GAZING AT INTELLECTUAL PROPERTY LAW

THROUGH THE LENS OF CRITICAL RACE THEORY:

THE INTERPLAY OF RACE, POWER, AND INTELLECTUAL PROPERTY LAW

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s/Pelin Turan

‘Many Jewish academics specializing in IP law had – like Jewish writers –

to leave Germany or were murdered.’[1]

Dedicated to the memory of Professor Ernst Eduard Hirsch,

who arrived at the Republic of Turkey in 1933,

held the Chair of Commercial Law at the University of Istanbul,

taught at the Faculty of Law at Ankara University,

and contributed to the enactment of the Copyright Act of 1951,

And to my beloved family

[1] Martin Vogel, ‘From Privilege to Modern Copyright Law’ in Lionel Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright* (Edward Elgar 2010) 121.

Abstract

The post-colonial era witnessed the emergence of a new strand of intellectual property (IP) scholarship primarily concerned with the Western-centrism of the international IP system and its distant stance to non-Western modes of creatorship and creativity. The scholarly debates revolving around this conundrum are often detached from the history of colonialism, hence, disregard the core of this dilemma: Western (European) modernity and the inevitable repercussion of its overarching racial thought on the idea and key concepts of IP law. This dissertation endeavors to fill the gap in the literature by producing a postmodernist critique of Western (European) modernity and its projections onto the law, particularly onto IP law, with the aim of exposing the legacies of the colonial mindset and the racialized valorization schemes overhauling contemporary IP law.

In this vein, it is asserted herein that law is not an objective and value-neutral enterprise, and IP law is not an exception. This skepticism toward the universality and value-neutrality of IP law is manifold: The racialized power and cultural hierarchies of Western (European) modernity not only rested the foundations of international IP law, but also pushed non-Western political actors to the periphery of the global IP diplomacy. These power asymmetries ruling the IP diplomacy facilitated the implementation of racial connotations into the key concepts and principles of IP law. Such subjectively articulated norms, on the one hand, reflect and sacralize the Western (European) cultural values and assumptions. On the other hand, they set the standards and contour the scope of the global(ized) IP frameworks and protection.

The dissertation adopts Critical Race Theory (CRT) as a method for legal thought and analysis, while contributing to its most recent offshoot: The Critical Race IP Movement. Committed to postmodern American jurisprudence; it maps the interplay of race, power, and (IP) law from a

race-oriented viewpoint, whilst illuminating the investments of international law and the maneuvers of international diplomacy in the subordination of racialized minorities and indigenous peoples by means of IP law.

Driven by its purposes, the dissertation analyzes three jurisdictions connected with a colonial past: The United Kingdom, the United States, and the Commonwealth of Australia. Within these parameters, it follows the timeline of the fabrication of the idea of race in parallel to that of the genesis and evolution of IP law. It traces the interaction of these phenomena both in a colonial and post-colonial context. In doing so, it undertakes the challenge of applying the main tenets and doctrinal resolutions of CRT to other common law countries.

The dissertation reveals that the law does not operate in an economic, historical, and political vacuum – neither does IP law. They prioritize, justify, essentialize, and ratify the culturally-specific and materially-driven interests of economically and politically powerful actors. Thus, prior to confronting the capacity of IP law to extend legal protection to historically marginalized creators and creations, one shall question whether the racialized cultural and power hierarchies that have been informing international (IP) law over centuries can eventually be undone.

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Last but not least, to Hendrick's and many other gin distilleries all around the world – for various reasons.

Thank you!

And thanks to life!

Table of Contents

List of Abbreviations

ALAI	:	*Association Littéraire et Artistique Internationale*
Art.	:	Article
BCDF	:	Boalt Hall Coalition for a Diversified Faculty
BIRPI	:	*Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle*
BLSA	:	Black Law Students Association
CBD	:	Convention on Biological Diversity
Ch.	:	Chapter
Cht	:	Commonwealth of Australia
Cl.	:	Clause
CLS	:	Critical Legal Studies
Critical Race IP	:	Critical Race Intellectual Property
Crits	:	Critical Legal (Studies) Scholars
CRT	:	Critical Race Theory
EoF	:	Expressions of Folklore
EU	:	European Union
Fem-Crits	:	Feminist Critical Legal (Studies) Scholars
GATT	:	General Agreement on Tariffs and Trade
GRs	:	Genetic Resources
GWTW	:	Gone With the Wind
HRs	:	Human Rights
ICCPR	:	International Covenant on Civil and Political Rights
ICESCR	:	International Covenant on Economic, Social and Cultural Rights
ILO	:	International Labour Organization
IP	:	Intellectual Property
IP Law	:	Intellectual Property Law
IPRs	:	Intellectual Property Rights
NT	:	Northern Territory of Australia
Para.	:	Paragraph
PTO	:	Patent and Trademark Office
Sec.	:	Section
TCEs	:	Traditional Cultural Expressions

TK	:	Traditional Knowledge
TRIPs	:	The Agreement on the Trade-Related Aspects of Intellectual Property Rights
TTAB	:	Trademark Trial and Appeal Board
TWAIL	:	Third World Approaches to International Law
TWDG	:	The Wind Done Gone
UC Berkeley	:	University of California, Berkeley
UDHR	:	Universal Declaration of Human Rights
UN	:	United Nations
U.S.	:	United States
UNDRIP	:	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	:	United Nations Educational, Scientific and Cultural Organization
WIPO	:	World Intellectual Property Organization
WTO	:	World Trade Organization
WW	:	World War

‘(…) that culture which is strongest from the material and technological point of view threatens to crush all weaker cultures, particularly in a world in which (...) the technologically weaker cultures have no means of protecting themselves. All cultures have, furthermore, an economic, social and political base, and no culture can continue to live if its political destiny is not in its own hands.’[2]

James Baldwin

on Aimé Césaire's opening remarks

at *Congrès des Ecrivains et Artistes Noirs* (19.09.1956, Sorbonne-France)

[2] James Baldwin, *Nobody Knows My Name: More Notes of A Native Son* (Dial Press 1961) 38.
I am grateful to my supervisor, Professor Mathias Möschel, for providing this quotation.

Introduction

Western-centrism of contemporary intellectual property law (hereafter 'IP law') is a well-acknowledged phenomena within the intellectual property (hereafter 'IP') circles – so does the incompatibility of Western-centric IP regimes with non-Western modes of creatorship and creativity. The 'Western and non-Western' binary paradigm of contemporary IP law has not only been consolidated into a recurrent theme of the global IP debates, but it has also conceived a relatively new strand of IP scholarship in the aftermath of the Decolonization Movement.

There exists a vast of body of descriptive as well as critical IP scholarship outlining the shortcomings of the existing global and national IP regimes in providing legal protection to communal and tradition-based intellectual creations of non-Western States and sub-nation groups.[3] This strand of scholarship is enriched with the works of scholars and institutions, especially of the Word Intellectual Property Organization (hereafter 'WIPO'), concentrating on the reconciliation of the Western-centrism of IP law with the legal needs and expectations of non-Western benefactors, by questioning whether or how to extend IP protection to folklore and traditional knowledge (hereafter 'TK').[4] In a similar vein, there are scholarly and institutional endeavors

[3] It is neither possible nor desired to provide a comprehensive literature review herein. However, for a few examples of this strand of IP scholarship, please see: Graham Dutfield, 'TRIPS-Related Aspects of Traditional Knowledge' (2001) 33 Case Western Reserve Journal of International Law 233; Daniel J Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (2002) 12 Fordham Intellectual Property, Media and Entertainment Law Journal 929; Daniel J Gervais, 'Spiritual But Not Intellectual - The Protection of Sacred Intangible Traditional Knowledge Symposium: Traditional Knowledge, Intellectual Property, and Indigenous Culture' (2003) 11 Cardozo Journal of International and Comparative Law 467; Weerawit Weeraworawit, 'International Legal Protection for Genetic Resources, Traditional Knowledge and Folklore: Challenges for the Intellectual Property System' in Christophe Bellmann, Graham Dutfield and Ricardo Meléndez-Ortiz (eds), *Trading in Knowledge: Development Perspectives on TRIPS, Trade and Sustainability* (1st edn, Earthscan Publications Ltd 2003); Graham Dutfield and Uma Suthersanen, 'Traditional Knowledge: An Emerging Right?', *Global Intellectual Property Law* (1st edn, Edward Elgar Publishing Limited 2008).

[4] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore- An Overview' (World Intellectual Property Organization (WIPO), 16 March 2001) <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_3.pdf> accessed 14 May 2019; Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Elements of a Sui Generis System for the Protection of Traditional Knowledge' (World Intellectual Property Organization (WIPO), 30 September 2002)

addressed to non-Western intellectual creators with the aim of providing these potential beneficiaries of IP law with a roadmap on how to take advantage of conventional intellectual property rights (hereafter 'IPRs') to reinforce their economic and cultural activities.[5]

Despite their invaluable insights on the 'Western and non-Western' dilemma of contemporary IP law, these attempts are mainly centered around the reasons behind and the outcomes of the power dynamics and asymmetries that have ruled the global IP diplomacy, especially before and during the negotiations of the Agreement on the Trade-Related Aspects of Intellectual Property Rights of 1994 (hereafter 'the TRIPs Agreement'). Consequently, the ever-growing IP literature, especially on folklore and TK, is often prone to turn a blind eye on the colonial history and the interplay of colonialism with IP law. Instead, the clash of the interests of Western (European) States and non-Western States or sub-state groups are analyzed in a post-colonial context. Accordingly, the scholarly debates in this axis revolve around post-colonial power structures, such

<https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_4/wipo_grtkf_ic_4_8.pdf> accessed 20 May 2019; Silke von Lewinski, 'The Protection of Folklore' (2003) 11 Cardozo Journal of International and Comparative Law 747; Ágnes Lucas-Schloetter, 'Folklore' in Silke von Lewinski (ed), *Indigenous Heritage and Intellectual Property* (Kluwer Law International BV 2008); Peter-Tobias Stoll and Anja von Hahn, 'Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law' in Silke von Lewinski (ed), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (2nd edn, Kluwer Law International 2008); Ruth L Okediji, 'Negotiating the Public Domain in an International Framework for Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions' in Daniel F Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (1st edn, Routledge 2017); Susy Frankel, 'Trademarks and Traditional Knowledge and Cultural Intellectual Property Rights' (2011) 36 Victoria University of Wellington Legal Research Papers 1; Susy Frankel, 'Traditional Knowledge, Indigenous Peoples, and Local Communities' in Rochelle Cooper Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (Oxford University Press 2018).

[5] See e.g., Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Defensive Protection Measures Relating to Intellectual Property, Genetic Resources and Traditional Knowledge: An Update' (World Intellectual Property Organization (WIPO), 15 December 2003) <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_8.pdf> accessed 27 May 2019; Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Contractual Practices and Clauses Relating to Intellectual Property, Access to Genetic Resources and Benefit-Sharing' (World Intellectual Property Organization (WIPO), 31 March 2003) <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_9.pdf> accessed 21 May 2019; 'Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities' (World Intellectual Property Organization (WIPO), 2017) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1048.pdf> accessed 19 May 2019.

as the 'developed and developing countries' and the 'Global North and South' dichotomies – which were cumulatively induced by the Westphalian perceptions of 'State', modern international law, and the Decolonization Movement.[6]

Notwithstanding these resolutions, this dissertation asserts that the core of the 'Western and non-Western' conundrum of contemporary IP law pre-dates the international IP negotiations – and, definitely, the TRIPs Agreement of 1994. It is further argued that this dilemma beholds a broader spectrum of controversies that are produced not only by disparate economic development levels of post-colonial States, but also by Western (European) colonial mindset and the speculations of Western (European) cultural superiority – both of which stemmed from Western (European) modernity and its overarching racial thought.[7] Indeed, the history of Western (European) modernity, beginning with the Renaissance era, gave birth not only to the construction of race within a 'Western (European) and non-Western' binary paradigm but also to the construction of the key IP concepts, norms, principles, and international regimes under the shadow of a race-based thinking, colonialism, and the notorious 'civilizing' missions.[8]

[6] See e.g., S James Anaya, 'The Historical Context', *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004); S James Anaya, 'Developments within the Modern Era of Human Rights', *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004); Matthias Åhrén, 'Classical International Law and Early Philosophy Theory on Peoples' Rights', *Indigenous Peoples' Status in the International Legal System* (Oxford University Press 2016); Matthias Åhrén, 'Indigenous Peoples' Legal Status under Contemporary International Law', *Indigenous Peoples' Status in the International Legal System* (Oxford University Press 2016).

[7] For a detailed account of the construction race, and the genesis of biological and cultural racism during Western (European) modernity, please see: Ivan Hannaford, 'The First Stage in the Development of an Idea of Race, 1684-1815', *Race: The History of an Idea in the West* (Woodrow Wilson Center Press 1996).

[8] See e.g., Ruth L Gana, 'Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property' (1995) 24 Denver Journal of International Law and Policy 109; Michael D Birnhack, 'The Idea of Progress in Copyright Law' (2001) 1 Buffalo Intellectual Property Law Journal 3; Ruth L Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (2003) 7 Singapore Journal of International & Comparative Law 315; Olufunmilayo B Arewa, 'Culture as Property: Intellectual Property, Local Norms and Global Rights' [2007] Northwestern Public Law Research Paper No. 07-13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=981423> accessed 16 April 2021; Olufunmilayo B Arewa, 'Intellectual Property and Conceptions of Culture' (2012) 4 WIPO Journal 10; Michael D Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (1st edn, Oxford University Press 2012).

Therefore, this dissertation is premised on the assumption that law, either as a body of legal norms and principles or as the legal order of a specific jurisdiction, is 'the creation of a particular type of culture.'[9] Given its cultural-specificity, law cannot be taken-for-granted as a universal, objective, or value-neutral enterprise – and neither can IP law. Originated from and evolved under the influence of Western (European) cultural, economic, historical, political, and social realities; IP law is built upon Western (European) cultural values and assumptions, materialistic interests, and racially-charged perceptions of creativity, creatorship, and ownership. Due to this, let alone being value-neutral, IP law mirrors and promotes Western (European) modes of creatorship and creativity – often at the expense of their non-Western 'others'. Nevertheless, the face-neutral legal framework of IP law conceals its colonial roots and latent racial baselines.

Based on these, this dissertation aspires to provide a postmodernist critique of Western (European) modernity, by revealing its investments in the parallel construction of race and IP. Driven by this overarching goal, the dissertation is built upon two main pillars: Critical Race Theory (hereafter 'CRT') and IP law. While IP law comprises the subject-matter of the dissertation, CRT constitutes the postmodern 'lens' to investigate and the main theoretical tool to construe this subject-matter from a race-based viewpoint.

Hypothesis and Research Questions

Drawing upon postmodern legal philosophy in general, and CRT doctrine in particular, the dissertation articulates its hypothesis as follows: Law is not an objective and value-neutral enterprise[10] – and IP law is not an exception. IP law takes the Western (European) readings of

[9] Kenneth B Nunn, 'Law as a Eurocentric Enterprise' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (2nd edn, Temple University Press 2000) 429.

[10] The original hypothesis of the dissertation, as well as the thesis structure proposal, derived from Mathias Möschel's CRT project and scholarship aiming towards a European CRT doctrine; thus, it used to read as follows: 'Law is not a neutral science' – and IP Law is not an exception. Nevertheless, this dissertation focalizes the application of CRT doctrine to the common law tradition. Considering the fundamental differences in the historiography of legal education and the emergence of law as a discipline in civil and common law countries; the dissertation has reverted Möschel's

'culture' as a reference point; thus, it adopts Western (European) modes of creatorship and creativity as benchmarks to establish a global(ized) legal framework. Despite its ostensibly objective and neutral construct, IP law secures the materialistic interests of and provides legal protection to Western (European) stakeholders, while subordinating those of the non-Western – especially of racialized minorities and indigenous peoples.

In this vein, the dissertation principally questions the following: What would the assessment of IP law through the race-conscious lens of CRT reveal – specifically, about the interplay of race, power, and IP law? To elaborate on its central research question, the dissertation sets forth several sub-questions, as follows: What does the idea of race stand for in the IP domain? What are the visible and invisible racial baselines of IP law? What are the consequences of the racial thinking and the racially-charged values and perceptions embedded in the IP framework? How does race come into play in the contemporary international and national IP regimes? Do Western (European) creators and their non-Western 'others' stand on a formally and substantively equal footing before the face-neutral and seemingly objective construct of IP law and the courts?

Aims and Objectives of the Dissertation

Being skeptical about the universality, objectivity, and value-neutrality claims of international IP law and of its global(ized) norms and principles; the dissertation is primarily concerned with pinpointing the various facets of the intersection of Western (European) racial thought and IP law. It aspires to showcase the racial information that have informed and permeated the genesis, evolution, and gradual globalization of IP law, due to acknowledging the legacies of Western

articulation from 'law as a field of science' to 'law as an enterprise.' For a detailed account on the issue, please see; Mathias Möschel, 'Color Blindness or Total Blindness - The Absence of Critical Race Theory in Europe' (2007) 9 Rutgers Race & the Law Review 57, 106–108.

(European) modern thought and colonialism as the core of the unequal treatment of Western (European) and non-Western modes of creatorship and creativity by contemporary IP law.

Therefore, it aims to reveal the reciprocal investments of colonial and post-colonial legal and political mechanisms in the idea of race and IP law. To achieve this end, the dissertation places IP law in a greater historical, legal, and political setting to be able to identify the different factors that were in play while the construction of race and IP. This requires the introduction of non-doctrinal information into law and multidisciplinary research, especially to reveal the conscious or unconscious racial motivations and the materialistic interests of actors who have rested the foundations of IP law.

Given its commitment to postmodern ideology, the dissertation also aspires to contribute to the most recent offshoot of CRT: The Critical Race IP Movement and its developing body of race-conscious IP literature. It conjoins the collective scholarly efforts initiated within American jurisprudence to deconstruct, deracialize, and to decolonize IP law.[11]

The Scope of the Dissertation and Its Justification

The scope of the dissertation shall be contoured from two different dimensions: Race and IP law. Regarding the race dimension, it shall be crystallized that the dissertation not only focuses on non-Western races. Inspired and guided by Cheryl I. Harris' ground-breaking scholarly piece, entitled 'Whiteness as Property'[12], the dissertation acknowledges that Whiteness and non-Whiteness have mutually created each other, by reciprocally feeding into each other's construction within an oppositional binary paradigm.[13] Thus, the racial critique of the dissertation consists of the racial

[11] Anjali Vats and Deidré A Keller, 'Critical Race IP' (2018) 36 Cardozo Arts & Entertainment Law Journal 735, 787–794.
[12] Cheryl I Harris, 'Whiteness as Property' (1993) 106 Harvard Law Review 1707.
[13] In a similar vein with Harris, another preeminent CRT scholar, Ian F. Haney López, has a seminal work on the legal construction of, mainly, Whiteness. In his piece, López investigates the American courts' general attitude in naturalization cases brought by aliens, and he critically assesses the ways in which the American judiciary acts to uphold the positive and 'superior' features attributed to Whiteness. In respect to the 'exclusiveness' of the White

connotations of Whiteness (though there is a tendency to not see it as a 'color' or race), on the one hand; Blackness and indigeneity, on the other. Even though the dissertation does not attribute to Critical Whiteness Studies, it neither discredits nor overlooks Critical Whiteness Studies – rather, it acknowledges Critical Whiteness Studies as a sub-category[14] and an essential component of CRT.[15]

As to the IP law dimension, the dissertation focalizes on two conventional forms of IPRs: Copyright and trademark. Based on their beneficiaries, policy objectives, legal definitions, and differential evolutionary histories; it can be argued that copyright and trademark have characteristics that are quite distinct, rather than in common – which also obscures the assimilation of such disparate legal disciplines into 'IP' as a generic term.[16] Notwithstanding this statement, the choice of copyright and trademark herein is not a random one and can be justified from both legalistic and postmodernist perspectives.

identity, López reaches the conclusion that '[f]or each negative characteristic ascribed to people of color, an equal but opposite and positive characteristic is imputed in Whiteness. (…) These cases show that Whites fashion an identity for themselves that is the positive mirror image of the negative identity imposed on people of color.' Ian F Haney López, 'White by Law' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (2nd edn, Temple University Press 2000) 632.
For another concise narrative on the construction of race by the employment of oppositional binary paradigms, please see: Kimberlé Williams Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 Harvard Law Review 1331.

[14] Richard Delgado and Jean Stefancic (eds), 'Introduction', *Critical White Studies: Looking Behind the Mirror* (Temple University Press 1997) xviii.

[15] Indeed, the descriptive stand of CRT scholarship includes themes such as the law's investments in the construction of Whiteness and the operation of the legal regime to uphold the White supremacy amongst the main issues which the CRT movement and literature tackle with. See e.g., Kimberlé Williams Crenshaw and others (eds), 'Introduction', *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press 1996) xiii.

[16] As highlighted by Peter K. YU, the conceptualization of 'IP' as an 'umbrella term' to encompass a wide array of IPRs imposes a 'simplistic thinking' that melts such disparate legal institutions and regimes within the same pot. Peter K Yu, 'Intellectual Property and the Information Ecosystem' (2005) 1 Michigan State University Law Review 1, 4 <http://ssrn.com/abstract=578575> accessed 20 November 2018; Lionel Bently, 'What Is "Intellectual Property"?' (2012) 71 Cambridge Law Journal 501.
For a similar discussion, see e.g., William Robert Cornish, 'The International Relations of Intellectual Property' (1993) 52 Cambridge Law Journal 46; Peter Drahos, 'The Universality of Intellectual Property Rights: Origins and Development', *Intellectual Property and Human Rights* (World Intellectual Property Organization (WIPO) 1999) <https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_1.pdf>; Richard M Stallman, 'Did You Say "Intellectual Property"? It's a Seductive Mirage' (*GNU Operating System: Philosophy*, 2004) <https://www.gnu.org/philosophy/not-ipr.en.html>.

From a legalistic viewpoint, copyright refers to a bundle of economic (and moral) rights entitled to the author or creator of an original work fixated on a tangible medium.[17] As to trademark, it refers to an industrial right that bestows a business enterprise the exclusive right to use the registered sign or mark, which distinguish the goods and services of an enterprise from those of others.[18] Despite their inherent differences, both copyright and trademark are concerned with communication to the public, though in different ways. Copyright, while creating a legal monopoly and granting exclusive rights to intellectual creators, aims to stimulate the progress of culture, since the copyright owners are expected to disclose their works to the public at large.[19] In a similar vein, trademark aims to protect consumers, by maintaining the market transparency regarding the source of goods and services in the marketplace.[20] Thus, both forms of IPRs encourage the dissemination of the information or conveyance of the message articulated by their holders – both of which link the functions of copyright and trademark with social constructionism, hence, postmodernism.

From a postmodernist perspective, both knowledge and language – including the legal language and reality – are constructed by the society at large.[21] Hence, knowledge comprises the common imagery, beliefs, and values mediated by the members of a society under certain cultural, historical, and political circumstances and through the use of *language*.[22] Due to this, neither language provides an objective and value-neutral glossary, nor does an objective reality exists

[17] World Intellectual Property Organization (WIPO), *WIPO Intellectual Property Handbook* (2nd edn, 2004) 40 para. 2.163 <http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf>.
[18] Ibid, 67 para. 2.320.
[19] Ibid, 40 para. 2.162.
[20] Ibid, 67 paras. 2.318-2.320.
[21] Peter C Schanck, 'Understanding Postmodern Thought and Its Implications for Statutory Interpretation' (1992) 65 Southern California Law Review 2505, 2508–2509, 2518.
[22] Ibid, 2509. Also see: Vivien Burr, 'What Is Social Constructionism?', *An Introduction to Social Constructionism* (Routledge 2006).

without the contextual backdrop in which it has been constructed.[23] Regarding this, postmodernism rejects the existence of a universally accepted truth as well as that of any 'neutral, objective standpoint which (…) [can be retired] in order to determine the true value of any assertation.'[24] To explain this phenomena, postmodern theories, including CRT, employ social constructionism.[25]

Social constructionism emphasizes the role of language as the precursor of the overall cognitive process of individual members of a society as well as social exchange, while questioning the ways in which 'language's underlying structures (…) [shape one's] understanding of reality and texts.'[26] For the purposes of this dissertation, the (legal) language and common knowledge constructed under the shadow of racially-charged information, racial slurs and epithets, racially pejorative imagery and stereotypes that have been consciously or unconsciously learnt and internalized[27] constitute the focal point of the dissertation. Accordingly, the dissertation looks at the social construction of race, IP, the laws centered around these concepts, and case law with the aim of grasping the correlation of societal knowledge, legal language, and the (racially-informed) thinking of policy-, law-, and decision-makers in the realm of IP.

In light of the postmodernist readings of (legal) language and the construction of common knowledge; IP law in general, and copyright and trademark in particular, come to the fore as the gatekeepers of culture, common imagery, and knowledge – and not only in a specific society, but also on a global scale. Indeed, (international) copyright law, on the one hand, has conceived and induced a special lexicon which articulates the intellectual output that is *worthy* of legal protection, conceptualizes notions such as 'intellectual work' or 'public domain', identifies intellectual

[23] Schanck (n 21) 2508.
[24] Ibid, 2517.
[25] Trudy Mercadal, 'Social Constructionism', *Salem Press Encyclopedia* (2017).
[26] Schanck (n 21) 2514.
[27] Charles R Lawrence III, 'The Id, The Ego, and Equal Protection Reckoning with Unconscious Racism' in Kimberlé Williams Crenshaw and others (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (The New Press 1995) 237–241.

creators and IPRs holders, and sets the standards for accessing to and participating in the construction of culture and information. On the other hand, it operates as a tool to secure the use and exploitation of certain expressions, regardless of their underlying ideas. In the same line, (international) trademark law also produces a unique lexicon and the legal space where registered marks can spread certain messages, including that of the racially-informed ones, while enjoying legal protection.[28]

Based on these, the dissertation aspires to unearth the racial connotations embedded in copyright and trademark concepts, norms, and principles; whilst exploring the ways in which copyright and trademark laws and systems contribute to the construction and accumulation of culturally- and temporally-specific racial information by means of the law. On that note, it shall be highlighted that it is neither desired by nor shall it be expected from the dissertation to delve into a comprehensive analysis of trademark law. Instead, it employs trademark only to reinforce the conclusions drawn from copyright, and particularly from its 'idea and expression' dichotomy. Within these self-imposed restrictions, it does not investigate the interplay of race with trademark law per se, but the impact of trademark's *expressive power* on the reinforcement of the idea of race, accumulation of racial information, construction (or destruction) of cultural and communal identities of racialized minorities and indigenous peoples. In other words, the dissertation is concerned with what Rosemary J. Coombe articulates as the extension of the 'author-function' to trademark law and business enterprises, which equips the corporate powers with the monopoly to generate and to control the use of social meaning in the social sphere and the marketplace.[29]

[28] Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (1st edn, Duke University Press 1998) 59–62.
[29] Ibid, 59-60.

The Choice of Jurisdictions and Its Justification

In line with its hypothesis and objectives, this dissertation studies the IP systems of three jurisdictions, which are as follows: The United States, the United Kingdom, and the Commonwealth of Australia.

Selection of these jurisdictions is justified on three major grounds: First and foremost, there is a strong correlation between these jurisdictions, specifically the United States and the United Kingdom, and the two main pillars of the dissertation, namely CRT and IP law. In this regard, the United States constitutes the first jurisdiction to be analyzed, primarily, because of its close relation to the first pillar of this dissertation: CRT. Indeed, the CRT Movement and its race-oriented doctrine are unique assets of postmodern American jurisprudence.[30] The initial CRT scholarship has flourished from the American constitutional law and civil rights discourse, and it was shaped according to the peculiarities of the American cultural, economic, historical, legal, and political reality.[31] Therefore, the construction of race, the study of the interplay of race and law, and the initial race-oriented literature of CRT are all the matters of the American experience and legal scholarship.[32] In this respect, the analysis of the United States and the American (IP) jurisprudence is not only a *must* on the CRT front, but it also enables the exploration and comprehension of the genesis, main arguments, tenets, hallmark themes, and key writings of CRT in their authentic context. Besides, the United States stands as the first country to witness the inaugural scholarly attempts linking CRT doctrine to IP law.[33]

[30] Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 167–168.
[31] Ibid.
[32] Ibid.
[33] See e.g., Kevin Jerome Greene, 'Copyright, Culture & Black Music: A Legacy of Unequal Protection' (1998) 21 Hastings Communications and Entertainment Law Journal 339; Kevin Jerome Greene, 'Copynorms, Black Cultural Production, and the Debate over African-American Reparations' (2008) 25 Cardozo Arts & Entertainment Law Journal 1179; Kevin Jerome Greene, 'Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues' (2008) 16 Journal of Gender, Social Policy & the Law 365; ibid; John Tehranian, 'Towards a Critical IP Theory:

The United Kingdom stands as the second jurisdiction of this dissertation, mainly, because of its relevance to the second pillar of the dissertation: IP law. Indeed, it is not possible to outline the genesis and evolution, especially, of copyright law without paying regard to the cultural and legal terrain of the United Kingdom, where modern copyright law originated from.[34] The Statute of Anne of 1710[35] enacted by the British legislature not only comprises the first statutory copyright law, but it is also acknowledged in the literature as the origins of contemporary IP law.[36] Despite being born out of the literary and legal scene in the United Kingdom, the Statute of Anne of 1710 has influenced many other countries; in fact, some of these countries, either directly or indirectly, modelled their copyright laws on the British Statute.[37]

Second, the three jurisdictions of the dissertation are interconnected due their legal and political history shaped by Western (European) colonialism. The colonial practices of the United Kingdom encompass the British settlement in, hence, the colonization of American and Australian soil starting with the early 1600s. It can be argued that the imperial rule over colonial as well as post-colonial America and Australia has been the main catalyzer in the making of the modern American and Australian IP tradition and system. In other words, the United States and the Commonwealth of Australia stand among the countries which transplanted the Statute of Anne of

Copyright, Consecration, and Control' [2012] Brigham Young University Law Review 1237; Toni Lester, 'Blurred Lines - Where Copyright Ends and Cultural Appropriation Begins - The Case of Robin Thicke Versus Bridgeport Music and the Estate of Marvin Gaye' (2014) 36 Hastings Communications and Entertainment Law Journal 217; Toni Lester, 'Oprah, Beyoncé, and the Girls Who "Run the World" - Are Black Female Cultural Producers Gaining Ground in Intellectual Property Law' (2015) 15 Wake Forest Journal of Business and Intellectual Property Law 537; Anjali Vats and Deidre A Keller, 'Critical Race IP' (2018) 36 Cardozo Arts & Entertainment Law Journal 735; Anjali Vats, *The Color of Creatorship: Intellectual Property, Race, and the Making of Americans* (1st edn, Stanford University Press 2020).

[34] Lionel Bently, 'Introduction to Part I: The History of Copyright' in Lionel Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar 2010) 7.

[35] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned of 1710, 8 Anne, Ch. 19 (The Statute of Anne).

[36] Bently, 'Introduction to Part I: The History of Copyright' (n 34) 7.

[37] Ibid, 11-12.

1710 – along with the British cultural values and assumptions built in the imperial copyright laws – into their national legal system.[38] Owing to this, the United Kingdom's pivotal role in the Western (European) colonial history complements its leading position in the IP discourse and further justifies its selection as a jurisdiction herein.

Given this colonial dimension of the dissertation, the choice of the United States is further justified, due to offering the opportunity to explore the racial connotations embedded in and carried along with IP law, by taking into consideration the legacy of Western (European) colonialism and the colonial legal mechanisms. From this aspect, the United States appears as an ideal candidate for the historical and legal analysis herein. The initial responses of colonial America to the advent of the printing press were formed under the imperial rule, whereas the influence of the imperial copyright laws continued to guide the colonial and post-colonial American copyright laws – and even formed the backbone of modern American copyright law.[39]

In this sense, the Commonwealth of Australia comprises another ideal candidate for the investigation of the investments of colonialism in the construction of race and the consolidation of racial information into IP law. Furthermore, the analysis of the Australian legal history and jurisprudence offers a narrative, which is alternative to that drawn upon the American experience, on the interplay of race, colonialism, and IP law. Consequently, such an historical and legal

[38] See e.g., Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968); Oren Bracha, 'United States Copyright, 1672–1909' in Isabella Alexander and H Tomás Gómez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016); Robert Burrell, 'Copyright Reform in the Early Twentieth Century: The View from Australia' (2006) 27 The Journal of Legal History 239; Sarah Ailwood and Maree Sainsbury, 'Copyright Law, Readers and Authors in Colonial Australia' (2014) 14 Journal of the Association for the Study of Australian Literature; Sarah Ailwood and Maree Sainsbury, 'The Imperial Effect: Literary Copyright Law in Colonial Australia' (2016) 12 Law, Culture and the Humanities 716; Catherine Bond, '"Cabined, Cribbed, Confined, Bound in": Copyright in the Australian Colonies' in Isabella Alexander and H Tomás Gómez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016).

[39] See e.g., Patterson, *Copyright in Historical Perspective* (n 38); Bracha, 'United States Copyright, 1672–1909' (n 38).

account complements the depiction of the continuum of the overarching racial thought and racial connotations in the colonial and post-colonial Australian legal tradition and order.

On that note, it can be briefly mentioned that the colonial past and shared colonial experiences of these three jurisdictions, on the one hand, help in mapping the travel of the ideas of race and IP from the United Kingdom to the United States and the Commonwealth of Australia. On the other hand, the intricacies of colonialism facilitate tracking the (colonial) legal transplantation[40] of imperial IP norms and principles into the legal order of colonial territories – hence the implementation of the culturally- and temporally-specific values stemmed from the British cultural and legal scene into the American and Australian legal reality.[41]

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[40] Whilst speaking of legal transplants, the dissertation borrows from Alan Watson's seminal work, entitled *Legal Transplants: An Approach to Comparative Law*. Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, The University of Georgia Press 1974). Accordingly, the phrase '(colonial) legal transplant' used herein to pinpoint certain concepts or a set of legal norms and principles which were transferred from one jurisdiction (United Kingdom) to others (the United States and the Commonwealth of Australia).
Nevertheless, it shall be clarified that it is not an original idea or articulation of the dissertation to refer to the foundations of the American and Australian copyright traditions as (colonial) legal transplants. Legal historians and IP scholars who work on the relationship of the imperial copyright laws with the American and Australian IP systems acknowledge this interaction as colonial legal transplants or, simply, legal transplants. See e.g., Pierre-Emmanuel Moyse, 'Colonial Copyright Redux: 1709 v. 1832' in Lionel Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar 2010); Oren Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (2010) 25 Berkeley Technology Law Journal 1427; Benedict Atkinson, 'Australia's Copyright History' in Brian Fitzgerald and Benedict Atkinson (eds), *Copyright Future Copyright Freedom: Marking the 40 Year Anniversary of the Commencement of Australia's Copyright Act 1968* (1st edn, Sydney University Press 2011).

[41] Perhaps it would be useful to open a parenthesis herein and to briefly explain why the dissertation opts for a CRT lens, rather than the prism of the Third World Approaches to International Law (hereafter 'TWAIL') – especially given the strong emphasis on colonialism on the parallel construction of race and key IP concepts. In Makau Mutua's words, TWAIL is rooted in the anti-colonial movement, and it constitutes 'a response to decolonization and the end of direct European colonial rule over non-Europeans.' Accordingly, and in line with the argument made within Chapters II and III of this dissertation, TWAIL rejects the universality, objectivity, and value-neutrality of international law, due to its focalization of Western (European) actors and their readings of 'civilization', State, and nation. Hence, TWAIL is dedicated to 'unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans.' Makau Mutua and Antony Anghie, 'What Is TWAIL?' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31, 31, 33.
Whereas TWAIL's approach to international law and institutions also inform the dissertation's explanations over the transplantation of imperial copyright laws and principles to the colonial territories of the United Kingdom by means of colonial legal relations and then to the rest of the world through global IP diplomacy; this racial aspect of contemporary IP law constitutes only a layer of this multi-layered problem. Besides, the dissertation does not primarily concentrate on the conversion of colonial structures to the modern international law structures and dynamics, but the investments of colonialism into the parallel construction of race and IP. In other words, respecting and sharing TWAIL's ideology, the dissertation looks at colonialism not as a socio-historical and political reality that underpins

The last reason underpinning the choice of jurisdictions is rather a practical one – and it hinges upon Mathias Möschel's scholarship, which pioneers the implementation of CRT doctrine to the European socio-historical context and jurisprudence.[42] Informed by Möschel's conclusions on the conditions that would ease the application of CRT to a non-American context, a selection has been made only from common law countries, in terms of eliminating any 'linguistic and legal hurdles.'[43]

In this sense, the United Kingdom, apart from illuminating the interplay of colonialism with IP law, offers an optimum ground for the application of CRT doctrine. According to Möschel, the United Kingdom can acclimate the race-conscious critique and race-oriented doctrine of CRT, due to a couple of reasons: On the one hand, the experience of mainland Europe with the idea of race and racism were primarily forged in between the two World Wars (hereafter 'WW') and by the predicaments of anti-Semitism and the Holocaust, which were backed up by State-mandated campaigns and the law per se.[44] Nevertheless, the United Kingdom has not been directly subjected to or affected by Nazism or the systemic persecution of Jews.[45] Instead, the construction of race and the racial reality in the British context can be explained, at least for the purposes of this dissertation, by another category of 'European *racisms*'[46] identified by Möschel: '[Colonialism]

international law, but as a means of the transfer of the ideas of race and racially-charged IP laws from one context to another.

As a last remark, the dissertation commits to the opinion that TWAIL and CRT can support and complement each other. See e.g., James Thuo Gathii, 'Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other' (2021) 67 UCLA Law Review 1610.

[42] See e.g., Möschel, 'Color Blindness or Total Blindness - The Absence of Critical Race Theory in Europe' (n 10); Mathias Möschel, 'Race in Mainland European Legal Analysis: Towards a European Critical Race Theory' (2011) 34 Ethnic and Racial Studies 1648; Mathias Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (1st edn, Routledge 2014).

[43] Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42) 82.

[44] Möschel, 'Race in Mainland European Legal Analysis: Towards a European Critical Race Theory' (n 42) 1651; Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42) 92.

[45] Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42) 92.

[46] Möschel notes that the construction of race has followed different timelines and patterns under different national conditions. To avoid overgeneralizing or even essentializing any specific construct, he uses 'European racisms' to cumulatively refer to such ideology. Despite their divergences, Möschel confirms that the archetypical ideas of race and racism were premised on the same ideological ground both in the American and European context. Hence, American and European racisms, in principle, require often a White dominant group and other 'target' groups deemed to be biologically or culturally inferior to White race. Möschel, 'Color Blindness or Total Blindness - The Absence of

and (…) racial hierarchies, which place White Europeans and their civilization above those of the colonized populations that were often identified as subordinate colonial subjects.'[47] In other words, the construction of race and racialization of certain groups in the British context was centered around the idea of White supremacy – as was the case in the United States.[48]

On the other hand, British legal academia, in comparison to Continental European jurisprudence, is more prone to welcome race and post-colonial discourse and scholarship.[49] As a matter of fact, there exists a race-centered strand of IP scholarship on – or, more correctly, a post-colonial critique of – the legal history as well as IP laws and strategies that are associated with the British Empire. A cohort of IP scholars – Catherine Seville, Lionel Bently, Martin Kretschmer, Michael D. Birnhack, and Ronan Deazley, to name a few – have authored works that either explicitly focus on the colonial history and the enforcement of imperial IP laws in the colonial territories, or they have works that implicitly study the consequences of racial practices in the IP realm.[50] These scholarly endeavors enable and guide the investigation of the interaction of IP law with colonialism – especially, the use of IP law as a colonial project and the legal transplantation of British IP laws into the legal order of the British colonial territories.

Critical Race Theory in Europe' (n 10) 70–71. Also see, Eddie Bruce-Jones, *Race in the Shadow of Law: State Violence in Contemporary Europe* (1st Edn, Routledge 2017) 25–26.

[47] Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42) 92.

[48] Ibid, 117.

[49] Ibid, 98-99.

[50] See e.g., Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (1st edn, Cambridge University Press); Catherine Seville, 'British Colonial and Imperial Copyright' in Isabella Alexander and H Tomás Gómez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016); Lionel Bently, 'Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries' (2007) 82 Chicago-Kent Law Review 1181; Lionel Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (2011) 12 Theoretical Inquiries in Law 161; Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* <http://www.copyrighthistory.org>; Michael D Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (1st edn, Oxford University Press 2012); Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)* (Hart Publishing 2004); Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar 2006).

In the case of CRT's applicability to other common law countries, the Commonwealth of Australia constitutes a convenient testbed. In fact, it can be argued that the Australian race relations not only confirm Möschel's articulation of 'White supremacy' as the driving force of the construction of race in common law countries, but these dynamics also enrich the race discourse of the dissertation, by introducing the 'Western (European)/White and Aboriginal' binary paradigm.[51] Therefore, Australia presents a curious case to test the race-conscious lens of CRT and to understand the response of the law to race and race-related IP matters in a different geographical context. It is also worth to mention that Australian legal scholarship holds a two-pronged racial debate: On the one side of this spectrum is the post-colonial critique of the ever-lasting impact of the imperial IP laws on the Australian IP domain.[52] On the other side is the debates revolving around the compatibility and the clash of Western-centric IP norms and principles with the Aboriginal creatorship and creativity.[53] Additionally, a significant portion of the general IP literature and case law on TK stems from the Australian Aboriginal reality. Hence, Australia offers a rich texture to conduct research on the interaction of IP regimes and TK of the

[51] See e.g., 'Australians at War: Colonial Period, 1788–1901' (*Australian War Memorial*) <awm.gov.au> accessed 9 September 2021.

[52] See e.g., Burrell (n 38); Atkinson (n 40); Ailwood and Sainsbury, 'Copyright Law, Readers and Authors in Colonial Australia' (n 38); Ailwood and Sainsbury, 'The Imperial Effect: Literary Copyright Law in Colonial Australia' (n 38); Bond (n 38).

[53] See e.g., Fleur Johns, 'Portrait of the Artist as a White Man: The International Law of Human Rights and Aboriginal Culture' (1995) 16 Australian Year Book of International Law 173; Andrew Kenyon, 'Australian Aboriginal Art, Carpets and Copyright' (1996) 1 Art Antiquity and Law 59; Colin Golvan, 'Aboriginal Art and Copyright: An Overview and Commentary Concerning Recent Developments' (1999) 21 European Intellectual Property Review 599; Terri Janke, 'The Application of Copyright and Other Intellectual Property Laws to Aboriginal and Torres Strait Islander Cultural and Intellectual Property' (1997) 2 Art Antiquity and Law 13; Andrew T Kenyon, 'Copyright, Heritage and Australian Aboriginal Art Special Issue: Intellectual Property and Indigenous Culture' (2000) 9 Griffith Law Review 303; Jane Anderson, 'The Making of Indigenous Knowledge in Intellectual Property Law in Australia' (2005) 12 International Journal of Cultural Property 347; Jane E Anderson, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (Edward Elgar Publishing 2009); Annette Van den Bosch and Ruth Rentschler, 'Authorship, Authenticity, and Intellectual Property in Australian Aboriginal Art' (2009) 39 Journal of Arts Management, Law & Society 117; Maroochy Barambah, 'Relationship and Communality: An Indigenous Perspective on Knowledge and Expression' in Brian Fitzgerald and Benedict Atkinson (eds), *Copyright Future Copyright Freedom: Marking the 40 Year Anniversary of the Commencement of Australia's Copyright Act 1968* (1st edn, Sydney University Press 2011).

Aboriginal people – in which resonates the experiences and realities of indigenous peoples of the World.

Research Methodology

The research herein fits in the category of 'critical projects' – a term conceptualized to refer to academic research conducted for 'expos[ing] un[der]stated assumptions, patterns or results, internally inconsistent structures, or other tensions within the body of law or legal practices or institutions.'[54] Aligned with its critical nature, the dissertation adopts theoretical research[55] as its overarching research methodology, mainly for two reasons: First, the dissertation relies on the race-oriented philosophy of CRT, rather than praxis,[56] in terms of understanding the operation of legal phenomena in various geographical and historical contexts. Second, it addresses the inequalities induced by the law and aims to expose the underpinnings of such dilemmas. Thus, the critical legal method helps in embracing a 'radical and focused perspective to the matter at hand'[57] in order 'to overcome the tradition'[58] and '[to] rectify the social wrongs.'[59]

Yet, given its postmodern stance, the dissertation is eclectic in its choice of methodology and combines several other research methods to achieve its goals. This bundle of research methods can be clustered into and explained under two categories: Data collection and data analysis methods.

[54] Martha Minow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63 Journal of Legal Education 65, 68.
[55] The dissertation relies on the definition adopted by the Pearce Committee, which articulated theoretical research as 'research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity.' Terry Hutchinson, *Researching and Writing in Law* (4th edn, Thomson Reuters (Professional) Australia Limited 2018) 7.
[56] Ibid.
[57] Panu Minkkinen, 'Critical Legal "Method" as an Attitude' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 119.
[58] Ibid, 122.
[59] Ibid.

For collection of data, the dissertation principally relies on systematic literature review.[60] The key concepts and other essential terms constitute the starting point to conduct research, to identify, and to retrieve data from (secondary) legal sources.[61] Although facilitating the search of well-established concepts, principles, and recurrent themes in the legal literature; systematic literature review impedes the identification of postmodern literature, simply because the latter category of scholarship is not always labelled as 'postmodern' and the like. Whereas CRT scholarship has produced edited volumes and collections of key writings,[62] the Critical Race IP Movement has not completed that stage of theorization yet.[63] To overcome the obstacles imposed by this situation, the so-called 'snowball' method, also known as the chain-referral (sampling) method, is also employed – specially to identify the literature associated with, but do not bear the CRT or Critical Race IP cachet.

For analyzing the collected data, the dissertation refers to doctrinal and comparative research methods. Doctrinal method instructs the legal analysis of the primary (international legal instruments, national laws, and case law) and secondary sources of law (legal literature, toolkits, and guidelines of international organizations), especially in mapping the role that the law played in the construction and ratification of social and legal constructs, such as indigeneity. This method is used not only 'to analyze and synthesize the content,'[64] but also 'to engage with the literature'[65]

[60] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 112–113.
[61] Ibid.
[62] See e.g., Kimberlé Williams Crenshaw and others (eds), *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press 1996); Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (2nd edn, Temple University Press 2000); Dorothy A Brown (ed), *Critical Race Theory: Cases, Materials and Problems* (2nd edn, Thomson West 2007).
[63] Anjali Vats and Deidre Keller, 'Critical Race IP' (Social Science Research Network 2017) SSRN Scholarly Paper ID 3050898 3 *supra* note 11 <https://papers.ssrn.com/abstract=3050898> accessed 20 November 2017.
[64] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 112–113.
[65] Ibid.

on a deeper level. Finally, comparative legal method informs the dissertation while mapping the continuum of certain legal patterns, such as (colonial) legal transplants of imperial copyright laws, in disparate, yet related, legal cultures and systems.[66]

Thematical Overview of the Dissertation

The dissertation breaks down the racial critique of IP law into four segments: The postmodern theory to be used for such analysis; the IP policy- and law-making systems at colonial, international, and global levels; the content of IP law, particularly the global(ized) IP norms and principles; the responses of national courts to the legal disputes concerning the interaction of Western-centric IP laws with non-Western creatorship and creativity, or simply put, the case law. Accordingly, the dissertation consists of four substantive chapters, each concentrating on a different dimension of the race-conscious assessment of IP law.

The first chapter constitutes the backbone of the dissertation due to setting its theoretical ground, by introducing the postmodern lens to be used in the subsequent chapters to look at IP law. Allocated to the description of CRT and its race-conscious doctrine within their original context, the chapter outlines the genealogy, main cause and arguments, and philosophy of CRT. Highlighting the scholarly efforts to incorporate CRT in geographical and legal contexts other than the American constitutional law, the chapter points at the most recent outgrowth of CRT: The Critical Race IP Movement. It explains the aims and objectives of this race-oriented endeavor tailored for IP law, whilst answering to the following questions: Why does the contemporary IP law necessitate a postmodern approach and a race-conscious critique? How can CRT inform and help deracialize IP law?

[66] Geoffrey Samuel, 'Comparative Law and Its Methodology' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 114; Hutchinson, *Researching and Writing in Law* (n 55) 148–151.

The second chapter initiates the application of CRT doctrine to the subtly racialized terrain of IP law. Comprising the first step in the analysis of IP law through the prism of CRT, the chapter question when and how IP law transformed into a Western (European) legal project that reflects and is shaped by the economic and political agendas of the Global North. Thus, the chapter investigates the intricate relationship of the idea of IP and IP law, respectively, with political power and race, by tracing the construction of IP within the Western (European) historical, legal, and political reality. It provides a synopsis of the genesis of *copy-right* as a censorship mechanism and outlines the evolution of statutory copyright law in parallel to Western (European) colonialism. Additionally, it maps the extension of such an inherently Western (European) legal mechanism to non-Western territories by means of colonialism, international (legal) diplomacy, and the globalization of normative IP frameworks.

The third chapter further develops and complements the task undertaken by the previous one. It shifts the focus from the multi-levelled IP policy- and law-making mechanisms to the output of such processes: The conceptualization of IP concepts and the establishment of IP norms, principles, and legal frameworks. It investigates the investments of the racialized power asymmetries into the content of IP law, while placing the construction of the key IP concepts, norms, and principles in a greater historical, legal, political, and social context. For its purposes, the chapter, on the one hand, narrates the construction of race, specifically of indigeneity, and the fabrication of racialized cultural hierarchies through the Renaissance, Enlightenment, and Romantic eras. On the other hand, it exposes the projections of the overarching racial thinking of Western (European) modernity onto IP law, by explaining the construction of the Romantic author, folklore, and TK as well as the normative principles stemmed therefrom.

The fourth and last substantive chapter synthesizes the previous ones. It compares the racialized cultural and power asymmetries, hence, the racial information interwoven into the fabric of IP law both in the colonial and post-colonial eras. In doing so, it investigates two specific paradigms: The 'colonizer and colony', and the 'former colony/nation-state and sub-state groups' binary paradigms. The chapter commences with a synopsis of the milestones in the legal history of Australian and American copyright law, in which the influence or imposition of the British Empire's copyright laws and practices are evident. This analysis is induced by and serves two purposes: First, it demonstrates the continuum of the imperial *copy-right* practices and copyright laws within the Australian and American copyright traditions because of the colonial relations and (colonial) legal transplantation. Second, it illuminates the travel of the idea of Western (European) cultural 'supremacy', which underpinned the key concepts and principles of copyright law, from the British Empire to its (former) colonies. To further unfold the racial layers of modern Australian and American IP doctrine, the chapter analyzes several high-profile copyright and trademark cases decided by the Australian and American judiciary. It illustrates the implications of the racially-charged cultural valorization schemes embedded in copyright and trademark norms and principles on the creative process, legal rights, and communal identities of racialized minorities and indigenous peoples reside in the Commonwealth of Australia and the United States.

The dissertation ends on a note, entitled 'Conclusion', where the main arguments and the key findings of the dissertation are outlined. Drawing upon its overall content and the conclusions it has reached, the dissertation therein adopts several normative resolutions as well.

Chapter I

Critical Race Theory: A Race-Oriented Approach to Construe Law

1.1. Introduction

This chapter builds the theoretical foundations of the dissertation by introducing CRT. The chapter provides a comprehensive account of CRT and its race-conscious philosophy, considering that CRT will be adopted as a postmodern approach to critically assess IP law in the consecutive chapters. Therefore, the chapter contours CRT doctrine, by explaining its postmodern origins, genesis and evolution, main tenets, and hallmark intellectual themes.

In broad terms, CRT refers to a radical political stance, or political activism, that emerged in American legal academia and discourse in the 1960s.[67] Proliferated in the aftermath of the Civil Rights Movement of the 1960s, CRT can be framed as a politically and scholarly committed reaction to the shortcomings of the Civil Rights Amendments – especially, to its broken promises to eradicate racism from the American legal order and to achieve a true racial equality in the United States.[68]

In this sense, CRT can be presented as a politically-acclaimed race-centered intellectual project initiated by legal scholars of color, who were devoted to combatting cultural and institutional racism deeply-ingrained in the American legal order.[69] The collective efforts of these scholars have gradually evolved into a legal theory during the late 1980s.[70] Eventually, CRT found itself a place

[67] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 168–169; Crenshaw and others, 'Introduction' (n 15) xix–xxvi; David M Trubek, 'Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How to Get Along with a Little Help from Your Friends' (2011) 43 Connecticut Law Review 1503, 1505.
[68] Mari J Matsuda and others, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1st edn, Westview Press 1993) 3; Crenshaw and others, 'Introduction' (n 15) xiv; Richard Delgado and Jean Stefancic (eds), 'Introduction', *Critical Race Theory: The Cutting Edge* (2nd edn, Temple University Press 2000); Trubek (n 67) 1505.
[69] Matsuda and others (n 68) 4–5.
[70] Crenshaw and others, 'Introduction' (n 15) xxii–xxvii.

in American jurisprudence amongst other postmodern legal theories, such as Law and Economics, Law and Literature, Critical Legal Studies (hereafter 'CLS'), and Feminist Legal Theory.[71]

Driven by its commitment to the postmodern thought and ideals, CRT is critical, if not skeptical, about the idea of State-neutrality, the universality, objectivity, and neutrality claims of law, and the formal conceptions of 'equality'.[72] Thus, CRT challenges the dominant narratives of law; it reconstrues the legal reality by introducing an alternative narrative: The race-conscious narrative of people of color.[73] CRT's race-conscious narrative prioritizes subjectivity, especially given that it stems from and is interwoven with the actual experiences of (racialized) minorities with cultural and institutional racism.[74] By giving voice to the historically silenced and marginalized people, CRT investigates the interplay of race, racial knowledge, political power, and the law.[75] In doing so, CRT examines the ostensibly neutral and objective legal order from a race-based point of view, principally, to uncover the ways in which the law constructs racial identities and reinforces a legal regime that maintains the racialized power hierarchies in the American society.[76] Nevertheless, it does not only aim to reveal the adverse impact of the law on the lives of people of color, but it also seeks remedies to advance their legal status as a group.[77]

Considering that CRT doctrine is centered around identity politics, the prime CRT scholarship was shaped by the particularities of the historical, legal, political, and social reality of the United

[71] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 191–195.
[72] Matsuda and others (n 68) 6; Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (2nd Edn, New York University Press 2012) 7–8.
[73] Matsuda and others (n 68) 6; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 45–47.
[74] Matsuda and others (n 68) 6; Crenshaw and others, 'Introduction' (n 15) xix; Delgado and Stefancic, 'Introduction' (n 68) xiv.
[75] Crenshaw and others, 'Introduction' (n 15) xiii.
[76] Ibid.
[77] Matsuda and others (n 68) 6–7; Crenshaw and others, 'Introduction' (n 15) xiii–xiv; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72).

States.[78] Accordingly, the basic tenets and hallmark intellectual themes of CRT derived from the American civil rights discourse and were influenced, mainly, by American constitutional law.[79]

Although the essence and core ideas of CRT have traveled to a variety of disparate disciplines,[80] the study of these concepts within their authentic context is crucial, at least for the purposes of this dissertation, for two major reasons: First, such an enterprise would enable one to have a profound understanding of CRT and to connect its postmodernist aesthetics and philosophy with a broader array of historical, political, and legal events. Second, it would facilitate implementation of CRT's culturally- and geographically-bound insights into any other discipline without causing any distortion in the original meaning of the 'theoretical vocabulary'[81] of CRT.

Therefore, this chapter begins with a synopsis of CRT's affiliation with the postmodern legal thought. It, then, briefly explains the chronology of CRT's genesis as a series of diversity movements in American legal academia and its gradual evolution into an eclectic postmodern legal theory. The chapter continues with mapping the main tenets and intellectual themes of CRT. It explains these features, as well as the CRT lexicon deducted therefrom, in their original textual and contextual setting. Subsequently, the chapter explains the internal and external critique received by CRT, given that criticism as such paved the way to the expansion of CRT's scope in various directions – especially, beyond the experiences of African-Americans, the national borders of the United States, and across disciplines. In this respect, the chapter pinpoints the relatively recent scholarly attempts to incorporate CRT's ideology in IP law; it allocates a full sub-chapter

[78] Matsuda and others (n 68) 3.
[79] Ibid; Roy L Brooks, 'Critical Race Theory: A Proposed Structure and Application to Federal Pleading' (1994) 11 Harvard BlackLetter Law Journal 85, 85; Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42) 42.
[80] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 114–126; Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42) 69–70.
[81] Crenshaw and others, 'Introduction' (n 15) xxvii.

to explain the proliferation of CRT in the IP law domain as a distinct legal movement, namely 'Critical Race IP.'[82]

The chapter concludes (and sets the tone of the following chapters by noting) that law is not an objective and value-neutral enterprise – and that IP law is not an exception. Indeed, there is no reason to think that IP law in general, and the global(ized) IP normative frameworks and the vastly harmonized national IP laws of various States in particular, are immune to the implications of the interaction of race, racial information, racialized power hierarchies, and the law per se. In fact, it can be argued that contemporary IP law requires a postmodern and especially a race-conscious lens more than ever, given the widening gap between the Global North and South, the power asymmetries that rule the global IP negotiations, the inherent Western-centrism of IP law, and maximization of such a Western-centric legal model. The chapter ends on the note that neither the racial thought nor its implications on the law and legal institutions are matters of the past; per contra, they prevail to haunt the legal domain and legal institutions, including those of the international and national IP frameworks.

1.2. An Overview of the Foundations of Critical Race Theory

The study of the interplay of race, political power, and law has been an extant theme in American jurisprudence, which precedes the theorization of CRT as 'a self-conscious entity.'[83] Regarding this, Gary Minda states that 'the intellectual origins of [CRT] are quite old, going back to the early history of slavery in America.'[84] Indeed, some of CRT's key writings were built upon the

[82] Anjali Vats and Deidré A Keller, 'Critical Race IP' (2018) 36 Cardozo Arts & Entertainment Law Journal 735.
[83] Delgado and Stefancic, 'Introduction' (n 68) xvi. Also see Derrick A Bell, Jr., 'Racial Realism' in Kimberlé Williams Crenshaw and others (eds), *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press 1996) 302.
[84] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 168.

intellectual heritage of opinion leaders such as Malcom X, Martin Luther King, Jr., Rosa Parks, Sojourner Truth, and W.E.B. Du Bois.[85]

Even though the intellectual precursors of race discourse are long-established in the American intellectual domain, the theorization and systematic presentation of these intellectual themes in the legal forum can only be traced back to the inauguration of CRT at the workshop held at Madison, Wisconsin in 1989.[86] Subsequently, CRT was welcomed by legal scholars to American jurisprudence, in Cornel West's words, as 'the most exciting development in contemporary legal studies.'[87] West frames CRT as 'an intellectual movement that is both particular to our postmodern (and conservative) times and part of a long tradition of human resistance and liberation.'[88]

In fact, CRT's authenticity derives not only from its subject-matter but also from its methodology – or, again in West's words, from its 'novel readings of a hidden past that disclose the flagrant shortcomings of the treacherous present.'[89] In order to provide an alternative reading to the dominant perceptions of the social and legal reality, CRT, principally, elaborates on the heterogenous structure of the American society and pinpoints the power asymmetries that have been ruling the public spaces.[90] Respectively, it introduces the historically ignored, marginalized, or silenced voices of the subordinated into the legal discourse.[91] Along the same line, CRT adds a

[85] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 5; Delgado and Stefancic, 'Introduction' (n 68) xvi.
[86] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 168–169; Delgado and Stefancic, 'Introduction' (n 68) xvi.
[87] Cornel West, 'Foreword' in Kimberlé Williams Crenshaw and others (eds), *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press 1996) xi.
[88] Ibid, xi-xii.
[89] Ibid, xii.
[90] Matsuda and others (n 68) 5; Delgado and Stefancic, 'Introduction' (n 68) xiv.
[91] Matsuda and others (n 68) 3–6; Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 167–173; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 7–12.

new epistemological source to the legal discourse: The actual experiences and subjective perspectives of racialized minorities.[92]

Considering the centrality of group identity to its philosophy, CRT scholars explain that '[CRT] cannot be understood as an abstract set of ideas or principles.'[93] This can be taken as CRT's rejection of static characterizations of its ideology and objectives. CRT holds an activist dimension, which underlines, if not describes, what CRT *is*. As declared by Kimberlé Williams Crenshaw, CRT 'desires not merely to understand the vexed bond between law and racial power but to change it.'[94] Hence, CRT scholars set the mission of CRT as elimination of 'racial oppression as part of the broader goal of all forms of oppression.'[95] Therefore, rather than to urge to develop a 'canonical set of doctrines and methodologies,'[96] CRT prioritizes the implementation of identity politics into the legal forum.[97]

Whereas the explanations made above provide only a snapshot of CRT's ideology, they require to be further substantiated for a better understanding of CRT. Therefore, this sub-chapter is allocated to explaining the postmodern origins of CRT. In doing so, the sub-chapter undertakes the challenge of defining postmodernism and the postmodern legal thought, at least for its own purposes. Then, it analyzes the postmodern origins and doctrine of CRT, by looking at its genesis as a series of diversity movements and its consolidation into a self-reliant theory. Additionally, it

[92] Matsuda and others (n 68) 6; Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 167.
[93] Matsuda and others (n 68) 3.
[94] Crenshaw and others, 'Introduction' (n 15) xiii.
[95] Matsuda and others (n 68) 9.
[96] Kimberlé Williams Crenshaw and others (eds), 'Introduction', *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press 1996) xiii; also see Mathias Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (1st edn, Routledge 2014) 41.
[97] Matsuda and others (n 68) 3; Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 167–169, 178–181.

posits CRT in postmodern American jurisprudence, while explaining CRT's intertwined relationship with other postmodern theories.

1.2.1. Postmodernism and Postmodern Legal Thought

As a pre-requisite for a synopsis of postmodernism and the postmodernist reflections onto jurisprudence, it is essential to clarify that postmodernism is not necessarily a legal term and has never been exclusive to the legal discourse.[98] However, postmodernism perpetuates to influence and to be implemented into various disciplines – though this shall not be interpreted as if postmodernism has been finally defined.[99] Despite the hardship in the conceptualization of postmodernism, scholarly efforts to elucidate its doctrine often initiate with distinguishing what postmodernism *is* from what it *is not.*[100] In this respect, Gary Minda stipulates that postmodernism should not be taken as a concept or a theory, but rather as 'a skeptical attitude or aesthetic that distrusts all attempts to create large-scale, totalizing theories in order to explain social phenomena.'[101]

Whereas Minda's words provide an insight into the essence of the postmodern thought, Brendan Edgeworth indicates that having a profound understanding of the nature of postmodernism depends on the retrospective assessment of the term, which would require the explanation of what the prefix, or the 'postness', therein stands for.[102] In brief, this prefix marks the end of the Modern era, which has started with Western (European) Enlightenment and resulted in the dominance of the Western (European) thought.[103] It also signals the arrival of a new and

[98] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 2.
[99] Brendan Edgeworth, *Law, Modernity, Postmodernity: Legal Change in the Contracting State* (Ashgate Publishing Limited 2003) 4.
[100] See e.g., Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 5, 224–225; Edgeworth (n 99) 5.
[101] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 224.
[102] Edgeworth (n 99) 5.
[103] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 224–225; Dennis Patterson, 'Postmodern Jurisprudence', *Law and Truth* (1st Edn, Oxford University Press 1996) 151–152.

eclectic social condition replacing the modern one.[104] Additionally, and more crucially, it also stands for the rejection of the epistemological foundations of modernism.[105] That said, a brief glance at modernism can help illuminate the epistemological foundations of postmodernism.

Modernism can be understood as the appraisal of science – the acknowledgement of rational, objective, and scientifically neutral knowledge which is alleged to be grasped by empirical observation and logical reasoning.[106] In this sense, the main motivation of modernism can be framed as '[bringing] order and stability to the world through rational construction of meta-theories.'[107] The importance of the modern thought, at least for this dissertation, is two-fold: On the one hand, the modernist belief in the rational and scientific explanations of the World has been the driving force in the construction of race and the cluster of humankind into racial categories.[108] On the other hand, the transplantation of the modern ideal into the legal sphere resulted in the efforts to systematize legal knowledge and to explain the legal system in coherence, by utilizing the scientific method.[109]

Based on these, the core idea(l) of the postmodern legal thought can be identified as challenging the modern legal thought's foundational, autonomous, universal, objective, and neutral conceptions of social phenomena, including the law.[110] It is also the common ground for disparate postmodern legal theories to promote pluralistic, contextual, and non-essential perceptions of law, which would allow the acknowledgment of the society as a fragmented and

[104] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 224–225; Edgeworth (n 99) 1–3.
[105] Ibid.
[106] Patterson, 'Postmodern Jurisprudence' (n 103) 153.
[107] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 224.
[108] Chapter III elaborates on this phenomenon and explain the construction of race as well as the proliferation of biological and cultural racisms, by referring to their relevance to the law and IP law.
[109] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 224.
[110] Edgeworth (n 99) 202–203.

heterogenous entity.[111] Indeed, it can be argued that looking at the society through the lens of postmodernism would not only distort an illusion and reveal the discrepancies amongst certain groups as well as the (intersectional) injustices, but it would also invest in a culturally diversified social and legal domain.

In respect to its confrontation of the modern (legal) thought's scientifically objective and neutral normative deductions, postmodernism embraces skepticism toward the universalism of knowledge.[112] It rejects the possibility of having stable, neutral, and objective standpoints to establish knowledge.[113] Hence, postmodernist theories mainly concentrate on the 'self' and attempt to understand the construction of the individual subject in the postmodern era.[114] Along the same line, the postmodern legal thought perceives law from an anti-essentialist and multi-dimensional perspective; it posits law in a greater cultural, economic, historical, political, and social reality.[115] As a result, postmodernism grasps law as an inconsistent system of not only legal norms, but also of legal institutions and procedures – which are infected by the subjective perceptions of the self.[116]

That said, postmodernism shatters the modern image of law and presents law as an instrumentalist, pragmatist, pluralist, fragmented, and political entity.[117] Utilizing the social constructionism thesis and its framing of language as a social and cultural invention of a specific society at a determinate time, postmodernism acknowledges any legal norm or text to be a matter of the perspective of its makers and appliers.[118] Whereas it is no longer possible to acknowledge abstract legal norms as objective, postmodernism highlights that the law legalizes the interests of

[111] Ibid, 167-169.
[112] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 224–226, 232–234.
[113] Ibid.
[114] Ibid, 226, 245.
[115] Ibid, 245.
[116] Mathias W Reimann, 'The American Advantage in Global Lawyering' (2014) 78 The Rabel Journal of Comparative and International Private Law 1, 14–15.
[117] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 232–234.
[118] Ibid.

certain groups at the expense of the others.[119] Hence, without necessarily being bound by the principles of a rigid theory, postmodern legal theories focus on the legal problems of specific groups and aim to develop problem-solving strategies to respond to these problems.[120]

Despite the heavy criticism it is burdened with,[121] postmodern doctrine comprises the most suitable theory to explain the postmodern condition and the fragmented and heterogeneous composition of the postmodern society.[122] Thus, postmodern thought has been adopted by many scholars who affiliate themselves with class-, gender-, and race-based struggles and who define their scholarship, respectively, with CLS, Feminist Legal Theory, and CRT.[123]

1.2.2. Origins of Critical Race Theory as a Postmodern Movement in Legal Academia

The descriptive compartment of CRT literature often emphasizes the political activism dimension of CRT,[124] given that such aspect of CRT not only underscores what CRT aims to achieve, but it also defines why and how CRT emerged from the American law schools. Gary Minda claims that a profound understanding of academic trends in contemporary legal theory would require an analysis of what has been happening at law schools at the time being.[125]

In his book, entitled *Postmodern Legal Movements: Law and Jurisprudence at Century's End,*[126] Minda argues that the societal and cultural transformations of the twentieth-century impacted the American university campuses.[127] He explains that these transformations opened a

[119] Ibid, 245.
[120] Ibid.
[121] Schanck (n 21) 2511.
[122] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 1; Edgeworth (n 99) 1–2.
[123] Schanck (n 21) 2512–2513.
[124] See e.g., Kimberlé Williams Crenshaw and others (eds), 'Introduction', *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press 1996); Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253; Richard Delgado and Jean Stefancic (eds), 'Introduction', *Critical Race Theory: The Cutting Edge* (2nd edn, Temple University Press 2000); Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (2nd Edn, New York University Press 2012).
[125] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 247.
[126] Ibid.
[127] Ibid, 247-249.

space for law students and faculty members to demand a more realistic and pluralistic curriculum.[128] Such a curriculum was expected to accept and to respect the heterogeneity and the multiculturality of the American society.[129] Along the same line, the legal education was anticipated to correspond to the needs and expectations of the traditionally excluded groups, such as ethnic, gendered, linguistic, racial, and sexual minorities.[130]

According to Minda, this paradigm shift in the mainstream American jurisprudence has become visible at the end of the century.[131] Inclusion of alternative perspectives within the legal theory fashioned the American jurisprudence with 'a distinctive postmodern temperament,'[132] which questions the theoretical presumptions of the modern jurisprudence, the taken-for-granted autonomy of law, and the Western-centric foundations of the legal thought.[133] It was such a historical backdrop in which CRT was initiated as a postmodern political organization by minority faculty and students and eventually consolidated into an eclectic postmodern legal theory addressed to provoke rethinking the (long-forgotten) subject(s) of law.[134]

In light of these, CRT can be framed as an active struggle started by students and faculty of color aspiring to respond to the needs of subordinated and oppressed racial minorities of the American society.[135] Even though the preeminent CRT scholars acknowledge that the Movement does not have an 'identifiable date of birth,'[136] there exists three alternative stories that explain the

[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid, 248.
[133] Ibid.
[134] Matsuda and others (n 68) 3–7; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 3–6.
[135] Matsuda and others (n 68) 3.
[136] Ibid.

grassroots movements of CRT: The Harvard story, the Berkeley story, and the Los Angeles story.[137]

The Harvard story is penned by one of the main figures of CRT: Kimberlé Williams Crenshaw.[138] Crenshaw's chronicle pays an homage to Derrick Bell, Jr., and it emphasizes the place that Bell's race-centered scholarship held in the Harvard Law School's curricula. In this frame, Crenshaw centralizes Bell's resignation from Harvard Law School in 1981 in the chronology of the CRT Movement and identifies this incident to be the main trigger of CRT's genesis.[139] According to Crenshaw's memoire, Bell is the only tenured Black faculty member of Harvard Law School at the time, even though he had many attempts to convince the Dean's Office to hire other faculty of color.[140] Frustrated by the Administration's procrastination of having a more diversified faculty, Bell decides to leave his position at Harvard Law School.[141] Whereas Bell's resignation restores the tenure of minority scholars, it also results in the exclusion of Bell's race-conscious courses from the curriculum.[142] Amongst those courses is the 'Constitutional Law and Minority Issues', which was of great importance for minority students of Harvard, given the centrality of race and race relations in Bell's legal pedagogy.[143] Thus, the members of the Black Law Students Association (hereafter 'the BLSA'), of which Crenshaw herself was a member,

[137] Richard Delgado, 'Liberal McCarthyism and the Origins of Critical Race Theory' (2009) 94 Iowa Law Review 1505, 1514; Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42) 39–40.
[138] Please see, Kimberlé Williams Crenshaw, 'The First Decade: Critical Reflections, or "A Foot in the Closing Door"' (2002) 49 UCLA Law Review 1343; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253; Kimberlé Williams Crenshaw and others (eds), 'Introduction', *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press 1996) xix–xxii.
[139] Kimberlé Williams Crenshaw, 'The First Decade: Critical Reflections, or "A Foot in the Closing Door"' (2002) 49 UCLA Law Review 1343, 1545–1546; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1265.
[140] Kimberlé Williams Crenshaw, 'The First Decade: Critical Reflections, or "A Foot in the Closing Door"' (2002) 49 UCLA Law Review 1343, 1349; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1265.
[141] Ibid.
[142] Ibid.
[143] Crenshaw and others, 'Introduction' (n 15) xx.

claims Bell's course to be rescheduled[144] and to be taught by a faculty of color – mainly because the BLSA and minority students are interested in hearing the perspective of a legal scholar, who experiences racial discrimination not only as a citizen but also as an insider of legal academia.[145] Nevertheless, the BLSA's request is turned down by the Dean, with the excuse of the so-called 'pool problem.'[146] Stating that there are not many African-American professors qualified for the Harvard standards, the Dean offers a three-week course on civil rights litigation, which was planned to be delivered by two 'excellent' White lawyers, instead of 'a mediocre Black one.'[147] The Dean's response sparks a student boycott, which later prompts the organization of an *alternative* course by minority students, with the aim of finding a substitute for Bell's course.[148] The BLSA and minority students at Harvard Law School arrange weekly visits by legal scholars of color, and they request each scholar to teach a chapter from Bell's renowned book, entitled *Race, Racism and America*,[149] by complementing the chapter with their subjective perspectives regarding race and race relations overhauling the American legal order.[150] That said, Crenshaw acknowledges the student-initiated alternative course as the beginning of the CRT Movement, due to bringing like-minded scholars and students of color together – not only for the course itself, but also for future alliances.[151]

[144] Kimberlé Williams Crenshaw, 'The First Decade: Critical Reflections, or "A Foot in the Closing Door"' (2002) 49 UCLA Law Review 1343, 1348; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1266–1268.
[145] Ibid.
[146] Kimberlé Williams Crenshaw, 'The First Decade: Critical Reflections, or "A Foot in the Closing Door"' (2002) 49 UCLA Law Review 1343, 1348–1349; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1267–1270.
[147] Ibid.
[148] Crenshaw and others, 'Introduction' (n 15) xxi.
[149] Derrick A Bell, Jr., *Race, Racism and American Law* (4th edn, Aspen Law & Business 2000).
[150] Crenshaw and others, 'Introduction' (n 15) xxi.
[151] Matsuda and others (n 68) 4; Crenshaw, 'The First Decade: Critical Reflections, or "A Foot in the Closing Door"' (n 138) 1350–1351.

Despite being the leading narrative on CRT's genesis, the Harvard story has a deficit: It overlooks the temporal gap between the alternative course organized by the Harvard Law School students in 1982 and the first formal CRT workshop held in 1989.[152] In order to fill in this gap, Sumi Cho and Robert Westley co-authored a journal article which posits CRT in a broader political setting and among a cumulative of resistance movements in the American legal academia. [153]

Cho and Westley's anecdote is centered around the Boalt Hall Coalition for a Diversified Faculty (hereafter 'the BCDF'), which was also a student-initiative, however, at the University of California, Berkeley (hereafter 'the UC Berkeley'). The authors map a series of student-led diversity movements, student boycotts, and protests outbroke at the University campus, all of which were devoted to achieving a multicultural and multiracial faculty and a pluralist curriculum. Commencing their chronological work with the Free Speech Movement of 1964, which is claimed to have an often ignored racial origin;[154] Cho and Westley encompass the Third World Strike of 1969 that spread from the UC Berkeley to other universities.[155] They also explain the foundations of the 'race-plus' coalition model addressed to protest the procrastination of the UC Berkeley to hire faculty of ethnic, cultural, racial, and sexual minorities.[156] Therefore, it can be claimed that, in comparison to the Black initiative at the center of the Harvard story, Berkeley story speaks for a broader spectrum of marginalized groups who have collided under the roof of the (dominantly White) BCDF.[157]

While the Harvard and Berkeley stories concentrate on student uprisings and their consequences, a third story of origin narrated by Richard Delgado draws attention to the efforts of

[152] Sumi Cho and Robert Westley, 'Critical Race Coalitions: Key Movements That Performed the Theory' (2000) 33 University of California, Davis Law Review 1377.
[153] Ibid, 1379.
[154] Ibid, 1381-1383.
[155] Ibid, 1383-1388.
[156] Ibid, 1385-1395.
[157] Ibid, 1377-1378.

four 'radical [White] Marxists and socialist professors.'[158] The Los Angeles story is centered around law professors who were denied employment by American law schools during the period referred to as 'Liberal McCarthyism'.[159] Delgado focuses on the attempts of these four professors to form new movements in law, namely CLS and CRT, as well as their efforts to spread the core arguments of both CLS and CRT by the time of their unemployment.[160] In this sense, it can be argued that Delgado pinpoints the ideological origins of the CRT Movement, due to his references to CLS and the conference held by the CLS scholars (hereafter 'Crits') in Los Angeles, which focused on the intersection of race and law.[161]

Regardless of the actors and the socio-political setting they have chosen to narrate, a glance at the Harvard, California, and Los Angeles stories provides an unfragmented view of the collective of feelings, idea(l)s, and frustrations that provoked demands of pluralism in the legal domain. Due to this, these anecdotes shall not be taken as competing, but complementary stories;[162] especially given that each event contributed in and enriched the CRT Movement. Delgado states that each series of events added a unique aspect to the CRT Movement, despite their disparities in time and place.[163] In Delgado's words, the Los Angeles story bestowed *scholarship* to the CRT Movement, while the Harvard story added *cachet*, and the Berkeley story brought the *human element* into the Movement.[164]

Whereas the anecdotes included herein explain the origins of CRT as a *political movement*, it should be mentioned that the embodiment of CRT into *an independent theory* with its unique ideology has not happened immediately. As already indicated above, CRT took some time to

[158] Delgado (n 137) 1508.
[159] Ibid, 1508.
[160] Ibid, 1513, 1541.
[161] Ibid.
[162] Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42) 40.
[163] Delgado (n 137) 1514.
[164] Ibid.

mature within another postmodern legal theory, namely CLS; furthermore, it developed under the influences of both CLS and the radical strand of Feminist Legal Theory.[165]

1.2.3. Relevance of Critical Race Theory to Other Postmodern Legal Theories

CRT's postmodern underpinnings, especially of its substantive arguments and methodology, affiliate CRT with two other postmodern legal theories:[166] CLS and Feminist Legal Theory.[167] It can be argued that whereas the relevance of CRT with CLS stems from the institutional and theoretical structures of these disparate movements, CRT's relation with Feminist Legal Theory is rooted in their shared methodology.

Regarding the affiliation of CRT with CLS, the literature on the theorization of CRT often refers to CLS as the 'ideological home'[168] of CRT. In broad terms, CLS is a theory premised upon a leftist discourse interwoven with Marxist ideals.[169] CLS is skeptical about the concept of 'the rule of law'.[170] This mainly stems from CLS's perception of law as 'one aspect of a larger social structure,'[171] which requires methods other than doctrinal legal research and the assessment of case law[172] – mainly because CLS articulates the role of the law as to maintain the power hierarchies and status quo in the American society.[173] Such radical and critical theoretical premises of CLS offered a solid ground for building a race-oriented critique of the American legal system.[174] Hence,

[165] Matsuda and others (n 68) 3–5; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 4–5.
[166] Ibid.
[167] Ibid.
[168] Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1288.
[169] Ibid.
[170] Ibid.
[171] Lewis A Kornhauser, 'The Great Image of Authority' (1984) 36 Stanford Law Review 349, 366.
[172] Ibid.
[173] Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1288.
[174] Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1289; Mari Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' in Kimberlé Williams Crenshaw and others (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (The New Press 1996) 64.

CLS's left-winged political environment provided a (relatively) safe-space to legal scholars of color, and it facilitated holding scholarly debates over the racialized power hierarchies inherent in law.[175]

In fact, CRT's relationship with CLS can be considered as a multi-layered one. These layers were unfolded within the scholarly works of Kimberlé Williams Crenshaw and Mari Matsuda, as follows: First, CLS articulates the normative value of law as '[the legitimization of the] existing maldistributions of wealth and power.'[176] This scholarly and strong claim has attracted racial minorities who have been perpetually denied access to the full benefits of their citizenship.[177] Second, the postmodernist stance of CLS and the concepts it has developed, such as 'the relative autonomy of law' and 'legal consciousness', contest the modern legal thought.[178] Thus, CLS's confrontation of the dominant understandings of law helped minority scholars to form CRT's political stance and main arguments.[179] Last but not least, CLS's cynicism about the neutrality of the State and law as well as its critique of the allegedly neutral and objective principles of rights have been an attractive notion for legal scholars of color.[180] Drawing upon CLS's ideology, CRT was also dedicated to criticize the neutrality and objectivity of the law as well as the efficacy of colorblindness, meritocracy, and formal equality.[181]

Despite CLS's initial hospitality toward minority scholars, Crits (a cohort of mostly White heterosexual male scholars)[182] had gradually developed a negative attitude toward the race-based

[175] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 173.
[176] Matsuda (n 174) 64.
[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] Kimberlé Williams Crenshaw, 'The First Decade: Critical Reflections, or "A Foot in the Closing Door"' (2002) 49 UCLA Law Review 1343, 1363; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1289.
[181] Ibid.
[182] Crenshaw and others, 'Introduction' (n 15) xxii.

critique of law, and they started to deprecate the race-oriented debates under the roof of CLS.[183] These attempts to detach and eliminate race discourse from CLS mark the beginning of CRT as an *autonomous* postmodern legal theory.[184] In this respect, CRT scholars often take the conference organized by Feminist Crits (hereafter 'Fem-Crits') in 1985 as a milestone in the history of CRT's consolidation into a stand-alone postmodern theory.[185]

The aforementioned conference was planned to focus on the interplay of race and CLS, where the alienation and marginalization of the race discourse and racial minorities within the leftist legal thought was supposed to be questioned.[186] However, the reactions received by Fem-Crits were discouraging – not only for feminist scholars, but also for minority scholars at large.[187] Regardless of these reactions, Fem-Crits pursued their efforts to develop a scholarship around race and law.[188] In respect to the outcome of such efforts, Crenshaw points at *The Minority Critique of CLS Scholarship (and Silence) on Race* panel of the next CLS Conference held in 1987.[189] The panel was centered around race scholarship and politics; thus, it brought together like-minded CLS scholars who had a racial awareness and wished to develop their scholarship in the race praxis.[190] The group organized their first independent workshop in 1989 at Madison, Wisconsin.[191] The

[183] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 6; Crenshaw, 'The First Decade: Critical Reflections, or "A Foot in the Closing Door"' (n 138) 1354–1360.
[184] Crenshaw and others, 'Introduction' (n 15) xxvi.
[185] See e.g., Mari J Matsuda and others, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1st edn, Westview Press 1993); Kimberlé Williams Crenshaw and others (eds), 'Introduction', *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press 1996); Kimberlé Williams Crenshaw, 'The First Decade: Critical Reflections, or "A Foot in the Closing Door"' (2002) 49 UCLA Law Review 1343; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253.
[186] Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (n 124) 1290–1291; Trubek (n 67) 1509.
[187] Ibid.
[188] Ibid.
[189] Kimberlé Williams Crenshaw, 'The First Decade: Critical Reflections, or "A Foot in the Closing Door"' (2002) 49 UCLA Law Review 1343, 1360–1365; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1295–1297.
[190] Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1298–1300.
[191] Ibid.

workshop was dedicated to the investigation of the intersection of race and law – where Crenshaw also coined the term 'CRT' to label this new-born theory.[192]

On that note, it shall be crystallized that despite the alternative narrations on the origins of CRT as a political *movement*, there is consensus within CRT literature on the origins of CRT as a *theory*: CRT emerged from CLS; however also as a criticism against the White male hegemony within CLS as well as against the dominance of color-blind approaches to assess law.[193] In fact, CRT scholars summarize CRT's affiliation with CLS as CRT bringing 'a left intervention into race discourse and a race intervention into left discourse.'[194] Thus, given its gradual development within CLS, CRT was named after *Critical* Legal Studies, in order to indicate its affiliation with the former and also to highlight what distinguishes one from another.[195]

As to CRT's affiliation with Feminist Legal Theory, Richard Delgado and Jean Stefancic explain that the latter's insights regarding the power structures and the socially constructed identities within the American society were inspirational for CRT.[196] Indeed, it can be argued that Feminist Legal Theory's use of social constructionism to define gender and societal gender roles, its reflections on the law's investment in the consolidation of socially constructed gender roles,[197]

[192] Kimberlé Williams Crenshaw, 'The First Decade: Critical Reflections, or "A Foot in the Closing Door"' (2002) 49 UCLA Law Review 1343, 1361; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1298–1299. 1361.
[193] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 173; Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (n 13) 108, 110–111; Trubek (n 67) 1506.
[194] Crenshaw and others, 'Introduction' (n 15) xix.
[195] Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1288.
[196] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 5.
[197] One of the leading figures of the Feminist Legal Theory, Catharine A. Mackinnon, articulates the main function of law as 'to organize social power among groups.' According to MacKinnon, this practice consists of and informed by the competing societal interests at the stake, including but not limited to raking at the higher rungs of the gendered power hierarchies as well as the ownership of rights and other materialistic interests. Catharine A MacKinnon, *Women's Lives, Men's Laws* (The Belknap Press of Harvard University Press 2005) 3.

its take of 'equality', and its prioritization of substantive equality over formal equality were all embraced by CRT.[198]

Just like CRT, Feminist Legal Theory is also an intellectual output of the diversity movements of the 1960s, which have raised awareness on the existing gender inequality within the American society.[199] In brief, Feminist Legal Theory acknowledges the social and legal domain as a system of oppression, which was generated by and according to the needs of men.[200] Thus, it theorizes that the masculine order, underpinned by power and privilege, is imposed onto the society at large.[201] Along the same line, it further hypothesizes that 'nearly all public laws in the history of the existing civilization are written by men.'[202] Feminist legal scholars are devoted to unveiling these 'rather obvious (but unspoken)'[203] phenomena.[204] Therefore, the Feminist Movement can be described as women's collective fight for equal treatment in the economic, political, and social domains – despite the disagreement of fragments within the Movement on the meaning of and the path that leads to 'equality'.[205]

[198] MacKinnon asserts that '[t]he racism and sexism of law and society emerged as often mutually constituting.' Ibid 1. As a matter of fact, a glance at the genesis of the Feminist Movement, or 'Woman Movement' as it used to be called at the times, exposes the interconnected genealogy of the feminist and racial confrontations of the dominant White male power overhauling the social and legal order – whilst revealing the stark contrast between the social and legal status of White and Black women. In this respect, Becker *et. al* explain that the 'seeds' of the Woman Movement in the United Stated had been planted at the Anti-Slavery Convention of 1840, where the female participants of the Convention were silenced and deprived of delegate status. This incident was 'justified' with the 'excuse' that the Convention was not about women's rights but anti-slavery. Thus, it was this incident that sparked the outbreak of the Woman Movement. Considering its social and political backdrop, the Movement was named as it is, with the aim of crystallizing the Movement was not concerned only with suffragette but also 'other struggles for social, legal, and political reform.' Accordingly, the singular use of 'woman' was to highlight the 'unity of interests among women.' Mary Becker, Cynthia Grant Bowman and Morrison Torrey, *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously* (2nd edn, West Group 2001) 1–2.
[199] Becker, Grant Bowman and Torrey (n 198) 1–16; Nancy Levit and Robert RM Verchick, *Feminist Legal Theory: A Primer* (New York University Press 2006) 15.
[200] Levit and Verchick (n 199) 15–16.
[201] Ibid.
[202] Ibid, 15-16.
[203] Ibid.
[204] Ibid.
[205] Becker, Grant Bowman and Torrey (n 198) 1; Levit and Verchick (n 199) 15.

For instance, the first-wave in the Feminist Legal Theory utilizes the 'equal treatment' theory.[206] It is formulated in respect to the formal equality principle; it claims the treatment of both women and men on an equal footing.[207] This first-wave of the Feminist Legal Theory aspires to achieve the entitlement of women with the same social and political opportunities with men, and it aims to dismantle the patriarchal legislations that construct the female identity in association with the domestic sphere.[208]

Nevertheless, the second-wave of Feminist Legal Theory is skeptical about the first-wave's reliance on the formal equality principle.[209] Instead, this second strand, namely 'cultural feminism', acknowledges the differences between women and men; thus, it argues that women and men should not be treated the same, where they are relevantly different.[210] Culture feminists assert that formal equality does not necessarily lead to substantive equality.[211] They assert that the ostensibly gender-neutral laws may create further barriers in the integration of women in the economic, political, and social life since such an attitude would overlook the unique experiences and perspectives of women.[212] Challenging the first-wave feminist scholars, cultural feminists suggest 'a concept of legal equality in which laws accommodate the biological and cultural differences.'[213]

The third-wave of the Feminist Legal Theory, namely 'radical feminism' or the 'dominance theory', was introduced by Catharine A. MacKinnon in 1979.[214] Radical feminism, principally, challenges the epistemological premises and aspirations of its predecessors, due to their implicit

[206] Becker, Grant Bowman and Torrey (n 198) 1–16; Levit and Verchick (n 199) 16–18.
[207] Ibid.
[208] Ibid.
[209] Ibid.
[210] Ibid, 18.
[211] Ibid.
[212] Ibid, 18-19.
[213] Ibid, 19.
[214] Ibid.

acknowledgement of men as a legal benchmark in determining what counts as 'equal' and the equal treatment of women and (or, *with*) men.[215] In this context, radical feminism relies on the social constructionism to comprehend the deeper underpinnings of gender inequality as well as the construction of female and male identities and roles *within* and *by* the society.[216] It focuses on the power dynamics amongst women and men, by locating gender inequalities at the intersection of economic, familial, and political spheres.[217] Consequently, radical feminism explains the subordination of women in reference to 'the complex patterns of force, social pressures, and traditions, rituals, and customs,'[218] which are products of not only interpersonal relationships but also of public authorities and institutions.[219] Hence, radical feminism highlights the importance of shattering the patriarchal structure of the society, given that patriarchy shapes the societal gender identities and creates a *false consciousness*.[220] To achieve a true equality of women and men, radical feminists highlight the importance of consciousness-raising as a pre-requisite to unearthing the structures of oppression and combatting sexism.[221]

On that note, it should be highlighted that it is the *radical strand* of Feminist Legal Theory upon where CRT draws it ideology and methodology.[222] Embracing radical feminism's explanations on the construction of gender and gendered identities, CRT embraces social constructionism to define (and to reject the scientific explanations of) race and traits associated with racialized groups.[223] Projecting radical feminism's approach to explain such concepts, CRT

[215] Ibid, 22.
[216] Ibid.
[217] Ibid, 23.
[218] Ibid, 23.
[219] Ibid.
[220] Ibid, 25.
[221] Ibid, 25-26.
[222] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 4–5.
[223] Matsuda and others (n 68) 6–7.

also posits the construction of race and race relations in a greater historical, legal, political, and social context.[224]

In addition to that, Feminist Legal Theory and CRT have another common characteristic: Political activism, hence, the dynamism of their content. As already indicated above, postmodern theories in general, and Feminist Legal Theory and CRT in particular, update and expand their doctrine in consonance with the transformations in the society. They adjust to the new formations of societal roles as well as the implications of such roles in the legal sphere. Consequently, postmodern theories tend to form new-waves and new alliances – of which 'Critical Race Feminism' is an example.[225]

To conclude, it shall be emphasized that the epistemological sources and methods borrowed from postmodernism and postmodern legal theories, particularly from CLS and the radical strand of Feminist Legal Theory, have contributed to the identification and articulation of CRT's core arguments, fundamental tenets, and intellectual themes.

