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Promoting Asian American Representation Through Copyright: Moral Rights in *The Last Airbender* and Fair Use in *Ms. Marvel*

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Promoting Asian American Representation Through Copyright: Moral Rights in *The Last Airbender* and Fair Use in *Ms. Marvel*

Jon Tanaka[†]

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INTRODUCTION

The invisibility of Asian Americans in American culture is well

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documented.¹ Asian American invisibility pervades through many facets of society: from the erasure of Asian American contributions and events throughout U.S. history,² to the absence of Asian American voices in political discourse,³ to the flattening of racial identity in America through the “Black-White binary.”⁴ And perhaps most evident in everyday life, Asian Americans struggle for representation in popular culture.

The issue of Asian American invisibility in television, film, and other media, however, is gaining visibility. Creators, especially Asian American creators, have recognized the lack of Asian American representation and brought the issue into mainstream consciousness.⁵ On social media, people responded to whitewashing—the act of casting white actors as nonwhite roles—of Asian characters with the project #StarringJohnCho, creating movie posters that depicted Korean American actor John Cho in popular leading roles originally starring white actors.⁶ Social movements like this are bringing to the forefront two primary issues of Asian American representation: (1) the lack of Asian American characters in the first instance and (2) the whitewashing of Asian characters that do exist. Two doctrines in

1. See RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 6–8 (1989) (calling for the need to remedy the lack of knowledge of Asian Americans and Asian American history).

2. See Eileen H. Tamura, *Introduction: Asian Americans and Educational History*, 43 *HIST. EDUC. Q.* 1 (2000) (noting the “previous invisibility” of Asian Americans); see also Mark E. Steiner, *Inclusion and Exclusion in American Legal History*, 23 *ASIAN AM. L.J.* 69, 91 (2016) (“Asian American legal history scholarship has not fully entered the mainstream of American legal history.”).

3. Alex Wagner, *Why Are Asian Americans Politically Invisible?*, *ATLANTIC* (Sept. 12, 2016), <http://www.theatlantic.com/politics/archive/2016/09/why-dont-asians-count/498893/> [<https://perma.cc/CK2H-2RMZ>].

4. Michael Omi & Dana Y. Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, 55 *REPRESENTATIONS* 155, 155–56 (Summer 1996) (noting that political discourse of race centers around a “black/white” paradigm); see also Linda Martin Alcoff, *Latino/As, Asian Americans, and the Black-White Binary*, 7 *J. ETHICS* 5, 7–8 (2003); Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 *ASIAN AM. L.J.* 57, 64 (2007) (noting the invisibility of Asian Americans from the “black/white paradigm” in the affirmative action debate).

5. E.g., Eliana Dockterman, *Master of None’s Alan Yang Makes Appeal for More Asian Americans on TV at Emmys*, *TIME* (Sept. 18, 2016), <http://time.com/4498750/emmys-2016-aziz-ansari-alan-yang/> [<https://perma.cc/GGA5-YPEY>]; *Master of None: Indians on TV*, Netflix (2015) (depicting two Indian American actors’ struggles to find roles); *Saturday Night Live: Lin-Manuel Miranda/Twenty One Pilots* (NBC television broadcast Oct. 8 2016) (acknowledging that *Saturday Night Live*’s Latina cast member was playing the role of Elaine Quijano, an Asian American reporter), <https://www.youtube.com/watch?v=5sYGjoUcusM>.

6. Katie Rogers, *John Cho, Starring in Every Movie Ever Made? A Diversity Hashtag Is Born*, *N.Y. TIMES* (May 10, 2016), <http://www.nytimes.com/2016/05/11/movies/john-cho-starring-in-every-movie-ever-made-a-diversity-hashtag-is-born.html> [<https://perma.cc/4XDV-NE2A>]; see also Frances Kai-Hwa Wang, *#StarringConstanceWu Continues the Conversation on Hollywood Whitewashing*, *NBC News* (May 17, 2016) (discussing a social media campaign which reimagined Constance Wu, a Chinese American actress, as popular female leads), <http://www.nbcnews.com/news/asian-america/starringconstancewu-continues-conversation-hollywood-whitewashing-n575501> [<https://perma.cc/2R52-UQBT>].

copyright law—fair use and moral rights—may aid creators in remedying these issues.

