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**CAN'T NOBODY TELL HIM NOTHIN': "OLD TOWN ROAD"
AND THE REAPPROPRIATION OF COUNTRY MUSIC BY THE
YEEHAW AGENDA**

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ABSTRACT

This Note examines country music's cultural reappropriation by Black artists, using Lil Nas X's "Old Town Road" as a central example. This Note analyzes musical genre through an intellectual property lens and details the theoretical claims against "Old Town Road" by the country music establishment, including trademark, copyright, and the First Amendment. This Note also explores potential defenses to these claims and discusses whether policing genre through legal means is feasible, concluding conferring property rights in genre is unworkable and would stifle the very creativity that intellectual property law is designed to encourage.

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INTRODUCTION

Cultural appropriation is “the act of taking or using things from a culture that is not your own,”¹ “without understanding or respecting the original culture and context.”² Cultural appropriation primarily occurs when dominant cultural creators take disadvantaged and minority creators’ innovations and pass off those ideas as their own, generating profit for themselves.³ This process turned country music into an enormously popular symbol of white American identity, dominated by white artists and fans, despite its origins in African American music and culture.⁴

However, several Black artists and musicians have recently reintroduced country style and imagery into their work, a trend which has become known as the “Yeehaw Agenda.”⁵ This reappropriation⁶ of country music and cowboy culture by Black artists is distinct from the ongoing appropriation of Black music and culture by white artists due to the unequal power distribution

¹ *Cultural appropriation*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/cultural-appropriation> (last visited Dec. 17, 2019).

² *Cultural appropriation*, DICTIONARY.COM, <https://www.dictionary.com/e/pop-culture/cultural-appropriation/> (last visited Dec. 17, 2019).

³ Brittaney Kiefer, *Cultural Appropriation: Don't Be An Invader*, CAMPAIGN, (Feb. 19, 2020), <https://www.campaignlive.co.uk/article/cultural-appropriation-dont-invader/1672978>.

⁴ See Jordan Marie-Smith, *Tracing Country's Music Roots Back to 17th-century Slave Ships*, WASH. POST, (Aug. 2, 2019), <https://www.washingtonpost.com/nation/2019/08/02/tracing-country-musics-roots-back-th-century-slave-ships/>.

⁵ Andrew R. Chow, *The Yeehaw Agenda Is About More Than Cowboy Hats. It's About American Identity*, TIME.COM (Nov. 21, 2019), <https://time.com/5735430/yeehaw-agenda-black-artists-reclaiming-cowboy-image/>.

⁶ By “reappropriation” I mean the process of taking and repurposing a slur or cultural artifact “previously used exclusively by dominant groups to reinforce a stigmatized group’s lesser status.”; Adam D. Galinsky et al., *The Reappropriation of Stigmatizing Labels: The Reciprocal Relationship Between Power and Self-Labeling*, 24 PSYCHOL. SCI. 2020, 2020 (2013).

in the cultural marketplace.⁷ Black, female, LGBTQ+, and other minority musicians are often passed over for recognition, or only receive recognition second-hand, through appropriation of their work by their white peers. The “Yeehaw Agenda’s” reappropriation of country music disrupts this power dynamic by bringing minority creators, like Lil Nas X, to the genre’s forefront.

In the music industry, the power to recognize and promote creative works lies with the industry’s predominantly white gatekeepers, which include record labels, media groups (e.g., Billboard), the Recording Academy, digital streaming services, and radio stations.⁸ These gatekeepers are entrusted with placing artists and songs into genres and onto charts, which is not typically accorded great significance.⁹ This critical role gives gatekeepers the ability to determine musicians’ exposure, audiences, and even their artistic identity, a potentially problematic power, particularly when the artist does not conform to a designated category’s norms. Today, this power is merely a part of industry practice, not a distinct legal right. However, various music gatekeepers have asserted quasi-property rights over genre determination, as if they owned the genre itself.¹⁰

This Note considers and critiques the theoretical application of intellectual property to define and police genre in music. The debate over who owns the rights to musical genres recently came into the spotlight amid the removal of Lil Nas X’s

⁷ Matthew D. Morrison, *Race, Blacksound, and the (Re)Making of Musicological Discourse*, J. AM. MUSICOLOGICAL SOC’Y 781—823, 784—85 (2019).

⁸ See, e.g., Kristin Corry, *The Music Industry Fails Black People Every Day*, VICE, (June 3, 2020), <https://www.vice.com/en/article/ep4xv4/the-music-industry-fails-black-people-every-day>; Neil Shah, *The Music Industry’s New Gatekeepers*, WALL ST. J., (Nov. 15, 2017), <https://www.wsj.com/articles/the-music-industrys-new-gatekeepers-1510761601>.

⁹ See Mark Laver, *Lil Nas X and the Continued Segregation of Country Music*, WASH. POST, (June 20, 2019), <https://www.washingtonpost.com/outlook/2019/06/20/lil-nas-x-continued-segregation-country-music/?arc404=true>.

¹⁰ See, e.g., Elias Leight, *Lil Nas X’s ‘Old Town Road’ Was a Country Hit. Then Country Changed Its Mind*, ROLLING STONE, (Mar. 26, 2019), <https://www.rollingstone.com/music/music-features/lil-nas-x-old-town-road-810844/>.

“hick-hop”¹¹ track “Old Town Road” from Billboard’s country music chart.¹² This Note argues the “Yeehaw Agenda” is not cultural appropriation, but rather cultural *reappropriation* emerging from Black musicians’ persistent exclusion from the country music genre.

Part I examines gatekeeping in the music industry and the racial boundaries among genres. Part II briefly details country music’s history and describes Billboard’s theoretical intellectual property claims against Lil Nas X and similar artists based on its perceived right to define country music’s boundaries. This Note also considers racial capitalism in the music industry—“the process of deriving social and economic value from the racial identity of another person”¹³—and mediating value through whiteness. Finally, Part III applies intellectual property and trademark law to conceptions of and decisions about genre, and describes the dangers of doing so.

I. BACKGROUND

A. RACIST GATEKEEPING IN THE MUSIC INDUSTRY

1. HISTORY

Throughout its history, country music has constantly wrestled with its identity and position within the music industry. In the early 20th century, a musician’s race “defined their inclusion in the genre as much as the music itself.”¹⁴ Billboard’s rhythm & blues (R&B) chart, jazz chart, and other music by Black artists was labeled “race music” while nearly identical music by white artists was categorized as “hillbilly,” a precursor to country

¹¹ “Hick-hop” is a term used synonymous with country rap. Rolling Stone, *Lil Nas X’s A History of Hick-Hop: The 27 Year-Old Story of Country Rap*, ROLLING STONE, (June 27, 2014), <https://www.rollingstone.com/music/music-country-lists/a-history-of-hick-hop-the-27-year-old-story-of-country-rap-22010/>.