1.3. Main Tenets and Hallmark Intellectual Themes of Critical Race Theory

According to Minda, the postmodern thought's most significant achievement in the legal domain has been '[the transition of modern jurisprudence due to] the success of a new form of jurisprudential discourse or "law talk" in penetrating, subverting, and decentering the conventional forms of legal discourse.'[226] To be more precise, postmodernism metamorphoses law into a 'study of diverse legal subjects'[227] by introducing the formerly outcasted identities, interests, and narratives into law – considering that it investigates law through the prism of class, gender, race,

[224] Ibid, 3, 6.
[225] Levit and Verchick (n 199) 26–29.
[226] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 189.
[227] Ibid.

and sexual orientation.[228] Such an approach to law depicts a more realistic scene of the society and fades the line between the law in books and the law in action.[229]

As a postmodern theory, CRT aims to construe law and the judicial system through the perspectives and experiences of people of color.[230] To this end, the CRT project is premised on a list of interrelated 'defining elements', which cumulatively embody the essence of CRT:[231] First, CRT acknowledges that racism is not an aberrational practice in the United States, but it is an integral element of the American social and legal order.[232] Second, CRT rejects the formal conceptions of equality and its acclaimed competence to accomplish a true racial equality.[233] Hence, CRT takes a skeptical stance toward 'the dominant legal claims of neutrality, objectivity, color-blindness, and meritocracy,'[234] which underpin the 'equal opportunity' ideology of the liberal legal order.[235] Third, CRT challenges ahistoricism of the study of law as well as its abstraction from the greater historical context.[236] This is particularly important since CRT holds that the blatantly racist practices of the pre-Civil Rights Movement era prevail, yet as transformed into more hideous forms of racism; nevertheless, ahistorical assessments of law are incapable of illuminating such a transformative continuum.[237] Fourth, CRT prioritizes the subjectivity of perspective and experiential knowledge of people of color, who have experienced the true nature of racism in their own 'skin'; thus, CRT gives primacy to the personal narratives of minorities over the formalistic language of law.[238] Fifth, CRT opts for eclecticism and borrows from a wide range

[228] Ibid, 197-198
[229] Ibid, 247-248.
[230] Matsuda and others (n 68) 3–6.
[231] Ibid; Delgado and Stefancic, 'Introduction' (n 68) xvi–xvii.
[232] Matsuda and others (n 68) 6; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 7–8.
[233] Matsuda and others (n 68) 6; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 26–29.
[234] Matsuda and others (n 68) 6.
[235] ibid 3–6; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 26–29.
[236] Matsuda and others (n 68) 6.
[237] ibid.
[238] Ibid, 3.

of radical jurisprudential theories that would help convey its message.[239] Last, CRT does not intend to be characterized as a static theory but an active and ever-evolving political and scholarly struggle.[240]

Partly because of its social constructionist take of race, and partly because of its postmodernist stance toward modernist structuralism; CRT avoids being theoretically- and temporally-fixed.[241] Despite the attempts to avoid a rigidly structured theoretical framework, Richard Delgado and Jean Stefancic extracted the main tenets and hallmark concepts of CRT scholarship, by studying the key writings that informed CRT. According to Delgado and Stefancic, these tenets and concepts can be enlisted as follows: Social constructionism, material determinism and the 'interest-convergence dilemma' theses, deconstructionist interpretation of history; racial distinctiveness, the 'voices of color', and race-consciousness theses; critical analysis of the liberal legal order, finally, anti-essentialism and intersectionality.[242]

These conceptualized intellectual themes would reveal their essence only if they are explained within the context from which they have proliferated. Therefore, the remainder of this sub-chapter explains this CRT lexicon in reference to their textual and contextual origins.

1.3.1. Social Constructionism

Social constructionism refers to an analytical framework often adopted by postmodern theories to explain the social phenomena such as the emergence of social categories and group identities, including but not limited to class, ethnicity, gender, and race.[243] Social constructionist theories are skeptical about the taken-for-granted objectivity and neutrality of such phenomena.[244] They assert

[239] Ibid 6; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 5–7.
[240] Matsuda and others (n 68) 6.
[241] Ibid.
[242] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 7–12.
[243] Mercadal (n 25).
[244] Ibid.

that '[s]hared meanings and understandings create *norms* that appear to be "natural" and impeachable [which eventually] become a *reality* generally taken for granted.'[245]

Questioning the existence of the universally acceptable truth, social constructionism holds that the societal norms which are presumed to be objective and neutral truths are fabricated within a web of relations; thus, they are socially and culturally created according to the widely-shared common values, beliefs, and social realities of the time.[246] By this way, social constructionism not only challenges the idea that individual and group identities, such as gender and race, are biologically determined; but it also provides an alternative approach to explore the underpinnings of identities as such.[247]

Similar to postmodernism, social constructionism does not seem to be concerned with establishing a canonical analytical framework. Due to this, Vivien Burr explains that there exists only a 'family resemblance' among the works of the scholars who utilize social constructionism.[248] Mapping the main chunk of relevant scholarship, Burr identifies four major features shared by a wide range of social constructionist works:[249] First, social constructionism takes a critical stance toward the conventional knowledge, due to acknowledging it being built upon subjective and biased observations of the subject-matter.[250] Second, social constructionism holds that knowledge is time- and culture-specific.[251] In other words, any assumption or particular form of knowledge created within a specific society is historically- and culturally-relative; thus, societal knowledge is destined to be related to the social and economic arrangements at a certain period of time.[252] In a

[245] Ibid. Emphasis added.
[246] Mercadal (n 25).
[247] Ibid.
[248] Vivien Burr, *An Introduction to Social Constructionism* (Routledge 2006) 2.
[249] Ibid, 3-5.
[250] Ibid, 3.
[251] Ibid.
[252] Ibid, 3-4.

similar vein, any information can alter from one society to another or even within the same society over time – along with the shift in the social and economic realities.[253] Third, from a social constructionist standpoint, the whole knowledge is fabricated by the members of the society via the communication of their accepted perceptions of what constitutes 'reality'.[254] Whereas knowledge is far from being objective and neutral, it also reflects the negotiated subjective perspectives accepted by the majority, which are ultimately condensed into widely-held beliefs.[255] Last, each accepted meaning implemented in knowledge necessitates a certain way of behavior.[256] Accordingly, certain social constructs may allow and maintain certain patterns of action and exclude some others.[257]

Social constructionism stands as a core tenet shared by three of the postmodern legal theories encompassed herein: CLS, Feminist Legal Theory, and CRT.[258] Within CRT doctrine, social constructionism helps in explaining the *fabrication* of race by means of law.[259] As eloquently articulated by Devon W. Carbado, 'CRT rejects the view that race precedes law, ideology, and social relations.'[260] Instead, race is presented as 'a product of law, ideology, and social relations.'[261] In this context, CRT investigates the face-neutral legal order, on the one hand, to comprehend and to expose law's construction of Whiteness[262] and, in Cornel West's words, 'complicity of law in upholding [W]hite supremacy.'[263] On the other hand, it reveals and maps the

[253] Ibid, 4.
[254] Ibid, 4.
[255] Ibid.
[256] Ibid, 5.
[257] Ibid.
[258] Kimberlé Williams Crenshaw and others (eds), 'Race and Postmodernism', *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press 1996), 440.
[259] See e.g., Matsuda and others (n 68) 6.
[260] Devon W Carbado, 'Critical What What' (2011) 43 Connecticut Law Review 1593, 1606.
[261] Ibid.
[262] Crenshaw and others, 'Introduction' (n 15) xiii; Carbado (n 260) 1606–1607.
[263] West (n 87) xi.

construction of 'other' races within paradigmatic binaries and as oppositional counterparts of Whiteness.[264] Based on these, it can be argued that law operates as a mechanism that produces not only the idea of race, but also various categories of races, the criteria, group identity, and communal features assigned for each category. As to the reason and the ultimate goal of such practices, Derrick Bell, Jr. explains that race, in the American social and legal order, constitutes an indicator to assign legal rights, liberties, legal and political status, and material interests among different groups within the same society.[265]

Ian F. Haney López's scholarship constitutes the cornerstone of the social constructionist scholarship of the CRT Movement. For instance, López's literary piece, entitled 'The Social Construction of Race'[266], investigates the role that both the law and the courts play in reifying race and racial identities. To substantiate his arguments, López concentrates on several cases brought before the American courts by non-White plaintiffs, and he pinpoints the maneuvers of the American judiciary to exclude non-Whites from the scope of legal protection – which, from an alternative reading, can be interpreted as if Constitutional rights and liberties are deemed exclusive to White-Americans. López refers to the *Hudgins v. Wright* case,[267] in which the Court ruled about the legal status of three generations of African-American women.[268] To identify their race and to decide on their legal status, the Court took Hudgins women's physical traits, such as their skin-

[264] See e.g., Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (n 13); Cheryl I Harris, 'Whiteness as Property' in Kimberlé Williams Crenshaw and others (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (The New Press 1995); Derrick A Bell, Jr., 'Property Rights in Whiteness: Their Legacy, Their Economic Costs' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (2nd edn, Temple University Press 2000).
[265] Derrick A Bell, Jr., *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books 1992) 10; Bell, Jr., 'Property Rights in Whiteness: Their Legacy, Their Economic Costs' (n 264) 77.
[266] Ian F Haney López, 'The Social Construction of Race' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (2nd Edn, Temple University Press 2000).
[267] *Hudgins v. Wright*, 11 Va. 134 [1 Hen. & M.] (Sup. Ct. App. 1806)
[268] Haney López (n 266) 163.

color, hair texture, and the shape of their nose, as the main determinants for the judgement.[269] Yet, in a latter court decision, *Ozawa v. Unites States,*[270] concerning the neutralization claim of a White Japanese plaintiff; the Court asserted that racial boundaries do not merely follow skin-color and dismissed the case.[271] Last, López refers to the *Saint Francis College v. Al Khazrai* case,[272] in which the Court recognized the socio-political conception of race, while deciding on what constitutes racial discrimination.[273] In this case, the Court ordered the claimant, of who was Arabian origin, to be compensated by the perpetrators of the racially discriminatory practices.[274]

López's observations reveal that race has never been a fixed category in the United States; instead, it alters according to the interests of the White majority.[275] Thus, Lopez concludes that the fabrication of race 'does not occur in a vacuum, but in the context of dominant ideology, perceived economic interests, and psychological necessity'[276] in which the law plays an active role, by reflecting and reinforcing racial stereotypes and prejudices.[277]

Jayne Chong-Soon Lee explores the same theme in her scholarly piece, entitled 'Navigating the Topology of Race'.[278] Exploring the ways in which the American judiciary engages with race, Lee claims that the current legal discourse tends to tackle with race by adopting a single-axis framework.[279] Such an approach leads to the acknowledgement of race *either* as a biological concept *or* a social construct.[280] Nevertheless, Lee asserts that race is indeed a social construct,

[269] Ibid, 163-164.
[270] *Ozawa v. United States*, 260 U.S. 178 (1922)
[271] Ibid, 165.
[272] *Saint Francis College v. Al-Khazraji*, 41 U.S. 604 (1987)
[273] Haney López (n 266) 167–168.
[274] Ibid.
[275] Ibid, 168.
[276] Ibid, 169.
[277] Ibid, 172.
[278] Jayne Chong-Soon Lee, 'Navigating the Topology of Race' in Kimberlé Williams Crenshaw and others (eds), *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press 1996).
[279] Ibid, 446.
[280] Ibid, 444.

mainly because of the racial information imputed in skin-color by the dominant segment of the society.[281] That said, Lee urges the American courts to embrace the multiplicity of biological and cultural axes in deciding on race-related legal disputes.[282] She further explains that a single-sided perception of race hinders the anti-racist struggle within the legal discourse, not only because of acknowledging race as a fixed category, but also for formalizing race-related definitions by means of law.[283]

Regarding the categorization of race as well as the constant shift in the conceptualization of race by the courts and over time, CRT scholarship has developed the *differential racialization* thesis.[284] This thesis accepts that the majority of the society may racialize different minority groups at different times, simply because of the altering economic needs and expectations brought by altering economic circumstances.[285] For the very same reason, contemporary CRT scholarship holds that race is not a definite and fixed category, but '[a number of] categories that the society invents, manipulates, or retires when convenient.'[286]

1.3.2. Material Determinism and the 'Interest-Convergence Dilemma' Theses

According to Delgado and Stefancic, the conception of *material determinism* finds its theoretical roots in the ideological differences among the idealist and the materialist cohorts of CRT scholars, since these groups of scholars have different opinions on the incentives that underpin the social construction of race, the purposes that racism serves to, and how to tackle with racism.[287]

[281] Ibid, 444-446.
[282] Ibid.
[283] Ibid, 444.
[284] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 9.
[285] Ibid.
[286] Ibid.
[287] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 20–22.

The idealist group adopts a purely social constructionist approach to explain the invention of race by the American society.[288] For the idealists, race stands for the consensual knowledge created and internalized by the majority of the society; it is comprised of the majority's shared perceptions and portrayal of minorities – mostly, in a negative way.[289] Thus, the idealist group claims race to be the product of a mere mental process; this process derives from and further generates racial prejudice, bias, stereotypes, racial slurs, epithets, and pejorative depictions of certain groups – all of which ultimately become integral to the common imagery and culture of the society at large.[290] Due to this, the idealists rely on the de/re-construction of race, in order to identify and to detach racist meanings imputed in the language and the collective imagery therefrom. They hold that changing the general mindset of the society would prevent the conveyance of racist messages and would lead into the transformation of the society toward racial equality.[291]

Acknowledging the idealist group's approach to construe race and its underpinnings, the materialists introduce another dimension to this debate and shed light upon an additional aspect of the construction of race. The materialists hold that race is not only an intellectual invention of the society, but also an indicator to determine the allocation of legal rights, privileges, and status quo among the different segments of the same society.[292] Hence, the materialist group asserts that racialization and racism are almost always driven by economic incentives, which stem from the majority's interest in maintaining their privileged position.[293] Due to this, the materialist cohort of CRT scholars considers the entire American civil rights scheme as a system that was primarily designed to serve to the self-interests of White-Americans, rather than being addressed to advance

[288] Ibid, 20-21.
[289] Ibid.
[290] Ibid.
[291] Ibid.
[292] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 21.
[293] Ibid.

the political and legal status of racialized minorities.[294] In this sense, the materialists articulated the term 'material determinism' to refer to the underpinnings of racism.[295] Hence, material determinism can be explained as a racially-charged legal system which works in favor of White-Americans as a group – and regardless of their economic class – while sustaining the inferior status of people of color, also as a group.[296]

Based on these, the materialists further claim that the White majority of the society does not have any natural incentive to advance the legal status of people of color or to put effort in eliminating the subtle racist connotations from the American laws and legal institutions[297] – since, these would mean surrendering their racial privileges for White-Americans.[298] Drawing upon material determinism's line of reasoning as such, Derrick Bell, Jr. has coined the term and developed the *interest-convergence dilemma* thesis, in his renowned scholarly work, entitled 'Brown v. Board of Education and the Interest-Convergence Dilemma.'[299]

Concentrating on the landmark Supreme Court decision, namely *Brown v. Board of Education,*[300] Bell takes a skeptical stance toward the Supreme Court's intention to cease the racial

[294] Delgado and Stefancic, 'Introduction' (n 68) xvi.
[295] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 20–22.
[296] Derrick A Bell, Jr., 'Brown v. Board of Education and the Interest-Convergence Dilemma' (1980) 93 Harvard Law Review Association 518.
[297] Kimberlé Williams Crenshaw points at the same issue and claims that White-Americans have an incentive in reinforcing racism, let alone eradicating it. Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (n 13).
In fact, Crenshaw's argument can be supported by another piece penned by Bell, entitled 'Property Rights in Whiteness, Their Legacy, Their Economic Costs'. Thereby, Bell refers to the history of the United States interwoven with slavery, and he pinpoints that looking at only to the 'slavery' as a (social and legal) institution would reveal the inherent clash and the hardship in the reconciliation of the White and non-White interests. As rightfully explained by Bell, 'paradoxically, slavery for [B]lacks led to greater freedom for poor [Whites], at least when compared with the denial of freedom to African slaves. Slavery also provided mainly propertyless [W]hiteness with a property in their [W]hiteness. (…) [B]lack rights have been sacrificed throughout the nation's history to further [W]hite interests.' Bell, Jr., 'Property Rights in Whiteness: Their Legacy, Their Economic Costs' (n 264) 75.
[298] Derrick A Bell, Jr., 'Brown v. Board of Education and the Interest-Convergence Dilemma' (1980) 93 Harvard Law Review Association 518; Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books 1992) 7.
[299] Derrick A Bell, Jr., 'Brown v. Board of Education and the Interest-Convergence Dilemma' (1980) 93 Harvard Law Review Association 518.
[300] *Oliver Brown, et al. v. Board of Education of Topeka, et al., 347 U.S. 483 (1954)*

segregation in public schools. He posits the Court's decision within a greater economic, historical, and social context with the purpose of unveiling the factors that may have played a role in the judgment.[301] In this respect, Bell claims that even if the majority may agree in the abstract and formal conceptions of racial equality, not many of them would be willing to give up on the race-related privileges that they hold merely because of being White.[302] Hence, Bell stresses that legal solutions to any racial inequality, or civil rights amendments in this case, would be introduced only if the interests of people of color *converge* with – or, at least, *not contradict* with – the interests of White-Americans.[303]

Even though the interest-convergence dilemma thesis is represented as an independent theme herein, the conclusion that Bell has achieved in his scholarly work is partly the consequence of employing a *deconstructionist interpretation* of the historical setting in which the Supreme Court decided on the cease of racial segregation.

1.3.3. Deconstructionist Interpretation of History

Deconstructionist interpretation of history can be deemed, perhaps, the most postmodernist feature of CRT scholarship. Similar to the postmodernist confrontation of the information taken-for-granted as objective facts, deconstructionist interpretation of history challenges the long-established records of the American history by reconsidering the same historical 'reality' from the alienated and undermined perspectives of racialized minorities.[304] Therefore, this 'reversed' interpretative method aims to introduce alternative narratives, or 'the outsider perspective,'[305] into

[301] Derrick A Bell, Jr., 'Brown v. Board of Education and the Interest-Convergence Dilemma' (1980) 93 Harvard Law Review Association 518.
[302] Ibid.
[303] Derrick A Bell, Jr., 'Brown v. Board of Education and the Interest-Convergence Dilemma' (1980) 93 Harvard Law Review Association 518; Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books 1992) 7.
[304] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 24.
[305] Matsuda and others (n 68) 2.

the process of construing history.[306] In doing so, it facilitates the disclosure of unknown or overlooked aspects of the historical events – especially the ones related to the racial struggle of various minority groups.[307]

As already explained in the previous section, Derrick Bell, Jr.'s seminal on the *Brown* case constitutes the paramount example of the deconstructionist interpretation of history in CRT scholarship.[308] In terms of articulating and supporting his hypothesis on the materialistic interests of the White majority in ending racial segregation, Bell reconsiders the Supreme Court's decision in light of the events happening at the broader economic, historical, political, and social context.[309] Against this backdrop, Bell anticipates three reasons, which may have underscored the convergence of the majority's interests with the racial justice demands of people of color:[310] First, anti-racist practices as such have been considered as an investment in the improvement of the United States' international reputation, especially during the Cold War; by this way, it was deemed to create potential for future alliances, mainly with non-White populations of the Third World countries, against the Soviet-bloc.[311] Second, it was planned as a political maneuver in order to ease the frustrations of African-American veterans, who have returned to a racially segregated country after serving to the United States Army during the Korean War and the WWII.[312] Third, it was considered as a leverage for the industrialization of the South which, in the long run, would develop the national economy at large.[313]

[306] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 24–25.
[307] Ibid.
[308] Ibid.
[309] Derrick A Bell, Jr., 'Brown v. Board of Education and the Interest-Convergence Dilemma' (1980) 93 Harvard Law Review Association 518.
[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Ibid.

Deconstructionist interpretation of history has become one of the 'signature themes' of CRT.[314] This tenet of CRT not only enlightens the materialistic interests of the majority that enabled limited civil rights gains for the people of color, but it also builds a bridge between the past and the present, in terms of unearthing the majority's historical and continuing pattern of racial domination over people of color.[315]

1.3.4. Racial Distinctiveness, the 'Voices of Color', and Race-Consciousness Theses

Considering its postmodernist nature, CRT's main epistemological source can be specified as the *experiential* knowledge of racialized minorities – or, in other words, the compilation of the subjective perspectives and personal encounters of minorities with racialization and racism.[316] The importance CRT imputes in this alternative type of knowledge resulted in the formulation of two theses: The *racial distinctiveness* and the *voices of color* theses.

CRT scholarship formulates and embraces the racial distinctiveness thesis, in order to express the importance of the subjective narratives of racialized minorities for the theory in question.[317] Racial distinctiveness refers to the self-awareness shared by the individual members of a racialized group; it stems from and reflects upon the experiences of these individuals with racially-motivated oppression and discrimination that the group has been subjected to.[318] Thus, racial distinctiveness thesis holds that such an awareness equips the members of a minority group with the unique intellectual and experiential ground to discuss the construction of race and racism from their own standpoints.[319]

[314] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 24.
[315] Matsuda and others (n 68) 6; Delgado and Stefancic, 'Introduction' (n 68) xvii.
[316] Matsuda and others (n 68) 3, 6; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 44; Delgado and Stefancic, 'Introduction' (n 68) xvii.
[317] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 172.
[318] Ibid.
[319] Ibid.

In a similar vein, W.E.B. Du Bois has coined another term, which became crucially important for CRT: Double-consciousness.[320] Du Bois construes double-consciousness as a 'sense of always looking at one's self through the eyes of others.'[321] With this term, Du Bois epitomizes the burden of being a racial minority in a predominantly White society; he also enunciates the burden of living one's own truth, whilst not being able to escape from the negative and pejorative feelings and thoughts attached to one's self by the majority.[322]

To complete and to vocal racial distinctiveness, CRT embraces the voices of color thesis, which often takes the form of legal storytelling.[323] The voices of color thesis communicates the unique experiences of minorities with racism to the members of the White majority of the community.[324] It aspires not only to build a community of people with shared experiences, but also to invite the majority to empathy with the minorities, by making the former to see the same reality from the perspective of the 'other'.[325]

In line with this goal, CRT embraces legal storytelling as an effective way to raise awareness to the experiences, needs, and expectations of people of color.[326] Thus, legal storytelling is one of CRT's main tools to include the historically marginalized or unheard voices of the victims of racism within the legal discourse and scholarship.[327]

[320] William Edward Burghardt Bu Bois, 'Of Our Spiritual Strivings', *The Souls of Black Folk* (Dover Publications 1903).
[321] Ibid, 1.
[322] Ibid.
[323] Daniel A Farber and Suzanna Sherry, 'Telling Stories Out of School: An Essay on Legal Narratives' (1992) 45 Stanford Law Review 807, 815; Matsuda and others (n 68) 5; Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 172.
[324] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 44–48.
[325] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 172–173.
[326] Ibid; Farber and Sherry (n 323) 808.
[327] ibid 824; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 10.

Nevertheless, legal storytelling has been subjected to criticism due to not being scientifically objective.[328] Still, the intellectual and political input of legal storytelling in the jurisprudence can be enlisted as follows: First, as articulated by Mari Matsuda, legal storytelling represents the 'outsider jurisprudence.'[329] In other words, it introduces historically and traditionally silenced, marginalized, and excluded experiences, narratives, and perspectives of the victims of discrimination.[330] Second, legal storytelling challenges the limits of the formalistic legal language.[331] It opens a new terrain within the legal discourse to discuss race relations and law's interplay with race, yet from an alternative viewpoint.[332] Third, Delgado and Stefancic claim that legal storytelling has, on the one hand, a destructive power, which can confront and shatter the predominant narratives of law.[333] On the other hand, it holds a transformative power, which can displace the negative perceptions consolidated into the legal discourse.[334] Thus, despite the critique it received, this method prevails to exist and adopts a wide array of expressive forms, including but not limited to chronicles, dreams, fiction, parables, personal histories, poetry, and stories.[335]

As a conclusion, the theses explained herein cumulatively aim to create and to raise *race-consciousness*, which can be formulated as the awareness of the importance that race possesses in

[328] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 44–45.
[329] Mari J Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1992) 14 Women's Rights Law Reporter <https://www.northeastern.edu/lawstudentaffairs/wp-content/uploads/2018/07/When-the-First-Quail-Calls.pdf> accessed 28 April 2019.
[330] Ibid, Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (2nd Edn, New York University Press 2012) 45–48, 49–51.
[331] Mari J Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1992) 14 Women's Rights Law Reporter <https://www.northeastern.edu/lawstudentaffairs/wp-content/uploads/2018/07/When-the-First-Quail-Calls.pdf> accessed 28 April 2019.
[332] Ibid, Daniel A Farber and Suzanna Sherry, 'Telling Stories Out of School: An Essay on Legal Narratives' (1992) 45 Stanford Law Review 807, 815–816; Margaret M Russell, '"A New Scholarly Song": Race, Storytelling, and the Law' (1993) 33 Santa Clara Law Review 1057, 1059.
[333] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 49–51.
[334] Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87 Michigan Law Review 2411, 2411; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 48–49.
[335] Matsuda and others (n 68) 5; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 49–51.

the American society and the awareness of the disparate treatment of different segments of the same society.[336] Formulated in this way, race-consciousness holds the anti-thesis of *color-blindness*. Neil Gotanda explains color-blindness in quite broad and crystal-clear terms as the 'technique of noticing but not considering race.'[337] As explained by Gotanda, an attitude as such falls far from combatting racial discrimination, due to being in denial about the racial underpinnings of unequal treatment of different segments of the society.[338] Thus, color-blind approaches to law and its impact on the legal status of people of color are incapable of grasping racial oppression; besides, they provide an environment where such practices can prevail.[339]

In fact, color-blindness is another concept of CRT scholarship. It resembles the liberal values of universalism and formalism, on the one hand, and the innate belief in accomplishing racial equality through objective and neutral laws, on the other.[340]

1.3.5. Critique of Liberal Legal Order

The emergence of CRT as a postmodern and race-centered theory was triggered by the prominent CRT scholars' dissatisfaction with the existing liberal legal order as well as its face-neutral theoretical framework and conceptualization of 'equality'.[341] In fact, CRT scholarship can be defined in reference to its critique of the liberal ideals of the American jurisprudence and the reflections of these ideals upon the civil and political status of minorities.[342]

Based on these, it would be useful to draw the contours of liberalism, before unfolding CRT's critique of liberal legal order. In brief, liberalism can be framed as 'a tradition in political and legal

[336] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 171.
[337] Neil Gotanda, 'A Critique of "Our Constitution Is Color-Blind"' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (2nd edn, Temple University Press 2000) 35. Internal parentheses excluded.
[338] Ibid.
[339] Ibid.
[340] Ibid.
[341] Richard Delgado and Jean Stefancic (eds), 'Critique of Liberalism', *Critical Race Theory: The Cutting Edge* (2nd Edn, Temple University Press 2000) 1; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 26.
[342] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 26–27.

theory which gives primacy to individual liberty in the political and legal arrangements of a society.'[343] Liberal legal theory holds four foundational (and intertwined) propositions on law and society:[344] First, law is considered as a public good, which serves to the public interest by setting a framework of rules that would enable the members of a society to harmonize their actions.[345] Second, the rule of law is central to the individual's liberty, due to its commitment to subjecting both public and private actions to the knowable, reasonably certain, and predictable law.[346] Third, liberal legal thought requires law to be knowable, reasonably stable, and ascertainable to prevent disparate understandings by the members of the society.[347] In fact, liberalism holds this as the only way to maintain the rule of law.[348] Last, the liberal legal thought is premised upon the presumptions of State-neutrality as well as the neutrality of the political institutions.[349] While taking this for granted, the liberal legal thought considers State-neutrality as a pre-requisite to maintaining the rule of law and to prevent oppression addressed to individuals.[350] In the same vein, it is also a common presumption that the liberal legal and political orders are self-correcting; hence, they would invest in the restoring of injustices that may occur.[351]

Given their over emphasis on State-neutrality, liberal legal theories adopt a formalistic approach in formulating 'equality', which simply rely on the equality of all human beings before the laws and the public authorities.[352] In this context, a formalistic conception of equality

[343] Suri Ratnapala, 'Radical Jurisprudence: Challenges to Liberal Legal Theory', *Jurisprudence* (1st edn, Cambridge University Press 2009) 212.
[344] Ibid, 214.
[345] Ibid.
[346] Ibid.
[347] Ibid.
[348] Ibid, 215-216.
[349] Ibid.
[350] Ibid, 216-217.
[351] Ibid, 217.
[352] Daniel Moeckli, 'Equality and Non-Discrimination' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 157.

concentrates on non-discriminatory practices and requires equals to be treated equally.[353] In other words, it is the *process*, rather than the *outcome*, that is centered by formal equality.[354] Whereas formal equality is individualistic in the sense that it imposes individuals to be treated on merit, regardless of their class, ethnicity, gender, race, religion, sexual orientation, or any other grounds; it also complicates achieving a true equality amongst individuals, due to necessitating a comparator to evaluate 'equality' and to address inconsistent treatment.[355] Besides, the formal conception of equality undermines the *result* of the equal treatment and overlooks at the continuing (adverse) impact of historical injustices on the lives of the members of formerly subordinated groups.[356]

Therefore, CRT's critique of the liberal legal thought can be clustered into two points: First, the conceptualization of equality; second, the legal methods to achieve equality in the socio-historical context of the American reality. In fact, both critical points stem from CRT's rejection of the presumed existence of racial symmetry in the American society, which underpins the formalistic formulations of 'equality'.[357] However, a glimpse of the American legal history reveals the asymmetry of races in American jurisprudence as also marked by two landmark cases: *Dred Scott v. Sandford,*[358] which introduced the 'separate and unequal' principle, and *Plessy v. Ferguson,*[359] which replaced the former principle with 'separate but equal' to resolve legal disputes of racial discrimination.[360]

Even though formal equality is the legacy of a relatively new case law, namely the *Brown* case, CRT advocates for substantive equality, rather than color-blind and formal conceptions of

[353] Ibid.
[354] Ibid.
[355] Ibid.
[356] Ibid, 159.
[357] Roy L Brooks and Mary Jo Newborn, 'Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction without a Difference?' (1994) 82 California Law Review 787, 790.
[358] *Dred Scott v. Sandford*, 60 U.S. 393 (1856)
[359] *Plessy v. Ferguson*, 163 U.S. 537 (1896)
[360] Brooks and Newborn (n 357) 792–793.

equality.[361] Thus, CRT claims positive action mechanism, which would blur the lines between the negative and positive obligations of the State and would pressurize the State to take active steps in attaining equality.[362]

That said, CRT holds that commitment to formal equality would be effective to combat only the most obvious and blatant forms of racism; however, it would fall short to address the subtle and institutionalized forms of racism and it would even perpetuate the existing patterns of disadvantages specific to racialized minorities.[363] Hence, CRT advocates for formulating equality by taking both equality in *opportunity* and in *result* into consideration. By this way, historical injustices can be redressed; besides, the State would be responsible of not only protecting individuals from discriminatory practices, but also of promoting equality for the benefit of the society at large.[364]

1.3.6. Anti-Essentialism and Intersectionality

Anti-essentialism and *intersectionality* tenets of CRT are inextricably interrelated with social constructionism, deconstructionist interpretation of history, and the voices of color thesis. It can be argued that both of these terms, principally, confront the social construction of the female identity in reference to White women. Thus, these tenets criticize the *essentialization* of White women and their experiences within the women's rights (or, anti-discrimination) discourse and the mainstream Feminist Movement, and they reject the centralization of White women's historical realities and legal claims within the feminist agenda.[365] That said, the feminist strand of CRT

[361] Ibid 795; Carbado (n 260) 1612.
[362] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 26–30.
[363] Brooks and Newborn (n 357) 798.
[364] Moeckli (n 352) 159–160.
[365] See e.g., Kimberlé Williams Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] The University of Chicago Legal Forum 139; Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stanford Law Review 581.

introduced the 'anti-essentialism' and 'intersectionality' principles into the CRT discourse, in order to combat against the marginalization of Black women's reality within the collective experiences of (predominantly White) women – and also within the (predominantly) Black (men's) experiences.[366]

For the purposes of the feminist discourse, *essentialism* stands for the idea and/or belief that the isolated experiences of a prototypical woman with oppression can define the experiences and the reality of women at large, regardless of their class, ethnicity, race, religion, and sexual orientation.[367] Thus, an essentialist approach to women's current legal status and needs eradicates the alternative forms of oppression faced by or the disparate treatment of women whose femininity is constructed by their societies in a different socio-historical setting.[368] In this context, Angela P. Harris claims that the contemporary feminist discourse homogenizes the feminine identity, by overlooking the different contextual settings from which heterogeneous female identities emerged.[369] As a result, mainstream feminism creates a unified reality which is taken-for-granted to be common for all women – even though this overgeneralization paves the way to alienation and marginalization of some female groups, and the ignorance of their unique experiences with discrimination.[370] Based on this, Harris articulates the mainstream feminist legal theory as another example in which the White and socio-economically privileged master narratives speak for all women.[371] She accentuates that '[j]ust like law itself, in trying to speak for all persons, ends up silencing those without power, feminist legal theory is in danger of silencing those who have traditionally been kept from speaking, or who have been ignored when they spoke.'[372]

[366] Ibid.
[367] Levit and Verchick (n 199) 26.
[368] Harris, 'Race and Essentialism in Feminist Legal Theory' (n 365) 585.
[369] Ibid.
[370] Ibid, 586–590, 605–608.
[371] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 62–65.
[372] Harris, 'Race and Essentialism in Feminist Legal Theory' (n 365) 585.

As opposed to essentialism, the *anti-essentialism* tenet of CRT holds that 'discrimination is best understood not from the center of an oppressed group's membership (meaning for women, [W]hite, middle-class, and heterosexual), but from the margins.'[373] Thus, anti-essentialists assert that for having a more holistic view of the *true* nature of discrimination, the historically ignored and marginalized experiences of minorities shall be taken into consideration.[374]

In fact, a quick glance at the grassroots of the American Feminist Movement can reveal the discrepancies in the social construction of White and Black femininities, and it can justify the necessity for an anti-essentialist approach to feminist struggle. As mentioned earlier within this chapter, the first-wave of the Feminist Movement centered the fight of (White) women for civil and political rights equal to those of men. Whereas White women were claiming to be recognized not just as human beings but rights-bearing citizens; Black women were concerned about even more fundamental issues, such as the abolition of slavery, hence, being acknowledged as human beings and rights-owners, rather than subject-matters of the right to property. The gap between the social and legal status of White and Black women were crystallized with, perhaps, the first legal victory of the Feminist Movement and the Declaration of Sentiments adopted in Seneca Falls, New York in 1848.[375] In response to the claims of (White) women for the cease of the 'civil death' women at large, several States adopted laws to grant women the right to property.[376] As evident from the Married Women's Property Act of 1848[377] passed by the State of New York, White male

[373] Levit and Verchick (n 199) 26.
[374] Harris, 'Race and Essentialism in Feminist Legal Theory' (n 365) 615–616; Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (n 365) 167.
[375] Levit and Verchick (n 199) 3–7.
[376] 'American Women: Resources from the Law Library' (*Library of Congress: Research Guides*) <https://guides.loc.gov/american-women-law/state-laws#s-lib-ctab-19233885-1> accessed 4 November 2021.
[377] The Act for the Effectual Protection of the Property of Married Women, 1848 Laws of New York 307, Ch. 200.

drafters of the law were motivated by the idea of keeping the family's wealth within the family, including the slaves to be inherited by married women.[378]

Along the same line, Sojourner Truth's renowned 'Ain't I a Woman?'[379] speech at the Women's Rights Conference held in Ohio in 1851, constitutes another strong example which underlines the differences among the experiences of Black and White women. Truth's epic monologue not only shatters the construction of (White) female identity as a weaker counterpart of men by the patriarchal mindset, but it also pinpoints the social construction of White and Black female identities.[380] Truth recalls slavery, plantation, and inhumane treatment of Black female slaves – which all require physical strength, which White women historically have not been associated with and which are utterly unfamiliar realities to White women.[381]

Complementary to anti-essentialism, Kimberlé Williams Crenshaw coined the term 'intersectionality' in 1989.[382] As formulated by Crenshaw, intersectionality stands as a critique of the essentialization of race and gender in the anti-discrimination and feminist scholarships, as if they are 'mutually exclusive categories of experience and analysis.'[383] In this frame, intersectionality stands for the multi-dimensional oppression faced by Black women, due to the combination of their race and gender, which results in the occurrence of a unique form of marginalization that is experienced both in the mainstream Black and Feminist Movements.[384]

To explain her argument, Crenshaw focuses on the American Courts' treatment of Black women who have brought class actions on behalf of, respectively, Black women, Black people, or

[378] Levit and Verchick (n 199) 7.
[379] 'Sojourner Truth: Ain't I A Woman? (U.S. National Park Service)' <https://www.nps.gov/articles/sojourner-truth.htm> accessed 29 April 2019.
[380] Levit and Verchick (n 199) 9.
[381] 'Sojourner Truth: Ain't I A Woman? (U.S. National Park Service)' (n 379).
[382] Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (n 365).
[383] Ibid, 139.
[384] Ibid.

women.[385] Within this frame, Crenshaw unveils that 'Black women' was not acknowledged by the Courts as a category for discrimination cases; furthermore, Black female plaintiffs were left at the crossroads and made to choose among one of their combined features: Race or gender.[386] Crenshaw concludes that any analysis of racism and sexism which overlooks the intersection of race and gender would be far from addressing the true and complex nature of social phenomena as such.[387]

Contributions of anti-essentialism and intersectionality to critical legal scholarship were emphasized by Mari Matsuda. According to Matsuda, these concepts provide an insight into multiple identities and usher a *multiple consciousness*, which Matsuda articulates as the 'deliberate choice to see the world from the standpoint of the oppressed.'[388] Similar to the social constructionism and differential racialization thesis, intersectionality also encourages the critical legal theories to look beyond the fragments of class-, gender-, race-, or sexual orientation-related problems and to trade their single-sided lens with a multi-dimensional one.[389]

On that note, it should be clarified herein that even though the concepts in question have flourished from the Black feminist discourse, both terms were integrated into the main tenets of CRT and applied by CRT scholars to legal dilemmas other than the discrimination of Black women.[390] For instance, Harris penned a scholarly work on the social construction of the masculine identity and male sexuality,[391] where she studied the impact of such social constructs on the

[385] Ibid, 141-150.
[386] Ibid, 150-152.
[387] Ibid.
[388] Mari J Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1992) 14 Women's Rights Law Reporter <https://www.northeastern.edu/lawstudentaffairs/wp-content/uploads/2018/07/When-the-First-Quail-Calls.pdf> accessed 28 April 2019.
[389] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 57–65.
[390] Matsuda and others (n 68) 4–5; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 57.
[391] Angela P Harris, 'Gender, Violence, Race, and Criminal Justice' (2000) 52 Stanford Law Review 777.

racially-motivated violent behaviors of men directed towards, principally, to other men – either to break the law or to enforce the law.[392] Along the same line, Darren Lenard Hutchinson has a piece which pinpoints the *multidimensionality* of race-, class-, gender-, and sex-based discrimination.[393] Hutchinson explains that the mainstream queer theory and the dominant scholarship on gays and lesbians often leave the race- and class-subordination out of their scope.[394] Referring to the racist and sexist actions of private actors that are inflicted upon minorities standing at the intersection or race, sex, and class; Hutchinson claims that the ignorance on the multiple layers of such forms of oppression – which mainly stem from stereotypes attached to masculine, racial, and sexual identities[395] – hinder framing this problem, hence, taking action against multidimensional subordination as such.[396]

As a conclusive remark, the contemporary readings of intersectionality have broadened the scope of the inaugural articulation of the concept. In sum, an intersectional perspective requires the investigation of the multiplicity of various elements, such as race, sex, class, national origin, and sexual orientation.[397]

1.4. Internal Critique and Development of Critical Race Theory

As already explained in the previous sub-chapters, CRT constitutes a postmodern theory in law. For the purposes of this dissertation, the postmodernist disposition of CRT emanates from two aspects of its doctrine: First, CRT investigates law and legal order from the positionality of people of color. Given its interrelation with identity politics, CRT scholarship derived from and develop

[392] Ibid, 797.
[393] Darren Lenard Hutchinson, 'Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (2nd edn, Temple University Press 2000).
[394] Ibid, 326.
[395] Ibid, 327.
[396] Ibid, 332.
[397] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 57–58.

according to the history, social and legal reality, subjective experiences, and personal narratives of African-Americans. Whereas the initial CRT scholarship concentrated on the race relations in the United States, the notion of 'race' was taken in a narrow sense and was built upon a 'Black and White' binary paradigm.[398]

Nevertheless, the construction of race in such an oppositional binary paradigm has sparked internal debates within CRT scholarship.[399] It was criticized due to hindering the advancement of race and anti-discrimination discourses within American jurisprudence.[400] These internal debates ultimately resulted in the broadening of the scope of race and the enrichment of the race discourse, by the involvement of the narratives of minorities other than African-Americans.[401]

Second, the postmodernist character of CRT rules out the possibility of isolating the legal order and construing the laws in a socio-historical vacuum. Hence, as already explained above, CRT places the legal realities in a greater historical, legal, political, and social context. It aspires to comprehend the implications of social and political realities in the legal sphere. This requires CRT to develop a time- and place-specific theoretical framework. Due to this, the initial CRT scholarship was produced by scholars of color and shaped in accordance with their unique experiences with racism in the aftermath of the Civil Rights Movements of the 1960s in the United States.[402]

[398] Richard Delgado and Jean Stefancic (eds), 'Beyond the Black-White Binary', *Critical Race Theory: The Cutting Edge* (2nd edn, Temple University Press 2000) 343.
[399] Delgado and Stefancic, 'Introduction' (n 68) xv; Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42) 57.
[400] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 79–80.
[401] Ibid.
[402] See e.g., Matsuda and others (n 68) 3; Crenshaw and others, 'Introduction' (n 15) xiii; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 90–91.

However, CRT scholars assert that the construction of race has altered in the United States over time, whereas racism perpetuated in different and more hideous forms.[403] As a consequence, CRT scholars study the so-called *post-racial* era and investigate the new facets of race relations and racist practices in the second decade of CRT and onward – which also provides an opportunity to outline the established motives and patterns of racist practices in the United States.[404]

Thus, this sub-chapter elaborates on these two points, and it demonstrates the thematical and temporal expansion of CRT.

1.4.1. Beyond the 'Black and White' Binary Paradigm

Gary Minda articulates the CRT Movement as: 'an African-American movement in legal studies to approach problems of race from the unique perspective of African-Americans.'[405] Minda's formulation of CRT as such discloses the main epistemological source of the initial CRT scholarship: The actual and subjective experiences, history, culture, and intellectual tradition of its prominent scholars, who were predominantly African-American.[406] Thus, the preliminary CRT scholarship was premised on the writings of mostly African-American scholars;[407] in fact, even the key concepts and main tenets of CRT were shaped in accordance with the narratives of African-American scholars.[408]

Despite being prompted as an African-American initiative, there is no precise evidence in the existing literature to prove that CRT intended to remain 'Black'. As a matter of fact, Derrick Bell,

[403] See e.g., Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books 1992); Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253.
[404] See e.g., Sumi Cho, 'Post-Racialism' (2008) 94 Iowa Law Review 1589; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253.
[405] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (n 30) 167.
[406] Matsuda and others (n 68) 3; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 10–11.
[407] Angela P Harris, 'Foreword: The Jurisprudence of Reconstruction' (1994) 82 California Law Review 741; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 90–91.
[408] Please see section 1.2.3. in the text.

Jr., as the 'founding father' of CRT, describes racism in a broad sense as 'the rationalization of exploitation, discrimination, forced removal and genocide.'[409] Thus, Bell adds: 'Other minorities who are identifiably non-[W]hite – Indians, Chinese, Japanese, Mexicans, and other non-[W]hite Spanish- or French-speaking people – have suffered exploitation and discrimination in quite similar ways to those experienced by Blacks often for similar purposes.'[410]

Along the same line, and as a critique of CRT's first decade, Angela P. Harris suggested that '[r]ace-crits' understanding of "race" and "racism" might also benefit from looking beyond the struggle between [B]lack and [W]hite.'[411] Hence, Harris asserts that the inclusion of new voices of color, such as Latina/o and Asian-American voices, in CRT scholarship would enrich the race discourse and reveal new dimensions of racism ingrained in the American legal order and institutions.[412] Harris also adds that the indigeneity discussions and the perspectives of indigenous peoples should be included within CRT scholarship.[413] Indeed, racialized minorities and indigenous peoples often share a common ground of being numerically inferior and a non-dominant group, compared to the White majority of their society.[414] However, from a legalistic perspective, racialized minorities would still fall under the category of 'national minorities', whereas indigenous peoples would comprise 'conquered nations.'[415] Hence, Harris highlights that the indigenous praxis would introduce another dimension to CRT's race-talk since the racialized minorities demand equal rights with the majority, while the claims of indigenous peoples go beyond civil right claims and focalize sovereignty.[416]

[409] Bell, Jr., *Race, Racism and American Law* (n 149) 684.
[410] Ibid.
[411] Harris, 'Foreword: The Jurisprudence of Reconstruction' (n 407) 775.
[412] Ibid.
[413] Ibid.
[414] Dieter Kugelmann, 'The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity' (2007) 11 Max Planck Yearbook of United Nations Law 233, 234–239.
[415] Harris, 'Foreword: The Jurisprudence of Reconstruction' (n 407) 775.
[416] Ibid.

Despite the multi-dimensional race-talks within CRT scholarship, the dominance of the African-American influence in CRT scholarship and the early writings' intense concentration on the experiences of African-Americans have raised questions and were subjected to criticism by scholars, who are not of African-American descent.[417] In fact, Juan F. Perea's seminal work, entitled 'The Black/White Binary Paradigm of Race'[418], can be considered as a cornerstone of this kind of critique. Perea claims that 'race discourse both inside and outside of law is dominated by a binary paradigm of race,'[419] which, ultimately, limits the scope and the spectrum of legitimate points to be raised while setting the contours of 'relevance'.[420] In this context, Perea articulates *paradigm* as follows: 'A set of shared understandings or premises which permits the definition, elaboration, and solution of a set of problems [that subsequently lead to distinguishing] the facts [that] matter in the solution of a problem.'[421]

Based on this definition, Perea explains that any paradigm excludes or ignores the alternative phenomena that do not fit in the analytical framework of paradigm.[422] This argument can be translated into the legal discourse as follows: '[T]he persistent focus of race scholarship on Blacks and Whites, and the resulting omissions of Latinos/as, Asian-Americans, Native-Americans, and other racialized groups.'[423] Hence, Perea argues that such a crystallization of a 'Black and White' binary paradigm takes the African-American history and experiences as a benchmark in

[417] Crenshaw and others, 'Introduction' (n 15) xvii; Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 90–91.
[418] Juan F Perea, 'The Black/White Binary Paradigm of Race' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (2nd Edn, Temple University Press 2000).
[419] Ibid, 345.
[420] Ibid, 345-346.
[421] Ibid, 344.
[422] Ibid.
[423] Ibid, 345.

conceiving race; this frame loosely accounts the oppression of 'other people of color' – and only if they can be explained by analogy with the experiences of African-Americans.[424]

Perea's line of argumentation was acknowledged by other minority scholars as well. According to Perea and his proponents, CRT was risking the establishment of a Black exceptionalism within its doctrine, which would reinforce a paradigm premised on the social construction of race in reference to the African-American legacy.[425] This cohort of scholars further argued that the acceptance of such a paradigm would consolidate a 'proto-[B]lack'[426]; this would not only mirror a false image of the American racial scene, but it would also overlook some racialized groups if they cannot identify their experiences within the frame set by African-Americans.[427] Therefore, the contemporary CRT scholarship emphasizes the inclusive nature of its scholarship and avoids any binary paradigm or dichotomous perceptions of race – since these practices would interrupt the safe-space created for race debates and would prevent cooperation and coalitions among disparate racialized minorities.[428]

In fact, it can be argued that the social constructionist premises of CRT's race discourse, by its nature, disables the fixation of race into a universal category. Still, as a response to the critique of CRT's dense concentration on the 'Black and White' binary paradigm, CRT scholarship has formulated *differential racialization* thesis, which is already defined in the previous sub-chapters. The differential racialization thesis not only officially extended the scope of race-related scholarship, but it also enabled CRT to have a more holistic view of the racist motives and racial practices in the United States.[429] Indeed, Delgado and Stefancic remark that CRT broadened its

[424] Ibid, 345-346, 351-352.
[425] Delgado and Stefancic, 'Beyond the Black-White Binary' (n 398) 343.
[426] Ibid.
[427] Ibid.
[428] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 81–82.
[429] Ibid, 77.

spectrum of minority perspectives, by uniting the realities of Asian-Americans, Latin-Americans, and Native-Americans 'under the umbrella of [CRT].'[430]

It should also be indicated that CRT's insights and race-centered discourse has traveled beyond the American jurisprudence. Compared to CRT's academic credibility and inclusion within academic curricula in the United States, CRT's reputation and implementation into alternative contexts are in the early stages in non-American contexts.[431] However, there exists a growing body of CRT literature, especially in the United Kingdom and mainland Europe. These scholarly efforts not only put American CRT scholars and European scholars into a dialogue, but they also bring together the legal scholars who apply the race-conscious lens of CRT to European reality with the ones who extensively work on the anti-discrimination discourse in the European context.

In this regard, Mathias Möschel's scholarship marks the arrival of CRT scholarship to the mainland Europe and the genesis of a postmodern critique of the European race relations. Especially in his earlier writings, Möschel questions why CRT has not been utilized by the European legal scholars, despite the increasing migration to Europe and the rise in xenophobia.[432] Regarding this, Möschel claims that '[t]he idea of racism in Europe is primarily associated with the horrors of the Holocaust and anti-Semitism [whereas] skin color (...) was less of an issue.'[433] Möschel's works also intensify on what Europe can learn from the teachings of CRT; especially in his book, entitled *Law, Lawyers and Race: Critical Race Theory from the United States to Europe*,[434] Möschel formulates the transplantation of CRT into European jurisprudence and the

[430] Ibid, 3. Also see Carbado (n 260) 1603.
[431] Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42) 1.
[432] See e.g., Möschel, 'Color Blindness or Total Blindness - The Absence of Critical Race Theory in Europe' (n 10); Möschel, 'Race in Mainland European Legal Analysis: Towards a European Critical Race Theory' (n 42); Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42).
[433] Möschel, 'Color Blindness or Total Blindness - The Absence of Critical Race Theory in Europe' (n 10) 73.
[434] Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42).

contextualization of a European CRT in accordance with the social construction of race and racism in the European reality.

Whereas Möschel addresses the Jewish and Roma communities as the holders of socially constructed race in Europe;[435] Eddie Bruce-Jones also embraces CRT to investigate the racialized terrain of Europe.[436] Bruce-Jones explores the racial subordination of Afro-Germans in Germany and the role of law 'as a part of a racial problem, rather than a solution, to racial injustice'[437] in the German context.[438] In a similar vein, Antonia Eliason authored a journal article on the Roma community within the European Union (hereafter 'EU') context.[439] She maps the race-based discrimination faced by Roma students in European schools and studies this reality in light of the anti-discrimination law of EU and the case law created by the European Court of Human Rights.[440]

1.4.2. Adaptation of Critical Race Theory to the Dynamics of Post-Racialism

From an originalist reading, CRT scholarship can be framed as a body of literature that builds a bridge between the pre- and post-Civil Rights Movement eras. It theorizes the social construction of race in the pre-Civil Rights Movement era, investigates its implications in the legal forum, and reveals the continuum of race and racial connotations in the post-Civil Rights era. Nevertheless, CRT scholarship has not remained as a body of literature centered around the American civil rights discourse; instead, it has broadened its temporal scope in terms of mapping the continuum of racialization and race relations in the American order.

[435] Ibid, 141–152.
[436] Bruce-Jones (n 46).
[437] Ibid, 24.
[438] Ibid.
[439] Antonia Eliason, 'With No Deliberate Speed: The Segregation of Roma Children in Europe' (2017) 27 Duke Journal of Comparative & International Law 191.
[440] Ibid.

In this respect, Derrick Bell, Jr. indicates that 'the racism that made slavery feasible is far from dead in the last decade of twentieth-century America.'[441] Whilst explaining that the very limited gains of the Civil Rights Movement are already rolling back, Bell warns against any discourse to be built upon 'racial progress' as this would serve only to exclude race-based remedies from the legal order.[442] In fact, Bell considers racial progress not as a response to solve the problem of racism, but just another way of regenerating the very same problem.[443] On that note, Bell highlights that the cease of the most blatant forms of racism – such as the abolition of slavery – should not be taken as if racism is over, because the color barriers and racial segregation signs of the racist laws have left their places to less visible and more hideous forms of racism.[444] Regarding this, Bell explains that 'the absence of visible signs of discrimination'[445] shall not be misleading, especially for White-Americans, as if a true racial equality has been achieved.[446]

Bell's insights gained further importance upon the designation of the first Black president of the United States to the White House in 2008. In fact, Barack Obama's presidency not only altered the racialized dynamics of the American history, but it also marked the arrival of the so-called 'post-racial' era.[447] Many have celebrated this event as the proof of the success of racial reforms and the racial equality in the American society[448] – nevertheless, the racial progress rhetoric and the post-racialist ideology have triggered new debates in CRT scholarship.

[441] Bell (n 298) 5.
[442] Ibid, 5-7.
[443] Ibid.
[444] Ibid.
[445] Bell, Jr., 'Racial Realism' (n 83) 306.
[446] Ibid, also see Carbado (n 260) 1607–1608.
[447] Sumi Cho, 'Post-Racialism' (2008) 94 Iowa Law Review 1589, 1591–1592; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1312–1313.
[448] Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1332.1332.

Indeed, Sumi Cho has penned an article on the defining characteristics of *post-racialism*, where she framed this phenomenon as 'a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies.'[449] Hence, Cho employs the term 'post-racial' era to denote a period in which race is not a subject of discussion or consideration in the policy, law-, and decision-making processes.[450]

To lay the foundations of this phenomenon, Cho identifies four intertwined features that collectively define the post-racial ideology: [451] First, the post-racial ideology is committed to the 'racial progress' rhetoric; in fact, racial progress constitutes the central feature of post-racialism.[452] According to Cho, racial progress is underscored by positive connotations, and it stands as a common name for the nation-wide achievements in restructuring race relations; however, implying the eradication of unequal treatment from the American legal order, this notion labels race-conscious approaches as backward or outdated.[453] It further establishes a 'legitimate' ground to eliminate race-based remedies from the legal framework.[454]

Second, the post-racial ideology endorses universalism as 'a normative ideal and political necessity.'[455] This aspect creates distrust in race-based policies and redress mechanism, including affirmative action; furthermore, it even results in the acknowledgment of race-based policies and mechanisms as divisive, due to escalating the interests of certain groups at the expense of the interests of the society at large.[456] Drawing upon the racial progress thesis, this feature also asserts

[449] Cho (n 404) 1594.
[450] Ibid.
[451] Ibid, 1593, 1600-1604.
[452] Ibid, 1601.
[453] Ibid.
[454] Ibid.
[455] Ibid, 1601-1602.
[456] Ibid, 1602-1603.

that race-based policies and remedies are not necessary anymore, and that their insistent presence would be reverse-racism along with shadowing another essential problem, namely class-based injuries.[457]

The third feature is closely related to what 'post-' in 'post-racialism' stands for. Cho unravels the two-folded meaning of this prefix, in respect to both the pre-Civil Rights and Civil Rights contexts. According to Cho, the 'postness' of post-racial era, first and foremost, admits the existence of racial practices in the pre-Civil Rights and also in the Civil Rights eras. Additionally, it consolidates the rejection of the centrality of race in the legal discourse in general and draws a 'moral equivalence' between these two eras, by rejecting the racial subordination specific to the pre-Civil Rights era, on the one hand, and the race-based policy-, decision-, and law-making of the Civil Rights era, on the other.[458] Last, Cho coins the 'distant move' term and uses this term to illustrate the stance of post-racialists towards the civil rights advocates and the followers of CRT scholarship.[459]

In this frame, Kimberlé Williams Crenshaw articulates post-racial landscape as 'a new space for race in unchartered terrain,'[460] rather than 'a raceless space'[461] Crenshaw further argues that, even though Obama's presidency has been a major argument in reinforcing the notion of racial progress, in fact, it has been the race factor that portrayed Obama's electoral victory as a milestone of the American history.[462] Besides, Crenshaw highlights that, making an assumption regarding the status of a whole group of historically marginalized people by looking at only one example,

[457] Ibid.
[458] Ibid, 1603.
[459] Ibid, 1604.
[460] Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1291.
[461] Ibid.
[462] Ibid, 1319-1320.

who has escaped the barriers of his race, would be illusionary.[463] According to Crenshaw, post-racialism pursues the color-blind projects of the post-Civil Rights era, by altering the latter's formal conceptions of merit with political pragmatism.[464]

Given the shift in the terrain in which race and racism continue to operate, Crenshaw advocates for the transformation of CRT into 'a broader project.'[465] The new wave of CRT project shall challenge and extend beyond the epistemological foundations of the existing race discourse; it shall embody an 'interdisciplinary, intersectional, and cross-institutional'[466] program to examine the contemporary configuration of the racial power.[467] In support of Crenshaw's proposition, Delgado and Stefancic pinpoint the new economic order of neo-liberalism; they add that CRT should consider the effects of globalization on the socio-economic power and status of all racialized minorities.[468]

1.5. Critical Race Theory in the Intellectual Property Domain: Critical Race IP

CRT offers an appealing tool and jargon to legal scholars who wish to study the racialized terrain of law and to investigate the interplay of race and law in a theoretical framework. Thus, as already mentioned above, CRT's insights and methods have extended beyond their original source, namely American constitutional law. Indeed, CRT is embraced by legal scholars working on a wide spectrum of legal disciplines, including those of business law.[469] It can be argued that this new strand of race-oriented scholarship was accommodated by or assimilated into the first-wave of

[463] Ibid, 1332.
[464] Ibid, 1314.
[465] Ibid, 1352.
[466] Ibid.
[467] Ibid.
[468] Delgado and Stefancic, *Critical Race Theory: An Introduction* (n 72) 114–134.
[469] Ibid.

CRT scholarship. Nevertheless, the infusion of CRT doctrine into the IP law discourse yielded a peculiar outcome: The birth of a new legal theory, namely Critical Race IP.[470]

The inaugural Critical Race IP conference, entitled 'Race + IP',[471] was held at Boston College in April 2017.[472] This first official event was dedicated to define the Critical Race IP Movement by setting its 'provisional boundaries and core ideological commitments.'[473] In this sense, the Critical Race IP Movement was articulated as 'an interdisciplinary movement that draws upon the CRT doctrine and that studies the racial contours of IP law within a historical context.'[474] In this frame, the Critical Race IP Movement aims to theorize the interplay of race, political and economic power, (neo)colonialism, and IP law; it aspires to unveil the racial and colonial non-neutrality of IP law and to address IP law's investment in the perpetual racial injustices.[475] For these purposes, Critical Race IP investigates how the racialized hierarchies embedded in the IP-related legal frameworks privilege and promote Whiteness and the materialistic interests of the Global North, on the one hand, and subordinate racialized minorities and indigenous peoples, on the other.[476]

However, the establishment of the Critical Race IP project shall not be read as if this is the first postmodern critique of IP law. On the contrary, and as admitted by the co-organizers of the Race + IP Conference,[477] both the idea of IP and IP law have been examined by critical and postmodern scholars before.[478]

[470] 'About Race + IP « Race + IP' <http://raceipconference.org/conference-organizers/> accessed 14 May 2018.
[471] Ibid.
[472] 'Race + IP' <http://raceipconference.org/> accessed 14 May 2018.
[473] Anjali Vats and Deidré A Keller, 'Critical Race IP' (2018) 36 Cardozo Arts & Entertainment Law Journal 735, 735–736.
[474] Ibid, 736.
[475] Ibid, 737, 740.
[476] Ibid, 740-742.
[477] Ibid, 740-741.
[478] Margaret Chon, 'Intellectual Property Research and Critical Theories' in Irene Calboli and Lillà Montagnani (eds), *Handbook on Intellectual Property Research (Forthcoming)* (Edward Elgar Press 2018) 1, 7–13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3219966>.

Legal scholars who identify their scholarship with CLS have been studying the power structures ingrained in IP law and the manipulative use of such power to enforce IPRs. For instance, being among the pioneers of the Critical IP scholarship, John Tehranian describes American IP law as 'a hegemonic battleground,'[479] and he works extensively on the implications of (racialized and gendered) economic and political power on shaping and applying the American IP (particularly, copyright and trademark) policies and laws.[480] In doing so, Tehranian often evokes and confronts the 'high culture and low culture' paradigm that informs IP law, hence, the non-neutrality of IP law.[481] Accordingly, he argues that despite its ostensibly neutral and objective construct, American copyright laws are built upon cultural valorization schemes which mirror the cultural, social, and aesthetic values of the dominant class.[482] It shall be noted that Tehranian's scholarship illuminates this dissertation, mainly because of exposing the ways in which IP law serves as a tool to consolidate the existing hierarchical social order through regulating the cultural production process, patrolling the dissemination of knowledge, and identifying who can access to knowledge and how.[483]

In a similar vein, Rosemary J. Coombe's scholarship is largely dedicated to the investigation of the face-neutral and Wester-centric construct of IP law from alternative vantage points, including those of the Global South, indigenous peoples, women, and other historically

[479] Tehranian, 'Towards a Critical IP Theory: Copyright, Consecration, and Control' (n 33) 1241.
[480] See e.g., John Tehranian, 'The Emperor Has No Copyright: Registration, Cultural Hierarchy and the Myth of American Copyright Militancy' (2009) 24 Berkeley Technology Law Journal 1397; John Tehranian, 'Parchment, Pixels, and Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)' (2011) 82 University of Colorado Law Review 1; John Tehranian, 'Towards a Critical IP Theory: Copyright, Consecration, and Control' [2012] Brigham Young University Law Review 1237; John Tehranian, 'Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality' in Matthew David and Debora Halbert (eds), *The Sage Handbook of Intellectual Property* (Sage Publications 2014); John Tehranian, 'Copyright's Male Gaze: Authorship and Inequality in a Panoptic World' (2018) 41 Harvard Journal of Law and Gender 343.
[481] Tehranian, 'Towards a Critical IP Theory: Copyright, Consecration, and Control' (n 33) 1249–1292.
[482] Ibid.
[483] Ibid, 1237-141.

marginalized groups.[484] Coombe's writings often emphasize the link between the cultural space and IP law; whereas, her publications focus on the constitutive role that IP regimes play in controlling the use, appropriation, interpretation, and circulation of cultural elements.[485]

IP law has attracted the attention of not only Crits, but also of feminist (legal) scholars. Though the feminist critique of IP law emerged only in the early 2000s, Dan L. Burk argues that the dualist theory developed by feminism – and especially feminism's examination of the allegedly objective reality through opposing dichotomies – can add into the collective efforts to unveil the hidden assumptions, gendered privileges, and power hierarchies embedded in IP law.[486] That said, Ann Bartow is among the leading feminist legal scholars who apply the 'female and male' binary opposition to the IP sphere. Bartow authors a journal article where she argued that IP law grounds on gendered assumptions about what is worth- or not-worth-to-be legally protected.[487] According to Bartow, this division thrives from the historically constructed and condensed perceptions of the 'interior space and exterior space' binary paradigm.[488] Whereas *the interior space* is associated with feminine forms of creations (such as cooking recipes), which are allocated to the public domain to be 'shared' with the greater society; *the exterior space* stands for the masculine forms

[484] See e.g., Rosemary J Coombe, 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy' (1993) 6 Canadian Journal of Law and Jurisprudence 249; Rosemary J Coombe, 'Cultural and Intellectual Properties: Occupying the Colonial Imagination' (1993) 16 PoLAR: Political and Legal Anthropology Review 8; Rosemary J Coombe, 'Marking Difference in American Commerce: Trademarks and Alterity at Century's Ends Law and Popular Culture: Intervention' (1995) 10 Canadian Journal of Law and Society 119; Rosemary J Coombe, 'Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity' (1998) 6 Indiana Journal of Global Legal Studies 59; Rosemary J Coombe, 'Authorial Cartographies: Mapping Proprietary Borders in a Less-Than-Brave New World' (1996) 48 Stanford Law Review 1357; Rosemary J Coombe, 'The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law Sixth Annual Tribal Sovereignty Symposium: Defending Indigenous Peoples' Heritage &(and) Autonomy' (2001) 14 St. Thomas Law Review 275.

[485] Rosemary J Coombe, 'Critical Cultural Legal Studies' (1998) 10 Yale Journal of Law & the Humanities 463, 469–470.

[486] Dan L Burk, 'Feminism and Dualism in Intellectual Property' (2007) 15 American University Journal of Gender, Social Policy & the Law 183, 184–185, 206.

[487] Ann Bartow, 'Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law' (2006) 14 American University Journal of Gender, Social Policy & the Law 551, 562–563.

[488] Ibid.

of creations, which are protected by IPRs and aggressively enforced by right owners and the courts.[489] In regard to this, Bartow explains that the underrepresentation of women in the IP sphere results in the marginalization and exclusion of feminine cultural productions within the IP domain, whilst the same laws continue to expand in consonance with the materialistic interests and greed of masculine cultural producers.[490] Bartow further argues that the absence of feminine voices and the limited feminist critique of IP law have even led to the abuse of women by means of IP law – as it is often the case in pornography.[491] Bartow explains how the American courts tend to consider pornographic performances under the constitutional right to freedom of speech – even if such works comprise violent acts inflicted upon women and violate the dignity, mental, and bodily integrity of women.[492]

In the same vein, Debora Halbert argues that irrespective of its face-neutrality, IP law stands on predominantly male assumptions of intellectual creation process and products.[493] According to Halbert, IP law grounds on masculine and individualistic forms of intellectual creativity (or *industrialized* labor)[494]. Halbert claims that this has resulted in the exclusion of traditionally feminine and collective creativity (or *craft* labor)[495], such as knitting and quilt making,[496] from the scope of legal protection.[497] Hence, Halbert concludes that, due to such gendered assumptions, IP law have been unequally benefitting men, while it has been pushing women and feminine intellectual creativity to the margins of IP law.[498]

[489] Ibid, 557-558, 562-563, 578-585.
[490] Ibid, 578-579.
[491] Ibid, 551-553, 567-568.
[492] Ibid.
[493] Debora Halbert, 'Feminist Interpretations of Intellectual Property' (2006) 14 American University Journal of Gender, Social Policy & the Law 431, 433.
[494] Ibid, 439.
[495] Ibid, 438-439.
[496] Ibid, 441-446.
[497] Ibid, 437-438.
[498] Ibid, 433.

Similarly, Sonia Katyal has a literary piece in which she also challenges the binary paradigms inherent in IP law – however, from the perspective of Queer Theory.[499] Katyal argues that copyright law has an intense relationship with identity politics since copyright constitutes the gatekeeper of 'the marketplace of speech'[500] in the information societies.[501] In this context, Katyal explains that while copyright sets the norms of cultural production and management, it privileges conventional expressions of ethnic, political, racial, and sexual identities.[502] To prove her point, Katyal focuses on the 'original work and derivative work' binary paradigm; she explains that copyright disputes over 'slash' (which refers to fanfiction or parodies where the original characters are replaced by 'homoerotic pairings of male characters'[503]) favor the original work and the heterosexual depictions of the characters, rather than the homosexually parodied ones.[504] Katyal further argues that, by taking the original works and their portrayal of certain characters as 'the standard', copyright law creates an authorial monopoly over these works; thus, copyright hinders the retelling or reinterpretation of the same story from alternative – and from unconventional and more complicated – perspectives.[505]

The postmodern critique of IP law and institutions did not come only from Crits, feminist (legal) and queer scholars. In fact, IP scholars who explicitly identify themselves with CRT scholarship have also applied the race-conscious lens of CRT to IP law. They investigated the racialized power dynamics inherent in IP law and the negative impact of such on the intellectual creators of color in the United States. Nevertheless, these earlier attempts of racial critique of IP

[499] Sonia K Katyal, 'Performance, Property, and the Slashing of Gender in Fan Fiction' (2006) 14 American University Journal of Gender, Social Policy & the Law 461. For a similar and earlier scholarly attempt, also see Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (n 28).
[500] Ibid, Katyal (n 499) 435.465.
[501] Ibid.
[502] Ibid, 462.
[503] Ibid, 483.
[504] Ibid, 506.
[505] Ibid, 479.

law did not necessarily urge the development of an independent CRT project tailored for the unique features of IP law. Instead, these scholars contributed to the mainstream CRT scholarship, either by implementing the hypothesis of CRT into IP law, or by translating the main tenets of CRT (such as material determinism, the interest-convergence dilemma, and intersectionality) into the IP discourse.

For instance, Kevin Jerome Greene has penned a couple of journal articles where he argued that American copyright laws take White cultural producers and their creative process as a benchmark to construct the copyright framework.[506] Regarding this, he studied the incompatibilities of American copyright laws with the creative process and products of Black cultural producers.[507] According to Greene, the face-neutral legal construct of American copyright laws has systematically excluded and continue to subordinate Black cultural producers.[508] In this frame, Greene draws the attention of readers to the ongoing appropriation of Black cultural productions as well as the lack of recognition and reparation mechanisms to correct such historic injustices.[509]

Greene also studied the investment of American trademark laws in the promotion and circulation of stereotypical or pejorative images as lawfully registered and legally protected marks.[510] In this context, Greene discusses the monopoly and the market power that American trademark law grants to corporations over racially (in)sensitive words and insignia.[511] He further

[506] Kevin Jerome Greene, 'Copyright, Culture & Black Music: A Legacy of Unequal Protection' (1998) 21 Hastings Communications and Entertainment Law Journal 339; Kevin Jerome Greene, 'Copynorms, Black Cultural Production, and the Debate over African-American Reparations' (2008) 25 Cardozo Arts & Entertainment Law Journal 1179.
[507] Ibid.
[508] Ibid.
[509] Ibid.
[510] Kevin Jerome Greene, 'Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship' (2008) 58 Syracuse Law Review 431.
[511] Ibid, 433-440.

elaborates on the consolidation of racial stereotypes, slurs, and epithets via the registration and use of racial imagery as trademarks.[512]

In fact, it should also be marked that Greene is the leading IP scholar who applied the intersectionality tenet of CRT to the American copyright and trademark laws. He has a journal article that extensively studies the legal status of Black female intellectual creators and performers in the American historical and legal contexts.[513] Explaining the challenges faced by Black female creators both in the pre- and post-Civil Rights Movement eras, Greene asserts that the former era witnessed the deprivation of Black female creators of being recognized as copyright owners, while the latter era witnessed the (mis)appropriation of Black female creatorship as well as the disparate treatment of Black female creators, especially in royalty payments.[514]

Along the same line, Toni Lester centers their scholarship around themes such as the Black cultural production and its underappreciated contribution to the American music scene, the appropriation of Black forms of intellectual creations and the complicity of the American copyright laws in such misconducts, the inhospitality of the American copyright law to accommodate and to protect Black cultural productions, and the intersectionality of race and gender in the IP realm. For example, in one of their works, Lester focuses on the *Robin Thicke v. Bridgeport Music and the Estate of Marvin Gaye*[515] case (also known as the 'Blurred Lines' case); they argue that the American copyright laws stand on the White perceptions and methods of creatorship – which extends the scope of protectable derivate works, while leaving original constituents of Black musical craftmanship in the public domain.[516] Thus, Lester asserts that American Courts' lack of

[512] Ibid, 433.
[513] Greene, 'Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues' (n 33).
[514] Ibid, 365-366, 381-389.
[515] Case *Pharrell Williams, Robin Thicke, Clifford Harris, et al. v. Bridgeport Music, Inc. & the Estate of Marvin Gaye* (District Court, 12 February 2021).
[516] Ibid, 225-231.

understanding of Black music *blurs the lines* between derivative works and cultural appropriation; this not only dishonors Black musicians, but also leaves them without any legal ground to claim recognition and compensation.[517]

In another work, Lester points out to the silence of the legal academia on the 'successes' of Black female cultural producers.[518] Thus, Lester looks at the intersection of race, gender, economic wealth and power (dis)embodied in the presence of famous figures; they argue that Black female cultural producers who can afford the legal assistance of famous White male attorneys are deemed to have favorable outcomes in the IP disputes – even though it is not their voice that is being heard in the courtrooms, but of their White male attorneys.[519]

The examples provided above are only a limited representation of the growing body of the postmodern IP scholarship. While each one of these scholarly works focus on a particular historically marginalized segment of the society and provide a critical analysis of the face-neutral IP laws from a particular vantage point, these works are all specific to the American society and the historical, legal, political, and social reality in the United States. In this regard, it can be argued that the conclusions reached by postmodern American IP scholarship resonate in other national contexts, due to the influence of the United States on the global IP marketplace and the international IP law. From another perspective, it can be claimed that the contemporary IP law constitutes a highly harmonized field of law. Thus, the racial connotations and the race-related impacts of IP law extend beyond those of the American reality and causes the occurrence of supra-power dynamics on a global scale – such as the Global North and Global South division, or the coalitions among indigenous peoples of the World against the block of developed countries.

[517] Ibid, 233, 239-240.
[518] Lester, 'Oprah, Beyoncé, and the Girls Who "Run the World" - Are Black Female Cultural Producers Gaining Ground in Intellectual Property Law' (n 33) 547.
[519] Ibid.

Therefore, it can be argued that the re/de-construction of the contemporary IP law necessitates a holistic approach, rather than a country-specific one, to address the racial investments of the internationalization and globalization of IP law. Similarly, any attempt to identify the hideous valorization schemes and the patterns of inclusion/exclusion specific to IP law would require positing the contemporary IP law in a historical context, including but not limited to the American racial history.

That said, Anjali Vats and Deidré A. Keller refer to the global colonial history and its 'Western and non-Western' binary paradigm in terms of justifying the existence of an IP-specific CRT project.[520] Clarifying that Critical Race IP relies on the notion of race being a social construct,[521] they declare that Critical Race IP 'invoke[s] race to describe the many ways intellectual property discourses play central role in the protection of [W]hiteness [and the maintenance of the existing racial status quo].'[522] Indicating that 'not all questions of racial justice have been previously invoked in CRT,'[523] Vats and Keller note that the Critical Race IP Movement embraces an open-ended and broad frame for race, which encompasses a broad array of racial formations, including those of White and non-White, Western and non-Western as well as indigeneity.[524]

Based on these, Vats and Keller provide a thematical overview of Critical Race IP Theory, which are as follows: (1) Retelling the stories of IP through the prism of personal experiences of cultural producers with racism; (2) concentrating on the conceptualization of *TK* and *indigenous peoples* at the intersection of IP and human rights (hereafter 'HRs') discourses; (3) revisiting and redefining *public domain*; (4) reconsidering the IP infringement in a greater historical context and

[520] See e.g., Anjali Vats and Deidré A Keller, 'Critical Race IP' (2018) 36 Cardozo Arts & Entertainment Law Journal 735.
[521] Ibid, 760.
[522] Ibid, 761.
[523] Ibid, 762.
[524] Ibid, 761.

through the eyes of the subordinated; and finally, (5) reconstructing a racially equal IP framework.[525]

At the time being, the Critical Race IP Movement is expected to have the third Race + IP Conference. These annual conferences are momentous events for the Movement, especially for justifying a CRT project exclusive to IP law and to meet one of the Movement's major commitments: Building an intimate community, that is devoted to anti-racist activism, by uniting like-minded scholars under the roof of Critical Race IP.[526] According to Vats and Keller, the Critical Race IP Movement contemplates creating a safe space where community members can freely engage in a conversation that is centered around identity politics and IP law – also, by introducing their own subjective narratives and personal experiences.[527] Additionally, the Critical Race IP Movement intends to encourage and to mentor younger generations of scholars who wish to explore the racialized terrain of IP law through a race-oriented theoretical framework.[528]

The groundwork for building a community and a well-established theory requires a considerable amount of time. Thus, it can be argued that despite its limited contributions to the IP law discourse, Critical Race IP Theory is a promising endeavor whose actual impact on the legal scholarship and the social reality are to be understood in the future. On that note, it should be indicated that one of the greatest achievements of the Critical Race IP Movement would be the compilation of a reader, which would consist of the cornerstone scholarly pieces about the relationship between race, economic and political power, and IP law. In fact, there exist a vast amount of literature on topics such as: the propertization of ideas and its capitalistic underpinnings, empirical confrontation of the justification of IP law, the Western-centrism of IP law, the

[525] Ibid, 767.
[526] Ibid, 777-778.
[527] Ibid, 784-787.
[528] Ibid, 778.

incompatibility of the Western-centric IP laws with the needs and expectations of non-Western communities, the Global North-Global South divide, the maximization and globalization of IP law, the appropriation of unconventional forms of intellectual creations and inventions via conventional forms of IP rights, and the ongoing struggle of indigenous peoples to gain IP rights over their TK.

Almost all these scholarly debates pre-date the Critical Race IP Movement; however, they are directly or indirectly underscored by race-based perceptions and racial hierarchies that rule the IP realm. Besides, these themes have been explored and explained for a long time, by legal scholars, including but not limited to Daniel J. Gervais, Graham Dutfield, James Boyle, Kal Raustiala, Keith Aoki, Laurence R. Helfer, Madhavi Sunder, Olufunmilayo B. Arewa, Peter Drahos, Peter K. Yu, Ruth L. Okediji, Susan K. Sell, and Uma Suthersanen. Therefore, a database consisting of the alternative and critical readings of IP law would be an invaluable asset for the postmodern IP scholarship – whether or not the compiled works are authored by scholars who label their scholarship with postmodernism, colonial or post-colonial studies, cultural studies, CLS, CRT, Feminist Legal Theory, or Queer Theory. Although Vats and Keller have enshrined (and shrunk) the idea of creating a reading list into a footnote in their paper,[529] a systematical and thematical presentation of the 'Key Writings that Formed the [Critical Race IP] Movement'[530] would be quite useful.

As a conclusive remark, it shall be indicated that this dissertation intends to contribute to the Critical Race IP Movement, mainly in three ways: First, the dissertation is guided by the following question: When and how did IP law transform into a Western (European) project that serves the materialistic interests and political agenda of the Global North? Therefore, it adopts a CRT

[529] Anjali Vats and Deidré A Keller, 'Critical Race IP' (Social Science Research Network 2017) SSRN Scholarly Paper ID 3050898 738, *supra* note13. <https://papers.ssrn.com/abstract=3050898> accessed 3 December 2018.
[530] By analogy with Crenshaw and others, *Critical Race Theory: The Key Writings That Formed the Movement* (n 62).

approach to assess the genesis, evolution, and gradual globalization of IP law from a race-based viewpoint. For its purposes, it indeed investigates the influence of Western (European) modern thought, hence, colonialism on the parallel construction of race and IP. Second, the dissertation conjoins the racial critique of American IP law with that of a Western (European) one. By this way, it extends the pre-dominantly American scope and scholarship of the initial Critical Race IP Movement to the Western (European) historical reality, race relations, and IP domain. Last, the dissertation puts the works of American CRT and IP scholars in a dialogue with those of Australian, British, and Continental European CRT and IP scholars. Thus, it brings together a preliminary list of 'key writings' that can inform the Critical Race IP Movement and be implemented into the prospective Critical Race IP reader.

1.6. Conclusion

This chapter was allocated to the introduction of the postmodern approach, namely CRT, which the dissertation employs to examine its subject-matter, namely IP law, in the following chapters. Accordingly, the chapter rested the theoretical foundations of the dissertation, by providing a comprehensive account of CRT and its race-oriented doctrine. It reviewed the existing CRT literature and outlined the genealogy, main tenets, hallmark intellectual themes, core arguments, and aspirations of CRT – also by giving references to the key CRT writings from where these features derived.

In brief, CRT refers to a postmodern legal theory originated from the historical, legal, political, and legal peculiarities of the United States. CRT's ideological and activist origins can be traced back to the diversity movements, specifically to the uprisings and boycotts outbroke at the American legal academia in the 1960s. CRT have emerged as a radical political reaction to the

backlash of the limited gains of the Civil Rights Movements of the 1960s, and it was embodied in a theory in the late 1980s.

CRT focuses on the status quo of people of color in the United States. It aims to unveil the cultural and materialistic underpinnings of the culturally and institutionally ingrained racism inherent in the American legal order. As asserted by its prominent scholars, CRT does not aim merely to address the historical and perpetual injustices of the American laws and legal institutions, but it also aims to eradicate racial connotations and all forms of oppression from the American legal system. Along the same line, it aspires to transform the laws and legal institutions, in order to attain a true racial equality in the United States.

Even though CRT had emerged from the American civil rights discourse and constitutional law tradition, its insights and resolutions have reached a variety of legal disciplines, even across the borders of the United States. CRT was implemented in the curriculum of many law schools[531] and has been the subject of many conferences, both in the United States and abroad. In fact, a group of European legal scholars have been applying and adapting the CRT doctrine to the historical, legal, political, and social realities of the Continental European countries. Furthermore, the theoretical and territorial expansion of CRT paved the way to the Critical Race IP Movement as well.

Evident from the review of selected literature focalizing the critical, feminist, and racial critiques of the American law, there is no rational or valid reason to think that IP law is immune to the impositions of hegemony, patriarch, and the dominant racial class. On the contrary to the universality, objectivity, and value-neutrality claims of IP law, the existing IP realm stands on a heavily racialized terrain. As eloquently articulated by Cheryl I. Harris, race and law have a

[531] Delgado and Stefancic, 'Introduction' (n 68) xv; Cheryl I Harris, 'Critical Race Studies: An Introduction' (2002) 49 UCLA Law Review 1215, 1216.

'mutually constitute relationship'[532] which continues to operate 'not only in domains where race is explicitly articulated, but also where race is unspoken or unacknowledged.'[533] Indeed, the contemporary discourse on the globalization of IP law and the ever-lasting harmonization of national IP laws via international treaties veil the colonial roots and the racial connotations underpinning even the key IP concepts, norms, and principles.

Being committed to the Critical Race IP Movement's intention to deracialize IP law, this dissertation adopts CRT as a postmodern and race-oriented approach to construe IP law – however, also by focusing on the contemporary international IP law, rather than focusing on merely national IP laws of certain countries. Therefore, the remainder of the dissertation is dedicated to the assessment of the global(ized) IP rules and principles through the prism of CRT. In line with the postmodern legal doctrine, this dissertation provides a critique of the universality and objectivity claims as well as the allegedly value- and aesthetics-free legal construct of IP law from a race-based vantage point. By applying the race-conscious lens of CRT to IP law, this dissertation hypothesizes and aims to prove that law is not an objective field of science – and that IP law is not an exception.

Therefore, the remainder of this dissertation investigates the interplay of race, power, and IP law, with the aims of illuminating the racialized power dynamics and unfolding the racially charged layers overhauling contemporary IP law, by positing the genesis and evolution of IP law in a greater historical, legal, and political context.

[532] Harris, 'Critical Race Studies: An Introduction' (n 531) 1217.
[533] Ibid.

Chapter II

'Whiteness as [Intellectual] Property'[534]: Construction and Legalization of Intellectual Property

2.1. Introduction

The previous chapter rested the theoretical foundations of the dissertation, by exploring CRT and its race-conscious doctrine. Additionally, the chapter recapped the scholarly efforts to expand CRT's insights and resolutions to jurisdictions and legal disciplines other than the United States and American constitutional law. In doing so, it pointed out to an IP-specific faction of CRT: The Critical Race IP Movement.[535] As already explained, the Critical Race IP Movement is organized by IP scholars who are dedicated to scrutinize the colonial roots and racially-charged baselines of IP law from a critical and postmodern perspective, with the aim of decolonizing IP law, hence, untangling IP from its racial foundations.[536]

In line with the aims of Critical Race IP, this chapter aspires to deconstruct IP law and to expose its racial constituents. In this frame, this chapter argues that both the idea of 'IP' and IP law were composed with racially-charged cultural assumptions, incentives, and motifs, which continue to manifest themselves as interest and power clashes in the global IP policy- and norm-making fora. The chapter identifies the core of such battles in the IP domain as the Western-centrism of IP law and the gradual globalization of the Western-centric IP norms, principles, and standards. To prove these arguments, the chapter employs an 'unconventional' understanding of race, and it investigates the racial investments of IP law in the Western (European) or White

[534] By analogy with: Harris, 'Whiteness as Property' (n 12).
[535] Please see sub-chapter 2.5 in Chapter II.
[536] Ibid.

identity. Accordingly, the chapter explores the ways in which racial elements and racialized structures of dominance were interwoven into the fabric of IP law. Driven by this goal, the chapter provides an overview of the genealogy as well the strategic and manipulative use of IP law, respectively, by the British ruling-elite, the Western (European) imperial powers, the developed countries bloc, and finally, the Global North. In doing so, the chapter sheds light upon the ideological, political, and economic agendas as well as the materialistic interests of these historically dominant powers, in order to illuminate the interplay of (non-/)Whiteness, power, and IP law within a historical continuum.

For its purposes, the chapter adopts the race-conscious lens of CRT and applies it to the supposedly race-neutral construct of IP law. It particularly utilizes a key writing of CRT scholarship, namely 'Whiteness as Property'[537] penned by Cheryl I. Harris. In respect to and by analogy with Harris' journal article, the chapter seeks an answer to the following questions: When and how did the IP law transform into a Western-centric legal project that privileges, essentializes, and justifies the ideological, political, economic agendas and materialistic interests of the Western (European) or White actors – often at the expense of those of the non-Western? To respond this question, the chapter embraces Harris' approach to the social and legal construction of 'proprietorship', which also encompasses social status and Whiteness. Thus, adopting a deconstructionist approach to the history of IP law, the chapter maps the interplay of race, power, privilege, and IP law.

Given the complexity of this task, the chapter sets temporal, contextual, and geographical limits. As to the temporal constraints, the chapter covers the time frame between the fifteenth- and twentieth-centuries. Regarding the context, the scope of the chapter is limited to copyright and

[537] Harris, 'Whiteness as Property' (n 12).

trademark laws – yet, copyright is given more weight, due to the differential historical origins and evolution of these two IPRs. Finally, in respect to the geographical limitations, the chapter focalizes the historically dominant political actors of the international legal fora. Whereas this is feasible while studying the latter stages of the IP history (such as the internationalization and globalization of IP law), the earlier stages of the IP history (such as the genesis and the colonial transplantation of IP law) require a more specific focal point. Hence, when exploring the power dynamics inherent in the early beginnings of IP law, the chapter takes the United Kingdom and the British colonial possessions as its reference point.[538]

Therefore, the chapter starts with the contextual definition of 'Whiteness as Property', as articulated by Harris. It summarizes Harris' reading of the American laws and legal order, whilst explaining the intricate relationship of race with proprietorship and the law. Subsequently, the chapter links Harris' line of argumentation with the Critical Race IP discourse, and it illuminates the inherently White structures of dominance built in IP law.

