 3rd.\textsuperscript{135} They called their version of the song, “Cater 2 U,” and featured it on their 2004 album, “Destiny Fulfilled.”\textsuperscript{136}

The particular standoff between Allen and Knowles was akin to the fight that took place between the mythical David and Goliath. Knowles had such heavyweight co-defendants as Sony Urban Music, Sony BMG Music, McDonald’s Corporation, and Destiny’s Child, Inc. flanked on one side\textsuperscript{137} and on the other side, a high-powered team of white male trial lawyers, including lead Texas attorney Henry

\begin{footnotes}
\item[125] Id. at *4.
\item[126] Id. at *5.
\item[127] Id. at *29–30.
\item[128] Id. at *17–19.
\item[129] Id.
\item[130] Id. at *4–5.
\item[131] Id. at *4.
\item[132] See Lester, supra note 70, at 221. Although, based on a recent jury verdict in favor of the estate of the late songwriter, Marvin Gaye, there is some indication that the musical bed for a song, at least the extent to which it is notated in a lead sheet, might be worthy of copyright protection. See Anthony McCartney, Jury Reaches Verdict in ‘Blurred Lines’ Music Case, HUFFINGTON POST, March 10, 2015, at http://www.huffingtonpost.com/2015/03/10/jury-verdict-blurred-lines_n_6842732.html.
\item[133] Destiny’s Child, 2009 U.S. Dist. LEXIS 63001, at *4–5.
\item[134] Id. at *29–30.
\item[135] Id. at *34–35.
\item[136] Id. at *2.
\item[137] Id. at *3–4.
\end{footnotes}
James Fasthoff. 138 Fasthoff has a national entertainment law practice with extensive intellectual property law experience, representing “numerous Grammy® and ASCAP Award-winning recording artists, songwriters, and producers; major and independent record labels; music publishers; management companies; advertising agencies, and more.”139 He has been cited as one of Texas Super Lawyers and rising stars by Texas Monthly/Law & Politics Magazines, and has the “Highest” rating from Martindale Hubbell.140 Among the other lawyers representing Knowles was David W. Inlander of the big Chicago firm, Inlander, Menna, Fischel & Kahn, Ltd.141 With an almost forty-year litigation practice, Inlander was also picked as one of Illinois’s 2014 Super Lawyers by his peers and has the highest rating from Martindale-Hubbell.142

In contrast to Knowles, Allen only had one person working for him—Chicago lawyer Matthew Robert Wildermuth—who at the time operated his own one-man firm.143 That it was only the two of them—Allen and Wildermuth—against Knowles’s litigation machine, makes it all the more impressive that they were able to convince the judge to refuse to grant DC’s motion for summary judgment.144 They did this by presenting an elaborate comparison of the two songs, and demonstrating that they were similar enough to each other to warrant a trial on the merits.145

For a plaintiff to win a copyright infringement case, they usually must show the defendant was aware that the prior song existed, among other requirements,146 and that the second song’s lyrics and melody used a substantial amount of the constitutionally protected elements of

139 Id.
140 Id.
142 See id.
144 Destiny’s Child, 2009 U.S. Dist. LEXIS at *41.
145 See id. at *30–32.
146 See id. at *15–16.
the first song. Also, a judge has to determine what aspects of a song are original and unique, and what aspects are generic and thus in the public domain. Finally, most judges apply an “ordinary observer test,” as opposed to an expert standard, in order to determine if the “accused work capture[s] the ‘total concept and feel’ of the copyrighted work.”

Typical damages in a copyright theft case include compensatory damages for such things as lost profits. Further, if it can be proven that the defendant knowingly copied and distributed a song for sale without the original author’s consent, they risk criminal penalties, including substantial fines and up to five years in jail.

The judge in the *Destiny’s Child* case said that titles and song plots are in the public domain. Thus, the fact that the two songs had the exact same title and subject theme was not enough to constitute copyright infringement. However, “while Allen’s descriptions may be standard expressions of his theme when standing alone, the combination of all of these elements may be sufficiently original so as to be protectable under copyright law.” With that in mind, the judge denied Knowles’ and DC’s motion for summary judgment.

The parties ended up settling the case out of court. From the perspective of Knowles, DC and their team, this is understandable, since given the judge’s pronouncements it is likely he would have ruled against them at trial. While the settlement details are not public, it is most likely that part of the agreement allowed Knowles and DC to perform their version of the song publicly, in return for Allen getting a percent of the sales. I say this because both versions are posted to “Youtube” and have been there for some time. It’s interesting to note that even now, after the case was settled, there are only 2,483 viewer

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147 *Id.* at *14–15, *32–33.
148 *Id.* at *32, *34–35.
149 *Id.* at *22–23.
150 *Id.* at *23 (citing Atari, Inc. v. N.A. Philips Consumer Elec., 672 F.2d 607, 614 (7th Cir. 1982), *superseded by statute on other grounds*, Fed. R. Civ. P. 52(a), *as recognized in* Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1429 (7th Cir. 1985)).
152 *See* 18 U.S.C. § 2319(b) (2012).
154 *See* *id.* at *24.
155 *Id.* at *33.
156 *See* *id.* at 41.
hits to Allen’s “YouTube” version of “Cater 2 U,” whereas the DC version has 2.4 million hits.