¹² Leight, *supra* note 10.

¹³ Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2152 (2013).

¹⁴ Jeff Manuel, *Will Ken Burns Whitewash Country Music’s Multiracial Roots?*, WASH. POST (Sept. 15, 2019), <https://www.washingtonpost.com/outlook/2019/09/15/will-ken-burns-whitewash-country-musics-multiracial-roots/>.

music.¹⁵ This racial boundary was aggressively enforced. For example, in 1927, Columbia Records mistakenly released songs by the Allen Brothers, a white duo, under the label's "race records" series.¹⁶ The Allen Brothers sued Columbia "for damaging their reputation" and signed with a new record label.¹⁷ Even after eliminating the "race records" classification in 1949, Billboard created the "rhythm and blues" genre to replace it.¹⁸

Billboard is not country music's only gatekeeper. Country radio stations and listeners also decide who is allowed into the genre.¹⁹ Radio plays are crucial to artists' success; however, they are not equally allocated. Despite gatekeepers' claims the parameters are neutral, that music either contains certain country "elements" or it does not, these features are "almost inevitably shorthand for much deeper, more politically fraught issues,"²⁰ such as the musician's race or gender. For example, country radio "has come under fire in recent years for its narrow playlists, including an aversion to playing songs by women."²¹ In 2015, country-radio consultant Keith Hill made waves by announcing, "[i]f you want to make ratings in country radio, take females out."²² According to Country Aircheck, the percentage of "purely female country songs" dropped from an already dismal 13 percent in 2016 to a mere 10.4 percent in 2017.²³

Mapping genre along race lines persists in the music industry today. In recent years, several Black artists have objected to the R&B and Hip Hop chart's restrictiveness, pointing out the

¹⁵ *Id.*; Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 594—95 (2010).

¹⁶ DIANE PECKNOLD, *HIDDEN IN THE MIX: THE AFRICAN AMERICAN PRESENCE IN COUNTRY MUSIC* 21 (2013).

¹⁷ *Id.*

¹⁸ Arewa, *supra* note 15, at 595—96, 599.

¹⁹ *See* Laver, *supra* note 9.

²⁰ *Id.*

²¹ *Id.*

²² Rob Harvilla, *How Bebe Rexha Broke the Country Charts*, THE RINGER (July 27, 2018), <https://www.theringer.com/music/2018/7/27/17619720/bebe-rexha-meant-to-be-country-charts>.

²³ Cindy Watts, *3 Years After 'Tomato-Gate,' There are Even Fewer Women on Country Radio*, THE TENNESSEAN (June 10, 2018), <https://www.tennessean.com/story/entertainment/music/2018/06/10/women-country-radio-tomatogate-music-row-kelsea-ballerini-maren-morris/675471002/>.

similarities to the past “race records” designation.²⁴ For example, FKA Twigs, whose avant-garde style does not neatly fit into a specific genre; Juice WRLD, whose musical style is “textbook rock and roll, awash in guitars;”²⁵ and Beyoncé, whose song “Daddy Lessons” is credited as starting a trend of “pop stars toying with American West and Southern aesthetics,”²⁶ have all been designated R&B artists.²⁷ As author and Professor of Women’s and Gender Studies Diane Pecknold explained, “one reason race has remained so central to genre definitions is that racial crossover destabilizes the very concept of genre, reliant as it is on homological conceptions of audience cultures.”²⁸

It is particularly difficult for Black artists to escape the R&B label when they integrate rap into their music. A double standard exists for artists attempting to cross genre lines. “If you are considered a ‘country artist making country-rap’, it’s OK,” says Melanie McClain, a music content specialist.²⁹ “But if you’re considered a rapper and making country-rap, the perception is a little different.”³⁰ As “hick-hop” country rapper Cowboy Troy insists, “what sounds like rap to some people is in fact merely his updating of the ‘recitation,’ an established mode within country music itself.”³¹ Troy claims “he isn’t so much hybridizing country with rap as he is highlighting a preexistent strain” within country music itself.³² Unlike White artists, the music industry’s

²⁴ Briana Younger, *Black Musicians on Being Boxed in by R&B and Rap Expectations: “We Fit in So Many Things,”* PITCHFORK (Sept. 28, 2017), <https://pitchfork.com/the-pitch/black-musicians-on-being-boxed-in-by-randb-and-rap-expectations-we-fit-in-so-many-things/>.

²⁵ Leight, *supra* note 10.

²⁶ Brittany Spanos, *Giddy Up! Here’s What You Need to Know About the Yeehaw Agenda*, ROLLING STONE (Mar. 8, 2019), <https://www.rollingstone.com/music/music-features/welcome-to-the-yee-yee-club-bitch-805169/>.

²⁷ See Younger, *supra* note 24; *Chart History Juice Wrld*, BILLBOARD <https://www.billboard.com/music/juice-wrld/chart-history/RBT>; *Beyonce*, BRITANNICA.COM, <https://www.britannica.com/biography/Beyonce> (last modified Dec. 10, 2020).

²⁸ PECKNOLD, *supra* note 16, at 12.

²⁹ Myers, *infra* note 71.

³⁰ *Id.*

³¹ PECKNOLD, *supra* note 16, at 240. Johnny Cash’s “A Boy Named Sue” is a classic example of the recitation style.

³² *Id.*

gatekeepers do not know where to place musicians of color who blur genre lines.³³

In contrast, “there has been comparatively little controversy over the incorporation of rap into the [country music] genre if it comes via White artists.”³⁴ For example, Florida Georgia Line’s single “Meant to Be” spent fourteen weeks topping Billboard’s country chart in 2018, and broke the all-time record for a song with a female lead, despite its snap-and-kick drum beat and a feature by Bebe Rexha, a primarily hip hop and R&B artist.³⁵ “[W]hite artists have infinitely more latitude when crossing genres than artists of color,” however their music may sound.³⁶

2. NEW ERA OF MUSIC DEVELOPMENT AND PROMOTION

Today’s music industry is dominated by digital streaming services rather than record sales, which means “songs can go viral before [record] labels, radio programmers and playlist curators can sort them into genre buckets.”³⁷ Billboard recently overhauled its chart methodology to accommodate these changes.³⁸ During the fifty years following its launch in 1958, Billboard’s “Hot Country Songs” chart primarily measured songs’ airplay on country radio.³⁹ However, beginning in 2012, Billboard put “more weight on streaming data, digital downloads, and in the case of the genre charts, crossover play on pop radio.”⁴⁰ Because the genre determination is made after the music’s release, this phenomenon exacerbates the already present “power struggle about who has the right to make what and whether Black artists can fit in predominantly white genres.”⁴¹

Digital applications allowing users to create video clips set to music, such as Musical.ly and TikTok, are particularly

³³ Leight, *supra* note 10.