To substantiate the investments of IP law in (non-/White) race and racialization, the chapter identifies a number of mileposts, such as: the invention of the printing press, the rise of the Western (European) imperial powers and the colonial expansion of IP law according to imperial agenda, the World Fairs and the drafting of the two major IP treaties, and the incorporation of IP law in the global trade talks. Accordingly, the chapter narrates the entanglement of race, power, and IP law by breaking this topic down to four parts: The first part covers the pre- and post-printing press periods. This part investigates the proliferation of IPRs literally as *copy-right* privileges, which were granted by the Monarch to the printers and publishers in order to reinforce censorship, to

[538] For a detailed account on the selection of the United Kingdom for the purposes of this chapter, also for the overall objectives of the dissertation, please see the section entitled 'The Choice of Jurisdictions and Its Justification' in the 'Introduction' of the dissertation.

hinder the dissemination of dissenting ideas, and to suppress opposing voices – thus, to reinforce the ruling-elite's authority. The second part centers the modernization of copyright and focuses on the period that followed the adoption of the Statute of Anne of 1710. It reveals the interplay of copyright with colonialism and explores the implementation of imperial copyright law into colonial territories to protect imperial interests. The third part studies the same time frame, yet in a broader geographical context. It questions and outlines how international (IP) law interacted with colonial strategies and facilitated the consolidation of Western-centric IP frameworks in non-Western territories. In this respect, this part especially focuses on the internationalization of IP law via bilateral and multilateral treaties. It also explains the establishment of WIPO and the international IP regime. The last part analyzes the globalization of the international IP regime. Furthermore, it explains the shift in the power dynamics overhauling the international IP diplomacy, especially with the establishment of the World Trade Organization (hereafter 'the WTO').

The chapter concludes that IP, both as a concept and a legal regime, is essentially a Western (European) – or, in Harris' words, White – project. It was created by the historically dominant Western (European) or White powers as a response to their racially-charged materialistic and socio-political interests. As a consequence, IP law has not only become a tool that prioritizes Western (European) modes of intellectual creativity and creatorship, but also it also carries along racialized cultural valorization schemes and hierarchies that have been built in its structure – which marginalize non-Western forms of creativity and exclude creations as such from the scope of legal recognition and protection. Despite the Western-centric ideologies, assumptions, and aesthetics embedded therein, IP law was imposed onto the non-Western world, primarily by means of colonialism. Entrenched by the racialized powers asymmetries that were in play in the global (IP)

diplomacy, the Western-centric international regimes of IP law were presented and consolidated as the new global order.

2.2. 'Whiteness as Property'[539]: A Critical and Race-Conscious Interpretation of the Interplay of Race, Power, Privilege, and Law

The previous chapter was devoted to CRT. It covered not only the genesis and evolution of CRT as a political movement, but also the main tenets and hallmark themes of CRT scholarship. Among these tenets was material determinism.[540] Material determinism helps in explaining racism on grounds of economic motives and incentives, which ultimately serve to maintain the existing status quo of the politically-dominant groups within the society.[541] In this respect, Derrick Bell, Jr. argues in his book, *Faces at the Bottom of the Well: The Permanence of Racism in America*, that law, in the American social and political terrain, comprises an indicator for the distribution of rights and privileges to certain groups at the expense of the others – who has happened to be people of color throughout the American history.[542]

Bell's reading of the American legal culture and order has been further investigated by Cheryl I. Harris in her renowned journal article, entitled 'Whiteness as Property'[543]. Harris' work in question constitutes the centerpiece of CRT's 'Whiteness' studies.[544] It aspires to present 'the historical and continuing pattern of [White] racial domination and economic exploitation'[545] in the United States.[546] Thus, by adopting a deconstructionist interpretation of the legal and social history,

[539] Harris, 'Whiteness as Property' (n 12).
[540] Please see section 1.3.2. in Chapter I.
[541] Ibid.
[542] Bell (n 298) 6–9.
[543] Harris, 'Whiteness as Property' (n 12).
[544] For a brief description of 'Critical Whiteness Studies' and its aims and objectives, please see *supra* notes 12-14 in the 'Introduction' of the dissertation.
[545] Harris, 'Whiteness as Property' (n 12) 1713.
[546] Ibid.

Harris examines the predicaments of race and law in general, and property law in particular.[547] In doing so, she emphasizes the manipulative use of law by the ruling-elite, or the ones in *power*, in order to entitle the members of their own racial group with legally protected and exclusive rights, while subordinating people of color.[548]

Although Harris focuses on the validation of 'Whiteness' as an immaterial value and explains how it was gradually infused in the scope of (the right to) 'property', her line of argumentation therein applies to the racially-motived power clashes and cultural valorization schemes inherent in IP law. In fact, and as already mentioned in the previous chapter, Anjali Vats and Deidré A. Keller have employed Harris' approach to the engagement of race and property in their paper, entitled 'Critical Race IP'.[549] Vats and Keller even analogized Harris' phraseology and coined the term 'Whiteness as IP'[550] to refer to the racialized baselines of the domestic and international legal frameworks of IP.[551] Though it may seem to be merely literary, Harris' contribution to the Critical Race IP discourse is exquisite: In light of Harris' theory, Vats and Keller reach the conclusion that '[W]hite racial identity confers not only a bundle of property rights but also *intellectual property rights*.'[552] This dissertation, and particularly this chapter, unfolds and substantiates this argument, with the guidance of Harris' scholarly piece.

Considering that this chapter wishes not only to speak for 'Whiteness as Property'[553] as a phrase, but also to premise its arguments on this concept, a brief explanation of Harris' scholarly piece becomes crucial. Thus, this sub-chapter offers a brief summary of Harris' articulation of the rationale behind the propertization of Whiteness and its consequences in the legal forum. Then, it

[547] Ibid.
[548] Ibid.
[549] Vats and Keller, 'Critical Race IP' (n 11) 758–759.
[550] Ibid, 758.
[551] Ibid.
[552] Ibid.
[553] Harris, 'Whiteness as Property' (n 12).

offers a snapshot of the translation of Harris' conception to the particularities of IP law, by reference to Vats' and Keller's vision of 'Whiteness as IP.'[554]

In her renowned scholarly work, Harris mainly draws her argumentation upon the social constructionism doctrine of CRT scholarship. She promotes conceptualization of 'property' as a social and legal construct which has traditionally covered material objects, yet extended to immaterial entities of economic value over time.[555] Unfolding this economic value, Harris refers to James Madison, who framed property as 'everything to which a man attaches a value and have a right.'[556] In line with this definition, Harris claims that 'Whiteness' has been a valuable asset for its holders: Whereas 'Whiteness' initially referred to a *color*, its association with *skin color* and race had gradually transformed it into a *status*, which determined the *social and legal status* of its holders – and the non-White 'others'.[557] Hence, Whiteness gained a 'property' dimension; it has grown civil and material interests within itself for the ones who 'own' Whiteness.[558] Regarding this, Harris explains that:

> '[B]eing [W]hite [in the United States] automatically ensured higher economic returns in short term, as well as greater economic, political, and social security in the long run[.] (…) [It] meant gaining access to a whole set of public and private privileges that materially and permanently guaranteed basic subsistence needs and, therefore, survival.'[559]

Although traditional theories on property describe the concept over its subject-matter, modern theories prioritize the function of property and the social relations reflected therein.[560] Thus, rooting her arguments in the modern readings of property as such, Harris quotes Jeremy Bentham, who claimed that '[p]roperty is nothing but the basis of expectation [which have been] recognized

[554] Vats and Keller, 'Critical Race IP' (n 11) 758.
[555] Harris, 'Whiteness as Property' (n 12) 1713.
[556] Gaillard Hunt (ed), *The Writings of James Madison* (1906) 101; Harris, 'Whiteness as Property' (n 12) 1726.
[557] Harris, 'Whiteness as Property' (n 12) 1726.
[558] Ibid.
[559] Ibid.
[560] Harris, 'Whiteness as Property' (n 12) 1728.

and protected [by law] as actual property.'[561] Based on this, Harris claims that in a society where White superiority and racial subordination are not aberrational practices, the recognition of settled expectations of Whites by law only codifies and reinforces interests in Whiteness.[562]

Perhaps the most striking aspect of Harris' analogy of Whiteness with property manifests itself in a basic tenet of the right to property: The absolute right to exclude.[563] Relying on the exclusivity of the right to property, Harris claims that each person who holds Whiteness is granted with the same set of privileges and benefits attributed to it.[564] This creates a closed-group of White people who are considered equal amongst themselves and before the laws.[565] Thus, 'Whiteness' establishes 'an exclusive club whose membership was closely and grudgingly guarded.'[566] Nevertheless, anyone who cannot be read as 'White' is not only excluded from legal protection, but also denied the right to Whiteness as property – which leads Harris to conclude that 'the real power and wealth never have been accessible to more than a narrowly defined ruling-elite (…).'[567]

To reach these conclusions, Harris brings up two case studies extracted from the racialized terrain of the American legal system: The enslavement of Black people, and the conquest of Native people's lands. These incidents help illuminate the paradigmatic construction of White and non-White races, on the one hand, and showcase the role that law played in the justification of even inhumane practices as such, on the other hand. By this way, Harris offers a prism for confronting law's modernist claims of universality, objectivity, and neutrality.

[561] Jeremy Bentham, *Theory of Legislation* (Richard Hildreth tr, 1931) 111–113; Harris, 'Whiteness as Property' (n 12) 1725.
[562] Harris, 'Whiteness as Property' (n 12) 1731.
[563] Ibid, 1714, 1736-1737.
[564] Ibid.
[565] Ibid.
[566] Ibid, 1736.
[567] Ibid, 1758.

In the context of enslavement, Harris illustrates the social status of White and Black people in a stark contrast: *Subjects* and *objects* of the right to property.[568] Mapping the institutionalization of enslavement in American jurisprudence, Harris crystallizes the fact that skin color had been *the* indicator, to which Bell often refers, that was employed to allocate legal rights and liberties among the lines of different racial groups within the same society.[569] Though Whiteness or Blackness, either as colors or physical traits, do not necessarily evoke such an unjust distribution; the common racial imagery and meanings negotiated amongst the members of the dominant group socially construct race within an oppositional binary.[570] These inventive categories of the societal knowledge and its assortments of materialistic interests had been not only justified by the American law, but also codified and 'effectively' enforced by the American judiciary.[571]

Harris finds a similar pattern of appropriation, exploitation, hence, racialization of Native-Americans. Whereas it was the physical labor of Black people that Whites had grown a materialistic interest in, the White-Native relations reveal that the former had an interest in the proprietorship of Natives of their ancestral lands.[572] Also analyzed in depth by a Native-American scholar, Robert A. Williams, Jr.,[573] not only the doctrines of discovery and trusteeship, but also the American case law[574] ratified and legalized the conquest of Native lands.[575] Based on these, Harris

[568] Ibid, 1716.
[569] Ibid.
[570] Ibid.
[571] Ibid, 1718.
[572] Ibid, 1723-1727.
[573] Robert A Williams, Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (University of Minnesota Press 2005).
[574] See e.g., Robert A Williams, Jr, 'The Rise of the Plenary Power Doctrine', *Like a Loaded Weapon: The Rehnquist Court, Indian Rigths and the Legal History of Racism in America* (University of Minnesota Press 2005); Robert A Williams, Jr, 'Indian Rights and the Marshall Court', *Like a Loaded Weapon: The Rehnquist Court, Indian Rights and the Legal History of Racism in America* (University of Minnesota Press 2005).
[575] Harris, 'Whiteness as Property' (n 12) 1723–1727.

asserts that the notion of 'possession' which underpins the right to property has been deemed only to belong to White people – just like Whiteness itself.[576]

Harris' scholarly piece is of great importance to this dissertation. Just like the property interests in Whiteness within a constitutional law context, the property interests in IP law have also been formed according to the White structures of dominance. Even though these structures become visible in the confrontation of Western-centric IP law by folklore and TK, it is essential to keep in mind that the roots of this conundrum predate the contemporary IP diplomacy and dates back to the origins of White interests in property per se.

Complementary to Harris' arguments, Anjali Vats, in her recent publication, entitled *The Color of Creatorship: Intellectual Property, Race, and the Making of Americans*, claims that just like to the property regime, the IP regime is also built upon a dichotomous thinking of the American society.[577] Whereas the property regime is governed by the 'White and non-White' binary paradigm, the IP regime revolves around a 'creatorship and infringement' binary.[578] According to Vats, the latter paradigm feeds into the presumptuous values ingrained in Whiteness and Western identity, mainly because people of color have long been denied legal rights over their intellectual creations.[579] This has not only caused the disregard of Black contributions to the common imagery and culture, but it also linked concepts and aptitude of creativity and inventorship merely to White people.[580] Thus, Vats asserts that '[t]he codified racial discrimination that made [IP] Law the purview of [W]hites in the 1800s'[581] persists to stand on a racial episteme which denies credits to

[576] Ibid.
[577] Vats (n 33) 1–2.
[578] Ibid.
[579] Ibid, 3-4, 8.
[580] Ibid.
[581] Ibid, 3.

people of color as *full* creators and devalues their intellectual creations – while it prevails to valorize and protect Whites' interests in IP.[582]

Although both Harris and Vats elaborate primarily on the American socio-historical reality and jurisprudence, their analyses concerning the construction of 'Whiteness' and 'property' are well-aligned with the racial investments entangled with 'IP', especially given the colonial history of the Western (European) powers who have rested the foundations of the idea of IP as well as the international IP frameworks. As argued by Vats and Keller, '[W]hites have historically constructed information regimes in ways which devalue the knowledge and practices on non-[W]hites.'[583] Nevertheless, a culturally-specific and value-laden IP regime as such was gradually globalized and imposed upon the non-Western hemisphere, by means of colonialism, the Westphalian perceptions of the 'State', and the international (IP) diplomacy. As a consequence, IP law continues to 'operate (…) protect[ing] the power of [W]hiteness and the Global North.'[584]

Thus, the remainder of this chapter critically investigates the subtly racialized terrain of IP law, by applying Harris' reading of Whiteness and its interplay with the law to the idea of 'IP' and IP law, with the aim of unravelling the layers of the Western-centrism – or innate Whiteness – of the presumably universal, objective, value-neutral IP law. Guided by Harris' theory, the chapter also maps the strategic and manipulative use of law for the legalization and protection of the Western (European) agendas and materialistic interests by means of IP law – which is an ongoing practice in the contemporary IP domain.

[582] Ibid.
[583] Vats and Keller, 'Critical Race IP' (n 11) 758–759.
[584] Ibid, 740-741.

2.3. 'Whiteness as [Intellectual] Property'[585]: A Critical and Race-Conscious Reading of Intellectual Property Law

A broad, yet widely accepted, definition of 'IP' would suggest that the term refers to a bundle of legal rights which result from the intellectual creativity of human mind, especially in the industrial, scientific, literary and artistic fields.[586] Drawing upon this definition, 'IP law' can be articulated as a specialized field of law setting the rules and principles which would enable producers of intellectual creations to have control over their intellectual creations for a limited period of time.[587]

Despite the existence of such color-blind and face-neutral definitions, both the conceptualization of IP and its underpinnings are recurrent themes of debates, which entail sharp criticism from different factions of the society. In fact, in one of his earlier works, William Robert Cornish claims that 'intellectual property is not a term with a standard meaning.'[588] Cornish unfolds his argument by explaining that the definition and scope of the term is in a constant change.[589] This change occurs in parallel to the altering economic demands of the socio-politically and economically dominant groups, who seek entitlement of political and trade-related privileges for their national and international investments.[590]

Though Cornish does not refer to any racial aspects of this phenomenon, there seems to be a consensus in the literature that the changes in IP law are often lobbied and reinforced by Western (European) States, Western (European) market actors, and the media and technology

[585] By analogy with Harris, 'Whiteness as Property' (n 12).
[586] *WIPO Intellectual Property Handbook* (Second Edition, World Intellectual Property Organization (WIPO) 2004) 3 <https://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf>.
[587] *WIPO Intellectual Property Handbook* (n 582).
[588] William Robert Cornish, 'The International Relations of Intellectual Property' (1993) 52 The Cambridge Law Journal 46, 46.
[589] Ibid, 63.
[590] Ibid.

conglomerates – especially those from the United States.[591] Hence, recalling Harris' articulation of 'Whiteness as Property', it can be argued that the globally accepted and ratified IP norms and principles have derived from, legalized, and codified the priorities and interests of these actors.

It should be indicated that neither law nor IP law operates in a vacuum; in fact, the general political and economic realities of the national and international forums influence and shape laws. In this context, the 'propertization' of intangible, non-exhaustive and non-rivalrous intellectual creations have played a pivotal role in establishing the power dynamics of IP law: Just like the transformation of 'Whiteness' from merely being a color to a status property according to the socio-political and economic agendas of the United States, the shift from industry-based economies to information-based economies imputed an economic aspect into information and knowledge.

Due to this, and similar to Harris' scholarly attempts to trace the propertization of Whiteness back to its origin, Alison Dean and Martin Kretschmer have a co-authored journal article in which they investigate the *capitalization* of ideas, information, and knowledge – or, what they cumulatively refer to as 'intellectual capital' – in the post-industrial era.[592] As a precursor to this, the authors explain that 'capital' initially referred to the loan borrowed to afford; however, upon its association with trade and commerce capital has become to stand for personal wealth, stock of goods, and a circulating sum – all of which contribute to the financing of commercial activities.[593] In line with this, the authors pay attention to the investigation of the holders of capital, and they

[591] See e.g., Peter Drahos, 'Developing Countries and International Intellectual Property Standard-Setting' (2002) 5 Journal of World Intellectual Property 765, 766; Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press 2003) 96; Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 199 *supra* note 202.
[592] Alison Dean and Martin Kretschmer, 'Can Ideas Be Capital? Factors of Production in the Postindustrial Economy: A Review and Critique' (2007) 32 Academy of Management Review 573.
[593] Ibid, 575- 577.

describe 'capitalists' as '[the occupants of] a significant degree of economic (and political) power.'[594]

In the same vein, Michael P. Ryan coins the term 'the knowledge-economy elites'[595], which corresponds to the 'capitalists' of the IP realm. Ryan's phraseology encompasses the influencers, lobbyists, policy- and law-makers in the IP domain.[596] Yet, Ryan refers to them as the *elites* since the group is comprised of 'the high socio-economic status people who tend to dominate economic, political, and social power in many societies'[597] and 'the economic, political, and social organizations that institutionalize ideas, interests, and power in society.'[598] Based on these, Ryan argues that the policy- and law-making processes at the national level includes a *'complex interdependence'*[599] of the institutionalized ideas of the elites who have stake in the possible outcome of such policies and law and who have real life experience regarding the market.[600]

In brief, the monopolization of the socio-economic and political power at the hands of a narrow group of *knowledge-economy elites* as well as the dominance of Western (European) intellectual capitalists in setting the international standards for IP protection have not only formed a legal regime fitting to the expectations of developed countries, but these factors have also insidiously created a cultural valorization system and cultural hierarchy among Western (European) and non-Western forms of intellectual modes of creatorship and creativity.

In fact, a critical and race-conscious glance at the proliferation of the idea of IP in the early fifteenth-century and its evolution over time reveal the fact that IP policy- and law-making

[594] Ibid, 579.
[595] Michael P Ryan, 'Knowledge-Economy Elites, International Law of Intellectual Property and Trade, and Economic Development' (2002) 10 Cardozo Journal of International and Comparative Law 271.
[596] Ibid.
[597] Ibid, 274.
[598] Ibid.
[599] Ibid, 277.
[600] Ibid, 274-279.

mechanisms have been a stage for clashes of inherently racialized interest and power struggles, rather than being a problem specific to information societies of the modern world. Therefore, the remainder of this chapter provides an historical account of the power dynamics that have existed since the genesis of IP law. For this purpose, the chapter studies four periods from the history of IP law: The pre- and post-printing press eras, the colonial era and the colonial transplantation of the imperial IP laws, the internationalization of IP law, and the globalization of the modern IP law.

2.3.1. Origins and Construction of 'Whiteness as [Intellectual] Property'[601]: Authority, Censorship, Privilege, and Economic Monopoly

Since its early beginnings, IP law, and particularly copyright law, had an intricate relationship with power. Benedict Atkinson and Brian Fitzgerald present this concurrence as the governance of information by 'a hierarchy of authority'[602] that prevailed until the enactment of the first copyright statute, namely the Statute of Anne of 1710.[603] Notwithstanding with these statements, it is asserted herein that the reciprocity of copyright and power was not limited to maintaining control over the exploitation of information. Neither this mutuality ceased with the codification of copyright as an *authorial* right by the aforementioned Statute. Per contra, it was institutionalized, along with the main structures of White dominance, in IP law, which echo, if not prevail to rule, the contemporary IP law domain.

Though the genesis and the maturation of the idea of 'IP' and 'copyright' pre-date the construction of race,[604] the ideology and the structures of (inherently White) dominance that had been interwoven into the fabric of IP law in general, and copyright in particular, catalyzed the

[601] By analogy with: Harris, 'Whiteness as Property' (n 12).
[602] Benedict Atkinson and Brian Fitzgerald, *A Short History of Copyright: The Genie of Information* (Springer 2014) 1–2.
[603] Ibid.
[604] Please see sub-chapter 3.2. in Chapter III.

construction of racialized modes of creatorship and creativity within a paradigmatic (White and non-White) binary in the latter stages of the Western (European) history.

Therefore, this section explains the origins of copyright, not only as a socio-political and legal construct, but also as a legal practice emerged from the Western (European) economic, historical, political, and legal context. Aspiring to unfold the relationship of copyright with the (reinforcement of) power, the section outlines the chronicle of events until the adoption of the Statute of Anne of 1710, by considering the milestones in copyright history. Aligned with this purpose, the section identifies and explains four interrelated aspects of the interface between IP and power: Physical authority, ideological authority, political authority, and economic authority. Whereas the narrative herein centralizes the Kingdom of England to substantiate its arguments and to explain the aforementioned power structures built in copyright law, other jurisdictions are also mentioned, when necessary.

The construction of copyright can be traced back to the early fifteenth-century, though such a construct hardly resembles the modern perceptions of copyright – but rather a *copy-right*.[605] Indeed, it is not possible to speak of an economic and transferrable authorial legal right in the early 1400s, mainly for two intertwined reasons: First, at the time there was no technology available to produce authorial works in large quantity. Second, in the absence of such technology, authorial works were being reproduced manually by copyists.[606] Thus, the art of making manuscript copies was a time-consuming and costly process.[607] Given the impossibility of mass reproduction and distribution, authors were often relying on wealthy patrons' sponsorship for a living.[608] Besides,

[605] Edward S Rogers, 'Some Historical Matter Concerning Literary Property' (1908) 7 Michigan Law Review 101, 104.
[606] Ibid, 101.
[607] Ibid.
[608] Ibid. For a detailed comparative analysis of the possible impact of copyright and sponsorship on the authorial creative process in musical field, please see: Michela Giorcelli and Petra Moser, 'Copyright and Creativity: Evidence

every copied manuscript had an immediate material return; hence, there were hardly stocks of copies and no economic imperative for securing future commercial transactions.[609]

This historical and literary backdrop of the early 1400s produced the first liaison of *copy-right* with power: Physical authority. In this respect, Alain Pottage and Brad Sherman explain that the Roman law's *specificato* principle was the main legal institution in medieval England which would help construe book-possessors' rights over authorial works.[610] The *dominium* of the possessor was acknowledged to prevail over the composite parts of a corporeal object, unless such parts could be recovered without damaging the object.[611] Therefore, the possession of the physical copy of a literary work embodied also the *perpetual* right to reproduce its content, without being subjected to any restrictions.[612]

Despite the limited number of archival materials on the origins of *copy-right* per se, there is an anecdote narrated by Edward S. Rogers that confirms this Roman law approach to the *original* manuscript and its (in a way) *derivatives*.[613] Rogers cites an historical episode between Finnian and Saint Columba which concerns the latter discovering a psalter in the former's possession and copying it.[614] Being informed about this incident, Finnian considers the Saint's act as theft; he

from Italian Operas in the Napoleonic Age' <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2505776> accessed 20 December 2020.

[609] John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (1st edn, Mansell Publishing 1994) 10.

[610] Alain Pottage and Brad Sherman, 'On the Prehistory of Intellectual Property' in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (1st edn, Cambridge University Press 2013) 13.

[611] Ibid.

[612] Rogers (n 601) 101–102; Pottage and Sherman (n 606) 13, 20–21.

[613] Admitting the absence of a direct link with the *verbatim copying* explored under this section with modern copyright law's *original work-derivative work* or *original work-fair dealing/use* paradigms, it can still be argued that the treatment of original authorial works as well as the narrative therein (regardless of the 'idea and expression' dichotomy) almost as tangible, exhaustive, and competitive 'property' resonates in legal disputes centered around the transformative use of such works by third parties. In fact, this argument comes up in Chapter IV in the analysis of American case law concerning an original literary work and its *unauthorized* transformative use with the aim of creating a parody of the former. For the relevant case and legal discussion, please see section 4.3.1.4. in Chapter IV.

[614] Rogers (n 601) 104.

claims that '[the copy] was as much his as the original'[615] and requests the *unauthorized* copy of the psalter.[616] The dispute ends up in a trial before King Dermott, who delivers the following judgement that solved the dispute: 'To every cow her calf, to every book its copy.'[617]

The physical authority aspect evident in this judgement, hence, the subjection of the trajectory of copies to the ownership of the physical copy of the original work lost their initial importance, due to one of the major achievements of the Century: The invention of the first moveable-type of printing press by Johannes W. Gutenberg in 1439.[618] With the arrival of the printing technology, not only *copy-right* transposed to a sophisticated entity, but also the dynamics within the publishing sector undergone transformation. Facilitating the reproduction and mass production of literary works,[619] the printing press decreased, on the one hand, authors' reliance on manual copyists, and the publication price, on the other.[620] Thus, it created a literary market, where books were more affordable, hence, accessible to a broader spectrum of readers.[621] In return, it also increased the potential economic gain of authors and printers, while introducing the risk of reproduction and distribution of unauthorized copies.[622] As highlighted by Ronan Deazley *et al*., along with these changes a new era began in the general *copy-right* history, which impacted each and every jurisdiction in the Western (European) hemisphere.[623]

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[615] Ibid.
[616] Ibid.
[617] Ibid.
[618] Encyclopedia Britannica, 'Berlin West Africa Conference' (*Britannica Academic*) <https://academic.eb.com/levels/collegiate/article/Berlin-West-Africa-Conference/78808> accessed 15 November 2021.
[619] Thomas F Cotter, 'Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism' (2003) 91 California Law Review 323, 325–326; Caterina Sganga, *Propertizing European Copyright: History, Challenges and Opportunities* (1st edn, Edward Elgar Publishing 2018) 53.
[620] Ibid.
[621]Atkinson and Fitzgerald (n 598) 15–23; Sganga (n 615) 53.
[622] Cotter (n 615) 36.
[623] Martin Kretschmer, Lionel Bently and Ronan Deazley, 'Introduction. The History of Copyright History: Notes from an Emerging Discipline' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010) 3–4.

Yet, the most sensational outcome of this process, at least for the purposes of this dissertation, was the reproduction and dissemination of the Bible, which startled the Protestant Reformation in 1517.[624] This incident presented a new aspect to the relationship between *copy-right* and power: Ideological authority.

Indeed, the advent of the printing press not only holds a milestone in the *global copy-right* history, but it also marks a turning-point (or, perhaps, a point-of-no-turn) in the relationship between the ruling-elite and the public at large, given the flow of the following events: The vernacular translations of the Bible, or the so-called Gutenberg Bible, was distributed to masses.[625] This incident illuminates the intricacies of *copy-right* and power in two ways: First, the printing press and the Gutenberg Bible broke the *monopoly* of the Roman Catholic Church on the production, interpretation, and dissemination of the Biblical *information*.[626] While enabling the publication and spread of the ideas dissenting from or confronting the practices of the Roman Catholic Church,[627] it empowered the society at large, by exploiting the information long kept in the hands of the ruling-elite.[628] Second, given the wide-dissemination of the Gutenberg Bible, the content of the materials to be published gained great importance for the ruling-elite.[629] Indeed, the printing technology made materials that are essential for the public to form an opinion quite accessible, whereas this comprised a 'threat' to the ruling-elite's status quo, political power, and religious authority.[630] Thus, they had the urge to introduce certain *copy-right* measures in order to control the dissemination of information as such.[631] This outcome is particularly intriguing, due to

[624]Atkinson and Fitzgerald (n 598) 15–16.
[625] Cotter (n 615) 324–325.
[626] Atkinson and Fitzgerald (n 598) 15–16.
[627] Ibid.
[628] Ibid.
[629] Rogers (n 601) 105–106.
[630] Peter Prescott, 'The Origins of Copyright: A Debunking View' (1989) 11 European Intellectual Property Review 453, 453.
[631] Ibid.

resulting in the use of *copy-right* as a mechanism to control (or, to prevent) the dissemination of information[632] (especially, of 'dangerous ideas' such as Royalism, Protestantism, or anything that does not comport with the doctrine of the Roman Catholic Church, and the like), to censor the content to be published, and to manipulate the society.[633]

The British Crown imported the printing technology in 1477 and established the official King's Print in 1518.[634] Given that the printing technology was introduced to the Kingdom of England by the King, the act of printing was considered a *royal prerogative* that is exclusive to the Crown.[635] Accordingly, and recalling King Dermott's judgment mentioned above, any printed material (which were mainly comprised of the translations of the Bible, psalters, prayer books, Church calendars, and laws) belonged to the King.[636] Yet, the arrival of the printing technology in England, especially in the aftermath of the Reformist movements, not only entrenched the physical and ideological aspects of *copy-right*'s relation to power, but it also introduced two other dimensions to this correspondence: Political and economic authority.

The political authority focalizes the Crown's endeavors to control the content of prospective publications before the printing and exploitation processes. In this context, the inaugural pre-publication censorship scheme was secured by the Crown by the Proclamation Prohibiting

[632] The role that the printing press played in the Reformation and the outcomes of the latter on the establishment of early copyright practices and law is pivotal to comprehend the postmodern critique of IP law, as explained in sub-chapter 1.5. in Chapter I. Specifically, John Tehranian's, Sonia Katyal's, and Toni Lester's scholarship pinpoint this stark contrast, while speaking of the American courts' treatment of Black and queer re-writings (or, in other words, parodies) of 'cult' American intellectual works. As discussed by Tehranian *et al.*, in certain legal disputes, the American courts act almost the same as how the Roman Catholic church acted in response to losing their dominance on and monopoly of holding and interpreting Biblical information. As will be discussed in Chapter IV, there are certain cases in which the American courts sacralized the original works and prioritized the ideas therein; hence, they upheld copyright of the author of the original work, with the aim of censoring the re-interpretation of such ideas from 'outsider' perspectives.
[633] Prescott (n 626) 453.
[634] Feather (n 605) 10.
[635] Rogers (n 601) 105.
[636] Ibid.

Unlicensed Printing of Scripture of 1538[637] (hereafter 'the Henrician Proclamation').[638] The Henrician Proclamation was issued to prevent the spread of the Protestant Reformation's impact in Britain.[639] It aspired to protect the Catholic theology and to prevent the dissemination of the Bible's English translation.[640] To achieve this end, it prohibited the printing and publication of the Divine scripture without prior view and examination of the King, the Privy Council, or an assigned bishop.[641] On that note, it shall be crystallized that the Henrician Proclamation constituted only a prelude to the pre-publication censorship schemes.[642] Indeed, this Proclamation was followed by many others varying in objectives and scopes.[643]

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[637] A Proclamation Prohibiting Unlicensed Printing of Scripture, London 1538.

[638] Ronan Deazley, 'Commentary on Henrician Proclamation 1538' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> accessed 26 December 2020.

[639] Ibid.

[640] Ibid.

[641] Lionel Bently and Martin Kretschmer (eds), 'Henrician Proclamation, London (1538)', *Primary Sources on Copyright (1450-1900)* <www.copyrighthistory.org> accessed 26 December 2020.

[642] Deazley, 'Commentary on Henrician Proclamation 1538' (n 634).

[643] The post-Stationers' Company period had witnessed a series of censorship regulations that stemmed from the convergence of the ruling-elite's interest in preventing 'blasphemy' with the publishers' interest in having a monopoly in the marketplace. John Feather explains that the legislations of the 1640s and 1650s were mostly concentrated on the control of the press, particularly because of its potential use for propaganda, rather than the regulation of the privileges or right embedded in the copies of the literary works. Feather (n 605) 39–40; Ronan Deazley, 'Commentary on the Stationers' Royal Charter 1557' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> accessed 22 December 2020.

For instance, an Ordinance for the Regulation of Printing was promulgated in 1643, in order to prevent 'abuses and frequent disorders' in the publishing business, such as 'false, forged, scandalous, seditious, libelous, unlicensed (...) [publications] to the defamation of [r]eligion and [the] Government.' With this ordinance, the powers of the Stationer's Company were extended; the Company (among many other State officials) were authorized to search any Presses and to seize any unlicensed printing presses and other editorial tools. Please see e.g., Lionel Bently and Martin Kretschmer (eds), 'An Ordinance for the Regulation of Printing, London (1643)', *Primary Sources on Copyright (1450-1900)* <www.copyrighthistory.org> accessed 22 December 2020.

Similarly, in 1647, an Ordinance against Unlicensed or Scandalous Pamphlets, and for the Better Regulation of Printing was issued. This ordinance was addressed to 'the better suppression and prevention' of such 'prejudicial' information and its dissemination to the public at large. It introduced punishments, varying from pecuniary penalties and seizure of unlicensed publications to whipping and confinement, to fight against such crimes. Lionel Bently and Martin Kretschmer (eds), 'An Act against Unlicensed and Scandalous Books and Pamphlets, London (1649)', *Primary Sources on Copyright (1450-1900)* 245–246, 251–252 <www.copyrighthistory.org> accessed 24 December 2020.

This ordinance was followed by two acts with the same title, in 1649 and 1653. The Act of 1649 concentrated on two major issues: First, it prohibited the publication and dissemination of the public authorities' proceedings, in order to prevent 'misrepresentations, (...) [and the spread of] false and seditious news, lies and rumors.'[643] Second, it prohibited the import of any published materials from abroad; it also prohibited the making, casting, forging, or importing printing presses from abroad. Lionel Bently and Martin Kretschmer (eds), 'An Act for Reviving [the 1649 Act], London (1653)', *Primary Sources on Copyright (1450-1900)* 696–697 <www.copyrighthistory.org> accessed 24 December 2020.

As to the economic authority, it centralizes the King's exclusive authority to bestow *royal grants* upon third parties. Indeed, the King could entitle certain people with the *privilege* to exercise the art of printing.[644] This practice is referred to as 'privilege' herein since neither the grant nor the renewal of such opportunity were bound to any statutory principle or objective criteria.[645] Per contra, these printings privileges were granted on an ad hoc basis and arbitrarily.[646] Whereas these ad hoc privileges were efficient at the beginning, the increasing dependency on the printing press not only resulted in the increase in the number of printing presses, but it also transformed printing into a highly competitive business.[647] This was followed by tradesmen's demand for securing their economic returns from printing by having a monopoly in the marketplace.[648] Such demands to suppress competition in the book trade paved the way to the

Finally, the Act for Preventing Abuses in Printing Seditious, Treasonable, and Unlicensed Books and Pamphlets, and for Regulating of Printing and Printing Presses of 1653 set out a comprehensive regulation on both the licensing of the press and the conduct of the book trade. The Act consolidated the custom that publishing any literary work is subject to pre-approval of the relevant authorities, which was given in the form of license to print; additionally, the Act criminalized unlicensed printing. Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press 1993) 30; Ronan Deazley, 'Commentary on the Licensing Act 1662' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> accessed 22 December 2020.

[644] These royal grants were referred to as 'license to print' or 'letters patent' for individual texts, and 'printing patent' for entire classes of works. Regardless of their difference in scope, both types of grants were arbitrary and *ad hoc* privileges. Rogers (n 601) 104–105; Ronan Deazley, 'Commentary on Early Tudor Printing Privileges' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> accessed 26 December 2020.

In respect to the terminology in use, Joanna Kostylo's explains that '(...) new attitudes towards creative production did not spring from the immaterial realm of ideas and books but from the very material world of craftsmanship and mechanical inventions.' Hence, the early privileges for printing and the grants for mechanical inventions were indistinguishable, at least in the fifteenth-century Venice. They were not subject to different regimes but granted on the same *ad hoc* basis. For instance, the first printing privilege ever known was granted to Johannes Speyer in 1469, which entitled Speyer to establish and operate a printing press, and to sell books in Venice. Joanna Kostylo, 'From Gunpowder to Print: The Common Origins of Copyright and Patent' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010) 22–23.

[645] Mark Rose, 'The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company, and the Statute of Anne' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010).

[646] Atkinson and Fitzgerald (n 598) 24.

[647] Ibid.

[648] Feather (n 605) 10–13.

incorporation of the so-called Stationers' Company[649] in 1557 by a royal decree, entitled the Royal Charter of the Company of Stationers[650] (hereafter 'the Charter').[651] The Charter not only provided a corporate legal status to the Stationers' Company, but it also entitled the Company and its members with exclusive control over the printing enterprise in England,[652] which Robert William Cornish articulates as the establishment of 'an entrepreneurial cartel.'[653]

The incorporation of the Stationers' Company was justified by the goals of regulating the printing enterprise, as well as attaining and maintaining the uniformity and order in the commerce.[654] Nevertheless, the Stationer's Company was more than a mechanism for precision in the commercial sphere. It was operating as a mechanism to police and enforce the publishers' compliance with the licensing laws, in exchange for a monopoly over the printing business.[655] This was aimed at enhancing the Crown's control over the dissemination of information to the public at large. The preamble of the Charter clarified that the information deemed to fit in certain categories were prohibited to be published, and these categories were articulated as follows:

> '(…) certain seditious and heretical books, rhymes and treatises are daily published and printed by divers scandalous, malicious, schismatical and heretical persons, not only moving our subjects and lieges to sedition and disobedience against (…) our crown and dignity, but also to renew and to move (…) heresies against the faith and sound doctrine of Holy Mother Church (…).'[656]

[649] The original name of the Stationers' Company was Master and Keepers or Wardens and Community of the Mystery or Art of Stationery in the City of London. Please see e.g., Lionel Bently and Martin Kretschmer (eds), 'Stationers' Charter, London (1557), Primary Sources on Copyright (1450-1900)' <www.copyrighthistory.org> accessed 22 December 2020.
[650] Royal Charter of the Company of Stationers, London 1557.
[651] Bently and Kretschmer, 'Stationers' Charter, London (1557), Primary Sources on Copyright (1450-1900)' (n 645) xxix.
[652] Deazley, 'Commentary on the Stationers' Royal Charter 1557' (n 639).
[653] William Cornish, 'The Statute of Anne 1709–10: Its Historical Setting' in Lionel Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar 2010) 17.
[654] Cotter (n 615) 327; Cornish, 'The Statute of Anne 1709–10: Its Historical Setting' (n 649) 17–18.
[655] Deazley, 'Commentary on the Stationers' Royal Charter 1557' (n 639).
[656] Bently and Kretschmer, 'Stationers' Charter, London (1557), Primary Sources on Copyright (1450-1900)' (n 645) xxviii.

Therefore, the Stationers' Company was entitled to search for any published or to be published material in any public or private premises within England (and its dominions), as well as to seize, hold, or even burn any such material, if they were deemed to be contrary to the laws or other regulations.[657]

Whereas the Charter, as a self-regulatory text of the Company, was centered around economic interests and concentrated on the regulation of the book trade, the Star Chamber Decree of 1566[658] equipped the Company with further authority – principally, due to the Crown's growing interest in controlling the press and the dissemination of information at its source.[659] Due to this, Deazley refers to the Decree of 1566 as the first explicit link between censorship and *copy-right*, hence, the first formal representation of the convergence of 'the proprietary interests of the stationers and the censorial impulses of the [M]onarch and the government.'[660] Furthermore, this Decree extended the scope of prohibited publications from religious texts to *any* book that was contrary to the laws, ordinances, and the letters patent.[661]

The Stationers' Company and its operation twisted the existing power structures, on many different levels and in a number of intertwined ways: First, the Decree restricted the operation of printing presses to the members of the Stationer's Company; thus, an exclusionary group of printers were formed.[662] Second, the Stationer's Company hindered the competition among publishers, or consolidated the existing privileges of the publishers, by introducing a book-keeping system.[663] The Company's registry became a record for the established *copy-rights* and

[657] ibid xxiii.
[658] Ordinances decreed for reformation of divers disorders in printing and uttering of Bookes, Westminster 1566.
[659] Ronan Deazley, 'Commentary on Star Chamber Decree 1566' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> accessed 26 December 2020.
[660] Ibid.
[661] Lionel Bently and Martin Kretschmer (eds), 'Star Chamber Decree, Westminster (1566)', *Primary Sources on Copyright (1450-1900)* <www.copyrighthistory.org> accessed 26 December 2020.
[662] Rogers (n 601) 106–107; Rose, *Authors and Owners: The Invention of Copyright* (n 639) 12.
[663] Feather (n 605) 162–167.

rightsowners.[664] Although this practice was born out as a custom in the printing business, it gained a compulsory character with the Star Chamber Decree of 1637,[665] which was later enshrined in a by-law of the guild.[666] Third, the Stationer's Company and its registry, once and for all, consolidated the physical aspect of the copyright and power relationship. While advancing the status quo of the business enterprises, the Company's operations deprived the authors, who do not possess a printing press, from their control over their intellectual creations, if they had left any.[667] Finally, the existence of the Company and its registry entrenched the Crown's absolute power of not only to controlling the copying process, but also controlling the *content* to be published.[668] Thus, the *copy-right* system has become, in Caterina Sganga's words, 'a cheap tool to control the press'[669] in the hands of the ruling-elite, until the early eighteenth-century.

That said, the State- and Church-imposed pre-publication censorship schemes ceased with the passing of the Statute of Anne of 1710.[670] The Statute is often celebrated in the IP circles due to replacing the printer- and publisher-oriented *copy-right* system with an author-oriented one.[671] Indeed, the Statute considered the *copy-right* practices detrimental to authors and their heirs, as well as disincentivizing for authors to pursue contributing to the cultural life.[672] Hence, it vested a *quasi*-right to property in authors over their new works, limited to a fourteen-year term and could

[664] ibid 18–19.
[665] A Decree of Starre-Chamber Concerning Printing, Westminster 1637.
[666] Ronan Deazley, 'Commentary on Star Chamber Decree 1637' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> accessed 27 December 2020.
[667] Rogers (n 601) 110–111.
[668] ibid 109.
[669] Sganga (n 615) 55.
[670] Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)* (n 50) 1.
[671] Lionel Bently and Martin Kretschmer (eds), 'Statute of Anne, London (1710)', *Primary Sources on Copyright (1450-1900)* <www.copyrighthistory.org> accessed 23 December 2020; Cornish, 'The Statute of Anne 1709–10: Its Historical Setting' (n 649) 19–20.
[672] Bently and Kretschmer, 'Statute of Anne, London (1710)' (n 667).

be renewed for another fourteen years, if the author was still alive.[673] Additionally, it recognized a single twenty-one-year term of legal protection for the publications already in print.[674]

Even though the Statute of Anne of 1710 is praised as the beginning of an author-centered (or, modern) copyright system, Peter Prescott points out to a less spoken reason for this shift: '*[E]xport[ation of]* copyright control to a region of Great Britain where the Stationers' Company's writ did not run.'[675] Prescott pinpoints the Kingdom of Scotland, as the Kingdoms of England and Scotland united in 1707 and formed Great Britain.[676] At the time being, there were no complex copyright systems in Scotland compared to that of England; still, there was a remarkable book trade ruled by Edinburgh and Glasgow publishers.[677] Given that the Scottish publishing enterprise was out of the reach of the London-based Stationer's Company, Prescott argues that following the Act of Union of 1707,[678] London publishers and booksellers may have feared parallel imports to Scotland.[679]

In fact, a broader historical analysis of the expansion of British copyright laws to territories across the borders of the Great Britain is explained in the following section. Prior to that and as a closing remark to this section, it is worth to briefly summarize that copyright emerged as a censorship mechanism from the Western (European) reality and constituted a tool paramount to reinforcing the interests of the ruling-elite, including those of the Monarch, the Roman Catholic Church, and the ones holding the capital. Based on this, it is concluded herein that *copy-right* was

673 Ibid.
674 Ibid.
675 Prescott (n 626) 455.
676 Act for a Union of the two Kingdoms of England and Scotland of 1707, 5 & 6 Anne, Ch. 8.
677 Prescott (n 626) 454–455.
678 Ibid.
679 Alastair J Mann, '"A Mongrel of Early Modern Copyright": Scotland in European Perspective' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010) 53.

not intended to comprise an aesthetics-free system. Per contra, it was an indicator for 'approved' content and 'worth-to-be' exploited information.

Even though the arbitrary or strategic use of the *copy-right* tool was transformed by the passing of the Statute of Anne of 1710; it is hard to say the same for the ideologically-, politically-, and economically-charged power structures ingrained in *copy-right* practices and copyright law. These aspects may have also transformed, though remained attached to the core of copyright law and carried along with the extension of British copyright laws to its colonial territories and beyond.

2.3.2. 'Externalization' of British Intellectual Property Law: Legal Transplantation of Imperial Copyright Laws into Colonial Territories

The previous section focused on the proliferation of the idea of 'IP' in medieval Britain – or, in other words, the idea of having a monopoly endorsed by law on authorial works. In doing so, it pinpointed the interplay of, mainly, *copy-right* with power. It outlined the inherently White structures of dominance and aesthetic values built therein. That period, hence, the intricacies of *copy-right* and power, were governed by the 'internal politics' of the time, and they shaped by the events that remained within the borders of Great Britain. Following up with that, this section focalizes the 'external politics' of the British Empire. It concentrates on the consolidation of copyright as a Western-centric socio-legal construct and its export to the 'external' realm at the peak of the colonial practices of the British Empire.

The reasons that underpin the investigation of imperial copyright policies and laws in an 'empire-colonies' paradigm are two-fold: First, the colonial history of copyright exposes the initial interaction of Western-centric copyright practices and laws with the non-Western world. Thus, it not only confirms 'Whiteness' of IP, but it also introduces the race factor into copyright's existing structures of dominance and aesthetics, which cumulatively rested the foundations of the 'Western

and non-Western' binary paradigm of (contemporary) IP law. Second, such an analysis illuminates the operation of law per se as a tool to ratify and legitimate the materialistic interests of the economically- and politically-dominant actors. Thus, this section continues to unravel the Western-centrism of IP law and to explain the racialization of its inherent power structures, by exploring the legal transplantation of British copyright laws into British possessions[680] through 'the colonial machinery.'[681]

That said, it shall be noted that there are opposing views in the literature about the interplay of British IP laws with colonialism: On the one side of this debate, there are scholars, such as Michael D. Birnhack and Ruth L. Okediji, who claim that the colonial transplantation of British IP laws was a pre-designed project and an accomplice of the colonial 'civilizing' missions.[682] Catherine Seville confirms these claims, by explaining that the British Empire had 'a strong sense of responsibility'[683] about fostering education in its colonies, however, according to the 'aristocratic tastes of the British [values and the publications available in the British book] market.'[684] On the other side, there are scholars like Lionel Bently who argue that there were no grand imperial plans to impose British IP laws onto the colonial territories.[685] While agreeing with the infliction of

[680] For the purposes of this section, the term 'British possessions' constitutes a generic term referring to the Crown colonies, self-governing dominions, and protectorates of the United Kingdom. The mandates and condominium territories are excluded from the scope of the term. Also, the term 'British possessions' is used interchangeably with the term 'colonial territories'.
[681] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 40.
[682] Ruth L Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (2003) 7 Singapore Journal of International & Comparative Law 315, 320–325; Michael D Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (1st edn, Oxford University Press 2012) 39–40.
[683] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 83.
[684] According to Seville, Britain's desire to 'educate' her colonial subjects with British morals and values had another aspect, which evokes the censorship laws of medieval England: 'to keep colonial subjects free from the undesirable moral and political influences of foreign works.' ibid.
[685] Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 161–162.

imperial laws upon the colonies, this cohort of scholars claim that the legal transplantation of British copyright laws into other jurisdictions was the outcome of an uncoordinated process.[686]

Despite their divergences, both camps agree on the ever-lasting impact of British IP laws on (former) colonies and their domestic IP frameworks. As to the purposes of this chapter, it is not the motive of colonizer(s) that is crucial, but the act itself: British IP laws directly applied to the Crown colonies, while they shaped the enactment of IP laws in the self-governing dominions.[687] Even if this application was not immediate in some (former) possessions, the domestic laws of such countries, even after they had gained their independence, were modelled, principally, on the Statute of Anne of 1710 and British case law.[688] Based on this, it is asserted herein that the initial ideologically-, politically-, and economically-charged dominance structures of the British *copy-right* tradition continued overhauling the legal terrain, both within and outside the United Kingdom. Only this time, it did not impose certain interpretations of theological information or protected the British ruling-elite's status quo and the materialistic interests of the Stationers' Company, as the Crown's accomplice. Rather they essentialized and imposed the Western (European) or British culture, the assumption of the 'superiority' of the Western (European) or

[686] Ibid.
[687] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 27–30.
[688] Bently, 'Introduction to Part I: The History of Copyright' (n 34) 7, 11–12.
It shall be indicated herein that both the United States and the Commonwealth of Australia fit in this description. Nevertheless, this chapter is not restricted with the analysis of the British Empire's diplomatic and legal relations with colonial America and Australia. Instead, this chapter provides a broader view of the British Empire's use of colonial machinery to impose its IP law in general, copyright in particular, upon its colonial territories at large. The explanation of the colonial roots of American and Australian IP law are analyzed in detail within sub-chapter 4.2. in Chapter IV.

British 'civilization', and the materially-driven interests of the British Empire – simply put, 'Whiteness as [intellectual] [p]roperty'[689] – onto the colonial and international legal domains.[690]

Therefore, this section studies the interplay of British IP law with colonization. It is argued herein that regardless of its underpinning motivations, the colonial IP system instilled the British ideals and aesthetic values in domestic IP laws of many (former) colonies. Thus, this section initiates with the gradual expansion of British copyright, and it will cover the period between the Statute of Anne of 1710 and the Imperial Copyright Act of 1911.[691]

In line with Seville's statement cited above, Michael D. Birnhack asserts that the Statute of Anne of 1710 was 'more than a matter of [book] trade regulation.'[692] It had a political agenda: The *encouragement* of learning, as emphasized in its original title.[693] Birnhack argues that while the Statute's (and copyright law's) explicit ideology was promoting cultural 'progress', its implicit ideology was building a hierarchy between British works, which were deemed 'worthy' for legal protection, and 'other' works composed in the British colonial territories.[694]

However, despite being enacted in the aftermath of the Act of Union of 1707, it was not clear from the text of the Statute of Anne of 1710 where it applied.[695] It is often acknowledged in the

[689] On that note, it shall be emphasized that the colonial legal transplantation of British IP laws has also paved the way to the travel of British cultural values and valorization schemes into the domestic legal domain of its colonial possessions. These normative values were implemented in colonial legal orders in disguise of potential beneficiaries of IP law, protectable subject-matter, and eligibility criteria for legal protection. Whereas this chapter in general, and this section in particular, concentrate on and explain the methods and process of such transplantations, the substantive norms that have been transplanted are outlined and explained in Chapter III.

[690] This statement constitutes a prelude to Chapter III, where the greater economic, cultural, historical, legal, political, and social context is considered for deconstructing and revealing the racial thought and racial information that have informed and underscored the content of imperial IP policies and laws. This section, and also this chapter, merely analyze the process, rather than substantive norms.

[691] Copyright Act of 1911, 1 & 2 Geo. 5, Ch. 46.

[692] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 42.

[693] Ibid.

[694] Ibid, 41-45.

[695] Ronan Deazley, 'Commentary on the Statute of Anne 1710' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> accessed 25 December 2020.

literature that it applied to Great Britain (England, Wales, and Scotland).[696] Yet, the British borders expanded for the second time in 1800 since Britain united, this time, with the Northern Ireland and established the United Kingdom.[697] This territorial expansion was followed by the Copyright Act of 1801[698] which extended the jurisdiction of the Statute of Anne of 1710 to Ireland as well as 'the British Dominions in Europe.'[699] These dominions were comprised of Gibraltar, Minorca, and Malta.[700]

The Act of 1801 did not introduce new rights or brought about substantive changes to the existing legal regime.[701] It simply extended the jurisdiction of the British copyright law in force – which was essential to the British (economic) reality. Consequently, the Act of 1801 caused a drastic change, for instance, in the Irish book trade.[702] The Act consolidated that the enforcement of copyright was bound to formalities; furthermore, it increased the number of copies to be deposited for copyright protection.[703] The latter requirement was characterized as 'a tax and an impediment to learning'[704] by various Irish market actors.[705] In fact, the Act of 1801, eventually, paved the way to the collapse of the publishing enterprise in Ireland.[706] It caused a shift from production of *original* books *in* Ireland to the *importation* of *British* books *to* Ireland.[707] This an

[696] Seville, 'British Colonial and Imperial Copyright' (n 50) 270.
[697] An Act for the Union of Great Britain and Ireland of 1800, 40 Geo. 3, Ch. 38.
[698] An Act for the further Encouragement of Learning, in the United Kingdom of Great Britain and Ireland, by securing the Copies and Copyright of printed Books to the Authors of such Books, or their Assigns for the Time herein mentioned of 1801, 41 Geo. 3, Ch. 107.
[699] Lionel Bently and Martin Kretschmer (eds), 'Copyright Act, London (1801)', *Primary Sources on Copyright (1450-1900)* 209 <www.copyrighthistory.org> accessed 6 January 2021.
[700] Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 172.
[701] Ronan Deazley, 'Commentary on Copyright Act 1801' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> accessed 6 January 2021.
[702] Ibid.
[703] Ibid.
[704] Ibid.
[705] Ibid; Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 173.
[706] Deazley, 'Commentary on Copyright Act 1801' (n 697).
[707] Ibid.

'A/act' is interpreted by Ronan Deazley as a way of '[securing] for the British booksellers an increasingly lucrative "overseas" market in the guise of the Irish nation.'[708]

The same British cultural and economic dominance was to be achieved in the colonial territories with the Copyright Act of 1814.[709] This legislation spread British copyright law to *all* British dominions; it further clarified that the Act applied to the United Kingdom; the Isles of Man, Jersey, and Guernsey; as well as 'any other part of the British Dominions.'[710] By this Act, reproduction or exploitation of a book, without the consent of its author or right owner, in any of these jurisdictions was considered copyright infringement and sanctioned.[711] Besides, the right owners were given the opportunity to bring action against infringers and seek for their damage before the competent courts in *any* of these jurisdictions.[712]

Given the complexity of imperial copyright laws and the vagueness of its terminology (especially, the references to British possessions therein), the Copyright Act of 1842[713] was adopted.[714] This Act mainly aimed at explaining and further expanding the jurisdiction of the British copyright law. Thus, the Act of 1842 not only defined what 'the British dominions' refer to, but it also crystallized that the law was applicable, in addition to the United Kingdom, in 'all

[708] Ibid.
[709] An Act to amend the several Acts for the Encouragement of Learning, by securing the Copies and Copyright of Printed Books, to the Authors of such Books or their Assigns of 1814, 54 Geo 3, Ch. 156.
[710] Lionel Bently and Martin Kretschmer (eds), 'Copyright Act, London (1814)', *Primary Sources on Copyright (1450-1900)* 820 <www.copyrighthistory.org> accessed 6 January 2021.
[711] Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (Cambridge University Press 1999) 259; Bently and Kretschmer, 'Copyright Act, London (1814)' (n 706) 820; Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 172.
[712] Bently and Kretschmer, 'Copyright Act, London (1814)' (n 706) 820.
[713]Copyright Law Amendment Act of 1842, 5 & 6 Vict., Ch. 45.
[714] Ronan Deazley, 'Commentary on Copyright Amendment Act 1842' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> accessed 6 January 2021.

parts of the East and West Indies, and all the colonies, settlements, and possessions of the Crown which now are and hereafter may be acquired.'[715]

Apart from extending the jurisdiction of British copyright laws to all the colonial territories, the Act of 1842 is acknowledged in the literature as a milestone in the British Empire's colonial relations and the history of the imperial copyright law. Indeed, the Act of 1842 not only prioritized British cultural *content*, but it also explicitly prioritized British authors' economic interests, by giving primacy to British book *trade* over the colonial *cultural space*. This was achieved in the following way: The Act favored the authors who were resident in any British possession; it provided the books which had been first published in the United Kingdom and registered to the Stationers' Hall in London with legal protection, not only in the United Kingdom, but also in all the British possessions – in brief, in the imperial market.[716] Nevertheless, this was a one-way rule; the books first published within the colonial territories, yet outside the United Kingdom, were not granted with reciprocal legal protection.[717]

To exemplify the impact of the Act of 1842 on the colonial territories, Graham Glover points out to the *first* copyright case in South Africa,[718] *Dickens v. Eastern Province Herald*.[719] The case was brought before the Supreme Court of the Cape of Good Hope in 1861, by the renowned British author, Charles Dickens, against the local newspaper, Eastern Province Herald.[720] According to Glover's anecdotes, the legal dispute herein concerned the unauthorized publication of Dickens'

[715] Lionel Bently and Martin Kretschmer (eds), 'Copyright Act, London (1842)', *Primary Sources on Copyright (1450-1900)* 405 <www.copyrighthistory.org> accessed 6 January 2021.
[716] ibid 408–410.
[717] Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 173–174.
[718] Graham Glover, 'Maybe the Courts Are Not Such a "Bleak House" after All? Or "Please Sir, I Want Some More Copyright"' (2002) 119 South African Law Journal 63, 63; Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 64.
[719] *Dickens v. Eastern Province Herald* (1861) 4 Searle 33.
[720] Glover (n 714) 65.

novel, entitled *Great Expectations*, by Eastern Province Herald in a serialized form.[721] Thus, Dickens took legal action to prevent the unauthorized reprint of his work.[722] At the time, there were no local copyright laws in South Africa, and the only piece of legislation relevant to the legal dispute was the imperial copyright law: The Copyright Act of 1842.[723] Hence, as the competent court to resolve the dispute, the Supreme Court of Cape of Good Hope applied the Act of 1842 and decided that Dicken's copyright was infringed by the defendant.[724]

As a matter of fact, the colonial legislatures were given the discretion to enact their own domestic copyright laws and to build up their own copyright regimes.[725] As mentioned by Bently, colonial populations were quite different than British society and quite diverse in 'wealth, *racial makeup*, [and] literacy,'[726] which may have justified the local governments' discretionary power in regulating the local IP matters.[727] Yet, this shall not be taken as if the colonies were given room to craft a legal system that would best fit *their* needs and interests.

As admitted by Bently himself (and confirmed by Birnhack and Seville), the British Government was confident about and had trust in the colonial legislative process, given that the colonial legislatures – especially, those of non-White Crown colonies[728] – were dominated by British appointees, who would act according to the interests and traditions of the Mother Country.[729] As to the self-governing dominions, whose legislatures were led by elected representatives rather than British appointees; there was a common understanding that the British

[721] Ibid.
[722] Ibid.
[723] Ibid.
[724] Ibid, 65-66.
[725] Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 181–184.
[726] ibid 181–182. Emphasis added.
[727] Ibid.
[728] Ibid, 184.
[729] Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 183–184; Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 27.

legal system and laws were *prima facie* compatible with and favorable for the dominion.[730] Thus, British laws were often being replicated in certain colonies; whereas the others diverging from the regulations of the United Kingdom were being subjected to the British Government's scrutiny and veto.[731] For instance, India's attempt to enact a local copyright law in 1847, mainly to compensate the shortcomings of the Act of 1842, was suppressed by the chief minister involved.[732] The restriction to the colonial legislature as such was 'justified' on ground of the *inappropriateness* of a *subordinate* legislature's deviation from the imperial regime.[733]

The Act of 1842 was followed by and supported with the Customs Act of 1842[734] by which the import of books to the United Kingdom and colonial territories, whether for commercial purposes or personal use, was strictly prohibited.[735] The customs authorities were expected to seize and destruct books which were reproduced without the authorization of authors or copyright holders.[736] This regulation was an outcome of the imperial strategy: According to the imperial mercantile order, the Mother Country had the exclusive control and right over the trade in her possessions. Hence, the Copyright and Customs Acts of 1842 intended to allocate both the British and imperial markets exclusively to British market actors.[737] Besides, the Customs Act was a strategic move to

[730] Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 186–187.
[731] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 27–28.
[732] Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 184.
[733] Ibid.
[734] Customs Tariff Act of 1842, 5 & 6 Vict., Ch. 47.
[735] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 79–80; Deazley, 'Commentary on Copyright Amendment Act 1842' (n 710).
[736] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 23; Seville, 'British Colonial and Imperial Copyright' (n 50) 271–272.
[737] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 78; Seville, 'British Colonial and Imperial Copyright' (n 50) 271–274.

prevent the flow of more affordable books or the pirate copies of British works, especially, from the United States to the British possessions, particularly to Canada.[738]

Nevertheless, both the Copyright and Customs Acts of 1842 caused unease in the colonial territories, especially in Canada, since it restricted the book supply to the colonies, suppressed competition and competitive prices, hence, raised the costs of books penned by British authors.[739] Besides, the Acts proved futile. The Committee reports from the colonies disclosed that the Acts neither increased the import of British books to the colonies nor did it cease the flow of pirate copies.[740] Due to these concerns raised by the colonies, the Copyright Act of 1842 was amended by the Foreign Reprints Act of 1847.[741]

At first sight, the Foreign Reprints Act of 1847 may give the impression of acknowledging the copyright-related 'injustices' in the colonial territories and of responding to the colonial needs to access culture and information. Nevertheless, the Act was the product of an 'interest-convergence dilemma'[742]: It benefitted the colonies, only because it simultaneously asserted the (not very hidden) legal and economic agenda of the British Government and market actors.[743] The Act restated that '[b]ooks wherein the [c]opyright is subsisting, first composed or written or printed in

[738] John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (1st edn, Mansell Publishing 1994) 169–170; Ronan Deazley, 'Commentary on Copyright Amendment Act 1842' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> accessed 6 January 2021; Catherine Seville, 'British Colonial and Imperial Copyright' in Isabella Alexander and H Tomás Gómez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016) 271–272.
[739] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 80–81; Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50); Seville, 'British Colonial and Imperial Copyright' (n 50) 272.
[740] Seville, 'British Colonial and Imperial Copyright' (n 50) 273.
[741] An Act to amend the Law relating to the Protection in the Colonies of Works entitled to Copyright in the United Kingdom of 1847, 10 & 11 Vict., Ch. 95.
[742] By analogy with Bell, Jr., 'Brown v. Board of Education and the Interest-Convergence Dilemma' (n 296).
[743] The main objective of the Foreign Reprints Acts of 1847 was evident in its original title which was: An Act to amend the Law relating to the Protection in the Colonies of Works entitled to Copyright in the United Kingdom. Lionel Bently and Martin Kretschmer (eds), 'Foreign Reprints Act, London (1847)', *Primary Sources on Copyright (1450-1900)* <www.copyrighthistory.org> accessed 6 January 2021.

the United Kingdom, and printed or preprinted in any other [c]ountry, are absolutely prohibited to be imported into the British Possessions abroad.'[744]

However, the Act created an exception to this general prohibition of importing unauthorized books. It introduced the possibility of suspending the effect of the Act of 1842 in the colonial possessions, which could enable the entry of foreign reprints to the imperial market – and for a considerably lower price.[745] Nevertheless, the suspension of the Act of 1842 was bound to a couple of conditions: First, the Foreign Reprints Act required the colonies to enact local copyright laws 'sufficient for the purpose of securing to *British authors* reasonable protection.'[746] Only after the approval of the colonial copyright laws by the Houses of Parliament, the Act of 1842 was being suspended for the relevant colony.[747] Second, and just like the Act of 1842, the Foreign Reprints Act was entrenched by another piece of legislation,[748] namely the Act to Impose Duty of 20 Per Cent *ad valorem* on Foreign Reprints of British Copyright Works of 1850.[749] The importer colonies were obliged to pay 12.5% royalties, presumably to authors, to have access to books reproduced out of the British Empire.[750] Therefore, it can be argued that it was, once again, British imperial and economic interests that were at the stake, rather than the cultural interests of the colonies. Bently explains that the Foreign Reprints Act had, indeed, achieved its goal and served well to the imperial machinery, given that nineteen colonies opted to be in this system and enacted copyright

[744] Ibid 620.
[745] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 86; Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50).
[746] Bently and Kretschmer, 'Foreign Reprints Act, London (1847)' (n 739) 620. Emphasis added.
[747] Ibid 621; Seville, 'British Colonial and Imperial Copyright' (n 50) 274.
[748] Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 175.
[749] An Act to Impose Duty of 20 Per Cent *ad valorem* on Foreign Reprints of British Copyright Works of 1850, 13 & 14 Vict., Ch. 6.
[750] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 87–88; Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 175.

laws,[751] often entitled as 'the Act to regulate the Importation of Books and *to protect British Author*.'[752]

Nevertheless, Seville explains that 'the system [introduced by the Foreign Reprints Act of 1847] proved a 'fiasco.'[753] Eventually, there was a variety of disparate, inconsistent, hence, burdensome colonial laws – whereas there was little economic return to British copyright owners.[754] Besides, the disparate treatment of the colonial copyright law of British and colonial copyright owners were consolidated with the landmark case, *Routledge v. Low,*[755] decided by the House of Lords in 1868.

The *Routledge* case concerned an American author, Maria Cummins, who had assigned copyright in her latest manuscript to her London-based publisher, Sampson Low.[756] When Low published her book, Cummins was residing in Canada, although not being a British citizen or subject.[757] Soon after the publication of Cummins' book, Routledge reproduced and published an authorized edition of the book – which caused a legal dispute amongst Low and Routledge.[758] The House of Lords decided that any book first published in the United Kingdom, whether by a British or alien author or copyright owner, was entitled to copyright protection both in the United Kingdom and the British possessions, only if the copyright owner was residing (even temporarily) in the United Kingdom or in any British dominions.[759] Consequently, it was established that books first published in the United Kingdom were granted with copyright protection both in the United

[751] Ibid, 176.
[752] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 64. Emphasis added.
[753] Seville, 'British Colonial and Imperial Copyright' (n 50) 274.
[754] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 88.
[755] *Routledge v. Low* (1868) LR 3 HL 100
[756] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 92; Seville, 'British Colonial and Imperial Copyright' (n 50) 276.
[757] Ibid.
[758] Ibid.
[759] Ibid.

Kingdom and throughout its possessions; by contrast, books first published in the colonies were not granted with reciprocal legal protection either in the United Kingdom or in any other colonial territory. These latter cluster of books were subject to local copyright laws if there were any.[760]

The legacy of the *Routledge* case was reversed with the International Copyright Act of 1886.[761] The Act of 1886[762] uniformed the copyright system throughout the Empire; it entitled the works first published in the colonies with the same legal protection as the works first published in the United Kingdom.[763] Additionally, it recognized the local registries established by the colonies and lifted the repository formalities for the colonies, which used to require the registration of works to the Stationers' Hall in London and deposit of books in the designated libraries in the United Kingdom.[764] Nevertheless, the advancement of colonial copyright owners' status by this Act was not merely to eliminate the inequalities among the Imperial and colonial copyright laws; it was a pre-requisite of the Berne Convention for the Protection of Literary and Artistic Works of 1886 (hereafter 'the Berne Convention'). Indeed, the Berne Convention relied on the national treatment principle to harmonize the disparate copyright laws of the signatory parties.[765]

The United Kingdom had the desire to maintain the imperial unity and to sign the Berne Convention in its own name and on behalf of all its colonial possessions.[766] Bently explains that achieving such a uniformity would 'increase [the Empire's] bargaining power significantly, while (...) highlighting that Britain did not really need to join a convention of non-English speaking

[760] Ronan Deazley, 'Commentary on International Copyright Act 1886' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> accessed 11 January 2021.
[761] Feather (n 605) 170–171.
[762] An Act to amend the Law respecting International and Colonial Copyright of 1886, 49 & 50 Vict., Ch. 33.
[763] Lionel Bently and Martin Kretschmer (eds), 'International Copyright Act 1886', *Primary Sources on Copyright (1450-1900)* 78–79 <www.copyrighthistory.org> accessed 11 January 2021.
[764] Ibid.
[765] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 114; Deazley, 'Commentary on International Copyright Act 1886' (n 756).
[766] Ibid.

states.'[767] Despite the United Kingdom's imperial aspirations, the colonies were given the discretion to opt-in or -out to be part of the Berne Union under the imperial umbrella.[768] In the end, the United Kingdom *did* sign the Berne Convention for its colonies as well.[769] Given the national treatment principle of the Berne Convention,[770] the Convention and the Act of 1886 comprised a compounded leverage for the colonies.[771]

The Berne Convention, hence, the international IP diplomacy, had further implications on British, imperial, and colonial laws, which prevailed to affect the colonies even after the Decolonization Movement of the 1940s-60s. Indeed, the United Kingdom adopted another law, the Imperial Copyright Act of 1911.[772] This Act was addressed to reflect the Berlin Protocol of 1908[773] revising the Berne Convention upon the existing copyright laws of the United Kingdom and its possessions.[774] For the purposes of the Act, all Crown colonies, protectorates, and Cyprus were acknowledged as parts of the United Kingdom; only the self-governing dominions were left out of this regulation.[775] Yet, the latter were given the opportunity to declare the Act to be in force in their jurisdiction and to opt-in the imperial system.[776] As a result, the Act of 1911 unified and

[767] Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50) 193; Bently, 'Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries' (n 50) 1219–1221.
[768] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 70; Bently, 'The Extraordinary Multiplicity of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (n 50); Seville, 'British Colonial and Imperial Copyright' (n 50) 281–283.
[769] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 71.
[770] The Berne Convention on for the Protection of Literary and Artistic Works of 1886, Art. 5(1), Art. 5(3).
[771] Deazley, 'Commentary on International Copyright Act 1886' (n 756); Bently, 'Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries' (n 50) 1224–1225.
[772] Copyright Act of 1911, 1 & 2 Geo. 5, Ch. 46.
[773] The Berlin Act of 1908 revising the Berne Convention for the Protection of Literary and Artistic Works of 1886.
[774] Seville, 'British Colonial and Imperial Copyright' (n 50) 285.
[775] Ibid, 285-286.
[776] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 74.

consolidated the British copyright laws and principles throughout the Empire.[777] It also put an end to the effect of the Copyright and Customs Acts of 1842.[778]

To conclude this section, it can be summarized herein that the British copyright policies, strategies, and laws from 1710 (at least) until 1986 were neither objective and aesthetics-free nor aimed at universalizing copyright ownership. On the contrary, and as articulated by Birnhack: 'Legal transplants are not neutral, especially not those that are the result of colonialism.'[779]

Also evident from this historical account of the imperial copyright strategy in general, imperial copyright law prioritized the materialistic interests of the predominantly White Motherland; whereas they undermined and even hindered the non-Western cultural and economic interests of the colonial territories, which were inhabited by predominantly racialized minorities and indigenous people. Besides, these Western-centric laws were implemented in the domestic legal order of the British colonial possessions via different mechanisms, including but not limited to the colonial legal transplantation, the maneuvers of imperial legal relations as well as those of international law. It shall be clarified that such law, as explained in Chapter III, infused Western-centric assumptions and cultural values into the legal order of non-Western countries.

Whereas the imperial copyright laws lasted for quite a long time in the colonial legal domains – in some cases, even after the cease of colonialism;[780] the next section depicts how such a Western-centric system was further solidified by the international policy- and law-making mechanisms.

[777] Seville, 'British Colonial and Imperial Copyright' (n 50) 285.
[778] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 76.
[779] Ibid, 35.
[780] Ibid, 66.

2.3.3. Internationalization of Intellectual Property Law: The 'Developed and Developing Countries' Polarization

The previous section explored the spread of British IP laws to the 'external' realm by means of colonial governance and colonial legal transplantation. It also provided a snapshot of the early beginnings of the internationalization of IP law against a colonial backdrop, by focalizing the impact of the Berne Convention on the diplomatic and legal relations between the British Empire and its colonial possessions. This section picks up from that point and concentrates on the underpinning motives and process of the internationalization of IP law.

Whereas the previous section concentrated on vertical power relations, by exploring the interaction of the imperial and colonial IP laws in the British context; this section slightly shifts the focus. It explores the horizontal power relations amongst the Western (European) imperial powers and the interplay of such powers (and interests) in the international legal forum, whilst explaining the implications of such horizontal power dynamics on the colonial territories.

Thus, this section commences with the late nineteenth-century events that paved the way to the adoption of the Paris Convention for the Protection of Industrial Property of 1883 (hereafter 'the Paris Convention') and the Berne Convention of 1886. It covers the period until the establishment of WIPO in 1970,[781] along with its entitlement as a specialized agency of the United Nations (hereafter 'the UN') in 1974.[782] Within this frame, the section prevails to unravel the Western-centrism of IP law, by mapping the milestones in the internationalization of IP law and its consequences (especially for the newly independent non-Western political powers), from a race-conscious viewpoint and by focalizing the British Empire. To achieve this end, the section posits the internationalization of IP law in a greater historical and political context, in order to shed

[781] Convention Establishing the World Intellectual Property Organization of 1967.
[782] Agreement concerning the relations between the two organizations of 1974.

light upon the power asymmetries existed while the two major international IP treaties were being negotiated.

The nineteenth-century witnessed not only the externalization of imperial laws and their implementation into colonial territories, but also the negotiations amongst imperial powers to establish a mutual understanding in respecting and providing legal protection to foreign authors, creators, and inventors. In the copyright field, this was the result of two incidents: First, there was a growing market of pirated copies of foreign copyright works.[783] The United States was in constant supply of unauthorized and cheap British reprints; Belgium was offering reprints of British and French publications; Germany was another supplier of, mostly, unauthorized British works.[784] Second, such foreign reprints were entering into the domestic marketplaces and creating a market for cheaper 'pirate' copies.[785] Overall, circulation of such unauthorized and cheaper copies was a threat for authors' royalties and their share in the global market.[786]

The flow of unauthorized copies to foreign markets was a result of the inefficacy of the territoriality of domestic copyright laws.[787] To overcome this legal obstacle and to guarantee legal protection for their citizens in foreign markets, the Western (European) imperial powers commenced entering into bilateral agreements.[788] These agreements relied upon national treatment and reciprocity principles.[789] To be more precise, by these agreements, the contracting parties were

[783] Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (n 16) 16; Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 42.
[784] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 42.
[785] Ibid.
[786] Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (n 16) 14–15; Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 22.
[787] Graeme B Dinwoodie, 'The Architecture of the International Intellectual Property System' (2002) 77 Chicago-Kent Law Review 993, 999.
[788] Cornish, 'The International Relations of Intellectual Property' (n 584) 48; Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (n 16) 14.
[789] Cornish, 'The International Relations of Intellectual Property' (n 584) 48; Daniel J Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (2002) 12 Fordham Intellectual Property, Media & Entertainment Law Journal 929, 935.

declaring to treat foreign intellectual creators as equals with national creators, and they were granting legal protection to foreign creators on a mutual basis.[790]

Even though the mainstream IP scholarship does not reveal much about the imperial or colonialist dimension of this first phase of the internationalization of copyright law, often referred to as 'the bilateral era', Carolyn Deere and Ruth L. Okediji bring this overlooked dimension into the light. Deere's and Okediji's anecdotes illuminate the racial elements that remained in the shadow of this color-blind narrative of the bilateral phase of IP law and the Western (European) imperial powers' actual concerns.

Deere and Okediji explain that the colonial territories in Africa, Asia, and the Pacific region were already affected by imperial IP laws by that time, due to in/formal Western (European) colonialist administration.[791] This was partly because Europe has had a long-established trade relationship with non-Western countries, especially with Africa.[792] Thus, to secure their materially-driven interest in colonial territories, the British Empire, for instance, imposed the imperial IP laws upon East Africa, India, Nigeria, and Malaysia.[793] Similarly, France secured the application of French IP laws in its colonies, including the ones in Francophone Africa.[794] Besides, there were some other colonial possessions whose IP laws were changing along with their colonial rulers.[795]

[790] Michael D Birnhack, 'Trading Copyright: Global Pressure on Local Culture' in Neil Weinstock Netanel (ed), *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford University Press 2008) 366 <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780195342109.001.0001/acprof-9780195342109-chapter-16> accessed 10 April 2021.
[791] Drahos, 'Developing Countries and International Intellectual Property Standard-Setting' (n 587) 767; Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 323–324; Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009) 36.
[792] According to Okediji, these trade relations prevailed until the moment that the subject-matter of trade shifted from gold and spices to slave labor. Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 321–323.
[793] Ibid, 316 *supra* note 3, 323 *supra* note 29.
[794] Deere (n 787) 35–36.
[795] Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 323–324.

For instance, Philippines was subjected, respectively, to Spanish and American colonial IP laws; whereas Korea experienced Japanese and American IP systems under colonial rule.[796]

Still, the Western (European) authorities gradually became more assertive in terms of engaging in trade in non-Western territories on their own terms and conditions, rather than the rules set by the local authorities.[797] According to Okediji, this was yet another consequence of the Enlightenment ideology and one of its major legacies: The assumptions of racial and intellectual 'superiority' of Europeans and the Western (European) systems.[798] In fact, due to this assumption, imperial laws used to treat non-European inhabitants of colonial territories as subjects, instead of right-bearing citizens; thus, such imperial laws did not apply to the locals.[799] As already mentioned in the previous section, the imperial laws were concerned about securing the material interests and legal rights of the predominantly White citizens of the Western (European) imperial powers in colonial territories[800] – and the bilateral agreements were an extension of this racially-charged scheme. In this vein, Okediji explains that imperial laws in general, and imperial IP laws in particular, were 'a central technique in the commercial superiority sought by European powers in their interactions *with each other* in regions beyond Europe.'[801]

Indeed, in such a fragmented political and legal terrain, the success of the bilateral era was a matter of question. Just to substantiate this idea, Sam Ricketson highlights that France was a signatory of thirteen bilateral copyright treaties, whereas Belgium had nine, Italy and Spain each had eight, and the United Kingdom and Germany each had five treaties.[802] Hence, the bilateral era

[796] Ibid.
[797] Ibid, 322-323.
[798] Ibid, 322.
[799] Ibid, 325.
[800] Please see section 2.3.2 in the text.
[801] Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 324.
[802] Sam Ricketson, 'The Birth of the Berne Union' (1986) 11 Columbia-VLA Journal of Law & the Arts 9, para 2.02.

ended up creating, in Daniel J. Gervais' words, 'a gigantic spider web of treaties.'[803] Although having secured copyright in other countries by these treaties, authors or right owners were neither well-informed nor certain about how to acquire copyright in other jurisdictions, as well as the scope and the term of such 'foreign' copyright protection.[804]

The problems caused by these piecemeal bilateral treaties and the discrepancies among domestic laws of the contracting parties were not specific to copyright. Industrial rights, specifically patent and trademark laws, have also undergone the 'bilateral' phase. According to Peter Drahos' anecdotes and Sam Ricketson's commentary, by 1883, there was also a web of bilateral treaties among European countries and the Americas which were dealing with certain fragments of industrial rights.[805] For instance, there were more than sixty-nine treaties merely dealing with trademark (and twenty of these treaties were concluded by the United Kingdom with other countries),[806] while there were only a few on patent.[807] Similar to the copyright-related bilateral treaties, the trademark- and patent-related treaties were also based on the national treatment and reciprocity principles.[808] However, as was the case for copyright, these principles were creating a complicated and patchy international legal protection since there was no unity about the obligations, the scope, and the term of protection in the contracting parties' domestic laws.[809]

[803] Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (n 785) 935.
[804] Ibid.
[805] Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (n 16) 18; Sam Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (Oxford University Press 2015) para. 2.02.
[806] Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (n 801) para. 2.04.
[807] Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (n 16) 17–18; Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (n 801) para. 2.04.
[808] Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (n 16) 17–18.
[809] Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (n 801) para. 2.06-2.07.

It should also be emphasized that during the bilateral era, not many countries had domestic patent laws – and Austria-Hungarian Empire, Germany, the Netherlands, the United States, and Switzerland were only a few of those countries.[810] Yet, the nineteenth-century has been the stage for 'World Fairs' where scientific developments and industrial progress of Western countries were exposed and celebrated.[811] Thus, starting with the 1870s, it became essential for inventors to secure the exclusivity of their rights over their inventions and to have predictability of patent law, at least to a certain extent, before exploiting their novel creations in such global events.[812]

Apart from their importance for IPRs, the World Fairs were quite imperative in crystallizing the 'Western (European) and non-Western' divide, by placing Western (European) perceptions of science, progress, and inventions at the pinnacle of 'an evolutionary hierarchy.'[813] This divide derived from and built upon oppositional binaries, such as 'colonizer v. colonized', 'civilized v. barbarian', 'progressive v. primitive'.[814] On that note, Olunfunmilayo B. Arewa explains that this 'hierarchical thinking' was a constituent of the Western (European) perceptions of 'civilization', technology, and political organization – which proliferated from the Western powers' increasing interactions with the non-Western 'others'.[815] Yet, Arewa also explains that such a paradigmatic categorization was built upon the evolutionary ideas of, in Arewa's words, 'armchair anthropologists.'[816] As a result, the Western (European) world formed an understanding of 'development' which depicted cultural and scientific progress as a linear process comprised of

[810] Peter K Yu, 'The Global Intellectual Property Order and Its Undetermined Future' [2009] The WIPO Journal 1, 3; Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (n 801) para. 2.06-2.07.
[811] Encyclopedia Britannica, 'World's Fair' (*Britannica Academic*) <https://academic.eb.com/levels/collegiate/article/worlds-fair/473631> accessed 15 November 2021.
[812] Catherine Seville, 'The Principles of International Intellectual Property Protection: From Paris to Marrakesh' (2013) 5 WIPO Journal 95, 96–97; Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (n 801) para. 2.09.
[813] Olufunmilayo Arewa, 'Culture as Property: Intellectual Property, Local Norms and Global Rights' 33.
[814] Ibid, 33-38.
[815] Ibid.
[816] Arewa, 'Intellectual Property and Conceptions of Culture' (n 8) 10–11.

'universal stages of development' that begins with 'savagery' and leads to 'civilization.'[817] In the end, these categorical assumptions and hierarchical thinking socially constructed the 'Western (European)' and 'non-Western' identities in a stark contrast – and these racially-charged concepts prevail to affect the realm of IP since then.[818]

The racial implications of the World Fairs were not restricted to creating mental categories and racially charged imagery. There had been various occasions over the years in which colonial subjects and indigenous peoples had been part of the exhibitions – and, in Arewa's words, 'to showcase the contrast between "civilization" and "savagery."'[819] For instance, the Columbian Exposition of the 1893 World Fair had a live display of a group of indigenous peoples.[820] Similarly, in the Louisiana Exposition of the 1904 World Fair, a group of Filipinos were part of a live show where they displayed their cultural manifestations.[821] Arewa highlights that these exhibitions (hence, the commodification of indigenous peoples and their cultural expressions) remained to be part of the Fairs for quite a while.[822] According to Arewa's anecdotes, each American World Fair from 1893 until the WW I consisted of an exhibition of at least one indigenous village.[823]

Regardless of their racial (or, even racist) baselines, the World Fairs consolidated the idea that bilateral agreements were falling short of providing adequate legal protection for inventors across the borders of their own countries. This need debuted in the Great Exhibition in London in 1851, since the London Exhibition was a global platform for inventors to publicly display their inventions – including the ones that had not acquired patent protection and had not entered the

[817] Ibid, 11.
[818] Ibid.
[819] Arewa, 'Culture as Property: Intellectual Property, Local Norms and Global Rights' (n 809) 36.
[820] Ibid.
[821] Ibid, 34-35.
[822] Ibid.
[823] Ibid, 35.

market yet.[824] The need for the harmonization of domestic IP laws was consolidated, especially, with the Vienna World Fair of 1873, which hosted an 'International Exhibition of Inventions'.[825] German inventors were reluctant to expose their inventions at the Vienna World Fair; whereas some others, pioneered by American inventors, refused expositions as such, due to the lack of an international regime for the protection of patent rights and due to the fear of free-riding of their inventions.[826] Hence, the Vienna World Fair rested the ground for the Congress of Vienna for Patent Reform that took place the same year.[827]

The Vienna Congress recommended that there should be 'assimilation in the law and practice in regard to inventions amongst the various *civilized* countries of the world.'[828] In this context, the legal protection of foreign inventors in the colonial possessions of the contracting parties have also been discussed. Furthermore, the United Kingdom was requested to report '[how far] the Foreign and Colonial Governments (...) [were] ready to concur international relations.'[829] Additionally, it has also been a matter of discussion whether and how 'the countries of the Orient'[830] would adopt industrial property laws. Following up with the work of the Vienna Congress, the Universal Exposition in Paris in 1878 sowed the seeds of what eventually became the Paris Convention.[831] The Paris Convention was signed by Belgium, Brazil, France, Guatemala, Italy, the Netherlands,

[824] Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (n 801) para. 2.10-2.11.
[825] Ibid.
[826] Christopher May, 'The Pre-History and Establishment of the WIPO' (2009) 1 WIPO Journal 16, 17; Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (n 801) para. 2.13.
[827] Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (n 16) 19–20.
[828] Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (n 801) para. 2.16. Emphasis added.
[829] Ibid.
[830] Ibid, para. 2.18.
[831] Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (n 16) 19–20.

Portugal, El Salvador, Serbia, Spain, and Switzerland.[832] After a year, the Paris Union was joined by the United Kingdom, Tunisia, and Ecuador.[833]

The late 1800s were also the stage for similar global events concerning the copyright field. These efforts were centered around the idea of developing an international legal regime for literary and artistic property. The initial international congress in this context was held in 1858 in Brussels, under the auspices of the Belgian Government.[834] The Brussels Congress produced a report which made explicit that the delegates of the Congress were 'in favor of an international and uniform copyright amongst all *civilized* nations.'[835] This resolution of the Brussels Congress was followed by the Paris Congress in 1878.[836] This time, the participants of the Congress founded the *Association Littéraire et Artistique Internationale* (hereafter 'ALAI') in 1878 and appointed the world-renowned author, Victor Hugo, as the honorary president of the association.[837]

ALAI held annual conferences to further discuss the harmonization of domestic copyright laws of interested parties.[838] Eventually, given the Swiss Government's support and diplomatic initiatives, ALAI held a conference in Berne in 1883.[839] The Swiss Federal Council invited the governments of 'all *civilized* nations'[840] to the Berne Conference, in order to achieve greater uniformity in the international protection of authors and their copyright – and, from this Conference emerged a draft convention.[841] This draft constituted the blueprint of the Berne

[832] Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Edward Elgar 2008) 25.
[833] Ibid.
[834] Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (n 16) 19–20; Seville, 'The Principles of International Intellectual Property Protection: From Paris to Marrakesh' (n 808) 98.
[835] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 53. Emphasis added.
[836] Ibid.
[837] Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 26; Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 59–60.
[838] Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 26.
[839] Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (n 16) 20.
[840] Seville, 'The Principles of International Intellectual Property Protection: From Paris to Marrakesh' (n 808) 96.
[841] Ibid.

Convention, which was adopted in a diplomatic conference in 1886.[842] Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, and the United Kingdom were the first signatories of the Convention, whereas Japan and the United States were represented by observers.[843] It should also be noted that France, Germany, Spain, and the United Kingdom signed the Berne Convention not only in their own name, but also on behalf of their colonies.[844]

The adoption of the Paris and Berne Conventions of 1883 and 1886 marks the beginning of the second phase in the internationalization of IP law, often referred to as 'the multilateral era.' Both Conventions were international legal instruments addressed to harmonize the disparate domestic laws and legal standards of contracting parties.[845] Therefore, these Conventions set the minimum standards for IP protection and drew the contours of domestic IP laws of the contracting parties.[846] Additionally, they each created a Union comprised of the contracting parties of the relevant Conventions, namely the Paris Union and the Berne Union.[847]

Evident from the narratives regarding the negotiation and adoption of the Paris and Berne Conventions, the internationalization of IP law was a 'private [Western (European)] initiative.'[848] This shall not come as a surprise since the international legal arena was going under (re)construction in the meantime. The same imperial powers, who have been shaping the international IP rules and standards, were also holding the Berlin Conference of 1884-1885 in parallel to these major IP conventions. The Berlin Conference was aimed at regulating colonialism

[842] Ibid.
[843] Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 27.
[844] Drahos, 'Developing Countries and International Intellectual Property Standard-Setting' (n 587) 767; Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 64.
[845] Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50) 64.
[846] Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 30–31.
[847] Ibid.
[848] Drahos, 'Developing Countries and International Intellectual Property Standard-Setting' (n 587) 767; Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (n 801) para 2.17.

and trade in Africa.[849] It resulted in the partitioning of African territories amongst the Western (European) imperial powers.[850] Amongst the signatories of the Paris and Berne Conventions; Belgium, France, Germany, and Portugal were the main beneficiaries of the Berlin Conference.[851]

That said, Arewa and Okediji point out to the Berlin Conference to expose and emphasize the racialized power asymmetries that were in play while the two major IP treaties, which remain to be the main pillars of contemporary IP law, were being negotiated.[852] As a 'natural' outcome of this imperialist approach at the time, the colonial territories and their subjects were denied representation, as well as the freedom to join negotiation, and to raise their voices in the constitution of the Paris and Berne Conventions.[853] As added by Deere, in signing these two major treaties, the Western (European) imperial powers undermined traditional or customary laws of their colonial possessions; besides, they also neglected establishing a local IP culture and expertise.[854] Yet, as already emphasized by Okediji, the Western (European) imperial powers neither had the needs of non-Western colonies nor their active participation in the global trade in mind while contracting the Paris and Berne Conventions. Besides, the imperial powers achieved their end goal: Their ignorance of colonies about IP-related matters has not only resulted in the treatment of colonial territories as marketplaces for Western (European) commerce, but it also prevented the introduction of non-Western forms of intellectual creations (especially those of indigenous peoples) into the international debate.[855] In fact, the absence of colonies' voice in these

[849] Encyclopedia Britannica, 'Berlin West Africa Conference' (n 614).
[850] Arewa, 'Intellectual Property and Conceptions of Culture' (n 8) 14.
[851] Ibid.
[852] Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 316, also see *supra* note 3.; Arewa, 'Intellectual Property and Conceptions of Culture' (n 8) 14.
[853] Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 316.
[854] Deere (n 787) 36.
[855] Ibid 35.

major IP treaties continued to haunt the internationalization of IP law – even during the Decolonization Movement and the establishment of WIPO.