Moral rights enable creators to protect their personal, as opposed to economic, rights in a work. Such rights include the ability to prevent others from distorting a work and to claim authorship in a work. In U.S. copyright law, the scope of works that enjoy moral rights protection is limited; moral rights do not extend to television, film, or literature.⁷ Other countries, such as France, offer much broader moral rights protection.⁸ If the United States adopted a more expansive moral rights regime, creators would have a legal challenge to protect their works from whitewashing. Creators could assert moral rights claims that changing the racial identity of their characters violates the integrity of their works.

While moral rights expansion could combat whitewashing, it could also halt diversity by maintaining the status quo: creators might try to prevent others from recasting white characters as racial minorities. However, application of the fair use doctrine would likely circumvent this issue. In the United States, the fair use doctrine limits moral rights.⁹ Fair use permits certain uses of works that would otherwise be copyright infringement, recognizing that “excessively broad protection would stifle, rather than advance” copyright’s goal of promoting creativity.¹⁰ Thus, secondary creators would still have room under fair use to make choices that change a character’s racial identity. Such fair use claims would be more likely to succeed if the secondary work recognized and explored the racial identity of the character. These deeper explorations into racial identity are more likely to come from works that choose to increase, rather than decrease, diversity, as those choices tend to be more deliberately made.¹¹

Part I of this Article describes the lack of Asian American representation in popular culture, the reasons for this lack of representation, and the harms it causes. Part II describes moral rights in copyright law and the interaction of moral rights and fair use in the U.S. copyright system. It then considers a copyright framework that would allow creators to protect against the whitewashing of their works through moral rights. Though the expansion of moral rights is unlikely and potentially detrimental, fair use, as it currently exists, can be used to protect works which reimagine the racial identity of a character.¹² Finally, Part III evaluates two recent popular culture

7. See 17 U.S.C. §§ 101, 106A(a) (2012) (defining the scope of moral rights as applying to “visual art”).

8. Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUDIES 95, 96–97 (1997).

9. See 17 U.S.C. § 106A(a).

10. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990).

11. See *infra* Part II.B.3

12. As the focus of this Article is specifically about Asian American representation, this Article

case studies under this framework: (1) the movie adaptation of *Avatar: The Last Airbender*, which cast white actors in the roles of Asian characters, and (2) the 2014 comic book series *Ms. Marvel*, which reimaged a white superhero as a Pakistani American girl.

I. REPRESENTATION OF ASIAN AMERICANS IN POPULAR CULTURE

Asian Americans make up a growing percentage of the U.S. population. In fact, Asians are the fastest growing racial group in the country, growing 3.4 percent between July 2014 and July 2015.¹³ Between 2000 and 2010, the population of Asians in the United States grew 45.6 percent,¹⁴ which was nearly five times faster than the U.S. population as a whole.¹⁵ In 2016, there were twenty-one million Asians in the United States,¹⁶ accounting for 5.7 percent of the total population.¹⁷

The percentage of Asian Americans is even greater in the United States' largest cities. Asian Americans are concentrated on the West Coast and urban areas.¹⁸ Los Angeles County has the greatest number of individuals who identify as Asian,¹⁹ comprising 15.1 percent in 2015.²⁰ Asian Americans also represent a disproportionate segment of San Francisco County (35.4 percent)²¹ and New York County (Manhattan Borough) (12.8 percent).²²

specifically considers how this copyright regime might affect Asian Americans. Much of the analysis, however, would apply equally to other underrepresented groups.

13. The Associated Press, *These Are the Fastest-Growing Racial Groups in America*, FORTUNE (June 23, 2016, 10:25 AM), <http://fortune.com/2016/06/23/census-bureau-race-age/> [<https://perma.cc/9QFK-BBKS>].