³⁴ *Id.*

³⁵ Harvilla, *supra* note 22.

³⁶ Laver, *supra* note 9.

³⁷ Leight, *supra* note 10.

³⁸ Billboard, *Billboard Finalizes Changes to How Streams Are Weighted for Billboard Hot 100 & Billboard 200*, BILLBOARD NEWS (May 1, 2018) <https://www.billboard.com/articles/news/8427967/billboard-changes-streaming-weighting-hot-100-billboard-200>.

³⁹ Harvilla, *supra* note 22.

⁴⁰ Harvilla, *supra* note 22.

⁴¹ Leight, *supra* note 10.

influential in elevating a song's popularity. Between November 2018 and November 2019, TikTok reported more than 750 million downloads, which far surpasses the number of downloads of Facebook, Instagram, YouTube, and Snapchat during the same time period.⁴² Memes created on these platforms often swiftly send a song to the top of the charts, such as Rae Sremmurd's "Black Beatles" in 2016 and Drake's 2018 hit "In My Feelings."⁴³ In early 2019, TikTok launched the career of a formerly unknown rapper Montero Lamar Hill—better known as Lil Nas X.⁴⁴

When Lil Nas X first shared his banjo-based, cowboy lifestyle-praising, twangy hip hop hit "Old Town Road," he hosted it on the music-sharing website SoundCloud as a country record.⁴⁵ This was in part a strategic choice by Lil Nas X. As viral country sensation manager Danny Kang noted, this choice was "favorable versus trying to go to the rap format to compete with the most popular songs in the world."⁴⁶ After gaining some traction on SoundCloud, "Old Town Road" swiftly rose to meme status on TikTok through the "Yeekaw challenge," in which young users suddenly appear in full cowboy get-up from hat to boots as the beat drops.⁴⁷ In March 2019, "Old Town Road" matured from internet sensation to chart-topping hit, debuting on Billboard's cross-genre "Hot 100" chart, the "Hot Country Songs" chart, and the "Hot R&B" and "Hip Hop Songs" chart simultaneously.⁴⁸ Despite his success, Lil Nas X's country chart domination was short-lived.

⁴² Jack Nicas, et al., *TikTok Said to Be Under National Security Review*, N.Y. TIMES (Nov. 1, 2019), <https://www.nytimes.com/2019/11/01/technology/tiktok-national-security-review.html>.

⁴³ Harvilla, *supra* note 22.

⁴⁴ James Poniewozik, et al., *48 Hours in the Strange and Beautiful World of TikTok*, N.Y. TIMES (Oct. 10, 2019), <https://www.nytimes.com/interactive/2019/10/10/arts/TIK-TOK.html?module=inline>.

⁴⁵ Leight, *supra* note 10.

⁴⁶ *Id.*

⁴⁷ *Id.*; see also, TikTok, *I Got Horses in the Back Challenge Compilation*, YOUTUBE (Mar. 29, 2019), <https://www.youtube.com/watch?v=diYDzpJYXVc>.

⁴⁸ *The Hot 100: Week of March 16, 2019*, BILLBOARD, <https://www.billboard.com/charts/hot-100/2019-03-16>; *Hot Country Songs: Week of March 16, 2019*, BILLBOARD, <https://www.billboard.com/charts/country-songs/2019-03-16>; *Hot R&B/Hip-Hop: Week of March 16, 2019*, BILLBOARD, <https://www.billboard.com/charts/r-b-hip-hop-songs/2019-03-16>.

3. *THE DISAPPEARANCE OF "OLD TOWN ROAD"*

Soon after "Old Town Road" debuted and reached the number nineteen spot, Billboard quietly removed it from its "Hot Country" chart, stating:

Upon further review, it was determined that "Old Town Road" by Lil Nas X does not currently merit inclusion on Billboard's country charts. When determining genres, a few factors are examined, but first and foremost is musical composition. While "Old Town Road" incorporates references to country and cowboy imagery, it does not embrace enough elements of today's country music to chart *in its current version*.⁴⁹

"Old Town Road" contains hip hop elements, most notably trap-style 808 drums and bass, but it also, as Billboard notes, "incorporates references to country and cowboy imagery."⁵⁰ Although these elements make the song difficult to corral into one traditional genre, today's genres are not as distinct as they once were. Even still, "no genre wrestles with its identity as openly as country."⁵¹ The country music gatekeepers in Nashville saw "Old Town Road" as a gimmick created by an outsider.⁵²

Although rap's infiltration of country music is "ancient news,"⁵³ previous forays featured white male artists, who have the power to admit outsiders to the genre.⁵⁴ Enter: Billy Ray Cyrus. A

⁴⁹ Leight, *supra* note 10 (emphasis added).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Laver, *supra* note 9.

⁵³ *Id.*

⁵⁴ See, e.g., Nelly, *Over and Over* (ft. Tim McGraw) (Universal Records, 2004); Snoop Dogg, *My Medicine* (ft. Willie Nelson) (Doggy Style Records, 2008).

fellow country chart outcast, Billy Ray expressed support for Lil Nas X in a tweet:

@LilNasX Been watching everything going on with ["Old Town Road"]. When I got thrown off the charts, Waylon Jennings said to me 'Take this as a compliment' means you're doing something great! Only Outlaws are outlawed. Welcome to the club!⁵⁵

Cyrus's tweet led to a legendary collaboration between the two outlaws—an "Old Town Road" remix—which peaked at number one on Billboard's "Hot 100" chart for a record-breaking nineteen consecutive weeks.⁵⁶ The remix also earned the Country Music Association (CMA) Award for "Musical Event of the Year," making Lil Nas X the first openly gay performer to win a CMA award.⁵⁷ Now a bona fide country music mainstay, Cyrus's collaboration is a prime example of "racial capitalism"⁵⁸ in the music industry and the ability of white artists to legitimize the work of their Black peers. Cyrus and Lil Nas X give a cheeky nod to Cyrus's racial capital in the music video for their remix, in which both men play Nineteenth Century outlaws:

Lil Nas X: "The last time I was here they weren't too welcoming to outsiders."

⁵⁵ Billy Ray Cyrus (@billyraycyrus), TWITTER (Apr. 3, 2019), <https://twitter.com/billyraycyrus/status/1113531625336385536> (last visited Dec. 17, 2019).

⁵⁶ Gary Trust, *Lil Nas X's 'Old Town Road' Leads Billboard Hot 100 for 19th Week, Ariana Grande & Social House's 'Boyfriend' Debuts in Top 10*, BILLBOARD (Aug. 12, 2019), <https://www.billboard.com/articles/business/chart-beat/8527171/lil-nas-x-old-town-road-number-one-hot-100-19-weeks>.