The Paris and Berne Convention Secretariats were merged in 1893 under the roof of *Bureaux Internationaux Réunis de la Protection de la Propriété Intellectuelle* (hereafter 'BIRPI').[856] Given the ever-expanding internationalization and the growing importance of IPRs (also as economic assets), the founders of BIRPI decided to transform this Permanent Joint-Bureau into an international organization.[857] Therefore, BIRPI adopted the Convention Establishing the World Intellectual Property Organization in 1967, and WIPO came into existence with the Convention's entry into force in 1970.

The chronology of the establishment of WIPO coincides with the Decolonization Movement, which began in the aftermath of the WW II.[858] Peter K. Yu explains that the post-WW II period witnessed the independence of many colonies, which gained the status of 'State' and the right to self-determination.[859] On that note, Okediji underlines that the 'State' status and the legal consequences attached to it were also predetermined by the existing international legal regime.[860] In other words, this category was built by the former imperial powers and upon their Western-centric international legal norms.[861] With the decolonization process, the newly independent States

[856] Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 9; May (n 821) 21–22.
[857] Christopher May explains that starting with the 1950s, other international organizations have also developed an interest in IP law. The International Labour Organization, the (former) League of Nations, the United Nations Education Scientific and Cultural Organization (hereafter 'UNESCO') were among them. In fact, UNESCO even adopted the Universal Copyright Convention in 1952, which 'operated as a clear alternative center of diplomatic gravity to BIRPI.' May (n 821) 21. Hence, it can be argued that it was not only the Western imperial powers 'battling' over political dominance and international venues that are hospitable to their economic agenda, but also the international organizations. This fact constituted another trigger for the transformation of BIRPI into a more formal and universally recognized legal entity – which paved the way to the establishment of WIPO.
[858] Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 9; Peter K Yu, 'Five Decades of Intellectual Property and Global Development' (2016) 8 WIPO Journal 1, 2.
[859] Yu, 'The Global Intellectual Property Order and Its Undetermined Future' (n 806) 2; Yu, 'Five Decades of Intellectual Property and Global Development' (n 853) 1–2.
[860] Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 326.
[861] Ibid.

become part of this pre-existing system – in whose constitution they did not play an active role either.

Notwithstanding these statements, Yu claims that these new States were 'eager to exercise their newfound independence and sovereignty by affirming international obligations into which *their former colonial masters had entered on their behalf.*'[862] Reflecting her skepticism about such 'eagerness' of the newly independent States, Okediji argues that the former colonies had neither much flexibility nor choice in that – mainly, due to the state-succession principle and the treaty accession systems created by international law.[863] This system facilitated the continuing dominance of the former imperial powers in the international forum, also in the realm of IP.[864]

As explained by Ricketson, the Berne Convention did not have any formal mechanism to recognize the former colonies as existing contracting parties.[865] The ordinary accession methods stipulated within Article 29 of the Convention were addressed only to the States that were out of the Union.[866] Yet, the former colonies were already within the Union.[867] Due to this, an 'extraordinary' accession method was introduced via Article 31 for 'certain territories.'[868] According to this regulation, a State could make 'a declaration of continued adherence.'[869] In this case, 'the pre-independence application of the Convention remained in force'[870] in the newly

[862] Yu, 'Five Decades of Intellectual Property and Global Development' (n 853) 2. Emphasis added.
[863] Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 330.
[864] Ibid.
[865] Sam Ricketson, 'The Shadow Land of Berne: A Survey of the Hidden Parts of the Berne Convention (Part III)' (1989) 11 European Intellectual Property Review 58, 59–60.
[866] Ibid.
[867] The Berne Convention for the Protection of Literary and Artistic Works of 1886, Art. 29(1).
[868] Ibid, Art. 31.
[869] Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 331.
[870] Ibid.

independent State. The same system applied to the Paris Convention as well.[871] Regardless of the internal motives of the newly independent States, Christopher May asserts that both BIRPI and WIPO were welcoming the accession of these States to the multilateral IP treaties, because this 'would potentially benefit the export-oriented companies,'[872] hence, (the continuum of) the economic interests of the Western *exporters* in the(ir) former colonies.[873]

Despite the overarching colonialist interests inherent in the establishment of the international IP standards, it should also be mentioned that the widening of, first, BIRPI and then, WIPO memberships to newly independent States introduced new voices and their concerns to the international IP discourse. These newly emerged States' interests in accessing information and their right to development were often in clash with the IP-related interests of the 'established' States.[874] Hence, the former were reluctant about the universalization of IPRs in line with the priorities, socio-cultural and economic agenda of the latter.[875] Eventually, this reality revealed a new form of polarization among former colonizers and colonies: The assortment of countries according to their level of economic development, such as 'developed countries' and 'developing countries'. With this new power-related arrangement, the developing countries had limited success in blocking developed countries' IP maximization strategies.[876] They also requested WIPO to adopt democratic structures similar to that of the UN system.[877] Partly as a result of such oppressions, WIPO became a specialized agency of the UN in 1974, via the Agreement between the United Nations and the World Intellectual Property Organization of 1974.

[871] The Paris Convention for the Protection of Industrial Property, Art. 24(1); Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 331; Deere (n 787) 40–41.
[872] May (n 821) 20–21.
[873] Ibid.
[874] May (n 821) 20–21; Yu, 'Five Decades of Intellectual Property and Global Development' (n 853) 6–7.
[875] May (n 821) 25–26.
[876] Birnhack, 'Trading Copyright: Global Pressure on Local Culture' (n 786) 366.
[877] May (n 821) 20–21.

The link between WIPO and the UN, on the one hand, allowed the developing countries to push for development agendas. This was mainly because of Article 11 of the Agreement, by which WIPO commits to comply with the Charter of the United Nations of 1945 (hereafter 'the UN Charter') and the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960. The same provision further stipulates (although in a paternalistic tone) that WIPO agrees to co-operate with the UN in matters affecting 'the well-being and development of the peoples of the Trust, Non-Self-Governing and other Territories.'[878] On the other hand, the Agreement entitled WIPO with international legal personality and the diplomatic privileges and immunities.[879] Also, Christopher May adds that the first Deputy Director General of WIPO, Arpad Bogsch, considered the co-operation of WIPO with the UN as an opportunity to attract more developing countries, which would further Bogsch's vision of *universalization* of IP law, in the long run.[880] Instead, the accession of developing countries to WIPO emerged the critique of universality of IP law, and further compartmentalized the WIPO Member States along racialized power structures.

To conclude, the internationalization process of IP law only further strengthened its inherent ideological, political, and economic structures of dominance. The subjective aesthetic values and the presumptions of Western (European) culture and 'civilization' have not only established an international legal order that essentializes Western (European) interests, but they also racialized, stigmatized, and subordinated those of the non-Western – still, they imposed this legal order upon the non-Western world through the maneuvers of international law. Thus, the Western-centric international law left the (formerly colonized) newly independent States with a Western-centric IP regime in whose negotiation they did not have a say.

[878] The Agreement between the United Nations and the World Intellectual Property Organization of 1974, Art. 11.
[879] May (n 821) 25.
[880] Ibid, 24.

As articulated by Okediji: '[C]olonization had accomplished an assimilation that decolonization could not dismantle since it only reordered the context of engagement between Europe and the developing world.'[881] Besides, as indicated by Ruth L. Gana, the ideological structures of dominance built in IP law and the latter's emphasis on Western (European) 'civilization' forged the idea that the protection of IPRs was not only an essential requirement for 'civilization', but also an indicator of former colonies' progress toward a Western-style 'civilization'.[882] Even though the Decolonization Movement and the enlargement of WIPO Member States proved that the international IP forum could no longer remain a Western 'club,'[883] this process only reshuffled the power dynamics and formed the 'developed and developing countries' divide. This divide was further entrenched with the 'globalization' of IP law – which is explained in detail in the next section.

2.3.4. Globalization of Intellectual Property Law: The 'Global North and South' Divide

Following the previous section, which encompassed the initial stages of the internationalization of IP law, this section proceeds with the expansion of Western-centric IP norms across the globe – or, in other words, the 'globalization' of IP law. In this regard, the section embraces Graham Dutfield's and Uma Suthersanen's definition for globalization, which is articulated as 'a process, or a series of processes, which create and consolidate a unified world economy, (…) where [g]eographical, social and political boundaries [are] (…) eroding.'[884] Dutfield and Suthersanen identify two dimensions of this phenomenon: Globalized localism and localized globalism.[885] Globalized localism refers to the internationalization of a local phenomenon at a global level,

[881] Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 327.
[882] Ruth L Gana, 'The Myth of Development, the Progress of Rights: Human Rights to Intellectual Property and Development' (1996) 18 Law & Policy 315, 332.
[883] Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 29–30.
[884] Ibid 3.
[885] Ibid.

which often underpins the international policy- and law-making, as well as enforcement processes; whereas, localized globalization stands for the adjustment of local conditions under the international and transnational influences.[886]

This section studies these phenomena, by focusing on the aftermath of WIPO's entitlement as a specialized agency of the UN in 1974. It maps the chronology of events centered around the General Agreement on Tariffs and Trade (hereafter the 'GATT') negotiations of 1986-1994, which resulted in the establishment of the WTO and the adoption of the TRIPs Agreement in 1994.

In this frame, the section argues and explains that the implementation of IP law into the global trade talks at the WTO startled the globalization of IP law; however, this was a constituent of the greater socio-economic and political realities of the time – such as the international relations and economic alliances among the industrialized Western (European) powers. Interactions of the Western (European) powers and their industrialized economies not only shifted the international IP policy- and law-making forum from WIPO to the WTO, but they also inflicted a new (and sharper) economic polarization, which is often referred to as the 'Global North and the Global South' divide. In this line, the section explains how the adoption of the TRIPs Agreement, or the *localized globalization* of IP norms it brought upon, deeply engrained the colonial roots and Western-centric dominance structures of IP rules and principles into the international and national IP regimes of former colonies, despite the Decolonization Movement.

The internationalization of IP law, under the governance of WIPO, ended up creating a legal regime.[887] This regime, as explained in the previous section, derived from the ideological, political, and economic structures of Western (European) or White dominance. Thus, the initial efforts to standardize IPRs were modelled on the current laws and practices of the Western (European)

[886] Ibid 6–12.
[887] Birnhack, 'Trading Copyright: Global Pressure on Local Culture' (n 786) 365–366.

imperial powers. Besides, a regime as such was born out of the socio-economic and political realities of a time when non-Western 'others' were categorized either as colonial possessions or 'the States of the Orient'.[888] Despite their foundation exclusively upon Western (European) values, both BIRPI and its successor WIPO welcomed many new Member States, which had recently declared independence from colonial governance.[889]

Although the polarization among former colonizers and colonies was already discernable, WIPO achieved a certain level of 'assimilation' of non-Western legal regimes into that of the Western (European) one, with the aim of establishing a common understanding and a set of normative standards for the extra-territorial protection of (predominantly White rights holders') IPRs.[890] However, the legal regime governed by WIPO was not satisfactory for the developed countries bloc, because these countries were already industrialized and were recently transitioning from an industry-based economy to an information-based economy model.[891] For these countries, IP was no longer merely a cultural or scientific commodity centered around the author or the inventor, but a crucial asset and leverage in the global trade.[892] Due to this, it was mainly the trademark industries and corporations that were claiming for an enhanced IPRs framework, rather than individual or associations of authors and inventors.[893] Such a shift in the interest group was, mainly, the result of the advancement of technology and the widespread use of the internet, which

[888] Please see section 2.3.3 in the text.
[889] Ibid.
[890] Ibid. Also see Birnhack, 'Trading Copyright: Global Pressure on Local Culture' (n 786) 365–366; May (n 821) 18–19.
[891] Christopher May and Susan K Sell, *Intellectual Property Rights: A Critical History* (Lynne Rienner Publishers 2006) 161–162; Susan K Sell, 'The Dynamics of International IP Policymaking' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (2nd edn, Oxford University Press 2014) 73, 74–75.
[892] Cornish, 'The International Relations of Intellectual Property' (n 584) 46; Jerome H Reichman, 'Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement' in Carlos M Correa and Abdulqawi A Yusuf (eds), *Intellectual Property and International Trade: The TRIPS Agreement* (3rd edn, Wolters Kluwer 2016) 347–348.
[893] Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 32; Deere (n 787) 1.

made intangible goods, hence, the subject-matters of IPRs vulnerable to free-riding, piracy, and counterfeiting on a larger scale.[894]

Nevertheless, the WIPO regime was falling short to respond to developed countries' materialistic interests and expectations, which were emanating from their wish for a smoothly operating global market.[895] From their perspective, WIPO was deficient for a number of reasons: First, the WIPO regime was comprised of various legal instruments concentrating on specific IPRs, rather than offering a holistic approach to IP per se.[896] Indeed, the WIPO-administered treaties greatly varied in their subject-matter and scope, mainly because the WIPO system was based on national treatment and reciprocity principles, rather the standardization of national laws.[897] Additionally, the signatory parties of each treaty differed, because within the WIPO system, States had an absolute discretion over whether or not to protect IPRs, which conventional IPRs to protect, and to what extent.[898] Although this system was efficient for having a common understanding of IPRs and harmonizing national legal regimes,[899] it was not capable of standardizing national laws, let alone guaranteeing the recognition of *all* conventional forms of IPRs by each WIPO Member State.[900]

Second, as explained by Daniel J. Gervais, WIPO has become an agency of the UN; hence, it was committed to the UN's mission and values, operating on democratic rules, including but not limited to the requirement of unanimous approval of revisions to international treaties in force.[901]

[894] Deere (n 787) 9; Wei Shi, 'Globalization and Indigenization: Legal Transplant of a Universal TRIPS Regime in a Multicultural World' (2010) 47 American Business Law Review 455, 466–467.
[895] Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (n 785) 939; Shi (n 889) 466; Sell, 'The Dynamics of International IP Policymaking' (n 886) 74.
[896] Meir Perez Pugatch, 'Intellectual Property Policy Making in the 21st Century' (2011) 3 The WIPO Journal 71, 72.
[897] Birnhack, 'Trading Copyright: Global Pressure on Local Culture' (n 786) 366; Reichman (n 887) 348–349.
[898] Deere (n 787) 7–8.
[899] May (n 821) 18.
[900] Ibid.
[901] Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (n 785) 941, *supra* note 68.

Nevertheless, a system as such was complicating, or even hindering, the adoption of stronger IP norms and standards desired by developed countries.[902] Indeed, within the WIPO system, developing countries had the opportunity to block the negotiations, due to the one-State-one-vote rule.[903] In fact, this has even paved the way to the stagnation of WIPO's norm-setting processes between the last revision of the Paris and Berne Conventions between 1967 and 1994.[904]

Last, the WIPO regime was not reinforced by a binding enforcement or dispute resolution mechanism.[905] Thus, the WIPO system did not provide many opportunities (which would be in favor of developing countries) for effectively dealing with the signatory States' non-compliance with their treaty-based obligations.[906] A legal regime without an effective enforcement system was deemed futile by developed countries as a system as such would lack the ideological and political structures of dominance (the imperial powers and the imperial) IP law used to have.[907]

Due to these, the developed countries bloc was in search for a more 'favorable' forum that would accommodate their politically- and economically-driven demands.[908] This forum happened to be the GATT, which was dominated by the United States and American corporate powers.[909] Although developing countries were not content with this forum-shifting, especially given that it was undermining WIPO's authority in IP policy- and law-making;[910] developed countries, especially the EU, the United States, and Japan, were enthusiastic about merging the global IPRs

[902] Thomas Cottier and Marina Foltea, 'Global Governance in Intellectual Property Protection: Does the Decision-Making Forum Matter?' (2012) 3 WIPO Journal 139, 141; Seville, 'The Principles of International Intellectual Property Protection: From Paris to Marrakesh' (n 808) 103.
[903] Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (n 785) 941.
[904] Ibid, 942.
[905] Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (n 16) 19–20; Birnhack, 'Trading Copyright: Global Pressure on Local Culture' (n 786) 365–366.
[906] Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 33.
[907] Reichman (n 887) 350.
[908] Cottier and Foltea (n 897) 140; Anette Kur, 'International Norm-Making in the Field of Intellectual Property: A Shift Towards Maximum Rules?' (2009) 1 WIPO Journal 27, 32.
[909] Drahos, 'Developing Countries and International Intellectual Property Standard-Setting' (n 587) 769.
[910] Seville, 'The Principles of International Intellectual Property Protection: From Paris to Marrakesh' (n 808) 100.

governance with the global trade talks.[911] As a result, the Uruguay Round of GATT, held in Punta del Este in 1986, included the negotiations on the trade-related aspects of IPRs within its agenda.[912]

The shift from WIPO to the WTO was an important and a multi-dimensional strategic move. From a political perspective, Christopher May and Susan K. Sell pinpoint the geo-political climate of the time and the ways in which it was reshaping the global power dynamics: On the one hand, the EU was becoming an important economic actor.[913] On the other hand, the Cold War between the Soviet Union and the United States, as well as their allies, had built new trade blocs; nevertheless, with the dissolution of the Soviet Union, many socialist or communist economic regimes undergone liberalization.[914] With the integration of these Eastern and Central European countries to the global trade, new 'export' markets were emerging for developed countries.[915] Thus, it became crucial for the industrialized countries to take measures for eliminating the distortions in the global market and for facilitating the flow of goods and services without any legal barriers.[916] Among these measures was securing the equal protection of IPRs across the globe.[917]

In this context, the Uruguay Round of trade talks were aimed at '[developing] a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods.'[918] Nevertheless, the outcome of the Uruguay Round was more ambitious than this initial

[911] Pugatch (n 891) 73; Seville, 'The Principles of International Intellectual Property Protection: From Paris to Marrakesh' (n 808) 100.
[912] Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (n 785) 944; Seville, 'The Principles of International Intellectual Property Protection: From Paris to Marrakesh' (n 808) 100.
[913] May and Sell (n 886) 161–162.
[914] Ibid.
[915] Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (n 785) 933; May and Sell (n 886) 161–162.
[916] Shi (n 889) 466.
[917] The Agreement on the Trade-Related Aspects of Intellectual Property Rights of 1994, Preamble. Also see e.g., Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (n 785) 939; Seville, 'The Principles of International Intellectual Property Protection: From Paris to Marrakesh' (n 808) 100.
[918] The Agreement on the Trade-Related Aspects of Intellectual Property Rights of 1994, Preamble. Also see e.g., Seville, 'The Principles of International Intellectual Property Protection: From Paris to Marrakesh' (n 808) 100.

aim – hence, more favorable for developed countries, but quite unfavorable for those of the developing. The negotiations extended beyond trademark-related issues and encompassed *all* the existing forms of IPRs.[919] Besides their ongoing efforts to revise the WIPO-administered treaties and to further enhance the level of protection at the WIPO front, developed countries negotiated the effective enforcement of such international IP norms at the Uruguay Round as well.[920]

Just like the aims of the Uruguay Round, the dynamics of the drafting and text-based negotiations were shaped under the influence of developed counties. In the early 1990s, a group of developed countries, mainly the United States, Japan, and the EU, submitted a proposal.[921] This proposal was consolidated into a single text, along with the other proposals submitted by other developed countries, such as Switzerland and Austria.[922] The proposals submitted by developing countries were also given room in the same document – yet, as an alternative *approach* to the IPRs governance, rather than an alternative legal *draft*.[923] Eventually, the composite text that had been crafted by the developed countries alliance was adopted as the TRIPs Agreement in 1994.[924]

Considering the power asymmetries in its negotiation, drafting, and adoption phases; the TRIPs Agreement can be construed as another legal tool of international law which enabled the politically- and economically-powerful States to give primacy to their own needs over those of their 'racialized others' and to impose their own rules upon the rest of the world.[925] Furthermore,

[919] Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (n 785) 954; Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 32.
[920] Seville, 'The Principles of International Intellectual Property Protection: From Paris to Marrakesh' (n 808) 101.
[921] Daniel J Gervais, 'Intellectual Property, Trade & Development: The State of Play' (2005) 74 Fordham Law Review 505, 507–508.
[922] Ibid.
[923] Ibid.
[924] Drahos, 'Developing Countries and International Intellectual Property Standard-Setting' (n 587) 770; Gervais, 'Intellectual Property, Trade & Development: The State of Play' (n 916) 582.
[925] Peter Drahos, 'When the Weak Bargain with the Strong: Negotiation in the World Trade Organization' (2003) 8 International Negotiation 79, 80.

the TRIPs Agreement was only a 'floor', a minimum of acceptable standards, for its lobbyists.[926] Yet, it was already the 'ceiling' for many developing countries, which would have opted for a more limited IPRs protection tailor-made for their national development agenda.[927] Nevertheless, neither the GATT or the WTO were UN agencies sensitive to the HRs discourse, nor the trade talks were much sensitive to development agendas of developing countries. On the contrary, the main concern of the GATT was the liberalization of trade.[928]

That said, it shall be emphasized that the TRIPs Agreement triggered a shift from the IP *regime* set by WIPO, to what Kal Raustiala refers to as, a *regime complex*[929] of IP.[930] According to Raustiala, the notion of 'regime' is defined as 'implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations.'[931] By contrast, *regime complex* is articulated as 'a collective of partially overlapping and even inconsistent regimes [often consist of many agreements drafted and ratified by disparate institutions] that are not hierarchically ordered, and which lack a centralized decisionmaker or adjudicator.'[932] Based on these definitions, Raustiala claims that in a regime complex, new principles and norms are hardly negotiated on 'a clean slate.'[933] On the contrary, a regime complex reinforces the existing structures and 'the political interests these rules have engendered.'[934] Yet, this only further polarizes the interest groups since the path dependency of a

[926] Sell, 'The Dynamics of International IP Policymaking' (n 886) 74.
[927] Ibid 75.
[928] Bruce M Harper, 'TRIPS Article 27.2: An Argument for Caution' (1997) 21 William and Mary Environmental Law and Policy Review 381, 397.
[929] Kal Raustiala, 'Density and Conflict in International Intellectual Property Law' (2007) 40 U.C. Davis Law Review 1021, 1025.
[930] Also see e.g., Laurence R Helfer, 'The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 Yale Journal of International Law 1, 18–20.
[931] Raustiala (n 924) 1025.
[932] Ibid.
[933] Ibid, 1026.
[934] Ibid.

regime complex leads to forum-shopping and the proliferation of new institutions, especially by the marginalized groups.[935]

The controversies regarding the TRIPs Agreement did not stem only from its *travaux préparatoires*, but also from its scope and general context. To begin with, and as mentioned before, unlike the WIPO-administered treaties, the TRIPs Agreement was designed as a comprehensive document encompassing and compiling *all* the existing IPRs within a single multilateral treaty.[936] These rights comprised copyright and related rights, trademark, geographical indication, industrial design, patent, layout design of integrated circuits, protection of undisclosed information as well as the measures to prevent anti-competitive market behaviors.[937]

It may be argued that the norms introduced by the TRIPs Agreement were not ground-breaking since the Agreement, simply, incorporated the WIPO-administered treaties into its operative text by reference.[938] However, such a maneuver left no leeway for the WTO Member States in choosing the WIPO-administered treaties that they would like to commit to or to pick the IPRs that they would like to legally protect.[939] Instead, it imposed a positive obligation on all the Contracting Parties to respect and to protect all the existing forms of IPRs.[940] Besides, the TRIPs Agreement expanded the scope of some of the protectable subject-matter of the existing IPRs.[941]

Second, the TRIPs Agreement set the minimum standards for each form of IPRs, and it obliged the Member States to implement these into their national IP laws.[942] Yet, such minimum standards

[935] Ibid, 1022-1024. For a similar view, please see e.g., Yu, 'The Global Intellectual Property Order and Its Undetermined Future' (n 806) 2.
[936] Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 35.
[937] The Agreement on the Trade-Related Aspects of Intellectual Property Rights of 1994, Art. 9-41.
[938] Ibid, Art. 2(1), Art. 9(1).
[939] Shi (n 889) 466.
[940] Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 35.
[941] Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (n 785) 947; Reichman (n 887) 348.
[942] Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (n 16) 23–24; Peter K Yu, 'International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia' (Social Science Research

takes the existing IP rules and principles of developed countries as a benchmark.[943] As a result, most of the developed countries needed to slightly amend or to make minor or 'cosmetic' changes in their legal frameworks, whereas developing countries faced the need for fundamental changes in their IP laws.[944] Still, the extent of the legal amendments was not the sole problem. The *minimum* standards set by the TRIPs Agreement were quite high for the developing world – thus, the TRIPs system proved that the 'one-size-fits-all' approach to IPRs was merely over-ambitious and unjust.[945]

Regarding this, the developing countries bloc argued that the maximalist approach of the TRIPs Agreement was not incentivizing or promoting development but impeding it.[946] In fact, the TRIPs Agreement was advantaging only 'the exporters of the IP protected goods'[947] and facilitating the transfer of capital from developing countries to developed countries.[948] Nevertheless, as also mentioned above, the TRIPs Agreement not only detached the global IP law-making from the UN mandate, but it also detached the IPRs discourse from the HRs discourse.[949] Due to this, developing countries had to forum-shop to raise their concerns regarding the implications of the TRIPs Agreement on a wide range of HRs issues, including but not limited to the access to information and the right to health.[950] On that note, it shall be admitted that the WTO became sensitive, to a limited extent, to these efforts, especially in 2001, when the Doha Round of global trade talks took

Network 2007) SSRN Scholarly Paper ID 1007054 <https://papers.ssrn.com/abstract=1007054> accessed 12 December 2018.

[943] Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 35.

[944] Kur (n 903) 27–28.

[945] May and Sell (n 886) 168; Anseln Kamperman Sanders and Dalindyebo Shabalala, 'Intellectual Property Treaties and Development' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press 2014) 48; Reichman (n 887) 365; Yu, 'Five Decades of Intellectual Property and Global Development' (n 853) 8.

[946] Raustiala (n 924) 1031; Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 222.

[947] Sell, 'The Dynamics of International IP Policymaking' (n 886) 73.

[948] May and Sell (n 886) 170; Deere (n 787) 1–2; Kamperman Sanders and Shabalala (n 940) 59–60.

[949] Gervais, 'Intellectual Property, Trade & Development: The State of Play' (n 916) 505.

[950] Cottier and Foltea (n 897) 161.

place. This Round was the first time that developing countries' claims regarding development were included in the global trade talks agenda.[951]

Third, the TRIPs Agreement was linked to the WTO's enforcement mechanism.[952] Due to this, the Council of TRIPs had the means to monitor the Member States' compliance with the Agreement.[953] Any incompliance was to trigger the binding dispute resolution mechanism of the WTO, which was enforced by trade-based sanctions.[954]

Last, and most importantly, the TRIPs Agreement constituted the Annex-1C of the Marrakesh Agreement Establishing the World Trade Organization of 1994. In other words, any country wishing to become a Member of the WTO and to have a word in the global trade had to accept the TRIPs Agreement along with the rest of the WTO 'package'.[955] Thus, this approach extensively limited developing countries' possibility to opt-out from the legal regime brought by the TRIPs Agreement.[956]

On that note, Ruth L. Okediji emphasizes that the TRIPs Agreement was a signpost of the change in Western (European) States' perception of non-Western States.[957] Although IP laws and strategies of imperial powers were aimed at securing their colonial markets against other European States; with the adoption of the TRIPs Agreement, the same IP laws and strategies have become tools to protect their economies against the competition from non-Western States.[958] In fact,

[951] Gervais, 'Intellectual Property, Trade & Development: The State of Play' (n 916) 511; Sell, 'The Dynamics of International IP Policymaking' (n 886) 75.
[952] The Agreement on the Trade-Related Aspects of Intellectual Property Rights of 1994, Art. 64.
[953] Birnhack, 'Trading Copyright: Global Pressure on Local Culture' (n 786) 368.
[954] Ibid, Art. 68; Graham Dutfield and Uma Suthersanen, 'The Globalisation of Intellectual Property', *Global Intellectual Property Law* (Edward Elgar Publishing Limited 2008) 37.
[955] Gervais, 'Intellectual Property, Trade & Development: The State of Play' (n 916) 507; Yu, 'International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia' (n 937) 9–10.
[956] Birnhack, 'Trading Copyright: Global Pressure on Local Culture' (n 786) 367; Dutfield and Suthersanen, *Global Intellectual Property Law* (n 827) 32; Shi (n 889) 469.
[957] Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 334–335.
[958] Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 334–335; Ruth L Okediji, 'Legal Innovation in International Intellectual

Okediji's statements can be complemented by giving reference to the imperial resemblance of the TRIPs Agreement and its enforcement mechanism. Indeed, the WTO system can be compared to the discretion of the colonial legislatures to enact IP law responding to their domestic needs. Just like the British Parliament's strict scrutiny and the right to veto colonial legislations that do not comport with the imperial economic agenda,[959] the WTO has secured, by its 'minimum' standards and trade-based sanctions, the opportunity to (not) scrutinize the contracting parties' national legal regimes.

There exist other scholarly views and critique on the same issue. For instance, Meir Perez Pugatch interprets the power dynamics overhauling the contemporary IP system as the 'loss of national sovereignty'[960]; whereas Jane Ginsburg articulates the IP regime imposed by the WTO as a 'supranational code'[961], which Peter K. Yu confirms.[962] Alternatively, and from a race-conscious perspective, it can be argued that the WTO system merely consolidated the already existing *quasi*-supranational structures of the Western (European) dominance.

That said, it shall be clarified that the imperial IP laws had played an important role in the maintenance of Western (European) values and interests via the global IP diplomacy, given that most of the former colonies retained the imperial IP laws and institutions in their domestic legal systems even after the decolonization process.[963] In fact, the imperial laws continued to exist in the former colonies' jurisprudence, mainly because of IP law reforms were not a priority in these

Property Relations: Revisiting Twenty-One Years of the TRIPS Agreement' University of Pennsylvania Journal of International Law 191, 191.

[959] Please see section 2.3.2. in the text.

[960] Pugatch (n 891) 80.

[961] Jane C Ginsburg, 'International Copyright: From a Bundle of National Laws to a Supranational Code?' (2000) 265–290 Journal of the Copyright Society of the U.S.A. 47.

[962] Yu, 'The Global Intellectual Property Order and Its Undetermined Future' (n 806) 5.

[963] Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 335, 339.

newly-found States.[964] Yet, the TRIPs Agreement not only revised the existing rules and standards in accordance with developed countries' aspirations, but also fixated such a Western-centric system into the legal order of the non-Western developing countries bloc.[965] Thus, once more, it confirmed the inherently White structures of ideological, political, and economic structures of the *globalized* IP law.

Before closing this section, it is worth to quote Gervais' words, who interprets the adoption of the TRIPs Agreement as 'the [imposition of the]so-called "North" (...) its then most-advanced set of norms on the "South."'[966] Although the developing countries found themselves integrated in a new world order shaped by the Global North, Peter K. Yu asserts that '[international IP] system is now heading into an arguably uncharted territory where both sides will have to learn (...) how to co-operate with each other (...) while at the same time fighting hard against each other to protect their own interests.'[967]

Despite Yu's positive note on the future trajectories of IP, this section concludes that even if developing countries may have a chance to create alliances and to make their voices heard in the international legal venues, the same does not apply to the sub-nation groups, who have been historically marginalized and stigmatized.[968] Instead, these groups prevail to constitute the non-Western 'others' of the international political and market actors. In sum, the 'Whiteness as [Intellectual] Property'[969] continues to take its toll on the non-Western actors of IP, especially on racialized minorities and indigenous peoples.

[964] Deere (n 787) 37.
[965] Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (n 8) 339.
[966] Gervais, 'Intellectual Property, Trade & Development: The State of Play' (n 916) 509.
[967] Yu, 'The Global Intellectual Property Order and Its Undetermined Future' (n 806) 7.
[968] The multiple oppressions faced by indigenous peoples within the IP domain is analyzed in Chapter III.
[969] By analogy with: Harris, 'Whiteness as Property' (n 12).

2.4. Conclusion

This chapter initiated the application of CRT doctrine to IP law. In doing so, the chapter concentrated on CRT's seminal understanding of law, in reference to Cheryl I. Harris' renowned piece, entitled 'Whiteness as Property.'[970] CRT in general, and Harris in particular, articulate the law as a mechanism that rationalizes and legitimates the materialistic needs and interests of the politically- and economically-powerful groups – or, simply, the ones who hold the *authority*. In light of this argument, the chapter questioned the ways in which contemporary IP law have become a Western-centric normative system that meets the expectations of the Global North – often at the expense of the Global South. To respond this question, it adopted a deconstructionist approach to look at and to map the Western (European) or White roots of not only IP law per se, but also the idea of IP itself.

This deconstructionist historical analysis that the chapter engaged in proved that the idea of IP as well as the IP practices and laws are intellectual and legalistic outputs of the Western (European) reality, hence, the inherently White structures of physical, ideological, political, and economic dominance. The investigation of the interplay of such White power structures with non-Whiteness and IP law confirmed that IP law is neither objective or value-neutral nor it was ever intended to be. On the contrary, the very existence of IP law is an embodiment of the ruling-elite's aesthetic values and impulse to *rule*. Thus, since its early beginnings, IP law serves to the distribution of power and legal rights according to the ruling-elite's economic, ideological, and political agendas.

To achieve this end, the chapter did not focus on the conceptualization of race and racialization per se. Instead, it had a skeptical approach to the taken-for-granted neutrality and objectivity of IP law. It critically assessed the color-blind construct of IP law. It unearthed how IP law has

[970] Ibid.

historically taken Western (European) and/or White ideals – which are deemed to be 'raceless' – as a benchmark and built a legal regime upon such non-neutral presumptions.

That said, it shall be highlighted that this chapter was a pre-requisite to unfolding the Western-centrism and the various racial layers of IP law, as well as to showcasing IP law's active role in protecting the dominant racial groups' authority. Accordingly, this chapter focalized the *process*, rather than the *substantive IP norms* to outline the racial constituents of IP law. Within this context, it identified several groundbreaking events that (re)structured the racialized power dynamics in IP law, which were studied in four sections: The royal *copy-right* privileges, the imperial and colonial IP laws, internationalization of (or the construction of modern) IP law, and globalization of (or the foundation of contemporary) IP law and order.

The first section consolidated the ruling-elite's abuse of power and the manipulative use of law, in order to control the dissemination of the 'approved' content and ideology, and to maintain the political and economic status quo within the British context. The second section explored the gradual expansion of British IP law, respectively, to Great Britain, the United Kingdom, and to all British colonial possessions. It provided an overview of the imperial economic, ideological, and political agenda as well as their infliction upon the colonial territories by means of colonialism and colonial legal transplantation. The third section contextualized the dominant and color-blind narrative of the internationalization of IP law, by offering the often-overlooked historical background to the negotiation and adoption of the Paris and Berne Conventions of 1883 and 1886. It not only exposed the racialized cultural hierarchies and valorization schemes deeply ingrained in the international IP regime, but also pinpointed the racialized power asymmetries that overhauled the international IP diplomacy at the time. Finally, the last section explained the globalization of the WIPO-administered treaties and the IP regimes stemmed therefrom, mainly

by the adoption of the TRIPs Agreement of 1994. It showcased the crystallization of the existing racialized cultural and power asymmetries, due to the disparate levels of economic development and political representation of former colonizers and their former colonies.

On that note, and in brief, this chapter employed the race-conscious lens of CRT, in order to unravel the Western-centric or White presumptions and norms inherited by IP law. It can be concluded that the face-neutral construct of the global IP regimes ruled by WIPO and the WTO are subtly racialized, and they uphold the priorities and materialistic interests of the Western (European) powers while further entrenching the innately White structures of dominance.

The next chapter complements the arguments and findings of this one. It concentrates on the consequences of the construction and consolidation of IP law as a Western-centric legal project. This is a crucial task for the Critical Race IP scholarship since such an effort would connect this debate with another main pillar of the CRT doctrine: The (social and legal) construction of race – or the oppositional binaries of 'Whiteness as [Intellectual] Property.'[971] Therefore, the next chapter turns the race-conscious lens of CRT to the interaction of the Western-centrism of international (law and) IP law with the intellectual creators and creations of the non-Western States and sub-State groups, especially those of indigenous peoples – where the presence of race and the racialization of non-Western (or, non-White) groups within the IP realm become (even more) visible.

[971] By analogy with: Harris, 'Whiteness as Property' (n 12).

Chapter III

Terra Nullius of International Intellectual Property Law: Construction and Disenfranchisement of Folklore and Traditional Knowledge

3.1. Introduction

The previous chapter initiated the analysis of IP law through the prism of CRT. It argued that IP law originated as a Western (European) project tailored for the materialistic interests of the Western (European) imperial powers. The chapter proved that IP law not only invests in the construction of the 'Western' or 'White' identity, but also rationalizes and legitimates the materialistic interest of the economically- and politically-dominant Western (European) actors. It operates as an indicator for the allocation of power and legal rights according the economic and political agendas of the Western (European) authorities and market actors. To achieve these conclusions, the chapter studied the dominant perspectives and narratives of IP law, and it investigated the racial constituents inherent in the Western-centrism of the face-neutral IP regimes. It exposed the colonial roots of IP law and the racialized power dynamics and cultural hierarchies that underpin the global IP diplomacy.

This chapter continues to unfold the racial layers of IP law. Whereas the previous chapter exposed the latent racial baselines of IP law, by exploring the racialized cultural and power hierarchies that govern the global IP policy- and law-making processes; this chapter questions and aspires to unravel the consequences of such a Western-oriented norm-setting mechanism. Therefore, this chapter focuses on and exposes the Western (European) assumptions and cultural values integrated into the global(ized) IP regimes, particularly into those of the international copyright and trademark frameworks. Furthermore, the chapter outlines the adverse impact of such Western (European) perspectives imputed in the global(ized) IP norms and standards on the

intellectual creators and creations of non-Western States and sub-state groups. Hence, this chapter no longer studies the global IP *diplomacy* and the interaction of such a Western-oriented *process* with the political and economic power of non-Western States. Instead, it shifts its vantage point to the *substantive IP rules and principles*. It maps the interplay of the innately racialized construct of IP law with the racialized intellectual creators and creations – precisely, with former colonies and their folklore, as well as with indigenous peoples and their TK.

That said, the scope of the chapter shall be clearly contoured in advance to the investigation of its topic. As mentioned earlier within the dissertation, there is a vast body of literature dedicated to studying the interaction of the existing IP system with folklore and TK.[972] A considerable amount of this scholarship favors the legal protection of folklore and TK by means of IP law; hence, they aspire to justify the compatibility of these non-Western forms of intellectual creations with IP law or the feasibility of their inclusion within the scope of conventional IPRs.[973] Nevertheless, it is not the intention of this chapter to explain how the existing copyright and trademark regimes can be utilized by non-Western States and sub-state groups to *empower* their cultural identities and expressions. On the contrary, this chapter is devoted to critically assess and to illustrate how the existing IP regimes, due to the racial information fed into them, can become destructive tools at the hands of the Western (European) authorities and market actors, and how these tools can *disempower* non-Western stakeholders, as well as their cultural identities and intellectual creations.

In this frame, this chapter asserts that the color-blind, yet inherently Western-centric, construct of international IP law is built upon racialized cultural hierarchies and valorization schemes, which were born out of the overarching racial thinking introduced by Western (European) modernity,

[972] Please see the 'Introduction'.
[973] Ibid.

colonialism, and the 'civilizing' missions. It is argued herein that the main reasons underpinning such hierarchies and schemes are the Western (European) aesthetic standards integrated into the IP norms and standards, which reflect 'the nineteenth-century evolutionary assumptions about the relative status of different cultures.'[974] As a result, international IP law not only imposes a dichotomous thinking based on antithetical pairings, but it also favors Western (European) modes of intellectual creativity and creatorship over those of the non-Western. Accordingly, IP law sets its legal standards by taking the Western (European) readings of creativity and creatorship as a benchmark. This process, on the one hand, produces racially-charged oppositional binaries, such as: Culture v. folklore and TK. On the other hand, this system protects Western (European) cultural creations, whilst denying legal protection to folklore and TK – which ultimately contours the 'legal protection v. public domain' binary paradigm.[975]

To substantiate these arguments, the chapter opens with the exploration of the Western (European) assumptions built into IP law. In doing so, the chapter places both these assumptions and their interaction with IP law in a greater economic, historical, political, and social context. It outlines the proliferation of the idea of race in the Enlightenment era, as well as the genesis of cultural racism in the Romantic era in parallel to that of the myth of 'the Romantic author', which underscores the contemporary copyright regime. The chapter, then, moves to the interplay of these Western (European) constructs, the overarching racial thinking of Western (European) modernity, and the racially-charged IP concepts and norms with non-Western intellectual creators and creations. This interaction is studied under two different titles, according to the disparate legal characteristics of the actors involved and the different nature of the policy questions raised from

[974] Olufunmilayo B Arewa, 'TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks' (2006) 10 Marquette Intellectual Property Law Review 155, 159–160.
[975] Madhavi Sunder, 'The Invention of Traditional Knowledge' (2007) 70 Law and Contemporary Problems 97, 100.

the clash of their interests. Therefore, the chapter, first, focuses on non-Western States and the construction of folklore in contrast to Western (European) modes of creativity. Subsequently, it focalizes sub-state and sub-nation groups, namely indigenous peoples, and explains the construction of TK, once again, in contrast to Western (European) intellectual creations.

The chapter concludes that the *globalized* IP regimes carry along racial information which, on the one hand, accentuates the Western (European) cultural 'superiority' and, on the other hand, deteriorates non-Western cultural identities and forms of creativity. Therefore, the global IP system not only legitimizes the appropriation and exploitation of the formerly colonized countries' and peoples' intellectual labor and property, but it also pushes folklore and TK to the margins of the globalized IP frameworks. In this sense, the global(ized) IP regimes serve as tools to consolidate the colonial power structures and the White structures of dominance that rule IP law, while subordinating non-Western identities, States, peoples, and intellectual creations.

3.2. Western (European) Cultural Assumptions Built in Intellectual Property Law: Racialized Cultural Hierarchies and Valorization Schemes

The notion of IP and the global(ized) IP regimes, as already explained in the previous chapter, were invented by the Western (European) imperial powers.[976] Due to this, Western (European) powers have been historically dominating the global IP policy- and law-making processes, whereas the non-Western powers have been (and still are) underrepresented, undermined, or unheard in the global IP fora. For the same reason, the legal concepts, norms, and frameworks of IP were shaped and developed according to the dominant Western (European) actors' economic, political, and social agendas. As a consequence, the global(ized) IP regimes prioritize the materialistic interests,

[976] Please see sections 2.3.2. and 2.3.3. in Chapter II.

needs, and expectations of Western (European) States, intellectual creators, and market actors, whilst overlooking those of the non-Western stakeholders.

Nevertheless, the historical affiliation of the international IP law with discrimination cannot be reduced to the racialized power asymmetries that have been governing the global IP policy- and law-making mechanisms. As rightfully articulated by Ruth L. Gana, '[the global IP regime endorsed by] the TRIPs Agreement at best prioritizes intellectual property, and at worst, imposes a model assumed to be *objectively* the *"right form"* of intellectual property protection.'[977] In fact, Gana's statement can be taken a step further. It can be argued that this ostensibly objective and value-neutral model has a clear and racially-charged normative understanding of the potential right owners, legally protectable subject-matters of IPRs, and the eligibility criteria for legal protection.[978]

The existence of such subjective and race-based presumptions can be explained with the infusion of Western-centric assumptions, primarily, of authorship into the global IP system.[979] Indeed, the Western (European) powers have historically, politically, and socially constructed the 'author' in the White man's image[980] – from where the Western idea(l)s of intellectual creativity, intellectual work, IP, and IPRs have flowed. Hence, and again as mentioned by Gana, this 'global' regime centered around the Western (European) readings of authorship and intellectual creativity subordinates – or even excludes – the intellectual creators and creations of the societies 'whose intellectual and creative experiences have not been formed around Gutenberg's printing press nor defined by printed works.'[981] Though it is self-evident in Gana's statement, it shall be clarified that

[977] Gana (n 8) 140. Emphasis added.
[978] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 46–48.
[979] Gana (n 8) 128, 140.
[980] See: Johns (n 53).
[981] Gana (n 8) 218.

the societies which are being pushed to the margins of the global IP regimes happen to be non-Western nations as well as non-Western sub-nation communities.

Therefore, following up with the previous chapter's investigation of the racialized power dynamics inherent in the global IP diplomacy, this chapter in general, and this sub-chapter in particular, illuminates the consequences of such power asymmetries. It shall be noted that there is harmony in the contemporary (and especially in the critical) IP scholarship on the acknowledgement of the inherent Western-favoritism of IP norms and standards. Though the vast majority of this line of literature concentrates on the disempowerment of the Global South through the WTO-administered TRIPs Agreement,[982] there is also a group of scholars who mainly focus on the Western (European) cultural assumptions embedded in and carried along with the global(ized) IP norms and standards.[983] This camp of scholars seem to agree on the idea that 'many elements of the current IP regime are grounded in the [taken-for-granted and often unquestioned] Western cultural [assumptions]'[984] that are widely-shared in Western societies.[985] These assumptions un/consciously influence IP law and integrate the implicit Western (European) ideologies into the global(ized) IP regimes.[986] A critical and particularly a race-conscious reading of these Western cultural models reveal the racially-charged societal and cultural beliefs and ideologies imputed in notions such as civilization, culture, creativity, science, and progress – which

[982] Please see the 'Introduction'.
[983] See e.g., Birnhack, 'The Idea of Progress in Copyright Law' (n 8); Anupam Chander and Madhavi Sunder, 'The Romance of the Public Domain' (2004) 92 California Law Review 1331; Megan M Carpenter, 'Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community' (2004) 7 Yale Human Rights & Development Law Journal 51; Olufunmilayo B Arewa, 'Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property' [2006] Case Legal Studies Research Paper No. 04-19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=596921> accessed 16 April 2021; Madhavi Sunder, 'IP^3' (2006) 59 Stanford Law Review 257; Arewa, 'Intellectual Property and Conceptions of Culture' (n 8); Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8); Vats (n 33).
[984] R Keith Sawyer, 'The Western Cultural Model of Creativity: Its Influence on Intellectual Property Law' (2011) 86 Notre Dame Law Review 2027, 2030.
[985] Ibid.
[986] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 45.

cumulatively derived from the race-based and racially-biased ideologies of the eighteenth-century Europe.

In this context, this sub-chapter argues that such Western-centric readings of culture, science, creativity, and progress are deeply-rooted in the eighteenth-century, especially in two consecutive eras of Western (European) modernity that reshaped the European Continent: The Enlightenment and Romanticism. Before the investigation of the racial investments of these eras and their ideologies in the realm of IP, it is worth to have a brief look at their historical origins and core values.

The Enlightenment emerged as a critical response to dogmatism, the scholastic thought it imposed on the society, and the political consequences stemmed therefrom.[987] Thus, the Enlightenment established its ideology on modernist debates regarding 'the controversies about the arts and sciences and about ideas of progress and reason.'[988] It embraced liberal ideals and promoted rational thought and human reasoning.[989] In this regard, the use of reason was acknowledged as the key for humankind 'to understand the universe and improve their own condition.'[990]

However, the Enlightenment's celebration of science, progress, and the methodical ways to construe the universe,[991] eventually, paved the way to the invention of race and the classification of humankind over a Western (European) scale.[992] This reality, on the one hand, resulted in the

[987] Robert Wokler, 'Enlightenment, Continental', *Routledge Encyclopedia of Philosophy* (1st edn, Routledge 2016) <https://www.rep.routledge.com/articles/thematic/enlightenment-continental/v-1> accessed 17 May 2021.
[988] Ibid.
[989] Ibid.
[990] Encyclopedia Britannica, 'Enlightenment' (*Britannica Academic*) <https://academic.eb.com/levels/collegiate/article/Enlightenment/32680> accessed 17 May 2021.
[991] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 43.
[992] Robert Wokler explains that the Enlightenment ideology's 'purely instrumental grasp of scientific rationality' and its modernist perceptions of race did not remain as the relics of the past, but established the foundations of the Nazi ideology and led to the genocidal practices during the WWII. Robert Wokler, 'Enlightenment, Continental', *Routledge Encyclopedia of Philosophy* (1st edn, Routledge 2016)

positioning of the Western (European) race at the pinnacle of this racial hierarchy.[993] On the other hand, it not only enabled the construction of 'civilization' and 'progress' as projections of the reality of the Western (European) race, but it also 'justified' the colonial practices and the 'civilizing' missions inflicted upon the 'lower' races.[994] In brief, it would not be wrong to argue that the Enlightenment ideology and scientific methods – once combined with colonialism – planted the seeds of biological and cultural racism.

As to Romanticism, it can be portrayed, to some extent, as a reaction against the Enlightenment ideology, mainly because of its critique and rejection of purely rational thinking and the rational order imposed by the Enlightenment.[995] Indeed, the Romantic ideology was inspired by the 'irrational' – or, in other words, the imaginative and emotional.[996] Due to this, Romanticism is characterized predominantly with arts, literature, and architecture; given that its ideology revolved around notions such as the individual, personal intellect, creativity, and the genius of the artist, who was depicted as 'a supremely individual creator.'[997] Yet, Romanticism originated within an atmosphere of racial thinking that had been introduced by the Enlightenment. Hence, while concentrating on and appreciating arts and science, it still focused on and appraised the European reality and intellectual creativity.[998]

Considering its appraisal of arts and literature, Western (European) Romanticism socially constructed several notions such as author, authenticity (or, originality), intellectual work, and authorial property rights – which, even today, resonate in the fundamental tenets and principles of

<https://www.rep.routledge.com/articles/thematic/enlightenment-continental/v-1> accessed 17 May 2021.
[993] See e.g., Hannaford (n 7).
[994] Ibid.
[995] Encyclopedia Britannica, 'Romanticism' (*Britannica Academic*)
<https://academic.eb.com/levels/collegiate/article/Romanticism/83836> accessed 17 May 2021.
[996] Ibid.
[997] Ibid.
[998] Ibid.

contemporary IP law.[999] In this respect, this chapter argues that IP law takes such Western (European) constructs as universal, objective, neutral, and globally valid frames, despite their cultural- and temporal-specificity. It is further argued that the legal system premised upon such aesthetic values and subjective constructs not only rationalizes and legitimizes these subjective values, but also essentializes them as objective and value-neutral *benchmarks* to set the global IP rules and principles.

Based on these, this sub-chapter focuses on, respectively, the Enlightenment and Romantic ideologies, and it exposes the racial investments of these Western (European) modes of thinking into the seemingly objective and neutral construct of the global(ized) IP concepts, norms, and principles. In doing so, the sub-chapter demonstrates that these IP norms and principles create racialized valorization schemes and cultural hierarchies in IP law, by giving primacy to Western models of creativity over those of the non-Western. This mechanism subordinates non-Western actors, this time, not by silencing or suppressing the voices of the non-Western powers in the global IP diplomacy, but by largely allocating their cultural creations into the (Western) public domain.

Before unraveling the Enlightenment's investment in the racial baselines of contemporary IP law, it shall be clarified in advance that the Western (European) imperial powers' endeavors to cast the foundations of an international IP system falls into the historical era[1000] which, according to Ivan Hannaford's scholarly work, witnessed the peak of the idea of race and the emergence of theories dedicated to contextualizing race: The time period between 1870 and 1914.[1001] It shall also

[999] See: Peter Jazsi, 'On the Author Effect: Contemporary Copyright and Collective Creativity' (1992) 10 Cardozo Arts & Entertainment Law Journal 293; William R Cornish, 'Authors in Law' (1995) 58 Modern Law Review 1; Martha Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics* (Columbia University Press 1994); Carpenter (n 977); Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8).
[1000] As already explained in detail within the previous chapter, the major international IP treaties, namely the Paris and Berne Conventions, were negotiated and entered into force, respectively, in 1883 and 1886. For a detailed account of the negotiations of these major IP treaties under the shadow of colonialism, please see section 2.3.3. in Chapter II.
[1001] Hannaford explains that a conscious idea of race became visible in the post-Reformation era only in the early 1880s. Hannaford (n 7) 187.

be clarified that the same era concurs with the (early) beginnings of the Enlightenment in Europe and extends to the proliferation of the modern thought in the eighteenth-century.

As indicated earlier, this transition from the scholastic thought to modernism not only celebrated science, but also introduced a scientific approach to construe the universe.[1002] In fact, in 1619, René Descartes proclaimed that 'the universe was a material mechanism – a vast system explicable mathematically by the power of human reason.'[1003] Dedicated to this ideology, the world-renowned Enlightenment philosophers embraced a systematic approach to various philosophical paradigms, in order to establish abstract, normative, and objective theories.[1004] Among these endeavors were the exploration and theorization of human species and race – which Hannaford articulates as 'an original and *imaginative* contribution to modernity.'[1005]

Race was initially coined as a term to refer to 'a group of persons, animals, or plants connected by a common descent or origin.'[1006] Nevertheless, the idea of classifying living organisms into races had extended to humankind as well.[1007] Many Western (European) scientists, including but not limited to François Bernier, Carolus Linnaeus, and Johann Friedrich Blumenbach, contributed to this modernist endeavor of categorizing human beings over a scale from the *superior* to *inferior* groups.[1008] In doing so, each of these scientists identified disparate criteria, such as geography, physical traits, *skin color*, morality, and *cognitive faculties*.[1009] Despite the discrepancies in the

Considering that it is not the aim of this chapter to map the evolution of the idea of race, but to shed light upon the implications of such racial thinking on the international IP norms and standards, this chapter focalizes the time period, which coincides with the drafting and negotiations of the Paris and Berne Conventions of 1883 and 1886.

[1002] For a brief description of modernity and its implications on the legal domain, please see section 1.2.1. in Chapter I.

[1003] Hannaford (n 7) 202.

[1004] Ibid, also please see section 1.2.1. in Chapter II.

[1005] Hannaford (n 7) 187. Emphasis added.

[1006] Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42) 93.

[1007] Hannaford (n 7) 203; Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (n 42) 92–93.

[1008] Hannaford (n 7) 203–213.

[1009] Ibid, 203, 204, 207-208.

criteria they used, their classifications shared a common ground: Ranking the White European race at the highest rung of this hierarchical ladder; hence, constructing the Western (European) and/or White race as the most advanced one, by associating the 'White' identity with literary, artistic, technological, and religious superiority and achievements.[1010]

These hierarchies of modernity, which mirrored the Western (European) readings of civilization and progress, eventually, opened a new terrain for racial thinking. The new 'trend' in racial classifications was no longer to be based on biological differences of humankind, but on the *cultural* distinctions of groups of people. This shift from biological racism to cultural racism was triggered by Charles Darwin's evolutionary theory.[1011] With the help of Darwinian theory, modernist claims regarding the uniqueness of national cultures were combined with 'the contemporary [Western (European)] pride in technological progress arising from literacy and education.'[1012] Due to this, human history, or the history of human *progress*, was formulated as a single, linear, and gradual evolutionary development that initiates from 'savagery' and aims to achieve (a Western-style) 'civilization.'[1013]

Based on these assumptions, the White and/or European race was constructed as the most mechanical, the most scientifically- and culturally-advanced group.[1014] Yet, the races labelled as 'savage' were depicted as the ones who lack the imagination and cognitive abilities to invent.[1015] They were constructed as 'imitators' who *borrow* from the nature in order to survive.[1016] Within this scheme, Australian Aboriginal people were ranked at the *lowest* level, whereas other

[1010] Ibid, 231.
[1011] Gana (n 8) 114–115.
[1012] Ibid, 115.
[1013] Arewa, 'Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property' (n 977) 36–37; Arewa, 'Intellectual Property and Conceptions of Culture' (n 8) 12.
[1014] Gana (n 8) 124.
[1015] Ibid, 115.
[1016] Ibid.

indigenous peoples, such as Polynesians and '*Red* Indians', were above the Aboriginal people – but below African and Papuan races.[1017] In brief, whereas this rhetoric subjectively portrayed the Western (European) and/or White creativity as an *original* and sophisticated one, it reduced the intellectual and creative capabilities of non-Western peoples to simplicity, *purposeless* creations, or pure *imitations* of the nature.[1018]

These racial hierarchies of the modern thought – and even the *exact* racial categories forged by such racial thinking – were projected upon the modernist readings of culture. Indeed, literacy has gained great importance; in fact, it was even recognized as a *yardstick* to distinguish 'civilized people from a herd of savages who are incapable of knowledge.'[1019] Ultimately, the promotion of literacy as a medium of 'civilization' transformed racism, in Hannah Arendt's words, to 'the main ideological weapon of imperialistic politics'[1020] which ratified not only colonialism, but also the 'civilizing' missions in colonized territories.[1021] Therefore, it is asserted herein that the scientific methods of the Enlightenment philosophy and the racially-charged ideology of Western (European) modernity established not only racialized power hierarchies, but also racialized *cultural* hierarchies.

Given the contextualization of the idea of race by reference to cultural and technical advancement of the racialized groups, the interaction of the modern racial thought with IP law gains a new dimension: IP law is the primary legal regime to regulate the creative process, and to control the access to and use of knowledge.[1022] Thus, it would not be wrong to present IP law as

[1017] Ibid.
[1018] Gana (n 8) 124; Chidi Oguamanam, 'Local Knowledge as Trapped Culture: Intellectual Property, Culture, Power and Politics' (2008) 11 The Journal of World Intellectual Property 29, 33.
[1019] Gana (n 8) 114.
[1020] Hannah Arendt, 'Race-Thinking before Racism' (1944) 6 The Review of Politics 36, 41.
[1021] Arewa, 'TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks' (n 968) 155; Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 3–4.
[1022] Birnhack, 'The Idea of Progress in Copyright Law' (n 8) 3–4.

the gatekeeper of *progress* – which is *the* term that has been pivotal to classify humankind and to construct race.

Regarding this, Olufunmilayo B. Arewa explains that the racialized cultural hierarchies and the relative ranking of the Western (European) and non-Western races have not only underscored the common beliefs held by the society, but they also legitimized the interests of the dominant political actors and 'justified' the subordination of the non-Western actors of IP law.[1023] In fact, the consolidation of Western (European) readings of culture, creativity, and progress as such have been the main indicators to identify what is *worth* – or *advanced* enough – to be protected by IP law.[1024]

Yet, the 'civilized v. primitive' oppositional binary introduced by the Enlightenment philosophy is not the only paradigm that has impacted the global(ized) IP norms and standards. In addition to the colonialist motifs of the former and its relativist construction of culture and progress, there were other Western (European) philosophical influences which indirectly, yet drastically, impacted the interaction of IP law with the non-Western forms of intellectual creations and creators: Romanticism.

Though Romanticism was a reaction to the Enlightenment ideology and its appraisal of scientific methods,[1025] there is no concrete evidence that it denied the modernist construction of race, racialized cultural hierarchies, and the 'civilizing' missions introduced and enabled by the Enlightenment philosophy. Instead, it can be argued that Romanticism built upon modernity's construction of the Western (European) and/or White identity and culture. In doing so, the

[1023] Arewa, 'Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property' (n 977) 30; Arewa, 'TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks' (n 968) 160.
[1024] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 45.
[1025] Encyclopedia Britannica, 'Romanticism' (n 989).

Romantic ideology forged the archetypes of the contemporary IP concepts, which not only promoted the propertization and exploitation of intangible intellectual creations, but also identified the initial right owners and set the parameters of the protectable subject-matters of IPRs.[1026] These concepts include, primarily, authorship – from which derived the other fundamental concepts and tenets of copyright norms, such as: Originality, fixation of intangible intellectual creations on a tangible medium, the 'idea and expression' dichotomy, and even the indicator to set the term of copyright protection. Cumulatively, these constructs characterized intellectual creations and IPRs as exploitable and, more importantly, as individualistic commodities.

That said, the modernist construction of authorship and the role that the modern author plays in the IP realm calls for special attention.

3.2.1. A Post/Modernist Analysis of the Origins of Copyright Law

The *modern* perceptions regarding the notion of authorship have first been put under a critical – or, more correctly, a *postmodern*[1027] – lens by Michel Foucault in his scholarly work, entitled 'What is an author?'[1028], published in 1969.[1029] For his purposes, Foucault condemns ahistoric efforts to expose the true meaning of authorship. He deconstructs authorship by placing it in a greater historical, social, and political context. In such a setting, he articulates authorship as 'the *privileged* moment of *individualization* in the history of ideas, knowledge, literature, philosophy, and the sciences.'[1030] He further points out to the materialism that underscores the concept and argues that

[1026] Angela R Riley, 'Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities' (2000) 18 Cardozo Arts & Entertainment Law Journal 175, 179; Daniel Burkitt, 'Copyrighting Culture - the History and Cultural Specificity of the Western Model of Copyright' [2001] Intellectual Property Quarterly 146, 146.
[1027] Cornish, 'Authors in Law' (n 993) 6.
[1028] See: Michel Foucault, 'What Is An Author?' in James D Faubion (ed), Robert Hurley (tr), *Aesthetics, Method, And Epistemology*, vol 2 (The New York Press 1998).
[1029] Martha Woodmansee, 'On the Author Effect: Recovering Collectivity' (1992) 10 Cardozo Arts & Entertainment Law Journal 279, 279; Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 46.
[1030] Foucault (n 1022) 205. Emphasis added.

authorship did not emerge from natural law, but it was socially constructed by the society and served as an indicator for entitlements over intellectual works.[1031]

Though being thought-provoking, Foucault's reading of authorship has been a matter of criticism for a group of legal scholars, mainly because it did not fully take into account the long-established legal conceptualization of the term.[1032] Yet, Foucault's inquiry and portrayal of the author function have opened the floor to scholars who share the ambition of revealing the origins of the social and cultural construction of authorship.[1033] Among this cohort of scholars, Martha Woodmansee pioneers the exploration of the origins of the concept, by tracing its genesis back to the German Romanticism in the eighteenth-century.

According to Woodmansee's historical account, the modern understanding of authorship was fabricated by a group of writers, who had chosen writing as a profession and desired to earn a living from their writings.[1034] Woodmansee explains that this emerging class of 'professional' writers were seeking a justification for the legal protection of their intellectual labor; hence, they depicted the author as 'an individual who is the sole creator of an "original" work.'[1035] This person was a *solitary* intellectual creator whose creative power flows from his own unique genius, whose creativity is detached from those of his predecessors, whose creative works depend on his solitary acts of origination (or, production), and who deserves the full credit for his work.[1036]

[1031] Riley (n 1020) 183.
[1032] See e.g., Cornish, 'Authors in Law' (n 993) 6.
[1033] Peter Jazsi and Martha Woodmansee, 'Preface' (1992) 10 Cardozo Arts & Entertainment Law Journal 277; Jazsi (n 993) 293–294.
[1034] Woodmansee (n 1023); Woodmansee (n 993) 36; Burkitt (n 1020) 146.
[1035] Woodmansee (n 1023) 280; Mark Rose, 'The Author in Court: Pope v. Curll (1741)' (1992) 10 Cardozo Arts & Entertainment Law Journal 475, 476.
[1036] Jazsi (n 993) 294–295; Woodmansee (n 993) 35–37.

Though the Romantic construction of the author proliferated from the German economic, historical, and social reality; this image was actually built upon the British Romanticism.[1037] This image was later projected upon many other jurisdictions, including those of the United Kingdom and the IP systems developed under the influence of the Anglo-Saxon copyright tradition.[1038]

In respect to the British reality, Daniel Burkitt explains that the eighteenth-century England witnessed the emergence of the Romantic author due to a number of intertwined reasons: The industrial revolution and the capital it granted upon the burgeoning middle classes, on the one hand, startled the dissolution of the feudal order.[1039] On the other hand, these events facilitated the proliferation of a new literary and educated class, who could afford and would invest in literature and arts.[1040] These incidents not only decreased British authors' reliance on patronage, but also created a discourse around the authorial *autonomy* and property rights of the author on his intellectual work.[1041] It was also in this historical setting that the commodification of intellectual labor became visible and the propertization of intellectual creations was justified. In fact, this alignment of intellectual labor and property derived from John Locke's writings, compiled under the title *The Two Treatises of Government.*[1042] According to Locke, every individual is the

[1037] Mark Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' (1988) 23 University of California Press 51, 62.
[1038] As already mentioned before, British IP concepts and norms have been influential for the United States and the Commonwealth of Australia. However, the remainder of this chapter continues analyzing the British economic, historical, legal, and social reality in order to deconstruct the modern readings of authorship, given that the British legal reality was the 'origins' of the common law's response to the romantic author.
The construction of authorship in the American and Australian realities and the imprint of this concept on the legal systems of these two States are examined in the next chapter, where the normative meanings imputed in authorship are unfolded and substantiated with concrete examples extracted from case studies and case law.
[1039] Burkitt (n 1020) 147–148.
[1040] Ibid, 148.
[1041] Ibid.
[1042] See: Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Georgetown Law Journal 287, 297–298; Edwin C Hettinger, 'Justifying Intellectual Property' (1989) 18 Philosophy & Public Affairs 31, 36–39; William Dibble, 'Justifying Intellectual Property' (1994) 1994 UCL Jurisprudence Review 74, 76.

proprietor of his own *person*; hence, he owns the labor of his own body and the work of his hands, only if he mixes whatever he removes from the state of nature with his labor.[1043]

Yet, William R. Cornish notes that the institutionalization of the Romantic author in British IP law was not achieved by professional authors.[1044] Instead, the Stationers' Company lobbied for a copyright system centered around the *sole* author and the initial proprietor of a work, since the publishers were mistrusted at the time and required the 'respectability' of the authors – from whom they can acquire the copyright of authorial works.[1045] In respect to this, Mark Rose states that the Stationers' Company 'so perfectly incorporated the Lockean discourse with its assumptions about the priority of the individual and the sanctity of property.'[1046] It shall also be mentioned that even though the Stationers' Company could not secure a perpetual copyright via this argumentation, the Lockean labor theory has become one of the dominant theories to justify the propertization of IP and the presentation of the author as the 'proprietor' of his work.[1047] It shall be noted that it was also the writings of Locke and especially his *Two Treaties of Government* that rested the foundations of the doctrine of discovery, hence, the appropriation of the ancestral lands of indigenous peoples, by removing *terra nullius* as such out of the state of nature and turning it into private property.[1048]

Regardless of the underpinnings of the proliferation of the authorship discourse in the British reality, the Statute of Anne of 1710 was the first legal regulation to introduce authors' rights into the Western (European) IP laws.[1049] The Statute reflected the presence of an identifiable author

[1043] Ibid. See: John Locke, *Two Treatises of Government* (Peter Laslett ed, Cambridge University Press 1988).
[1044] Cornish, 'Authors in Law' (n 993) 3–4.
[1045] Ibid.
[1046] Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' (n 1031) 59.
[1047] Ibid, 56.
[1048] Robert A Williams, Jr, 'Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (2nd edn, Temple University Press 2010) 99–100. See: Locke (n 1037) 327–339.
[1049] Please see section 2.3.1. in Chapter II.

who holds the initial title of the work and holds the ultimate 'authority' over the work.[1050] Furthermore, the Romantic author resonated in a landmark copyright case decided by the British courts: In 1769, the *Millar v. Taylor* case,[1051] in which the court was to decide upon whether and when does the author has a common law right to property on his work, the court established a strong moral link between the author and his work.[1052] The court ruled that 'a literary composition belonged to the individual author because it constituted an embodiment of that individual. The basis of literary property is not just the sweat of the author's brow, but the imprint of his personality.'[1053] Eventually, this notion, as well as the Romantic ideals and individualism imputed therein, were carried along with the Imperial Copyright Act of 1911 into the colonial territories and their legal systems.[1054]

Though it is not possible nor intended herein to provide a comprehensive analysis and an historical account of the authorship-oriented research and debates started with Foucault's theorem, the role that Foucault attributes to authors is also worth mentioning: According to Foucault, while creating their own works, authors set the rules and standards for the production of prospective works.[1055] Though Foucault's claim about standard-setting is centered around the idea of 'initiating discursive practices,'[1056] it would not be wrong to claim that the Romantic construction of 'author' has not only sacralized a certain mode of creativity and the features attributed to the Western (European) and/or White author, but it also contoured the global(ized) IP norms. In fact, and as

[1050] Ibid.
[1051] *Millar v. Taylor* (1769) 4 Burr. 2303.
[1052] It shall be noted that the court decision in the *Millar* case was overruled with the landmark case, *Donaldson v. Becket* in 1774. Though the individualism attributed to the author remained the same, the legal characteristic of the authorial rights and their acquisition were altered with the latter case. *Donaldson v. Becket* (1774) Hansard, 17 (1774): 953-1003; Benjamin Kaplan, 'An Unhurried View of Copyright: Proposals and Prospects' (1966) 66 Columbia Law Review 831, 838.
[1053] Burkitt (n 1020) 151–152.
[1054] Please see sections 2.3.2. and 2.3.3. in Chapter II.
[1055] Foucault (n 1022) 217.
[1056] Ibid.

mentioned earlier, the imprint of the Romantic author can be detected in the overarching features of IP law, such as individualism, exploitation, and commodification.[1057] Besides, it also underscores and formulates the legal construction of the initial copyright owners, the eligibility criteria for legal protection (such as originality and fixation), and the legally protectable subject matter (as embodied in the 'idea and expression' dichotomy).[1058]

To begin with, the Romantic ideals fed into the solitary genius of the author detaches the base of his knowledge, his intellectual faculties, and his creative process from the state of the art, the collective knowledge of the society, the works of his predecessors, and the contributions of other 'craftsmen' or 'craftswomen' involved in the cultural production process.[1059] Hence, it infuses 'individualism' into the fabric of IP law.

According to R. Keith Sawyer, individualism is best understood once compared to collectivism. Sawyer describes collectivist cultures as societal entities in which group members have a strong sense of and loyalty to the social body.[1060] In such societies, individual members of the group identify themselves over the group; thus, the group identity and interests are given primacy over those of the individual members of the group.[1061] In contrast, individualist cultures center the individual and their interests, rather than the group to which they belong.[1062] This appears as a consequence of the loose ties between the individual and the social body.[1063]

[1057] See e.g., Daniel J Gervais, 'Traditional Knowledge and Intellectual Property: A TRIPS-Compatible Approach' (2005) 2005 Michigan State Law Review 137, 144–145.
[1058] Woodmansee (n 1023) 279.
[1059] Woodmansee (n 1023); Cornish, 'Authors in Law' (n 993); Sawyer (n 978) 2042.
It shall be indicated herein that the Romantic construction of the author has fabricated the gendered layers of copyright law as well. The (White) male dominance in the conceptualization, justification, and codification of copyright law and the essentialization of male forms of creativity have not only marginalized non-Western modes of creatorship and creativity, but also those of the feminine as well. For a brief explanation and a synopsis of the feminist critique of IP law, please see sub-chapter 1.5. in Chapter I.
[1060] Sawyer (n 978) 2028–2029.
[1061] Ibid, 2029.
[1062] Ibid.
[1063] Ibid.

While appreciating individualism and disentangling the author's genius and creative power from the Divine, the modern thought disregarded cumulative creative processes and broke the ties of the individual creators with the society and the common cultural heritage.[1064] Hence, it can be argued that this assumption requires the existence of an identifiable author, in order to bestow copyright upon him and to initiate the exploitation of the work.

Second, the modernist construction of the Romantic author inherently determines the features of 'worth-to-be legally-protected' works. Among these features is originality. Woodmansee explains that the notion of originality also derives from the *sole* genius of the Romantic author.[1065] This notion was primarily pronounced by the British Romantic authors, such as William Wordsworth and Edward Young.[1066] Whereas Wordsworth acknowledged originality as 'producing something utterly new, unprecedented, or in radical formulation'[1067]; Young considered it as literary 'mastery'.[1068] These idealistic views about originality influenced German philosophers and writers, including but not limited to Emmanuel Kant, Johann Gottfried Herder, Johann Gottlieb Fichte, and Johann Wolfgang Goethe.[1069]

Premised on such assumptions, originality was acknowledged as, in Angela R. Riley's words, '[breaking] with all the *tradition* in writing.'[1070] On that account, James Boyle explains that the Romantic understandings of authorship underlined and valued the author's capability of '[revising] the form'[1071], in which originality 'became the watchword of artistry and the warrant for [IPRs].'[1072]

[1064] Riley (n 1020) 181–182.
[1065] Woodmansee (n 993) 39.
[1066] Ibid.
[1067] Ibid.
[1068] Ibid.
[1069] Ibid.
[1070] Riley (n 1020) 182. Emphasis added. Also see: James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Harvard University Press 1997) xiv; Sunder, 'The Invention of Traditional Knowledge' (n 969) 109–110; Madhavi Sunder, 'From Free to Fair Culture' (2012) 4 WIPO Journal 20, 22.
[1071] Boyle (n 1064) 54.
[1072] Ibid.

Though transformed in time and reached a lower threshold than viewed by Wordsworth, the modernist constructions of originality as such stands in the Berne Convention as the main eligibility criteria to identify the copyrightable works.[1073]

Third, the economic, historical, and social setting in which the Romantic image of the author emerged has imputed another Western (European) assumption of intellectual creatorship into the criteria for legal protection: Fixation. As mentioned by Gana, the copyright discourse was originated from and revolved around the printing technology.[1074] As a consequence, the fixation of intellectual creations on a tangible medium has been an unquestioned trait of copyrightable works.[1075] In fact, fixation has always been vital for the exploitation, commercialization, and propertization of the print culture and the published works.[1076] This pre-requisite was already evident in the Statute of Anne of 1710. Indeed, the Statute's authorial rights were centered around the published works – and the Statute was largely silent about the legal status and the possible rights that derive from unpublished ones.[1077] According to this, authors gained the statutory copyright only with the publication of their work.[1078] This taken-for-granted pre-requisite also instituted in the first international copyright treaty, namely the Berne Convention, among the eligibility criteria for copyright protection.[1079]

Finally, the last Western (European) assumption that shall be mentioned herein is the 'idea and expression' dichotomy, which also has flowed from the Romantic author and embedded in the global(ized) copyright frameworks of copyright. According to Rose's historical analysis of the

[1073] The Berne Convention for the Protection of Artistic and Literary Works of 1886, Art. 2(3).
[1074] Gana (n 8) 218.
[1075] Sunder, 'The Invention of Traditional Knowledge' (n 969) 109.
[1076] Kaplan (n 1046) 836; Peter Jazsi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) 2 Duke Law Journal 455, 834.
[1077] Bently and Kretschmer, 'Statute of Anne, London (1710)' (n 667).
[1078] Ibid.
[1079] The Berne Convention for the Protection of Literary and Artistic Works of 1886, Arts. 3(1)(b), 3(3), 6.

authorship, the need to distinguish idea from expression stemmed from the writings of another Romantic German public figure.[1080] It was Fichte who, in his book, *Proof of the Illegality of Reprinting: A Rationale and a Parable*,[1081] identified two aspects of a published work: The physicality of the work, and the idealistic part embodied in such physical object.[1082] Fichte further divided the ideal aspect of a work in two other components: The content, which he restricted to the ideas presented in the work; and the form, which he articulates as 'the combination of phrasing and wording in which the ideas are presented.'[1083] Therefore, Fichte argued that whereas the content of a book was not legally protectable, the form was – due to the reasons that it contained and constituted the imprint of the author's personality and authentic expression.[1084]

To this day, the 'idea and expression' dichotomy not only set the scope of copyright protection, but it also stood as the main feature of copyright protection that distinguishes it from patent protection. Besides, it can be argued that this tenet of copyright law brings copyright closer to trademark law, due to the role that it plays in fabricating, fixating, and circulating a (or, any) message.[1085]

3.2.2. A Post/Modernist Glance at Trademark Law

Trademark law responds to completely different needs than those of copyright law, due to being addressed to different beneficiaries and being built upon different policy goals. Trademark refers to a registered mark that distinguishes the goods and services of a business enterprise from those others.[1086] Unlike copyright (or patent), trademark law does not require the mark to be original (or

[1080] Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' (n 1031) 76.
[1081] Ibid.
[1082] Ibid.
[1083] Ibid.
[1084] Ibid.
[1085] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 48.
[1086] *WIPO Intellectual Property Handbook* (2nd edn, World Intellectual Property Organization (WIPO) 2004) 68 para. 3.318, 69 paras. 2.322–2.323.

novel), but to be distinctive.[1087] Thus, it serves to protect consumers by enabling market transparency regarding the origins of the goods and services.[1088] Furthermore, it minimizes the consumer search cost and reduces the risk of consumer confusion regarding the provider of the goods and services available in the market.[1089]

Although the consumer interest is at the center of trademark law, the actual beneficiaries of trademark law are the market actors who engage in trade and offer goods and services to the marketplace.[1090] Indeed, trademark law vests the exclusive right to use the registered mark in business transactions and the right to prevent third parties from using identical or similar marks for identical and similar goods and services for which the trademark is registered.[1091]

Though they are closely related with corporations and the marketplace, rather than the advancement of culture and science;[1092] trademarks have the potential and the power to convey a message, to alter the societal realities, to fabricate – even racially-charged, white-washed, or falsified – social meanings and imagery, and to integrate such social constructs and structures into the fabric of the society.[1093] In this sense, just like the disentanglement of idea from expression within the copyright context, trademark law is also not concerned with whether a mark is culturally (in)sensitive, inappropriate, or historically wrong.

As rightfully articulated by Rosemary J. Coombe, the information societies are constantly introduced to goods and services that bear trademarks, which comprise of 'commodified forms of

[1087] Ibid.
[1088] Ibid.
[1089] *WIPO Intellectual Property Handbook* (n 1080) 68, para. 2.310-2.320.
[1090] Ibid.
[1091] Ibid, 84 para. 2.444.
[1092] Ibid.
[1093] Ann Bartow, 'Trademarks of Privilege: Naming Rights and the Physical Public Domain' (2006) 40 University of California, Davis Law Review 919, 929–930.

cultural representations.'[1094] Even though these trademarks may not have any 'organic' meaning that have been collectively constructed by the society over time, these signs and symbols enter the common imagery of the society via corporations' "meaning-making [or 'cultural recoding' practices] (…) [aimed at adapting] signs, text, and images to their own agenda.'[1095] In respect to this, Ann Bartow explains that *naming* practices, including the branding of goods and services with trademarks, communicate information about a certain society and its historical, cultural, and political heritage.[1096] In this sense, Bartow also attributes a cultural dimension to trademarks and adds that trademarks 'affect public perceptions and permeate the collective public conscience.'[1097]

Nevertheless, just like copyright law, trademark law does not operate in a socio-historical and political vacuum.[1098] As opposed to its face-neutral legal framework, trademark law has been under the influence of the general public discourse as well as its racial classifications; hence, it has historically promoted racially-charged information and racial hierarchies.[1099] In fact, Bartow claims that the current naming practices, including the legal norms and principles on trademarks, often privilege the interests of 'the wealthy, male, and [W]hite.'[1100]

The racially-charged 'meaning-making' practices of corporations, as ratified and legalized by the Western-centric trademark regimes, have a couple of major and intertwined consequences, especially on the racialized cultural identities of historically marginalized non-Western groups: First, these practices, at their 'best', pave the way to phenomena known as *cultural imperialism* and *cultural (mis)appropriation*. Cultural imperialism refers to 'the threat of assimilation or the

[1094] Rosemary J Coombe, 'Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue' (1990) 69 Texas Law Review 1853, 1863.
[1095] Ibid.
[1096] Bartow (n 1087) 929.
[1097] Ibid, 932.
[1098] Greene, 'Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship' (n 510) 435.
[1099] Ibid; Sunder, 'From Free to Fair Culture' (n 1064) 25.
[1100] Bartow (n 1087) 934.

loss of cultural distinctiveness,'[1101] due to the (mis)use or mis(appropriation) of mainly the non-Western or indigenous cultures.[1102] As to cultural (mis)appropriation, it refers to the phenomenon of using a distinct cultural element out of its original context, hence, causing the distortion of its authentic meaning, as well as the exploitation of such cultural elements without free, prior, informed consent of its traditional holders.[1103] In order to identify the problematic aspects of this phenomenon, Coombe refers to the 'colonial imaginary.'[1104] According to Coombe, cultural (mis)appropriation stems from the lingering colonial mindset that denies, especially, indigenous peoples the status of being currently existing human beings who can narrate their own reality and engage in a dialogue with the dominant groups in the society.[1105] Furthermore, such a racial thinking reduces them to archetypes or 'mythical' beings who stem from the imagination of the society, authors, creators, or trademark owners.[1106]

Second, the existing trademark regime that is built upon the Western commercial relations and interests can further invest in the colonial and racial imagery, by providing the legal basis for the registration of racial stereotypes, derogatory marks, and even racial slurs as trademarks.[1107] In fact, the IP domain holds many notorious examples of racially insensitive trademarks that were registered and that are still in use. These trademarks include but not limited to the following: The 'Aunt Jemima' and 'Uncle Ben' words and images, which evoke the racial and stereotypical house servants – or, slaves; the inherently racist trademarks, such as 'Redskins' and 'N***** Hair'; the

[1101] Madhavi Sunder, 'Intellectual Property and Identity Politics: Playing with Fire' (2000) 4 Journal of Gender, Race and Justice 69, 73.
[1102] Ibid, 91.
[1103] Ibid, 73-34, 91-92.
[1104] Coombe, 'Cultural and Intellectual Properties' (n 484) 9.
[1105] Ibid, 10-11.
[1106] Ibid, 11.
[1107] Greene, 'Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship' (n 510) 437–438. Also see: Daphne Zografos Johnsson, 'The Branding of Traditional Cultural Expressions: To Whose Benefit?' in Peter Drahos and Susy Frankel (eds), *Indigenous People's Innovation: Intellectual Property Pathways to Development* (Australian National University Press 2012) 147.

'Crazy Horse' trademark, which consists of the name of a Native-American chieftain and inappropriately attributes his name to alcoholic beverages, hence, dishonors the Chief and his legacy.[1108]

Regardless of the message that trademarks carry and circulate, the legal protection bestowed upon such corporate commodities interact with the public space and the common knowledge of the society in the following ways: On the one hand, just like copyright law, trademark law gives primacy to the economic interests of the Western (European) market actors over the identity and cultural survival, predominantly, of non-Western and indigenous communities.[1109] It not only 'justifies' the meaning imputed within the trademark, but also commodifies such cultural insignia and monopolizes its dissemination by the corporation that 'owns' the trademark.[1110] On the other hand, the registration of the mark and the acquisition of exclusive IPRs over the trademark fixates and 'freezes' the (negative) cultural connotations attached to the relevant insignia, whilst constantly feeding the common imager with such racial information.[1111]

As a consequence, these racial practices within the trademark domain lead to what Madhavi Sunder calls 'the struggles over discursive power – the right to create and control cultural meaning.'[1112] In this sense, it can be argued the global IP diplomacy has become a new venue for the historically subordinated groups, including racial and ethnic minorities and indigenous peoples, to claim exclusive legal rights to control their cultural representation and public image, and to

[1108] See e.g., Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (n 28) 199–204; Collier-Wise Kelsey, 'Identity Theft: A Search for Legal Protections of the Indigenous Intangible Cultural Property' (2010) 13 Great Plains Natural Resources Journal.
[1109] Coombe, 'Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue' (n 1088) 1866.
[1110] Ibid.
[1111] Ibid.
[1112] Sunder, 'Intellectual Property and Identity Politics: Playing with Fire' (n 1095) 70.

prevent their pejorative or falsified images portrayed by third parties, including Western (European) intellectual creators and media conglomerates.[1113]

To summarize and conclude, the contemporary global IP frameworks are products of the diplomatic relations established amongst Western (European) States, which were drafted and negotiated in an atmosphere of racial thinking – and in the shadow of colonialism.[1114] Thus, both copyright and trademark laws hold the potential to further entrench the colonial mindset, to consolidate the presumption of the Western (European) 'superiority', and to engage in racially-charged practices. In fact, IP norms and standards, on the one hand, locate the Western (European) culture, values, and ideals at the pinnacle of a racialized cultural hierarchy, and they reflect the Western (European) readings of authorship and creativity. On the other hand, the same IP regime places non-Western cultures and the non-Western perceptions of creativity at a subordinate level in this hierarchical ladder.

The dominance of the Western (European) political and market actors in the IP realm had (and continues to have) two major implications on the non-Western actors of IP: First, these racialized cultural hierarchies, and the Western (European) cultural assumptions fed into IP law resulted in the 'invention' of two categories, in which non-Western modes of creativity and creations are clustered: Folklore and TK.

Second, the Western (European) assumptions of the 'worth-to-be legally-protected' intellectual works have marginalized the non-Western readings of creativity and excluded non-Western modes of creations from the scope of 'global' IP law.[1115] As a result, both folklore and TK have been largely placed in the (Western European) public domain, where they are vulnerable

[1113] Ibid 71; Sunder, 'IP^3' (n 977) 266–275.
[1114] Arewa, 'TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks' (n 968) 162.
[1115] Ibid, 161-163.

to being (mis)used, (mis)appropriated, and commodified by anyone – and, once again, by virtue of (the Western-centric assumptions interwoven into) IP law.[1116]

That said, the remainder of the chapter analyzes the interaction of the global(ized) Western IP norms and standards, respectively, with folklore and TK. In doing so, the chapter adopts a deconstructionist approach to explain the historical and legal context in which folklore and TK were conceived. It specifically focuses on the input of the Western (European) assumptions of creativity, the international legal order, and the statism of the international diplomacy into the construction of these concepts. The chapter also outlines the systematical marginalization and stigmatization of folklore and TK by means of the Western-centric of IP norms and standards.

3.3. Western Norms v. Non-Western Cultures: Construction of 'Folklore'

Just like the idea of race, the construction of 'folklore' has its origins in the Western (European) modern thought and the evolutionary theories of the Enlightenment era. According to Ivan Hannaford's historical account, it was another Enlightenment philosopher, namely Johann Gottfried von Herder, who introduced a new attribute to categorize humankind into races: *Kultur*.[1117] For Herder, culture was a broad concept consisting of 'language, religion, education, inherited traditions, folk songs, ritual, and speech'[1118] – or, briefly, a wide spectrum of artistic and scientific elements.[1119] Based on this broad description of the term, Herder attributed additional features to culture: Culture was acknowledged as the organic bond between an individual and the *Volk*.[1120] In the same vein, culture was considered also the main indicator to distinguish one *Volk* from other *Völker*.[1121]

[1116] Arewa, 'TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks' (n 968) 161–163; Sunder, 'The Invention of Traditional Knowledge' (n 969) 103, 109.
[1117] Hannaford (n 7) 230–231.
[1118] Ibid, 231.
[1119] Ibid.
[1120] Ibid.
[1121] Ibid.

Hannaford notes that Herder's acknowledgement of *Volk*-lore, or the folk's culture, has been a ground-breaking theory.[1122] Since then, this theory was adopted by the successors of Herder to classify different populations of the World.[1123] Therefore, folklore was fashioned with ethnic or national characteristics. Due to this, the study of folklore was considered an effective medium to construct different communal identities.[1124] These explanations of Hannaford are confirmed by Ágnes Lucas-Schloetter in her scholarly work focalizing folklore. Lucas-Schloetter notes that the first recorded use of 'folklore' in the literature was in 1846.[1125] The concept was first used by an English archeologist, W. G. Thoms, as an umbrella term to cumulatively refer to 'the traditions, customs, and superstitions of the members of a community.'[1126] According to Lucas-Schloetter's historical account, after Thoms' use of the term, folklore has become a constituent of almost all languages – along with the meanings imputed in it by the Western (European) ideology.[1127]

This new culture-oriented trend in the exploration of humankind and social identities were followed by the emergence of a new academic discipline in the early nineteenth-century: Folklore studies.[1128] The motivation behind the folklore studies was defined as the exploration of the intellectual history, or the history of cultural *progress*, by unearthing 'the archaic customs and beliefs [of the prehistoric human beings and communities].'[1129] Due to this, earlier folklore studies concentrated 'exclusively upon rural peasants, preferably uneducated, and a few other groups relatively untouched by *modern* ways (e.g., gypsies).'[1130]

[1122] Ibid.
[1123] Ibid.
[1124] Encyclopedia Britannica, 'Folklore' (*Britannica Academic*) <https://academic.eb.com/levels/collegiate/article/folklore/34758> accessed 22 May 2021.
[1125] Lucas-Schloetter (n 4) 345.
[1126] Ibid.
[1127] Ibid.
[1128] Ibid.
[1129] Ibid.
[1130] Encyclopedia Britannica, 'Folklore' (n 1118). Emphasis added.

At the same time, the original definition of folklore had undergone reconstruction: The new definition stood for '[the] sum total of *traditionally* derived and orally or *imitatively* transmitted literature, material culture, and custom of *subcultures* within predominantly literate and technologically advanced societies.'[1131] Though it was initially conceptualized to refer to a certain group of people's *culture*, the modern thought and its hierarchical modes of thinking reduced folklore to *subculture* and transformed it into *an obsolete stage* of culture.

