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Anjali Vats, The Color of Creatorship: Intellectual Property, Race, and the Making of Americans. Stanford, California: Stanford University Press. 2020, p.p.273, ISBN: 9781503603301, £74.00 Hardback, £22.90 Paperback, £20.13 e-book.

The claim that intellectual property law both includes and excludes – that only some types of labour 'count' for intellectual property protection– has been a central premise of much critical scholarship, particularly regarding copyright law (e.g. Woodmansee and Jaszi (1994)). Much of this scholarship emerged from interdisciplinary conversations between scholars of law and literature starting in the 1980s and 1990s: inspired by Michel Foucault's 'What is Author?' (1969), these scholars sought to interrogate the historicity of copyright law's central category of 'authorship', to trace its genealogy, rather than assuming legal categories to be natural, timeless and universal givens. Yet, this literature, though it did point to biases against the cultural practices of certain groups like indigenous artists (e.g. Jaszi, and Woodmansee (1996)) nevertheless centred on exploring the *aesthetic* biases and assumptions embodied in law, particularly those stemming from the influence of Romantic authorship on copyright doctrine.

Viewed in this context, *The Color of Creatorship* by Anjali Vats can be seen as part of a growing body of scholarship that takes further the critical consideration of intellectual property's inclusions and exclusions, moving away from a focus on particular aesthetic theories, to broader questions about the relationship between law and social justice more generally. Vats' study is the first in-depth and longitudinal account of the significance of race to intellectual property law, and the 'anchoring analytic' for her analysis is the idea of 'intellectual property citizenship'. Accordingly, a central claim made by Vats is that US intellectual property doctrine is bound up with conceptions of citizenship, and citizenship is itself a 'raced concept' (2).

In adopting this approach, Vats furthers the influence of Michel Foucault on legal scholarly thinking. Beyond mere questions of 'genealogy' and historicity of legal categories (that lie at the heart of much existing copyright history scholarship) Vats engages directly with ideas that go to the heart of Foucault's theory of power. From Foucault, Vats takes the concept of 'a grid of intelligibility', as a 'scheme that helps to make sense of social orders' (7) and 'a framework for understanding how power is organised' (2-3). Vats convincingly shows that 'intellectual property citizenship' – the set of rhetorics that decide inclusion and exclusion – is such a 'grid of intelligibility'. She asserts that critically analysing such frameworks 'reveals the racializing

and colonizing principles around which familiar and repeated doctrinal standards in copyright, patent and trademark law were and are structured.' (3). In uncovering these frameworks, Vats borrows from Critical Race Theory, identifying 'racial scripts' in key moments in IP history and showing how they are integrated into a seemingly colour-blind legal discourse (3). She shows that 'racial inequalities in copyright, patent and trademark law are interlinked and ongoing' (11) and, in the final chapter, provides a vision of how we can re-think this for the future.

The Color of Creatorship concerns patent, trade mark and copyright law in the United States over a long trajectory: the 1700s to the 2000s. This long time-frame is divided into three periods, defined by reference to the 'racial zeitgeist of the era', and for each Vats considers case studies from US patent, trade mark and copyright law, that reveal intellectual property's 'racial scripts'.

The first time-period, the subject of Chapter 1, is the time of 'codified discrimination', from the 1700s to the 1900s. As regards patents and copyright, Vats shows that a 'raced system of protection' emerged, which was a product of the links between intellectual property ownership and citizenship; black people were denied basic citizenship rights long into the nineteenth century, and this excluded them from intellectual property protection. Yet, even after the end of formal exclusions of people of colour, Vats shows that 'the understanding of people of color as being outside the boundaries of creatorship and citizenship persisted' (34). For example, in *Supreme Records v Decca Records* decided as late as 1950, 'racial scripts of Black people as lacking in creativity, intelligence and uniqueness', were invoked by a court in determining that the arrangement of the Black jazz musician Paula Watson lacked 'intelligence, imagination and skill' (45). In making this ruling, Vats argues that Watson was not just an unoriginal musician for the purposes of copyright law. Rather 'she was an implicitly bad intellectual property citizen, who could not live up to the ideals of Americanness' (45). Accordingly, far from just a 'legal construct', US copyright and patent law are 'a rhetorical and cultural formation through which national identity and citizenship were and are constituted' (33).

Turning to trade mark law during the same period of 'codified discrimination', Vats explores the example of the trade mark of Aunt Jemima, the 'humble pancake-maker' that even in the anti-slave North, reinforced the message that 'Black women were happy, even jubilant to remain obedient caretakers, confined to the kitchen, looking after children other than their own' (58). Trade mark law, then, protected a 'racialized surplus emptional value' which objectified

people of color and turned them into 'lucrative properties, largely for the benefit, convenience, and comfort of white persons' (61). Vats also refers to the emergence of trade mark law tests, such as consumer confusion and the reasonable consumer, showing how these were 'heavily racially biased against people of color and continued to be so well into the mid-1900s' (64).