⁵⁷ Nico Lang, *Lil Nas X Is First Out Gay Musician to Win Country Music Award*, OUT MAGAZINE (Nov. 14, 2019), <https://www.out.com/music/2019/11/14/lil-nas-x-first-out-gay-man-win-country-music-award>.

⁵⁸ "The process of deriving social and economic value from the racial identity of another person." Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2152 (2013).

Cyrus: "Eh, you and me this time! Everything's gonna be alright."⁵⁹

In the video, as in real life, Cyrus leverages his whiteness to give Lil Nas X entry into an arena in which he would not otherwise be welcome. While the original version was removed from Billboard's "Hot Country" chart "in its current version," Cyrus's addition was all it took to transform "Old Town Road" into a valid country song.

4. *MUSIC'S INCLUSION PROBLEM*

In the music industry, most genres are "still thought of as music by, and for, white people."⁶⁰ The R&B and Hip Hop chart is the exception and where the "vast majority of African American artists end up."⁶¹ White artists, meanwhile, "can be placed there or anywhere else."⁶² While white rappers like Eminem and Post Malone easily climb the hip hop charts, Black artists are often excluded from charts unless placed under the old "race records" designation.⁶³

Lil Nas X is not the first Black artist to attempt to break into a genre other than hip hop or R&B. British singer FKA Twigs has lamented "the frustration of being creatively pigeonholed by the color of [one's] skin."⁶⁴ "When I first released music and no one knew what I looked like, I would read comments like, 'I've never heard anything like this before, it's not in a genre,'" she told *The Guardian* in 2014. "And then my picture came out six months later, now she's an R&B singer."⁶⁵ In 2016, Beyoncé attempted to submit her track "Daddy Lessons" to the Grammy committee overseeing the awards given to country songs, "only to be shot

⁵⁹ Lil Nas X, *Old Town Road (Official Movie) ft. Billy Ray Cyrus*, YOUTUBE (May 17, 2019), <https://www.youtube.com/watch?v=w2Ov5jzm3j8>.

⁶⁰ Leight, *supra* note 10.

⁶¹ Laver, *supra* note 9.

⁶² Laver, *supra* note 9.

⁶³ Laver, *supra* note 9.

⁶⁴ Younger, *supra* note 24.

⁶⁵ Ben Beumont-Thomas, *FKA Twigs: "Weird Things Can be Sexy,"* THE GUARDIAN (Aug. 9, 2014), <https://www.theguardian.com/music/2014/aug/09/fka-twigs-two-weeks-lp1>.

down.”⁶⁶ Newcomer Juice WRLD⁶⁷ listed the rock bands Fall Out Boy, Black Sabbath, and Megadeth among his greatest influences.⁶⁸ However, he is absent from Spotify’s premier rock playlist, which is dominated by white artists.⁶⁹ Even some pop radio programmers acknowledge many peers are reluctant to play music by Black artists.⁷⁰

Country music in particular has an inclusion problem, tending to shut out female artists and people of color. In 2018, Billboard’s year-end “Hot Country Songs 100” featured only five songs by artists of color, three of which were by breakout, biracial star Kane Brown.⁷¹ The same year, Brown tweeted (and later deleted): “Some people in Nashville who have pub[lishing] deals won’t write with me because I’m black.”⁷² By comparison, more than half the “Hot 100’s” year-end songs—dominated by hip hop songs—featured Black artists.⁷³ At the 52nd annual CMA Awards in 2018, the ceremony contained several performances by country’s male stars, while women and artists of color were “by and large relegated to the fringes.”⁷⁴ Notably, neither Kacey Musgraves (who won album of the year) nor Kane Brown (“one of country’s most promising young stars”) were granted a performance slot.⁷⁵

⁶⁶ Leight, *supra* note 10.

⁶⁷ Juice WRLD (born Jarad Anthony Higgins) tragically died during the writing of this paper, on Dec. 8, 2019 at the age of 21.

⁶⁸ Alex Zidel, *Juice WRLD Reveals The Origin Of His Name & His Major Influences*, HOT NEW HIP HOP (May 24, 2018), <https://www.hotnewhiphop.com/juice-wrld-reveals-the-origin-of-his-name-and-his-major-influences-news.50999.html>.

⁶⁹ Leight, *supra* note 10.

⁷⁰ Elias Leight, *How Big Boi’s ‘All Night’ Became 2018’s Most Improbable Hit*, ROLLING STONE (Aug. 14, 2018), <https://www.rollingstone.com/music/music-features/how-big-bois-all-night-became-2018s-most-improbable-hit-707444/>.

⁷¹ *Year-End Charts: Hot Country Songs*, BILLBOARD (2018), <https://www.billboard.com/charts/year-end/2018/hot-country-songs>.

⁷² Owen Myers, *Fight for Your Right to Yeehaw: Lil Nas X and Country’s Race Problem*, THE GUARDIAN (Apr. 27, 2019), <https://www.theguardian.com/music/2019/apr/27/fight-for-your-right-to-yeehaw-lil-nas-x-and-countrys-race-problem>.

⁷³ *Year-End Charts: Hot 100 Songs*, BILLBOARD (2018), <https://www.billboard.com/charts/year-end/2018/hot-100-songs>.

⁷⁴ Pedro Rosado, *Kane Brown, Pistol Annies, and Country Music’s Inclusion Problem*, N.Y. TIMES (Nov. 17, 2018), <https://www.nytimes.com/2018/11/17/arts/music/popcast-country-music.html>.

⁷⁵ *Id.*

Contemporary country songs often portray the white working class, illuminating the challenges of being poor in the southern United States.⁷⁶ However, popular country music as a genre has largely neglected to address “the way class and regional identity intersect with hierarchies of race and gender.”⁷⁷ As Geoff Mann argues, country music voices a nostalgia that “suppresses specific histories of racism and domination” and paints white people as naïve victims, allowing them to “lament their own loss of privilege without acknowledging ever having held it.”⁷⁸ To preserve this idyllic image, country music’s white gatekeepers must exclude those who would disrupt it.

II. POTENTIAL LEGAL CLAIMS AGAINST “OLD TOWN ROAD” AND ITS PEERS

The United States’ current legal system does not have a workable scheme to protect one group’s cultural identity from the intrusion or degradation by another group. However, culture wars over identity persist, as does the struggle for control of their values, practices, and representation in popular culture. As Professor Madhavi Sunder notes in her article “Cultural Dissent,” the “[l]aw’s conception of culture matters. As cultures become more internally diverse and members appeal to courts to determine a culture’s meaning, increasingly, it will be law, not culture, that regulates cultural borders.”⁷⁹

Without an applicable legal regime in place, people must imagine the grounds on which cultural groups might challenge intrusion against their perceived identity. In considering “Old Town Road,” two main groups are fighting for the power to define

⁷⁶ Pecknold, *supra* note 16, at 3.