The legal fees for defending the case probably amounted to over $300,000. The DC version of the song ended up going platinum in 2005, and has since sold 7 million copies globally. Had Allen simply been paid the regular compulsory licensing fees for the group’s use of the song, he would have received about $6.3 million. This figure is based on what mechanical licensing fees on CD sales for a song this popular would cost. Instead, they probably paid their attorneys’ fees and Allen’s licensing fees. Like Winfrey and her co-producers, Knowles, et al, seem to have crafted their version of “Cater 2 U” as if they thought they would be immune to costly litigation. Obviously, this was not true.

Alice Randall also went on the offensive when she decided to make liberal use of the book, GWTW, in her own book, The Wind Done Gone (“TWDG”). Rather than deny that GWTW was the catalyst for TWDG, Randall asserted her right to use GWTW on the grounds that her book was doing a public service—righting a historical wrong.

C. Suntrust Bank v. Houghton Mifflin

On her website, Randall reveals herself to have been a talented renaissance woman at the time of the Suntrust lawsuit. She studied with Julia Child as a Harvard undergraduate, was the first African-

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158 Rick Allen Cater 2 U, YOUTUBE (Dec. 6, 2009), www.youtube.com/watch?v=zmcmhYHqtnI.
159 Destiny’s Child Cater 2 U, YOUTUBE (Dec. 26, 2009), http://www.youtube.com/watch?v=RpwbwWUIi3PM.
160 Depooter & Walker, supra note 114, at 343.
163 Harry Fox, supra note 162.
164 See Alois V. Gross, Annotation, Measure of Damages and Profits to Which Copyright Owner is Entitled Under 17 U.S.C.A. § 504(b), 100 A.L.R. Fed. 258 (1990) (discussing that courts allow attorneys’ fees (§ 14(a)) in addition to statutory damages measured by licensing fees (§ 11) under Copyright Act suits).
166 Id.
American woman to write a number one country music hit, and is an ASCAP Silver Circle Inductee.\textsuperscript{168} Of her written work, she now explains:

I write novels that comment on other novels, and on other readers. I write in my mother tongue, the black English I learned as a child, in an enclave of Detroit inhabited by refugees from Jim Crow Alabama . . . . I am concerned with the questions and problems of discovering fact, discerning history, and making meaning when cultures that privilege written language collide with cultures that give primacy to oral language.\textsuperscript{169}

Margaret Mitchell’s popular novel about the Civil War, GWTW, depicts blacks as “creatures of small intelligence . . . like monkeys or small children turned loose among treasured objects whose value is beyond their comprehension, they ran wild—either from perverse pleasure in destruction or simply because of their ignorance.”\textsuperscript{170} Further, the book depicts blacks as lazy and inept.\textsuperscript{171} In order to counter these negative stereotypes, Randall wrote TWDG, which \textsuperscript{172} uses many of the same characters, plots and scenes from GWTW.\textsuperscript{173} In contrast to GWTW, it is the white characters in TWDG who are portrayed as ignorant,\textsuperscript{174} and “nearly every black character . . . [has] some redeeming quality—whether depth, wit, cunning, beauty, strength, or courage—that their GWTW analogues lacked.”\textsuperscript{175}

As one law writer put it, GWTW:

\begin{quote}
[A]t worst, . . . serves to perpetuate brutal racial stereotypes and marginalize the role of African-American slaves during Reconstruction . . . . Randall . . . dragged these flaws into the public consciousness . . . [and] succeeded in accomplishing what she set out to do—to “explode” Gone with the Wind and condemn
\end{quote}

\textsuperscript{168} See id. See also, Penelope Green, At Home With Alice Randall, N.Y. TIMES (Sept. 16, 2009) www.nytimes.com/2009/09/17/garden/17randall.html?pagewanted=all\&_r=0.

\textsuperscript{169} See Alice Randall, supra note 167.

\textsuperscript{170} Suntrust, 268 F.3d at 1270 (citing GWTW at 654).

\textsuperscript{171} Id. at 1270 (citing GWTW at 904) (“Blacks elected to the legislature are described as spending ‘most of their time eating goobers and easing their unaccustomed feet into and out of new shoes.’”)

\textsuperscript{172} Id. at 1259.

\textsuperscript{173} Id. at 1259.

\textsuperscript{174} Id. at 1270.