14. ELIZABETH M. HOEFFEL ET AL., U.S. CENSUS BUREAU, THE ASIAN POPULATION: 2010 4 (Mar. 2012).

15. The U.S. population grew 9.7 percent between 2000 and 2010. *Id.*

16. The Associated Press, *supra* note 13.

17. QuickFacts: United States, CENSUS.GOV, <https://www.census.gov/quickfacts/table/PST045215/00#headnote-js-a> [<https://perma.cc/FQP8-G2Z6>] (last visited Nov. 20, 2016). This figure only includes those who identify as "Asian alone" and not those who identify as mixed race. In 2010, the percent of the total population who identified as Asian alone or part Asian was 5.7 percent, and as Asian population has grown since 2010, that percent is likely greater today. *See* HOEFFEL, *supra* note 14, at 4.

18. *See* OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, THE FEASIBILITY OF USING ELECTRONIC HEALTH DATA FOR RESEARCH ON SMALL POPULATIONS (Sept. 1, 2013), <https://aspe.hhs.gov/report/feasibility-using-electronic-health-data-research-small-populations/population-1-asian-american-subpopulations> [<https://perma.cc/SN4F-VVKG>].

19. ASIAN AMS. ADVANCING JUSTICE, A COMMUNITY OF CONTRASTS 1 (2013), http://advancingjustice-la.org/system/files/CommunityofContrasts_LACounty2013.pdf [<https://perma.cc/B6UN-Y9FD>].

20. QuickFacts: Los Angeles County, California, CENSUS.GOV, <https://www.census.gov/quickfacts/table/PST045215/06037> [<https://perma.cc/FY5Z-99KZ>] (last visited Nov. 20, 2016).

21. QuickFacts: San Francisco County, California, CENSUS.GOV, <https://www.census.gov/quickfacts/table/PST045215/06075> [<https://perma.cc/5ZMV-JYQ7>] (last visited Nov. 20, 2016).

22. QuickFacts: New York County (Manhattan Borough), New York, CENSUS.GOV,

Despite the growing presence of Asian Americans in the country, representation of Asian Americans in the media has not followed suit. One study of popular films found that, in 2015, 3.9 percent of characters were Asian, with no change in percentage between 2007 and 2015.²³ Even more troubling, none of the 2015 films that the study reviewed featured a single Asian actor as the lead or co-lead.²⁴ Another study showed that Asians only made up 3 percent of characters in primetime and 1 percent of credits in media.²⁵ A third study of popular movies from 2010 to 2014 found that Asians occupied only 2 percent of lead roles and 3 percent of supporting roles.²⁶

Representation of Asian Americans on television is slightly better than in movies. On scripted TV shows, actors of Asian descent portrayed 7.1 percent of main cast members.²⁷ However, actors of Asian descent portrayed only 4.3 percent of lead characters.²⁸ While these numbers more closely match the actual demographics of the United States as a whole, many TV show representations still lag far behind the demographics of the cities in which they are set. A disproportionate number of shows take place in California and New York: nearly 20 percent of reviewed TV shows were set in New York City and many more took place in California.²⁹ However, despite Asian Americans making up an increased percentage of the population in these areas, Asian Americans do not see increased representation on TV shows.

The lack of Asian American representation in television and film stems from two issues. First, Asian American characters and actors are simply not being written and cast by those making decisions in the entertainment industry. Second, even when Asian American characters do exist, directors frequently cast non-Asian American actors in those roles.

<https://www.census.gov/quickfacts/table/PST045215/36061> [<https://perma.cc/7D9T-JZ2R>] (last visited Nov. 20, 2016).

23. STACY L. SMITH ET AL., USC ANNENBERG, *INEQUALITY IN 800 POPULAR FILMS: EXAMINING PORTRAYALS OF GENDER, RACE/ETHNICITY, LGBT, AND DISABILITY FROM 2007–2015 2* (Sept. 2016).

24. *Id.*

25. Christina Chong, *Where Are the Asians in Hollywood? Can §1981, Title VII, Colorblind Pitches, and Understanding Biases Break the Bamboo Ceiling?*, 21 *UCLA ASIAN PAC. AM. L.J.* 29, 30 (2016).

26. *Id.* at 32–33.

27. Molly Fitzpatrick, *The Number of Asian Actors on TV Is Up 1%*, *FUSION* (Oct. 12, 2015), <http://fusion.net/story/209278/asian-actors-on-network-tv-here-are-the-updated-numbers/> [<https://perma.cc/RQP4-K5TR>].