⁷⁷ *Id.*

⁷⁸ PECKNOLD, *supra* note 16 (citing Geoff Mann, *Why Does Country Music Sound White? Race and the Voice of Nostalgia*, 31 J. ETHN. RACIAL STUD., 73, 89 (2008)). Recently, some country artists have moved to disassociate themselves from the genre’s history of racism; most notably the Dixie Chicks, who dropped “Dixie” from their name, and Lady Antebellum, who became “Lady A.” Lisa Respers France, *Country Music’s Race Issue is no Surprise*, CNN (Feb. 4, 2021), <https://edition.cnn.com/2021/02/04/entertainment/morgan-wallen-country-race-issue/index.html>

⁷⁹ Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 496 (2001).

and popularize a particular cultural product—country music. Billboard, a prominent country music gatekeeper, versus Lil Nas X, a 20-year-old Black rapper from rural Georgia who recently came out as gay.⁸⁰ To some, Lil Nas X embodies many things country music’s gatekeepers assert the genre is not—diverse in race, sexual orientation, and musical style. These gatekeepers, primarily white men,⁸¹ firmly objected⁸² to Lil Nas X’s breakout hit “Old Town Road” being associated with country music. In removing “Old Town Road” from Billboard’s country chart, the gatekeepers asserted a property-like ownership claim over the genre by determining who can participate. This claim is complicated because country music was never owned by white gatekeepers.

A. BRIEF HISTORY OF COUNTRY MUSIC

Ironically, Black artists were integral to country music’s birth and development.⁸³ Despite the genre’s historical perception as the most “‘pure white’ of all American music forms,”⁸⁴ country music draws heavily on African American musical influences like the blues. The banjo, a quintessential country instrument, first came to the United States from West Africa.⁸⁵ The instrument originated among enslaved people and their children “who defied restrictions on the drum by picking out beats” on the banjo.⁸⁶ Despite the racial boundaries defining music in the early 20th Century, at least fifty African American musicians played on

⁸⁰ Jon Blistein, *Lil Nas X Comes Out on World Pride Day*, ROLLING STONE (July 1, 2019), <https://www.rollingstone.com/music/music-news/lil-nas-x-comes-out-on-world-pride-day-853892/>.

⁸¹ Amanda Petrusich, *Darius Rucker and the Perplexing Whiteness of Country Music*, THE NEW YORKER (Oct. 25, 2017), <https://www.newyorker.com/culture/cultural-comment/darius-rucker-and-the-perplexing-whiteness-of-country-music>.

⁸² Leight, *supra* note 10.

⁸³ Arewa, *supra* note 15, at 593.

⁸⁴ PECKNOLD, *supra* note 16, at 1.

⁸⁵ Greg Allen, *The Banjo’s Roots, Reconsidered*, NPR (Aug. 23, 2011), <https://www.npr.org/2011/08/23/139880625/the-banjos-roots-reconsidered>.

⁸⁶ RJ Smith, *Race and Country Music Then and Now*, NPR (Aug. 23, 2013), <https://www.npr.org/sections/therecord/2013/08/23/213852227/race-and-country-music-then-and-now>.

hillbilly records before 1932.⁸⁷ In the 1950s, African American pianist Ray Charles changed the genre's sound by introducing blues, pop, and R&B influences to country music.⁸⁸

Black cowboys also played a more significant role in American history than popular culture has acknowledged. Approximately one in four cowboys were Black.⁸⁹ Many African Americans turned to ranch work after the Civil War when “[b]eing a cowboy was one of the few jobs open to men of color who wanted to not serve as elevator operators or delivery boys or other similar occupations.”⁹⁰ Unfortunately, “[f]ailing to acknowledge country music’s multiracial origins has made it difficult to shake the perception that it is a genre by and for white people.”⁹¹

III. CONCEIVING OF GENRE IN PROPERTY-LIKE TERMS

Today’s culture wars are increasingly governed by property-like conceptions.⁹² “The very concept of property is founded on ownership” with the three main principles being: (1) the right of absolute use; (2) the right to exclude or exclusive use; and (3) the right of transfer or alienability.⁹³ Music genres are amenable to a property distinction because genres often “belong” to specific groups. For example, hip hop and R&B are the new “race records,” and are dominated by Black artists. On the other hand, country music has become the new hillbilly genre primarily by and for white people. Informal property-like rights have been asserted over these genres as evidenced by the exclusion of “Old Town Road” from the country charts. Country music’s gatekeepers—the genre’s de facto owners—have asserted their

⁸⁷ *Id.*

⁸⁸ Myers, *supra* note 71.

⁸⁹ Katie Nodjimbadem, *The Lesser-Known History of African-American Cowboy*, SMITHSONIAN MAGAZINE (Feb. 13, 2017), <https://www.smithsonianmag.com/history/lesser-known-history-african-american-cowboys-180962144/>.

⁹⁰ *Id.*

⁹¹ Manuel, *supra* note 14.

⁹² Madhavi Sunder, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143, 143 (1996).

⁹³ Madhavi Sunder, *Intellectual Property and Identity Politics: Playing With Fire*, 4 J. GENDER RACE & JUST. 69, 71 (2000).

right to exclude by determining which artists are allowed onto the genre's charts, radio stations, and streaming playlists. Only occasionally do these de facto owners confer rights to featured artists outside the country genre, such as Bebe Rexha on "Meant to Be."⁹⁴

A. GENRE AS INTELLECTUAL PROPERTY: THE RIGHT TO FIX MEANING

Intellectual property is intangible⁹⁵ and thus more susceptible to cooption and corruption than real property. For this reason, intellectual property protects not only the use and exclusion of rights, but also the power to fix its meaning and representations.⁹⁶ Billboard asserted this power in its decision to remove "Old Town Road" from its country music chart. As provided in its official statement, Billboard felt Lil Nas X's song misrepresented country music as a genre and asserted its right to exclude the track.⁹⁷

Country music represents more than a music genre—to many it is a way of life. Like hip hop, which originated in the Bronx, New York, and often "chronicle[d] and critique[d] the black urban experience,"⁹⁸ country music has deep roots in American history and culture. However, country music's history is hotly disputed along racial lines. For White people, "the trope country music has often functioned much like the Confederate battle flag . . . as the 'expression of an ideological tradition'"⁹⁹ does not paint the genre's origins completely or accurately.

Intellectual property law can be a powerful tool for subordination and empowerment because these rights give the holder power to define and enforce cultural meaning in a way that conforms with the holder's ideology. "[M]any of the most popular

⁹⁴ Harvilla, *supra* note 22.

⁹⁵ *Intellectual Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁹⁶ See, e.g., Sunder, *supra* note 92 at 70—71.