\textsuperscript{175} Id. at 1271.
the misconceived notions of an ignorant era.\textsuperscript{176}

Sun Trust, the trust for Mitchell that oversees granting rights in connection with the novel,\textsuperscript{177} was not happy about this. They sued Randall's publisher, Houghton Mifflin, for copyright infringement.\textsuperscript{178} The district court granted an injunction in their favor, maintaining that Randall adopted core aspects of the main character’s “physical attributes, mannerisms, and distinct features that Ms. Mitchell used to describe them . . .”,\textsuperscript{179} Houghton Mifflin appealed.\textsuperscript{180}

Whereas Winfrey, Knowles and DC had vast financial resources from which to draw to fund their respective defenses, I suspect that Randall did not. Had she self-published her book, it is doubtful she would have been able to amass the kind of money necessary to fund an appeal. However, her publishing contract probably transferred her copyrights in the book to Houghton Mifflin in return for a percent of the royalties from its sales.\textsuperscript{181} This made Houghton Mifflin the defense party of record in the case, and gave Randall access by proxy to its legal team—lawyers Joseph M. Beck and Jerre B. Swann, now with the Atlanta law firm, Kilpatrick, Townsend and Stockton.\textsuperscript{182} Voted as two of the best IP lawyers in Georgia in 2012,\textsuperscript{183} Swann and Beck both graduated from Harvard Law School.\textsuperscript{184} The law firm describes itself as “a full-service international law firm with more than 500 attorneys in eighteen offices across the globe.”\textsuperscript{185} Both men are white.\textsuperscript{186}

\textsuperscript{176} Jeffrey D. Grossett, The Wind Done Gone: Transforming Tara into a Plantation Parody, 52 CASE W. RES. L. REV. 1113, 1130 (2002).

\textsuperscript{177} Suntrust, 268 F.3d at 1259.

\textsuperscript{178} Id.

\textsuperscript{179} Id. at 1266–67.

\textsuperscript{180} Id. at 1259.

\textsuperscript{181} Id.

\textsuperscript{182} Id. at 1258.


\textsuperscript{186} See generally, Jerre B. Swann, MARTINDALE HUBBELL, continued . . .
The court was persuaded by Beck and Swann’s arguments. It said the issue in the case was when “a critic may use a work to communicate her criticism of the work without infringing the copyright in that work.” It also outlined the general factors that courts use to make this determination. The first factor is the purpose of the work (i.e., commercial or nonprofit). Here the court noted that even if the work is commercial in purpose, if it is transformative enough, an infringement case will not stand. The court also said that even if the use of the original is extensive, as long as “the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary,” that is legal. The second factor to consider is the extent to which the new book will have a negative effect on the original book’s market.

Randall also received support from some of the most esteemed literati in the country, including Pulitzer prize-winning authors, Toni Morrison and Harper Lee, author of To Kill a Mockingbird. In her Declaration to the Court, Morrison said the real issue in the case was “who controls how history is imagined?” She also said:

The Wind Done Done Gone neither ‘follows’, copies or exploits Gone With The Wind. What Miss Randall’s book does is imagine and occupy narrative spaces and silences never once touched upon nor conceived of by Mrs. Mitchell’s novel: that is the interior lives of slaves and ex-slaves; their alternate views; their different journey.

Harper Lee’s comments were short and to the point: “Mitchell’s novel has become a prime source of knowledge about plantation life for

187 Suntrust Bank, 268 F.3d at 1260.
188 Id. at 1267–77.
189 Id. at 1269.
190 Id. (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).
191 Id. at 1269 (citing Elsmere Music, Inc. v. Nat’l Broad. Co., 623 F.2d 252, 253 n.1 (2d Cir. 1980)).
192 Id. at 1274.
193 See Declaration from Toni Morrison 1 (Apr. 15, 2001) (on file with author).
195 Morrison, supra note 193, at 3.
196 Id. at 2.
much of mainstream America. Now is the time for the American public to hear another perspective on this legend.”

The court of appeals ruled in favor of Houghton Mifflin, and remanded the case to enable Mifflin and Randall to launch a more comprehensive fair use defense. The court opined that TWDG “is not a general commentary upon the Civil–War–era . . . , but a specific criticism of and rejoinder to the depiction of slavery . . . in GWTW.” As such, the court said that First Amendment protections concerning comment and criticism should be given serious due. Finally, it determined that Randall’s book would not hurt the market for sales of GWTW or other derivative possibilities. Celebrating the appeals decision, law writer John Tehranian says, “[b]y sharp contrast to the district court, which sought to retain the aesthetic integrity of Mitchell’s saccharine depiction of Dixie and protect it from unwanted mutilation, the appeals court viewed Mitchell’s work as one ripe for, if not outright in need of, deconstruction.”