Whereas Herder's Romantic approach to classify human species and social identities failed to dissolve the racialized cultural hierarchies from the Western (European) modern thought, the scholarly efforts that followed invested in and solidified such an overarching racial thinking. In fact, the folklore studies transformed folks' culture into the main determinant to hierarchically rank human species, once more, over a Western (European) valorization scheme.[1132] This scheme, as already mentioned before, was inherently racialized, due to being based on the Enlightenment idea(l)s about human progress: A single and linear evolutionary chain, which starts with 'savagery' and progressively evolves into 'civilization'.[1133] Within this context, folk was portrayed as a *primitive* group of people; while folklore was constructed as the *natural*, hence not original, unsophisticated, primitive state of culture.[1134]

In respect to this, Olufunmilayo B. Arewa explains that: '[t]he evolutionary progression of humans towards civilization was often seen as accompanied by the regression of folklore.'[1135] Indeed, its acknowledgment as 'subculture' has reduced folklore to a retrograde form of knowledge and artistic expression, which civilized nations were expected to lose along their way

[1131] ibid. Emphasis added.
[1132] Lucas-Schloetter (n 4) 233.
[1133] Arewa, 'Intellectual Property and Conceptions of Culture' (n 8) 11–12.
[1134] Hannaford (n 7) 191; Paul Kuruk, 'Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States' (1999) 48 American University Law Review 83, 93 *supra* note 42.
[1135] Arewa, 'Intellectual Property and Conceptions of Culture' (n 8) 12.

in cultural progress.[1136] For the same reason, the modern folklorists established the idea that the 'civilized' and developed Western (European) countries do not hold folklore anymore since folklore could exist only in the earlier stages of the cultural evolution of humankind.[1137]

Based on these, this sub-chapter argues and aims to prove that such inherently racial prejudices against folklore[1138] and its subtle degradation to subculture continues to have implications on the realm of IP. The global(ized) IP regimes, which were established by the former colonizers of the Global North, treat folklore in two, yet equally disparaging, ways: On the one hand, these regimes tend to construct folklore as the cultural *heritage* of humankind and place it in the (Western European) public domain.[1139] On the other hand, the same regimes associate folklore, often solely, with the formerly colonized, non-Western, 'less advanced' countries, which comprise the developing countries bloc – or, in other words, the Global South. Despite their differences at the surface, both attitudes are driven by the same motives and lead to the same results: The Western (European) assumptions of creativity fed into the global(ized) IP law and the incompatibility of such idea(l)s with non-Western models of creativity; hence, the marginalization of folklore within the IP discourse and its exclusion from the existing IP frameworks – which make folklore vulnerable to commercial exploitation, distortion, and non-consensual appropriation by third parties.

[1136] Arewa, 'TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks' (n 968) 161; Arewa, 'Intellectual Property and Conceptions of Culture' (n 8) 11–12.
[1137] Arewa, 'Intellectual Property and Conceptions of Culture' (n 8) 12.
[1138] In order to unfold this argument, it shall be clarified that the term 'race' herein does not only refer to the so-called people of color, but also the White and/or Western/European people who are often deemed 'raceless'. (For the justification of this articulation of race, please see the 'Introduction'.) Hence, this sub-chapter is premised on the following argument: Just like the racial identities, culture was deemed 'raceless', due to being forged in accordance with the Western (European) assumptions and idea(l)s of progress; whereas folklore was no longer defined with the 'civilized' Western (European) culture, due to being associated with the non-Western peoples who have not yet reached the Western 'civilization' milestone.
[1139] Also see: Erica-Irene Daes, 'Intellectual Property and Indigenous Peoples' (2001) 95 Proceedings of the Annual Meeting (American Society of International Law) 143, 146.

In line with its argument, the sub-chapter begins by explaining the interaction of folklore with the Western-centric global copyright and trademark regimes that were established, mainly, by the Berne and Paris Conventions of 1883 and 1886, and the TRIPs Agreement of 1994. In doing so, the sub-chapter embraces a historical and race-conscious approach, in order to contour the clash of Western (European) IP norms and standards with non-Western forms of intellectual creations. Subsequently, it explains the reasons behind and the consequences of the allocation of folklore to the (Western European) public domain, while unraveling the Western-centrism and 'the romance'[1140] of the public domain. Then, the sub-chapter turns its race-conscious lens to the (partially successful) initiatives of WIPO, in cooperation with the UNESCO, in response to the developing countries' request to provide IP protection to folklore.

The acknowledgment of folklore either as a primitive stage in the Western (European) cultural progress, or as the knowledge of merely non-Western countries, reveals itself in two intertwined ways in the global IP diplomacy: First, folklore was excluded from the scope of the major international IP instruments. Neither the Paris and Berne Conventions nor the TRIPs Agreement explicitly refer to folklore. Once read within the historical, social, and political background presented in the previous chapter, this shall not come as a surprise – especially given the motivations that underpin such treaties: Providing legal protection to Western (European) authors and creators in the external realm, including colonial territories.[1141] Hence, the focus of this system was centered around the economic gain and market share of the Western (European) stakeholders, rather than those of the non-Western.

However, even the Decolonization Movement, the adherence of newly independent non-Western States to the global IP talks, or the transformation of WIPO into a specialized agency of

[1140] Chander and Sunder (n 977).
[1141] Please see section 2.3.2. in Chapter II.

the UN could have changed this reality. As evident in the Convention Establishing the World Intellectual Property Organization of 1967 (as amended in 1979), WIPO's approach to IP has not diverged from the original one and remained Western-oriented.[1142] In fact, a critical analysis of the interplay of folklore with the global(ized) copyright and trademark regimes not only clearly depicts the incompatibility of these phenomena, but also reveal folklore's trajectory, as a non-Western mode of creativity, within the Western-centric copyright and trademark domains.

3.3.1. Copyright v. Folklore

The reasons that underscore the systematic marginalization of folklore within the IP domain can be traced back to the legacy of Romanticism. As mentioned before, the globalized IP regimes reflect the image of the Romantic author.[1143] However, folklore does not comply with the Romantic idea(l)s that define the notion of author (or the initial IPRs owner) as well as the eligibility criteria for legal protection, such as originality, fixation, and the 'idea and expression' dichotomy. This further complicates the determination of the term of protection to be granted to folklore.

To begin with, the Berne Convention's copyright protection framework is designed for the identifiable and individual author(s).[1144] Although this is not explicitly mentioned within the operational text of the Convention, the regulation within Article 3 reveals this presumption, due to focalizing notions such as nationality and habitual residence of its potential beneficiaries.[1145] The

[1142] Among the 'Definitions' covered in Article 2(iii), the Convention contours the definition of IP, by indicating that IP includes right pertaining to literary, artistic and scientific works; performances of performing artists, phonograms, broadcasts; inventions, scientific discoveries; industrial design, trademark and the like; protection against unfair protection, and other rights resulting from the intellectual activities in the industrial, scientific, literary or artistic fields. The Convention Establishing the World Intellectual Property Organization of 1967, Art. 2(viii).

[1143] Please see 3.2.1. in the text.

[1144] Berta Esperanza Hernández-Truyol and Stephen J Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York University Press 2009) 218–219; Caroline Joan S Picart and Marlowe Fox, 'Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalisation of Traditional Knowledge and Expressions of Folklore: Part I' (2013) 15 International Community Law Review 319, 333.

[1145] The Berne Convention for the Protection of Literary and Artistic Works of 1886, Art. 3: '(1)The protection of this Convention shall apply to: (a) authors who are nationals of one of the countries of the Union, for their works, whether published or not; (b) authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.

provision stipulates that the legal protection envisioned by the Convention applies only if the authors are *nationals* or *residents* of a Member State of the Berne Union.[1146] Additionally, the article extends legal protection to authors who are not nationals, but who have *first published* their work in one of the Berne Union States.[1147] Apart from the emphasis on criteria such as nationality, residency, and the first publication; the article also introduces individual traits into the definition of 'published works'. According to this, only the works published with the *consent* of their authors are considered 'published' and included within the scope of the Convention.[1148]

Whereas the criteria envisioned by Article 3 may not constitute obstacles for the protection of certain folkloric works, for instance for the Grimm Brothers' collection of folk tales; the need to identify the author(s) of a folkloric work complicates the protectability of folklore, as it is understood in the non-Western States. In the non-Western context, folklore has no individual authors.[1149] Instead, it is associated with a nation or a group of people; hence, it is collectively created and held.[1150] Along the same line, folklore does not belong to a single citizen of the State or a single member of the community, but it is accepted to belong to the nation or the community per se.[1151] Additionally, the long-lasting existence of folklore in such societies endorses further hardship in tracing the folkloric works back to their originators.[1152] Even if that was possible, the

(2) Authors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country.
(3) The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. (…) (4) A work shall be considered as having been published simultaneously in several countries if it has been published within thirty days of its first publication.'

[1146] The Berne Convention for the Protection of Literary and Artistic Works of 1886, Art. 3(1).
[1147] Ibid, Art. 3(2).
[1148] Ibid. Art. 3(3).
[1149] Marc Perlman and others, 'From "Folklore" to "Knowledge" in Global Governance: On the Metamorphoses of the Unauthored', *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective* (The University of Chicago Press 2011) 115.
[1150] Dutfield (n 3) 242–243; Lucas-Schloetter (n 4) 386.
[1151] Riley (n 1020) 191.
[1152] Ibid.

consensual publication criteria regulated within the same article would be quite hard to fulfil: As already admitted by WIPO itself, quite a large portion of folklore has been exploited by the Western (European) powers[1153] – which was a 'natural' outcome of colonialism and the 'civilizing' missions. Yet, neither the dissemination of such information can be recognized as consensual, nor the exhibition of folklore in the museums, libraries, and archives can be acknowledged as publication.[1154]

Second, the legally protectable 'work' of the Romantic author is deemed to be *original*, due to flowing from the author's unique genius.[1155] This common belief has been consolidated in the contemporary copyright regime as well.[1156] Owing to this, it is widely-accepted in the normative copyright frameworks that a work shall be the author's own intellectual creation; in other words, it shall not be copied from anywhere else, but originate from the author's own intellectual process.[1157] Though the Berne Convention does not define 'originality', this requirement is presented in Article 2(3) of the Berne Convention. This article stipulates that derivative works (in other words, the works that are not independent from an original work, such as translations) can be protected as *original* works, only if they do not infringe copyright in the *original* work.[1158]

Nevertheless, originality, as understood in international IP law, does not accommodate the collective authorship or communal creativity that conceives folklore. Given that folklore is deeply-

[1153] 'Background Brief No. 9: Documentation of Traditional Knowledge and Traditional Cultural Expressions' (World Intellectual Property Organization (WIPO), 2016).
[1154] Ibid.
[1155] Riley (n 1020) 177.
[1156] Ibid.
[1157] See e.g., Burton Ong, 'Finding Originality in Recreative Copyright Works' in Catherine WNg, Lionel Bently and Guiseppina D'Agostino (eds), *The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver* (Hart Publishing 2010) 255–256; Deming Liu, 'Of Originality: Originality in English Copyright Law: Past and Present' (2014) 36 European Intellectual Property Review 376, 376–377. Also see: Elizabeth F Judge and Daniel J Gervais, 'Of Silos and Constellations: Comparing Notions of Originality in Copyright Law' (2009) 27 Cardozo Arts & Entertainment Law Journal 375.
[1158] The Berne Convention for the Protection of Literary and Artistic Works of 1886, Art. 2(3).

rooted in the history of a nation or a group of people, its existence goes even back than the copyright regime and its originality requirement.[1159] Besides, folklore rejects individual creatorship and the unique genius attached to it; instead, it depends on an impersonal, continuous, and traditional production of intellectual creations, often by the 'successive elaborations'[1160] of an idea or text by the members of the community, through the consecutive repetition of such content.[1161] Therefore, the originators of folklore do not act in their own name, but on behalf of the community to which they belong.[1162] In doing so, their creative power is often bound by the truthful transmission of the lore; that said, folkloric works are not deemed to be an 'original' one, as understood in the Western (European) copyright tradition, but a *re-production* of the existing and previous work(s) that are aimed at transmitting the core values of the community.[1163]

Third, and as previously highlighted by Ruth L. Gana, the legal norms and frameworks of copyright have emerged from and evolved around the Gutenberg printing-press and the Western (European) printing traditions.[1164] As a consequence of this, copyright has been historically associated with works that are fixed on a tangible medium. Although the Berne Convention leaves the decision of whether to include fixation among the eligibility criteria for legal protection to the discretion of the Member States,[1165] the common law countries and several civil law countries often consider fixation as a pre-requisite for copyright protection.

[1159] The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action of 1985, Introductory Observations, para. 10.
[1160] Riley (n 1020) 188.
[1161] The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action of 1985, Introductory Observations, para. 10; Picart and Fox (n 1138) 334.
[1162] Lucas-Schloetter (n 4) 384–385.
[1163] Ibid.
[1164] Gana (n 8) 218.
[1165] The Berne Convention for the Protection of Literary and Artistic Works of 1886, Art. 2(2).

Nevertheless, a large portion of folklore has been created and transmitted from one generation to another through oral traditions.[1166] Besides, fixation was seldom a desired form of creation for the custodians of folklore since it is considered that the material form cannot grasp the complexity of folklore and the message it conveys.[1167] As a result, the fixation requirement automatically excludes a great amount of folklore from the scope of copyright protection.[1168] It further imposes a Western-centric model of creation upon the non-Western creators and requires them to abandon the traditional ways of creating, if they wish to be part of the *global* IP community.[1169]

In fact, the oral transmission of folklore and its incompliance with the fixation requirement can be associated with another tenet of the global(ized) copyright regime: The 'idea and expression' dichotomy. Though this tenet has not been made clear within the Berne Convention, the TRIPs Agreement crystallizes this norm: 'Copyright protection shall extend to expressions and not to ideas (…).'[1170] Whereas it is relatively easier to distinguish form and content in the Western (European) models of intellectual creations, it can be argued that these two components are often found intertwined in folklore. In other words, the way that the information is transmitted can also be a constituent of the information itself – which is mostly the case in rituals and initiations.[1171] Hence, the convergence of the insignia and its symbolism in folklore[1172] contradicts with the 'idea and expression' dichotomy consolidated in the global(ized) copyright frameworks – which ultimately appears as another obstacle for folklore to be legally protected by copyright.

[1166] Dutfield (n 3) 250; Lucas-Schloetter (n 4) 384–385; Picart and Fox (n 1138) 335.
[1167] Riley (n 1020) 196–197.
[1168] Picart and Fox (n 1138) 335.
[1169] Riley (n 1020) 195.
[1170] The Agreement on the Trade-Related Aspects of Intellectual Property Rights of 1994, Art. 9(2).
[1171] Kamal Puri, 'Preservation and Conservation of Expressions of Folklore: The Experience of the Pacific Region' (UNESCO and WIPO 1997) 5; Riley (n 1020) 195.
[1172] Puri (n 1165) 5.

Last but not least, the Romantic author's image has been a determinant in the global(ized) copyright regime for setting the term of legal protection. In fact, this principle has been consolidated withing Article 7(1) of the Berne Convention. According to this regulation, the term of copyright protection to be granted to works covered by the Berne Convention, in principle, lasts during the lifetime of the author and at least fifty years post-mortem.[1173]

Nevertheless, criteria such as 'first publication' and 'first exploitation', or indexing the duration of legal protection onto the authors life-time do not serve for the purposes of folklore – given the absence of an identifiable and individual author.[1174] Besides, the regulation within Article 18(1) stipulates that the Berne Convention applies only to the works which have not fallen into the (Western European) public domain at the time of the Convention's entry into force.[1175] Article 18(2) clarifies that the Berne Convention does not have a retrospective effect either.[1176] Once combined with the long-lasting existence of folklore, these regulations, once more, crystallize that folklore is not protectable under the international copyright regime.

Based on these, it can be concluded that the racially-charged readings and conceptualization of folklore by the Western (European) powers prevent folklore, in Gana's words, to fit in 'the right form of legal protection'[1177] set and imposed by the major international treaties. However, it shall be noted that, the incompliance of folklore with the consolidated IP framework, hence, its marginalization by means of international IP law is not restricted to copyright law. The same structures of marginalization and the undermining of non-Western stakeholders' needs, and

[1173] The Berne Convention for the Protection of Literary and Artistic Works of 1886, Art. 7(1).
[1174] von Lewinski (n 4) 478; Lucas-Schloetter (n 4) 389.
[1175] The Berne Convention for the Protection of Literary and Artistic Works of 1886, Art. 18(1).
[1176] Ibid, Art. 18(2).
[1177] Gana (n 8) 140. Internal quotation marks removed.

expectations can be detected in folklore's relationship with the established trademark regime as well.

3.3.2. Trademark v. Folklore

As mentioned earlier, trademarks have a close-knit relationship with the public sphere and the common imagery of the society.[1178] Accordingly, the interplay of trademark law with folklore can be investigated in reference to the 'discursive power', or the right to control the cultural meaning communicated by a trademark, by taking into consideration the occasions in which trademark has been used by Western (European) market actors to disempower non-Western countries, communities, and other non-Western stakeholders: Cultural imperialism, cultural (mis)appropriation, and the registration and use of racially (in)sensitive marks.[1179]

To begin with, the beneficiaries of trademark protection are business enterprises which offer goods and services to the global or national markets.[1180] In other words, trademark norms and principles are not addressed to regulate the creative space (with which copyright is concerned), but the commercial space. Due to this, trademark protection can only come into play if folklore is privatized, propertized, and ready to be exploited as an intangible or tangible commercial commodity.[1181] Even if the trade-related complications are resolved, still trademark protection does not offer any solution to communal ownership of trademark.[1182] Therefore, it can be argued that the Western (European) individualism embedded in the IP law at large, once more, constrains the accommodation of the IP-related needs and expectations of non-Western stakeholders, this time, in the trademark law domain.

[1178] Please see section 3.2.2. in the text.
[1179] Ibid.
[1180] Ibid.
[1181] Andrea Radonjanin, 'Folklore, Human Rights and Intellectual Property' in Paul LC Torremans (ed), *Intellectual Property Law and Human Rights* (3rd edn, Kluwer Law International BV 2015) 501.
[1182] Lucas-Schloetter (n 4) 401.

Second, Article 15(1) of the TRIPs Agreement regulates the protectable subject-matters of trademark. According to the regulation therein, 'personal names, letters, numerals, figurative elements, and combinations of colors as well as any combination of such signs' can be registered as trademark.[1183] Though the TRIPs Agreement embraces a broad approach to set the contours of the protectable subject-matters of trademark, it neglects setting any limitations to registrable marks. The absence of such a restriction, as rightfully indicated by Anette Kur and Roland Knaar, has the potential to disenfranchise non-Western stakeholders.[1184] Indeed, this regulation within the TRIPs Agreement enables and legalizes the registration of folkloric elements, sacred insignia, as well as the names of Native-American tribes or public figures by third parties.[1185] The registration of such insignia by 'outsiders' of the relevant community not only commercializes the essential elements of a community's cultural and spiritual identity, but it also monopolizes the trademark owner's use over the mark.[1186] Whilst hindering the power of the community to control the narrative centered around their identity, core values, and beliefs; it integrates the trademark owner's message in the commercial and social space.[1187] In a similar vein, this also prevents the non-Western business enterprises to use their own folkloric elements or other insignia for their own commercial purposes, due to the third-party ownership of the same insignia.[1188]

Once combined with the legal regulation envisioned by Article 6ter of the Paris Convention, the unlimited scope of registrable marks unearths a subtle hierarchy that is deeply-rooted in the

[1183] The Agreement on the Trade-Related Aspects of Intellectual Property Rights of 1994, Art. 15(1).
[1184] Anette Kur and Roland Knaak, 'Protection of Traditional Names and Designations' in Silke von Lewinski (ed), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (1st edn, Kluwer Law International) 293.
[1185] Frankel, 'Trademarks and Traditional Knowledge and Cultural Intellectual Property Rights' (n 4) 2–3.
[1186] See: Coombe, 'Cultural and Intellectual Properties' (n 484); Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (n 28); Bartow (n 1087); Greene, 'Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship' (n 510); Zografos Johnsson (n 1101); Vats (n 33).
[1187] Ibid.
[1188] Frankel, 'Trademarks and Traditional Knowledge and Cultural Intellectual Property Rights' (n 4) 16.

modern nation-states: The superiority of the nation-states' values in comparison to those of the sub-state groups. According to this regulation, the Member States of the Paris Union have the discretionary power to introduce legal regulations within their national laws to prohibit, refuse, or invalidate the registration of any mark that consists of armorial bearings, flags, State emblems, official hallmarks, or emblems of intergovernmental organizations.[1189] As also emphasized by Susy Frankel, this regulation respects and privileges the values of the nation-states, whereas no regulation similar to this exists to respect and to protect the values of sub-state and sub-nation groups.[1190]

In fact, Article 6bis of the Paris Convention adds another dimension to the disempowerment of non-Western stakeholders by means of trademark law. This regulation not only flexes the territoriality principle of trademark protection, but also the registration requirement. According to this regulation, the Member States of the Paris Union may extend legal protection to well-known trademarks; thus, they may refuse or cancel registration or even prohibit the use of mark that are identical to a well-known mark.[1191] Given the existence of well-known marks that (mis)appropriate the cultural identity of non-Western communities, such as the 'Grand Cherokee' trademark registered for the automobile industry, it can be argued that the legal protection extended to foreign marks may further disempower the relevant communities and disable them to have control over their identity and culture even across the borders of the territory in which the mark is registered.[1192]

Last but not least, it is worth to mention the term of protection bestowed upon trademarks. According to Article 18 of the TRIPs Agreement, any registered mark shall be legally protected

[1189] The Paris Convention for the Protection of Industrial Property Rights of 1886, Art. 6ter.
[1190] Frankel, 'Trademarks and Traditional Knowledge and Cultural Intellectual Property Rights' (n 4).
[1191] The Paris Convention for the Protection of Industrial Property Rights of 1886, Art. 6bis.
[1192] Also see: Zografos Johnsson (n 1101) 148–150.

for a minimum of seven years.[1193] However, the same regulation stipulates that this term can be renewed indefinitely.[1194] Nevertheless, the unlimited term of protection becomes a threating tool, once considered with the unlimited scope of protectable subject-matters. In other words, the TRIPs Agreement not only deprives the non-Western stakeholders, whose folklore has been registered as a trademark, from the right to control cultural identity for an indefinite time, but it also provides legal ground for the prevalence of racially insensitive trademarks to communicate their racist messages as long as the trademark exists.

Based on these, it can be summed up that the Western-centric IP regimes extend the colonial power relations and structures to the modern times. In this context, copyright law endorses and accentuates the racialized cultural hierarchies and valorization schemes deeply-rooted in the colonial history of the West. Accordingly, it imposes the Western-rubrics of copyright upon non-Western stakeholders. In doing so, it leaves these stakeholders at the crossroads: Either to remain loyal to the traditional ways of producing intellectual creations and to be excluded from copyright protection; or, to embrace the Western (European) perceptions and models of creativity in order to receive legal protection, but to loosen bonds with one's community and communal identity.[1195]

In a similar vein, trademark law projects the materialistic interests of the Western (European) colonial powers over the colonial territories, markets, and resources. Thus, the existing Western-oriented trademark regime opens non-Western identities, intellectual creations, and folkloric elements to the commodification, (mis)use, and exploitation of the Western market actors.[1196] Although the global(ized) trademark regime prevails turning a blind eye on the cultural and materialistic needs of the non-Western stakeholders, especially those of the racialized minorities

[1193] The Agreement on the Trade-Related Aspects of Intellectual Property Rights of 1886, Art. 18.
[1194] Ibid.
[1195] Esperanza Hernández-Truyol and Powell (n 1138) 213.
[1196] Zografos Johnsson (n 1101) 149–151.

and indigenous peoples; there had been a few minor initiatives in the global(ized) copyright forum, which remained at a regional level though. The limited gains of non-Western stakeholders in the international forum are explained below from a critical and race-conscious viewpoint.

3.3.3. A Postmodern Critique of the Modernist Approaches to Folklore

One can argue that it would be overambitious to expect the Paris and Berne Conventions to acknowledge, respect, and to include non-Western forms of intellectual creations, given the historical setting in which they were drafted: Right before and after the Berlin Conference of 1884-1885, which reshuffled and regulated the imperial control over the African colonies.[1197] Hence, the dominant colonial ideology at the time and the construction of folklore as a rudimentary form of knowledge often associated with the 'primitive' communities were, indeed, barriers to the appreciation of folklore by means of the Western-centric IP system. Nevertheless, not only the imperial ideology, but also the meanings imputed in folklore has changed in the aftermath of the WW II.[1198] The focus of the folklorists was no longer restricted with the rural communities deemed as less advanced; instead, any group, also resident in the urban areas, were put under the lens.[1199]

Despite the shift in the initial focus groups, the dominant perceptions of folklore as a dying and archaic entity continued to haunt the IP scholarship.[1200] Due to these lingering negative connotations of folklore,[1201] little has changed in the global IP regimes' attitude toward folklore. The 'civilized' Western (European) powers have not seen any materialistic interest and economic value in their or in their non-Western others' folklore; neither they have seen any benefit of folklore in the advancement of the Western-oriented scientific and cultural *progress*.[1202] Consequently,

[1197] Please see section 2.3.2. in Chapter II.
[1198] Encyclopedia Britannica, 'Folklore' (n 1118).
[1199] Ibid.
[1200] Arewa, 'Intellectual Property and Conceptions of Culture' (n 8) 12–13.
[1201] Kuruk (n 1128) 93; Lucas-Schloetter (n 4) 345.
[1202] von Lewinski (n 4) 751.

folklore was deemed as an economic and cultural value for *only* the Global South. In fact, the events followed by in the international IP fora confirm this argument.

Folklore and its protection by law have become matters of copyright-related debates in the 1960s.[1203] These debates were triggered, principally, by the Decolonization Movement; hence, the urge to provide legal protection for folklore have been initially called by (the former colonies, or, in other words) the newly independent African States, as part of their collective efforts to revitalize their cultural and political identity.[1204]

Yet, folklore has officially become a matter of the international IP negotiations only in 1967, when the Indian delegates proposed its inclusion within the established copyright framework at the Stockholm Diplomatic Conference for the Revision of the Berne Convention.[1205] The Indian delegates suggested the term 'works of folklore' to be inserted in the non-exhaustive list of legally protectable works that are stipulated in Article 2(1) of the Berne Convention.[1206] At the time, this proposal was rejected on grounds of the vagueness of folklore and the hardship in having a comprehensive definition for it.[1207] Nevertheless, Ágnes Lucas-Schloetter explains that Western (European) powers were hesitant to refer to folklore as 'work'; instead, they have articulated terms such as 'expressions of folklore' (hereafter 'EoF') or 'traditional cultural expressions' (hereafter 'TCEs') to circle around the term 'work'.[1208]

This ostensibly 'harmless' choice of vocabulary, in fact, veils racially-charged assumptions and racialized cultural hierarchies. As already explained above, the concept of 'work' was originated from the Western (European) printing culture, which was centered around the Romantic

[1203] Lucas-Schloetter (n 4) 339.
[1204] Ibid.
[1205] Michael Jon Andersen, 'Claiming the Glass Slipper: The Protection of Folklore as Traditional Knowledge' (2010) 1 Case Western Reserve Journal of Law, Technology & the Internet 148, 152; Perlman and others (n 1143) 116–117.
[1206] Perlman and others (n 1143) 116–117.
[1207] von Lewinski (n 4) 752; Perlman and others (n 1143) 117.
[1208] Lucas-Schloetter (n 4) 346.

author and his sole genius.[1209] Hence, for the purposes of IP law, 'work' refers to the *original* intellectual creation of an *identifiable* author, and it is deemed copyrightable.[1210] However, folklore is not the intellectual output of an individualistic creative endeavor, but the communal efforts of a group of people.[1211] Thus, the avoidance of the use of 'work' at the Stockholm Conference underlined that folklore is not an original authorial work worthy of copyright protection, but rather a traditionally (re)produced cultural 'expression' belonging to the *public domain*.[1212] In brief, such an articulation vocals that folklore is neither compatible with nor eligible for copyright protection.[1213]

In this vein, rather than including folklore in the existing copyright framework, the mere response of the Stockholm Conference to the issue had been the addition of a new article regarding *unpublished* works to the Berne Convention.[1214] According to this new regulation embodied in Article 15(4) of the Convention, unpublished works whose authors cannot be identified became legally protectable.[1215] In respect to the protection of folklore by means of copyright, this regulation has two caveats: First, there shall be 'every ground to presume that [the author of the unpublished work] is a national'[1216] of one of the Berne Union Member States.[1217] Second, the protectability of unpublished works has been left to the discretion of the Member States; thus, it has become a matter of national legislation.[1218]

[1209] Please see section 3.2.1. in the text.
[1210] Ibid.
[1211] *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore* (World Intellectual Property Organization (WIPO) 2003) 6–7, 25–28.
[1212] Lucas-Schloetter (n 4) 346.
[1213] Ibid.
[1214] Kuruk (n 1128) 848–849; Lucas-Schloetter (n 4) 350–351. Also see: Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action of 1985, Introductory Observations, para. 9.
[1215] The Berne Convention for the Protection of Literary and Artistic Works of 1886, Art. 15(4).
[1216] Ibid.
[1217] Ibid.
[1218] Ibid.

It shall be clarified that even though the text of Article 15(4), once again, excludes the term 'folklore', the *travaux préparatoires* of the Stockholm Conference reveal so.[1219] Yet, this regulation does not truly respond to the needs and expectation of the African States as well as India. On the one hand, it does not dissolve the absolute individualism of copyright protection.[1220] On the other hand, it does not impose the protection of unpublished works as it does for original and published works. Furthermore, as rightfully criticized in the literature, Article 15(4) does not clarify many issues, such as: The nature of the competent body to manage the protection of unpublished works, the method for the distribution of royalties by the competent body, and the term of protection to be granted to the unpublished works.[1221] Besides, it shall be noted that Article 15(4) is merely for 'unpublished' works; hence, the protection provided by this regulation is disrupted if the work is somehow exploited.[1222] In this sense, it is hard to say that this regulation was intended to cover folklore, considering that folklore has already been exploited by and large, mainly, by the Western (European) imperial powers.

The same critique is valid for the regulation within Article 15(3). This regulation entitles anonymous and pseudonymous works with copyright protection.[1223] This regulation is often invoked in the literature by scholars who consider that the Berne Convention's normative framework is sufficient to legally protect folklore. Yet, without falling into repetition, it can be briefly explained that though this regulation loosens the identifiability of the author, it does not remedy the individualism of copyright either. In fact, Marc Perlman notes that there is no concrete evidence in the global IP debates or in the literature which demonstrates that the developing

[1219] Lucas-Schloetter (n 4) 351. Also see: The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action of 1985, Introductory Observations, para. 9.
[1220] Ibid 747.
[1221] Ibid 351–352.
[1222] Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edn, Oxford University Press) 513.
[1223] The Berne Convention for the Protection of Literary and Artistic Works of 1886, Article 15(3).

countries had ever invoked this provision of the Berne Convention to protect their national folklore.[1224] Besides, this regulation was in no way a remedy for all the other eligibility criteria that folklore has missed to fit in the Berne Convention's scope.

These paradoxical approaches to folklore raise doubt about how 'genuine' the intentions of the global IP fora to protect folklore are. It can thus be concluded that the Stockholm Conference failed the expectations of the non-Western States, due to falling short in advancing the status of folklore to the level of Western (European) intellectual creations. As a result of the rigidity of the global(ized) IP norms and standards, folklore has been largely allocated to the Western (European) public domain.[1225]

The public domain can be broadly defined as 'the intellectual elements that are not protected by copyright or whose protection has lapsed, due to the expiration of the duration of protection.'[1226] Hence, neither the public domain nor the intellectual creations placed in the public domain are subject-matters of IP law.[1227] In fact, Séverine Dusollier indicates that IP norms and standards hardly ever regulate the public domain and the elements allocated therein.[1228] Due to this, the public domain is considered as a 'repository of resources'[1229] that can be used, appropriated, exploited without being subject to the permission and licensing schemes envisioned by the established IP regimes.[1230]

Despite such an ostensibly objective and value-neutral articulation of the concept, Anupam Chander and Madhavi Sunder note that 'it is appropriate to ask who this public domain will likely

[1224] Perlman and others (n 1143) 117.
[1225] von Lewinski (n 4) 758–759; Perlman and others (n 1143) 115.
[1226] Séverine Dusollier, 'Scoping Study on Copyright and Related Rights and the Public Domain' (WIPO 2011) 5.
[1227] Ibid.
[1228] Ibid, 6.
[1229] Ibid, 5.
[1230] Ibid.

serve.'[1231] As an answer to this question, it can be argued that the 'public domain' is yet another economic, political, and legal construct that derives from the Western (European) States' and market actors' economic and political agenda.[1232]

The borders of the 'Western' public domain have been drawn by the Western-centric IP norms and standards, which determine what fits into the Western rubrics of IP, hence, what is worth-to-be legally protected – and what is not.[1233] Due to being premised upon such racially-charged assumptions, Chander and Sunder assert that the public domain is not free from racialized power dynamics and cultural valorization schemes either.[1234] Just like the Romantic author and the global(ized) IP norms and standards, the public domain stands as a legal concept which translates the materialistic interests of the Western (European) imperial powers into IP law and invests in their (intellectual) property claims.[1235] In doing so, it not only ratifies the Western assumptions of culture and progress, but also often legalizes the treatment of non-Western intellectual creations as the *terra nullius* of the global IP domain. Hence, just like once colonialism did, the public domain provides a venue for the exploitation of intellectual labor of the politically-disempowered.[1236] Though it is presumed that the public domain is available for the equal access and use of all, Chander and Sunder label such presumptions as 'the romance of the commons'[1237], considering the asymmetries in the access to and use of the knowledge allocated to the public domain.[1238]

[1231] Chander and Sunder (n 977) 1373.
[1232] Ibid, 1342-1346.
[1233] Dusollier (n 1220) 5–6.
[1234] Chander and Sunder (n 977) 1373.
[1235] Ibid, 1335.
[1236] Ibid.
[1237] Ibid, 1332
[1238] Ibid.

From an alternative perspective, it shall be emphasized that even though folklore does not fit in the Western-centric rubrics of IP law, it is hardly out of any protection. On the contrary to the consolidated beliefs, folklore falls under the protection that derives from the customary laws and traditions of its non-Western holders.[1239] In fact, such customary laws resonate the exclusive protection granted by the Western (European) copyright frameworks: They identify the community members who have an exclusive authority to use or share folklore, whilst prohibiting the non-members from accessing and using such information.[1240] The criteria for such an identification can vary from title, role, age, kinship to gender.[1241] Additionally, customary laws often stipulate sanctions for violation of these rules and the non-consensual use of folklore.[1242] Yet, the Western-centric frameworks of IP law resist acknowledging customary laws, and they place folklore (and the indigenous intellectual creations) into the public domain instead.[1243]

In brief, a legal system based on the Western public domain provides advantages to a limited group of stakeholders (mainly, the business corporations of the Western hemisphere), whereas it has been persistently disadvantaging some others (such as the non-Western States and especially indigenous peoples).[1244] As a consequence of such distributive injustices enabled by the global(ized) IP regimes, Chander and Sunder explain that the public domain creates a space for 'free works upon which capitalists can draw without either seeking consent or drawing liability.'[1245] They conclude that the public domain, once again, ruled by the existing dynamics of wealth and political power.[1246]

[1239] Kuruk (n 1128) 96.
[1240] Ibid 88; Gervais, 'Traditional Knowledge and Intellectual Property: A TRIPS-Compatible Approach' (n 1051) 140–141.
[1241] Kuruk (n 1128) 88.
[1242] Ibid, 96.
[1243] Dutfield (n 3) 247; Dusollier (n 1220) 11.
[1244] Chander and Sunder (n 977) 1337.
[1245] Ibid, 1343.
[1246] Ibid, 1334.

Despite the exclusion of folklore from the *global* IP regimes, non-Western States pursued their claims for legal protection for folklore. As a result of such resistance, WIPO, in collaboration with the UNESCO, drafted two instruments addressed to this purpose: The Tunis Model Law on Copyright for Developing Countries of 1976 (hereafter 'the Tunis Model Law') and the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action of 1985 (hereafter 'the Model Provisions').[1247]

Prior to their assessment from a race-conscious viewpoint, it shall be emphasized that both instruments constitute non-binding guiding principles, hence, soft law – as opposed to the binding international instruments that established the *globalized* IP regimes. Additionally, both instruments vocal the paternalistic tone of developed counties' assumptions about culture and progress, which are deeply-rooted in the colonial times: Folklore belongs to the earlier stages of moral development of humankind and nations; hence, it matters only for the developing countries. Due to this, both the Tunis Model Law and the Model Provisions are tailor-made for and addressed to *developing* countries – even though the (mis)appropriation and (mis)use of folklore have largely been committed by *developed* countries.[1248] Additionally, these instruments underline that regardless of the disparate features in which folklore is produced, the only acceptable legal framework to protect folklore of non-Western States shall resemble the established IP frameworks, which is premised on the Western (European) assumptions of intellectual creations and creativity. In light of these, a closer look at the Tunis Model Law and the Model Provisions becomes necessary.

The Tunis Model Law had a clear agenda. It offered developing countries with a normative copyright model on which they can apply minor changes and adopt as their national copyright

[1247] von Lewinski (n 4) 753.
[1248] Perlman and others (n 1143) 116.

law.[1249] In the meantime, the Tunis Model Law aimed at harmonizing the divergent national copyright laws of developing countries and to ease their integration into the international IP system.[1250] To achieve this aim, it created a model based on the Berne Convention.[1251] In doing so, the introductory remarks that explain 'the basic features of the Model Law'[1252] entrenched the overarching paternalistic tone of the instrument, by clarifying for the developing countries that 'its provisions allow for the Anglo-Saxon or the Roman legal approach of the countries for which it is intended.'[1253] In other words, it can be argued that the Tunis Model Law was addressed to secure the prevalence of former colonizers' copyright norms and standards in their former colonies' national laws.

What distinguishes the Tunis Model Law from the global(ized) IP regimes and makes it 'adapted' to the needs of the Global South is the explicit references to folklore. For its purposes, the Tunis Model Law articulates folklore as 'all literary, artistic, and scientific works created on national territory by authors presumed to be nationals of such countries or be ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.'[1254]

In its commentary, the Tunis Model Law explains that folklore constitutes 'an appreciable part of the cultural heritage' of the developing nations.[1255] Hence, it includes 'the works of national folklore' as well as the works derived from national folklore within the scope of protectable subject-matter of the law.[1256] Regarding this, Lucas-Schloetter notes that the use of the term 'work'

[1249] Lucas-Schloetter (n 4).
[1250] The Tunis Model Law for Developing Countries of 1976, Appendices, para. 88; von Lewinski (n 4) 753–754.
[1251] The Tunis Model Law for Developing Countries of 1976, Basic Features of the Model Law, para. 7.
[1252] Ibid, Basic Features of the Model Law.
[1253] Ibid, para. 4(ii).
[1254] Ibid, Art. 18(iv).
[1255] Ibid, Commentary, para. 17.
[1256] Ibid, Arts. 2(1)(iii), 2(3), 6.

implies the consideration of folklore within the established scheme, rather than being subjected to sui generis protection.[1257] Alternatively, it can be argued that the terminology in the drafting of the Tunis Model Law may not have been that careful, since it was neither hard-law nor imposed on the developed countries.

Another factor that is centered around folklore and eases its protection was introduced with the Article 2(5bis). According to this *optional* regulation, the fixation requirement could be lifted for the works of folklore.[1258]

As to the management of copyright over works of national folklore, the Tunis Model Law suggested the establishment of a competent body for this purpose.[1259] It is envisioned that the competent body comprises officials appointed by the Government,[1260] in order to exercise the moral and economic rights over the works of folklore for an indefinite time.[1261] Based on this regulation, the competent body was supposed to have the authority to grant permissions for the use of folklore as well to prohibit the import or distribution of works that infringe the rights deriving from folklore.[1262] Yet, the Tunis Model Law had its deficiencies: For instance, similar to the way in which the Berne Convention dealt with unpublished works, the Tunis Model Law did not have any clarity regarding how the State authorities, as right-bearing agents of the nation or ethnic communities, shall act – particularly, when distributing the royalties.[1263] In relation to this, one can also question the efficiency of authorizing a State body to govern the rights over an ethnic

[1257] Lucas-Schloetter (n 4) 446.
[1258] Tunis Model Law for Developing Countries, Art. Article 2(5bis).
[1259] Ibid, Art. 6(1).
[1260] Ibid, Art. 18(iii).
[1261] Ibid, Commentary, para. 39.
[1262] Ibid, Art. 6(3).
[1263] von Lewinski (n 4) 754; Perlman and others (n 1143) 118.

minority's folklore, especially given that the interests of the nation-states and their ethnic minorities have not always been in harmony.[1264]

Despite such deficiencies, Paul Kuruk notes that the Tunis Model Law was utilized by several African countries, including but not limited to Algeria, Burundi, Cameroon, Ghana, Guinea, Congo, the Ivory Coast, Kenya, Mali, Senegal, and Tunis.[1265] Still, it shall be emphasized that the Tunis Model Law neither established basis for an international legal framework for the protection of folklore, nor it introduced a system that resolves copyright's shortcomings to extend legal protection to folklore.[1266]

The Tunis Model Law was followed by the Model Provisions, which were also drafted for developing countries and to achieve the same result: Setting a normative framework and standards of a model law that can be adopted by the Global South, in order to provide legal protection to folklore within their national jurisdiction.[1267] Though the targeted beneficiaries of the instrument have not been made clear within the title (as was the case in the Tunis Model Law), the introductory remarks attached to the Model Provisions explain this issue clearly: Folklore constitutes an essential element of the social identity and cultural heritage of each community – '*even* [those of the] modern communities all over the world.'[1268] However, it is of particular importance only for the developing countries,[1269] whereas in 'industrial communities' folklore is allocated to the public domain, because these countries have no expectations or intentions to receive economic gain from it.[1270] This fact not only explains the lack of a legal regime in the developed countries' legal systems

[1264] Coombe, 'Intellectual Property, Human Rights & Sovereignty' (n 484) 83.
[1265] Kuruk (n 1128) 130–131.
[1266] Perlman and others (n 1143) 118.
[1267] The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action of 1985, Preamble.
[1268] Ibid, Introductory Observations, para. 1. Emphasis added.
[1269] Ibid, para. 1.
[1270] Ibid, para. 3.

for the protection of folklore,[1271] but it also explains the developed countries' lack of incentives to grant legal protection to folklore by means of international IP instruments.[1272]

In fact, the Model Provisions were drafted as a response to the Bolivian Government's request for a *binding international* instrument on the protection of folklore, which dates back to 1973.[1273] In spite of acknowledging the need for an international instrument,[1274] the UNESCO and WIPO cohort presented a *non-binding* instrument tailored for *national* law. Therefore, just like the Tunis Model Law, the Model Provisions concentrated on the national sphere, rather than the international one; they also formed IP-related *guidelines* for the developing countries.

Yet, as opposed to the Tunis Model Law, the Model Provisions did not read folklore through the prism of copyright. Instead, they admitted the shortcomings of the established copyright regime to protect folklore.[1275] Indeed, they aspired to generate a sui generis system of protection.[1276] Along the same lines, the terminology used in order to refer to folklore was shifted from 'works of national folklore' to 'EoF.'[1277]

According to their purposes, the Model Provisions defined EoF as 'productions consisting of characteristic elements of the *traditional* artistic heritage developed and maintained by a community (…) or by individuals reflecting the *traditional* artistic expectations of such a community.'[1278] In respect to the authorship, right ownership, originality, fixation, and term of protection related issues, the Model Provisions closely resembled the Tunis Model Law.

[1271] Ibid.
[1272] Oguamanam (n 1012) 41.
[1273] Ibid, para. 15.
[1274] Ibid, para. 20.
[1275] Ibid, para. 10.
[1276] Lucas-Schloetter (n 4) 150. See also: The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action of 1985, Commentary, para. 32
[1277] The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action of 1985, Sec. 2.
[1278] Ibid. Emphasis added.

Only, it is worth to mention that in identifying the right owners of the EoF, the Model Provisions consider two options: A national competent authority or the 'community concerned'.[1279] This regulation was to enable ethnic communities or other sub-nation communities to hold the authority over folklore and to control its use by third parties. Besides, it stipulated that all printed publications and any other forms of public dissemination concerning EoF shall give attribution to the source of the information – whether it be a geographical region or a specific community.[1280] By this way, the Model Provisions loosened the Tunis Model Law's emphasis on the national or ethnic character of folklore, and they opened the gate for the consideration of indigenous peoples and their intellectual creations under this title as well.[1281]

In fact, it can be argued that with the Model Provisions and their relatively more inclusive wording, the term folklore is being more and more used interchangeably with indigenous knowledge, indigenous heritage, indigenous cultural expressions, TK, and TCEs. [1282] Nevertheless, the construction of these concepts and the international instruments centered around them suggest the reverse.

Nevertheless, from a race-conscious and social constructionist viewpoint, it can be argued that folklore and TK (including TCEs and indigenous knowledge) belong to disparate oppositional binary paradigms built into IP law. In other words, they were coined as a contrasting pair for different aspects of the Western (European) culture. From a legalistic viewpoint, these two concepts raise different policy questions and bring up different legal complications regarding right ownership, protectable subject-matter, and their (in)compatibility with the existing international

[1279] Ibid, Sec. 10, Commentary, para. 72.
[1280] Ibid, Sec. 5(1).
[1281] Ibid, Commentary, para. 45, para. 49. For instance: 'Traditional Cultural Expressions' <https://www.wipo.int/tk/en/folklore/index.html> accessed 25 May 2021.
[1282] Andersen (n 1199) 151; Radonjanin (n 1175) 495.

IP regime. Besides, indigenous claims regarding IP law belong to a struggle that is different than the one between the Western (European) and non-Western States. As a sub-nation group, who have been deprived of their right to self-determination, respectively, by the imperial powers and the nation-states; the IP-oriented claims of indigenous peoples are addressed to reconstructing their image, regaining their narrative about their identity and culture, and restoring their right to self-determination.[1283]

On that note and as a closing remark to this sub-chapter, it can be concluded that the colonial aspirations of the former Western (European) imperial powers, namely cultural assimilation and 'civilizing' missions, prevail in the contemporary IP law – yet, as a hidden cultural and ideological agenda. Nevertheless, such practices are not limited to the horizontal, yet asymmetrical, power relations between the Global North and the Global South. There is also a vertical dimension to this relationship, which refers to the racialized power hierarchies and dynamics between the Western (European) States and non-Western sub-state groups – namely, indigenous peoples of the formerly colonized or conquered lands.

Whereas the 'Global North and South' divide tells the story of cultural subordination and exclusion in the image of folklore, the power struggles between the Western States and indigenous peoples tells that of systemic erosion of indigenous rights and the legal history of 'intersectional injustices.'[1284] Therefore, the remainder of the dissertation explains the interaction of the indigenous identity and indigenous forms of creativity with the Western-centric IP norms and standards.

[1283] Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights - Why Living Law Matters* (Routledge 2014) 156.
[1284] In reference to: Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (n 365).

3.4. Western Norms v. Non-Western Sub-Nation Cultures: Construction of 'Traditional Knowledge'

'Indigenous peoples' stands as a contemporary phraseology. It was first officially used in the international legal domain in 1989.[1285] Despite its relatively new 'public appearance', both the reasons for the existence of such a concept at the first place and the ever-lasting controversies it brought along to the global negotiations table are remnants of the past. In fact, even the definition (or hardship in and desirability of defining) the concept is among these polemical issues. Though there had been persistent efforts to generate a comprehensive and objective definition for 'indigenous peoples', neither the UN nor any of its working bodies managed to articulate a consensual, undisputed, overarching, and formal definition.[1286]

In fact, there was not even consensus on whether there shall be a precise, legal definition of the term, until very recently. On the one side of this controversy were the States which host indigenous peoples.[1287] These States were eager to agree on a succinctly and narrowly articulated definition of the term, considering that such a definition would identify the beneficiaries of any legal regulation regarding indigeneity, hence, the positive and negative responsibilities of the State.[1288] On the other side, indigenous peoples and indigenous rights defenders argued that States shall refrain from defining indigeneity since this would end up imposing a specific legal category upon the ones who are being defined over this term.[1289] Instead, indigenous peoples claimed the right to self-identification.[1290] This claim was consolidated by the World Council of Indigenous

[1285] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013) 437–438.
[1286] The Secretariat of the Permanent Forum on Indigenous Issues, 'The Concept of Indigenous Peoples' (United Nations Department of Economic and Social Affairs, 2004) 1; Picart and Fox (n 1138) 323.
[1287] Jeff J Corntassel, 'Who Is Indigenous? "Peoplehood" and Ethnonationalist Approaches to Rearticulating Indigenous Identity' (2003) 9 Nationalism and Ethnic Politics 75, 75–76.
[1288] Ibid; Picart and Fox (n 1138) 324–325.
[1289] The Secretariat of the Permanent Forum on Indigenous Issues (n 1280) 2; Corntassel (n 1281) 75.
[1290] Ibid.

Peoples of 1977.[1291] Following up with the decision made at the Council, the Secretariat of the UN Permanent Forum on Indigenous Issues concluded that many other key concepts, such as 'minority' and 'people', also lack formal definitions, whereas these notions have been at the center of many binding and non-binding documents.[1292] Thus, it was accepted that the absence of a formal definition shall not be construed as an obstacle to deal with the legal status of indigenous peoples.[1293] Since then, the vast majority of the UN working bodies have embraced this approach, especially in drafting their documents and toolkits.[1294]

Despite these debates and the absence of a formal and binding definition of the term, the international legal fora rely on a common understanding of who indigenous peoples are.[1295] This widely-shared perception of indigeneity was developed and disclosed by the UN Special Rapporteur José R. Martínez Cobo in 1982 within his 'Study of the Problem of Discrimination Against Indigenous Populations' (hereafter 'the Cobo Report').[1296]

The Cobo Report's approach to indigeneity is centered around two historical incidents: Conquest and colonialism. In respect to these two 'building blocks' of the indigenous experience, Cobo broadly frames 'indigenous peoples' as follows:

> '[T]he existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a (…) colonial condition.'[1297]

[1291] Ibid, 90.
[1292] The Secretariat of the Permanent Forum on Indigenous Issues (n 1280) 3–4.
[1293] Ibid.
[1294] Ibid.
[1295] Picart and Fox (n 1138) 323.
[1296] Bantekas and Oette (n 1279) 436. Please see: 'Martínez Cobo Study' (*United Nations | Department of Economic and Social Affairs: Indigenous Peoples*, 20 June 1982) <https://www.un.org/development/desa/indigenouspeoples/publications/martinez-cobo-study.html> accessed 22 December 2019.
[1297] José R Martínez Cobo, 'Study of the Problem of Discrimination Against Indigenous Populations | Chapter V: Definition of Indigenous Populations' (United Nations (UN) Economic and Social Council 1982) Final Report E/CN.4/Sub. 2/1982/2/Add. 6 48, para 362.

Evident from this description, the indigenous experience, hence, the indigenous identity is premised on a series of inherently racial and oppositional binary paradigms, such as: Colonized v. colonizer, non-dominant v. predominant, sub-state and sub-nation groups v. the State and the nation.

After revealing the colonial baselines of the indigenous identity, Cobo indicates that indigenous peoples have a strong bond with their ancestors, ancestral lands, and culture.[1298] He adds that indigenous peoples live in conformity with their unique customs and traditions, rather than with those of the laws of the nation-state.[1299] Accordingly, Cobo highlights indigenous peoples' desire to preserve their traditional and customary ways of living, all of which they consider as 'the basis of their continued existence.'[1300] In this respect, it is the intention (and a defining characteristic) of indigenous peoples to transmit their ancestral lands, ethnic identity, culture, cultural patterns, language, social institutions, and customary laws to the next generations.[1301]

Regardless of the careful wording and the objective approach of Cobo, it can be argued that indigeneity is a social construct which has been forged by the Western (European) racial thinking and the race-based biases, prejudices, stereotypes, pejorative connotations, and the common racial imagery embedded in the colonial mindset. As a matter of fact, even Cobo admits the racial connotations of the term in his report. Referring to the national reports submitted to the UN, Cobo explains that the criteria adopted by the UN Member States' national laws are 'exclusively or

[1298] Ibid.
[1299] Ibid.
[1300] José R Martínez Cobo, 'Study of the Problem of Discrimination Against Indigenous Populations | Chapter XXI-XXII: Conclusions, Proposals and Recommendations' (United Nations (UN) Economic and Social Council 1983) Final Report E/CN. 4/ Sub. 2/ 1983/ 21/ Add. 8 50 para 379. Also see: Bantekas and Oette (n 1279) 436, 439.
[1301] Erica-Irene Daes, 'Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People- New Developments and General Discussion of Future Action' (United Nations (UN) Economic and Social Council 1995) Note E/CN. 4/Sub. 2/AC. 4/1995/3 Annex II, 11.

almost exclusively racial.'[1302] Besides, the negative racial information imputed in the term[1303] resonates even in the contemporary attempts to define indigeneity.[1304] Nevertheless, this sub-chapter argues that these modern laws and regulations are tools that merely circulate the racial meaning imputed within the term, whereas the actual racialization of indigeneity antecedes such normative frameworks – and dates back to the Renaissance era and the transition to modernity.

As explained earlier, the idea of race had originated from the Western (European) modernity, and it matured and entrenched through the works of modern philosophers and scientists.[1305] These modernist attempts paved the way to the creation of racial hierarchies, in which the European (or, White) race is considered superior and ranked at the top of the evolutionary ladder, whereas the non-European 'others' are ranked inferior to the former.[1306] In this scheme, the natives – or, in other words, indigenous peoples – were not only ranked at the lowest level, but they were also 'considered half-animals, whose physical qualities were not inferior to those of European but who had lacked opportunity for the development of faculties.'[1307]

Given the association of racial categories with 'moral development'[1308] as such – or, simply, with science and culture – the racialized hierarchies of modernity inevitably affected the Western

[1302] The most obvious example of such racial criterion is ancestry. Cobo explains that most of the UN Member States' reports reveal the fact that ancestry is being acknowledged as a biological factor. Due to this, many States assess the descendancy of a person from a native population on the basis of their blood. In fact, many of these States, including the Commonwealth of Australia and the United States, have explicit references to descent and/or blood ratio in their national laws, in order to clarify what is meant and what is required to be recognized as native. Martínez Cobo, 'Study of the Problem of Discrimination Against Indigenous Populations | Chapter V: Definition of Indigenous Populations' (n 1291) 3–4 paras. 4, 12 39, 12 41–44.
[1303] Picart and Fox (n 1138) 323.
[1304] Even though the term 'indigenous peoples' has become a widely-used legal concept, the hardship in finding a precise definition for the term, hence, the ambiguity of its meaning prevails. The UN documents and toolkits that were published even years after the Cobo Report emphasize that there is no universally accepted, overarching, succinct definition of the term yet. Still, these documents also carry along such racial information, which mainly derives from the colonial past of the Western (European) modern thought. These documents and toolkits can be exemplified as follows: The Operational Directive 4.20 of 1991 and the Operational Manual 4.10 of 2005 published by the World Bank; and the Social and Environmental Standards of 2014 published by the UN Development Programme (UNDP).
[1305] Please see sub-chapter 3.2. in the text.
[1306] Ibid.
[1307] Hannaford (n 7) 210.
[1308] Ibid, 223.

(European) perceptions of indigenous cultures and modes of creativity. In fact, the repercussions of this racial (or, racist) thinking on the IP law domain have already been exemplified in the previous chapter: The World Fairs of the eighteenth-century, which were the main global events to celebrate science and to showcase the scientific progress and achievements of the Western world, had become stages for Western actors to exhibit their 'non-Western others', particularly indigenous peoples, in order to contour their 'civilized' state over the 'primitiveness' of the latter.[1309]

That said, this sub-chapter argues that the legacy of the World Fairs and the racially-charged biases and pejorative imagery wrapped around indigenous cultures prevail in the contemporary IP policy- and law-making processes. This is not to say that the global IP fora consciously and willfully marginalize indigenous modes of creativity and exclude them from the scope of IP law. Per contra, this sub-chapter argues and aims to prove that the historical marginalization and exclusion of the indigenous intellectual creators and creations by means of the IP law are the results of a greater economic, historical, legal, political, and social reality: Colonialism and the construction of indigenous identity and legal persona through the racial thinking at the time.

As aptly mentioned by Jonathan Friedman, indigeneity discourse crystallizes the presumed racial hierarchy among the first peoples and the last occupants of the conquered and colonized territories.[1310] Within this paradigm, the term 'indigenous peoples' stands as '[a category] that have been imposed by colonial orders [upon the subaltern], at least in the past centuries of the modern [S]tate.'[1311] Though the terminology gives the impression of being a contemporary phraseology,

[1309] Please see section 2.3.3. in Chapter II.
[1310] Jonathan Friedman, 'Indigeneity: Anthropological Notes on a Historical Variable' in Henry Minde (ed), *Indigenous Peoples: Self-determination, Knowledge, Indigeneity* (Eburon Academic Publishers 2008) 29–30, 42–44.
[1311] Ibid, 43.

Friedman argues that indigeneity is a political identity that is deeply-engrained in the structure of the modern nation-states.[1312]

Along the same line, the sub-chapter argues that the global IP diplomacy represents a relatively new venue where the Western (European) assumptions fed into the modern nation-states and the racialized cultural hierarchies of the modernity reveal themselves under the disguise of IP-oriented debates. Such revelations are the outcomes of constant power struggles among the States and indigenous peoples, who have been reduced to sub-state groups by means of the Western-centric and statist structures of international law. Consequently, the clashes between the interests of these two disparate groups of stakeholders can be clustered into two categories: First, indigenous forms of creations are largely excluded from the scope of IP law, due to the racialized cultural valorization schemes embedded in IP law. It has been acknowledged that indigenous modes of creations do not fit in the Western (European) perceptions of creativity and creatorship.[1313] As a result of this, indigenous intellectual creations are allocated to the (Western European) public domain, where they are denied any legal protection.

In respect to this, Birnhack presents the exclusion of the non-Western modes of creativity as a hidden agenda of the imperial powers.[1314] According to the Western (European) valorization schemes, non-Western cultural productions were not only 'less advanced' works whose authors cannot be identified, but also 'raw materials' for legally protectable intellectual creations which fit in the Western patterns of creativity.[1315] Hence, non-Western forms of intellectual creations were a better fit for the Western (European) public domain – where they were acknowledged as publicly

[1312] Ibid, 43-44.
[1313] Please refer back to the discussions on the compliance of folklore with the existing copyright and trademark regimes, respectively, in sections 3.2.1. and 3.2.2. in the text.
[1314] Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 48–49.
[1315] Boyle (n 1064) 1 *supra* note 10; Sunder, 'The Invention of Traditional Knowledge' (n 969) 99–101; Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (n 8) 48–40.

available materials to be used by anyone, including the ones who wish to acquire Western-oriented IPRs via the use of such materials.[1316]

Second, the sub-state status of indigenous peoples restricted their opportunity to have a word in the global IP policy- and law-making mechanisms, mainly because of the prevalence of the adverse impacts of conquest and colonialism on the indigenous identity and legal persona. In respect to this, Michael H. Davis asserts that the IP-related claims of indigenous peoples are not isolated from the broader indigenous experience, but such claims are, indeed, part of this broader and dominant problem.[1317] Hence, Davis points out to economic disempowerment as the overarching problem of indigenous peoples.[1318] Though this sub-chapter agrees with Davis' deduction, it also takes his argument a step further. Thus, it is argued herein that the indigenous efforts at the global IP fora are integral to the broader indigenous movement; thus, these efforts are addressed to compensate the systematic abuse of indigenous rights, by working toward restoring the natural right of indigenous peoples to self-determination.

Therefore, this sub-chapter investigates the proliferation of indigeneity as a racial category in colonial times, and it maps the transformation of such a racial category into a legal one. For its purposes, the sub-chapter outlines the broader economic, historical, political, and social setting in which indigeneity discourse has emerged and developed. Then, it explains the interplay of such a social construct with the legal order. In doing so, the sub-chapter provides a synopsis of the contributions of the classical legal thought (especially, of natural law school) and modern legal thought (particularly, positivism) into the crystallization of the racially-charged indigenous identity. In order to prove its point, the sub-chapter visits the major legal doctrines and the main

[1316] Dutfield (n 3) 237–238.
[1317] Michael H Davis, 'Some Realism About Indigenism' (2003) 11 Cardozo Journal of International and Comparative Law 815, 815–817.
[1318] Ibid.

international instruments that invested in the conceptualization of indigeneity – and the disempowerment of indigenous peoples by means of and within international law. Finally, the sub-chapter focuses on the global IP domain, with the purpose of mapping the subordination of indigenous creators and indigenous modes of creativity within the international IP fora.

3.4.1. A Deconstructionist Reading of the Indigenous Identity and Legal Persona

Construction of the indigenous identity and legal persona (or, succinctly, indigeneity) antecedes both the construction of folklore by Romanticism and of race by the Enlightenment. Yet, just like these two concepts, indigeneity also finds its ideological origins in the history of Western (European) modernization – and in *the* era that triggered the shift from classicism to modernity: The Renaissance.[1319]

The Renaissance refers to the historical period that follows the Middle Ages in the European history, which had initiated in the early fifteenth-century and ended with the emergence of the Modern era in the early 1500s.[1320] In fact, this era and some of its legacies are already familiar from the previous chapter of the dissertation, given that it held a milestone in the history of human 'progress': The invention of the moveable type of printing press by Johannes Gutenberg,[1321] which enabled the spread of ideas and literature to the masses, and the growth in the literacy and the educated population in the European Continent.[1322] This era (and its emphasis on literacy) also set the stage for the proliferation of the idea of IP – particularly, of *copy-right*.[1323]

[1319] S James Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004) 15; Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (1st edn, Oxford University Press 2016) 8.
[1320] Encyclopedia Britannica, 'History of Europe' (*Britannica Academic*) <https://academic.eb.com/levels/collegiate/article/history-of-Europe/106072> accessed 1 June 2021.
[1321] Encyclopedia Britannica, 'Renaissance' (*Britannica Academic*) <https://academic.eb.com/levels/collegiate/article/Renaissance/63161> accessed 1 June 2021.
[1322] Encyclopedia Britannica, 'History of Europe' (n 1314).
[1323] Please see section 2.2.1. in Chapter II.

Nevertheless, the Renaissance era can be affiliated not only with the achievements in the artistic and literary fields.[1324] But this era also witnessed mechanical novelties other than the Gutenberg's printing press, such as: The invention of gunpowder and the mariner's compass.[1325] These two inventions opened the gate for drastic changes in the political field, mainly because of inevitably affecting the World map as well as the political and economic realities at the time. To be more precise, gunpowder had been the most crucial item to explode the fortifications of the ruling-elite, hence, to commence the dissolution of the feudal order.[1326] With the decline of feudalism, there was a gradual transition, first, to city-states, and then, to nation-states.[1327] As to the compass, it (presumably, along with gunpowder) constituted the primary commodity for excursions across the ocean, the discovery of new continents[1328] – and for the conquest and colonization of the 'New World.'

In fact, colonialism stands as the main reason for the existence of 'indigenous peoples', both as a historical reality and as a racially-charged legal category, which derived from the common imagery of the Western (European) powers.[1329] As already indicated above, the advent of the compass enabled Western (European) explorers to organize *voyages of discovery* to continents other than the Western Hemisphere. These excursions resulted not only in the exploration of non-Western lands that were previously unknown to the Western (European) imperial powers, but they also ushered the first encounters between the Western (European) colonizers and the non-Western

[1324] Encyclopedia Britannica, 'Renaissance' (n 1315).
[1325] Ibid.
[1326] Encyclopedia Britannica, 'Western Philosophy' (*Britannica Academic*) <https://academic.eb.com/levels/collegiate/article/Western-philosophy/108652#60944.toc> accessed 1 June 2021.
[1327] Ibid.
[1328] Ibid.
[1329] Friedman (n 1304) 43–44; Steven Newcomb, 'Domination in Relation to Indigenous ('dominated') Peoples in International Law' in Irene Watson (ed), *Indigenous Peoples as Subjects of International Law* (1st edn, Routledge 2018) 19.

inhabitants of these newly explored lands.[1330] Thus, from a Western (European) colonial viewpoint, these excursions provided the Western (European) imperial powers with 'potential' territories where they can expand their borders and with people over whom they can exercise their political authority. Regarding the latter point, Jonathan Friedman explains that indigeneity was the by-product of this very first Western (European) and non-Western interaction.[1331] Accordingly, the idea of indigeneity stemmed from and was built upon the 'autochthonous peoples and their foreign rulers'[1332] paradigm, which was intellectually forged by the colonial mindset and the materialistic interests of the Western (European) imperial powers on the riches of the New World.[1333] Therefore, the Renaissance theorists and public figures had started theorizing the legal status of the non-Western inhabitants of this new 'unchartered' terrain and the possible legal characteristics of any potential (economic) affairs with them.[1334]

However, these legal theories, as explained by David Theo Goldberg, were developed under the influence of the Western (European) racial thinking.[1335] While defining their non-Western 'others', Western (European) colonists adopted the Western (European) identity and Western 'civilization' as benchmarks.[1336] Accordingly, they assessed the natives from a Western-centric point of view and through the taken-for-granted assumptions of the Western (European) 'superiority' and the non-Western 'inferiority.'[1337] Such a racially-charged ideology had not only invested in the stigmatization of indigenous peoples, which lasted at least four centuries, but also it had paved the way to the deprivation of indigenous peoples from their autonomy and their natural

[1330] Ibid.
[1331] Friedman (n 1304) 43–44.
[1332] Ibid, 29
[1333] Newcomb (n 1323) 18–19.
[1334] Anaya, *Indigenous Peoples in International Law* (n 1313) 15–17.
[1335] David Theo Goldberg, *The Racial State* (Blackwell Publishers 2002) 4.
[1336] Ibid.
[1337] Ibid.

rights over their ancestral lands and knowledge in a systematical and methodical (or, *modernist*) way.[1338]

That said, James Anaya explains that the initial attempts to construct the indigenous identity emerged from the anecdotes of two historical figures of the Renaissance era: Bartolomé de las Casas and Francisco de Vitoria.[1339] Both De la Casas and De Vitoria were Spanish colonists and Dominican clerics, whose ideologies had a long-lasting impact on the indigeneity and international law discourses.[1340] Among the two theorists, De la Casas was a prominent defender of indigenous peoples, due to condemning the massacre of Indians and the *encomienda* system;[1341] whilst De Vitoria conformed with the dominant views of his day and evaluated the indigenous identity from a Western-oriented vantage point. He portrayed the inhabitants of the newly 'found' lands as '[people] who are not of unsound mind, but have, according to their kind, the use of reason.'[1342] He added that these communities had their own laws, 'systems of exchange'[1343] of goods, and 'a kind of religion'[1344] – which, according to De Vitoria, required the use of reason.[1345] Yet, he added that neither the Indian laws nor magistrates or their arrangements regarding interpersonal affairs could compete with those of the Western (European) States.[1346] Therefore, none of the 'positive' features he attributed to indigenous peoples held De Vitoria back from labelling them as 'barbarians'.[1347]

[1338] Newcomb (n 1323) 25.
[1339] Anaya, *Indigenous Peoples in International Law* (n 1313) 16–17.
[1340] Ibid.
[1341] Ibid, 16.
[1342] Ibid, 17.
[1343] Ibid.
[1344] Ibid.
[1345] Ibid; Stoll and von Hahn (n 4) 8.
[1346] Anaya, *Indigenous Peoples in International Law* (n 1313) 18.
[1347] Åhrén, *Indigenous Peoples' Status in the International Legal System* (n 1313) 9.

As a matter of fact, De Vitoria's main concern in dealing with indigeneity was not addressed to their acknowledgment as human beings and their humane treatment. He was rather interested in the legal title over the ancestral lands of indigenous peoples, and he was keen on theorizing a legal 'justification' to lawfully transfer such title to the Western (European) colonizers.[1348] Nevertheless, his anecdotes on Indians, the features he had imputed in the indigenous identity, and especially his emphasis on the use of reason not only established a solid ground for the racialization of indigenous peoples, but also contoured the indigenous legal persona within the Western (European) legal order.[1349]

Regarding the racial aspect of De Vitoria's anecdotes, it can be argued that his emphasis on the use of reason has resonated, even after a century, in the hierarchical order of races by modern philosophers.[1350] Besides, De Vitoria had statements on the cognitive faculties and creative abilities of Indians in which he had claimed that they are 'without any literature or arts, not only the liberal arts, but the mechanical arts also.'[1351] Once more, it can be argued that De Vitoria's depiction of indigenous culture has rested the ground for the ranking of indigenous creativity at the lowest level within the Western-centric cultural valorization schemes.[1352]

As to the legal aspect of the same anecdotes, it is important to note that De Vitoria is acknowledged among the founders of international law.[1353] At the time, international law was broadly understood as a normative system that regulated the relationships of the Western (European) States with each other and with their non-Western others, including their colonies and

[1348] Anaya, *Indigenous Peoples in International Law* (n 1313) 17–19; Åhrén, *Indigenous Peoples' Status in the International Legal System* (n 1313) 9.
[1349] Ibid.
[1350] Please see sub-chapter 3.2. in the text.
[1351] Anaya, *Indigenous Peoples in International Law* (n 1313) 18.
[1352] Please see sub-chapter 3.2. in the text.
[1353] Esperanza Hernández-Truyol and Powell (n 1138) 207.

the inhabitants of the lands they have conquered.[1354] Hence, De Vitoria's recognition of Indians as rational human beings, who are ruled by reason, consolidated the Indian title over their ancestral lands.[1355] The acceptance of the Indian autonomy paved the way to the conclusion of treaties between the Western colonizers and indigenous peoples.[1356]

However, with the decline of natural theories due to the adoption of modern approaches to law,[1357] the initial rights-bearing legal persona of indigenous communities regressed.[1358] The shift from natural law to modern law embraced a secular approach to the source of law; hence, the modern approaches to law replaced God, mainly, with the State authority and its positivistic laws.[1359] As a natural outcome of this, the notion of 'State' gained importance to identify legal authority – while Indians were deemed to be 'unfit to found or administer a lawful State up to the standards required by human rights and civil claims.'[1360]

The rise of the notion of 'State' was mainly the outcome of the Treaty of Westphalia of 1648.[1361] Concluded amongst the Western (European) imperial powers, this treaty introduced the notion of 'the independent territorial State', or more precisely 'the sovereign State'.[1362] Accordingly, and from the Hobbesian 'state and individual' dichotomy at the time, a new body of law emerged: The law of nations.[1363] This new body of law was consolidated in the late 1750s by the writings of Emmerich de Vattel, who articulated the law of nations as follows: '[T]he science

[1354] Åhrén, *Indigenous Peoples' Status in the International Legal System* (n 1313) 8.
[1355] Anaya, *Indigenous Peoples in International Law* (n 1313) 16.
[1356] Åhrén, *Indigenous Peoples' Status in the International Legal System* (n 1313) 9–10.
[1357] Please see section 1.2.1. in Chapter I.
[1358] Anaya, *Indigenous Peoples in International Law* (n 1313) 16–18.
[1359] Ibid, 16-17.
[1360] Ibid, 18.
[1361] Encyclopedia Britannica, 'European History: Peace of Westphalia' (*Britannica*, 19 November 2021) <https://www.britannica.com/event/Peace-of-Westphalia> accessed 15 November 2021.
[1362] Anaya, *Indigenous Peoples in International Law* (n 1313) 19–20; Åhrén, *Indigenous Peoples' Status in the International Legal System* (n 1313) 12.
[1363] Anaya, *Indigenous Peoples in International Law* (n 1313) 20.

of the rights which exist between Nations or States, and of obligations corresponding to these rights.'[1364]

The revision of international law from a Western-centric and statist point of view had implications on the status quo of indigenous peoples. As rightfully articulated by Anaya, the Vattelian vision of international law was premised upon Western and post-Westphalian readings of the 'nation' and the 'State'.[1365] Hence, this normative system validated and consolidated the European models of political and social organizations, which were dominantly defined over characteristics such as exclusivity of territorial domain and hierarchical, centralized authority.[1366] Given the establishment of a frame as such, indigenous peoples were expected to fit in this definition.[1367] If not, they would be deprived of their communal identity and group autonomy – and they would be 'reduced to their individual constituents.'[1368] In fact, the statism of international law and its strictly individualist approach to legal rights were further entrenched with the positivism of the nineteenth-century, which ended up excluding indigenous peoples from the scope of international law since they did not constitute nations or States, but rather sub-nation or sub-state groups within the sovereign States.[1369]

In respect to this, in his book, entitled *The Racial State*, Goldberg claims that the ideas of race and nation-state were conceptualized co-dependently, hence, they mutually institutionalize each other.[1370] According to Goldberg, it has been the idea of race that 'marks and orders'[1371] the nation-state, mainly for two reasons: First, the Western (European) imperial powers fabricated 'race' in

[1364] Ibid.
[1365] Ibid, 22-23.
[1366] Ibid, 22.
[1367] Ibid.
[1368] Ibid.
[1369] Ibid, 26-27; Esperanza Hernández-Truyol and Powell (n 1138) 207.
[1370] Goldberg (n 1329) 4.
[1371] Ibid.

order to define the 'other'.[1372] Yet, the racial configuration of the non-Western identity over its marginal state (compared to the Western identity) not only racialized indigenous peoples, but also the Western (European) colonists – and in this case, within a hierarchical rank.[1373]

Second, and also as a consequence of the first point, the political interactions of the Western (European) imperial powers and non-Western inhabitants of the colonized lands gave birth to the rhetoric of the Western (European) States' autonomy and natural right to self-rule as well as that of the non-Western nations' immaturity and incapability to such governance.[1374] Therefore, Goldberg asserts that colonialism entrenched the modern definitions (or, illusions) of the Western (European) nation-state.[1375] And, he adds: 'The apparatuses and technologies employed by modern [S]tates have served variously to fashion, modify, and reify the terms of racial expression, as well as racist exclusions and subjugation.'[1376]

In fact, the widely-shared Western (European) beliefs of 'civilization' paved the way to 'historical claims of immaturity and un(der)development'[1377] of indigenous peoples.[1378] Within the historical and legal background set by the modern revision of international law and its inherent Western-centric assumption of State, the seeds of the trusteeship doctrine and the 'civilizing' missions were planted.[1379]

The trusteeship doctrine and 'civilizing' missions were vivid representations of the dominant and Western-centric assumptions of the modern thought, especially those of evolution and (cultural

[1372] Ibid, 23.
[1373] Ibid.
[1374] Ibid, 50-51.
[1375] Ibid.
[1376] Ibid, 4.
[1377] Ibid.
[1378] Ibid.
[1379] Anaya, *Indigenous Peoples in International Law* (n 1313) 26–27; Åhrén, *Indigenous Peoples' Status in the International Legal System* (n 1313) 8–9.

and scientific) progress.[1380] Both of these notions originated from the racial thinking of modernism and the established ideas around the 'primitive' or 'backward' stage of the non-Western inhabitants of the conquered or colonized lands.[1381] Hence, the natives were deemed inferior communities, especially compared to their Western (European) colonizers.[1382] Based on these assumptions, the trusteeship doctrine and its 'civilizing' missions were the mediums, in Anaya's words, '[to reengineer] [the natives'] cultural and social patterns in line with European conceptions of civilized behavior.'[1383] Though these practices were disguised by superficial humanistic idea(l)s, such as instructing and assisting the natives to achieve civilization, both practices were materialistically-motivated and manipulative tools.[1384] They served to the colonizers to exercise non-consensual authority over indigenous peoples and to exploit their ancestral lands, natural resources, and labor – more than they served (or was supposed to serve) to the natives.[1385]

Nevertheless, the trusteeship doctrine did not remain within the national legal discourse and legal systems of the Western (European) States. It infused and instituted in international law through a series of international conferences – of which the most notorious is the Berlin Conference of 1884-1885. The negotiators of the Berlin Conference agreed 'to bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being.'[1386] In the name of bestowing 'the blessings of

[1380] Please see section 2.3.3. in Chapter II.
[1381] Anaya, *Indigenous Peoples in International Law* (n 1313) 26–27; Åhrén, *Indigenous Peoples' Status in the International Legal System* (n 1313) 8–9.
[1382] Ibid.
[1383] Anaya, *Indigenous Peoples in International Law* (n 1313) 31–32.
[1384] Ibid.
[1385] Ibid.
[1386] The Berlin Conference of 1884-1885, General Act, Art. VI.

civilization'[1387] upon the native people, both the trusteeship doctrine and its 'civilizing' missions helped to eliminate the native self-governance and to assimilate the native culture.[1388]

The colonial mindset and the Western (European) assumptions that underpinned the 'civilizing' missions were further entrenched by the League of Nations and the international instruments adopted under its aegis.[1389] Although being the linchpin of contemporary human rights law, even the Charter of the United Nations of 1945 (hereafter 'the UN Charter') was built upon these ideals. Indeed, the UN Charter consolidated that the UN Members comprise only sovereign States.[1390] Nevertheless, as rightfully articulated by Richard Falk, indigenous peoples' claims clash with the very core of this system since their demands for being considered as collective right holders and the right to self-determination not only threaten the sovereignty of the nation-states, but also the territorial integrity of their 'host' State.[1391]

It is neither possible nor intended to provide a comprehensive analysis of the international legal forum and its treatment of indigenous peoples within this sub-chapter. Still, it is worth assessing the racial underpinnings of four major international instruments, which would highlight the racialized power asymmetries that were not only ingrained in but also overhauled international law – of which international IP law is a constituent. These instruments are as follows: The International Labour Organization Convention concerning the Protection and Integration of Indigenous and Other Tribal Populations and Semi-Tribal Populations in Independent Countries of 1957 (hereafter 'the ILO Convention No. 107'), the International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989 (hereafter 'the ILO Convention

[1387] Anaya, *Indigenous Peoples in International Law* (n 1313) 32.
[1388] Ibid.
[1389] Åhrén, *Indigenous Peoples' Status in the International Legal System* (n 1313) 19.
[1390] The Charter of the United Nations of 1945, Art. 3, Art. 4.
[1391] Richard Falk, 'The Rights of Peoples (In Particular Indigenous Peoples)' in James Crawford (ed), *The Rights of Peoples* (Oxford University Press 1988) 18; Stoll and von Hahn (n 4) 15; Esperanza Hernández-Truyol and Powell (n 1138) 211; Bantekas and Oette (n 1279) 437.

No. 169'), the United Nations Convention on Biological Diversity of 1992 (hereafter 'the CBD'), and finally the United Nations Declaration on the Rights of Indigenous Peoples of 2007 (hereafter 'the UNDRIP').

Before a legal analysis through a race-conscious prism, it shall be crystallized that these international legal instruments constitute the main pillars of the contemporary indigenous discourse, hence, the legal basis of the rights and the contours of the (quite limited) gains of indigenous peoples.[1392] However, this statement shall not be taken as a depreciation of the outcomes of the long-lasting struggles of indigenous peoples in the legal fora. On the contrary, this sub-chapter is more of a critique of the conditions that required the affirmation of indigenous peoples' legal status at the first place and the shortcomings of these legal instruments to compensate, let alone restore, the historical injustices inflicted upon indigenous peoples – since, as rightfully articulated by Audre Lorde, '[t]he master's tools will never dismantle the master's house.'[1393]

In this frame, amongst the drafters of these international law instruments, the International Labour Organization (hereafter 'ILO') stands as the first intergovernmental organization to deal with the legal status of indigenous peoples and to regulate their rights via a binding legal instrument.[1394] Though the institution's official history largely disregards the colonial motivations behind ILO's interest in indigenous peoples, Luis Rodríguez-Piñero claims that the ILO

[1392] See e.g., Falk (n 1385); Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002); Rene Kuppe, 'The Three Dimensions of the Rights of Indigenous Peoples' (2009) 11 International Community Law Review 103; Elsa Stamatopoulou, 'Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing Ltd 2011).

[1393] In reference to: Audre Lorde, 'The Master's Tools Will Never Dismantle The Master's House' in Julia Penelope and Susan J Wolfe (eds), *Lesbian Culture: An Anthology* (Penguin Random House LLC 1993).
I am grateful to my supervisor, Professor Mathias Möschel, for referring to and quoting Lorde within his feedback on an earlier version of this chapter.

[1394] Thornberry (n 1386) 320; Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (Oxford University Press 2006) 332.

Conventions shall be considered as an extension of the trusteeship doctrine and the 'civilizing' missions.[1395] In the same vein, Goldberg explains that the Western (European) imperial powers have acknowledged colonialism as an apparatus to control the 'external' territories.[1396] Surely, this desire to control the colonial territories were driven by economic interests; however, such interests were not restricted to the exploitation of lands, but also of labor.[1397] Thus, the racial thinking of the modern times transformed race into an indicator to identify (and to legitimate) the 'exploitable labor.'[1398] Andrew Erueti confirms these claims by adding that ILO's initial attempts to improve the living and working conditions of indigenous peoples were purely economically-driven since indigenous peoples were acknowledged as 'an important source of labor,'[1399] which could have been an asset for the economic prosperity of the nation-state.[1400]

In fact, the original drafting of the Constitution of the International Labour Organization of 1944 (hereafter 'the ILO Constitution') supports these arguments. The original document sets the jurisdiction of the ILO as '[the Member States'] colonies, protectorates, and possessions which are not fully self-governing.'[1401] Due to this, Rodríguez-Piñero claims that ILO's intention was to draft a 'Colonial Code'[1402] addressed to disciplining the conditions of exploitation of indigenous labor (and natural resources), mainly, in the colonial territories.[1403]

As a matter of fact, the overarching paternalistic tone of the ILO Convention No. 107 and its blatantly racial language, especially in defining its beneficiaries, validate the colonial and racial

[1395] Rodríguez-Piñero (n 1388) 10–11, 19–22.
[1396] Goldberg (n 1329) 51.
[1397] Ibid.
[1398] Ibid.
[1399] Andrew Erueti, 'The International Labour Organization and the Internationalisation of the Concept of Indigenous Peoples' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing Ltd 2011) 95.
[1400] Ibid, 95-96.
[1401] The Constitution of the International Labour Organization of 1919, Art. 45.
[1402] Rodríguez-Piñero (n 1388) 18.
[1403] Ibid, 18-19.

underpinnings of the instrument. The Preamble of the Convention initiates with manifesting that various indigenous, tribal, and semi-tribal populations continue to reside in independent States, given that these populations are 'not yet integrated in the national community.'[1404] According to the Preamble, these populations constitute marginal groups in the society since their 'social, economic or cultural situation hinders them from fully benefitting from the rights and advantages enjoyed by the other elements of the population.'[1405] Once read within the historical setting at the time and through the prism of the racial thinking of modernity, these statements within the ILO Convention No. 107, as well as their emphasis on 'the humanitarian reasons'[1406] to tackle with the legal status of indigenous peoples, echo the 'civilizing' missions and the Western (European) idea(l)s of bringing 'the blessings of civilization'[1407] to the natives. Additionally, and as rightfully articulated by Patrick Thornberry, the ILO Convention No. 107 adopts an integrationist tone and portrays indigenous peoples as populations that are 'destined to disappear'[1408] – especially given that it considers indigenous peoples' unique (and non-Western) cultures and polities as an obstacle for the advancement of their status.[1409]

It is not only the Preamble of the Convention that sounds colonialist. The operational text of the Convention is also rich in racially-charged material. For instance, Article 1 of the Convention identifies three groups of beneficiaries: Indigenous, tribal, and semi-tribal populations residing in the independent States.[1410] It can be argued that there is a common Western (European) assumption that underscores these categories: Representing the lower rank in the 'civilized and primitive'

[1404] The International Labour Organization Convention concerning the Protection and Integration of Indigenous and Other Tribal Populations and Semi-Tribal Populations in Independent Countries of 1957, Preamble para. 6.
[1405] Ibid.
[1406] Ibid, Preamble para. 7.
[1407] Anaya, *Indigenous Peoples in International Law* (n 1313) 33.
[1408] Thornberry (n 1386) 331; Dutfield (n 3) 233; Esperanza Hernández-Truyol and Powell (n 1138) 209.
[1409] Thornberry (n 1386) 331.
[1410] The International Labour Organization Convention concerning the Protection and Integration of Indigenous and Other Tribal Populations and Semi-Tribal Populations in Independent Countries of 1957, Art. 1(1).

binary paradigm. Yet, what differentiates these groups from each other is their current stage in the evolutionary chain and their closeness to a Western (European) model of 'civilization'.[1411] According to this, semi-tribal populations refer to the groups who are in the process of losing their tribal characteristics, but who have not yet fully integrated into the mainstream society.[1412] Tribal populations refer to the groups who have not yet achieved the 'desired' level of assimilation and loosening of tribal characteristics.[1413] Last, indigenous populations stand for the descendants of the inhabitants of conquered or colonized lands, who 'live more in conformity with the social, economic and cultural institutions of [the colonial times]'[1414] rather than those of the nation-state.[1415]

Furthermore, Article 3 of the Convention stipulates that the normative framework of the Convention is a temporary one, which lasts until the fully integration of its beneficiaries into the dominant society.[1416] To further entrench the idea of assimilation, the Convention stipulates that the Member States have a positive obligation to create 'possibilities of national integration (…) of these populations.'[1417] Whereas Catherine Brölmann and Marjoleine Zieck read these regulations as the proof of a general unwillingness at the time to recognize the autonomy of indigenous peoples,[1418] Rodríguez-Piñero interprets these regulations as another reflection of the racial

[1411] Erueti (n 1393) 96.
[1412] The International Labour Organization Convention concerning the Protection and Integration of Indigenous and Other Tribal Populations and Semi-Tribal Populations in Independent Countries of 1957, Art. 1(2).
[1413] Ibid, Art. 1(1)(a).
[1414] Ibid, Art. 1(1)(b).
[1415] Ibid.
[1416] Ibid, Art. 3(1); Catherine Brölman and Marjoleine Zieck, 'Indigenous Peoples' in Brölman, René Lefeber and Marjoleine Zieck (eds), *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers 1993) 200.
[1417] The International Labour Organization Convention concerning the Protection and Integration of Indigenous and Other Tribal Populations and Semi-Tribal Populations in Independent Countries of 1957, Art. 2(2)(c).
[1418] Brölman and Zieck (n 1410) 200–202.

hierarchies embedded in the trusteeship doctrine: The responsibility of the 'civilized' *nations* to advance the social and legal polities of the 'uncivilized' *populations*.[1419]

The assimilationist orientation of the ILO Convention No. 107 has not only been a matter of criticism in the academia. Even the ILO itself has recognized and 'apologized' for this, by revising the Convention with the ILO Convention No. 169 – after thirty-two years.[1420] The ILO Convention No. 169 not only replaces the ideas of integration and assimilation with cultural diversity,[1421] but also departs from its predecessor's approach to identify the beneficiaries of the legal regulation.[1422] In this sense, rather than imposing indigeneity as a category upon the descendants of the former colonies, the Convention introduces the 'self-identification' principle.[1423] Additionally, it eliminates semi-tribal populations from the beneficiaries; in defining tribal populations, it merely emphasizes their distinct social, cultural, and economic features.[1424]

Still, the most important novelty of the ILO Convention No. 169 is the replacement of the term 'populations' with 'peoples'.[1425] Though the use of 'indigenous peoples' within the Convention recalls the right to self-determination,[1426] Article 1(3) immediately prevents any 'misunderstandings', by clarifying that the use of 'peoples' shall not be construed as having any implications of the right to self-determination.[1427] By this way, the ILO Convention No. 169

[1419] Rodríguez-Piñero (n 1388) 19–20.
[1420] The International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989, Preamble para. 4.
[1421] Ibid, Preamble para. 7.
[1422] Ibid, Art. 1.
[1423] Ibid, Art. 1(2).
[1424] Ibid, Art 1, Art. 1(1)(a).
[1425] Ibid, Art. 1.
[1426] Thornberry (n 1386) 342–343; Anaya, *Indigenous Peoples in International Law* (n 1313) 59.
[1427] The International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989, Art. 3(1).

compromises the autonomy of indigenous peoples, while committing to the statism of international law.[1428]

The peoplehood debate, and thereby the controversies around the legal persona of indigenous peoples that had started with the ILO Convention No. 169, gained another dimension with the CBD. Unlike the ILO Conventions, the CBD is not an international instrument that is exclusively addressed to indigenous peoples. Instead, it introduces a set of environmental norms and standards to be adopted by the Member States.[1429] In this context, the CBD aims to rest a normative ground for the conservation of biological diversity, the sustainable use of biological diversity and its components, and finally to establish a system of fair and equitable share of benefits deriving from the exploitation of genetic resources (hereafter 'GRs').[1430]

In other words, the CBD neither focalizes nor prioritizes the needs and expectations of indigenous peoples; instead, it is centered around the materialistic interests of the developed countries bloc, as evident from the emphasis on benefit-sharing mechanism.[1431] In fact, this aspect of the CBD was further entrenched in 2012 with the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization to the Convention on Biological Diversity (hereafter 'the Nagoya Protocol'). Still, the CBD and the Nagoya Protocol are widely-cited sources within the legal scholarship, mainly, because both the Preamble and several articles of the Convention and the Protocol explicitly refer to indigenous and local communities or peoples.