⁹⁷ *Backlash After Lil Nas X's "Old Town Road" Removed From Billboard Hot Country Chart*, CBS NEWS (Apr. 10, 2019) <https://www.cbsnews.com/news/old-town-road-lil-nas-x-billboard-removes-song-from-hot-country-critics-question-race-factor/>.

⁹⁸ Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 488 (2005).

⁹⁹ PECKNOLD, *supra* note 16, at 254.

cultural images, which generate far-reaching understandings of gender, race, sexuality, and dominance, are protected by copyrights and trademarks.”¹⁰⁰ In particular, Professor Sunder has observed:

Scholars and activists increasingly are seeking to use intellectual property law to provide subordinate groups with legal rights to exclusive control over cultural representation including, most importantly, the right to exclude unwanted or harmful images from being portrayed by ‘non-owners’ of the intellectual property.¹⁰¹

This new intellectual property conception is seen in cases brought by Native American tribes against professional football over teams’ use of Native American images and practices.¹⁰² Because the “right of exclusion at the heart of the concept of property is ultimately about power,” endowing subordinate groups with property rights in their culture would protect it from appropriation and thus provide empowerment.¹⁰³ The right to exclude becomes more complicated when, as with “Old Town Road,” the cultural representation at issue is being reappropriated by the subordinate group’s members.

In some circumstances, it is more advantageous for minority group’s members when they appropriate. For example, in the recent United States Supreme Court case *Matal v. Tam*, the musical group “The Slants” sought legal action when the United States Patent and Trademark Office (PTO) denied its application to trademark the band’s name.¹⁰⁴ The PTO denied the trademark

¹⁰⁰ MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 66 (2012).

¹⁰¹ Sunder, *supra* note 92, at 71.

¹⁰² See, e.g., *Pro-Football, Inc. v. Blackhorse*, 112 F.Supp.3d 439 (E.D. Va. 2015) (holding the trademark registration of the Washington, D.C. football team name the Redskins should be cancelled, because it is disparaging to Native Americans).

¹⁰³ Sunder, *supra* note 92, at 74.

¹⁰⁴ *Matal v. Tam*, 137 S.Ct. 1744, 1747 (2017).

application because the band’s name was disparaging to people of Asian descent.¹⁰⁵ The basis for the application denial rests on a Lanham Act provision, which prohibits registering trademarks that may “disparage . . . or bring . . . into contempt or disrepute” any “persons, living or dead.”¹⁰⁶ In denying its application:

“[t]he government ignored the band’s rationale for wanting the trademark: not to disparage Asian Americans for their ‘slanted’ eye but to transform the slur into a badge of pride – just as some gays, feminists, and blacks have attempted to reappropriate derogatory labels (such as ‘queer,’ ‘bitch,’ and even the N-word).”¹⁰⁷

Distinct from the actions challenging trademarks using Native American imagery as football mascots, the individuals attempting to trademark the “disparaging” mark “Slants” were members of the disparaged group.¹⁰⁸ This affects the disparagement analysis significantly. The Slants’ members, all Asian Americans, chose to adopt the slur as the band’s name to “reclaim the term and drain its denigrating force.”¹⁰⁹ In this way, the Slants reappropriated culture that was traditionally wielded to exclude them.

The appropriator’s identity affects the appropriating act’s perception and purpose. In the Slants’ case, researchers found “Americans (Asians and non-Asians alike) construe the term ‘Slants’ differently depending on the context; they are more likely to believe a band’s reappropriation motives when the band is Asian than when the band is non-Asian.”¹¹⁰ Therefore, the study’s authors concluded, the ban on disparaging trademarks “simply lacked internal coherence.”¹¹¹ The Supreme Court agreed, holding

¹⁰⁵ *See id.*

¹⁰⁶ *Id.* at 1751; 15 U.S.C. § 1052(a).

¹⁰⁷ Gregory P. Magarian, et al., *Data-Driven Constitutional Avoidance*, 104 IOWA L. REV. 1421, 1422-23(2019).

¹⁰⁸ *See id.* at 1445.

¹⁰⁹ *Matal*, 137 S.Ct. at 1751.

¹¹⁰ Magarian, *supra* note 106, at 1723.

¹¹¹ *Id.*

the reappropriation at issue had a commercial purpose and “expressed a view about social issues;” therefore, the Lanham Act’s disparagement clause was facially invalid.¹¹²

Many viewed “Old Town Road” as disparaging country music because they perceived the song as having a sarcastic tone and stereotypical lyrics.¹¹³ However, Lil Nas X leveraged his country music reappropriation through song to reclaim Black artists’ membership in the genre. Like the Slants used its name “to supplant a racial epithet” and put cultural identity at the forefront of its creative product, Lil Nas X used “new insights, musical talents, and wry humor”¹¹⁴ to assert his place as a Black artist in the genre pitted against its own Black cultural roots.

B. THE FIRST AMENDMENT AND CULTURAL DISSENT

In *Matal*, the Supreme Court emphasized the First Amendment principle, “[s]peech may not be banned on the ground that it expresses ideas that offend,”¹¹⁵ and “the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”¹¹⁶ The Court relied on the First Amendment as its basis for striking down the disparagement clause in *Matal*, and denounced “the suppression of any speech that may lead to political or social ‘volatility.’”¹¹⁷ The holding in *Matal* supports Professor Sunder’s argument that “[j]ust as the First Amendment recognizes the importance of political dissent, intellectual property law should acknowledge the importance of cultural dissent”—the right and ability to disagree with cultural traditions or norms.¹¹⁸ Justice Kennedy alluded to this idea in his concurring opinion in *Matal*, calling the disparagement bar an “attempt[] to remove certain ideas or perspectives from a broader debate” and commending the Slants’ trademark’s “potential to

¹¹² *Matal*, 137 S.Ct. at 1764—65.

¹¹³ E.g. “Ridin’ on a tractor... Cheated on my baby... Bull ridin’ and boobies... Wrangler on my booty.”

¹¹⁴ *Matal*, 137 S.Ct. at 1766.

¹¹⁵ *Id.* at 1751.

¹¹⁶ *Id.* at 1764 (citing *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

¹¹⁷ *Id.* at 1765.

¹¹⁸ SUNDER, *supra* note 99, at 80.

teach.”¹¹⁹ These same principles emphasized in *Matal* can and should be used to protect the expressive rights of other traditionally marginalized groups.