28. *Id.*

29. Molly Fitzpatrick, *Of 800 Main Cast Members on 100 Network TV Shows, Just 52 (6%) Are of Asian Descent*, *FUSION* (Apr. 23, 2015), <http://fusion.net/story/119292/we-crunched-the-numbers-asians-are-severely-under-represented-on-tv/> [<https://perma.cc/JL5R-6B4N>].

A. *The Absence of Asian American Characters and Narratives*

There is a dearth of Asian American characters in popular culture. Many works ignore Asian Americans altogether. A majority of “film, television and streaming properties feature zero named or speaking Asian characters.”³⁰ Hollywood decision makers rarely place Asian American-centric stories at the forefront of popular narratives. In the entire history of network television, only three sitcoms have starred Asian American families: *All-American Girl*, *Fresh off the Boat*, and *Dr. Ken*.³¹ After *All-American Girl*’s cancellation in 1994, twenty years passed before another network sitcom starring an Asian American family aired.³² Moreover, broadening the search from finding an Asian American family to finding multiple Asian actors does not help: fewer than 11 percent of network TV shows in 2015 had more than one Asian actor in its main cast.³³

This absence of Asian American characters extends beyond Hollywood. On Broadway, Asian American actors only accounted for 2.3 percent of roles in Broadway plays in the five theater seasons prior to 2012.³⁴ Similarly, in comic books, Asian American leads are scarce.³⁵ Despite increasing gender³⁶ and sexual orientation³⁷ diversity in young adult fiction, protagonists in

30. Amanda Hess, *Asian-American Actors Are Fighting for Visibility. They Will Not Be Ignored.*, N.Y. TIMES (May 25, 2016), <http://www.nytimes.com/2016/05/29/movies/asian-american-actors-are-fighting-for-visibility-they-will-not-be-ignored.html> [https://perma.cc/X7SV-UXRC].

31. See Kat Chow, *A Timeline of Sitcoms Featuring Families of Color*, NPR CODE SWITCH (Oct. 28, 2014) (identifying *All-American Girl* and *Fresh Off the Boat* as two network family sitcoms featuring Asian Americans), <http://www.npr.org/sections/codeswitch/2014/10/28/358307426/a-timeline-of-51-family-sitcoms-with-people-of-color> [https://perma.cc/4B3Q-S4EY]; E. Alex Jung, *2015: The Year Asian-Americans Finally Got a Shot on TV*, VULTURE (Nov. 11, 2015) (identifying *All-American Girl*, *Fresh Off the Boat*, and *Dr. Ken*), <http://www.vulture.com/2015/11/asian-americans-on-tv-2015.html> [https://perma.cc/5GLK-GCL3].

32. Eric Deggans, *ABC Tones down Author’s ‘Fresh Off the Boat’ for Sitcom Audience*, NPR (Feb. 4, 2015), <http://www.npr.org/2015/02/04/383724495/abc-tones-down-authors-fresh-off-the-boat-for-sitcom-audience> [https://perma.cc/LLA7-4FL3].

33. Fitzpatrick, *supra* note 27.

34. Randy Gener, *Asian-Americans: Why Can’t We Get Cast in NYC?*, NPR (Feb. 15, 2012), <http://www.npr.org/2012/02/14/146890025/asian-americans-why-cant-we-get-cast-in-nyc> [https://perma.cc/W4VW-Q2ZZ].

35. Jennifer de Guzman, *Bring on the Spam Musubi: The State of Asian Representation in Comics [Roundtable]*, COMICS ALLIANCE (May 6, 2016), <http://comicsalliance.com/asian-representation-comics-roundtable/> [https://perma.cc/Y2WD-A4QF].

36. See Jennifer Baker, *Women Dominate the NYT Bestseller List for Young Adult Hardcover*, FORBES (May 29, 2016) (noting that majority of the young adult books released in 2015 were authored by women), <http://www.forbes.com/sites/jenniferbaker/2016/05/29/women-dominate-the-nyt-bestseller-list-for-young-adult-hardcover/#7401d4d547f7> [https://perma.cc/QN98-S7A8].