In 2002, the two sides in the dispute decided to avoid another trial and settle the case. Houghton Mifflin agreed to make a donation to the traditional black college, Morehouse College, and Suntrust agreed to let them publish Randall’s book, with the stipulation that Mifflin put a seal on the cover of the book, which says “unauthorized parody.”

As was true for the Winfrey and Destiny’s Child cases, Randall’s story is an excellent example of the way the idea of the individual author as sole mistress of a book’s creation and fate is not sufficient to explain why she won the case. I say, “won” because, even though Randall’s case was ultimately settled out of court, she was able to publish her critique of GWTW. In fact, controversy about the court case contributed to its becoming more widely known, which in turn caused it to become a bestseller.


continued . . .
legal team, and the countless literary supporters and organizations who spoke on her behalf during the legal proceedings all made the final outcome possible. As the African proverb says, “It Takes a Whole Village to Raise a Child.”

It also apparently takes a village to make sure that BFCPs gain ground in copyright law.

IV. PART THREE: CONCLUSION

In 2006, leading feminist law scholars, Deborah Rhode and Barbara Kellerman, conducted a research study about whether or not women have different leadership styles than men. They found it was possible to discern the gender of the interviewees simply by analyzing their responses. Applying the lessons learned by Rhode and Kellerman by analogy, if identifiable demographic information about Winfrey, Knowles and Randall were removed from the texts of the court decisions discussed here, and all readers were privy to the other facts in their cases, I think most people would assume that the protagonists in the Winfrey and Destiny Child’s cases were white men with a certain kind of patriarchal power and privilege. This is because Winfrey, Knowles, and their respective co-producers and collaborators conducted themselves in a manner we usually associate, fairly or not, with that kind of power and privilege. This is in contrast to the tendency of most people to assume that African Americans are not powerful players in American society; indeed that they are inferior to whites in all areas of life that matter—intelligence, ability, education, wealth, etc.

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208 Id.

Randall’s book, however, addresses black themes. And since the content of her book would have to be mentioned in order to give justice to whole point of the final court decision, most people would probably assume that the protagonist in her court case was black. My conclusions here echo the work of Shulamith Firestone, referenced earlier, who said: “women’s participation in culture has primarily been indirect and only direct if women act as men.” Some might think that being able to engage in social darwinistic behavior like this is in and of itself a sign that BFCPs have finally crashed through the gender and racial glass ceiling. On the other hand, it may instead signal a loss, not a gain, in terms of how we hope marginalized people will progress as they move away from the sidelines and towards the center of society.

Talking about the ascendancy of black women writers in the late 1960s in the US, scholar Gloria Wade-Gayles says that “some critics (most of them male) . . . [said] that the black woman writer’s double jeopardy . . . [became] a double asset . . . .” However, others argued that the real concern should be that that newfound popularity did not trickle down to the lives of black women in general. Iconic poet and writer, Langston Hughes, made a similar observation about the impact of the Harlem Renaissance on black society: “Some Harlemites thought the millennium had come . . . . They were sure the New Negro would lead a new life from then on in green pastures of tolerance . . . . The ordinary Negro hadn’t heard of the Negro Renaissance. And if they had, it hadn’t raised their wages any.”

I tend to concur with these views. While the Beyoncé’s and Oprahs of the world have been able to exploit copyright law by manipulating its complex language to their advantage (in the case of Oprah) or buying their way out of its punitive aspects (in the case of Beyoncé), it is not clear the advantages of these approaches will trickle down to the vast amount of BFCPs who struggle every day to make a decent


211 Halbert, supra note 62, at 435 n.18 (citing SHULAMITH FIRESTONE, THE DIALECT OF SEX: THE CASE FOR FEMINIST REVOLUTION, 176 (1970)).

212 See James Allen Rogers, Darwinism and Social Darwinism, 33 J. HIST. IDEAS 265, 265 (1972) (describing the notions of a “struggle for existence” and “survival of the fittest” as “major slogans of the Social Darwinists who wanted to view human society through Darwin’s vision of the animal world”).


214 Id. at 15.

215 Id. (quoting LANGSTON HUGHES, THE BIG SEA 228 (1940)).
livelihood.216 Even Randall, whose work in this case was the one most societally beneficial in that it celebrated, rather than demeaned, black life, was only able to win her claim because she had a powerful publisher behind her who could hire a resourceful legal team and galvanize a host of literary supporters to speak on her behalf.217 Most BFCPs don’t have access to any of this. It is therefore too soon to say with certainty that race and gender are no longer liabilities in copyright law. Until the time comes when most BFCPs can have just as much autonomy over their work as Winfrey, Knowles and Randall, the only “girls” who get to run the world will be the handful of BFCPs like those discussed here who have climbed over the proverbial IP fence with the backing of a vast amount of financial resources, paid white male legal hired guns, and a cadre of stakeholders championing their cause.