The second period considered by Vats, in Chapter 2, refers to the era of 'racial liberalism', starting with the US civil rights reforms of the 1960s, and culminating, on the international stage, with the Trade-Related Aspects of Intellectual Property Rights agreement of 1995 (which brought intellectual property within the remit of the World Trade Organisation). These developments – on both the domestic US and international planes – while generating 'race neutral legal doctrine' ultimately disguised the persistence of 'racist conceptions of intellectual property citizenship from the pre-Emancipation era'; 'laws, policies, and discourses that 'did not see race'' sustained an 'appearance of equality', but 'did not remedy the persistent structural inequalities that had resulted from centuries of racism and oppression' (67). In copyright, authorship and creativity reflected the attributes of the 'white male genius', as compared with infringing Black hip hop artists, who were presented as 'obscene, thieving, copyright thugs' (69). Similarly, with Western science developing, patent law became the domain of 'raced conceptions of human progress' underpinned by the idea that knowledge was 'white property' (68). Finally, in trade mark law, the doctrine of trade mark dilution through tarnishment and blurring centred round a 'consumer gaze' imbued with 'white anxieties' about 'racial intermixing' (71). These points are substantiated with original analyses of a number of intellectual property cases (including well-known decisions like *Diamond v Chakrabarty* (1980) and *Campbell v Acuff-Rose Music* (1994)). Taken together, Vats argues that intellectual property cases, though using seemingly race-neutral language, developed their own 'grammar of race' (71).

In Chapter 3, Vats considers her final time-period, starting with the Presidency of Barack Obama in 2008. While the language of 'postracial egalitarianism' became common, Vats rightly notes there was also a naivety to a belief in a 'postracial zeitgeist' (which point is supported, of course, by recent events: the murder in May 2020 of George Floyd, a black man, by a white police officer in Minnesota, USA and the resulting Black Lives Matter movement). In this way, though Obama spoke of intellectual property in egalitarian terms - as reflecting 'the innovation and the ingenuity and creativity of the American people' (110) – 'postracial intellectual property policy and discourse was anything but race neutral' (112). Both domestically in the US and internationally, Vats shows that 'racialised understandings'

persisted in intellectual property, for example, in drawing the line between creatorship and infringement, in reflecting anxieties about threats to the nation, and in defining intellectual property citizenship (112).

In Chapter 4, Vats turns to three stories of resistance to racialised categories. First, the artist formerly known as Prince, who in his contractual dealings with his record companies, critiqued existing conceptions of creatorship, asserting new narratives of 'Black creativity and Black entrepreneurialism' (p.162). Secondly, Vats explores how, since the late 1990s, Indians and Indian Americans developed 'a new language of creatorship' for yoga, so as both to resist Western commodification as well as claiming ownership in their own cultural property (25). The third case-study concerns the more recent development of the BEAST LINE brand of clothing, in which American footballer Marshawn Lynch claimed property rights in 'his own Black bestial body'; Lynch 'simultaneously embraced, refused, and monetized the stereotype of the Black beast in order to assert his rights to full intellectual property citizenship and bodily autonomy' (26).

Taken together, Chapters 1 to 4, open the question of how we might best re-think the relation between intellectual property and race. This is the subject of the final concluding chapter. Here, Vats turns to decolonial theory, as a means of 'rewriting' racial scripts, and grappling with 'legal and economic structures' that sustain them (196). The focus, argues Vats, should be on identifying 'the *logics* that underlie racial inequality' in intellectual property law, and in view of its close relationship to concepts of citizenship, this involves opening up the 'problem of racial inequality at the root, with ideological depth' (198).

The Color of Creatorship is a timely and much needed contribution to intellectual property scholarship. As well as being significant for the specific story it tells of the relation between race and intellectual property, it is important as one of a number of recent intellectual property monographs critically engaging with the relation between intellectual property and social power and, in so doing, providing a vision for a better world (Bowrey (2021) and Macmillan (2021)). In particular, in making new connections between intellectual property law and Foucault's theory of power, as well as Critical Race and decolonial theories, Vats' study demonstrates new ways of analysing law and social power. Accordingly, this study is essential reading not just for scholars of law, the humanities and social science interested in the relationship between race and law, but also legal scholars more generally, as well as policy-makers and judges.

DR ELENA COOPER

CREATe, University of Glasgow, UK.

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