Although the CBD and the Nagoya Protocol acknowledge the close relationship of indigenous peoples with biological resources and considers their 'traditional' knowledge and methods in

[1428] Anaya, *Indigenous Peoples in International Law* (n 1313) 60.
[1429] The United Nations Convention on Biological Diversity of 1992, Preamble.
[1430] Ibid, Art. 1.
[1431] Stoll and von Hahn (n 4) 39. Also see: The United Nations Convention on Biological Diversity of 1992, Art. 1.

preserving and maintaining biological diversity;[1432] they, still, crystallize the sub-state status of indigenous peoples, which has caused disappointment for indigenous peoples.[1433] Indeed, the CBD refrains from the use of 'peoples' and opts for 'communities'.[1434] Furthermore, despite the fact that the vast majority of the biological diversity of the World is found in the ancestral lands of indigenous peoples and preserved by them for ages, the CBD and the Nagoya Protocol overlook the indigenous title over such lands and acknowledge the States' authority over such biological materials.[1435] In doing so, they subject such biological materials to the national laws of the State, hence, ignore the customary laws of indigenous peoples.[1436] Along the same line, the benefit-sharing mechanism introduced thereby undermine the interests of indigenous peoples over their ancestral lands and biological sources derived therefrom, and they require third parties to seek the consent of the State, rather than the custodians of such sources, in order to have access to and use them.[1437] Therefore, as aptly put by Surendra J. Patel, the CBD, although giving the signals of departing from the innate Western-centrism of IP law, fails to 'build a bridge between indigenous knowledge and IPRs.'[1438]

[1432] Ibid, Preamble para. 12, Art. 8(j); The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Beneficiaries Arising from their Utilization to the Convention on Biological Diversity of 1992, Preamble paras. 23-26.
[1433] Coombe, 'Intellectual Property, Human Rights & Sovereignty' (n 484) 89; Stoll and von Hahn (n 4) 32.
[1434] The United Nations Convention on Biological Diversity of 1992, Preamble para. 12, Art. 8(j), Art. 17, Art. 18.
[1435] Ibid, Preamble para. 4, Art. 3; The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Beneficiaries Arising from their Utilization to the Convention on Biological Diversity of 1992, Art. 12(1), Art. 13. Also see: Coombe, 'Intellectual Property, Human Rights & Sovereignty' (n 484) 101.
[1436] The United Nations Convention on Biological Diversity of 1992, Art. 15; The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Beneficiaries Arising from their Utilization to the Convention on Biological Diversity of 1992, Art. 12; Saskia Vermeylen, 'The Nagoya Protocol and Customary Law: The Paradox of Narratives in the Law' (2013) 9 Law Environment and Development Journal 185, 190; Brendan Tobin, 'Biopiracy by Law: European Union Draft Law Threatens Indigenous Peoples' Rights over Their Traditional Knowledge and Genetic Resources' (2014) 36 European Intellectual Property Review 124, 124–125; Caroline Joan S Picart and Marlowe Fox, 'Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalisation of Traditional Knowledge and Expressions of Folklore: Part II' (2014) 16 International Community Law Review 3, 9–10.
[1437] Stoll and von Hahn (n 4) 34; Picart and Fox (n 1430) 7.
[1438] Surendra J Patel, 'Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge' in Stephen B Brush and Doreen Stabinsky (eds), *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights* (Island Press 1996) 318; Sunder, 'The Invention of Traditional Knowledge' (n 969) 103.

After the ILO Conventions and the CBD, all of which gave primacy to the Western-centrism and statism of international law, the UNDRIP was celebrated by many as 'a remedial instrument'[1439] for the re-empowerment of indigenous people.[1440] As opposed to the piecemeal regulations of the former instruments, the UNDRIP constitutes the most comprehensive international instrument, which systematically maps the historical injustices suffered by indigenous peoples and regulates – not only the individualistic rights – but also the collective rights of indigenous peoples per se.[1441]

Given the emergence of 'indigeneity' as a consequence of a historical reality entangled with 'conquest, dispossession, marginalization, and neglect,'[1442] the UNDRIP initiates with emphasizing that 'indigenous peoples are equal to all other peoples.'[1443] The Declaration also explicitly condemns 'all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences.'[1444] In fact, any product of such ideologies is declared to be 'racist, scientifically false, legally invalid, morally condemnable and socially unjust.'[1445] Based on these, and in order to advance the legal status of indigenous peoples within the international law domain, the UNDRIP encompasses a wide spectrum of legal rights, including but not limited to the right to self-

[1439] Stamatopoulou (n 1386) 407.
[1440] S James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment' in S James Anaya (ed), *International Human Rights and Indigenous Peoples* (1st edn, Aspen Publishers 2009) 99.
[1441] Claire Charters and Rodolfo Stavenhagen, 'The UN Declaration on the Rights of Indigenous Peoples: How It Came to Be and What It Heralds' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs 2009) 10; Mauro Barelli, *Seeking Justice in International Law: The Significance and the Implications of the UN Declaration on the Rights of Indigenous Peoples* (1st edn, Routledge 2016) 13–14; Erica-Irene Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing Ltd 2011) 38.
[1442] Anaya and Wiessner (n 1434) 99.
[1443] The United Nations Declaration on the Rights of Indigenous Peoples of 2007, Preamble para. 2.
[1444] Ibid, Preamble para. 4.
[1445] Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' (n 1435) 38.

determination, self-identification, and the right to lands, territories and natural resources.[1446] There is also a tendency in the literature to acknowledge the principle of free, prior, informed consent among the main pillars and the major achievements of the UNDRIP since this principle constitutes a pre-requisite to a vast majority of the regulations concerning the relationship of the State and indigenous peoples.[1447]

Despite the overarching positive tone of the UNDRIP and its appraisal within the legal scholarship, there exists critique of and skepticism about its true impact on the legal status of indigenous peoples.[1448] These debates are often centered around two major points, which can trigger a 'domino effect': First, whereas indigenous peoples have historically been deprived of their autonomy, human rights, and freedoms via legally justified practices, court decisions, laws, and binding international instruments; the UNDRIP, as the only promising document for compensating these historical injustices, constitutes a non-binding, soft-law instrument.[1449] Therefore, there is an ongoing debate in the literature on the enforceability of the UNDRIP. Scholars like James Anaya and Siegfried Wiessner claim that the UNDRIP is a constituent of the international customary law, and that it shall be binding for the members of the international community.[1450] Yet, scholars, including but not limited to Alexandra Xanthaki, Mattias Åhrén, Mauro Barelli, and Megan Davis find the association of the UNDRIP with the international customary law rather as a premature idea – given that there is neither an established rule nor a

[1446] The United Nations Declaration on the Rights of Indigenous Peoples of 2007, Arts. 3, 4, 25, 26, 33.
[1447] Andrea Carmen, 'The Right to Free, Prior, and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress' in Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Purich Publishing Ltd 2010) 120.
[1448] Kenneth Deer, 'Reflections on the Development, Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples' in Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Purich Publishing Ltd 2010) 20.
[1449] Åhrén, *Indigenous Peoples' Status in the International Legal System* (n 1313) 44; Barelli (n 1435) 105.
[1450] Anaya and Wiessner (n 1434) 100.

wide-spread State practice regarding the application of the UNDRIP in national law.[1451] Besides, as mentioned by Xanthaki, the negative votes of States such as Canada, the Commonwealth of Australia, New Zealand, and the United States complicate the acknowledgement of the UNDRIP even as *opinio juris*.[1452] Due to these, the latter camp of scholars presents the UNDRIP as a *common standard* of achievement, rather than a binding instrument.[1453]

As to the second point, the face-neutral and objective construct of Article 3 seems to entitle indigenous peoples with an unconstrained right to self-determination.[1454] Nevertheless, Karen Engle notes that this regulation shall be construed with Articles 4 and 46(1) of the Convention.[1455] The former regulation presents an immediate compromise to the right to self-determination since it restrains the autonomy of indigenous peoples to matters relating to their internal and local affairs[1456] – mainly to prevent any secessionist movements, hence to protect the territorial integrity of the nation-states.[1457] In a similar vein, the latter regulation consolidates the primacy of the nation-state over indigenous peoples, by indicating that nothing in the Declaration may be interpreted in a way that would 'dismember or impair (…) the territorial integrity or political unity of sovereign and independent State.'[1458] In this respect, it can be argued that the UNDRIP also

[1451] Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 The International and Comparative Law Quarterly 957, 967; Alexandra Xanthaki, 'Reflections on a Decade of International Law: Indigenous Rights Law Over the Last 10 Years and Future Developments' (2009) 10 Melbourne Journal of International Law 27, 35; Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 Australian International Law Journal 17, 36–38.
[1452] Xanthaki (n 1445) 35.
[1453] Ibid.
[1454] The United Nations Declaration on the Rights of Indigenous Peoples of 2007, Art. 3.
[1455] Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 The European Journal of International Law 141, 145.
[1456] The United Nations Declaration on the Rights of Indigenous Peoples of 2007, Art. 4.
[1457] Stefania Errico, 'The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview' in S James Anaya (ed), *International Human Rights and Indigenous Peoples* (1st edn, Aspen Publishers 2009) 66.
[1458] The United Nations Declaration on the Rights of Indigenous Peoples of 2007, Art. 46(1).

scrutinizes the sub-state and sub-nation status of indigenous peoples, and it fails short to restore their autonomy to the pre-colonial times.[1459]

In brief, it can be concluded that indigeneity and the legal discourse centered around indigenous peoples are overtly politicized issues that emerged from the Western (European) colonial reality.[1460] Though the concept of 'indigenous peoples' appear as a contemporary phraseology, neither the economic, historical, and political conditions that paved the way to its origination nor the racial thinking that underscores its existence are new. On the contrary to the mainstream literature, indigeneity is as old as the nation-states, and it is deeply-rooted in the colonial history of the Western (European) political actors and the formation of the nation-states.[1461] As a consequence, the concepts of 'indigeneity' and 'indigenous peoples' are interwoven with and carry along the burden of colonialism, racially-charged information, and long-lasting human rights abuses. Whereas the role that law plays in the compensation of the historical injustices experienced by indigenous peoples is unclear,[1462] especially given that many of the resolutions adopted by the UNDRIP were not embraced by the States;[1463] there is no room for doubt regarding the role that it played in their dehumanization, exploitation, disempowerment, and

[1459] Asbjørn Eide, 'The Indigenous Peoples, The Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs 2009) 42.
[1460] Friedman (n 1304) 29–30.
[1461] Ibid.
[1462] According to the report drafted by UN Permanent Forum on Indigenous Issues, there is a general decline in the UN Member States' as well as the UN-bodies to honor and apply the UNDRIP. Please see: 'Study on How States Exploit Weak Procedural Rules in International Organizations to Devalue the United Nations Declaration on the Rights of Indigenous Peoples and Other International Human Rights Law' (The UN Permanent Forum on Indigenous Issues, the Economic and Social Council (ECOSOC), 2016).
Along the same line, Russel L. Barsh underlines that it has become a habit within the international legal diplomacy to refer to indigenous peoples *per se* in explanatory notes or in other non-binding instruments, then, to switch 'peoples' with 'communities' when drafting the operational texts of such instruments and of binding legal instruments. See e.g., Russel Lawrence Barsh, 'Indigenous Peoples: An Emerging Object of International Law' (1986) 80 The American Journal of International Law 369, p. 376; Russel Lawrence Barsh, 'Indigenous Peoples in the 1990s: From Object to Subject of International Law' (1994) 7 Harvard Human Rights Journal 33.
[1463] Bantekas and Oette (n 1279) 438.

subordination. In fact, contemporary international law continues to muddle the indigenous right discourse with overlapping (yet, clashing) legal instruments, the inconsistent use of legal concepts, and diplomatic maneuvers.

In line with this argument, the remainder of the chapter concentrates on the international IP policy- and law-making processes, in order to analyze the interaction of the statist nature of the global IP diplomacy as well as the Western-centric IP norms and standards with indigenous modes of creativity, indigenous intellectual creators and creations.

3.4.2. Reflections of the Indigenous Identity and Legal Persona on International Intellectual Property Law: An Ongoing Debate

The previous sub-chapter explained that the indigenous identity and legal persona are the intellectual outputs of a series of racially-charged acts, comprising of systematic marginalization, stigmatization, deprivation, exploitation of indigenous peoples and their exclusion from the international legal fora. In such a historical and legal setting, which has been interlaced with the racial thinking of modernity and the idea of the Western (European) 'superiority'; indigenous peoples were stripped off from their autonomy, self-governance, customs, and from their unique lifestyles in the name of 'civilizing' missions and the guardianship rhetoric.

Nevertheless, these negative experiences of indigenous peoples with global diplomacy are not specific to the international law sphere. In fact, the same pattern of misconduct resonates in the global IP diplomacy as well. The main reason for the continuum of these historical injustices can be associated with the fact that international IP law draws upon the existing (and racialized) legal terminology fabricated by international law, also given that it is neither the aim nor within the scope of IP law to re/define indigeneity and to reconstruct the indigenous legal persona. As a consequence, international IP law not only utilizes racially-charged legal frames, but it also

conveys the same racial information, hence, further entrenches the racialized (cultural) hierarchies in the legal discourse. Accordingly, and just like the legitimation of the appropriation of indigenous peoples' ancestral lands by the Western-centric legal mindset and laws, the existing Western-oriented IP regimes rest the foundations of the (mis)use and (mis)appropriation of indigenous knowledge, against the free will and consent of its indigenous holders.

This colonial mindset forged two major consequences in the IP domain, which mutually reinforce each other: On the one hand, indigenous knowledge systems and intellectual creations are acknowledged, metaphorically, as *terra nullius*. Thus, they are allocated to the (Western) public domain, where they can be used by anyone without any IP-related concerns and without necessarily being subject to licensing schemes and royalty payments.[1464] On the other hand, the shift from industry-based economies to information-based economies, along with the global markets' constant demand for new products at shorter intervals, resulted in the search for 'exotic' raw materials that were previously unknown to the Western world.[1465] Hence, there is an ever-growing market-related interest in indigenous knowledge.[1466] In fact, the combination of these two factors not only paved the way to the use and exploitation of indigenous knowledge by the Western (European) industries, but it also incentivized such actions by entitling these market actors with IPRs over their 'original' or 'novel' end-products, even though such products have derived from indigenous peoples' cultural heritage.[1467]

Besides, in many cases, Western (European) market actors, who are outsiders of the relevant indigenous community, either end up infringing upon the customary laws of the relevant

[1464] *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (World Intellectual Property Organization (WIPO) 2015) 10.
[1465] Silke von Lewinski, 'Introduction' in Silke von Lewinski (ed), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (2nd edn, Kluwer Law International 2008) 1–2; Frankel, 'Traditional Knowledge, Indigenous Peoples, and Local Communities' (n 4) 759.
[1466] Ibid. Also see: Michael F Brown, *Who Owns Native Culture?* (1st edn, Harvard University Press 2003) 1–10.
[1467] Dutfield (n 3) 243, 249; von Lewinski (n 1459) 1–2. Also see: Boyle (n 1064) Preface.

community, or use the indigenous cultural elements out of their original context, hence, distort their meaning – including those of the secret or sacred cultural elements and rituals.[1468] Furthermore, the treatment of indigenous knowledge and intellectual creations as *terra nullius* often prompts the use of such without the free, prior, informed consent of indigenous peoples – and even without giving credits to the community that originated such knowledge, and without sharing the materialistic benefits deriving from the end-products with its indigenous holders.[1469] Therefore, as rightfully articulated by Susy Frankel, indigenous peoples have found themselves in a dilemma in which 'IP incentivizes the use of TK and excludes those who provide the knowledge.'[1470]

Based on these, this sub-chapter argues and aims to prove that the global IP policy- and law-making processes and their outcomes are not immune to the racialized power dynamics and cultural hierarchies, which have been ruling the international diplomacy since the colonial times. In line with this, the sub-chapter argues that the disempowerment of indigenous peoples in the global IP arena and the subordination of their knowledge and culture systems are the projections and the continuum of their historical deprivation from their natural rights to self-determination and to control their culture and knowledge. In this frame and recalling David Theo Goldberg's explanations over the multiple functions of race,[1471] the sub-chapter further argues that it has not only been indigenous lands and *physical* labor that were exploited by the Western (European) imperial powers, but also the indigenous *intellectual* labor and TK.

[1468] 'Background Brief No. 7: Customary Law and Traditional Knowledge' <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_7.pdf> accessed 19 May 2019.
[1469] Oguamanam (n 1012) 34; von Lewinski (n 1459) 2; Frankel, 'Traditional Knowledge, Indigenous Peoples, and Local Communities' (n 4) 763.
[1470] Frankel, 'Traditional Knowledge, Indigenous Peoples, and Local Communities' (n 4) 764.
[1471] Please see section 3.4.1. in the text.

In terms of substantiating its argument, the sub-chapter initiates with a brief overview of how the indigenous knowledge has become an IP-related theme. For this purpose, it points at the indigenous initiatives that were addressed to protest the erosion of indigenous knowledge and to claim legal protection for TK. Then, the sub-chapter moves to the consequences of such indigenous activism: The UN's initial attempts to comprehend the nature and extend of the disenfranchisement of TK by means of IP law and the WIPO-led initiatives to assess the feasibility of protecting TK through IP law. In this context, the chapter, finally, focuses on WIPO's most recent and long-lasting efforts in this field, namely the Draft Articles on the Protection of TK and TCEs (hereafter cumulatively referred to as 'the Draft Articles'). In doing so, it questions the ability of the Draft Articles to compensate the historical injustices faced by indigenous peoples within the IP domain, and it critically examines to what extend this normative framework meets the IP-related needs and expectations of indigenous peoples.

The global IP fora have become aware of the IP-related concerns and claims of indigenous peoples in the early 1990s.[1472] This decade witnessed a series of international and regional initiatives of indigenous peoples.[1473] Despite the heterogeneity of the stakeholders and the discussion platforms, these efforts were mainly centered around the same ideal: Raising awareness to the historical subordination of indigenous peoples and to seek remedies for the systematic erosion of their pre-colonial rights – especially their right to self-determination.[1474] Whereas it is neither possible nor desired to enlist and analyze all these collective efforts; it is worth to mention three of them, due to their explicit refences to the interplay of colonialism, indigeneity, and IPRs.

[1472] Lucas-Schloetter (n 4) 469.
[1473] Ibid.
[1474] Ibid.

The Inaugural International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, which was held in New Zealand in 1993, marks the beginning of these awareness-raising attempts.[1475] The Conference ended with the adoption of the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (hereafter 'the Mataatua Declaration'). The Mataatua Declaration explicitly mentions and outlines the discrimination of indigenous culture and knowledge by conventional IP regimes. It asserts that the existing IP frameworks do not provide indigenous forms of IP with legal protection,[1476] which makes TK vulnerable to non-consensual appropriation and exploitation by third parties.[1477] In fact, this practice is acknowledged within the Preamble of the Declaration as a negative experience that is common to all indigenous peoples around the world.[1478] Furthermore, the Declaration crystallizes the link between indigenous peoples' right to self-determination and IP-related claims.[1479] In this sense, it can be argued that the Declaration condemns colonialism and the legacy of its 'civilizing' missions, due to implicitly rejecting the overarching paternalism of such colonial practices and cultural assimilation. The Declaration, indeed, underlines that '[i]ndigenous [p]eoples are *capable* of managing their traditional knowledge themselves (…).'[1480] Along the same line, the Declaration, firstly, clarifies that indigenous peoples are 'willing to offer [their TK] to all humanity.'[1481] However, it is made explicit that indigenous peoples are the sole guardians of their TK[1482] and that they are the ones to hold the exclusive right to control the use and

[1475] Lucas-Schloetter (n 4) 469–470.
[1476] The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples of 1993, Recommendation 1(1.2.).
[1477] Ibid, Preamble. Also see: Dutfield (n 3) 249.
[1478] The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples of 1993, Preamble.
[1479] Ibid.
[1480] Ibid. Emphasis added.
[1481] Ibid.
[1482] Ibid, Recommendation 2(2.1.).

dissemination of it.[1483] In this respect, the Declaration acknowledges the indigenous control over TK as an integral aspect of indigenous peoples' right to self-determination.[1484]

Only after a few months, the spirit of the Mataatua Declaration was evoked in another regional conference held by the Aboriginal People of Australia in Jingarra, Australia. Like its predecessor, this Conference also concluded with the adoption of a declaration: The Julayinbul Statement on Indigenous Intellectual Property Rights of 1993 (hereafter 'the Julayinbul Statement'). The Julayinbul Statement repeats that the Aboriginal IPRs are inherent and inalienable rights that belong to the Aboriginal People.[1485] It asserts not only the Aboriginal title over such IPRs, but also the fact that these rights are subject to the Aboriginal Common Law.[1486] Similar to the Mataatua Declaration, the Julayinbul Statement implies that the Aboriginal IPRs can be shared with the public at large; however, the terms and conditions of such uses shall comply with the Aboriginal customary laws.[1487]

In a similar vein, the International Conference on the Rights of Indigenous Peoples, held in Taiwan in 1999, issued a declaration with the same overarching tone.[1488] According to the Taipei Declaration on the Rights of Indigenous Peoples (hereafter 'the Taipei Declaration'), the States shall take all the necessary measures to provide indigenous peoples with positive and defensive IPRs protection. In other words, whereas the Taipei Declaration claims the ownership of IPRs over indigenous knowledge, it also claims the right to prevent third parties to use such knowledge without the consent and permission of indigenous peoples.[1489] In doing so, the Declaration asserts

[1483] Ibid, Recommendation 2(2.4.).
[1484] Ibid, Preamble.
[1485] The Julayinbul Statement on Indigenous Intellectual Property Rights of 1993.
[1486] Ibid.
[1487] Ibid.
[1488] 'Taipei Declaration on the Rights of Indigenous Peoples, International Conference on the Rights of Indigenous Peoples (June 18–20, 1999)' (*Taiwan First Nations*, 1999) <http://www.taiwanfirstnations.org/Taipeidec.htm> accessed 20 June 2021.
[1489] Ibid.

that the States shall acknowledge that '[i]ndigenous peoples *can* protect their cultural heritage'[1490] and that it is their inherent right to own, protect, and to control their TK.[1491]

Last but not least, it is worth to briefly mention the Bellagio Global Dialogues on Intellectual Property organized by the Rockefeller Center in 1993, on 'Cultural Agency/Cultural Authority'[1492] – even though this Conference was not an indigenous initiative like the formers.[1493] This Conference was concluded with the adoption of the Bellagio Declaration of 1993.[1494] Among the signatories of this Declaration were IP scholars and historians whose works are crucial for the purposes of this dissertation, such as: James Boyle, Rosemary J. Coombe, Peter Jazsi, Mark Rose, and Martha Woodmansee.[1495]

The Bellagio Declaration crystallized that the contemporary IP frameworks are 'constructed around a paradigm that is selectively blind to the scientific and artistic contributions of many of the [W]orld's cultures [especially those of indigenous and tribal peoples] and constructed in fora where those who will be most directly affected have no representation.'[1496] In terms of unfolding this claim, the Declaration explains that the current IP regimes are centered around the notion of the *[R]omantic author* or a solitary creator; accordingly, such a framework denies IP protection to the communal originators and collective custodians of TK, as they do not fit within this frame.[1497] Additionally, it is made explicit that the importance of indigenous knowledge is undervalued and

[1490] Ibid. Emphasis added.
[1491] Ibid.
[1492] Joe Karaganis, 'The Bellagio Global Dialogues on Intellectual Property (PIJIP Research Paper Series)' (American University Washington College of Law, 2012) 4–7.
[1493] Ibid.
[1494] See: 'The Bellagio Declaration from the 1993 Rockefeller Conference "Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era"' (*The Society for Critical Exchange: IPCA*, 1993) <https://case.edu/affil/sce/BellagioDec.html> accessed 20 June 2021.
[1495] Ibid.
[1496] Ibid.
[1497] Ibid. Emphasis added.

placed in the public domain.[1498] Whereas indigenous knowledge is made public, the flow of information protected by IPRs to developing countries and indigenous and tribal populations are bound to complex laws and trade sanctions.[1499] In this regard, the Bellagio Declaration advocates for a more inclusive IP framework, which would acknowledge indigenous peoples' right to self-determination, include TK within the scope of IP law, and eradicate distributive injustices within the IP domain.[1500]

As a consequence of the growing indigenous activism and the above-mentioned international and regional statements, the UN had included the interaction of IP law and indigenous knowledge within its agenda.[1501] In fact, the World Forum on the Protection of Folklore, which was co-organized by UNESCO and WIPO at Phuket, Thailand in 1997, marks the beginning of a new term in the relationship of IP law with non-Western intellectual creations.[1502] The Forum provided the opportunity for the non-Western stakeholders' voices to be heard. Thus, the (predominantly indigenous) non-Western States' and indigenous peoples' requests for an effective international legal framework for the legal protection of non-Western forms of intellectual creations, including indigenous knowledge, were once more declared and emphasized.[1503] The Forum ended on the note that a Committee of Experts shall hold consultations for compiling information on the IP-related needs and expectations of various non-Western stakeholders.[1504] This Committee was expected to draft an international legal instrument by the second quarter of 1998, which was aimed at providing

[1498] Ibid.
[1499] Ibid.
[1500] Ibid.
[1501] von Lewinski (n 4) 754–755.
[1502] Weerawit Weeraworawit, 'Formulating an International Legal Protection for Genetic Resources, Traditional Knowledge and Folklore: Challenges for the Intellectual Property System' (2003) 11 Cardozo Journal of International and Comparative Law 769; Lucas-Schloetter (n 4) 469.
[1503] The UNESCO-WIPO World Forum on the Protection of Folklore of 1997, 235.
[1504] Ibid.

sui generis protection to such intellectual creations.[1505] These points were consolidated within a plan of action, which was adopted by the participants of the Forum at the closing session.[1506]

Though the deadline envisioned by the plan of action was quite ambitious – and was not met,[1507] following up with the World Forum, the WIPO conducted extensive research on the topic. It launched regional consultations and fact-finding missions to have a comprehensive understanding of the issue.[1508] Finally, it established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereafter 'the IGC') in 2000.[1509] Initially, the IGC constituted a forum for discussion where the WIPO Member States could discuss the IP-related aspects of GRs and benefit-sharing, TK, and TCEs.[1510] At the time, its mandate was penned quite broadly and without prescribing any tangible outcomes from such inter-state discussions.[1511] Yet, with the update of its mandate in 2009, the IGC evolved into a 'negotiating body'.[1512] Since then, the IGC's agenda involves identifying and reaching a common understanding about the core issues related to the IP-related aspects of TK.[1513]

The IGC admits the pitfalls of the conventional forms of IPRs to encompass non-Western forms of intellectual creations; thus, it offers a clean slate to negotiate the feasibility of the

[1505] Ibid; Lucas-Schloetter (n 4) 460–461.
[1506] Ibid.
[1507] von Lewinski (n 4) 755; Picart and Fox (n 1430) 16.
[1508] Lucas-Schloetter (n 4) 461.
[1509] 'Background Brief No. 2: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (World Intellectual Property Organization (WIPO), 2015) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf> accessed 19 May 2019.
[1510] Ibid.
[1511] Ahmed Abdel-Latif, 'Revisiting the Creation of the IGC: The Limits of Constructive Ambiguity?' in Daniel F Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (1st edn, Routledge 2017) 23.
[1512] Ibid.
[1513] 'Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC): Decision' <https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2020-2021.pdf> accessed 17 June 2020.

protection of indigenous knowledge by means of IP law.[1514] In this context, the IGC also aspires to hold the formal text-based negotiations for reaching an agreement on at least one international legal instrument that would effectively protect GRs, TK, and TCEs.[1515] Despite its clearly defined aims, the IGC has not determined the legal status of such a prospective instrument – it can either be soft law and provide the Member States with recommendations regarding the protection of non-Western intellectual creations, or it can comprise a binding legal instrument.[1516]

The foundation of the IGC was celebrated among many circles, due to appearing to be a new and 'friendlier' platform that is dedicated exclusively to non-Western forms of intellectual creations.[1517] Furthermore, Weerawit Weeraworawit notes that the IGC has accommodated diversity and witnessed the participation of a large number of States from all around the World – including those from Africa, Asia, and Latin America.[1518] Besides, the IGC slightly shifted the beneficiaries of its prospective legal instrument(s) from the developing countries to indigenous peoples and local *communities*.[1519] For the very same reason, and as underlined by Wend Wendland, the IGC stands amongst the very few international policy- and decision-making forums in which the participation of indigenous peoples, either through non-governmental organizations or as ad hoc observers, is enabled.[1520]

[1514] 'Background Brief No. 2: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (n 1503).
[1515] Ibid.
[1516] Ibid.
[1517] Picart and Fox (n 1430) 18; Abdel-Latif (n 1505) 19–20.
[1518] Weeraworawit (n 1496) 782.
[1519] 'Background Brief No. 1: Traditional Knowledge and Intellectual Property' <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf> accessed 19 May 2019; 'Background Brief No. 2: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf> accessed 19 May 2019.
[1520] 'Background Brief No. 2: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (n 1503); Wend Wendland, 'The Evolution of the IGC from 2001 to 2016: An Insider's Perspective' in Daniel F Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (1st edn, Routledge 2017) 32.

Nevertheless, these statements shall not be taken as if the IGC is free from racialized power dynamics and path dependency. As rightfully mentioned by Peter K. Yu, the fate of the negotiations and the outcome of such a process are directly linked to the mindset and enthusiasm of the negotiators.[1521] According to Yu, the negotiators who envision the outcome of this process as a 'zero-sum game' would be prone to manipulating such an outcome and pushing others to make compromises in their initial claims; whereas the ones who vision a 'non-zero-sum game' would be more willing to conclude an agreement, especially to secure mutual benefits from the negotiations.[1522] In this frame, can be argued that the negative votes of the United Kingdom and the United States regarding the plan of action in the World Forum[1523] were early indicators of the ongoing procrastination of the IGC to reach an agreement on the draft instrument(s). Besides, the Global North has been historically distant to the idea of entitling legal protection to indigenous knowledge since this would require saving these creations from the public domain, hence, shrinking the freely accessible materials.[1524] Therefore, it can be argued that the opening of a new venue for negotiating the protectability of non-Western modes of creativity was immediately shadowed by the continuing racialized power dynamics of the international forum.

That said, Yu claims that the forum for negotiations plays a vital role in the direction that the conversations and the outcome would lead.[1525] The intergovernmental organization that launches the negotiation process can effectively impact the terms and agreements of a treaty, by imposing its own overarching agenda on the negotiators. However, Kal Raustiala refers to a phenomenon,

[1521] Peter K Yu, 'Traditional Knowledge, Intellectual Property, and Indigenous Culture: An Introduction' (2003) 11 Cardozo Journal of International and Comparative Law 239, 243.
[1522] Ibid.
[1523] 1/2/2022 10:11:00 AM
[1524] Sunder, 'The Invention of Traditional Knowledge' (n 969) 101, 106; 'Background Brief No. 1: Traditional Knowledge and Intellectual Property' (n 1513).
[1525] Yu, 'Traditional Knowledge, Intellectual Property, and Indigenous Culture: An Introduction' (n 1515) 242.

which would contradict with Yu's claims: Path dependence.[1526] Raustiala utilizes this term to explain that new norms on a subject are not always being negotiated on a clean slate and objectively.[1527] According to Raustiala, the policy- and norm-makers can be under the influence of and restricted by the existing rules and principles on the same subject.[1528] Hence, this can be interpreted as the foundation of the IGC as a new international venue does not promise the independence of the negotiation of a sui generis framework from the established IP regimes.

As a matter of fact, the existing IP regimes, which have been created and administered by WIPO, immediately affected the text-based negotiations at the IGC. Given the complexity of indigenous knowledge, the IGC has adopted a three-tiered approach to indigenous knowledge and created three categories of indigenous knowledge: GRs, TK, and TCEs.[1529] These categories were organized by taking the conventional forms of IPRs as benchmarks, and they divided the interrelated elements of indigenous knowledge in accordance with the subject-matters of copyright, patent, and trademark.[1530] In this sense, TK stands as an umbrella term, which covers the latter two; still, it is mostly associated with patent rights.[1531] While TCEs are associated with copyright and (partially with) trademark, GRs are acknowledged within the patent discourse.[1532]

In fact, the WIPO mandate over this issue has been a matter of concern since the beginning, especially given the inevitable influence of the WTO-administered TRIPs Agreement on the global IP regimes.[1533] The gap between the initial documents prepared by the IGC on the legal protection

[1526] Raustiala (n 924) 1026.
[1527] Ibid.
[1528] Ibid.
[1529] See: Chidi Oguamanam, 'Towards a Tiered or Differentiated Approach to Protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) in Relation to the Intellectual Property System' (2019) 23 The African Journal of Information and Communication 30.
[1530] Ibid, 1034.
[1531] 'Background Brief No. 1: Traditional Knowledge and Intellectual Property' (n 1513).
[1532] Ibid.
[1533] Yu, 'Traditional Knowledge, Intellectual Property, and Indigenous Culture: An Introduction' (n 1515) 242.

of TK/TCEs and the latest version of the Draft Articles reveal the path dependence, racialized power struggles, and the clash of the Western (European) stakeholders' and indigenous peoples' interests. Yet, as a pre-requisite to the analysis of the discrepancies between the first and the most recent approaches of the international fora to the protection of TK, what 'TK' stands for in this debate shall be clarified.

There is a consensus in the global IP diplomacy and literature that TK (still) does not have a single, precise, formal, and widely-accepted definition.[1534] However, for the purposes of the IGC's mandate, WIPO broadly articulates TK as follows: 'TK is a living body of knowledge that is developed, sustained, and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.'[1535] According to this working definition crafted by WIPO, TK encompasses a wide-spectrum of elements, such as knowledge, know-how, skills, innovations, and practices of an indigenous or local community.[1536] As mentioned before, TK is acknowledged as an umbrella term which covers GRs and TCEs. The former term stands for biological materials that contain genetic information, such as agricultural crops, animal breeds, medicinal plants, plant seeds, and the like.[1537] The latter term refers to 'the forms in which traditional culture [and the core values and beliefs a community] is expressed.'[1538] These expressions can be tangible or intangible; verbal, musical, or even expressions by motion. In this

[1534] *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* (World Intellectual Property Organization (WIPO) 2001) 22–23; 'Glossary' (*World Intellectual Property Organization (WIPO)*) <https://www.wipo.int/tk/en/resources/glossary.html#49> accessed 15 November 2021.
[1535] *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (n 1458) 13.
[1536] Ibid.
[1537] Ibid, 18.
[1538] *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (n 1458) 15.

sense, TCEs include but not limited to artistic or cultural expressions, ceremonies, dances, designs, handicrafts, signs, songs, symbols, rituals, folk tales.[1539]

What distinguishes TK from contemporary intellectual creations is its 'traditional' aspect. Though it refers to the cultural context in which TK is produced and maintained,[1540] the 'traditional' character of TK has been largely misunderstood by the international community.[1541] As a consequence, TK has been often degraded to 'antiquity' or old information that lacks originality or novelty, hence, does not worth to be protected by IPRs.[1542] Due to this, WIPO repeatedly remarks that the 'traditionality' of TK does not 'necessarily relate to the nature of the knowledge [or the date on which the knowledge was produced][1543], but to the way in which the knowledge is created, preserved, and disseminated.'[1544] In other words, 'tradition' in TK emphasizes the link between the community and the culture, customs and traditions of that community.[1545] Yet, it is still a matter of question whether WIPO's explanation as such succeeded to wash off the negative connotations attached to (folklore and) TK.

[1539] Ibid, 15-17.
[1540] 'Glossary' (n 1528); *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* (n 1528) 22–23; Picart and Fox (n 1138) 329.
[1541] Stoll and von Hahn (n 4) 20; Picart and Fox (n 1138) 329.
[1542] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Elements of a Sui generis System for the Protection of Traditional Knowledge', 6 para. 12 <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8.pdf> accessed 16 May 2019; Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Review of Existing Intellectual Property Protection of Traditional Knowledge', 11 para. 33 <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_7.pdf> accessed 16 May 2019.
[1543] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Review of Existing Intellectual Property Protection of Traditional Knowledge', 11 para. 33 <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_7.pdf> accessed 16 May 2019.
[1544] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Elements of a Sui generis System for the Protection of Traditional Knowledge', 6 para. 12 <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8.pdf> accessed 16 May 2019.
[1545] 'Background Brief No. 1: Traditional Knowledge and Intellectual Property' <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf> accessed 19 May 2019.

Indeed, the prejudices against the traditional character of TK, along with a number of other aspects, have been considered as limitations to the protection of TK by means of IP law.[1546] These limitations derive from the same source: The Western (European) assumptions built into IP law – mainly, the myth of the Romantic author and the Western (European) public domain. Due to this, the difficulty in identifying the individual authors or creators of TK constitutes another obstacle for the protection of TK by the existing IP regimes.[1547] Additionally, the current status of TK as an integral part of the public domain is favored by many States, and it is often mentioned that recapturing TK from the public domain would not only shrink the latter, but the privatization and propertization of TK would also conflict with its communal nature.[1548] Last but not least, it is also claimed that IPRs serve for a utilitarian purpose and incentivize authors for future intellectual endeavors, whereas TK's protection by means of law cannot be justified on the same ground.[1549]

Based on these, the IGC's fact-finding missions and consolidated reports highlight the need for sui generis protection of TK.[1550] This stem, primarily, from the sophisticated nature of TK. The IGC identifies four characteristics unique to TK: The entanglement of the spiritual and the practical within TK, the constant reproduction and evolution of TK, the wide coverage of the scope of TK, and the dependence of TK to the cultural context in which it has been produced.[1551] Furthermore,

[1546] Picart and Fox (n 1138) 334.
[1547] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Review of Existing Intellectual Property Protection of Traditional Knowledge', 10 para. 32 <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_7.pdf> accessed 16 May 2019.
[1548] Ibid.
[1549] Ibid, 11 para. 32. Also see: Dutfield (n 3) 245.
[1550] See e.g., *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* (n 1528); Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Composite Study on the Protection of Traditional Knowledge' (World Intellectual Property Organization (WIPO), 28 April 2003) <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_8.pdf> accessed 21 May 2019; *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore* (n 1205).
[1551] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Composite Study on the Protection of Traditional Knowledge', 44 para. 108 <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_8.pdf> accessed 21 May 2019.

the IGC underlines that TK is 'not the mere sum of its separated components, (…) [but] the consistent and coherent combination of those elements into an indivisible piece of knowledge and culture.'[1552] Respectively, it adds that 'no single IP system, however broad in scope, is likely to embrace all the characteristics and the full context of [TK] in its original cultural setting.'[1553] Due to its inherent complexity, the IGC marks that TK requires a holistic approach which would avoid 'impractical simplifications'[1554] and artificial categorization of its constituents, in order to make TK (or its elements) to fit in the existing IP frameworks.[1555] In doing so, the IGC gives the impression of breaking through the rigid frames imposed by the Romantic author, the (Western) public domain, and the predominantly economic approach to TK – which has ended up being a broke promise.

The IGC has set several objectives of and reasons for protecting TK by a sui generis regime. In this context, it was made clear that any normative framework to protect TK shall encompass both positive and defensive protection.[1556] Whereas the former intends to provide the TK holders with legal grounds to acquire legal rights over TK, to protect, to use (also for commercial purposes), and to license TK; the latter aims to prevent the third parties from acquiring any legal rights over TK and to hinder the unauthorized appropriation or exploitation of TK, or to safeguard TK against its offensive or culturally inappropriate use.[1557]

Within this frame, the elements of a prospective sui generis framework for TK were envisioned as follows: First, this normative framework shall acknowledge and respect the complexity of TK;

[1552] Ibid, 43 para. 107.
[1553] Ibid, 42-43 para. 106.
[1554] Ibid, 42 para. 104.
[1555] Ibid.
[1556] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Composite Study on the Protection of Traditional Knowledge', 12 para. 27-28 <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_8.pdf> accessed 21 May 2019.
[1557] 'Background Brief No. 1: Traditional Knowledge and Intellectual Property' <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf> accessed 19 May 2019.

thus, it shall embrace a holistic approach to TK, rather than dissecting it to its constituents in reference to the conventional IPRs.[1558] Second, the beneficiaries of such a framework shall be, in principle, the community with whose collective efforts TK has been generated.[1559] Third, the sui generis regime shall not be limited to economic rights, but it shall also encompass moral rights.[1560] Last but not least, this regime shall take the customary laws of indigenous peoples into account,[1561] since indigenous peoples claim that their TK is subject to their complex customary systems which regulate the ownership, custodianship, the terms and conditions of the use and dissemination of TK.[1562] Hence, the IGC promised to honor indigenous peoples' perspectives on their TK and listen to their concerns regarding the purely Western-centric approach to TK and its allocation of TK to the (Western European) public domain.

Nevertheless, the heavily-bracketed[1563] text of the draft instrument reveals that the negotiators of the Draft Articles cannot agree even on the basic terminology and the core issues regarding the sui generis protection of TK – even though the Draft Articles were published in 2004 for the first time and have been negotiated since then. It can be argued that the controversies reflected upon the Draft Articles are by-products of the statism of international law, path dependence, and the Western (European) assumptions ingrained in IP law.

[1558] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Elements of a Sui generis System for the Protection of Traditional Knowledge', 14 para. 29 <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8.pdf> accessed 16 May 2019.
[1559] Ibid, 18-19 para. 41.
[1560] Ibid, 20 para. 46.
[1561] Ibid.
[1562] Ibid, 19 para. 42.
[1563] In principle, the IGC includes not only the most favored regulations within the Draft Articles, but also the alternatives of such. In this case, the alternative regulations are places in brackets. Similarly, the controversial terminology or alternatives to the terminology in use are also written in brackets within the draft text. Whereas this can be taken as evidence for the democratic nature of the IGC negotiations, the Draft Articles is comprised of a 'heavily-bracketed' text since its first publication in 2004. Among the bracketed words, the term 'peoples' and 'customary law' as well as the regulations that favor indigenous peoples come to the forefront. Therefore, it can be concluded that within the last 17 years, the negotiating parties could not reach any consensus on the terminology in use as well as in the core issues regarding the sui generis protection of TK.

To begin with, the terminology used within the Draft Articles reflects the reluctance of WIPO, hence, the stark contrast between the interests of the nation-states and indigenous peoples in using the term 'peoples'. In identifying the beneficiaries of the legal instrument, the Draft Articles either put the term 'peoples' in brackets or alter this term with 'communities'.[1564] Alternatively, whenever the Draft Articles refer to indigenous peoples per se, they immediately add that such status shall be determined by national laws of the relevant State.[1565] Hence, the draft text reveals the ongoing hesitance of the international fora to recognize the peoplehood and the right to self-determination of indigenous peoples, despite the regulations within the UNDRIP.[1566]

The identification of the instrument's beneficiaries as such is crucial for identifying the ones who can exercise the legal rights over TK/TCEs. Regarding this, the Draft Articles give the Member States the discretion to appoint a competent authority to exercise and enforce the rights stemming from TK/TCEs.[1567] Yet, this regulation may result in further disenfranchisement of

[1564] See e.g., Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Knowledge: Draft Articles [WIPO/GRTKF/IC/40]' (World Intellectual Property Organization (WIPO), 19 June 2019) Preamble paras. 2, 5, 9, 14; Arts. 1-4. <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/facilitators_text_on_tk.pdf> accessed 22 November 2021; Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Cultural Expressions: Draft Articles [WIPO/GRTKF/IC/40]' (World Intellectual Property Organization (WIPO), 19 June 2019) Preamble paras. 2-5, 9, 14; Arts. 1-5 <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/facilitators_text_on_tces.pdf> accessed 22 November 2021.

[1565] Ibid.

[1566] Paradoxically, the last revised version of the Draft Articles initiates with the acknowledgment of the UNDRIP. However, even doing so, the Draft Articles place 'peoples' in brackets.
See: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Knowledge: Draft Articles [WIPO/GRTKF/IC/40]' (n 1558) Preamble para. 1; Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Cultural Expressions: Draft Articles [WIPO/GRTKF/IC/40]' (n 1558) Preamble para. 1.
Perhaps due to the ongoing debates over the peoplehood dilemma, there have not been any attempts to revise or negotiate, let alone conclude, the Draft Articles after June 2019.

[1567] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Knowledge: Draft Articles [WIPO/GRTKF/IC/40]' (n 1558) Art. 8; Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Cultural Expressions: Draft Articles [WIPO/GRTKF/IC/40]' (n 1558) Art. 6.

indigenous peoples, rather than their empowerment, since the relevant State may not have the political will to acknowledge indigenous title over TK/TCEs.[1568]

Second, the Draft Articles contradict with the contours of the envisioned sui generis protection, which were initially drawn by the IGC in its composite study. Even though the Draft Articles acknowledge and refer to the importance of TK/TCEs for the cultural existence and core values of indigenous and local communities,[1569] it does not further unfold this relationship and the desire of indigenous peoples to have control over their TK/TCEs. Per contra to the IGC's initial approach, the draft text remains silent on the positive protection of TK/TCEs; hence, it does not expose any political will or incentives to entitle indigenous peoples with legal rights over their TK/TCEs, which could have empowered indigenous peoples. Instead, the Draft Articles give more weight to fair use, limitations, and exceptions to the legal protection of TK as well as benefit-sharing mechanism.[1570] Nevertheless, these mechanisms, by their nature, give primacy to the third parties' materialistic interests over those of indigenous peoples. Regarding this, Chidi Oguamanam argues that the Draft Articles fail to justify the legal protection of indigenous knowledge.[1571]

Third, the Draft Articles do not reflect a common understanding or agreement on the term of the prospective legal protection.[1572] It can be argued that the controversy over the term of protection

[1568] Please see section 3.2.1. in the text.
[1569] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Knowledge: Draft Articles [WIPO/GRTKF/IC/40]' (n 1558) Preamble para. 7; Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Cultural Expressions: Draft Articles [WIPO/GRTKF/IC/40]' (n 1558) Preamble para. 7.
[1570] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Knowledge: Draft Articles [WIPO/GRTKF/IC/40]' (n 1558) Art. 9; Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Cultural Expressions: Draft Articles [WIPO/GRTKF/IC/40]' (n 1558) Art. 7.
[1571] Oguamanam (n 1523) 33–34.
[1572] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Knowledge: Draft Articles [WIPO/GRTKF/IC/40]' (n 1558) Art. 10; Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Cultural Expressions: Draft Articles [WIPO/GRTKF/IC/40]' (n 1558) Art. 8.

is a matter of the statism of international law at large combined with the legacy of the Romantic author. Considering the hardship in identifying the originator of TK, it is not possible to follow the Berne Convention's pattern and to link the term of protection to the lifetime of the author. Hence, the Draft Articles come up with two 'solutions', which undermine the right to self-determination of indigenous peoples: The first option respects the sovereignty of the nation-states and regulates that the States shall have the discretion to determine the term of protection according to their national laws.[1573] The second option can be considered to favor indigenous peoples. Nevertheless, this option disregards the vital role that TK plays for the identity and cultural survival of indigenous peoples since it stipulates that TK shall be protected as long as its beneficiaries enjoy the rights stemming from TK.[1574] While the first option accentuates the nation-state and sub-state divide, the latter option resembles the ILO Convention No. 107's assimilationist tone, which was taking the extinction of indigenous peoples for granted.

Fourth, and closely related to the previous point, the regulations regarding the scope of the legal protection does not show any intention of saving TK from the (Western European) public domain. Instead, the alternated regulations stipulate that the legal protection envisioned by the Draft Articles do not extend to TK that is already in the public domain, but only to TK which has been kept within the indigenous and local community without being revealed to third parties.[1575] It can be argued that these regulations not only fundamentally clash with the initial fact-finding missions and report of the IGC, but also 'justify' the mis/use and mis/appropriation of TK by third parties and without the free, prior, informed consent of indigenous peoples.

[1573] Ibid.
[1574] Ibid.
[1575] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Knowledge: Draft Articles [WIPO/GRTKF/IC/40]' (n 1558) Art. 5; Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Cultural Expressions: Draft Articles [WIPO/GRTKF/IC/40]' (n 1558) Art. 5.

Regarding this, Ruth L. Okediji argues that the Draft Articles shall have a clear-cut definition of what the public domain refers to for the purposes of the sui generis protection of TK, since the definition of the term has been historically left to the discretion of the national laws, rather the international law.[1576] Okediji claims that the Western (European) and indigenous readings of the public domain can be reconciled, for the following two reasons: First, both the Western stakeholders and indigenous peoples are biased towards each other's perception of the public domain and each other's approach to the use of the materials found in the public domain.[1577] Second, whereas the Western stakeholders are concerned about the shrinking of the public domain, Okediji rightfully indicates that part of the indigenous knowledge is open to and available for the access and use of the third parties.[1578] Hence, it is a matter of *mutual respect* to reconstruct the public domain, by taking the customary laws and interests of indigenous peoples into account.[1579]

Last but not least, Brendan Tobin emphasizes the gradual decline of customary laws within the draft text.[1580] In fact, the IGC gave the impression being a venue that welcomes the customary laws of indigenous peoples.[1581] It was explained and acknowledge that customary laws are not only normative frameworks that define the rights and responsibilities of the members of the indigenous community, but they are also central to the identity and the cultural survival of indigenous peoples.[1582] Furthermore, the WIPO reports consolidated that the indigenous customary laws,

[1576] Okediji, 'Negotiating the Public Domain in an International Framework for Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions' (n 4) 143, 146.
[1577] Ibid, 144-145.
[1578] Ibid.
[1579] Ibid, 161.
[1580] Brendan Tobin and others, 'Now You See It Now You Don't: The Rise and Fall of Customary Law in the IGC', *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (1st edn, Routledge 2017) 192.
[1581] See: 'Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issue' (World Intellectual Property Organization (WIPO), 2013) <https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf> accessed 19 May 2019; 'Background Brief No. 7: Customary Law and Traditional Knowledge' (n 1462).
[1582] 'Background Brief No. 7: Customary Law and Traditional Knowledge' <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_7.pdf> accessed 19 May 2019.

often, hold a complex set of rules which govern the owners, holders, the ones who can access to and use TK as well as the confidentiality regimes for secret and sacred TK.[1583] Due to this, the IGC has advocated for the insertion of customary laws as 'one potential element of a holistic approach (…) for protecting [TK].'[1584] However, Tobin asserts that references made to the customary laws of indigenous peoples have been replaced with a vaguely articulated phrase, namely 'cultural norms and practices', by 2014.[1585] In a similar vein, a vast majority of the references made to customary laws were completely eradiated from the draft text by 2017.[1586] Therefore, it can be argued that the Draft Articles cannot help but turn into a State-oriented legal regime, rather than constituting sui generis protection tailored for the unique needs and expectations of indigenous peoples.

Despite the long-lasting debates and negotiations at the international level and under the auspices of WIPO, the three main forms of non-Western intellectual creations are still excluded from the scope of the conventional forms of IPRs. Though the necessity for protecting TK via an international instrument was formerly amplified at the WIPO level,[1587] the IGC itself recently declared that the legal protection of GRs, TK, and TCEs via conventional forms of IPRs or by sui generis normative frameworks are matters, principally, for the nation-states and their domestic laws.[1588] Nevertheless, it was again the IGC who explained that private disputes over TK may

[1583] *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* (n 1528) 57–65.
[1584] Ibid.
[1585] Tobin and others (n 1574) 192.
[1586] Ibid, 196-197, 206.
[1587] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: The International Dimension' (World Intellectual Property Organization (WIPO), 30 November 2003) <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_6.pdf> accessed 27 May 2019.
[1588] 'Background Brief No. 3: Developing a National Strategy on Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions' (World Intellectual Property Organization (WIPO), 2016) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_3.pdf> accessed 19 May 2019.

involve rights, acts, or interests closely attached to more than one jurisdictions – despite the fact that not many WIPO Member States have a normative ground to protect territorial or foreign TK by means of national laws or via the principles of reciprocity and national treatment.[1589] In other words, regardless of the decades-long discussion in the international and global fora, there is still lack of consensus on whether to tailor a binding international legal instrument for this purpose as well as on the details of such a prospective instrument.[1590]

Given the absence of or the discrepancies among the domestic laws of different States on the protection of TK and the absence of an international instrument to harmonize these laws, the IGC also promotes dispute resolution methods for the tackling with TK-related legal disputes, alternative to the litigation process.[1591] It further adds that the formal court-based dispute resolution methods may enhance the disadvantaged position of indigenous peoples since, in most countries, there is neither a legal basis to protect non-Western forms of intellectual creations nor any legal means to formally recognize the customary laws of indigenous peoples.[1592] In sum, the exclusion of non-Western forms of intellectual creations not only cause the allocation of TK to the public domain, but it also hinders the opportunity of indigenous peoples to access to justice and to seek for remedies before the national legal mechanisms.

As a last remark to this sub-chapter, it shall be mentioned that the power and interest clashes in the international IP domain have not only faced the intervals in the IGC's mandate and mission (first in 2003, then in 2014, and finally in 2018), but they have also transformed the IGC

[1589] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: The International Dimension', 3 para 3(d), 4 para. 7 <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_6.pdf> accessed 27 May 2019.
[1590] Wendland (n 1514) 34–35.
[1591] 'Background Brief No. 8: Alternative Dispute Resolution for Disputes Related to Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources' <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_8.pdf> accessed 19 May 2019.
[1592] Ibid.

proceedings, in Ahmed Abdel-Latif's words, into 'a process without an outcome.'[1593] Along the same line, Wendland asserts that none of the core issues regarding the legal protection of TK/TCEs have been settled so far and the main reason behind this reality is the developed countries' lack of political will and economic incentives to agree on bestowing legal protection to indigenous intellectual creations, which are already placed in the (Western European) public domain.[1594]

This claim was consolidated by the report published by the UN Permanent Forum on Indigenous Issues in 2016.[1595] As emphasized in the report, the IGC negotiations serve as legal venue 'to diminish indigenous peoples' human rights.'[1596] The report indicates that the Draft Articles deprive indigenous peoples from right ownership and reduce them to being beneficiaries, subordinate their customary laws, and does not recapture TK/TCEs from the public domain.[1597] Hence, the report claims that the Draft Articles privilege and give primacy to the economic interests of the WIPO Member States and transnational corporations over those of indigenous peoples.[1598]

To conclude, the IP-related debates over TK have been brought to the international negotiations table by the international and regional awareness-raising efforts of indigenous peoples. Though these efforts have been appreciated and embraced by the UN and its specialized agencies, especially by WIPO, neither the conceptualization of TK nor its interplay with the Western-centric IP law managed to escape the heavily racialized terrain of global diplomacy and the statism of international law. Besides, the international IP forum has, consciously or unconsciously, adopted the legal terminology coined by international law within a colonial

[1593] Abdel-Latif (n 1505) 27.
[1594] Wendland (n 1514) 33–35.
[1595] 'Study on How States Exploit Weak Procedural Rules in International Organizations to Devalue the United Nations Declaration on the Rights of Indigenous Peoples and Other International Human Rights Law' (n 1456).
[1596] Ibid, 11 para. 40.
[1597] Ibid, 12 para. 41.
[1598] Ibid.

historical setting. Hence, indigeneity, as well as the negative connotations and the pejorative racial imagery attached thereto have been inherited by and embodied in the international IP terminology and discourse. For the same reason, TK was conceptualized to refer to non-Western intellectual creations, and it has been constructed as the negative counterpart of the contemporary Western (European) forms of intellectual creations. As a result, TK has not only been considered 'unworthy' of legal protection and was allocated to the (Western European) public domain, despite the protection provided by the customary laws of indigenous peoples.

Evident from the most recent negotiations at the WIPO level, neither the Western (European) assumptions built in IP law, nor the WIPO Member States' political unwillingness help TK to be recaptured from the public domain. Therefore, the international IP diplomacy only adds another chain to the colonial machinery, in terms of denying the indigenous autonomy and depriving indigenous peoples from the fruits of their intellectual heritage and labor.

3.5. Conclusion

This chapter pursued and advanced the race-conscious project commenced with the previous one: The application of CRT doctrine to the ostensibly objective and value-neutral construct of international IP law. Just like the previous chapter, this one also aspired to unearth the racial constituents of the contemporary and international IP frameworks, by outlining the parallel construction of race and IP law.

Whereas the previous chapter was concerned with the racialized power asymmetries overhauling the global IP fora, hence, the disempowerment of the (former) colonies and non-Western States within this hierarchical system; this chapter shifted its focus to another, yet complementary, aspect of the global IP diplomacy: The implementation of racial information fabricated by the Western (European) powers into the key IP concepts and substantive IP norms

and principles, particularly those of copyright and trademark law. In this context, the chapter paid special attention to the construction of folklore and TK, given the racial factors and connotations that were in play while their conceptualization.

The chapter, mainly, argued that not only the global IP diplomacy, but the global(ized) IP concepts, rules, and principles are also the intellectual outputs of the colonial mindset and the overarching racial thought introduced by the Western (European) modernity. It was asserted that both the idea of race and the fundamental IP concepts, norms, and principles were fabricated by the Western (European) imperial powers within the same time span. Thus, it was claimed that the contemporary and international IP regimes are premised upon the modern Western (European) idea(l)s centered around the 'superiority' of the European or White race, and the inferiority of non-Western races, especially of indigenous peoples who were ranked at the lowest rung of such racial hierarchies.

In line with these, the chapter aspired to prove that IP law essentializes the Western (European) identity and modes of creativity, by taking the Western (European) readings of 'civilization', culture, science, and progress as universal benchmarks. Thus, the chapter claimed that the conceptualization and marginalization of folklore and TK as non-Western forms of intellectual creations – and as oppositional binaries of Western (European) intellectual works and inventions – are the outcomes of the racially-charged modern idea(l)s, which also underpinned the colonization of non-Western lands, construction of 'indigeneity', and the 'civilizing' mission.

To prove its arguments, the chapter critically assessed the main tenets of copyright and trademark laws, by placing them within a greater economic, historical, political, and social context. Within this frame, the chapter studied the Renaissance era, which witnessed the exploration of the New World, the very first encounters of the Western world with the non-Western one as well as

the conquest, colonization, and the 'civilizing' missions. It also studied the Enlightenment era and the proliferation of the idea of race, hence, biological racism. Last but not least, the chapter covered Romanticism from which stemmed cultural racism, along with the myth of the Romantic author, hence, the building blocks of copyright law.

The chapter demonstrated that the Western (European) racial thinking simultaneously constructed the idea of race and the main IP-related concepts and principles, such as the author, originality, fixation requirement, the term of protection, and lastly, the 'idea and expression' dichotomy. It is revealed that the Romantic author and the criteria stemmed therefrom reflect the features attributed to Western (European), hence, White creatorship and creativity; therefore, these notions not only marginalized non-Western modes of creatorship and creativity, but they also played an active role in the construction of two other categories to define the non-Western intellectual creations that do not hold the 'merits' of the Western ones: Folklore and TK.

Aside the copyright regime, the chapter also encompassed the interplay of trademark law with the non-Western stakeholders, especially given its expressive power and resemblance with the 'idea and expression' dichotomy of copyright law. In this context, the chapter revealed the ways in which trademark law serves to communicate racial information, integrates such information into the fabric of the society, and deprives non-Western stakeholders from the right to control the narrative centered around their identity, folklore, and TK.

Based on these, the chapter concludes that the contemporary international legal system is ordained by the Western (European) values and ideals, which are in and of themselves racially-charged. Within this setting, international IP law constitutes just an extension of the Western-centric and statist international law. Indeed, it was the modern international law which rested the foundations and justified the consequences of racist practices, such as the conquest and

colonization of non-Western lands, the construction of the indigenous identity and legal persona, the 'civilizing' missions, and the trusteeship doctrine. Evident from the international legal instruments drafted under the influence of such Enlightenment idea(l)s, of which the most notorious is the ILO Convention No. 107, international law not only ratified the Western (European) interests over the indigenous lands but also reinforced the deprivation of non-Western and indigenous inhabitant of such lands from their autonomy as well as the exploitation of their physical labor. Just like international law, international IP law operates as a tool to justify the declaration of non-Western and indigenous knowledge as *terra nullius* and the exploitation of, particularly, indigenous peoples' *intellectual* labor.

Accordingly, the interaction of the White and Western (European) origins of international IP law with non-Western and indigenous modes of creatorship and creativity reveal itself in several intertwined ways: First, the myth of the (White) Romantic author draws the borders of copyright protection. Whereas this hinders the recognition of communal ownership of intellectual creations, it also denies legal protection to folklore and TK, due to their incompliance, mainly, with the originality and fixation criteria. Thus, the Western-centric copyright system allocates folklore and TK to the Western (European) public domain, where they can be used without being subject to permission or licensing schemes or royalty payments.

Second, the Western-centric trademark regimes do not offer any measures that would help non-Western communities, racialized minorities, and indigenous peoples prevent the use of their folklore, TK, sacred or sensitive cultural elements being (mis)used and (mis)appropriated by third parties. Though prioritizing the valuable insignia of the States, the current international trademark regime leaves the non-Western and racialized sub-state groups and their communal identities vulnerable to commercial exploitation by corporate powers.

Third, the international organizations' attempts to recognize folklore and TK do not go beyond providing a set of guidelines addressed merely to developing countries. Along the same line, the endeavors to negotiate a binding legal instrument protecting folklore or TK are often, in Chidi Oguamanam's words, 'riddled with terminological traps'[1599], thus, end up in a political and legal dead-end.

In sum, the racial thinking of European modernity and the colonial mindset, both of which have historically underpinned the degradation of non-Western communities and their legal status, prevail to haunt the global(ized) copyright regimes, though in more subtle ways. The racially-charged Western (European) values and assumptions established legal concepts and legal frameworks which favor the Western (European) modes of intellectual creatorship and creativity, whilst disenfranchising those of the non-Western.

Drawing upon the main findings of this chapter, the next chapter complements the race-conscious analyses of the previous chapters and concludes this task, by explaining another dimension of the interface of race, power, and IP law. Indeed, Chapter II illuminated the racial baselines of IP law, by revealing the racial aspect enshrined in the global IP diplomacy. Chapter III illustrated the racial information imputed in the fundamental IP concepts, norms, and principles. Following up with these, Chapter IV focalizes the racial aspect(s) of the judicial interpretation and application of the racially-charged IP laws and frameworks, by demonstrating the consequences of the interplay of race, power, and IP law with concrete examples.

Aligned with this goal, the next chapter looks at two former colonies of the British Empire which host racialized minorities and indigenous peoples: The United States and the Commonwealth of Australia. The chapter extracts several case studies and case law from the

[1599] Oguamanam (n 1012) 37.

American and Australian jurisprudence. By analyzing these, it aims to demonstrate the travel of the inherently White structures of dominance of IP law to the American and Australian IP laws, by means of colonial and legal transplantation. It also aspires to illuminate the ways in which the innately Western (European) or White concepts, norms, and principles transplanted into the American and Australian IP systems subordinate African-American creators and Native-American communities of the United States, and the Aboriginal creators and communities of the Commonwealth of Australia.

Chapter IV

'Like A Loaded Weapon'[1600]: Deconstruction of Australian and American Copyright and Trademark Laws

4.1. Introduction

This chapter completes the previous ones, by introducing and critically assessing the third and last aspect of the interplay of race, power, and IP law. Chapter II focalized the genesis and evolution of IP law as a Western-centric and inherently White legal project. It exposed the racially non-neutral power structures built in IP law and the racialized power hierarchies overhauling the IP diplomacy. Chapter III concentrated on the content of IP law and the consequences of the racialized power asymmetries in the IP policy- and law-making mechanisms. It revealed the racial information imputed in the globalized IP concepts, norms, principles, and legal frameworks. This chapter finalizes the critical and race-conscious analysis of IP law, by focusing on the judicial interpretation and application of the racially-charged copyright and trademark regimes as such. It extracts and analyzes the outcomes of the court proceedings concerning indigenous peoples and racialized minorities.

For its purposes, the chapter investigates the legal systems, IP laws, and case law of the Commonwealth of Australia and the United States. As explained earlier, these two countries constitute the two other jurisdictions of this dissertation, mainly because of being former colonies of the British Empire.[1601] Yet, this chapter reveals that their declaration of independence from the United Kingdom did not resolve the ties of Australia and America with the British Empire, even

[1600] In reference to: Williams, Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (n 570).
[1601] Please see the 'Introduction'.

though these ties were the extensions of the colonial mindset which had historically subordinated Australian and American authorities, authors, and other stakeholders. Neither their independence eradicated the imperial IP laws as well as the British cultural assumptions and values from the Australian and American jurisprudence. A glance at the legislative histories of these countries show that the Commonwealth of Australia and the United States preferred to remain loyal to the British IP law tradition, and they decided to continue developing their national copyright and trademark strategies in line with that of the United Kingdom. Due to this, the investigation of Australian and American legal spaces provides a new angle to confront the cultural assumptions, normative values, and racialized cultural hierarchies ingrained in IP law, particularly in copyright and trademark law: The formerly oppressed and new oppressor conundrum.

Both former colonies of the United Kingdom have quite different racial complexions than that of the Empire. Furthermore, the racialized minorities and indigenous peoples resident in Australia and America hold different perceptions of creatorship and creativity, which do not often fit in the Western-centric readings of authorship, IPRs ownership – or simply, the White Romantic author archetype. As a consequence, the Australian and American IP regimes further entrench the historical subordination of indigenous peoples and racialized minorities. They add to the consequences of the Enlightenment ideology, conquest and 'civilizing' missions, and the statism of international law, by pushing non-Western creatorship and creativity to the periphery of IP law.

The exclusion of non-Western modes of creatorship and creativity from the scope of Australian and American IP laws cannot be reduced to the inherent Western-centrism of IP law. In fact, both the Commonwealth of Australia and the United States had adopted racially-charged, or even racist, laws that not only deprived indigenous peoples and racialized minorities from right ownership, but also systematically discriminated them on the basis of race.

Thus, the chapter argues that embracing these racial idea(l)s and legal frameworks entitled Australian and American creators to Whiteness. Furthermore, the inheritance of the Western (European) racial ideology and legal terminology united the formerly *oppressed* Australians and Americans with their former British *oppressor* in owning 'Whiteness as [Intellectual] Property.'[1602] Thus, it is asserted herein that the Australian and American legislature's and judiciary's endeavors to uphold the ideological, economic, and political underpinnings and power structures – or, simply, the Whiteness – of IP law results in the marginalization and subordination of non-White creators and their creations.

Driven by its purposes, and as a pre-requisite to the analysis of case law, the chapter begins with a snapshot of the legislative history of Australian and American copyright laws. It aims to reveal the travel of the idea of the Romantic author, hence the racially-charged cultural assumptions and values imputed therein, from the imperial copyright regime to the Australian and American copyright doctrine. For its purposes, the chapter identifies the milestones in the political and legal history of these two former colonies of the British Empire. Whereas the political and legal timelines of the Commonwealth of Australia and the United States show radical differences, the chapter applies the same test to both countries and explore their response to the British influence under similar legal and political conditions, which are extracted as follows: The colonial rule or pre-Federation era, post-Federation era, and finally, the post-independence era.

Then, the chapter moves to the analysis of case law and the implications of the Australian and American courts on the creatorship and creativity of indigenous peoples and racialized minorities. In terms of assessing the outcomes of the interplay of the Western-centrism of Australian and

[1602] By analogy with: Harris, 'Whiteness as Property' (n 12).

American IP laws, the chapter focuses on several high-profile copyright and trademark cases widely cited in the legal literature.

The chapter concludes that race is indeed a social construct and neither Australian and American IP laws nor Australian and American courts can be absolved from contributing to its construction. The colonial and post-independence Australian and American authorities have adopted the culturally specific and inherently White concepts, norms, principles, and frameworks of imperial IP laws. Whereas the legislature consolidated the racial embodiments of White authorship and IPRs ownership in the national legal doctrines; the judiciary, through un/conscious aesthetic evaluations and non-neutral interpretations of the racially-charged laws, fed into the historical patterns of racial subordination. Even in cases where the courts are willing to challenge these power structures of IP law, the rigidity of the Western-centrism, Whiteness, and statism of the Australian and American legal systems hinder these efforts – hence, the reparation of historical injustices.

Therefore, not only the racialized cultural hierarchies and valorization schemes of Western (European) modernity continue to haunt the legal space of IP, but the racial connotations ingrained in the imperial (IP) norms and principles continue to be barriers for the inclusion of non-Western modes of creativity and creations within the Western-centric IP frameworks.

4.2. The Making of Modern Australian and American Copyright Laws: An Imperial Legacy

This sub-chapter is dedicated to narrating the travel of the innately Western (European) or White perceptions of authorship and copyright ownership, respectively, to the Commonwealth of Australia and the United States. The sub-chapter offers a brief historical account of the making of modern Australian and American copyright laws considering the diplomatic and legal relationships of the Commonwealth of Australia and the United States with the United Kingdom.

It shall be clarified that this sub-chapter by no means aspires to provide a comprehensive historical analysis of the genesis and development of modern Australian and American IP laws. On the contrary, its intentions and scope are limited to pointing at the key moments in the Australian and American legislative history in which the British IP norms and principles have been transformed into the domestic laws of these two countries. While it may not come as a surprise that the legacy of imperial IP laws still prevails in Australian and American jurisprudence, the rationale behind the implementation of the British normative values depicts a peculiar reality.

In this context, the study of the intricacies of the relationship among the modern Australian and American copyright systems and the imperial copyright laws can be justified as follows: First, the post-independence Australian and American Federations preferred to remain loyal to the imperial copyright regime, whereas they could have broken their remaining (legal) ties with their former colonizer.[1603] This legislative decision was rationalized on two major grounds: The prestige of the imperial copyright law, given the 'civilized' state of the British Empire; and the ease in accessing to British statutes and case law without any linguistic and legal barriers.[1604] Second, by the time that the British colonies, such as Canada and New Zealand, were in search for statutory models that could offer better protection to local authors and stakeholders; the Commonwealth of Australia preferred to take the post-independence American copyright doctrine, especially the IP-related constitutional debates and the so-called patent and copyright clause[1605] of the Constitution of the United States (hereafter 'the U.S. Constitution'), as a reference point while building its post-

[1603] See e.g., Burrell (n 38); Atkinson (n 40); Patterson, *Copyright in Historical Perspective* (n 38); Bracha, 'United States Copyright, 1672–1909' (n 38).
[1604] See e.g., Karl Fenning, 'The Origins of the Patent and Copyright Clause of the Constitution' (1929) 11 Journal of the Patent Office Society 438; Leslie Zines, 'The Spicer Committee (1958)' in Brian Fitzgerald and Benedict Atkinson (eds), *Copyright Future Copyright Freedom: Marking the 40 Year Anniversary of the Commencement of Australia's Copyright Act 1968* (1st edn, Sydney University Press 2011) 47.
[1605] The Constitution of the United States, Art. 1, Sec. 8, Cl. 8.

Federation copyright laws.[1606] Even this can be taken as an indicator of the Australian legislature's commitment to the British copyright tradition, since the U.S. Constitution did not (and still does not) fall far from the British copyright tradition, due to being modelled on the Statute of Anne of 1710.[1607]

Therefore, this sub-chapter argues and aims to reveal that despite their disparate colonial and legislative timelines, both the Commonwealth of Australia and the United States show striking similarities in their eagerness to welcome and to maintain central values and normative perceptions of the imperial copyright laws. Due to this, the dissertation pays the utmost importance to the legislative history of copyright in the Australian and American contexts, since even a brief glance at the milestones of the Australian and American copyright history exposes that race, also in the IP domain, is a social construct, which has been ratified by law and translated into authorship and copyright ownership. The construction of race, or White authorship and copyright ownership, in the Australian and American IP domain is two-pronged: On the one side of this spectrum, there are Australian and American authors who had been denied copyright by the British imperial copyright laws. On the other side, there stands indigenous peoples and racialized minorities who had been denied copyright by the colonial- and post-colonial Australian and American copyright laws.

Thus, by analogy with Noel Ignatiev's seminal work, entitled *How the Irish Became White*,[1608] the sub-chapter questions how Australian and American authors became as White as British authors. However, the dissertation takes this more of a rhetorical question, since it asserts that what

[1606] Burrell (n 38) 246; Ailwood and Sainsbury, 'The Imperial Effect: Literary Copyright Law in Colonial Australia' (n 38) 717.
[1607] See: Oren Bracha, Lionel Bently and Martin Kretschmer, 'Commentary on the Intellectual Property Constitutional Clause 1789', *Primary Sources on Copyright (1450-1900)* (2008) <http://www.copyrighthistory.org/>; Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (n 40).
[1608] Noel Ignatiev, *How the Irish Became White* (Routledge 1995).

helped Australian and American authors to join their British counterparts in Whiteness was creating their own non-White counterparts, who could 'contour' their 'civilized' state and authorial genius. Considering that racialized power hierarchies often come along with oppositional binaries and normative values concerning how the law shall treat Whites and non-Whites,[1609] this sub-chapter reveals, in Ignatiev's words, 'how the oppressed became the oppressors,'[1610] particularly in the IP domain.

4.2.1. Copyright as Colonial Legal Transplant:[1611] A Deconstructionist Reading of the Australian Copyright Tradition

The colonization of the Australian territories by the British Empire had initiated in 1788.[1612] At the time, there was a modern understanding of copyright in the Empire, mainly because of the system established with the Statute of Anne of 1710 and the acknowledgement of copyright as an authorial right.[1613] Therefore, the (colonial) Australian legal regime did not experience the *copy-right* phase;[1614] instead, copyright was first introduced to the Australian legal reality as a statutory right.[1615] In respect to this, Adrian Sterling describes the modern Australian copyright tradition as 'a branch of the copyright tree planted in the [United Kingdom] in 1710 (…).'[1616]

The emphasis on the British Statute in Sterling's statement is a clear reference to the colonial past of the Commonwealth of Australia. Indeed, neither the history of Australian jurisprudence

[1609] Please see the 'Introduction' and Chapter I.
[1610] Ignatiev (n 1602) Back cover.
[1611] In reference to: Watson (n 40). Also see: Bond (n 38) 379.
[1612] Encyclopedia Britannica, 'Australia' (*Britannica Academic*) <https://academic.eb.com/levels/collegiate/article/Australia/110544> accessed 20 November 2021.
[1613] Please see section 2.3.2. in Chapter II.
[1614] Please see section 2.3.1. in Chapter II.
[1615] See: An Act for the further Encouragement of Learning, in the United Kingdom of Great Britain and Ireland, by securing the Copies and Copyright of printed Books to the Authors of such Books, or their Assigns for the Time herein mentioned of 1801, 41 Geo. 3, Ch. 107 (The Copyright Act of 1801). Also, please see section 2.3.2. in Chapter II.
[1616] Adrian Sterling, 'The Copyright Act 1968: Its Passing and Achievements' in Brian Fitzgerald and Benedict Atkinson (eds), *Copyright Future Copyright Freedom: Marking the 40 Year Anniversary of the Commencement of Australia's Copyright Act 1968* (1st edn, Sydney University Press 2011) 52.

nor the legislative history of the Australian copyright laws can be analyzed without reference to the United Kingdom and its legal system. Considering the long-lasting British rule over the pre-Federation Australian colonies and the post-Federation Australian States, the Anglo-Saxon legal tradition and the imperial copyright laws heavily influenced the legal order of the Australian colonies as well as the Commonwealth of Australia – which persist in the post-independence Australian copyright laws.

The reasons behind the legacy of the imperial IP laws in the Australian IP domain can also be explained in reference to the internationalization of copyright law with the Berne Convention of 1886, of which Australia became a signatory, due to the British Empire's signature of the Convention in its own name and on behalf its colonies.[1617] Although the Commonwealth of Australia became independent in 1901, post-independence Australia found itself at the threshold of the globalization of copyright law by the notorious TRIPs Agreement of 1994. In 1995, it became a Contracting Party of the TRIPs Agreement, which simply globalized the local rules and principles of the (former) Western (European) imperial powers and the United States.[1618]

Considering this historical background and the colonial setting, this section of the dissertation argues that the Australian copyright doctrine was born out of the economic, cultural, diplomatic, legal, and political interests of the British Empire over its colonial territories and across the imperial borders. As a result, the Australian copyright tradition emerged as an imperial legal project. It evolved along with the copyright-related needs and expectations of the imperial political and market actors. Hence, it not only sacralized the British perceptions of creativity and authorship, but it also gave primacy to White market actors' interest over those of the colonial – needless to mention over those of the indigenous inhabitants of Australia.

[1617] Please see section 2.3.3. in Chapter II.
[1618] Please see section 2.3.4. in Chapter II.

In order to map the integration of British cultural assumptions and norms as well as the colonial transplantation of the imperial laws in the Australian cultural and legal domains, the section analyzes the interaction of Australian copyright doctrine with colonialism in three phases: The copyright statutes adopted by the pre-Federation Australian colonies (1788-1900), the federal copyright laws developed under the influence of the imperial copyright policy and laws (1900-1912), and last, the post-Federation copyright scene in the Commonwealth of Australia (1968 and onward).

The first few decades of the imperial practices in Australia were mainly centered around the maintenance of civil order in the territory, by suppressing the resistance and uprisings of the indigenous inhabitants of Australia, namely the Aboriginal people.[1619] However, these same pre-Federation years had also witnessed the inception of the idea of modern copyright into the Australian colonies.

In the pre-Federation era, the interplay of the imperial copyright policy and laws with the legal domain in the Australian colonies had two dimensions. The first dimension of this relationship was closely related to the Empire's legislative agenda aimed at securing British authors' copyright within the Mother Country and across her colonial possessions.[1620] In line with this goal, the Imperial Government had passed the Copyright Act of 1801[1621] which extended the jurisdiction of the Statute of Anne of 1710 to all colonial possessions – including those of the Australian colonies.[1622] Thus, only fifteen years after the first British settlement in the territory, the Australian colonies were introduced to the British copyright system.

[1619] Encyclopedia Britannica, 'Australia' (n 1606).
Also see: 'Australians at War: Colonial Period, 1788–1901' (n 51).
[1620] Please see section 2.3.2. in Chapter II.
[1621]The Copyright Act of 1801, 41 Geo. 3, Ch. 107.
[1622] Ibid.

The exposure of the Australian colonies to a relatively developed copyright system was rather an odd incident, especially given that both the Statute of Anne of 1710 and the Copyright Act of 1801 pre-date the advent of the printing press in colonial Australia. The Australian colonies were to welcome the printing technology only in the late 1820s.[1623] Nevertheless, the imperial copyright regime – also the British perceptions of authorship and intellectual creativity – have been inflicted upon the Australian colonies decades before the colonial authorities had a chance to grasp the colonial literary scene's needs and expectations in order to develop a local copyright policy.[1624]

The Copyright Act of 1801 was followed by the Copyright Act of 1842.[1625] This Act consolidated the imperial copyright strategy over the colonial territories, since it denied copyright protection to books first published in the colonial territories, whilst extending the copyright protection of the books first published in the United Kingdom to the colonial territories.[1626] This Act caused uncertainties in the Australian colonies regarding the beneficiaries and the scope of the legal protection envisioned within the Copyright Act of 1842.[1627] However, the *Routledge v. Low*[1628] case unearthed the discriminatory treatment of imperial and local authors, and it crystallized that the Act did not grant reciprocal legal protection to local authors who first published in the colonies.[1629]

Catherine Bond explains that it is not realistic to refer to an 'Australian' copyright system until the *Routledge* decision.[1630] According to Bond's historical account, at the time of this decision, there were no local copyright laws at the Australian colonies, mainly because of the trust in the

[1623] Ailwood and Sainsbury, 'Copyright Law, Readers and Authors in Colonial Australia' (n 38) 721.
[1624] Ibid.
[1625] Ibid. Also see: Copyright Law Amendment Act of 1842, 5 & 6 Vic., Ch. 47 (The Copyright Act of 1842).
[1626] Please see section 2.3.2. in Chapter II.
[1627] See e.g., Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (n 50); Burrell (n 38); Bond (n 38).
[1628] *Routledge v. Low* (1868) LR 3 HL 100.
[1629] Please see section 2.3.2. in Chapter II.
[1630] Bond (n 38) 380.

Act of 1842 – and perhaps due to the general lack of knowledge about and interest in copyright.[1631] However, only a year after the *Routledge* case, several Australian colonies started to enact local copyright laws.[1632] These first local copyright laws closely resembled the copyright regime envisioned by the imperial copyright laws, especially in their formulation of the scope, protectable subject-matter, and the term of protection.[1633] In fact, these laws were essentially modelled on the Copyright Act of 1842 – even though this particular piece of legislation was detrimental to the colonial conditions and the rights of local authors.[1634] Still, certain aspects of the British Act were adapted to the colonial reality in order to respond to the needs and expectations of the local stakeholders.[1635] However, Sarah Ailwood and Maree Sainsbury highlight that 'the adaptation to local conditions were piecemeal at best.'[1636] Along the same line, Robert Burrell describes these colonial laws as 'more like a compilation of [the various fragments of] the British legislation than like a true copyright code.'[1637]

The replication of the British copyright laws, sometimes even verbatim, seems to be a common practice among the colonial possessions, due to the prestige imputed in the British identity and the association of the British Empire with 'civilization'.[1638] Hence, the colonial authorities which had internalized the British values and assumptions of racial superiority often had incentives to follow

[1631] Ibid.
[1632] The first of these statutes was enacted by Victoria in 1869. It was followed by South Australia in 1878, New South Wales in 1879, and finally, by Western Australia in 1895. The other two colonies, namely Queensland and Tasmania, also passed a series of laws related to copyright, respectively, in 1887 and 1891. Nevertheless, these laws were neither as specific nor as comprehensive as the other colonies' laws. Burrell (n 38) 242–243; Catherine Bond, 'There's Nothing Worse than a Muddle in All the World: Copyright Complexity and Law Reform in Australia' (2011) 34 University of New South Wales Law Journal 1145, 372–375.
[1633] Ibid.
[1634] Ailwood and Sainsbury, 'Copyright Law, Readers and Authors in Colonial Australia' (n 38) 11.
[1635] Burrell (n 38) 378–379; Ailwood and Sainsbury, 'Copyright Law, Readers and Authors in Colonial Australia' (n 38) 11.
[1636] Ibid.
[1637] Burrell (n 38) 243.
[1638] Ibid.

the British Empire and to imitate the imperial copyright laws.[1639] Yet, Ailwood and Sainsbury indicate that the Australian colonies were unique in 'toeing the imperial copyright line, in ways that were frequently contrary to the interests of colonial authors and readers.'[1640] It would not be wrong to claim that the transplant of the imperial laws in the local copyright statutes of the Australian colonies consolidated the British copyright norms and standards in colonial Australia – along with the Whiteness of authorship and copyright ownership.

Although the first dimension of the British influence on the pre-Federation Australian copyright tradition was rather of a colonial nature, its second dimension was the outcome of the internationalization of copyright law. While the Australian colonies were enacting local copyright statutes, the Western (European) imperial powers, including the United Kingdom, gathered at Berne to hold a series of diplomatic conferences in terms of discussing the harmonization of national copyright laws of different countries.[1641] These negotiations ended up with the drafting and signing of the Berne Convention of 1886.[1642] The United Kingdom signed the Berne Convention in its own name and on behalf of the colonial territories.[1643] Then, it passed the International Copyright Act of 1886,[1644] mainly, to implement the Berne standards into the imperial copyright law.[1645] In doing so, the Act eradicated the overarching discriminatory tone of the Act of 1842 by entitling the works first exploited in the colonies with fair and equal legal protection as the ones first exploited in the United Kingdom.[1646]

[1639] Ibid.
[1640] Ailwood and Sainsbury, 'The Imperial Effect: Literary Copyright Law in Colonial Australia' (n 38) 716.
[1641] Please see section 2.3.2. in Chapter II.
[1642] Ibid. Also see: The Berne Convention for the Protection of Literary and Artistic Works of 1886.
[1643] Please see section 2.3.2. in Chapter II.
[1644] An Act to amend the Law respecting International and Colonial Copyright of 1886, 49 & 59 Vic., Ch. 33 (The International Copyright Act of 1886).
[1645] Please see section 2.3.2. in Chapter II.
[1646] Deazley, 'Commentary on International Copyright Act 1886' (n 756).

Whereas the International Copyright Act of 1886 improved the legal status of Australian authors and creators to a certain extent, more copyright reforms were to follow – especially along with the transformation of the Australian colonies into States within a federal system. In 1901, the colonies united under the Australian Federation and established the Commonwealth of Australia (hereafter 'the Commonwealth' or 'the Federation').[1647] Even though the IP law-related matters were not among the primary concerns of the newly found Federation, the framers of the Commonwealth of Australia Constitution Act of 1900[1648] (hereafter 'the Australian Constitution') granted the Federal Parliament the power to enact laws with respect to 'copyrights, patents of inventions and design, and trademarks.'[1649]

Regarding this, Robert Burrell notes that although the pre-Federation copyright laws were fragmented, incoherent, and varied in their substance; the constitutional clause on the Federal Parliament's power to enact IP laws did not receive much attention in the constitutional debates.[1650] He claims that the inclusion of such a clause to the Australian Constitution happened only because the framers of the Constitution used the list of powers given to the Congress by the U.S. Constitution[1651] as a refence point.[1652]

Whereas this section of the dissertation remained silent about the legal persona and the legal status of the Aboriginal people until this point, it shall be indicated herein that the Australian Constitution also included a regulation concerning the Aboriginal people.[1653] This regulation was quite concise and was aimed at excluding the Aboriginal people from the 'population' of the

[1647] See: The Commonwealth of Australia Constitution Act of 1900, Ch. 12.
[1648] Ibid.
[1649] Ibid, Sec. 51(xviii).
[1650] Burrell (n 38) 243.
[1651] Although it is explained in detail within the next section of this chapter, it is worthy to mention herein that the so-called 'patent and copyright clause' of the U.S. Constitution was modelled on the Statute of Anne 1710. See: The Constitution of the United States. Art. 1, Sec. 8, Cl. 8.
[1652] Burrell (n 38) 246.
[1653] The Commonwealth of Australia Constitution Act of 1900, Sec. 127.

Commonwealth.[1654] The regulation remained in force until the Constitutional amendment in 1947.[1655] Nevertheless, by then, many major amendments had occurred in the Australian copyright regime, which overlooked the Aboriginal creatorship and creativity.

For instance, the Federal Parliament used its constitutional power to enact laws regarding IPRs soon after the adoption of the Australian Constitution and enacted the first post-Federation copyright statute in 1905.[1656] The Copyright Act of 1905[1657] compiled a wide spectrum of copyright regimes addressed to different forms of works within a single document.[1658] It systematized and harmonized the disparate pre-Federation copyright laws and practices.[1659] Burrell acknowledges the Copyright Act of 1905 as a catalyzer that '[crystalized] an inchoate British copyright model into concrete legislative form [within the Australian legal domain].'[1660] Besides, soon after its passing, the international copyright domain had gone through a new wave of copyright reforms, which majorly extended the scope of the protectable subject-matters and the term of legal protection.[1661] Indeed, the Berne Union introduced some amendments to the existing international copyright regime, by revising the Berne Convention of 1886 with the Berlin Diplomatic Conference in 1908.[1662] Such amendments to the Berne Convention had its impact on the Imperial copyright law as well as that of the Commonwealth.[1663]

[1654] The regulation read as follows: 'In reckoning the number of the people of the Commonwealth, or of a State or other parts of the Commonwealth, aboriginal natives shall not be counted.' The Commonwealth of Australia Constitution Act of 1900, Sec. 127.
[1655] See: The Commonwealth of Australia Constitution Act No. 81 of 1947.
[1656] Sterling (n 1610) 52.
[1657] An Act relating to Copyright No. 25 of 1905 (The Copyright Act of 1905).
[1658] Ibid, Parts III-IV.
[1659] Burrell (n 38) 249.
[1660] ibid 250.
[1661] Please see section 2.3.2. in Chapter II.
[1662] Ibid.
[1663] Burrell (n 38) 263.