In particular, “the liberty to contest hegemonic discourses has . . . profound possibilities for women and other minorities who traditionally have not had agency over the stories that dominate [their] lives.”¹²⁰ For example, female rappers are erupting in the music industry, disrupting the traditionally male-dominated genre, and reappropriating the objectification of their bodies. Cardi B, one of the genre’s current titans,¹²¹ is known for her sexually explicit lyrics and pride in her former career as a stripper. The song “Bickenhead” from her Grammy-winning breakout album “Invasion of Privacy” includes the lyrics:

Pop that pussy like you ain’t
 pop that pussy in a while
 Pop that pussy like poppin’
 pussy is goin’ out of style
 Pop that pussy while you work,
 pop that pussy up in church
 Pop that pussy on the pole, pop
 that pussy on the stove¹²²

By repeatedly using “pussy”—a term generally used to disparage and objectify women¹²³—Cardi B reappropriates the offensive word in the same manner as the Slants: to assert power over her own story.

Intellectual property law should not stifle minority artists’ ability to express dissatisfaction with cultural norms through music. Intellectual property “regulates the production and

¹¹⁹ *Matal*, 137 S.Ct. at 1767 (Kennedy, J., concurring in part and concurring in the judgment).

¹²⁰ SUNDER, *supra* note 99, at 66.

¹²¹ Among her numerous awards and nominations, Cardi B won the American Music Award for Favorite Artist—Rap/Hip Hop in both 2018 and 2019. AMERICAN MUSIC AWARDS, 2018 *Winners*, <https://www.theamas.com/winners/2018-winners/>; American Music Awards, 2019 *Winners*, <https://www.theamas.com/winners/2019-winners/>.

¹²² Cardi B, *Bickenhead* (Atlantic Records, 2018).

¹²³ Recognizing the word “pussy” is also used to disparage men (in a different manner), I did not include this above because it is not relevant to my discrete analysis here.

distribution of culture,¹²⁴ and the ability to shape and influence culture confers great power.¹²⁵ Music implicates personal and group identity, constitutional freedom of expression, and modern culture as a whole. Therefore, suppressing minority artists' ability to express such cultural dissatisfaction through music would disempower the artists and deprive them of identity and expression.

C. TRADEMARK DILUTION

In removing "Old Town Road" from its country music chart, Billboard theoretically asserted a trademark dilution claim over the song for diluting its country music trademark. The Trademark Anti-Dilution Act of 1996 provides a trademark owner with a cause of action against the "use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark."¹²⁶ Dilution by blurring occurs when a mark or trade name is so similar to a famous mark that it "impairs the distinctiveness of the famous mark."¹²⁷ Dilution by tarnishment arises when a mark develops an association with a famous mark due to the marks' similarities, and the association must harm the reputation of the famous mark.¹²⁸ Both dilution by blurring and dilution by tarnishment must cause harm to the famous mark to be actionable.

Billboard's act of removing "Old Town Road" from its country chart could be based on both tarnishment and blurring dilution claims, arising out of the right to protect its genre from impaired distinctiveness and reputational harm. Some country artists objected to the song's "sarcastic representation of country music," believing that "the music should be taken seriously."¹²⁹ To protect country music's reputation as a genre, according to these critics, similar music damaging its reputation cannot be permitted to exist, and should not be allowed to come along with

¹²⁴ SUNDER, *supra* note 99, at 104.

¹²⁵ *Id.* at 91.

¹²⁶ 15 U.S.C. § 1125.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Randy Lewis, *Meet Luke Combs, the Country Superstar you Probably Haven't Heard of*, L.A. TIMES (Apr. 23, 2019) <https://www.latimes.com/entertainment/music/la-et-ms-luke-combs-stagecoach-festival-20190424-story.html>.

“real” country music. Country music fans also weighed in online, calling for the denunciation of “Old Town Road” as cultural appropriation. These critics even went as far as claiming the song is an outright attack on country music.¹³⁰ As one anonymous commentator posted to the blog “Saving Country Music”:

There has definitely been a mission creep over the years to desensitize the country music listening public to accept anything as country. Now if you don't, you'll be accused of racism, sexism, be de-platformed and shunned . . . This is about subjugating country music to the monoculture, and if it doesn't acquiesce, destroying it.¹³¹

This is essentially an impaired distinctiveness argument: if “Old Town Road” can be a country song, then anything can. Thus, to avoid these negative associations, Billboard needed to make the statement “Old Town Road” was not entitled to use its country music mark.

D. “OLD TOWN ROAD” AS PARODY OR CRITIQUE UNDER THE COPYRIGHT ACT

Country music gatekeepers, including artists, may also theoretically claim “Old Town Road” infringes on the country music copyright, to which Lil Nas X could assert a fair use defense. “Old Town Road” can be analyzed as a modern country music parody and a critique of the genre’s historically racist gatekeeping. A parody is a “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule,” or as a “composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear

¹³⁰ *Opposing Lil Nas X's “Old Town Road” in Country Is Not “Racism,”* SAVING COUNTRY MUSIC.COM (Mar. 27, 2019) <https://www.savingcountrymusic.com/opposing-lil-nas-xs-old-town-road-in-country-is-not-racism/>.

¹³¹ *Id.*

ridiculous.”¹³² Many critics allege “Old Town Road” was intended to and does ridicule country music and southern culture,¹³³ which is one argument advanced in support of the song’s removal from the country music charts. However, even if Lil Nas X’s intent was to make contemporary country music “appear ridiculous,” his ability to do so is protected as fair use under the Copyright Act.¹³⁴

In determining whether a use is a fair use, the following factors are considered:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.¹³⁵

Despite its commercial character, “Old Town Road”’s parodic nature keeps it within the scope of fair use, only borrowing certain discrete elements of the country music genre, and does not significantly affect the market for “traditional” country music.¹³⁶ Additionally, the fair use doctrine “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹³⁷ Old Town Road’s” creativity lies in its clever critique of country music excluding Black artists, and the genre’s resistance to welcome new styles.

¹³² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (holding the commercial character of song parody did not create a presumption against fair use, and a parody’s commercial character is only one element to be weighed in a fair use enquiry).

¹³³ Lewis, *supra* note 128.

¹³⁴ 17 U.S.C. §§ 101, 107.

¹³⁵ *Campbell*, 510 U.S. at 576-77.

¹³⁶ By “traditional” country music, I mean music that is today considered traditional (and that populates the contemporary country music charts).

¹³⁷ *Iowa State Univ. Rsch. Found. v. Am. Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

Lil Nas X highlights this exclusionary gatekeeping by juxtaposing rap and country music's conflicting styles. In his lyrics for "Old Town Road," Lil Nas X alternates between characteristically country turns of phrase and themes typically associated with modern rap and hip hop culture. For example, his seconds verse proceeds:

Ridin' on a tractor
 Lean all in my bladder
 Cheated on my baby
 You can go and ask her
 My life is a movie
 Bull ridin' and boobies
 Cowboy hat from Gucci
 Wrangler on my booty¹³⁸

While "[r]idin' on a tractor" is stereotypical country imagery, "lean," or "purple drank," is a popular drug among rappers, particularly those from the South.¹³⁹ Similarly, cowboy hats are quintessentially country, but Gucci—a high-end designer brand—is one of the top three most name-dropped brands in rap songs.¹⁴⁰

The "Old Town Road" music video for the remix featuring Billy Ray Cyrus extends the theme of juxtaposing country and hip hop imagery. The video portrays Lil Nas X as an outlaw transported from the 19th century old west to the year 2019.¹⁴¹ In the video, Lil Nas X is chased into a tunnel by a white farmer seemingly protecting his daughter.¹⁴² The tunnel then transports Lil Nas X forward in time and into a suburban Southern

¹³⁸ Lil Nas X, *Old Town Road* (Columbia Records 2018).

¹³⁹ See TAMARA PALMER, COUNTRY FRIED SOUL: ADVENTURES IN DIRTY SOUTH HIP-HOP 188 (2005). See also, Future, *Dirty Sprite* (101 Distribution Records 2011): "My purple stuff stay in my cup, Got drank on me I pour me up, Texas oil got me spoiled, Red and Yellow I'm leaning hard."

¹⁴⁰ Jacob Gallagher, *These Are the Fashion Brands That Rappers Name-Drop the Most*, WALL ST. J. (Apr. 22, 2019), <https://www.wsj.com/articles/these-are-the-fashion-brands-rappers-namedrop-the-most-11555943601>. See also, The Game, *Gucci Flip Flops* (Fifth Amendment Records, 2019); Lil Pump, *Gucci Gang* (Warner Bros. Records, 2017).

¹⁴¹ Lil Nas X, *Old Town Road (Official Movie) ft. Billy Ray Cyrus*, YOUTUBE (May 17, 2019), <https://www.youtube.com/watch?v=w2Ov5jzm3j8>.

¹⁴² *Id.*

California Black neighborhood, where he is met with confusion.¹⁴³ Unwelcome in the country realm, as in real life, Lil Nas X is expelled to the Black block,¹⁴⁴ where he is reluctantly embraced.¹⁴⁵ Lil Nas X also makes a nod to the TikTok meme responsible for “Old Town Road”’s rise to popularity, sipping from a bottle labeled “Yee Yee Juice” at the end of the video before hitting the “whoa,” a viral dance move.

Author and songwriter Alice Randall faced similar accusations following the publication of her book “The Wind Done Gone”—a parody of Margaret Mitchell’s “Gone with the Wind.”¹⁴⁶ The original novel’s copyright owners brought an infringement action against Randall, seeking to enjoin her from publishing or distributing the book.¹⁴⁷ The Eleventh Circuit Court of Appeals stated it would “treat a work as parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work.”¹⁴⁸ In her defense, Randall contended she “appropriated the characters, plot, and major scenes” of “Gone With the Wind” to critique it’s “depiction of slavery and the Civil War-era American South.”¹⁴⁹ The court, adopting Randall’s argument, held her novel to be a parody, and therefore a fair use.¹⁵⁰

Randall also has ties to country music, as both a fan and an artist. She cowrote one of the first songs written by an African American woman to top the country charts about a girl who dreams of becoming successful in a man's world.¹⁵¹ The song also references R&B and soul singer Aretha Franklin and country singer Patsy Cline, two influential crossover artists. In discussing country music, Randall has said, “No genre of music deals with a more diverse body of subject matter, provides a more mature perspective, or draws from a wider range of conflicting impulses.”¹⁵² As Randall recognizes, country music involves

¹⁴³ *Id.*

¹⁴⁴ Slang for “neighborhood.”

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001).

¹⁴⁸ *Id.* at 1268—69.

¹⁴⁹ *Id.* at 1259.

¹⁵⁰ *Id.* at 1277.

¹⁵¹ Trisha Yearwood, *XXXs and OOs (An American Girl)*, (MCA Records 1995). PECKNOLD, *supra* note 16, at 263.

¹⁵² PECKNOLD, *supra* note 16, at 272.

complex issues, including race, class, gender, and African American musical heritage.

Parody and the fair use doctrine are crucial elements of intellectual property law because they allow for artistic critiques created by Randall and Lil Nas X. As the court noted in the case against Randall, “copyright does not immunize a work from comment and criticism.”¹⁵³ Rather, it “assures authors the right to their original expression but encourages others to build freely upon the ideas and information conveyed by the work.”¹⁵⁴ These rights—to original expression and criticism—are fundamental and are at the core of the First Amendment.

CONCLUSION

As technology and culture advances, so does intellectual property law. In particular, music’s digitization and the Internet’s collaborative and participatory culture has created new challenges that intellectual property law must address. Modern technology also facilitates increased cross-cultural exchanges and creative ventures. This environment allowed “Old Town Road” to come to life, and also fueled the controversy surrounding the song. Lil Nas X, a 19-year-old aspiring rapper from Georgia, discovered and purchased a musical beat online, created by a Dutch producer of the same age, which sampled a ten-year-old recording by Nine-Inch Nails, a rock band from Ohio.¹⁵⁵

Given the omnipresent cultural mixing and other social concerns, we must question whether genre is a realm over which the law can and should take control. Intellectual property is an inappropriate legal regime for policing genre because genres are closely tied to culture and “[i]ntellectual property rights in culture assume a cultural homogeneity that does not, in fact, exist in the modern world.”¹⁵⁶ In addition to being improper, intellectual property law is also an unworkable regime because it requires clearer designations. Because of its amorphous and ever-developing nature, the challenge of defining a culture’s bounds, owners, and authorized users is too great.

¹⁵³ *Suntrust*, 268 F.3d. at 1265.

¹⁵⁴ *Id.* at 1264.

¹⁵⁵ Philip Trapp, ‘Old Town Road’: Did You Know a Nine Inch Nails Song Spawned the Lil Nas X Hit?, *LOUDWIRE* (Apr. 18, 2019), <https://loudwire.com/old-town-road-nine-inch-nails-lil-nas-x/>.

¹⁵⁶ Sunder, *supra* note 77, at 96.

Intellectual property law should also function to protect marginalized groups and prevent their subjugation. As Professor Sunder writes, “A central concern of a cultural approach to intellectual property should be how to facilitate cultural production that involves inter- and intra-cultural borrowing in a socially just manner.”¹⁵⁷ As such, the “[L]aw should put its weight on the side of those who would dissent from cultural authorities, or those who seek greater autonomy to play and share in cultural communities”¹⁵⁸ Allowing genres to be “owned” by one distinct cultural group, or company, will significantly inhibit artists’ ability to dissent through their music, and will stifle the creativity intellectual property law is designed to encourage.

¹⁵⁷ *Id.* at 94.

¹⁵⁸ *Id.* at 80.