The British Empire passed the Imperial Copyright Act of 1911[1664] and adopted the Berlin revisions of the Berne Convention.[1665] The Commonwealth admitted to the imperial decision and pursued the British precedent by passing the Australian Copyright Act of 1912,[1666] which implemented the Imperial Copyright Act of 1911.[1667] Whereas the reasons underpinning this decision of the Commonwealth are not know for fact, Ronan Deazley explains that it was neither sensible nor desirable for colonies to leave or to be excluded from the international copyright order.[1668] Thus, despite the controversies and the dissenting voices, the Federal Parliament adopted the Copyright Act of 1912 and pursued the imperial copyright strategy.[1669]

Around the same time as the Commonwealth's integration to the international IP system, the initial Federal attempts to assimilate the Aboriginal people had become visible in the legal forum. The inaugural legal regulation in this context was the Act to consolidate the Law relating to the Aboriginal Natives of Victoria of 1915[1670] (hereafter 'the Aborigines Act of 1915'), which racially categorized Aboriginal people based on 'blood purity'.[1671] This was followed by the Ordinance Relating to Aboriginals of 1918[1672] (hereafter 'The Aboriginals Ordinance of 1918'), which was addressed to the governance of the Aboriginal people and reserves.[1673] Enacted under the 'humanitarian' pressures at the time, the Aboriginals Ordinance of 1918 was, quite conspicuously, a by-product of the Western (European) racial thought which was evident in its classification of

[1664] An Act to amend and consolidate the Law relating to Copyright of 1911, 1 & 2 Geo. 5, Ch. 46 (The Imperial Copyright Act of 1911).
[1665] Please see section 2.3.2. in Chapter II.
[1666] An Act relating to Copyright No. 20 of 1912 (Cth) (The Copyright Act of 1912).
[1667] Burrell (n 38) 257–264; Sterling (n 1610) 52.
[1668] Deazley, 'Commentary on International Copyright Act 1886' (n 756).
[1669] Atkinson (n 40) 40.
[1670] An Act to consolidate the Law relating to the Aboriginal Natives of Victoria No. 2610 of 1915 (The Aboriginal Act of 1915).
[1671] Ibid, Secs. 4-5.
[1672] The Ordinance Relating to Aboriginals No. 9 of 1918 (Cth) (The Aboriginals Ordinance).
[1673] 'Aboriginals Ordinance No. 9 of 1918 (Cth)' (*Documenting a Democracy*) <https://www.foundingdocs.gov.au/item-sdid-62.html> accessed 18 September 2021.

the Aboriginal people by reference to descent, origin, or caste.[1674] Besides, it had an overhauling paternalistic tone stemmed from an innate assumption of the Western (European) 'superiority' and Aboriginal 'inferiority'. Furthermore, the Ordinance also rested the foundations of the assimilation of the Aboriginal culture, for instance, by placing Aboriginal children under the custody of, principally, the Superintendent who held the authority to displace the 'Aboriginal or half-caste' children.[1675] Additionally, it deprived the Aboriginal people from governing their own financial matters and entitled the Superintendent to manage their property.[1676]

It is neither possible nor desired to map the vast body of laws concerning the Aboriginal people and their 'rights'. However, it is worth to mention the Ordinance to Provide for the Care and Assistance of Certain Persons of 1953-1960[1677] (hereafter 'The Welfare Ordinance of 1953-1960') herein, since it was partially a response to the emerging Aboriginal art trade. In this sense, it can be argued that the Welfare Ordinance of 1953-1960 constituted the first legal instrument of the Commonwealth regulating the copyright-matters over Aboriginal works.[1678] Nevertheless, instead of recognizing Aboriginal authors' and creators' entitlement to copyright, the Ordinance deprived Aboriginal individuals of legal autonomy, hence, the capability of bearing legal rights and obligations – including copyright over their traditional paintings and drawings.[1679]

Meanwhile, the United Kingdom amended the Imperial Copyright Act of 1911 and adopted the Copyright Act of 1956,[1680] due to the advancement of technology and further reforms in the

[1674] The Aboriginals Ordinance of 1918, Sec. 3.
[1675] Ibid, Sec. 7.
[1676] Ibid, Sec. 43.
[1677] An Ordinance to Provide for the Care and Assistance of Certain Persons No. 16 of 1953 (as amended respectively in 1955, 1957, 1959, 1960) (NT) (The Welfare Ordinance of 1953-1960).
[1678] Stephen Gray, 'Government Man, Government Painting? David Malangi and the 1966 One-Dollar Note' in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar Publishing 2015) 139.
[1679] The Welfare Ordinance of 1953-1960 (NT), Sec. 15.
[1680] Act An Act to make new provision in respect of copyright and related matters, in substitution for the provisions of the Copyright Act, 1911, and other enactments relating thereto; to amend the Registered Designs Act, 1949, with

international copyright discourse.[1681] Accordingly, the Australian Federation appointed a Copyright Law Review Committee in 1959, also known as the Spicer Committee, to assess the Australian copyright law and to evaluate the necessity for amendments in the current copyright regime.[1682] The Committee prioritized the implementation of the Berne standards into the Australian copyright law, and they also provided various practical reasons, such as the availability of literature and case law in the United Kingdom, to substantiate why the Australian copyright law *shall not depart* from the British precedent.[1683]

The suggestions of the Spicer Committee were consolidated into the bill drafted by the Commonwealth General Attorney in 1967.[1684] In fact, this bill did not only trigger the enactment of the Copyright Act of 1968,[1685] but it also set the parameters of the modern Australian copyright framework. On that note, Atkinson refers to the Australian Copyright Act of 1968 as 'an analogue of the British Act of 1965.'[1686]

The Copyright Act of 1968, which entered into force in 1969, formed the backbone of modern Australian copyright law – and it continues to do so even today. It has introduced many new provisions which helped the Australian copyright doctrine to catch up with the international normative framework and to better fit into the Australian cultural and legal context.[1687] Despite these amendments, Burrell asserts that the marks of the International Copyright Act of 1911, hence, the imperial laws' influence are still visible in the modern Australian copyright law.[1688]

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respect to designs related to artistic works in which copyright subsists, and to amend the Dramatic and Musical Performers' Protection Act, 1925; and for purposes connected with the matters aforesaid of 1956, Ch. 74 (The Copyright Act of 1956).

[1681] Please see section 2.3.2. of Chapter II.

[1682] Sterling (n 1610) 54.

[1683] See: Zines (n 1598) 47–50.

[1684] Ibid.

[1685] The Copyright Act No. 53 of 1986 (Cth) (The Copyright Act of 1968).

[1686] Atkinson (n 40) 44.

[1687] Bond (n 1626) 1156–1158.

[1688] Burrell (n 38) 240.

As a last remark, it shall be noted that although the discrimination of the Aboriginal people on grounds of race was eliminated from the Australian Constitution by 1947,[1689] the recognition of Aboriginal artists as Australian citizens did not help in acquiring copyright over their works, mainly because of the failure of tradition-based works to meet the originality criteria of copyright protection of the Copyright Act of 1968. This issue was even highlighted in a report prepared by the working group appointed by the Federal Government in 1974.[1690] The committee reported that the communal and trans-generational creative process, hence, the works deriving from pre-existing traditions and tribal designs do not meet the originality threshold stipulated in Section 32(1) of the Copyright Act of 1968.[1691] Thus, the committee suggested an 'Aboriginal *Folklore* Act' to be passed to entitle the Aboriginal creations with legal protection.[1692] In fact, the denial of copyright to the Aboriginal creators was reversed only in 1991 with case law.[1693]

4.2.2. Copyright as Legal Transplant:[1694] A Deconstructionist Reading of the American Copyright Tradition

In respect to the genesis of the modern American copyright doctrine, Mark Lemley claims that 'copyright law [has] been around in the United States since its origin.'[1695] Lemley's claim echoes an objective observation and an absolute fact concerning American IP law, especially given the inclusion of a 'patent and copyright clause'[1696] in the founding document of the Federation, namely the U.S. Constitution. Nevertheless, the American legal order's acquaintance with copyright (and

[1689] See: The Commonwealth of Australia Constitution Act No. 81 of 1947.
[1690] Janke (n 53) 15.
[1691] Ibid.
[1692] Ibid.
[1693] Please see 4.3.1.2. in the text.
[1694] See: Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (n 40).
[1695] Mark A Lemley, 'Property, Intellectual Property, Free Riding' (2005) 83 Texas Law Review 1031, 1033 *supra* note 9.
[1696] The Constitution of the United States, Art. 1, Sec. 8, Cl. 8.

with its antecedent *copy-right*) precedes the U.S. Constitution – and even the Declaration of Independence of 1776. As emphasized by Oren Bracha, focusing merely on the post-independence copyright statutes and federal copyright laws would, at best, reflect 'a particular version of American exceptionalism,'[1697] if not 'ignore the colonial period or minimize its significance to the vanishing point.'[1698]

In line with Bracha's statements, this part of the dissertation argues that the modern copyright regime of the United States cannot be isolated from the legal and diplomatic relationship between the British Empire and the United Colonies of America, particularly for three reasons: First, the British Crown's initial reaction to the printing technology, particularly the royal printing privileges, had been prototypes of the first legislative attempts to regulate the art of printing and publishing in the United Colonies.[1699] Second, not only the institutionalization of copyright, but also the transition of the American copyright system from a printer- and publisher-oriented one to an author-oriented one has happened under the influence of the Anglo-Saxon copyright tradition. Indeed, the British cultural scene and the literary debates centered around the author (and his sole genius), have had a gradual impact on the American cultural and legal domains. Third, the Western (European) cultural and political assumptions, particularly those of 'civilization' and the Romantic author have not only reached out of the colonial context, but also constituted the linchpin of the post-independence American copyright system – primarily because of the legal transplant of the British Statute of Anne of 1710 in the post-independence American legal reality.[1700]

[1697] Oren Bracha, 'Early American Printing Privileges. The Ambivalent Origins of Authors' Copyright in America' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010) 89.
[1698] Ibid.
[1699] Ibid.
[1700] See: Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (n 40).

Thus, this part of the dissertation overviews the proliferation of the modern copyright regime in the United States, by tracing its roots back to the United Colonies, mainly to avoid, in Justin Hughes' words, an 'incomplete historiography'[1701] of American copyright law. The sub-chapter initiates with a synopsis of the diplomatic and legal affairs between the British Empire and the United Colonies, in order to explain how the British *copy-right* tradition guided the American printing practices. Then, it focuses on the impact of the British literary debates on the American *copy-right* tradition. Finally, it maps the legal transplant of the Statute of Anne of 1710 in the post-independence statutes and federal laws – with which the Western (European) Romantic ideals of (White) authorship, and the naturalist and utilitarian justifications of authorial copyright were integrated into the Anglo-American copyright tradition.

In accordance with the classification in the American IP literature, this sub-chapter identifies four stages to study the history of modern American copyright law: The colonial precursors of copyright (1600s-1776), the post-Revolution copyright statutes of the independent States (1783-1786), the constitutional clause regarding copyright (1887-1889), and finally, the first federal copyright Act passed in 1790.[1702] The sub-chapter examines the early beginnings and the continuum of the influence of the Anglo-Saxon literary scene and copyright tradition on the American legal order accordingly.

The colonial precursors of copyright in colonial America presents a curious case, since the American copyright system originated almost as a replica of the British one, despite the stark contrast between the American and British cultural spaces and economic realities. In the Empire, there was an organized literary production and book trade – hence, a strong lobbying for exclusive

[1701] Justin Hughes, 'Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson' (2006) 79 Southern California Law Review 993, 993.
[1702] See: Patterson, *Copyright in Historical Perspective* (n 38) 180.

copy-right as well as a guild for printers and publishers, known as the Stationers' Company.[1703] As opposed to the stimulating book trade in the Empire, literary production in the United Colonies was limited to the publication of governmental documents, religious texts, and local histories – accompanied by a small and unorganized book trade that remained mostly within the colony in which the book was first published.[1704] Considering the nature of the printed works and the scale of the book trade, there was neither any (need for) an institution equivalent to the Stationers' Company, nor an active lobbying for a legal monopoly for publishing certain works or groups of works.[1705] Therefore, the literary production in the United Colonies was largely unregulated.[1706]

The stagnation of the cultural space in the United Colonies altered drastically, due to the advent of the printing technology in the colonial territories in 1638.[1707] The arrival of the printing press in colonial America raised concerns similar to those of the British ruling-elite.[1708] Hence, the colonial authorities adopted the British *copy-right* system, and they decided to control the art of printing.[1709] By this way, the first function, or the first inherently White power structure, of copyright law was instituted in the American legal domain: Censoring the alternative, dissenting, and confrontational ideas and narratives.[1710]

Just like the British *copy-right*, the colonial printing privileges were being granted to printers and publishers on an ad hoc basis, in order to entitle them to print and sell certain books for a

[1703] Please see sub-chapter 2.3. in Chapter II.
[1704] Oren Bracha, 'Commentary on John Usher's Printing Privilege 1672' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <http://www.copyrighthistory.org>.
[1705] Ibid. ibid.
[1706] Bracha, 'United States Copyright, 1672–1909' (n 38) 336.
[1707] Bracha, 'Commentary on John Usher's Printing Privilege 1672' (n 1698); Bracha, 'Early American Printing Privileges. The Ambivalent Origins of Authors' Copyright in America' (n 1691) 91.
[1708] Bracha, 'Early American Printing Privileges. The Ambivalent Origins of Authors' Copyright in America' (n 1691) 91; Bracha, 'United States Copyright, 1672–1909' (n 38) 336.
[1709] Ibid.
[1710] Bracha, 'United States Copyright, 1672–1909' (n 38) 336. Also, please see section 2.3.1. and sub-chapter 2.4. in Chapter II.

limited period of time.[1711] Only, the colonial printing titles were not royal privileges, but legislative grants entitled by the colonial governmental bodies.[1712] Given the shared characters of the British and American *copy-right*, there is no reason not to consider the latter, in Bracha's words, as 'the rudimentary versions of English royal printing patents.'[1713] In fact, Francine Crawford takes Bracha's statement even one step further and claims that the American *copy-right* regime embodied *all the key aspects* of the prospective and pre-constitutional statutory copyright laws of the post-independence American States.[1714] Although Crawford's explanation concerns the scope, eligibility criteria, and the like; it may be argued that even the censorship function of these early *copy-right* practices were to be revoked by the American judiciary, after a few centuries, to prevent the race-conscious confrontation of the predominantly White narratives.[1715]

Indeed, the British *copy-right* system not only planted the seeds of the American copyright tradition. This system prevailed in the American legal order until the 1790s – even though the British precedent was already declined in the United Kingdom by 1695.[1716]

The decline of *copy-right* in the British Empire was mainly the result of the emergence of a new class of professional writers who wished to make a living out of the fruits of their intellectual labor.[1717] As a response to the professional writers' intense lobbying, the British Empire decided to substitute the royal printing privileges of printers and publishers with author's copyright and became the first country to enact an author-oriented copyright Statute: The Act for the

[1711] Ibid 336–337.
[1712] Ibid.
[1713] Ibid, 335.
[1714] Francine Crawford, 'Pre-Constitutional Copyright Statutes' (1975) 47 Journal of the Copyright Society of the U.S.A. 167, 168. Emphasis added.
[1715] Please see section 4.3.1.4. in the text.
[1716] Bracha, 'Early American Printing Privileges. The Ambivalent Origins of Authors' Copyright in America' (n 1691) 95.
[1717] Please see sections 2.3.1. and 2.3.2. in Chapter II.

Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies of 1710, or, the so-called the Statute of Anne of 1710.[1718]

The rationale behind the Statute of Anne of 1710 was, on the one hand, to prevent the printing, reprinting, and exploitation of books without the consent of their authors, in order to prevent the economic distress such practices cause to authors and their families.[1719] On the other hand, the Statute had a public policy rationale, since it was aimed to entitle the 'learned men'[1720] with property rights over their intellectual creations in order to encourage them to produce *useful* books.[1721] This rationale was not only an indicator of the economic power structures built in IP law, but it has also rested the foundations of (racialized) valorization schemes, due to requiring subjective and political choices about which works deserve copyright protection and which do not – or which works have a social value and contribute to culture and which do not.

Although the Statute was not clear about where the law applied, its legal impact had reached to the periphery.[1722] However, this happened only in the early 1800s – in the aftermath of the independence of the United Colonies from the Empire.[1723] Hence, the British Statute did not apply to the colonial literary production in the United Colonies.[1724] Yet, the Statute of Anne of 1710 constituted the linchpin of the post-independence American copyright tradition – not as a colonial imposition, but as a legal transplant adopted by the post-independence States and the Federation due to its *prestige*.[1725]

[1718] The Statute of Anne of 1710, 8 Anne, Ch. 19.
[1719] Bently and Kretschmer, 'Statute of Anne, London (1710)' (n 667).
[1720] Ibid.
[1721] Ibid.
[1722] Please see section 2.3.2. in Chapter II.
[1723] Encyclopedia Britannica, 'United States' (*Britannica Academic*) <https://academic.eb.com/levels/collegiate/article/United-States/111233> accessed 20 November 2021.
[1724] Patterson, *Copyright in Historical Perspective* (n 38); Bracha, 'United States Copyright, 1672–1909' (n 38) 335.
[1725] See: Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (n 40) 1456.

According to Lyman Ray Patterson's historical account, neither the United Colonies nor post-independence America accommodated a class of professional writers that was equivalent to the British one.[1726] Still, the individual attempts of petitioning authorial printing privileges in the 1770s gradually led to the adoption of an author-based *copy-right* system at the State level.[1727] These authorial printing grants were, in broad terms, a mere duplicate of the printing privileges entitled to printers and publishers in the United Colonies.[1728] In fact, apart from their addressee, the authorial printing grants carried the exact same key aspects of the printers' and publishers' printing privileges.[1729] Yet, these post-independence authorial grants are often anticipated as harbingers of a transition from legislative printing privileges to a modern and author-oriented copyright system,[1730] mainly because these grants introduced the Romantic idea(l)s around authorship to the American copyright system, along with the British values and assumptions that underpinned the British literary debates: The Lockean and utilitarian justifications of modern copyright.[1731]

Indeed, the post-independence States witnessed a growing interest in and lobbying for the authorial copyright in parallel to the gradual growth in the number of professional writers.[1732] The American stakeholders' line of argumentation, as highlighted by Hughes, resembled that of their British forebearers, Daniel Dafoe and John Locke, given the emphasis on the contributions of authorial economic rights in the progress of culture.[1733] Eventually, the Continental Congress responded to such lobbying by passing a resolution in 1783 to encourage the thirteen States to

[1726] Patterson, *Copyright in Historical Perspective* (n 38).
[1727] Bracha, 'Commentary on John Usher's Printing Privilege 1672' (n 1698).
[1728] Bracha, 'United States Copyright, 1672–1909' (n 38) 339.
[1729] Ibid.
[1730] Oren Bracha, 'Commentary on Andrew Law's Petition 1781' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <http://www.copyrighthistory.org/>.
[1731] Ibid.
[1732] Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (n 40) 1440.
[1733] Hughes (n 1695) 1022.

enact copyright laws.[1734] All States acted upon this resolution and enacted copyright statutes within a three-year time span, except for Delaware.[1735] These first examples of modern American copyright statutes were modelled on the Statute of Anne of 1710.[1736] In fact, most of these laws were even named after the British Statute, by emphasizing notions such as 'learning' and 'useful arts.'[1737]

The similarities between the Statute of Anne of 1710 and the American statutes were not restricted merely to phraseology. The preambles, public policy rationale, and much of the technical details of the American Statutes (such as the right owner, protectable subject-matter, fixation requirement, term of legal protection, and the formalities of registration and deposit of a copy to the national authorities) were inspired – or even in some cases, reiterated verbatim – from the British Statute.[1738] Additionally, except for the Statutes of Maryland and South Carolina, the post-independence States' copyright Statutes were selective in their beneficiaries – as much as the Statute of Anne was. Hence, these Statutes bestowed copyright upon merely the citizens, residents, or inhabitants of the American States; by this way, the foundations of the territoriality principle were also established.[1739]

Regarding the legal transplant of the Statute of Anne of 1710 in State laws, Bracha rightfully inquires why the post-independent States remained loyal to their former colonizer's legal tradition and modelled their laws on a relatively old British Statute, while they could have broken their

[1734] Crawford (n 1708) 169.
[1735] Ibid 167; L Ray Patterson, 'Understanding the Copyright Clause' (1975) 47 Journal of the Copyright Society of the U.S.A. 365, 374; Oren Bracha, Lionel Bently and Martin Kretschmer, 'Commentary on the Connecticut Copyright Statute 1783', *Primary Sources on Copyright (1450-1900)* (2008) <http://www.copyrighthistory.org/>.
[1736] Lionel Bently and Martin Kretschmer (eds), 'Connecticut Copyright Statute, Connecticut (1783)', *Primary Sources on Copyright (1450-1900)* <www.copyrighthistory.org>; Lionel Bently and Martin Kretschmer (eds), 'Copyright Act, New York (1790)', *Primary Sources on Copyright (1450-1900)* <http://www.copyrighthistory.org/>.
[1737] See: Fenning (n 1598); Crawford (n 1708).
[1738] Bracha, Bently and Kretschmer (n 1729); Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (n 40) 1445.
[1739] Bracha, Bently and Kretschmer (n 1729).

bonds with the British Empire and enact their copyright laws on a clean slate.[1740] Indeed, the legal transplant of the British copyright tradition into the American States had two major reasons: First, the text of the British Statute was not only accessible in the American States, but the States were already familiar with the text due to their colonial past.[1741] As rightfully articulated by Karl Fenning, copyright was enshrined in the colonial legal order, at least as a legal institution.[1742] Second, the British Empire was acknowledged as a highly *intellectual* and *civilized* nation at the time. Hence, the post-independence American States willfully adopted the normative framework of the Statute of Anne in order to facilitate their joining in the 'leading civilized nations' club.[1743]

Regardless of its rationale, the Statute of Anne of 1710 was legally transplanted into the American statutory laws.[1744] Besides, this legal transplantation rested the foundations of modern American copyright law by bringing upon a legal system that is centered around the genius of the sole (or, identifiable) author as well as a combination of a natural rights discourse and the utilitarian justifications of copyright into the State laws as the rationale of the existence of authorial copyright.[1745]

Although the copyright Statutes of the twelve States were quite alike – due to being directly modelled on the British Statute or on each other, and thus, indirectly on the British Statute – there were many discrepancies in their approaches to the protectable subject-matter, scope of author's copyrights, the term of protection, and the remedies for copyright infringement.[1746] This soon

[1740] Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (n 40) 1456.
[1741] Ibid 1427.
[1742] Fenning (n 1598) 444.
[1743] Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (n 40) 1428.
[1744] Bracha, Bently and Kretschmer (n 1729).
[1745] Jane C Ginsburg, 'Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1989) 64 Tulane Law Review 991, 1000–1001; Bracha, Bently and Kretschmer (n 1729).
[1746] Crawford (n 1708) 191–192; Bracha, 'United States Copyright, 1672–1909' (n 38) 341.

raised the question of whether the Continental Congress had the power to harmonize the statutory copyright laws and legislate a Confederation-wide copyright law.[1747] The answer to this question came up at the threshold of the constitutional convention in 1787[1748] and the problem was resolved by the addition of the so-called 'patent and copyright clause' to the U.S. Constitution.[1749]

The Continental Congress undertook the mission to find out 'the most proper means of cherishing *genius* and *useful* arts (…) by securing to the authors and publishers of *new* books their *property* in such works.'[1750] Since the conventional proceedings were kept confidential, little is known about the incentives of the framers and the interest group which lobbied to this end.[1751] However, the so-called 'patent and copyright clause' was approved at the convention without any further debates.[1752] With this constitutional regulation, the Congress was given the power '[t]o promote the progress of science and *useful arts* by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.'[1753]

On a different note, Lyman Ray Patterson points at the irony of this legal transplant: A legal regime that was invented in the Kingdom of England in terms of censoring certain ideas, hence, suppressing knowledge has become the fundamental tenet of the American legal regime – however, to facilitate the promotion of learning.[1754] Despite such irony, the U.S. Constitution invested in the advancement of intellectual production for social goals.[1755] The British readings of

[1747] Bracha, 'United States Copyright, 1672–1909' (n 38) 340.
[1748] On a different note, whereas the copyright-related matters to be dealt at the conference was enshrined in the sixth clause of the relevant Constitutional Convention Journal entry, the third clause was about the non-Western 'others' of Americans. The third clause indicates that 'affairs with Indians as well within and without the limits of the United States' was another issue to be discussed within the same seating. See: Lionel Bently and Martin Kretschmer, 'Constitutional Convention Journal Entry, Philadelphia, Pennsylvania (1787)', *Primary Sources on Copyright (1450-1900)* (2008) <http://www.copyrighthistory.org/>.
[1749] Hughes (n 1695) 1021.
[1750] Ibid. Emphasis added.
[1751] Fenning (n 1598) 438.
[1752] Fenning (n 1598).
[1753] The United States Constitution, Art. 1, Sec. 8, Cl. 8. Emphasis added.
[1754] Patterson, 'Understanding the Copyright Clause' (n 1729) 376.
[1755] Ginsburg (n 1739) 996.

IP and IPRs – as well as of progress, science, and arts – were enshrined, this time, in the national legal order of the United States. Only this time the medium to this end was not the Statutes of the Confederation, but the Constitution of the Federation.

The implementation of copyright-related regulations and the cultural assumptions associated with copyright in the U.S. Constitution raises questions about the construction of authorship and legally protectable (or 'useful') intellectual works by the framers and the society at large, especially given the intricacies of the American social and legal reality with racism and enslavement of African-Americans. In her seminal book, entitled *The Color of Creatorship: Intellectual Property, Race, and the Making of Americans*,[1756] Anjali Vats asserts that the naturalization statutes and the Fugitive Slave Laws that were in force at the time consolidated the fact that '[k]knowledge production (…) had always functioned as a racialized practice (…).'[1757] In a similar vein, Kevin Jerome Greene clarifies that '[t]he history of the production of cultural property in the United States follows the same pattern as the history of racial divide that inaugurated the founding of the Republic,'[1758] especially given that African-Americans were denied being the subjects of the rights and liberties secured in the Constitution at the time.[1759]

Once combined with the overemphasis on 'learned' men, scientific and cultural 'progress', creativity, and 'useful' arts, all of which have been interwoven into the fabric of the American copyright tradition; it may be claimed that the U.S. Constitution has forged an explicitly racially-charged and false assumption: Creative and imaginative White American citizens, who deserve legal protection for their intellectual outputs.[1760] This very same racial depiction of White

[1756] Vats (n 33).
[1757] Ibid 27.
[1758] Greene, 'Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues' (n 33).
[1759] Ibid.
[1760] Vats (n 33) 27–30.

authorship, as usual, created its oppositional binary as well: Unimaginative non-White creators whose intellectual output lack originality, thus, do not deserve copyright protection.[1761] This phraseology and its inherent subjective aesthetic judgments not only denied cultural value to Black intellectual creations, but it also concealed the contributions of Black cultural production to the American culture.[1762]

Regardless of the racialized power asymmetries and the systemic exclusion of African-American authors from copyright ownership, the American copyright discourse continued to evolve around the needs and expectations of White copyright holders. Indeed, the discrepancies among the *copy-right* practices of the post-independence States was one of these issues. This was mainly the consequence of the American stakeholders' misinterpretation of the Congress' power.[1763] Since they assumed that the U.S. Constitution granted the Congress to entitle authors with individual printing privileges, the Congress received a vast number of petitions requesting such individual authorial grants.[1764] Though the initial approach of the Congress to granting *copy-right* to authors on a case-by-case basis was positive, this system proven to be burdensome, hence, inefficient. Due to this, the Congress took action to draft a general copyright bill.[1765]

The American framers' devotion to British copyright tradition, once more, revealed itself in the preparations of the bill – and within the first national copyright regime of the United States. The Statute of Anne of 1710 was taken as a ready-made legislative precedent, or even as a 'template', by the framers.[1766] As a result, the first copyright Act of the Federation, namely the Act

[1761] Ibid.
[1762] Greene, 'Copynorms, Black Cultural Production, and the Debate over African-American Reparations' (n 33) 1186–1189.
[1763] Oren Bracha, 'Commentary on the U.S. Copyright Act 1790' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <http://www.copyrighthistory.org/>.
[1764] Ibid.
[1765] Ibid.
[1766] Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (n 40) 1453.

for the encouragement of learning, by securing the copies of maps, Charts, And books, to the authors and proprietors of such copies, during the times therein mentioned of 1790[1767] (hereafter 'the Copyright Act of 1790'), was not only titled after the Statute of Anne of 1710, but it also closely resembled the normative framework of its British precedent – along with a few modifications.[1768]

Bracha asserts that the Statute of Anne of 1710 was a successful example of legal transplantation that remained for a long time within the United States.[1769] Despite the series of statutory amendments of the Copyright Act of 1790, Bracha claims that the normative framework borrowed from the Anglo-Saxon copyright tradition constituted the backbone of the Anglo-American copyright law, at least until the mid-1800s – though the British foundations of the latter were still visible even after the major amendments of 1870.[1770]

For instance, the first major statutory reform of the Copyright Act of 1790 was lobbied by Noah Webster upon his arrival from the United Kingdom and in order to extend the copyright protection to musical works and also to extend the term of legal protection bestowed upon the authors – in line with the legal system in the United Kingdom.[1771] From a different angle, even the United States' admission to the Berne Convention of 1886 in 1988 – a hundred and two years after the ratification of the Convention – could not wash off certain elements of the British copyright

[1767] 1 Statutes at Large 124 (Copyright Act of 1790).
[1768] Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (n 40) 1453.
[1769] Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (n 40).
[1770] Ibid.
[1771] Oren Bracha, 'Commentary on the U.S. Copyright Act 1831' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <http://www.copyrighthistory.org/>.

tradition from that of the American, especially the formalities of registration and deposit of copies which initially derived from the economic reality in Britain.[1772]

Referring back to Bracha, it may be argued that the Copyright Act of 1790 was, perhaps, also a 'successful' example of consolidating IPRs, and particularly copyright, as a legal right exclusive to White authors and creators. Indeed, Vats explains that the the Act formalized the long-lasting interplay of race and IP law, by restricting copyright ownership to American 'citizens, citizens thereof, or residents within.'[1773] Even though this may be read as the American legislature's compliance with the general trends in the IP law-making at time and with the territoriality principle, a race-conscious glance at the conceptualization of citizenship, thus copyright ownership, reveals the overt racial discrimination in the American legal system. Vats explains that '(…) under the Three-Fifths Compromise, enslaved persons were not treated as whole people, they were not afforded the basic rights of citizens or even persons.'[1774] However, the same time frame, as explained by Greene, marks the genesis of new genres in music, such as ragtime, blues, and jazz – all of which were based on slave songs and rituals, thus, originated by African-American creators.[1775] Given the legal status of African-American people at the time, their musical works created under these genres were allocated to the (White) public domain. Thus, their works have not only been appropriated and exploited by White citizens of the United States, but these creations also have been distorted, altered, or reproduced by White artist, whilst constituting the cultural bases of such White 'creations' – needless to mention, without any credits been given to their Black originators.[1776]

[1772] Jane C Ginsburg and John M Kernochan, 'One Hundred and Two Years Later: The U.S. Joins the Berne Convention' (1988) 13 Columbia-VLA Journal of Law & the Arts 1.
[1773] Vats (n 33) 30. Also see: 1 Statutes at Large 124, Copyright Act of 1970, Sec. 1.
[1774] Ibid.
[1775] Greene, 'Copyright, Culture & Black Music: A Legacy of Unequal Protection' (n 33).
[1776] Ibid; Greene, 'Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues' (n 33).

These discriminatory practices continued to deny copyright ownership to non-White cultural producers at least until the late 1800s. Indeed, the Copyright Act of 1836, which amended the Copyright Act of 1790, upheld the Whiteness of authorship and copyright ownership, due to preserving the so-called 'citizenship clause.'[1777] Only a few years after the passing of the Copyright Act of 1836, the American judiciary reflected upon the predominant racial ideas at the time and entrenched such rhetoric in a landmark case, *Dred Scott v. Sandford.*[1778]

The Court's approach to the legal persona of African-Americans in the *Dred Scott* case sheds light upon the misperceptions regrading Black creatorship at the time, which was articulated as follows: '(…) beings of an inferior order (…) altogether unfit to associate with the [W]hite race, either in social or political relations; and so far inferior, that they had no rights which the [W]hite man was bound to respect.'[1779] Yet, the inaugural shift in the American race relations came along with the Fourteenth Amendment in 1868,[1780] which eradicated the racial segregation and the barriers to the entitlement of African-American authors with copyright. Whereas the most obvious visible forms of racial discrimination were dismantled from the IP domain, the court decision to be analyzed in the following sub-chapter expose the legacy of the racial imagery in the legal space of IP.

As a last remark to this sub-chapter, it can be claimed that it was not only the British copyright concepts, norms, and principles that have traveled to Australia and the United States. In fact, the race relations, cultural assumptions, and racialized valorization schemes hidden in the British copyright law, which sacralize Western (European) modes of creativity and creatorship, have also found themselves a fertile ground where they could cultivate according to the specificities of the

[1777] Vats (n 33) 30.
[1778] *Dred Scott v. Sandford*, 60 U.S. 393 (1856).
[1779] Ibid, 606.
[1780] The Constitution of the United States (amendment XIV, 1868).

race relations that stemmed from the Australian and American cultural, economic, legal, and political realities.

Therefore, the following sub-chapter builds upon this one by bringing up case studies and case law, respectively, from the Commonwealth of Australia and the United States. In doing so, the dissertation demonstrates the interaction of the Western (European) assumptions and values embedded in British copyright law with the racialized minorities and indigenous peoples in the Commonwealth of Australia and the United States.

4.3. 'Like A Loaded Weapon'[1781]: The *Jurisgenesis* of Non-Western Modes of Creatorship and Creativity by the Western Judiciary

In his book, entitled *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*,[1782] Robert A. Williams, Jr. engages in a deconstructionist analysis of the interplay of race, power, and law, by addressing the owners of the socially- and legally-constructed narratives that infuse a meaning into law.[1783] By quoting Robert Cover, Williams refers to the latter process as *jurisgenesis* and defines this term as 'the creation of legal meaning [as] a collective, social enterprise.'[1784] In this regard, Williams concentrates on the U.S. Supreme Court, given the authority and the power of the justices occupying the American judiciary to interpret and create law.[1785] Williams asserts that it is, indeed, the subjective and racially-charged narratives of the American jurists that monopolize the choice, interpretation, and enforcement of the State's laws – and it is, indeed, the same judicial narrative that legalizes and gives an authoritative and

[1781] Williams, Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (n 570).
[1782] Ibid.
[1783] Ibid.
[1784] Robert Cover, 'Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law' (1983) 97 Harvard Law Review 4. as quoted in Williams, Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (n 570) 20.
[1785] Williams, Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (n 570) 20.

binding legal meaning to the racial information, including pejorative racial stereotypes and prejudices, embedded within the court decisions.[1786] Therefore, Williams deconstructs the landmark cases concerning the rights of Native-Americans. He exposes the racial thought and racially-charged idea(l)s that have not only informed the American judiciary's legal reasoning and decisions, but that were also entrenched and transmitted to the future by means of legal language and principles, especially that of *stare decisis*.[1787]

In this context, Williams analogizes the *jurisgenerative* power of the American judiciary with 'a loaded weapon aimed at destroying the rights of any minority group targeted by a judicially validated language of racism.'[1788] Inspired by and building upon Williams' this specific approach to the law, and particularly to case law, this sub-chapter extends his analyses to the Australian and American courts' judgments that 'resolved' the legal disputes concerning the IP-related claims of the racialized minorities of the Commonwealth of Australia and the United States. Conceding with Williams' thesis, the sub-chapter argues that the Australian and American courts, as well as the case law deriving from their judgments, are neither objective nor value-neutral. On the contrary, Australian and American copyright and trademark case law carry along, circulate, and consolidate racial information premised upon the Enlightenment idea(l)s regarding race and racialized cultural hierarchies. Thus, these decisions arm Australian and American jurisprudence with 'loaded weapons' that are ready to explode – or, in other words, with the opportunity and power to deprive racialized minorities from the positive and defensive protection mechanisms of IP law.

Within this frame, and in alignment with its findings until this stage, the sub-chapter's approach to this topic is two-pronged: The previous sub-chapter unearthed the continuum of the

[1786] Ibid, 17-21
[1787] Ibid, 49, 57-58.
[1788] Ibid, 22.

British cultural assumptions and valorization schemes within the Australian and American legal orders, due to the colonial and legal transplant of the Empire's IP laws into the legal systems of its two former colonies. Following up with that, this sub-chapter investigates the interaction of the racial information (both the inherently White structures of dominance[1789] and the racialized cultural hierarchies[1790]) built in IP law with the racialized minorities of post-independence Australia and America.

Therefore, the remainder of the chapter aspires to bring the interplay of the Western-centric IP laws with the racialized minorities and indigenous peoples into the light, by referring to high-profile IP cases that have attracted scholarly attention and were widely-cited in the literature. In doing so, the chapter seeks for the 'weapons' aimed at customary and statutory IPRs as well as the communal identities, respectively, of the Aboriginal people of Australia, African-American intellectual creators of the United States, the Native-American and Asian-American communities of the United States. Such an analysis not only confirms Derrick Bell, Jr.'s material determinism thesis, due to illustrating the use of race as an indicator to allocate (this time) IPRs among the members of the same society, but it also reveals the ways in which Whiteness unites former colonizers and former colonies, especially given the eagerness of each predominantly White society to create their own non-White 'faces at the bottom of the well.'[1791]

Before moving on to the race-conscious analysis of Australian and American case law, it would be useful to highlight a few points, which affected the selection of the cases studied herein. First and foremost, the IP system, particularly those of copyright and trademark, are premised upon inherently and fundamentally Western-centric normative frameworks. Thus, and as explained and

[1789] Please see sub-chapter 2.2. and its sections, as well as sub-chapter 2.4. in Chapter II.
[1790] Please see sub-chapters 3.2. and 3.3. in Chapter III.
[1791] By analogy with: Bell, Jr., *Faces at the Bottom of the Well: The Permanence of Racism* (n 265).

substantiated in Chapter III, neither the copyright system nor the trademark system is compatible with non-Western modes of creatorship and creativity. The inherent individualism, materialism, the Western (European) readings of 'originality', and the economic function of IP law marginalize non-Western creators' needs and expectations, let alone empowering their communal identities and cultural values.[1792] Besides, the lack of any binding international instrument, which could have pressurized the Global North to adopt *lex specialis* tailored for TK and folklore, push non-Western creators and creations toward *lex generalis*, whose incompetence to protect non-Western knowledge and cultural productions is articulated by Mick Dodson as follows: 'You cannot fit a round peg in a square hole.'[1793] The incompatibility of the Western-centric IP system with non-Western modes of creatorship and creativity not only ended up creating a widespread distrust, especially, of indigenous peoples in IP law, but it also paved the way for the acknowledgement of IP law as 'a new form of colonization.'[1794] Along the same line, the inherent Western-centrism and especially the fixation requirement imposed by the printing culture have been the main obstacles for African-American creators to rely on copyright to legally protect their musical works, which are characterized by improvision, as it is the case for jazz and blues.[1795]

Second, as explained in the previous sub-chapter, Australian and American laws had denied full citizenship, respectively, to the Aboriginal people until the 1990s and to African-Americans until the 1860s. Denial of citizenship not only hindered Aboriginal and African-American creators' IPRs ownership, but it also hindered their access to the courts to seek for justice. Even after their recognition as bearer of rights and responsibilities, the Aboriginal people have been hesitant to seek justice from the Australian courts, mainly because of the language barrier and simply for not

[1792] Please see sections 3.2.1., 3.2.2., 3.3.1., and 3.3.2. in Chapter III.
[1793] As quoted in: Tobin (n 1277) 157.
[1794] Ibid.
[1795] Greene, 'Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues' (n 33) 371.

being able to afford the court and attorney fees.[1796] In a similar vein, the high rate of illiteracy or semi-literacy complicated African-American creators to register their works, hence, to gain the opportunity to enforce their IPRs through litigation.[1797]

Third, there is another aspect that is pivotal to the creation of case law, though it is vastly ignored in the literature: The role of lawyers in the pre-judicial and judicial processes.[1798] This issue, including the gap in the literature, was brought to the attention of legal scholarship by Toni Lester within a journal article in which three high-profile copyright cases involving Black female cultural producers, namely Oprah Winfrey, Beyoncé Knowles, and Alice Randall,[1799] were put under a critical lens.[1800] Lester exposes that all three Black women were represented by White male attorneys to whom Lester, ironically, refers as the 'paid [W]hite male hired *guns.*'[1801]

Whereas there is no concrete evidence that would link the absence of race discourse in the IP-related case law with White male attorneys, Lester's resolutions hint several points that cannot be undermined. Evident from CRT doctrine and American jurisprudence, double-consciousness or at least race-consciousness[1802] of lawyers may lead to racial reform by means of case law. Nevertheless, it would be unrealistic to expect from business lawyers to act upon the same ideals, for instance, with the National Association for the Advancement of Colored People (also known as the NAACP), and to frame IP claims as race-based discriminatory practices, rather than

[1796] See: Colin Golvan, 'Aboriginal Art and Copyright: The Case of Johnny Bulun Bulun' (1989) 11 European Intellectual Property Review 346. Also see: *Yumbulul v. Reserve Bank of Australia and Others* (1991) 21 IPR 481, 487.
[1797] See: Greene, 'Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues' (n 33) 371.
[1798] See: Lester, 'Oprah, Beyoncé, and the Girls Who "Run the World" - Are Black Female Cultural Producers Gaining Ground in Intellectual Property Law' (n 33).
[1799] It shall be noted herein that Alice Randall stands as the author of a work that is subject to one of the legal disputes analyzed within this dissertation as well. Please see section 4.3.1.4. in the text.
[1800] Lester, 'Oprah, Beyoncé, and the Girls Who "Run the World" - Are Black Female Cultural Producers Gaining Ground in Intellectual Property Law' (n 33).
[1801] Ibid 27. Emphasis added.
[1802] Please see section 1.3.4. in Chapter I.

commercial disputes – especially given the well-established trends in IP litigation. Also driven by the commercial nature of IP law, and especially in the absence of *lex specialis* addressed to non-Western forms of intellectual creations, lawyers may advise their clients to opt for alternative dispute resolution methods, rather than litigation – as also suggested by WIPO for TK-related disputes.[1803] Besides, this may end up being a more advantageous alternative, since it may help in avoiding bearing the court fees and the winning party's attorney fees. However, this would not only prevent inherently racial disputes as such to be brought before the courts, but it would also resolve these disputes via confidential and out-of-the-court settlements – which would restrict the availability of such data on the databases compiling case law.

Last but not least, the hardship in conducting legal research on online databases cannot be overlooked either. Needless to mention that any attempt of categorizing case law by taking race into consideration may lead to anti-social practices, such as racial profiling – especially if these cases are not intentionally framed as race-related legal disputes by the parties or their lawyers. Furthermore, the economic nature and the transferability of IPRs differentiate IP cases from cases concerning HRs abuses. Indeed, unlike the cases that derive from the violation of HRs brought by the individuals whose rights have been violated, copyright cases can be brought by the right owner, who does not need to be the author or creator of the intellectual work. Due to this, courts do not often engage with the identity of the parties, but they assess whether the intellectual creation in question meets the eligibility criteria for copyright protection.

In fact, this is the only place where a very opaque representation of race can be seen in IP case law, which is literally deeply-embedded in IP. As already explained in Chapter II, the idea of IP and the globalized IP frameworks are the intellectual, materially-driven, and political projects of

[1803] Please see section 3.4.2. in Chapter III.

the Western (European) powers.[1804] Also demonstrated in Chapter III, the fundamental IP concepts and the eligibility criteria of copyright protection derived from the printing culture and the myth of the Romantic author, which is a Western (European) construct built upon the image of English (and German) writers who intended to have a commercial return from their writings.[1805] Thus, if the judges deciding on a legal dispute has an un/conscious racially-charged mindset, their mindset only underline their application of such criteria to the intellectual creation subject to the legal dispute.

Whereas these justify postmodernist critique of the formalism of legal language and CRT's reasons to embrace legal story-telling to convey its message; the court cases to be assessed herein are selected by having a couple of ideas in mind, in terms of overcoming the restrictions in accessing to a large number of court decisions: The court decisions extracted from the Australian jurisprudence are selected among the four cases that are widely-cited in literature and deemed as the main pillars of indigenous IPRs, also by Aboriginal lawyers.[1806] Inspired by Bell's critique of the *Brown* case, which marked the end of an era in the American race relations due to ceasing racial segregation in public schools;[1807] this dissertation argues and aspires to illustrate the other factors (or the aesthetic choices) that were in play in the decision of these cases. Additionally, it is intended to expose the limited capacity of these judicial decisions, although being in favor of indigenous peoples, to undo the historical injustices and systematic discrimination of indigenous peoples within the IP domain, let alone eradicating the legacy of the Enlightenment idea(l)s and 'civilizing' missions. Whilst appreciating the advancement of the legal status of the Aboriginal

[1804] See Chapter II in general.
[1805] See sub-chapter 3.2. in Chapter III.
[1806] See e.g., Golvan (n 53); Erica Burke, 'Bulun Bulun v. R & T Textiles Pty Ltd - The Aboriginal Artist as a Fiduciary Comments on Recent Developments' (1999) 3 Flinders Journal of Law Reform 283; Terri Janke, 'Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions' (World Intellectual Property Organization (WIPO), 2003) <https://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf> accessed 19 May 2019.
[1807] See: Bell, Jr., 'Brown v. Board of Education and the Interest Convergence Dilemma' (n 296).

people by the Australian courts, the critique herein shall be read as the condemnation of the Western-centric legal system at large that shall not have subordinated indigenous people at the first place, and again the condemnation of the incapability of the same system to compensate the consequences of such racial thought. As to the copyright and trademark cases excerpted from American jurisprudence, the dissertation chooses amongst the cases that have been pinpointed by critical American IP scholars, and it cherry-picks the ones in which the racial element is the most obvious and was (implicitly or explicitly) elaborated upon by the courts.

Within these limitations imposed by various factors, the remainder of the sub-chapter, firstly, looks at the interplay of race, power, and copyright law. For its purposes, it extracts one case study and three court cases from the Australian jurisprudence, and one court case from the American jurisprudence. Subsequently, it focuses on the interplay of race, power, and trademark law, merely to illustrate the destructive power of trademark's expressive function, with the aim of complementing the 'idea and expression' dichotomy of copyright law. Thus, it brings up two relatively recent, quite controversial, and interrelated court cases from American jurisprudence.

4.3.1. The Interplay of Race, Power, and Copyright

This section offers a postmodern and especially a race-conscious analysis of, respectively, the Australian and American courts' operation in resolving legal disputes that concern the intellectual creations of indigenous peoples and racialized minorities. It aims to illustrate the Australian and American judiciary's interpretation of modern copyright laws, which carry along Western (European) cultural assumptions and normative cultural values, while tackling with questions regarding the copyright ownership of indigenous peoples and racialized minorities.

Whereas the section is dedicated principally to overview case law, a case study from the Aboriginal reality will also be presented herein, since it has the potential to expose the

subordination of non-Western modes of creatorship and creativity in legal spaces that are out of the reach of the courts.

In this frame, this section asserts that the Australian and American courts are not immune to un/conscious racial thinking and making racially-charged decisions. Per contra, it is the racial thinking as such that rules whether a work is worthy of legal protection, as historically understood and acknowledged by the Western (European) (colonial) mindset and legal systems. In this regard, this section is informed by the scholarship of mainly Alfred C. Yen and John Tehranian.[1808] Focusing on the American legal domain, both scholars claim that 'the distinction between aesthetic reasoning and legal reasoning is illusory,'[1809] since deciding upon whether a work promotes learning or the progress of useful arts, hence whether it is worthy of copyright protection, requires having an opinion about what art is.[1810]

Yen explains that 'copyright opinions do not openly adopt specific aesthetic perspectives to justify case outcomes.'[1811] Still, he identifies three major copyright doctrines informed by the aesthetic choices of the judges: Originality (derived from the myth of the Romantic author and his sole intellect), the useful art doctrine (initiated with the Statute of Anne of 1710), and the substantial similarity doctrine (adopted especially in cases that involve original-derivative work conundrum and fair use defense).[1812] Building upon Yen's thesis, Tehranian points at several copyright infringement cases decided by the American courts, and he exposes that the type of a work, its economic or social value, as well as the author's commercial success comprise strong

[1808] Alfred C Yen, 'Copyright Opinions and Aesthetic Theory' (1998) 71 Southern California Law Review 247; Tehranian, 'Towards a Critical IP Theory: Copyright, Consecration, and Control' (n 33); Tehranian, 'Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality' (n 480).
[1809] Yen (n 1802) 249.
[1810] Ibid 248–249; Tehranian, 'Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality' (n 480) 418–420.
[1811] Yen (n 1802) 250.
[1812] Ibid, 152.

indicators for the judges to determine the work's 'legal worth and (…) the level of protection is deserves.'[1813]

This section not only agrees with Yen and Tehranian, but also takes their arguments, perhaps, a couple of steps further. First, it is argued herein that the aesthetic evaluations overhauling copyright cases are not specific to American judiciary; per contra, the same pattern is clearly visible in the Australian judiciary's general attitude, especially in cases that involve Aboriginal creators and creations.[1814] Second, Yen and Tehranian imply but do not clarify the 'aesthetic choices' which influence the courts in their judicial process. While they indicate 'the inherent ambiguity of aesthetics'[1815]; this section, by drawing upon the findings of Chapter II, asserts that these aesthetic choices are nothing other than the Western (European) and White structures of physical, ideological, political, and economic dominance built in IP law.[1816]

By taking into consideration the cultural specificity of copyright law, the section concentrates on the interaction of these power structures, hence, the myth of the Romantic author with non-Western modes of creatorship and creativity. Accordingly, the section draws upon the findings of Chapter III and contours its scope with the criteria for legal protection that derived from the Romantic author archetype. It investigates the interaction of such features of Western (European) copyright law with the intellectual creations of the Aboriginal people of Australia and African-American intellectual creators of the United States.

[1813] Tehranian, 'Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality' (n 480) 419.
[1814] In fact, each and every court decision that is analyzed in this section includes strong statements regarding the economic and social value as well as the market share of the works subject to the disputes therein.
[1815] Yen (n 1802) 248.
[1816] Please see sections 2.3.1., 2.3.2., 2.3.3., and sub-chapter 2.4. in Chapter II.

4.3.1.1. David Malangi and the One-Dollar Banknote: A Case Study

This section opens with a case study from post-Federation Australia. It presents an incident occurred in 1966 – at the peak of the assimilationist strategies of the Commonwealth of Australia.[1817] Even though the incident herein was never brought before the Australian courts, the study of this incident showcases a fragment of the earliest interactions of the Aboriginal people of Australia with the Australian copyright regime.[1818] While positing the Aboriginal copyright discourse within a broader historical and legal context, this case study also clearly demonstrates that IP law does not operate in a vacuum but constitutes an integral part of the general national legal framework, and it is affected by the overarching ideological and political ideals that govern the law at the time.

The 'One-Dollar Banknote' incident concerns David Malangi, an Aboriginal artist who was born in 1927 in the newly-established Milingimbi Mission in the Northern Territory of Australia.[1819] Malangi's career as an Aboriginal artist started in the late 1950s,[1820] and he created the artwork subject to this legal dispute in 1963.[1821]

Shortly after this, in February 1966, the Australian Government put a financial reform in action, which required conversion from the Imperial to decimal currency.[1822] The new currency was introduced the same year.[1823] Among these banknotes, there was the new one-dollar bill bearing the artistic work of Malangi, entitled *Mortuary Feast of Gurrmirrinyu*.[1824] What makes this

[1817] Anderson, 'The Making of Indigenous Knowledge in Intellectual Property Law in Australia' (n 53) 352.
[1818] Stephen Gray, '"Dollar Dave" and the Reserve Bank: A Tale of Art, Theft and Human Rights' (*The Conversation*) <https://theconversation.com/dollar-dave-and-the-reserve-bank-a-tale-of-art-theft-and-human-rights-56593> accessed 22 May 2021.
[1819] National Gallery of Australia, 'No Ordinary Place: The Art of David Malangi' <https://nga.gov.au/exhibition/malangi/default.cfm?MnuID=6&Essay=2> accessed 18 September 2021.
[1820] Ibid.
[1821] Gray (n 1812).
[1822] Gray (n 1672) 147.
[1823] Ibid.
[1824] Ibid.

incident important for the race and IP discourse is the fact that Malangi did not receive any recognition from the Reserve Bank of Australia or any other governmental body as the author of the work reproduced on the banknote – let alone the payment of any royalties or license fees.[1825] Instead, one of the contractors of the Bank, Gordon Andrews, received all the credits for the design of the banknote.[1826] The main reason that underpinned the differential treatment of Malangi, as well as the misappropriation and misuse of his intellectual creation by the State and Andrews, was Malangi's race.

At the time, the copyright regime in the Commonwealth of Australia was regulated by the Copyright Act of 1912,[1827] which was the main instrument that transplanted the British Imperial Copyright Act of 1911[1828] into the Australian legal order. According to Article 1(1)(a) of the latter Act, '*every* original literary, dramatic, musical, and artistic work'[1829] first published in the United Kingdom or in any of its dominions were entitled copyright protection.[1830] As stipulated by Article 1(2) of the Act, the copyright owner of the work held 'the sole right to *produce* or *reproduce* the work or any substantial part thereof in any material form whatsoever (…) [as well as] to *authoriz*e any such acts as aforesaid.'[1831]

Given the ostensibly objective and face-neutral phrasing of the Act, it may be assumed that Malangi was the copyright owner of his own intellectual creation, and that the actions of both the Bank and Andrews constituted infringement of Malangi's copyright. Nevertheless, the Aboriginal

[1825] Ibid.
[1826] Ibid.
[1827] An Act relating to Copyright No. 20 of 1912 (Cth) (Copyright Act of 1912).
[1828] An Act to amend and consolidate the Law relating to Copyright of 1911, 1 & 2 Geo. 5, Ch. 46 (Copyright Act of 1911).
[1829] Ibid, Art. 1(1)(a). Emphasis added.
[1830] Ibid.
[1831] Ibid, Art. 1(2). Emphasis added.

copyright ownership in the Northern Territory of Australia, at the time, was under the shadow of another piece of legislation: The Welfare Ordinance of 1953-1960.[1832]

The Welfare Ordinance of 1953-1960 determined the legal status of Aboriginal persons as 'wards' and placed them under the legal guardianship of the Director of the Welfare.[1833] The term 'ward' was defined within Section 14(1) of the Ordinance as a person 'by reason of his manner of living; inability, without assistance, adequately to manage his own affairs; his standards of social habit and behavior; and his personal associations, stands in need of such special care or assistance (…).'[1834] Due to the 'incapability' of the ward of managing his own legal affairs, 'all property of a ward, whether corporeal or incorporeal,'[1835] was held by the Director of the Welfare 'as a trustee for the ward.'[1836] It shall be indicated that Section 25(3) introduced an 'exception' to this general rule, and it enabled the ward to enter into commercial transactions that were of a value up to *ten pounds*.[1837]

Based on these regulations, it may be argued that the Australian legal scene at the time did not require any debates over the originality of Aboriginal artworks, hence, the copyrightability of Aboriginal intellectual creations. Given the economic value that was indirectly and implicitly estimated for incorporeal property of Aboriginal persons, it may be assumed that the Australian legal system at large neither envisioned Aboriginal artists' *authorship*, as understood in the Western (European) copyright tradition, hence the Aboriginal *authority* over such works, nor it allowed Aboriginal artists to hold copyright or to earn their living by commercially exploiting their

[1832] An Ordinance to Provide for the Care and Assistance of Certain Persons No. 16 of 1953 (as amended respectively in 1955, 1957, 1959, 1960) (NT) (The Welfare Ordinance of 1953-1960).
[1833] Ibid, Part I.
[1834] Ibid, Sec. 14(1).
[1835] Ibid, Sec. 25(1).
[1836] Ibid.
[1837] Ibid, Sec. 25(3).

works. Nevertheless, all these opportunities denied to the Aboriginal people in the 1960s were provided to Western (European) and White authors by the Statute of Anne of 1710.[1838]

In fact, the 1957 amendments to the Ordinance consolidated these assumptions as well as the discrimination of Aboriginal artists on grounds of race and the Western (European) readings of culture and art. The amended text allocated a section to regulate the commercialization of Aboriginal works.[1839] However, this newly added section commenced with the clarification that the term 'work of painting or drawing' used therein did not include the copyright in the work.[1840] Instead, the regulation focalized the transfer of the *physical object* on which the intellectual creation was fixed, and it stipulated that the purchase of Aboriginal paintings and drawings were subject to the guardian's or any other designated governmental body's approval.[1841]

Given the ambiguity of the Ordinance on the trajectory of the copyright that subsists in Aboriginal works, it can be argued that the hierarchical race relations that informed the early years of the post-Federation Australian copyright regime treated Western (European) and non-Western creators in a stark contrast based on race and (at least) the ideological and economic structures of dominance built in IP law. On the one side of this spectrum, there were Western (European) or White authors and their *original works*, which held an economic and social value. These works were deemed worthy for *copyright* protection; thus, their Western (European) copyright holders were granted with an authorial *monopoly* over their intellectual creations, which extended to the *intangible* expressions fixated on a tangible medium. On the other side, there were Aboriginal artists and their *painting and drawings*, which could not cost more than ten pounds, unless the State authorities were involved in the commercial transaction. Hence, it would not be wrong to

[1838] Please see section 2.3.2. in Chapter II and section 3.2.1. in Chapter III.
[1839] The Welfare Ordinance of 1953-1960, Part VA.
[1840] Ibid, Sec. 71A.
[1841] Ibid, Sec. 71B(1).

claim that the legal 'right' deemed fit for Aboriginal works at the time resembled the archaic *copy-right*, which would not extend to the intangible intellectual creation, but would facilitate the commercialization of a work by anyone who holds the *tangible* embodiment of the work.[1842] Also in light of the findings of the previous chapter, it can be argued that this second category of creations were denied copyright protection and were reduced merely to tangible property, simply because of being considered as unsophisticated, archaic objects created by the 'inferior' race.[1843]

In fact, Stephen Gray's anecdotes on this incident not only confirm these statements, but also reveal further details of such nuisance. According to Gray, the story of the one-dollar banknote is the sum of multiple infringements of Malangi's 'copyright' on an international scale and by various actors – including those of public agencies of several developed countries.

Under the trusteeship regime endorsed by the Welfare Ordinance of 1953-1960, Malangi's work was purchased in 1963 from the Welfare Branch of Northern Territory Administration.[1844] The purchaser was a Czech collector, who then reproduced the work by means of photography and donated the original work to the Museum of Africa and Oceania in Paris, France.[1845] While the original work had been on display at the 'primitive' section of the museum – even though it was created in 1963,[1846] the photograph of the original work found its way to Andrews.[1847] Upon the receipt of the photo, Gordon reproduced the original work and incorporated it onto his banknote design.[1848] In doing so, he did not seek for the author of the original work, let alone asking for the

[1842] Please see section 2.3.1. in Chapter II.
[1843] Please see sub-chapter 3.2. in Chapter III.
[1844] Gray (n 1672) 147.
[1845] Ibid.
[1846] Ibid, 134.
[1847] Ibid.
[1848] Ibid.

prior informed consent of Malangi; rather, he relied on the excuse that the work was already on public display in France.[1849]

Only after the letter of the Superintendent of the Milingimbi Reserve, the State authorities became aware of the fact that Malangi was the author of the work incorporated into Andrews' design.[1850] In 1967, and after exchanging a few letters with the Superintendent, the Australian authorities recognized Malangi's contribution to the design of the banknote, and they accepted to pay him a lump-sum due to the use of his artistic work on the banknote.[1851]

Gray notes that Malangi's absence from the negotiations over the use of his work prevailed during the post-infringement negotiations as well.[1852] Just like the negotiations, the outcome of this process was also influenced by the former racially-driven practices of the Commonwealth – even though neither the Welfare Ordinance of 1953-1960 was in force nor Malangi was a ward by law at the time.[1853] Still, the Australian authorities deposited the payment into a trust account, rather than making the payment to Malangi himself.[1854]

To conclude, this case study illustrates the racialized power hierarchies in the Australian context and their implications on the Australian laws, and particularly on copyright law. In this sense, the 'One-Dollar Banknote' incident offers a synopsis of the sharp reflections of the Enlightenment ideology and the modern Western (European) perceptions of 'civilization' and culture on the IP domain.[1855]

[1849] Ibid.
[1850] Ibid, 151.
[1851] Ibid, 152.
[1852] Ibid, 153.
[1853] The Welfare Ordinance of 1953-1960 and its trusteeship regime were revoked by the passing of the Ordinance to Provide for the Care and Assistance of Certain Persons of 1964 (The Social Welfare Ordinance of 1964). See: An Ordinance to Provide for the Care and Assistance of Certain Persons No. 31 of 1964 (NT) (The Social Welfare Ordinance of 1964).
[1854] Gray (n 1672) 152–153.
[1855] Please see sub-chapter 3.2. in Chapter II.

Additionally, this case study reveals the extent of the unauthorized reproduction and commercial exploitation of TK, which ultimately triggered indigenous movements to claim legal protection for TK.[1856] Besides, it also substantiates the emphasis of indigenous initiatives on the *capability* of the Aboriginal or indigenous peoples to control their intellectual creations, while unearthing the reasons behind their distant stance to the Tunis Model Law's, the Model Provisions, and the Draft Articles' tendency to appoint a State authority to exercise the prospective sui generis rights over TK.[1857]

In sum, the 'One-Dollar Banknote' case comprised the first milestone of the Aboriginal copyright discourse. Premised upon the dominant racial thinking at the time, it illuminated the first stage of the Aboriginal intellectual creations' relationship with the Western (European) copyright laws: An absolute exclusion from the existing copyright framework and the allocation of Aboriginal intellectual creations to the Western (European) public domain. This reality was gradually altered, at least to a certain extent, by case law, starting with *Yumbulul v. Reserve Bank of Australia and Others.*[1858]

4.3.1.2. Yumbulul v. Reserve Bank of Australia and Others

This section brings up a well-known court case decided by the Australian judiciary in 1991. It presents a curious case, mainly because of involving, once again, the Reserve Bank of Australia and a legal dispute that stems from the reproduction of Aboriginal art, this time, on a ten-dollar banknote. Another curious aspect of the *Yumbulul* case is that it is often cited as a key judgment of the Aboriginal IPRs discourse – however, even the judgment comprising a main pillar of the indigenous IPRs doctrine comes from a court case in which the Aboriginal applicant was defeated.

[1856] Please see section 3.4.3. in Chapter III.
[1857] Ibid.
[1858] *Yumbulul v. Reserve Bank of Australia and Others* (1991) 21 IPR 481.

This case, also known as the 'Ten-Dollar Banknote' case, involves an Aboriginal artist, Terry Yumbulul, who was born in 1950 as a member of the Warimiri people.[1859] Yumbulul started his painting career in the 1980s as an initiated artist, who was entitled to create traditional and sacred Aboriginal art according to the Warimiri customary laws.[1860] The legal dispute herein derived from the reproduction of certain elements of one of Yumbulul's artistic works, namely the *Morning Star Pole*, on the ten-dollar banknote released by the Reserve Bank of Australia, ironically enough, to commemorate the first Western settlement in Australia.[1861]

Yumbulul created the Morning Star Pole in 1986.[1862] His work comprised a wooden carving decorated with feathers and strings, which embodied a traditional story that have been told to him by his ancestors.[1863] He commercially exploited the pole the same year and sold it to Inada Holdings Pty. Ltd., later known as Aboriginal Arts Australia Ltd. (hereafter 'the Agency').[1864] The Agency was set up as a governmental initiative addressed to promote Aboriginal artists and art; hence, it operated as a collecting society for Aboriginal artists.[1865] This Agency not only purchased Yumbulul's work as a tangible good, but they also obtained Yumbulul's copyright over his work, by signing an exclusive license agreement with the artist.[1866] Though the transaction among the parties were realized for the display of the Morning Star Pole in the Australian Museum, this issue was not made explicit within the license agreement.[1867] Besides, the agreement included a vaguely

[1859] Ibid, 482.
[1860] Ibid.
[1861] Ibid, 481.
[1862] Ibid, 484.
[1863] Ibid.
[1864] Ibid.
[1865] Ibid, 484-485.
[1866] Ibid, 485.
[1867] Ibid, 484.

worded clause that granted the Agency with the right to reproduction of the work 'by mechanical reproduction throughout the world'[1868] – which underscored the legal dispute in this case.

Due to the exclusive license agreement concluded between Yumbulul and the Agency, the latter was approached by the Reserve Bank of Australia in 1987.[1869] The Bank was in search for Aboriginal art which they could use in the design of the ten-dollar banknote to be released in 1988 for the Bicentennial celebrations.[1870] The designer of the banknote had come across with Yumbulul's artistic work and wished to incorporate this work, along with the works of two other Aboriginal artists, into the memorabilia.[1871] Due to this request, the Agency contacted the applicant and asked him to sign another standard license agreement for 'one particular clearance for an important governmental organization.'[1872]

Yumbulul was told that the governmental agency in question was acting in strict confidentiality; hence, the purpose and nature of the prospective use of his work were not disclosed to him.[1873] Yumbulul signed the license agreement, despite his initial hesitation, and he received a lump-sum payment in return.[1874] Following his consent, the Agency sub-licensed the Bank.[1875] Eventually, the commemorative banknote, in which the Morning Star Pole had been integrated, was released in 1988.[1876]

Based on the merits of the case, the applicant filed a lawsuit against the Bank, the Agency, and the director of the Agency for copyright infringement; he sought injunctions and damages to

[1868] Ibid.
[1869] Ibid, 486.
[1870] Ibid.
[1871] Ibid, 478.
[1872] Ibid, 488.
[1873] Ibid, 489.
[1874] Ibid, 489-490.
[1875] Ibid, 490.
[1876] Ibid, 491.

compensate such nuisance.[1877] The dispute between the applicant and the Bank was resolved before the court proceedings.[1878] Hence, the proceedings prevailed over the dispute between the applicant and the Agency. The core of this legal dispute was whether Yumbulul had given the Agency a blanket authorization to decide on the prospects of his artwork, which entails the sacred knowledge and sensitive religious information crucial to the Warimiri people.[1879] The applicant claimed that the sub-license agreement between the Bank and the Agency was invalid.[1880] To substantiate this claim, he alleged that the director of the Agency acted in 'misleading, deceptive, or unconscionable conduct,'[1881] since the director did not reveal any information about the future use and such wide dissemination of the work.[1882]

Nevertheless, Yumbulul's claims were dismissed by the Court. Indeed, the Court pointed out to the initial exclusive license agreement concluded between the applicant and the Agency in order to interpret the rights conferred upon the latter.[1883] The broad wording of this clause, and especially the overbroad articulation of 'mechanical reproduction', was emphasized in the decision.[1884] The Court interpreted this clause as encompassing 'all forms of mechanical reproduction inclusive of photocopying and printing.'[1885] Therefore, the Court ruled that the sub-license was valid and the reproduction of the Morning Star Pole on the commemorative banknote did not constitute copyright infringement.[1886]

[1877] Ibid, 482.
[1878] Ibid, 482.
[1879] Martin Hardie, 'What Wandjuk Wanted?' in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar Publishing 2015) 163.
[1880] *Yumbulul v. Reserve Bank of Australia and Others* (1991) 21 IPR 481, 480.
[1881] Ibid.
[1882] Ibid.
[1883] Ibid, 482.
[1884] Ibid.
[1885] Ibid, 485.
[1886] Ibid, 486.

The rejection of Yumbulul's claims by the Court does not come as a surprise. Despite this defeat, the *Yumbulul* case has been acknowledged as a landmark case in the Aboriginal copyright discourse, mainly because of paving the way to the first court decision recognizing the originality of Aboriginal artworks.[1887] Although this decision has been a turning point for the Aboriginal artists, it may be argued that even the most favorable part of the judgment was the output of racial thinking.

In this context, it shall be clarified that the *Yumbulul* case was heard and decided within a legal and political context that was ultimately different than the one facilitated the occurrence of the 'One-Dollar Banknote' incident. By the time this lawsuit was filed, the Welfare Ordinance of 1964 had already abolished the trusteeship doctrine.[1888] Thus, the public discourse around indigeneity had undergone a significant change.[1889] For instance, the racially discriminatory references to the Aboriginal people were removed from the Constitution in 1965,[1890] which provided the legal basis for the recognition of Aboriginal persons as Australian citizens holding equal rights with those of their White counterparts.

Besides, the Australian authorities' assimilationist policies were replaced by a new attitude guided by the indigenous right to self-determination.[1891] Even though the inaugural attempts in this context were centered around the Aboriginal land-right claims, Jane Anderson notes that the

[1887] As a matter of fact, the *Yumbulul* case is predated by the *John Bulun Bulun v. Nejlam Investments* case. Nevertheless, the latter was resolved out of the court; thus, it has never been consolidated into a court decision with a binding effect. Thus, it was not until Yumbulul's lawsuit that the Australian judiciary had a binding decision on the originality of traditional Aboriginal artworks. *John Bulun Bulun v. Nejlam Investments* (FCA 1989). See: Janke (n 1800) 51; Hardie (n 1873) 162.

[1888] See: An Ordinance to Provide for the Care and Assistance of Certain Persons No. 31 of 1964 (NT) (The Social Welfare Ordinance of 1964).

[1889] Anderson, 'The Making of Indigenous Knowledge in Intellectual Property Law in Australia' (n 53) 352.

[1890] Ronald Sackville, 'Legal Protection of Indigenous Culture in Australia Symposium: Traditional Knowledge, Intellectual Property, and Indigenous Culture' (2003) 11 Cardozo Journal of International and Comparative Law 711, 711–712.

[1891] Anderson, 'The Making of Indigenous Knowledge in Intellectual Property Law in Australia' (n 53) 352.

'dialogic space where the interests of [i]ndigenous people were spoken, governmental objectives shaped, legal positions challenged'[1892] eventually became more accommodating to the issues related to the Aboriginal cultural practices – including the IP-related needs and expectations of the Aboriginal people.[1893]

Similarly, the international forum was witnessing many indigenous movements, some of which were already mentioned within Chapter III.[1894] Hence, there was an ever-growing awareness about indigenous peoples' claims for the right to self-determination, their desire to gain control over their TK, and the pivotal role that TK plays in the cultural survival and communal identity of indigenous peoples.[1895] In fact, the UN initiatives such as the Tunis Model Law and Model Provisions also befall the same time span.[1896]

Given these circumstances and the general political climate at the time, it is not possible to see conspicuous representations of racial thinking and racially-charged valorization schemes in the *Yumbulul* case. However, this statement shall not be taken as if this judgment is immune to less obvious implications of racial thought. It is hard to read the Court's decision herein as an attempt to elevate non-Western creations to the level of Western (European) creations. Furthermore, one cannot help but notice the economically-, ideologically-, and politically-driven aesthetic choices made by Justice French while deciding on the originality of the work in question – and also the other factors that may have affected the Court's approach to the assessment of the originality of an Aboriginal work.

[1892] Ibid.
[1893] Ibid.
[1894] Please see section 3.3.3. in Chapter III.
[1895] Ibid.
[1896] Please section 3.2.1. in Chapter III.

First and foremost, the originality, hence, the copyrightability of Yumbulul's work were neither central to the case, nor even disputed by the defendants – especially after the recurrent payments made by the State authorities to Yumbulul.[1897] As mentioned before, the main legal dispute in the case derived from the validity of the sub-license agreement between the Agency and the Bank. Thus, the Court did not even discuss the existence of the eligibility criteria for legal protection. Instead, the Court's attention was centered around 'the issue of liability only.'[1898]

Second, while deciding on the issue of liability, the Court pinpointed Yumbulul's commercial success and his ability to earn income from the sale of his works.[1899] Accordingly, neither Yumbulul's affidavit on his limited knowledge of English, nor the hardship he faced in grasping the terms and conditions of the license agreement were paid much attention.[1900] Instead, the Court dismissed the applicant's claims and ruled that the applicant could not satisfy the Court about his plea of deceit, especially given that he was *a well-known artist* whose works have been in public display before.[1901]

Third, the references that the Court made to Yumbulul's reputation and commercial success evoke Yen's and Tehranian's theses concerning the aesthetic choices that the judges rely on while deciding copyright cases which require the determination of the originality of a work.[1902] Indeed, in the *Yumbulul* case, the artist's social and economic value, rather than the attributes of his art or the uniqueness of his artistic expression, has been given importance. Particular references were made to Yumbulul's exhibitions in private galleries and the Northern Territory Museum, as well as the Northern Territory Government's habit of purchasing his artwork as 'official gifts for

[1897] Please see above.
[1898] *Yumbulul v. Reserve Bank of Australia and Others* (1991) 21 IPR 481, 480.
[1899] Ibid, 482.
[1900] Ibid, 487.
[1901] Ibid, 491-492.
[1902] Please see section 4.2.1. in the text.

visiting foreign dignitaries.'[1903] In this context, it can be argued that the Australian Court's decision herein confirms, especially, Tehranian's explanations regarding the importance that the courts attach to the social and economic value of a work while deciding whether the work *deserves* copyright protection.

It shall also be indicated herein that the examples Tehranian brings up often illuminate the courts' sacralization of the economically- or politically-powerful classes of authors.[1904] In the *Yumbulul* case, Tehranian's thesis helps in revealing an irony: Although the Aboriginal art trade dates back to the 1950s,[1905] when the Aboriginal artists were denied copyright ownership, the Court justified its color-blind approach to the legal dispute herein, simply by overlooking the historical injustices inflicted upon the Aboriginal artists and by taking it for granted that an artist who has a share in the market cannot be in a vulnerable position.

Last but not least, Justice French's reasoning of his decision regarding the originality of the Morning Star Pole constitutes, perhaps, the most palpable representation of race and the racialized cultural hierarchies and valorization schemes in this judgment. Before the critique of the Court's judgment, it shall be admitted that 'originality' does not stand as a term with a precise definition. Besides, neither the Copyright Act of 1968 nor the Australian judiciary offer a definition of 'originality' or a clear-cut description of the originality threshold required for copyright protection.[1906] Still, the *Macmillan & Co. v. K & J Cooper*[1907] judgment established that the Australian copyright doctrine neither requires novelty nor aesthetic values in assessing

[1903] *Yumbulul v. Reserve Bank of Australia and Others* (1991) 21 IPR 481, 482.
[1904] See: Tehranian, 'Towards a Critical IP Theory: Copyright, Consecration, and Control' (n 33); Tehranian, 'Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality' (n 480).
[1905] Please see section. 4.3.1.1. in the text.
[1906] Sam Ricketson, 'The Concept of Originality in Anglo-Australian Copyright Law' (1992) 39Journal of the Copyright Society of the U.S.A. 265, 287.
[1907] *Macmillan & Co v. K & J Cooper* (1923) LJPC 113.

originality.[1908] It was accepted that originality subsists in a work that is not directly copied from another work and in which the author has invested the necessary amount of 'knowledge, labor, judgment or literary skill or taste (…).'[1909]

The originality threshold determined by the *Macmillan* case comports with the Romantic author archetype long-established in the Australian copyright tradition.[1910] Thus, it considers the works that flow from the sole genius and personal intellect of the modern author as 'original'.[1911] In fact, the main obstacle for the acknowledgment of TK as original has been this inherent individualism of originality.[1912]

Regardless of the existing legal debates and frames, Justice French introduced an utmost 'authentic' test to assess the originality of Yumbulul's work. Although previously portraying Yumbulul as 'an Aboriginal artist of considerable skill and reputation,'[1913] he phrased the justification of the work's originality in rather peculiar words, as follows:

> 'I also accept […] that he [Yumbulul] made the pole *without assistance from any other person* and that its creation was the subject of *considerable care and attention on his part*. In the sense relevant to the Copyright Act 1968 (Cth), there is no doubt that the pole was an original artistic work, and that he was its author, in whom copyright subsisted.'[1914]

Based on these, it would not be wrong to claim that in the *Yumbulul* case, the Court had chosen an unprecedented indicator to assess the originality of a work: The cognitive skills and capability of an individual to create an artistic work. Whilst the outcome of the Court's analysis had established a precedent for future cases, the originality test that the Court utilized herein resembles the nineteenth-century anthropologists' approach in defining Aboriginal art as '[probably]

[1908] Ricketson, 'The Concept of Originality in Anglo-Australian Copyright Law' (n 1900) 271, 276.
[1909] *Macmillan & Co v. K & J Cooper* (1923) LJPC 113.
[1910] Please see sub-chapter 3.2. and especially 3.2.1. in Chapter III.
[1911] Ibid.
[1912] Please see section 4.2.1. in the text.
[1913] *Yumbulul v. Reserve Bank of Australia and Others* (1991) 21 IPR 481, 482.
[1914] Ibid, 484. Emphasis added.

executed by a self-taught savage'[1915] and in defining 'more sophisticated [Aboriginal] works'[1916] as 'perhaps executed by a long-vanished [W]hite race.'[1917]

Despite the inherent racial assessments embedded in the Court's decision, Justice French has started a new tradition in the Australian judiciary: Accepting the originality of Aboriginal work by taking the Romantic author archetype as a benchmark; however, not elaborating on what makes the Aboriginal artwork original, to avoid extending the positive features attributed to this myth to non-Western creators. In fact, in one of the most recent Aboriginal copyright cases, *Bulurru Australia Pty. Ltd. v. Oliver*,[1918] the Court ruled that the respondent's traditional artworks have 'an air of originality and competence.'[1919] Hence, without further investigation,[1920] the Court concluded that the respondent's works comprise original works and that copyright subsists in them.[1921]

One last note that is worth to be mentioned herein is the tone of the judgment while reflecting upon the witness statement of a leading member of the Aboriginal community, who explained that the unauthorized use and reproduction of sacred content may cause distress for the artist and the Aboriginal community at large.[1922] Whereas the Court accepted the witness statement, as well as the applicant's affidavit on his obligation to his people regarding the use and reproduction of sacred knowledge out of its original context;[1923] the case ended on the following note:

> 'For what it is worth, I would add that it would be most unfortunate if Mr. Yumbulul were to be the subject of continued criticism within the Aboriginal community for allowing the reproduction of the Morning Start Pole design on the commemorative banknote. The reproduction was, and shall

[1915] Gray (n 1672) 137.
[1916] Ibid.
[1917] Ibid.
[1918] *Bulurru Australia Pty. Ltd. v. Oliver* (2000) 49 IPR 384.
[1919] Ibid, 385.
[1920] Ibid, 394.
[1921] Ibid, 386.
[1922] *Yumbulul v. Reserve Bank of Australia and Others* (1991) 21 IPR 481, 484.
[1923] Ibid, 481.

> be seen, as a mark of the high respect that has all too slowly developed in Australian society for the beauty and richness of Aboriginal culture.'[1924]

To conclude, it may be said that the Yumbulul case, although focalizing the IPRs claims of Aboriginal people, did not challenge the inherent Western-centrism or the Statism, respectively, of the Australian copyright regime and legal system. It may even be possible to claim that the acknowledgment of Aboriginal artworks as original was a matter of 'interest-convergence.'[1925] Evident from the legal history of the Australian legal system, Aboriginal artworks have not been deemed catalyzers of the progress of culture; neither their allocation to the Western (European) public domain have provided any economic return to the State. On the contrary, denial of copyright to Aboriginal artists paved the way to the emergence of an 'illegal' market for Aboriginal works and hindered the possible tax returns to the State from their sale.[1926] In fact, even under the trustee regime, the economic contributions of the Aboriginal art trade in the national economy was evident – which pushed, for instance, the Northern Territory of Australia to introduce sanctions (including imprisonment) for the ones who gets involved in the unauthorized sale or purchase of such works.[1927]

Whereas saving the Aboriginal artwork from the public domain does not seem to impose any serious consequences; one cannot help but wonder whether the Australian courts would be this generous in applying the same logic to TK and GRs in patent cases – considering that restoring Aboriginal knowledge as such would, most probably, shrink the public domain and hinder the commercial activities of, at least, the pharmaceutical companies across the Globe.

[1924] Ibid, 493.
[1925] See: Bell, Jr., 'Brown v. Board of Education and the Interest Convergence Dilemma' (n 296).
[1926] Sackville (n 1884) 739.
[1927] See: The Welfare Ordinance of 1953-1960, Sec. 71B(2).

Despite the defeat of the applicant, the *Yumbulul* case encouraged Aboriginal artists to bring their IP-related claims before the national courts. The precedent set in this case, by the recognition of the Aboriginal artworks' originality, facilitated the discussion of other aspects of Aboriginal IPRs claims before the Australian judiciary. Among these issues was the interaction (or clash) of the Aboriginal copyright ownership claims with the inherent Western-centrism of the Australian copyright law regime. This issue held the main dispute in another landmark case:[1928] *Bulun Bulun v. R & T Textiles and Another*.[1929]

4.3.1.3. Bulun Bulun and Another v. R & T Textiles and Another

The last Australian case to be assessed herein is a clear depiction of the legacy of the colonial mindset, conquest, 'civilizing' missions, and the statism of international law – including the results of the colonial legal transplant of the imperial IP laws into the Australian legal domain. In this context, the legal dispute herein challenges three main features of the Western-centric copyright system: The construction of the public domain, the individualism of the Romantic author, and the statism of modern (IP) law. Nevertheless, what makes this case unique is Justice von Doussa's respect to the Aboriginal customary laws, his efforts to *jurisgenerate* the Aboriginal values and laws by means of the Western-centric copyright norms and principles, and his ambition to include the Aboriginal IPRs discourse within the scope of the Australian IP regime. Yet, the final outcome of the judgment reveals that even the race-conscious approach and endeavors as well as the *jurisgenerative* power of Justice von Doussa could not break the innate Western-centrism and the well-established racialized hierarchies of the Australian legal *system*.

[1928] Anderson, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (n 53) 141.
[1929] *Bulun Bulun and Another v. R & T Textiles Pty. Ltd. and Another* (1998) 41 IPR 513.

The *Bulun Bulun* case is about a legal action brought before the Australian courts in 1998 by John Bulun Bulun and George Milpurrurru, both of whom were senior members of the Ganalbingu people of the Northern Territory of Australia and prominent Aboriginal artists entitled to create traditional Aboriginal art.[1930] The applicants filed a lawsuit against R & T Textiles, a company based in Australia, and its directors for copyright infringement under the Copyright Act of 1968.[1931] The applicants sought interim relief, remedies for the indirect copyright infringement, and permanent injunctions for future nuisance.[1932]

The legal dispute therein concerned a painting, namely *Magpie Geese and Water Lilies at the Waterhole*, created by the first applicant, Bulun Bulun, in 1978.[1933] Various substantial elements of Bulun Bulun's artwork had been copied and reproduced by a third party, based in Indonesia, on clothing fabric without Bulun Bulun's free, prior, informed consent – hence, out of a license agreement.[1934] The respondent company imported and sold in Australia a vast amount of this imprinted fabric.[1935] Though the respondent company pleaded that the infringement occurred merely because of their 'ignorance in copyright [subsisting in the work],'[1936] the absence of the respondent's motive did not prevent its actions to fall under Section 37(1) of the Copyright Act of 1968.[1937]

[1930] Ibid, 514.
[1931] Ibid.
[1932] Ibid, 517.
[1933] Ibid, 515.
[1934] Anderson, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (n 53) 142.
[1935] By the time that the court proceedings started, the respondent had already imported and sold in Australia approximately 4,231 meters of clothing fabric on which Bulun Bulun's artistic work was embodied without any authorization. *Bulun Bulun and Another v. R & T Textiles Pty. Ltd. and Another* (1998) 41 IPR 513, 517.
Another curious aspect of this legal dispute that is worth mentioning herein is that the fabric in question was used to manufacture the protocol uniforms of certain government officials. See: Janke (n 1800) 53–54; Hardie (n 1873) 168.
[1936] *Bulun Bulun and Another v. R & T Textiles Pty. Ltd. and Another* (1998) 41 IPR 513, 517.
[1937] The relevant section of the Act, entitled 'Infringement by importation for sale and hire', stipulates that the unauthorized importation and distribution of a work protected by copyright for commercial purposes constitutes copyright infringement. The Copyright Act of 1968 (Cth), Sec. 37(1) para. 1.

Based on these, the first applicant, Bulun Bulun, sued the respondent, due to his title as the legal owner of copyright subsisting in the artistic work.[1938] The second applicant, Milpurrurru, also sued the respondent 'in his own right and as the representative of Ganalbingu people.'[1939] The second applicant's legal claims were based on customary laws and traditions of the Ganalbingu people. Indeed, Milpurrurru explained that Bulun Bulun's artistic work illustrated 'the corpus of ritual knowledge which Ganalbingu inherited from their ancestors.'[1940] Although admitting that Bulun Bulun was permitted by his people to create sacred artworks and to hold copyright over his artistic expressions of TK as such, Milpurrurru claimed that the knowledge embodied in Bulun Bulun's expression was traditionally owned and held by the Ganalbingu people as a community.[1941] Grounding his arguments in the communal Aboriginal title over the content expressed in Bulun Bulun's artwork, Milpurrurru further claimed that 'the Ganalbingu people had the power under customary law to control the reproduction of manifestations of (…) [such sacred knowledge], [whereas] Bulun Bulun held the copyright in the artistic work on *trust* for the Ganalbingu people or, alternatively, as a fiduciary.'[1942]

In response to these legal claims, the respondent company admitted the infringement of Bulun Bulun's copyright and accepted his legal claims.[1943] As a matter of fact, the legal dispute between the first applicant and the respondent were settled before the court proceedings.[1944] Whereas the terms and conditions of the settlement between the parties remained confidential, the applicants

[1938] *Bulun Bulun and Another v. R & T Textiles Pty. Ltd. and Another* (1998) 41 IPR 513, 514.
[1939] Ibid.
[1940] Ibid.
[1941] Ibid, 526.
[1942] Ibid, 517. Emphasis added.
[1943] Ibid.
[1944] Ibid.

decided to discontinue the legal action against the respondent (and its directors) pursuant to the copyright infringement claim.[1945]

Nevertheless, the legal claims of the second applicant regarding the Ganalbingu people's equitable ownership and fiduciary rights in Bulun Bulun's copyright were not abandoned; neither the respondent accepted infringement of the Ganalbingu people's communal copyright.[1946] Therefore, the Court decided to continue the legal proceedings over Milpurrurru's claims, which essentially derived from and had their legal basis in the Aboriginal customary law.

Before further analysis of the Court's decision, it shall be indicated that this case neither elaborates on the eligibility of Bulun Bulun's intellectual creation for copyright protection under the Copyright Act of 1968, nor does it reveal any information regarding the Australian judiciary's approach to the Aboriginal creators' copyright ownership. Instead, the Court has built its judgment on the assumption that Bulun Bulun's intellectual creation is an original artistic work in which copyright subsists and that Bulun Bulun is the rightful owner of copyright over such work.[1947]

Therefore, the Court's legal analysis was centered around the individual and communal ownership conundrum, hence, the applicability of customary law to the legal dispute therein. In fact, this aspect of the case has been considered and emphasized by the Court as 'another step by

[1945] Ibid.
[1946] Ibid.
[1947] The *Yumbulul* case has altered the Australian judiciary's predominant perceptions about the originality of the Aboriginal artworks despite Justice French's rather oddly phrased final decision. The cases that followed the *Yumbulul* case were built on this new approach and acknowledged the originality of Aboriginal artwork that derive from traditional Aboriginal knowledge. In this sense, *Milpurrurru and Others v. Indofurn Pty. Ltd. and Another* case, which had concerned the unauthorized reproduction of substantive elements of traditional Aboriginal artworks on carpets, constituted another milestone. The *Milpurrurru* case, also decided by Justice von Doussa, is often cited as another key judgment of the Aboriginal IPRs discourse, due to allocating room for expert opinions, the Aboriginal witnesses' statements, and the investigation of Aboriginal customary law, on the one hand, and consolidating the originality of the work subject to the legal dispute therein, on the other. *Milpurrurru and Others v. Indofurn Ply. Ltd. and Another* (1994) 30 IPR 209. See e.g., Janke (n 1800).

Aboriginal people to have communal title in their traditional ritual knowledge, in particular in their artwork, recognized and protected by the Australian legal system.'[1948]

Bulun Bulun's affidavit clearly explained the groundings of the Ganalbingu people's equitable copyright ownership claims and their interest in his personal artistic expression, both of which reveal the sophisticated nature of TK and the intricate relationship of Aboriginal IP with the communal indigenous identity. Bulun Bulun narrated that his paintings are 'manifestations of [his] ancestral past'[1949] in which sacred knowledge of his people, and laws and customs of the Ganalbingu is encoded.[1950] Unlike the Romantic author's endeavors to break his link with the past and to produce an original work that flows from his sole genius,[1951] Bulun Bulun's explanations prove that Aboriginal works aim reinforcing the link between the past, present, and the future of the Aboriginal community and cultural heritage – let alone breaking from the past and the state of the art. This point was also emphasized by Colin Golvan, who acted as the legal representative of the applicants in this case. Golvan emphasized that not only the Aboriginal artwork has 'a significant bonding role'[1952] within the community, but also the royalties received by the license or the sale of such works are shared by the community or used to purchase the needs of the community.[1953] In this context, Bulun Bulun asserted that the unauthorized reproduction of his artistic work had implications not only on his copyright over his work, but also on his relationship with his community and his community's relationship with their ancestors and also with their ancestral lands.[1954]

[1948] *Bulun Bulun and Another v. R & T Textiles Pty Ltd and Another* (1998) 41 IPR 513, 515.
[1949] Ibid, 518.
[1950] Ibid.
[1951] Please see section 3.3.2. in Chapter III.
[1952] Golvan (n 1790) 346.
[1953] Ibid.
[1954] *Bulun Bulun and Another v. R & T Textiles Pty Ltd and Another* (1998) 41 IPR 513, 519.

Given these statements of the first applicant, this case further required the Australian Court to elaborate on to what extent the Western-centric Australian copyright regime, which was inherited from the British Empire, accommodates the non-Western perceptions of communal copyright ownership. The Court accepted the evidence provided from the Aboriginal customary laws.[1955] Accordingly, the Court had to clarify and to rule on the interaction of the common law and statutory law of the Commonwealth with the customary laws of the Aboriginal people in copyright-related legal matters.

By referring to the decision of the Supreme Court of Canada in *Delgamuukw v. British Columbia,*[1956] Justice von Doussa explained that although 'customary indigenous law has a role to play within the Australian legal system,'[1957] such Aboriginal 'customary rights and obligations are not easily explicable and definable in terms of ordinary [W]estern jurisprudential analysis or common law concepts.'[1958] Still, the Court ruled that the Aboriginal legal systems cannot be overlooked by the Australian judiciary, especially in the legal disputes that concern Aboriginal rights and obligations.[1959] However, it has also been made clear that the Aboriginal customary law can only be accepted 'as a basis for the foundation of rights recognized within the Australian legal system.'[1960] Therefore, the Court put an end to the judicial debates on the individual and communal copyright ownership conundrum as follows:

> 'Customary Aboriginal law relating to group ownership of artistic works survived the reception of the English common law in Australia in 1788. But whether or not communal title in artistic works may once have been recognized by the common law, the codification of copyright law by statute now prevents communal title being successfully asserted as part of the general law. […]'[1961]

[1955] Ibid, 517.
[1956] *Delgamuukw v. British Columbia* [1997] 3 SCR 1010.
[1957] *Bulun Bulun and Another v. R & T Textiles Pty Ltd and Another* (1998) 41 IPR 513, 516.
[1958] Ibid.
[1959] Ibid.
[1960] Ibid, 517.
[1961] Ibid, 515.

> 'The common law right until first publication was abolished when the law of copyright was codified by the Copyright Act of 1911 (UK). That Act, subject to some modifications, became the law in Australia by §8 of the Copyright Act 1912 (Cth). *Copyright is now entirely a creature of statute.*'[1962]

Eventually, the Court dismissed the legal proceedings brought by the second applicant, Milpurrurru, in his own right and on behalf of the Ganalbingu people – hence, contoured the borders of the Aboriginal customary law's quite limited interaction with the Australian copyright law.[1963] Furthermore, the Court found the evidence regarding the trusteeship between the Galanbingu people and Bulun Bulun unsatisfactory; thus, it held that Bulun Bulun did not hold copyright in the artistic work under an express trust – which, clearly, contradicts the customary laws and traditions of the Ganalbingu people.[1964]

Still, Milpurrurru's claims regarding the fiduciary relationship between Bulun Bulun and the Ganalbingu people were accepted by the Court.[1965] To reach this conclusion, the Court investigated the evidence on customary laws of the Ganalbingu people.[1966] Relying on this evidence, the Court decided that Bulun Bulun was entitled by his people to create the artistic work in question; thus, he held fiduciary obligations toward his people, especially on 'not to exploit the artistic work in a manner that is contrary to customary law; and to take appropriate action against third parties to restrain and remedy any infringement of copyright in the artistic work.'[1967] Yet, the Court clarified that the fiduciary relationship between Bulun Bulun and the Ganalbingu people did not vest in the latter an equitable interest in copyright ownership and that the fiduciary relationship was limited with those two obligations – neither of which Bulun Bulun breached.[1968] Therefore, the Court ruled

[1962] Ibid, 529. Emphasis added.
[1963] Ibid, 532.
[1964] Ibid.
[1965] Ibid, 530-531.
[1966] Ibid, 531.
[1967] Ibid, 531.
[1968] Ibid.

that under the existing circumstances '[t]here was no occasion for equity to provide any additional remedy to the Ganalbingu people (…).'[1969]

Despite its deficiencies to break with the tradition imposed by the Romantic author, the *Bulun Bulun and Another v. R & T Textiles and Another* case, along with the previous ones, consolidate one of the major findings of Chapter III. Whereas the Global North has a long-established conviction that folklore and TK lack originality requirement for copyright and that such non-Western modes of creations belong to the public domain by and large, the Australian case law incline to acknowledge the originality of Aboriginal artwork – though it has been a long process.

Besides, the evidence submitted to the Australian Courts in these cases reveal the fact that Aboriginal artwork is under the protection of a complex legal system based on the customs and traditions of indigenous people, as suggested in Chapter III.[1970] Nevertheless, the legal disputes analyzed herein as well as the continuous unauthorized exploitation of indigenous knowledge expose that the Global North prefers to overlook these non-Western legal systems and insists on allocating such knowledge to the Western (European) public domain.

The investigation of the interplay of race, power, and copyright law within the Australian context revealed that the pattern of subordination of the Aboriginal creatorship and creativity permeate that of the Aboriginal sovereignty and polities. Due to this, the overarching problem that overhauls the Aboriginal IPRs discourse is not only the appropriation and use of Aboriginal artworks out of their authentic context, but also the subjection of Aboriginal modes of creatorship and creativity to a non-Aboriginal legal context – simply because of the legacy of the conquest and the deprivation of indigenous peoples from their right to sovereignty. For the very same reason,

[1969] Ibid, 516.
[1970] Please see section 3.3.2. in Chapter III.

indigenous movements across the Globe frame their IPRs claims as an aspect that is integral to their claims for right to self-determination.[1971]

Whereas the copyright disputes concerning Aboriginal artworks are centered around the incompatibility of non-Western intellectual creations with the Western-centric IP laws; the American reality presents a different scenario which stems from the unique experiences of racialized minorities in the United States. Given that this chapter focalizes African-American experiences, the copyright dispute to be analyzed herein does not speak for incompatibility, but for racial discrimination that originates from the American courts' endeavors to sacralize Whiteness. To substantiate this argument, the next section concentrates on the *Suntrust Bank v. Houghton Mifflin Co.* case,[1972] in which race, racial thinking, the common racial imagery, and the American courts' *jurisgenerative* efforts to uphold 'Whiteness as [intellectual] [p]roperty'[1973] are quite visible.

4.3.1.4. Suntrust Bank v. Houghton Mifflin Co.

The copyright case presented herein is yet another confrontation of the universality, objectivity, and value-neutrality of the (imperial and) American copyright regime(s). Just like the legal disputes concerning the Aboriginal intellectual creations, the dispute herein also challenges the myth of the Romantic author, and the copyright norms derived therefrom – especially those of individualism of the creative process and the originality criterion for legal protection. However, different from the cases extracted from the Australian jurisprudence, the *Suntrust Bank* case offers a new angle to view the courts' aesthetic non-neutrality in interpreting and applying the inherently Western-centric IP norms.

[1971] Ibid.
[1972] *Suntrust Bank v. Houghton Mifflin Co*., 136 F. Sup2d 1357.
[1973] By analogy with: Harris, 'Whiteness as Property' (n 264).

Indeed, the legal dispute herein illuminates the un/conscious racialized valorization schemes that inform the aesthetic choices of the District Court Judge, given that the dispute herein requires a comparative analysis to determine not only the originality of a work, but also to elaborate on the useful art and substantial use doctrines. As mentioned earlier, these doctrines are the three major categories identified by Yen as aesthetic choices adopted by the American courts.[1974] A closer look at the *Suntrust Bank* decision not only confirms Yen's thesis, but also illuminates the built-in economic, ideological, and political structures of dominance of IP law and the ways in which courts consolidate these structures.

The singularity of the *Suntrust Bank* case to address the racial non-neutrality of the American courts may be subjected to criticism, due to weakening the argument made herein. Nevertheless, the *Suntrust Bank* case shall be read as a reflection of the American judiciary's long-established racially non-neutral attitude onto the copyright domain. To be more precise, it is asserted herein that the *Suntrust Bank* is yet another cog in the machine, which encapsulates various other court decisions including but not limited to the *Dred Scott* case, *Plessy* case, *Hudgins* case, and *Ozawa* case. Though tackling with different legal issues, the American courts constructed and sacralized the White identity and legal persona in each of these cases.[1975] In a similar vein, the *Suntrust Bank* case is an extension of this racial ideology to White authorship, intellectual creativity, and creations.

This case was brought before the American courts in 2001. It involved Suntrust Bank, the estate of Margaret Mitchell and the copyright owner of Mitchell's book entitled *Gone with the Wind* (hereafter 'GWTW'), as the plaintiff; and Houghton Mifflin Co., the publisher and the copyright owner of Alice Randall's book entitled *The Wind Done Gone* (hereafter 'TWDG'), as

[1974] Please see section 4.3.1. in the text.
[1975] Please see section 1.3.1. in Chapter I.

the defendant.[1976] The legal dispute herein stemmed from the transformative use of Mitchell's novel, GWTW, by Randall, in order to pen a parody of it.[1977] The plaintiff claimed that Randall had appropriated many *substantive* elements of GWTW, including several characters, character traits, relationships among such characters, certain famous scenes, various elements of the plot, and some dialogues[1978] – all of which were protected by copyright under Section 102(1) of the Copyright Act.[1979] Thus, the plaintiff claimed that Randall's book, TWDG, *derived* from Mitchell's *original* work, GWTW. They further claimed that TWDG constituted an *unauthorized* sequel to Mitchell's book, hence, infringed their copyright.[1980] In response to these allegations, the defendant admitted that Randall's work had similarities with Mitchell's original work, despite its radical thematic differences.[1981] They explained that Randall's book constituted a race-conscious parody of GWTW, hence, was subject to fair use exception[1982] regulated within Section 107 of the Copyright Act.[1983]

The reasons that have informed Randall's decision to create a parody of GWTW had been explained in an interview by the author herself; the transcription of the interview was included within TWDG.[1984] Randall explained that she had read GWTW and enjoyed the book, even though

[1976] *Suntrust Bank v. Houghton Mifflin Co*., 136 F. Sup2d 1357, 1363, 1365.
[1977] Ibid.
[1978] Ibid, 1364.
[1979] Ibid, 1367.
Section 102(1) of the Copyright Act of 2000 (amended) stipulates that 'original works of authorship fixed in any tangible medium of expression' are eligible for copyright protection. According to Section 106(a) of the Act, the copyright owner of the work is entitled to the exclusive right to 'prepare derivative works based upon the copyrighted work.' The Copyright Act of 2000 (amended) §102(1), § 106(a), 17 U.S.C. §101.
[1980] *Suntrust Bank v. Houghton Mifflin Co*., 136 F. Sup2d 1357, 1367.
[1981] Ibid, 1366.
[1982] Section 107 of the Copyright Act of 2000 (amended) envisions a limitation to copyright and stipulates the fair use of a copyrighted work for purposes including but not limited to criticism and comment would not lead to copyright infringement. Nevertheless, the regulation introduces a fair use test and introduces several criteria for the assessment of the fairness of the use of the copyrighted work. The Copyright Act of 2000 (amended) §107, 17 U.S.C. §101.
[1983] *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Sup2d 1357, 1364.
[1984] Ibid.

'the racial stereotyping and Klan white-washing'[1985] within GWTW were emotionally distressing for her.[1986] She further explained that the racial connotations of GWTW had inspired her to tell the 'untold' story concealed in GWTW.[1987] Therefore, Randall intended to tell this 'most popular account of life on a slave plantation'[1988] from the perspective of the racialized minorities of the Antebellum South.[1989] To achieve this end, Randall narrated the story from 'the point of view of African-American slaves and mulattos, rather than [W]hite aristocrats (…) [to expose] the South's rigid and racist social hierarchy (…).'[1990] In doing so, she used some of the characters in GWTW; yet, she changed their names and many of their character traits.[1991] Indeed, TWDG reversed the racial stereotypes of GWTW (and even altered the sexual orientation of certain characters).[1992] Thereby, it 'mocked and ridiculed'[1993] the original work by 'endow[ing] the stereotypical [B]lack characters in [GWTW] with agency, cunning, and effectiveness.'[1994] It also pinpointed the 'bare racism and objectification'[1995] that GWTW had romanticized.[1996]

After the publication of TWDG, the plaintiff requested the defendant to withdraw the unauthorized work from publication and distribution; nevertheless, the defendant refrained from doing so.[1997] Therefore, the plaintiff filed an instant action and sought for 'a temporary restraining order (…) and a preliminary injunction to enjoin the defendant from further publication and distribution of [TWDG].'[1998]

[1985] Ibid, 1365 *supra* note 4.
[1986] Ibid.
[1987] Ibid.
[1988] Sunder, 'From Free to Fair Culture' (n 1064) 25.
[1989] Ibid.
[1990] Tehranian, 'Towards a Critical IP Theory: Copyright, Consecration, and Control' (n 33) 1281.
[1991] *Suntrust Bank v. Houghton Mifflin Co.,* 136 F. Sup2d 1357.
[1992] Ibid.
[1993] Ibid, 1373.
[1994] Ibid.
[1995] Sunder, 'From Free to Fair Culture' (n 1064) 25.
[1996] Tehranian, 'Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality' (n 480) 423.
[1997] *Suntrust Bank v. Houghton Mifflin Co.,* 136 F. Sup2d 1357, 1364.
[1998] Ibid, 1363.

As a pre-requisite to the actionability of the preliminary injunction, the District Court had to assess the defendant's fair use defense. In this context, the District Court noted that the existence of a parody, first and foremost, would depend on whether the second work constitutes transformative use – in other words, whether the secondary use generates any value.[1999] Eventually, the Court held that:

> 'Ms. Randall's use cannot receive the benefit of the fair use defense because she uses *far more of the original than necessary*. Her use does not merely "conjure up" the earlier work, but rather has made a wholesale encapsulation of the earlier work, copied its *most famous and compelling* fictional scenes, and appropriated its copyrighted and *most notable* characters. Her use of the copyrighted material *merely summarizes* most of the earlier work *without any commentary or fresh ideas* that challenge the reader's understanding of the earlier work. While the new work adds some new creative elements to the original story, those elements *only decorate and do not develop something new except to form a sequel*.'[2000]

Therefore, the District Court ruled that the publication and dissemination of Randall's derivative work would infringe the copyright interests of the plaintiff, hence, granted the plaintiff's motion for preliminary injunction.[2001] Due to this, the defendant was primarily enjoined from 'further production, display, distribution, advertising, sale, or offer for sale'[2002] of TWDG.[2003]

The District Court's legal reasoning and final judgment in the *Suntrust* case have caught the attention of IP scholars.[2004] The postmodern, and especially race-oriented, critique of the judgment asserted and explained that the District Court's legal analysis was far from being objective and value-neutral.[2005] In fact, this decision can be read in a few different ways: To illustrate how the

[1999] Ibid, 1372.
[2000] Ibid, 1381. Emphasis added.
[2001] Ibid, 1370.
[2002] Ibid.
[2003] Ibid.
[2004] See e.g., Tehranian, 'Towards a Critical IP Theory: Copyright, Consecration, and Control' (n 33); Sunder, 'From Free to Fair Culture' (n 1064); Amy Lai, 'Copyright Law and Its Parody Defense: Multiple Legal Perspectives' (2015) 4 New York University Journal of Intellectual Property and Entertainment Law 311; Lester, 'Oprah, Beyoncé, and the Girls Who "Run the World" - Are Black Female Cultural Producers Gaining Ground in Intellectual Property Law' (n 33); Vats (n 33).
[2005] Ibid.

Court utilized and entrenched the built-in White structures of dominance of copyright law, in order to secure 'Whiteness as [intellectual] property'[2006]; and to reveal the ways in which a White construct as such had affected the authorship, creativity, and the IPRs of an African-American author.

Regarding the reciprocity of Whiteness and copyright, it can be argued that the judgment initiates with placing GWTW at the pinnacle of a cultural hierarchy. Indeed, the opening lines of the Court's judicial, and supposedly neutral, decision are dedicated to emphasizing the 'best-seller' status, wide-dissemination to 'tens of millions'[2007], market success, in brief, social and economic value of GWTW.[2008] As rightfully pinpointed by John Tehranian, whereas none of these criteria are relevant to copyright infringement or fair use defense;[2009] these criteria informed the opinion of the Judge, apparently, in deciding the level of legal protection that shall be bestowed upon the work.

In this regard, it can be argued that the economic and social status of a work underpins and consolidates the White structures of dominance inherent in the author's copyright ownership. For instance, it entrenches the economic dominance of the work, by setting the limits of accessibility, the extend of its use without license fees, and the permitted types of use that would not interfere with the materialistic interests of the copyright owner. Similarly, it accentuates the ideological dominance of the copyright work, by identifying the authorized and unauthorized uses; hence, it draws the lines between copyright infringement and fair use. Last but not least, it even grants physical dominance to the copyright owner, by enabling the copyright owner to restrain further publication and dissemination of works that intervene with its economic and ideological interests.

[2006] By analogy with: Harris, 'Whiteness as Property' (n 264).
[2007] *Suntrust Bank v. Houghton Mifflin Co.,* 268 F.3d 1257, 1259.
[2008] Ibid.
[2009] Tehranian, 'Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality' (n 480) 421.

Each and every one of these dominance structures hold the potential to disempower creators and works that are denied such power mechanisms. Thus, it is asserted herein that the District Court not only sacralized the sole genius of the White Romantic author in its decision, but it also acted upon racial prejudices and biases – especially while assessing the cultural value and merit of Randall's book, hence denied such White power structures to Randall. In fact, the District Court's decision is worth to be analyzed in a more detailed way and from a race-oriented point of view, in terms of revealing the racial approach of the Court to the contributions of African-American creators to the progress of arts and culture.

Indeed, the District Court's elaborations on notions such as derivative work, sequel, and parody veil the Court's lack of faith in the merits of Randall's work. A sequel constitutes a derivative work which, according to Section 101 of the American Copyright Act, refers to a work based upon two or more pre-existing works.[2010] Given the dependency of a derivative work on the original one, Tehranian explains that the acknowledgment of Randall's book as an unauthorized sequel degrades TWDG 'nothing more than an effort to free-ride on the copyrighted work of another.'[2011] Articulation of TWDG as such stigmatizes Randall and her work, since a derivative work is copyrightable, hence, considered to contribute in the progress of arts, only if it does not unlawfully appropriate the original work.[2012]

Additionally, although the District Court admitted to the parodic elements of TWDG[2013] – especially in the transformative use of the GWTW characters, still it ruled that 'the purpose of putting the key characters of [GWTW] in new setting is to entertain and sell books to an active

[2010] The Copyright Act of 2000 (amended) §101, 17. U.S.C. §101.
[2011] Tehranian, 'Towards a Critical IP Theory: Copyright, Consecration, and Control' (n 33) 1282.
[2012] The Copyright Act of 2000 (amended) §103(1), 17. U.S.C. §101.
[2013] *Suntrust Bank v. Houghton Mifflin Co*., 136 F. Sup2d 1357, 1363, 1377.

and ready-made market for the next [GWTW] sequel.'[2014] It remains as a mystery, though, how the race-conscious critique of the original story within GWTW can substitute the original story or a true sequel of it.

Furthermore, the labelling of Randall's book as an unauthorized derivative work, rather than a parody of Mitchell's work, was indeed 'a loaded weapon'[2015] pointed at the persona of Randall as a female African-American author. While applying the fair use test to TWDG, the Court stated that '[t]he Court cannot (…) absolutely discern what Ms. Randall thought as she wrote TWDG.'[2016] By this claim, the Court paved the way to the economic analysis for the defendant's fair use defense. Despite its reluctance on Randall's intentions to use GWTW at the first place, the same Court held that TWDG was '*unquestionably* a fictional work that has an overarching *economic purpose*.'[2017] These assessments of the District Court were addressed to reduce Randall, in Tehranian's words, 'nothing more than a leech sucking economic value away from Mitchell's genius.'[2018] Yet, there is another racial layer to the issue. Anjali Vats argues that the Court intended to depict Randall's work as a 'parasitical'[2019] one, not just because Randall was a Black female author.[2020] Randall challenged the predominantly White and master narratives on the history of the Antebellum South, including its realities regarding slave trade and plantation, by introducing the alternative narratives of the racially oppressed.[2021] Whereas Tehranian interprets the Court's attitude as the sacralization of the original work and securing its inviolability;[2022] his statement can

[2014] Ibid, 1379.
[2015] By analogy with: Williams, Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (n 570).
[2016] *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Sup2d 1357, 1363, 1374.
[2017] Ibid, 1379. Emphasis added.
[2018] Tehranian, 'Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality' (n 480) 421.
[2019] Vats (n 33) 96.
[2020] Ibid.
[2021] Ibid, 95-96.
[2022] Tehranian, 'Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality' (n 480) 421.

be further crystallized by referring to the earlier attempts in the copyright history addressed to the same end: The use of *copy-right* as a censorship mechanism.[2023] Just like the ruling-elite's desire to control the dissemination of crucial information that can form the public's opinion, or that can organize masses to stand against such tyranny;[2024] the District Court embraced such an approach, with the aim of silencing dissenting voices.

Yet, it shall be highlighted that the District Court's decision was not the end to this story. The District Court's overtly subjective decision was appealed by the defendant. The Supreme Court not only vacated the preliminary injunction granted by the District Court,[2025] but it also held that: 'Alice Randall, the author of TWDG, *persuasively* claims that her novel is a critique of GWTW's depiction of slavery and the Civil-War era American South.'[2026] Accordingly, the Supreme Court ruled that TWDG was entitled to a fair use defense,[2027] hence, overturned the previous decision in favor of the defendant, as follows:

> '[…] the issuance of the injunction was at odds with the shared principles of the First Amendment and the copyright law, acting as *a prior restraint on speech* because the public had not had access to Randall's ideas or viewpoint in the form of expression that she chose.'[2028]

Aside the final judgment of the Supreme Court, the justification of this outcome is of great importance to this dissertation as well, since it reflects a stark contrast with the District Court's approach to Randall's creatorship, intellect, and the merits of TWDG.

The Supreme Court, by having a comprehensive analysis of the British copyright norms and principles that have informed the American copyright tradition, explained that American copyright

[2023] Please see section 2.3.1. in Chapter I.
[2024] Ibid.
[2025] Ibid, 1259.
[2026] *Suntrust Bank v. Mifflin Co.*, 268 F.3d 1257, 1259. Emphasis added.
[2027] Ibid, 1276.
[2028] Ibid, 1277. Emphasis added.

law has been centered around the idea of preventing censorship and promoting learning.[2029] Due to this, the American copyright tradition embraced the utilitarian justification of copyright in terms of incentivizing authors to produce original works and in return to enable the flow of new literary works into the cultural domain – hence maintaining a balance between the private and public interests.[2030]

As mentioned by the Supreme Court, the initial prioritization of original works was broken, respectively, with the introduction of derivative works with the Act of 1909 and the fair use defense with the Act of 1976.[2031] Whereas both copyright Acts enabled the use of original works by third parties to introduce new ideas, the latter also guaranteed respect to and protection of the First Amendment values within the copyright doctrine.[2032] Based on these, the Supreme Court emphasized that copyright protection does not 'immunize' an original work against critique or comment.[2033] Despite acknowledging Randall's appropriation of many features of GWTW, the Supreme Court held that Randall's use is *highly* transformative and, as opposed to the District Court's opinion, such transformative use overweighs the commercial purpose of the TWDG.[2034] Finally, the Court also noted that it was 'hard to imagine how Randall could have specifically criticized GWTW without depending heavily upon copyrighted elements of that book.'[2035]

Considering that the Supreme Court eloquently articulated the points that could have been raised herein as well, this section does not further elaborate on this case, also not to risk falling into repetition. However, in light of the flow of the events and the disparate attitudes of the lower and apex courts, it can be concluded that even though the inherently White dominance structures

[2029] Ibid, 1261-1262.
[2030] Ibid, 1262.
[2031] Ibid, 1262, 1264.
[2032] Ibid, 1264-1265.
[2033] Ibid, 1265.
[2034] Ibid, 1269.
[2035] Ibid, 1271.

of copyright law are awaiting thereby as 'loaded weapons,'[2036] it is the (aesthetic) choices of the judges that triggers the mechanism.

As a final remark, it shall be noted that cultural patrolling by means of IP law – or by the judiciary – is not specific only to copyright law. Trademark law can also turn into a tool to disempower the communal and cultural identities and to silence or restrict the alternative narratives of racialized minorities and indigenous peoples – especially when the registered marks consist of racial aspects. Therefore, the remainder of this chapter illustrates the destructive use of racially sensitive marks by third parties – or the racialized minorities themselves.

4.3.2. The Interplay of Race, Power, and Trademark

This sub-chapter offers a race-conscious analysis of the American judiciary's approach to legal disputes that involve culturally (in)sensitive and racially-charged insignia registered as trademark in the United States. The sub-chapter deals with the implications of the Western-centric American trademark regime on the communal and cultural identities of indigenous peoples and racialized minorities resident in the United States.

Although it is self-evident in this statement, it is worth to clarify that the sub-chapter does not intend to map the possible uses of the existing trademark legal framework to empower indigenous peoples and racialized minorities. On the contrary, this section aspires to illustrate how the registered trademarks and trademark law may function to spread racially-charged and culturally pejorative information constructed by the majority in association with the racially marginalized segments of the society.

The appropriation and branding of racial information are well-known and often challenged themes in the American legal scholarship, since the American commercial space is a rich source

[2036] By analogy with: Williams, Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (n 570).

of culturally insensitive trademarks that have been under the use of corporate powers for many years now. Though the 'insensitive trademarks' constitute a catch-all phrase that compiles various disparate uses of racially-charged insignia, it risks assimilating the messages conveyed by certain overtly racist trademarks into 'insensitivity'. To avoid this, Kevin Jerome Greene has mapped the various uses of racial information within the American marketplace, and he identified three major categories of trademarks that subordinate the non-White or non-Western 'others' of the American society.[2037]

The first category includes the culturally inappropriate uses, misappropriation, or misattribution of racialized minorities' tribal names or the names of important non-White or non-Western historical figures.[2038] The registration of the Native-American tribal names by non-Native businesses and third-party entrepreneurs for their commercial transactions (such as Cherokee, Navajo, or Sioux; or their derivatives, such as Grand Cherokee, Mazda Navajos, Pontiac Aztecs, University of Dakota Fighting Sioux, and the like) constitute examples of this first group of trademarks.[2039] Similarly, the legal dispute stemmed from the registration of the name of the Chief of the Sioux tribe, Crazy Horse, for alcoholic beverages also exemplifies the first group of culturally insensitive uses.[2040] The second category of trademarks encapsulate stereotypical images of racialized minorities which convey racially insensitive messages.[2041] The notorious 'Uncle Ben' and 'Aunt Jemima' brands, both of which draw upon the images of enslaved Black people' or, the 'Land O'Lakes Butter' or 'American Spirit Cigarettes' trademarks, which use and appropriate

[2037] See: Greene, 'Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship' (n 510).
[2038] Ibid 433.
[2039] Brown (n 1460) 78; Kelsey (n 1102) 86.
[2040] Brown (n 1460) 77–78.
[2041] Greene, 'Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship' (n 510) 436–437.

stereotypical images of Native-Americans, exemplify this category of trademarks.[2042] The last category consists of the derogatory marks or racial slurs, such as the N-word or its derivatives such as the 'N*****hair' mark, which were registered by White-owned businesses to identify the source of their commercial activities.[2043]

Within this context, the sub-chapter focalizes the expressive function of registered marks. It shall be clarified that the analysis of trademark law and the restriction of the analysis herein merely to the expressive function of trademark are justified on three major grounds: First, Article 9(2) of the TRIPs Agreement of 1994 consolidated and codified a long-established copyright principle.[2044] According to this regulation, copyright protection does not extend to the ideas, but it extends only to the expression of such ideas.[2045] Whereas this principle entrenches the utilitarian justification of copyright, simply by preventing the monopolization of ideas and facilitating the flow of works with the same or similar themes to the cultural space;[2046] it disables challenging a copyright work because of the anti-social messages it conveys, even if those messages are scientifically false or do not correspond with the socio-historical reality.

A perfect example to this type of disputes would be the one that centered Mara Morgan's best-seller, entitled *The Mutant Message Down Under*.[2047] Morgan's book was about the spiritual journey of a White American woman, who travels to Australia due to being 'summoned by a remote tribe of nomadic Aboriginals who call themselves the "Real People" (…).'[2048] Morgan's book was advertised, by emphasizing that the story was based on real-life events and the author's

[2042] Ibid; Kelsey (n 1102) 86.
[2043] Greene, 'Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship' (n 510) 436.
[2044] The Agreement on the Trade-Related Aspects of Intellectual Property Rights of 1994, Art. 9(2).
[2045] Ibid.
[2046] Please see section 2.3.1. in Chapter II. Also see: Kostylo (n 640).
[2047] Mara Morgan, *The Mutant Message Down Under* (Perennial 1994).
[2048] Ibid, Back cover.

personal encounters with the Aboriginal people of Australia.[2049] Nevertheless, the way Morgan depicted the Aboriginal people and culture were no different than those of, whom Olufunmilayo B. Arewa refers to as, 'the armchair anthropologists.'[2050] After being challenged by the Aboriginal community, Morgan had to confess that she had never travelled to Australia and had never met any Aboriginal person; hence, her book was entirely fictional.[2051] Yet, the falsified and derogatory portrayal of the Aboriginal people did not have an impact on her copyright.[2052] Neither it prevented Morgan's book to be translated into various languages and distributed across the Globe. In other words, the content of Morgan's copyright work did not hinder her to make a fortune out her destruction and appropriation of the Aboriginal identity and culture.

Besides, as brought up by the U.S. Supreme Court in the *Suntrust Bank* case, there is also a tendency to consider such narratives as freedom of speech.[2053] Thus, any attempt to challenge before the courts copyright of a work based on the content of the expressions therein would only produce a court case destined to be lost; whereas introducing limitations to the content of copyright works would only restore copyright's historical censorship function.[2054]

The second point that justifies the analysis of trademark herein is the overlapping subject-matters of copyright's 'idea and expression' dichotomy and trademark law's expressive function. To be more precise, in principle, the literary or visual expressions that are eligible for copyright protection can also be registered as trademarks and enjoy trademark protection, if they meet the eligibility criteria of the latter. Due to this, the sub-chapter takes the 'idea and expression'

[2049] Brown (n 1460) 22.
[2050] Arewa, 'Intellectual Property and Conceptions of Culture' (n 8) 10–11. Also, please see sub-chapter 3.2. in Chapter III.
[2051] Brown (n 1460) 22.
[2052] Ibid.
[2053] Please see section. 4.3.1.4. in the text.
[2054] Please see section 2.3.1. in Chapter II.

dichotomy of copyright law as a reference point and employs this copyright principle to draw the contours of its focus on trademark law.

Third, various WIPO initiatives and IP scholarship often present trademark's expressive function as a legal tool that may be effective for folklore and TK holders to prevent the commercialization of their sensitive cultural insignia.[2055] This would, surely, help communities engaging with trade practices in identifying their own products with marks that belong to their community. Nevertheless, this function of trademark cannot be of help to communities which do not wish to commercialize their insignia, but to prevent third parties doing so.

Therefore, this sub-chapter argues that whereas the Western-centric trademark regime provides the ones who wish to express and disseminate messages drawn upon the Enlightenment idea(l)s, the same system provides historically marginalized groups, perhaps, with a shield, which cannot prevent or undone the harm, but weaken the initial impact of such racially-driven practices. To substantiate this argument, the sub-chapter concentrates on two relatively recent, interrelated, if not overlapping, and surely controversial judgments of American jurisprudence: *Pro-Football, Inc. v. Blackhorse,*[2056] and *Matal v. Tam.*[2057]

4.3.2.1. Pro-Football, Inc. v. Blackhorse

The trademark subject to the legal dispute herein can be allocated to Kevin Jerome Greene's third category of insensitive trademarks.[2058] The notorious 'The Redskins' and its various combinations were first used by the Washington football club in the National Football League in 1933.[2059]

[2055] See e.g., Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'WIPO/GRTKF/IC/6/8' (n 5); Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'WIPO/GRTKF/IC/4/8' (n 4).
[2056] *Pro-Football, Inc. v. Blackhorse,* 112 F. Sup3d 439, *439; 2015 U.S. Dist. LEXIS 90091, 1; 115 U.S.P.Q.2D (BNA) 1524.
[2057] *Matal v. Tam*, 137 S. Ct. 1744.
[2058] Please see sub-chapter 4.3.2. in the text.
[2059] *Pro-Football, Inc. v. Blackhorse,* 112 F. Sup3d 439; 2015 U.S. Dist. LEXIS 90091, 1; 115 U.S.P.Q.2D (BNA) 1524, 1529.

Following up with this use, the mark and its derivatives were registered by the football club in 1967, under the entertainment services category.[2060]

'The Redskins' trademark has been a matter of controversy and the subject of ever-lasting legal disputes in the American jurisprudence.[2061] Indeed, it was brought before the American judiciary twice, by different Native-American groups who have claimed that the mark consists of a racial slur that is highly offensive for Native-Americans.

The first attempt for the cancellation of 'The Redskins' trademark and five of its derivatives was initiated by Suzan Shown Harjo and her *amici curiae* in 1994.[2062] They claimed that the trademarks in question comprise 'a pejorative, derogatory, degrading, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for a Native-American.'[2063] As to the logo that consisted of the word 'The Redskins' and the portray of a Native-American individual was claimed to bring the Native-American community at large into 'contempt, disrepute and ridicule.'[2064] Thus, they requested the cancellation of the trademarks based on Section 2(a) of the Lanham Act of 1946.[2065]

Whereas their claims were accepted by the Patent and Trademark Office (hereafter 'the PTO'), the PTO's decision was reversed by the District Court based on procedural obstacles.[2066]

[2060] Ibid.
[2061] 'Pro-Football, Inc. v. Blackhorse' (*Columbia University: Global Freedom of Expression*) <https://globalfreedomofexpression.columbia.edu/cases/pro-football-inc-v-blackhorse/> accessed 6 October 2021.
[2062] The trademarks subject to dispute included the following words or word and design combinations: 'The Redskins', 'Redskinettes', 'Skins', 'Washington Redskins', 'Redskins + Design', 'Washington Redskins + Design'. *Harjo v. Pro-Football, Inc.* 1994 TTAB Lexis 9; 30 U.S.P.Q.2D (BNA) 1828, 1829.
[2063] Ibid, 1829-1830.
[2064] Ibid, 1830.
[2065] Ibid.
[2066] Vats (n 33) 124.

Nevertheless, neither the District Court nor the Circuit have ever assessed the merits of the PTO's findings and its justification of the disparaging nature of the trademark.[2067]

While the *Pro-Football, Inc. v. Harjo* case was pending before the District Court, another group of Native-Americans, pioneered by Amanda Blackhorse, have filed a petition to the PTO and requested the cancellation of 'The Redskins' trademark and five of its derivatives.[2068] This petition paved the way to the landmark *Pro-Football, Inc. v. Blackhorse* case.

As mentioned above to describe the cancellation request brought before the PTO, the *Pro-Football, Inc. v. Blackhorse* case concerned the cancellation of six trademarks[2069] registered between 1967 and 1990 and owned by Pro-Football, Inc.[2070] The petitioners submitted their claims to the Trademark Trial and Appeal Board (hereafter 'the TTAB') in 2011.[2071] The claims of Blackhorse and her *amici curiae* were the same with the ones in Harjo's petition.[2072] They, just like Harjo, claimed the cancelation of the same disparaging trademarks regarding Section 2(a) of the Lanham Act of 1946.[2073]

Section 2(a) of the Lanham Act of 1946,[2074] or the so-called disparagement clause, stipulates that a mark that is capable of distinguishing the good and services of an enterprise from those of others cannot be refused registration unless it '[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons,

[2067] *Pro-Football, Inc. v. Blackhorse*, 112 F. Sup3d 439; 2015 U.S. Dist. LEXIS 90091, 1; 115 U.S.P.Q.2D (BNA) 1524, 1530.
[2068] 'Pro-Football, Inc. v. Blackhorse' (n 2055).
[2069] *Blackhorse v. Pro-Football, Inc.* 2011 TTAB Lexis 77, 1.
[2070] Ibid.
[2071] Ibid.
[2072] Ibid.
[2073] Ibid.
[2074] The Trademark Act of 1946 § 2(a), 15 U.S.C. §1051.

living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute (…).'[2075]

As to assess whether a mark is disparaging, the TTAB is required to take a two-step test.[2076] The first step involves identifying what the mark in question stands for in the society and in commerce.[2077] This step not only requires construing the official meaning of the mark by relying on dictionary entries, but it also necessitates the exposure of unofficial meanings imputed in the mark, by taking into consideration the following: The relationship of the mark with other elements therein, the marks' relation to the goods and services that will be commercialized under the mark, and finally, the mark's relationship with the general commercial use of the mark in the marketplace.[2078] If the mark is found to be associable with 'identifiable persons, institutions, beliefs or national symbols'[2079] at the end of the first step, then the TTAB shall pursue with the second step of the test. This involves the examination of whether the mark would be offensive, at least a for a significant fragment, of the target group.[2080]

In accordance with these rules, the TTAB conducted research in terms of comprehending whether the message that the word 'redskins' and the portrayal of the Native-American within the trademark in question are disparaging for the Native-American community. The dictionary search of the word revealed that 'redskin(s)' was offensive or slang.[2081] The TTAB also looked at the media coverages and requested opinion letters from experts.[2082] It also took into account the opinions of Native-American individuals and groups.[2083] Based on the evidence extracted from

[2075] Ibid.
[2076] Trademark Manual of Examining Procedure of 2017 (U.S.), Sec. 1203.03(b)(i).
[2077] Ibid.
[2078] Ibid.
[2079] Ibid.
[2080] Ibid.
[2081] *Blackhorse v. Pro-Football, Inc.,* 2014 TTAB Lexis 231, 133; 111 U.S.P.Q.2D (BNA) 1080, 1092-1093.
[2082] Ibid, 1093.
[2083] Ibid, 1095-1104.

such a variety of sources, the TTAB concluded that 'redskin(s)' was a racially-charged word used to address the skin color of Native-Americans, a racial epithet often used to degrade Native people, and a highly offensive slur which had been protested many times by the ones who were referred to as such.[2084]

Pro-Football, Inc. denied the allegations of Blackhorse and her *amici curiae*, principally, by asserting that the trademarks in question have gained 'a strong secondary meaning'[2085] which identifies the entertainment services provided by the football club, due to their consistent use of the mark in their commercial activities and advertising.[2086] They further asserted that the petitioners have failed to substantiate how the use of the trademarks by the football club had damaged and can prevail to damage the Native-American community.[2087] Last but not least, they claimed that the wording of the disparagement clause was 'unconstitutionally overbroad,'[2088] hence, they claimed that the clause was 'unconstitutionally void for vagueness.'[2089]

The TTAB rejected the points made by the defendant, while also emphasizing that the PTO does not have the authority to decide on the constitutionality of Section 2(a) of the Lanham Act of 1946.[2090] The TTAB held that 'redskin(s)' comprise a racial slur that originated in the 1960s in the American society to refer to Native-Americans.[2091] Considering the evidence collected from various sources, the TTAB stated that the term was found highly offensive by the Native-American tribes across the United States and the message conveyed by the trademarks are offensive for 'a substantive composite, which not need to be majority, of Native-Americans, at the times of the

[2084] Ibid.
[2085] Ibid.
[2086] Ibid, 1830-1831.
[2087] Ibid, 1832.
[2088] Ibid, 1833.
[2089] Ibid.
[2090] Ibid, 1832-1833.
[2091] Ibid, 1111.

registrations.'[2092] The TTAB also responded to the defendant's secondary meaning defense and stated that the argument was not found convincing, especially given that such secondary meaning had not eradicated the ethnic connotations embedded in 'redskin(s)'.[2093] Therefore, the TTAB granted the petitioners' claims and decided on the cancellation of the disparaging trademarks subject to the dispute.[2094]

This decision of the TTBA was contested by Pro-Football, Inc. before the District Court for two sets of cross-motions: The constitutionality of the so-called disparagement clause of the Lanham Act of 1946, and the legality of the TTAB's order to cancel the trademarks in question based on the disparagement clause.[2095] In respect to the first issue, the District Court denied the plaintiff's claims, by holding that the disparagement clause of the Lanham Act of 1946 does not implicate the free speech clauses of the First Amendment of the U.S. Constitution; besides, the Court asserted that trademark registration was Government speech, hence, exempted from the First Amendment scrutiny.[2096] As to the second issue, the Court held that the wide range of evidence collected by the TTAB reveals that 'The Redskins' and its variations bring disrepute to a substantive composite of the Native-American community.[2097] Hence, the Court denied the plaintiff's claim for the overturning of the TTAB's order of cancellation of the trademarks in question, and ruled in favor of Blackhorse and her *amici curiae*.[2098]

Nevertheless, the legacy of the *Pro-Football, Inc. v. Blackhorse*, hence the victory of Native-Americans against the interplay of the Enlightenment ideology and the law, short-lived due to

[2092] Ibid, 1110.
[2093] Ibid.
[2094] Ibid, 1114.
[2095] *Pro-Football, Inc. v. Blackhorse,* 112 F. Sup3d 439, *439; 2015 U.S. Dist. LEXIS 90091, 1; 115 U.S.P.Q.2D (BNA) 1524, 1528.
[2096] Ibid, 1531.
[2097] Ibid, 1532.
[2098] Ibid, 1558.

another landmark trademark case: *Matal v. Tam*. The latter case not only reconstructed the American trademark doctrine – and especially case law regarding the disparagement clause of the Lanham Act of 1946, but it also deprived racialized minorities of the United States of the mere legal mechanism to contest such abuses of corporate power and the defamation of racialized communal identities by means of trademark law.

4.3.2.2. Matal v. Tam

This case, which was brought before the U.S. Supreme Court, concerned a legal dispute stemmed from the rejection of Simon Tam's trademark application for the registration of the phrase 'The Slants' by the PTO.[2099] Tam is the lead singer of the music band, The Slants.[2100] He, just like the other members of the band, is an American citizen of Asian origin.[2101] Tam and the other members of the band have chosen the word 'slants', which is a racial slur socially constructed to address Asian-Americans,[2102] to name their music band, in principle, to stand against the stigmatization of the Asian community.[2103] They claimed that their use of 'The Slants' as their band name would 'reclaim'[2104] the word from the ones who racialize the Asian-American community, to help 'drain its denigrating force,'[2105] thus, to empower not only the members of the band, but the Asian-American community at large.[2106]

In various occasions, Tam mentioned that The Slants engages in the collective efforts to combat racism in the American society by using their music, especially integrating this racial slur into the titles and lyrics of their songs.[2107] In fact, during the court proceedings at the first instance,

[2099] *Matal v. Tam*, 137 S. Ct. 1744, 1751.
[2100] Ibid.
[2101] Ibid.
[2102] Ibid.
[2103] Ibid, 1754,
[2104] Ibid, 1751.
[2105] Ibid.
[2106] Ibid.
[2107] *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), 1331-1332.

Tam stated that The Slants have previously released albums entitled 'Yellow Album' and 'Slanted Eyes Slanted Hearts', which had drawn upon 'childhood slurs and mocking nursery rhymes.'[2108] In this context, Tam filed an application to the PTO in 2015 to register their band name as a Federal trademark, which was expected to provide the band with the positive and defensive legal protection at the Federal level while marketing their music.[2109] Nevertheless, Tam's application was found offensive for 'a composite part'[2110] of the Asian-American community, considering that 'a long history of being used to deride and mock a physical feature.'[2111] Thus, Tam's registration application was rejected by the PTO in respect to Section 2(a) of the Lanham Act of 1946.[2112]

Before reaching to this conclusion, the PTO conducted research on the socially constructed meanings of 'slant' by searching the word on various dictionaries and by analyzing the news related the band's history.[2113] The latter revealed that the band's name was found pejorative by many bloggers and commentators, and that the band's performances were canceled on several occasions due to the general public opinion on their use of a racial slur to name their band.[2114] Consequently, the PTO decided that the mark was offensive and could not be registered as a Federal trademark.[2115]

The PTO's decision was contested by Tam at the PTO level. Given that the PTO's TTAB did not overturn the trademark examiner's decision,[2116] Tam filed a lawsuit at the Federal Court in 2015. The Government also joined in the Federal case and submitted a petition *certiorari* to question whether the so-called disparagement clause of the Lanham Act of 1946 was 'facially

[2108] Ibid, *Matal v. Tam*, 137 S. Ct. 1744, 1754.
[2109] Ibid, 1752.
[2110] Ibid, 1754.
[2111] *In re Tam* 808 F.3d 1321 (Fed. Cir. 2015), 1331.
[2112] *Matal v. Tam*, 137 S. Ct. 1744, 1754.
[2113] Ibid.
[2114] Ibid, 1754.
[2115] Ibid.
[2116] Ibid.

invalid'[2117] under the free speech clauses of the First Amendment.[2118] Proceedings before the Federal Court ended with the majority of the *en banc* Federal Circuit deciding that the disparagement clause was facially unconstitutional under the free speech clause of the First Amendment, since it generated viewpoint-based discrimination.[2119]

Due to the Government's petition and the lack of clarification of the issue at the Federal level, the case was brought before the U.S. Supreme Court, where the constitutionality of the disparagement clause of the Lanham Act of 1946 was opened to question in order to avoid 'premature adjudication of constitutional questions.'[2120] The Court, in response to the Government's claims, clarified that the Government speech, according to the case law, is exempted from scrutiny under the First Amendment's fee speech clauses.[2121] However, the Court also crystallized that trademarks neither constitute Government speech nor exempted from such Constitutional scrutiny.[2122] Although the Court admitted that trademarks shall be acknowledged as private speech and comply with the First Amendment,[2123] it ruled that the disparagement clause violated the free speech clauses of the First Amendment.[2124]

Not only the final decision of the Supreme Court, but also its justification sheds light upon American judiciary's approach to the communal identities of historically marginalized people, especially when it comes to balancing the interests of the majority and the racialized minorities of the predominantly White American society. While assessing the interests involved in the protection of free speech and the disparagement clause, the Supreme Court held that preventing

[2117] Ibid, 1755.
[2118] Ibid.
[2119] 'Matal v. Tam' (*Columbia University: Global Freedom of Expression*) <https://globalfreedomofexpression.columbia.edu/cases/matal-v-tam/> accessed 4 October 2021.
[2120] *Matal v. Tam*, 137 S. Ct. 1744, 1755.
[2121] Ibid, 1757.
[2122] Ibid.
[2123] Ibid, 1760.
[2124] Ibid, 1765.

the underrepresented groups from being subject to pejorative and degrading (private or commercial) speech fails to justify the existence of 'substantial interest' to restrict free speech.[2125] Thus, the Court gave primacy to the interests of the majority over those of the racialized minorities, in the following words:

> 'Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."'[2126]

Additionally, and in reference to the interplay of race and trademark law, the Court held that:

> 'There is also a deeper problem with the argument that commercial speech may be cleansed of any expression likely to cause offense. The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear, as this case illustrates. If affixing the commercial label permits the suppression of any speech that may lead to political or social "volatility," free speech would be endangered.'[2127]

Based on the above, the Supreme Court's decision regarding the unconstitutionality of the disparagement clause can be labelled as a judicial effort to maintain the status quo in the American society – even though it seems to be in the favor of the Asian-American music band, The Slants. In fact, the *Matal* case offers a fresh angle to Derrick Bell, Jr.'s interest-convergence dilemma. In this frame, Anjali Vats elaborates on the outcome of this case and she asserts that although the Supreme Court's decision was a victory for Tam and his band, it was far from comprising an achievement on behalf of all the historically marginalized and racialized groups.[2128] It was not the color-blind approach of the Supreme Court, or of the American judiciary in general, that Tam has

[2125] Ibid, 1764-1765.
[2126] Ibid, 1764.
[2127] Ibid.
[2128] Vats (n 33) 120–124.

contested.[2129] On the contrary, Tam acted in accordance with the 'White male consumer gaze' of the American trademark doctrine.[2130]

Indeed, in his petition to the Federal Court, Tam evoked the origins of the disparagement clause and asserted that the clause had not been addressed to provide legal protection to racial and ethnic minorities against racism – but to protect the capital investment in the integrity of a trademark, hence, to protect the corporate body.[2131] It can be argued that, with this case, Tam reclaimed the inherent Whiteness of the disparagement clause and echoed the master narratives of the American trademark law, rather than reclaiming 'slants' whilst introducing an alternative and race-conscious gaze to trademark law. In the same vein, Tam's interest in the registration of a racial slur, though never clashed, converged with those of the politically and economically dominant segments of the society.

The impact of the *Matal* case is not limited to the Asian-American racial discourse. Indeed, as emphasized by Vats, Tam's proceeding of the case has caused interracial conflict between Asian-Americans and Native-Americans.[2132] As explained earlier, the disparagement clause of the Lanham Act of 1946, despite its White origins, was the only legal basis for the very limited gains of Native-Americans within the American trademark doctrine. Nevertheless, the unconstitutionality and the invalidity of the clause eradicated Native-Americans' victory against the Washington Redskins. In brief, the 'empowerment' of The Slants by 'reclaiming' this racial slur stripped off the American trademark doctrine from the mere legal mechanism to combat against racially insensitive and offensive trademarks.

[2129] Ibid.
[2130] Ibid, 113.
[2131] Ibid, 123.
[2132] Ibid, 120.

To conclude this section, Vats' words can be quoted herein: 'Tam reads not as an attempt to *empower* marginalized groups, as the courts and Tam would have us believe, but as a move to force individuals and markets to *self-regulate* racism in the context of trademark law.'[2133]

4.4. Conclusion

This chapter was dedicated to the exploration of the third and last dimension of the interplay of race, power, and IP law: The judicial interpretation and application of Western-centric IP norms and principles to non-Western creators and creations, respectively, by the Australian and American judiciary. Building upon the main findings of the previous chapters, the chapter asserted that the inherent Western-centrism and the racialized power structures ingrained in the face-neutral IP regimes, which serve to prioritize and consolidate the dominance of the Western (European) and/or White aesthetic values, continue to disadvantage indigenous peoples and racialized minorities. Thus, the chapter aspired to illuminate the legacy of the economic, ideological, and political aesthetic values, all of which are deeply-rooted in the medieval English reality,[2134] in the un/conscious or color-blind, yet aesthetically non-neutral, approaches of the Australian and American courts while tackling with legal disputes concerning non-Western modes of creatorship and creativity.

Driven by its agenda, the chapter investigated the interplay of the Western (European) IP norms and principles, which have been constructed by the racially-charged Enlightenment idea(l)s, with non-Western modes of creators and creativity in the Australian and American contexts. In doing so, the chapter focused on two aspects of the Australian and American legal orders: The statutory laws and case law. It unraveled the racial connotations deeply-embedded within the Australian and

[2133] Vats (n 33) 127.
[2134] Please see sub-chapter 2.3. and especially 2.3.1. in Chapter II.

American statutes and court decisions, by tracking the myth of the Romantic author and the criteria derived therefrom back to the British Empire's copyright tradition.

The chapter initiated with a deconstructionist historical analysis of the modern Australian and American copyright traditions. It outlined the travel of the inherently racialized cultural assumptions and values from the British Empire to the colonial and post-colonial laws of the Commonwealth of Australia and the United States. While narrating the history of copyright legislation in these jurisdictions, the chapter also pointed at the role that the law played marginalizing indigenous peoples and racialized minorities.

The synopsis of the genesis and evolution of a copyright discourse in the Australian context revealed that the colonization of the Australian territories succeeds the passing of the first modern copyright statute in the United Kingdom, namely the Statute of Anne of 1710. Thus, the Australian copyright history did not experience the *copy-right* phase.[2135] Instead, the journey of copyright law in the Australian historical and legal context initiated with the acknowledgement of copyright already as an exclusive authorial right, which was born out of the myth of the Romantic author.[2136] This was, principally, the outcome of colonialism and its restriction of the local governments' legislative sovereignty, hence, the transplant of the imperial copyright laws into the colonial legal domains.[2137]

Whereas Australian copyright scholars object to the acknowledgment of Australian legal regime as a passive recipient of the imperial copyright laws,[2138] they agree on the point that Australia, among all the colonies of the United Kingdom, constitutes a unique precedent, mainly for two reasons: First, colonial Australia became familiar with the notion of copyright because of

[2135] Please see section 4.2.1. in the text.
[2136] Ibid.
[2137] Ibid.
[2138] Burrell (n 38) 240; Bond (n 38) 379.

the imperial interests over the colonial territories. As a result, not only the imperial copyright norms and principles were infused into the Australian reality, but also the British cultural assumptions and values that are in and of themselves racially-charged. Thus, the normative framework created by the British 'civilization' has become the determinant of intellectual creations that are worthy of legal protection in the Australian legal domain.[2139] Second, neither the pre-Federation colonial governments nor the post-Federation Parliament were eager to create a legal regime tailored to the local conditions.[2140] Thus, let alone departing from the imperial strategy or the imperial laws, the Australian copyright tradition closely followed the British copyright tradition and evolved according to the copyright strategy of the United Kingdom.[2141] Therefore, the Commonwealth of Australia inherited an inherently White copyright tradition, and it continued to build the Australian creatorship and creativity discourse on such White structures.

The genesis and evolution of a copyright doctrine in the American context followed a rather different path and has been through different phases compared to its Australian counterpart. Colonial America had witnessed the adoption of the British *copy-right* system, first, as a privilege bestowed upon printers and publishers; then, this system transformed into an author-centered privilege, due to the influence of the Statute of Anne of 1710 on American laws.[2142] With the latter, the notion of the Romantic author and the appraisal of his sole genius were integrated in the American legal reality. Nevertheless, the impact of the cultural hierarchies and valorization schemes forged by the British Empire have extended beyond the colonial context – and well into the post-independence American States.[2143] The main catalyzer of this was the legal transplantation

[2139] Ibid.
[2140] Ibid.
[2141] Ibid.
[2142] Please see section 4.2.2. in the text.
[2143] Ibid.

of the Statute of Anne of 1710 in the post-independence American States' legal domain.[2144] Such a maneuver not only consolidated the British copyright doctrine as the building block or linchpin of the American copyright doctrine, but it also set the Romantic author as the benchmark for legal protection under the American copyright laws.

Another commonality of the Australian and American legal regimes is that both countries, once consolidated their Whiteness, created their own 'faces at the bottom of the well.'[2145] Though at different times, both countries had introduced and enforced race-oriented laws addressed to deprive indigenous peoples and racialized minorities from legal autonomy, legal rights and liberties, including those of copyright and the freedom of contract.[2146] Such practices not only denied indigenous people and racialized minorities recognition as authors, the right ownership, and the opportunity to license or transfer IPRs; but they also raised questions about the originality as well as social and legal value of Aboriginal and African-American creators' works.[2147]

Subsequently, the chapter moved to the investigation of Australian and American case law, in order to reveal the interaction of such culturally- and temporally-specific Western (European) norms, principles, and aesthetic values with non-Western modes of creators and creations.

The case study and the case law extracted from the Australian jurisprudence demonstrated the early beginnings and the gradual evolution of an Aboriginal copyright discourse in the Australian legal domain – which transformed from an absolute exclusion to a progressive, yet limited, inclusion. In this frame, the study of the 'One-Dollar Banknote' case exposed the initial racially-motived stance of Australian copyright law that kept Aboriginal creators at a distance.[2148] Promoted

[2144] Ibid.
[2145] By analogy with: Bell, Jr., *Faces at the Bottom of the Well: The Permanence of Racism* (n 265).
[2146] Please see sections 4.2.1. and 4.2.2. in the text.
[2147] Ibid.
[2148] Please see section 4.3.1.1. in the text.

by the assimilationist policies of the 1930s, the Australian copyright regime operated as an outreach of the general guardianship schemes of the Commonwealth and denied copyright ownership to Aboriginal individuals, mainly based on the Western (European) racial thought and the racially-driven prejudices overhauling post-Federation Australia.[2149] Even though these racially-driven assimilationist policies and laws were revoked in the mid-1900s, the chapter illustrated with the 'One-Dollar Banknote' case study that the eradication of racial connotations from the law in books did not prevent the continuum of these practices in the law in action.[2150]

Indeed, the Australian case law demonstrated the judiciary's gradual, yet limited, recognition of Aboriginal copyright ownership and legal claims. Evident from the judgments and as explicitly admitted by the Courts themselves, the Western legal tradition and normative system are not able to accommodate all aspects of the non-Western intellectual creators' copyright-related legal claims.[2151] The Western-centric IP law has hardship especially in acknowledging the customary laws and traditions of indigenous peoples and accepting communal copyright ownership.[2152]

Following up with the Australian case law, the *Suntrust Bank* case introduced a fresh perspective to the notion of 'originality', which was authenticated by single authorship and the sole genius of the Western (European) – or, White – Romantic author. This case demonstrated that American judiciary's approach to derivative works and fair use defense tend to sacralize the original work and to consolidate the 'untouchability' of original works, rather than their legal or fair use by third parties to promote culture by introducing fresh and alternative perspectives to the American cultural space.[2153] Whereas the District Court's judgment was reversed by the U.S.

[2149] Ibid.
[2150] Ibid.
[2151] Please see sections 4.3.1.2. and 4.3.1.3. in the text.
[2152] Ibid.
[2153] Please see section 4.3.1.4. in the text.

Supreme Court, the court decision at the first instance was a product of racial biases and it intended to hinder the alternative narratives and contributions of African-American creators of the United States to the American culture.[2154] Besides, the apex court's decision reversed only the lower court's decision; however, the same may not be claimed for the racially-charged mindset of the judge who decided on the case or the possible distress experienced by Alice Randall during the trial and after the Court's judgment.

Last but not least, the trademark cases extracted from the American jurisprudence complemented the deductions made from the copyright cases, especially given the similarity between the registrable insignia and the 'idea and expression' dichotomy. As illustrated by these cases, expressions that carry along insensitive or even offensive racial messages may enjoy IP protection, even if they misappropriate or bring disrepute to racialized minorities' communal identities and culture.[2155]

In sum, all the cases studied within this chapter crystallized the fact that law does not operate in a vacuum. In the hands of racially biased and prejudiced decision-makers, law can turn into a tool to consolidate the status quo or to sacralize the 'Whiteness as [intellectual] property.'[2156] Referring back to Robert A. Williams, Jr.'s metaphor, it can be asserted that not only case law, but the law as a holistic system can transform into 'a loaded weapon' aimed at the communal identities, customary and statutory rights of racialized minorities and indigenous peoples.

The chapter concludes that neither the Australian nor the American legislative and judiciary can be absolved from employing racial thought. Neither they can be absolved from recalling the race relations, racialized cultural hierarchies, and the historical patterns of racial subordination

[2154] Ibid.
[2155] Please see sections 4.3.2.1. and 4.3.2.2. in the text.
[2156] By analogy with: Harris, 'Whiteness as Property' (n 264).

introduced by Western (European) modernity, especially while justifying their legal decisions. If not their statutory laws, then case law developed in both countries reflect the socially constructed racial identities, pejorative stereotypes, and racial biases of Western (European) modernity, and the inherently White aesthetic values aimed at prioritizing the Western (European) values and dominance. Through their *jurisgenerative* practices, both countries continue to produce, consolidate, and convey similar racially-motived messages. In fact, this attitude is evident even in the court proceedings which ended in favor of the racialized minorities and indigenous peoples – just like the U.S. Supreme Court's decision in the *Ex parte Crow Dog*[2157] case.[2158]

Therefore, one cannot help but hesitate to read such court decisions as the judicial victories of the racialized minorities and indigenous peoples. Instead, these judgments can be read, perhaps, as bullets that continue to load the weapon of the institutionally ingrained racial thought.

On that note, both this chapter and the substantive chapters of this dissertation come to an end. The next chapter, entitled 'Conclusion', provides a general overview of the dissertation. It offers a comprehensive summary of each chapter and presents the main findings of the dissertation. Whilst this chapter had an overarching pessimistic tone, the next chapter provides some normative resolutions to spread hope and positivity (to a certain extent, though).

[2157] *Ex parte Crow Dog*, 109. U.S. 556 (1883).

[2158] *Ex Parte Crow Dog* is yet another landmark case regarding the rights of Native American people, which has been critically examined within Williams' book. What distinguishes the U.S. Supreme Court decision in this case is the blatantly racist language adopted by the Court while deciding in favor of the Native-American tribe concerned. Indeed, the Court has articulated Native-Americans as 'a dependent community who were in the stage of pupilage, advancing from condition of *a savage tribe* of a people (…) to become a self-supporting and self-governing society.' In fact, it has been their 'uncivilized' nature and 'savagery' that prevented them from being subject to the laws and legal order of a 'superior (…) race' – which ended up the Court upholding the right to self-determination of Native-American people to a certain extend in their reserved territories. Williams, Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (n 570) 77–79. Emphasis added.

Conclusion

In 1998, Rosemary J. Coombe published her renowned book, entitled *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law*.[2159] In the introductory remarks of her publication, Coombe indicates that the interaction of culture and IP law (as well as its consequences on the construction of social meaning and communal identities) has come to the attention of the legal community only very recently – in the 1980s.[2160] Coombe adds that this 'new' strand of literature has been developing due to the scholarly efforts and by the works of 'younger, female, and minority scholars sensitive to the workings of power and the effects of subjection and subjugation that pervade even the most facially neutral areas of legal doctrine.'[2161]

Even though more than two decades have passed since the first publication of Coombe's book, her statements therein pertain to contemporary legal scholarship. Postmodernist reviews of law and critical legal scholarship remain to be relatively new trends in the legal literature. Besides, they occasionally become the subjects of modernist critique, or they even face backlash.[2162] Despite the challenges they have to tackle with, postmodern stances in law prevail to vocal the historically unheard or silenced voices of marginalized groups, including but not limited to those of women, LGBTQI+, and racialized minorities. Besides, this critical strand of legal scholarship still vastly relies on the collective and scholarly efforts of leftist, feminist, queer, and minority scholars.

Being authored by, in Coombe's words, a 'younger, female, (…) [scholar] sensitive to the workings of power,'[2163] this dissertation aspired to contribute to the postmodern strand of legal

[2159] Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (n 28).
[2160] Ibid, 6.
[2161] Ibid, 7.
[2162] Schanck (n 21) 2510–2511.
[2163] Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (n 28) 7.

scholarship, by focusing on the power dynamics that rule the realm of IP. In fact, the dissertation took Coombe's statement one step further and argued that the social and political influences over IP law are not restricted to hegemony. There exist other external influences over the IP domain that derive from patriarchy and especially from the racial thinking invented by Western (European) modernity and the Enlightenment ideology. Though the struggle of IP law with patriarchy is briefly explained and exemplified,[2164] it has been made clear that this dissertation is dedicated to the investigation of the ostensibly objective facet of IP law from a race-oriented viewpoint. In this frame, the dissertation asserted that despite the taken-for-granted neutrality of its normative frameworks, IP doctrine is immune neither to hegemony nor to racial ideology, racialized power struggles, or to the race-based hierarchical valorization schemes. Thus, the dissertation drew attention to the latent racial baselines of IP law; it intended to expose and outline the interplay of race, power, and IP law. It aimed to unearth the race-based thinking and the racial information that underpins – and continues to haunt – the contemporary international and national copyright and trademark regimes.[2165]

In line with this goal, the dissertation formulated the following hypothesis: Law is not an objective and value-neutral enterprise, and IP law is not an exception. IP law takes the Western (European) readings of 'culture' as a reference point; thus, it adopts Western (European) modes of creatorship and creativity as benchmarks to establish a global(ized) legal framework. Despite its ostensibly objective and neutral construct, IP law secures the materialistic interests of and provides legal protection to Western (European) stakeholders, while subordinating those of the non-Western – especially of racialized minorities and indigenous peoples.

[2164] Please see sub-chapter 1.5. in Chapter I.
[2165] Please see the 'Introduction'.

As a preliminary task to substantiate these statements, the dissertation questioned when, why, and how contemporary international IP law transformed into a Western-centric legal project that is defined with and that serves to the cultural, economic, and political agendas of the Global North – often at the expense of the Global South.[2166] To this end, the dissertation adopted CRT as a postmodern stance and a race-conscious lens for investigating the barely chartered, yet heavily racialized, terrain of IP law.

In broad terms, CRT is an American legal theory which originated from a series of diversity movements that had occurred in the 1960s and influenced the universities and other public spaces in the United States. Being centered around identity politics and claims of equality, the intellectual outputs of such political activism were theorized in the late 1980s by legal scholars of color, who were committed to combatting against cultural and institutional racism. Eventually, CRT was consolidated into a postmodern legal theory and found itself a place within American jurisprudence. Since then, CRT doctrine and scholarship promote a true and substantive racial equality – also by extending to legal disciplines other than American constitutional law.[2167] In fact, IP law has witnessed the most recent outgrowth of CRT as a legal movement organized under the 'Race + IP'[2168] or 'Critical Race IP'[2169] cachet.[2170]

CTR constituted an important asset for this dissertation, due to the critical and race-conscious prism that it provides to assess the face-neutral concepts, normative legal frameworks, and law per se. Yet, CRT not only equips one with a race-oriented perspective and political stance, but it also

[2166] Please see the parts entitled 'Hypothesis and Research Questions' and 'Aims and Objectives' in the 'Introduction'.
[2167] Please see Chapter I in general.
[2168] 'Race + IP' (n 472).
[2169] Vats and Keller, 'Critical Race IP' (n 11).
[2170] Please see sub-chapter 1.5. in Chapter I.

offers a rich postmodern vocabulary and various race-related theses to challenge the modernist conceptions and claims of law.

In this sense, CRT's rejection of ahistoricism and the value it imputes in the deconstructionist reading of the law and legal history guided the dissertation in its quest for an honest and a more realistic narrative on IP law – a narrative that is not isolated from the burdens of the past and that is not tamed for the sake of achieving a formal, yet superficial, language. Therefore, the dissertation presumed and argued that neither law per se nor contemporary IP law are independent from their historical origins, the socio-economic and political realities of the time they were enacted, and from the materialistic interests of the dominant economic and political actors at the time.[2171] In fact, the dissertation did not restrict itself only with the history of IP law, but it also glanced at the origins and development of international law, mainly, to construe the proliferation of the ideas and legal concepts such as indigeneity, peoplehood, and indigenous peoples, by positing the origins of these concepts in a greater socio-historical and political context.[2172]

It was not only the deconstructionist reading of history that instructed the dissertation. The social constructionism tenet of CRT has been a companion to the former while identifying and addressing the common societal information and social values embedded in the long-established and supposedly value-neutral IP concepts, norms, and principles. By utilizing social constructionism, the dissertation searched for and unearthed the race-based opinions, racial biases and prejudices, and the racial connotations that underpin the fundamental IP concepts such as authorship, folklore, intellectual work, TCEs, and TK, as well as the normative standards including but not limited to the originality and fixation criteria, the 'idea and expression' dichotomy of

[2171] Please see Chapter II.
[2172] Please see Chapter III.

copyright, and the insignia eligible for trademark registration.[2173] Hence, the dissertation explained and demonstrated how the construction of such legal concepts and norms by the economically- and politically-dominant segments of the society and of the global community contoured the legal prospects of Western and non-Western intellectual creations and modes of creativity.[2174]

Last, but not least, material determinism and the 'interest-convergence dilemma'[2175] theses of CRT not only supported the claims made right above, but they also underscored the message that the dissertation aspired to convey: The existing legal frameworks of IP law have derived from and are reflections of the materialistic interests of the ones who have held and continue to have the economic and political power.

Although the main tenets and core arguments of CRT have emerged from and shaped according to the American economic, historical, legal, political, and social realities; CRT offers a critical ideology and method that can be employed to investigate jurisdictions other than the United States. As explained within the dissertation, CRT is being applied to the European historical and legal context by a group of European legal scholars.[2176] Still, the United States remained one of the jurisdictions of this dissertation, while two other jurisdictions, namely the United Kingdom and the Commonwealth of Australia, were also analyzed through the race-conscious lens of CRT. The choice of these jurisdictions relied, among many reasons, on their historiographies tied with colonialism. Thus, it was presumed that the study of these jurisdictions could give a sense of historical continuum to track and outline the racial imprints of IP law carried along from the colonial times until today, partially with (colonial) legal transplants and partially with international

[2173] Ibid.
[2174] Ibid.
[2175] Bell, Jr., 'Brown v. Board of Education and the Interest-Convergence Dilemma' (n 296).
[2176] Please see the 'Introduction' and Chapter I.

IP law.[2177] Within these geographical and temporal parameters, the dissertation concentrated, mainly, on the international and national copyright regimes. It glanced at those of trademark, only when relevant and necessary.[2178]

In this context, the dissertation initiated with a critical and race-oriented historical account of the foundations of IP law. In doing so, it aimed to unfold the racial layers and to expose the racial constituents of the contemporary IP law as well as its interplay with power. For these purposes, the dissertation delved into to the genesis of the idea of 'intellectual property' and took a glance at the power dynamics enshrined in the core of IP. Thus, the dissertation started with the assessment of the social, political, and legal order in the United Kingdom since it is *the* country to adopt the first modern copyright law on which the international copyright regime and many national regimes have been modelled – including those of the United States and the Commonwealth of Australia.[2179]

Such an inquiry revealed the fact that since its early beginnings, copyright, or *copy-right* in this case, was intertwined with and was an embodiment of authority, economic monopoly, and political power. *Copy-right* had proliferated as a censorship mechanism disguised as the royal prerogative to print books. These printing privileges were granted by the Monarch to a select group of printers, later known as the Stationers' Company, in order to hinder the dissemination of dissenting ideas and to suppress the opposing voices. Hence, *copy-right* served to reinforce the authority of the Crown and the Catholic Church, and it was crucial to maintain the authority and the political power of the ruling-elite.[2180]

[2177] Please see the 'Introduction'.
[2178] Ibid.
[2179] See e.g., Bently, 'Introduction to Part I: The History of Copyright' (n 34); Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant' (n 40); Ailwood and Sainsbury, 'The Imperial Effect: Literary Copyright Law in Colonial Australia' (n 38).
[2180] Please see Chapter II.

Nevertheless, copyright did not remain as *copy-right* – or, in other words, as the royal apparatus in which the ruling-elite's hegemonic power was embodied. With the enactment of the British Statute of Anne of 1710,[2181] copyright took the form of an authorial right. With the commencement of the Enlightenment era and due to the proliferation of scientific and cultural racisms, copyright too gained a racial dimension. The racialization of copyright was gradual and manifold. To begin with, considering the colonial practices of the British Empire, copyright gradually evolved into an imperial legal mechanism to protect the economic interests of the Western (European) imperial power(s) in the colonial territories. In fact, British copyright laws were tailored to respond merely to the materialistic needs and expectations of the British authors or the authors who first published their works in Great Britain. Though these laws were premised on the disparate treatment of British and non-British authors and market actors, the jurisdiction of British copyright laws extended in parallel to the borders of the Empire. In doing so, such laws not only secured legal protection to the imperial interests in the colonial territories, but also created a cultural hierarchy among British and colonial authors and market actors.[2182]

Second, regardless of their beneficiaries, imperial copyright laws were integrated into the legal systems of the colonial territories via the colonial machinery – or, in other words, the colonial legal transplants. Although these laws were not a match to the intellectual scene in the colonial territories and the IP-related needs and expectations of the local authors of the colonies, legal transplants as such introduced a Western-centric legal institution to the colonies and implemented various legal notions into the colonies' domestic laws. In fact, these legal transplants had a long-lasting impact

[2181] An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned of 1710, 8 Anne, Ch. 19
[2182] Ibid.

on the colonies. Even the Decolonization Movement could not wash off the colonial IP laws from the legal orders of the former colonies.[2183]

Third, the international IP standards and regimes were established by the Western (European) imperial powers amongst themselves and according to their own agenda. Subsequently, such regimes were imposed on non-Western countries, first, by means of colonialism, and then, through the maneuvers of international law and diplomacy – such as complex rules of treaty accession, forum-shifting, path dependency, and the enforcement mechanisms based on trade sanctions. As explained in detail within the dissertation, the major international IP treaties, namely the Paris and Berne Conventions of 1883 and 1886, were negotiated and adopted at the peak of the colonial times – and in the same time span with the Berlin Conference of 1884-1885. Due to this, the colonial territories did not have independent diplomatic representation at the international IP negotiations at the time, but they were subjected to the decision of their Mother Country. As a result, these Western-centric IP regimes were enshrined in the legal order of the colonies, though such regimes had overlooked their IP-related needs and expectations. Despite the Decolonization Movement and the emergence of newly found nation-states, the IP regimes established by the WIPO-administered Paris and Berne Conventions remained within the domestic laws of these States, mainly because of the sophisticated treaty accession rules. Eventually, the WTO-administered TRIPs Agreement of 1994 consolidated both treaties within a single text and imposed upon the developing countries – not only as a whole, but also as a maximalist global IP regime, which was set according to the IP needs and current laws of developed countries. The TRIPs Agreement only further entrenched the gap between the developed and developing countries; it reinforced a new racialized political divide: the Global North and the Global South.[2184]

[2183] Ibid.
[2184] Ibid.

Last, considering that IP law originated as a Western (European) legal project; the face-neutral concepts, norms, and principles of contemporary international IP law have been premised upon the Western (European) readings of culture and creativity. However, these Western-centric assumptions that had been infused in the *globalized* IP regimes were innately racialized as well. Given the fact that they were generated by the racial thinking of the Enlightenment era, these assumptions underscored colonialism, the Western (European) understandings of 'civilization', hence, the notorious 'civilizing' missions of the Western (European) imperial powers. This racially-charged ideology was committed to the Western (European) cultural 'superiority', which ended up creating racialized cultural hierarchies that place the Western (European) culture and modes of creativity at the pinnacle of an evolutionary ladder and deteriorate those of the non-Western.[2185]

Such Western (European) values and prejudices were not only carried along by means of IP law, but they also constituted the baselines of the normative structure of the international IP regimes by contouring the legal prospect of various intellectual creations. In other words, the latent racial baselines of copyright and trademark concepts and norms identified the creations and insignia that are *worth-to-be* protected or can be used by means of IP law. While taking Western (European) values as a yardstick, these regimes, on the one hand, imposed a dichotomous thinking and forged antithetical pairings, such as 'culture v. folklore and/or TK'. On the other hand, they provided legal protection to the former, but deprived the latter from the advantages of IP protection – and allocated them to the Western (European) public domain. Furthermore, the historical degradation of the non-Western insignia within the Western (European) cultural domain and the denial of legal protection to such symbols pave the way to the (mis)use and (mis)appropriation of

[2185] Please see Chapter III.

such non-Western cultural assets often by the Western (European) market actors, even though these uses inflicted cultural damage upon or caused the disparagement of racialized minorities.[2186]

Whereas this chronology of the internationalization of IP law in parallel to colonialism outlined the travel of the Western (European) cultural values and assumptions to contemporary international law, a narrower focus on the diplomatic and legal relationships between the British Empire and its former colonies reveal how these normative values formed and continue to hold the backbone of the modern American and Australian copyright regimes. Indeed, the analysis of the genealogy of American and Australian copyright traditions and modern copyright regimes exposes that the imperial copyright practices, norms, and principles were implemented into these two jurisdictions via (colonial) legal transplantation. Even after the resolution of their colonial ties with the United Kingdom, both countries remained loyal to the British legal tradition and developed their copyright regime in accordance with that of their former Mother Country, chiefly because of the *prestige* of the United Kingdom and its legal system.[2187] These historical and legal anecdotes gain further importance, especially when the American and Australian judiciary engage with legal disputes that require the interpretation and application of such Western (European) values-laden IP norms and principles to the intellectual creations of Black and Aboriginal creators.

Two major facts informed the analysis of American and Australian case law: First, given the absence of any binding international or domestic law addressed to the protection of TK or to prevent the degradation of communal identities by means of IP law, the resolution of legal disputes concerning TK of indigenous people and racialized communal identities are bound by the existing American and Australian IP systems – both of which were inherited from the British Empire. Second, a closer look at the content of American and Australian (colonial) legal transplants showed

[2186] Ibid.
[2187] Please see Chapter IV.

the main factor for the American and Australian copyright systems' inherent Western-centrism or Whiteness: The travel of the myth of the Romantic author, which reflects the image of British and German authors desiring to earn an income from their writings, from the British Empire to the United States and the Commonwealth of Australia.

Thus, the dissertation investigated the interaction of the Romantic author and the eligibility criteria derived from this myth, by analyzing American and Australian case law concerning non-Western modes of creatorship and creations. Such an analysis exposed that it is the Romantic author's Western (European) or White image, its individualism, and its 'sole genius' that denies copyright ownership to the communal beholders of TK in the cases brought by Aboriginal people before the Australian courts. Along the same line, it is the appraisal of the Romantic author's authority that causes the sacralization of original works and the hinderance of the recognition of parodied versions of such works by the American courts. Overall, American and Australian case law demonstrate that after racialized minorities' and indigenous peoples' struggles with their White oppressors and colonizers, they had quite limited gains in the IP realm: The recognition of their works or TK as original. In a similar vein, American trademark case law revealed the fact that even such little gains can be easily rolled back by the courts, especially when the legal rights granted to racialized minorities and indigenous peoples do not converge with White interests. [2188]

On that note, this dissertation achieves its ultimate goals of, first, shedding light upon the ever-lasting racialized power asymmetries that rule the realm of IP, and second, mapping the historical patterns of racial subordination of non-Western creators and creations by means of IP law. It also proves its hypothesis since the main findings of the dissertation confirms that IP law is not comprised of an objective and value-free normative system.

[2188] Please see Chapter IV.

Based on these, the overarching tone of this dissertation can be considered a pessimistic one. Additionally, the dissertation can be subjected to criticism, by claiming that it *depreciates* the UN initiatives such as the Tunis Model Law of 1976, the Model Provisions of 1982, and the Draft Articles on the Protection of TK/TCEs/GRs – all of which are addressed to the inclusion of non-Western modes of creations within the IP *discourse*, rather than within the *conventional legal frameworks*. Though one cannot object to the fact that the dissertation, indeed, raised certain concerns about the aforementioned endeavors; this attitude can be justified by the dissertation's commitment to CRT's vision, which was articulated by Mari Matsuda *et al.* as a 'utopia.'[2189]

Due to this, the dissertation's critical stance toward these international legal instruments and efforts can be best explained in reference to CRT's stance toward the Civil Rights Movement of the 1960s. In the 'Introduction' of one of the canonical texts of CRT scholarship, entitled *Critical Race Theory: The Key Writings That Formed the Movement*,[2190] the editors – who are also the principal figures of the Movement – crystallize their reaction to the Civil Rights Amendments and their outcomes, as follows:

> 'Our *opposition* to traditional civil rights discourse is neither a criticism of the civil rights movement nor an attempt to diminish its significance. On the contrary, (…) we draw much of our inspiration and sense of direction from that courageous, brilliantly conceived, spiritually inspired, and *ultimately transformative* mass action. (…) What we find most amazing about this ideological structure in retrospect is *how very little actual social change* was imagined to be required by the civil rights *revolution*.'[2191]

Likewise, this dissertation by no means disregards the endeavors of the UN and its specialized agencies, especially that of UNESCO and WIPO, to comprehend the IP-related needs and expectations of non-Western States and sub-state groups, especially of indigenous peoples. Per

[2189] Matsuda and others (n 68) 2.
[2190] Crenshaw and others, *Critical Race Theory: The Key Writings That Formed the Movement* (n 62).
[2191] Crenshaw and others, 'Introduction' (n 15) xiv–xvi. Emphasis added; internal quotation marks removed.

contra, it acknowledges and appreciates these institutional efforts that aspire to find normative solutions to this ongoing problem.

Neither it undermines the transformation of international legal forum from an exclusive 'elite's club' to a more democratic platform open to new political actors. Hence, the dissertation is far from criticizing the progress of international (IP) law or the inclusion of the former colonies, indigenous peoples, and other formerly marginalized stakeholders within the global (IP) diplomacy.

Nevertheless, just like CRT scholars' disappointment about how limited the gains of the Civil Rights Movement was, this dissertation is also dissatisfied with how such *major transformations* of international (IP) law paved the way to *such little actual change* in the legal status and especially IPRs ownership of non-Western creators, racialized minorities, and indigenous peoples.

Although being appreciative about the international (IP) forum's inclusion of non-Western political actors 'with no deliberate speed,'[2192] what this dissertation raises a flag about is the *racial element* that underscores and overhauls, for instance, the reasons of the UN and its specialized agencies as well as the Global North *not* to legally recognize and *not* to adopt a *binding* international instrument addressed to protecting folklore and TK under IP law. Similarly, it is the *unconscious, yet overarching, racial thought* ruling the global IP negotiations that is subjected to criticism herein. Again, what is being confronted is the *racial information* produced by such racial thinking and the *racialized cultural hierarchies* that inform and hinder the *conclusion* of the Draft Articles for the Protection of TK/TCEs/GRs. Last but not least, what is questioned herein is not the *ultimate outcome* of the American and Australian judiciary's decisions concerning non-

[2192] In reference to Antonia Eliason's analogy with Derrick Bell, Jr.'s critique of the Supreme Court's decision in *Brown v. Board of Education of Topeka,* 349 U.S. 294 (1955) in Bell, Jr., 'Brown v. Board of Education and the Interest Convergence Dilemma' (n 296); Eliason (n 439).

Western creators and creations, but the *set of rules and principles* they *had to* apply – since the combination of racial thinking, colonialism, 'civilizing' missions, (colonial) legal transplants, and the globalization of inherently Western (European) IP norms and principles did not leave any leeway for *an alternative globalized regime* to emerge in the IP realm – a regime which would (also) center and (equally) reflect the *others'* perspective and cultural values.

Then, perhaps, it would be useful to briefly reflect upon the *utopia*, or the alternative future trajectories of the interplay of race and (IP) law, that the dissertation envisions. By this way, a bridge can be built between what the problem *is* and what the solution *ought to* be – or, at least, could be.

At this point, the dissertation once more turns to CRT scholarship; it evokes Derrick Bell, Jr.'s articulation of 'racial realism.' Aligned with Bell's resolutions, the dissertation holds that '[r]ather than challenging the entire jurisprudential system, (…) [the focus herein] must be much narrower – a challenge to the principle of racial equality.'[2193] Bell points at this principle, mainly, because he believes racial equality is 'not a realistic goal'[2194] as it aims to achieve 'a status unobtainable in a perilously racist America (…).'[2195] Although the dissertation is hesitant to call the global(ized) IP regimes 'racist' and opts for describing them as 'racially-charged' instead, it agrees with Bell in principle. Considering how well-established the IP institutions are, it would not be realistic to expect IP law in general, and copyright and trademark frameworks in particular, to go under a drastic change in near future or to perish completely. Besides, it is definitely not realistic to expect the harm done by colonial practices and 'civilizing' mission to be undone. Nevertheless, there is no reason for not setting much narrower, or more realistic, goals. For instance, there is no actual

[2193] Bell, Jr., 'Racial Realism' (n 83) 302.
[2194] Ibid.
[2195] Ibid.

legal obstacles to de/re-construct the public domain. It is not impossible either, as indicated by Carlos M. Correa, to save folklore and TK from the public domain.[2196] In a similar vein, it is feasible to introduce folklore and TK as new forms of *conventional* IPRs and to uniform the domestic laws of, for instance, the WIPO Member States.

Although law per se would enable the achievement of ideals as such, the success of this process would require economically- and politically-dominant actors to engage in self-criticism and to confront the(ir) own racial thinking, which has been institutionalized in the global (IP) diplomacy. Thus, before asking how IP can be more inclusive and protect the non-Western creative output; it shall be questioned whether the Western (European) ruling-elite can finally see their non-Western counterparts as equals and whether they can give up on their (White) privilege.

Any answer to this question necessitates a more holistic approach than the one IP law can provide – simply because the actual problem herein derives from and belongs to a greater context, and its roots are deeper than those of IP law. Indeed, the patterns of racial subordination that seem to be unique to the realm of IP are yet another cog in the machine. As disclosed within the dissertation, even before the establishment of the international IP regimes, international law was already on a mission to sacralize the Western (European) values and perceptions of the law and legal subjects.[2197] This is not to put to the blame on the Western-centrism and statism of international law and to declare international IP law 'innocent'. On the contrary, this is to assert and to highlight that the law, despite its branches addressed to disparate beneficiaries, is a whole entity that works together – and in accordance with the materially-driven needs and expectations of the dominant, the economically and politically powerful, and of the ruling-elite.

[2196] Carlos M Correa, 'Access to Knowledge: The Case of Indigenous and Traditional Knowledge' in Gaëlle Krikorian and Amy Kapczynski (eds), *Access to Knowledge in the Age of Intellectual Property* (Zone Books 2010) 241–242.
[2197] Please see Chapter II in general.

Even though the feasibility of the ruling-elite to reconsider their (racialized) patterns of legal thinking is presented as a utopia, it shall be crystallized that neither the Global North nor the international organizations are unaware of the racial investment of the law in the Western (European) identity, cultural values, and diplomatic power. A quick glance at the genesis of the modern HRs discourse clearly demonstrates this fact.

Indeed, not only the two World Wars but also the UN itself emerged from a chaos caused by racial hatred and unprecedented HRs violations – all of which were backed by the law and the legal order.[2198] It was because of, in Marek Piechowiak's words, this 'legal lawlessness'[2199] that the UN Charter puts great emphasis on the principles of equality and non-discrimination, as well as the inherent dignity and worth of every human being.[2200] These principles were also underlined within the UDHR of 1948,[2201] the ICCPR[2202] and the ICESCR of 1966.[2203] Aside such general international instruments, other legal texts including but not limited to the Convention on the Abolition of Slavery, the Slave Trade and the Institutions and Practices Similar to Slavery of 1956; the International Convention on the Elimination of Racial Discrimination of 1965, and finally the UNESCO Declaration on Race and Racial Prejudice of 1978 focus on race, and they condemn and combat racism.

In the IP law sphere, there is also a network of international norms and instruments, such as Article 27 of the ICESCR, the Nagoya Protocol of the CBD of 1991, the Doha Declaration to the

[2198] Rhona KM Smith, 'The United Nations', *Textbook on International Human Rights* (7th edn, Oxford University Press 2016) 26–27.
[2199] Marek Piechowiak, 'What Are Human Rights? The Concept of Human Rights and Their Extra-Legal Justifications' in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights* (2nd Edn, Institute for Human Rights, Abo Akademi University 1999) 3.
[2200] The Charter of the United Nations of 1945, Preamble, Art. 1(2); Jerzy Zajadlo, 'Human Dignity and Human Rights' in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights* (2nd edn, Institute for Human Rights, Abo Akademi University 1999) 20–21.
[2201] The Universal Declaration of Human Rights of 1948, Preamble, Arts. 1, 2.
[2202] The International Covenant on Civil and Political Rights of 1966, Art. 10(1).
[2203] The International Covenant on Economic, Social and Cultural Rights of 1966, Art. 13(1).

TRIPs Agreement of 1995, Article 27 of the UNDRIP of 2001, and finally the UNESCO Universal Declaration on Cultural Diversity of 2001 – all of which *have the potential to* recognize cultural and IP-related needs and expectations of the historically marginalized members of the non-Western community. Last but not least, there is already a growing body of literature discussing or promoting the adoption of a HRs approach to IP law.[2204] In this sense, one can argue that *the* solution to eradicate the racial connotations of (IP) law is, perhaps, already out *there*.

Still, from a postmodern perspective, and also given the global context in which the law acted as an apparatus to justify and codify the interests of the dominant political actors; it would be naïve to expect *the* solution to the historical injustices caused by the interplay of race, power, and IP law to come from the existing structures of IP law itself. Therefore, this dissertation admits to the calls of the Critical Race IP Movement to decolonize IP law – but it also strongly argues that this cause cannot be realized unless the dominant legal *mindset* governing the global policy- and law-making processes is, as well, decolonized.

Indeed, having catalogues of HRs, group rights, or even IPRs formulated in positive law, let alone in soft law, is not sufficient to reach a legal order that stands on the equal treatment of the historically and politically dominant and marginalized groups – especially if such norms remain only in the books. Moreover, it is a well-known and widely-accepted fact that the realization of these principles and legal rights, in many respects, relies on the will of the States and the ones who

[2204] See e.g., 'Intellectual Property and Human Rights' (World Intellectual Property Organization (WIPO), 1999) <https://www.wipo.int/edocs/pubdocs/en/intproperty/762/wipo_pub_762.pdf> accessed 19 May 2019; Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' (2003) 5 Minnesota Intellectual Property Review 47; Carpenter (n 977); Peter K Yu, 'Ten Common Questions About Intellectual Property and Human Rights' (2007) 23 Georgia State University Law Review 709; Susan K Sell, 'Everything Old Is New Again: The Development Agenda Then and Now' (2011) 3 The WIPO Journal 17; Jayashree Watal, 'From Punta Del Este to Doha and Beyond: Lessons from the TRIPs Negotiating Processes' (2011) 3 The WIPO Journal 24; Radonjanin (n 1175); Paul LC Torremans, 'Copyright (and Other Intellectual Property Rights) as a Human Right' in Paul LC Torremans (ed), *Intellectual Property and Human Rights* (3rd edn, Kluwer Law International BV 2015).

use the sovereign power of the State.[2205] As Harold Hongju Koh has explained, there may be disparate reasons for the States to respect these principles and to take measures for protecting such rights and liberties.[2206] These reasons may vary from a simple coincidence to self-interest (or, 'the interest-convergence dilemma'[2207], as Bell would call it), rational choice, or rule-legitimacy and political identity.[2208] Yet, Koh argues that a true obedience of the States to international law and legal principles requires the internalization of such normative rules and values by the members of the State at large.[2209] Hence, once again, it comes to asking whether the Global North would and could *deracialize* their thinking and approach to law in general, and IP law in particular.

Thus, this dissertation concludes that it is not (only) the racialized constituents that IP law inherited from the Enlightenment that should be detached from IP law. It is (also) the deemed-to-be raceless, yet inherently White, Western (European) colonial mindset that must be eradicated from the legal thought, international diplomacy, and the global legal order – since such a mindset not only justifies, but also sacralizes 'Whiteness as [intellectual] property.'[2210]

Until then, the realm of IP, quite possibly, will remain to be a stage for the interplay of race, power, and the law. Not only it will maintain the status quo, but it will continue to treat the racialized intellectual creators all around the World as, in Eduardo Galeano's words, 'the nobodies.'[2211]

'[…] The nobodies: nobody's children, owners of nothing.

The nobodies: the no ones, the nobodied, […].

[2205] Smith (n 2192) 29.
[2206] Harold Hongju Koh, 'How Is International Human Rights Enforced?' in Richard Pierre Claude and Burns H Weston (eds), *Human Rights in the World Community: Issues and Action* (3rd edn, University of Pennsylvania Press 2006) 306–308.
[2207] Bell, Jr., 'Brown v. Board of Education and the Interest Convergence Dilemma' (n 296).
[2208] Ibid.
[2209] Ibid, 307, 310-311.
[2210] In reference to Harris, 'Whiteness as Property' (n 12).
[2211] Eduardo Galeano, *The Book of Embraces* (Cedric Belfrage tr, Norton 1992) 73.

[…]

Who don't create art, but handicrafts.

Who don't have culture, but folklore.

Who are not human beings, but human resources.

Who do not have faces, but arms.

Who do not have names, but numbers.

Who do not appear in the history of the world, but in the police blotter of the local paper.

The nobodies, who are not worth the bullet that kills them.'[2212]

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[2212] Ibid.

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