37. See Melanie D. Koss & William H. Teale, *What’s Happening in YA Literature? Trends in Books for Adolescents*, 52 J. ADOLESCENT & ADULT LITERACY 563, 567 (2009) (finding that 10 percent of the titles reviewed had at least one LGBTQ character); William P. Banks, *Literacy, Sexuality, and the Value(s) of Queer Young Adult Literatures*, 98 ENG. J. 33, 33–36 (2009) (noting the “proliferation of LGBT texts” while criticizing the quality of those representations).

young adult novels are still overwhelmingly white.³⁸ And works of science fiction, even those that draw upon “Asian-inspired” worlds, mostly feature white characters.³⁹

In this respect, science fiction is not unique: even in stories in which the primary setting seems inherently Asian, white characters often feature more heavily in the narrative than Asian characters. In both *The Great Wall*, a movie set at the Great Wall of China,⁴⁰ and *The Last Samurai*, a movie set during Japan’s Meiji Restoration,⁴¹ a white foreigner is the lead character. In the 2016 Bruce Lee biopic *Birth of the Dragon*, the point-of-view character is not Bruce Lee but a white character.⁴² Even the spec script for the live action *Mulan*, a Disney movie with entirely Asian characters, gave Mulan a white love interest.⁴³ Thus, Asian characters are not just missing from stories generally but are being erased from stories that are inherently Asian.

The lack of Asian American characters in popular media may in part be traced back to the lack of Asian American creators in these industries.⁴⁴ Few prominent Asian American directors exist in Hollywood.⁴⁵ A study of 500 movies from 2010 to 2014 found that Asians accounted for only 1 percent of

38. See Koss & Teale, *supra* note 37, at 566 (finding no representation of Asian American characters in the young adult fiction reviewed).

39. See, e.g., Douglas Ishii, *Palimpsestic Orientalisms and Antiblackness*, in TECHNO-ORIENTALISM: IMAGINING ASIA IN SPECULATIVE FICTION, HISTORY, AND MEDIA 180, 180–81 (David Roh et al., eds. 2015) (noting the lack of Asian representation in *Firefly*, which draws heavily on Chinese culture); Sarah Emerson, *Cyberpunk Cities Fetishize Asian Culture but Have No Asians*, MOTHERBOARD (Oct. 10, 2017) (describing the lack of Asian characters in *Blade Runner 2049*), https://motherboard.vice.com/en_us/article/mb7yqx/cyberpunk-cities-fetishize-asian-culture-but-have-no-asians-blade-runner [<https://perma.cc/ZZ7J-BU38>].

40. David Sims, *What Is Matt Damon Doing on Top of The Great Wall?*, ATLANTIC (Aug. 2, 2016), <http://www.theatlantic.com/entertainment/archive/2016/08/what-is-matt-damon-doing-on-top-of-the-great-wall/494090/> [<https://perma.cc/5KDB-8PUE>].

41. See Elvis Mitchell, *Film Review: From the Wild West to the Honorable East*, N.Y. TIMES (Dec. 5, 2003), <http://www.nytimes.com/movie/review?res=9F05EFD7173DF936A35751C1A9659C8B63> [<https://perma.cc/UQU9-S8DA>].

42. Catherine Shoard, *Birth of the Dragon: Anger over Whitewashing of Bruce Lee Biopic*, THE GUARDIAN (Oct. 5, 2016), <https://www.theguardian.com/film/2016/oct/05/bruce-lee-biopic-whitewashing-anger-birth-of-the-dragon> [<https://perma.cc/UP7Q-AGCD>].

43. Yohana Desta, *Don’t Worry: Mulan Will Not Feature a White Male Lead*, VANITY FAIR (Oct. 10, 2016), <http://www.vanityfair.com/hollywood/2016/10/mulan-white-male-lead-disney> [<https://perma.cc/G2W3-EFXT>]. After the spec script leaked and social media responded in anger, the studio confirmed that the actual movie would have an all Asian cast. *Id.*

44. Meg James & David Ng, *In Hollywood, Asian American Actors See Few Lead Roles, and Pay Discrepancies when They Land One*, L.A. TIMES (July 8, 2017), <http://www.latimes.com/business/hollywood/la-fi-ct-hawaii-five-0-asian-actors-20170708-story.html> [<https://perma.cc/4NA7-W9CL>].

45. Rebecca Sun & Rebecca Ford, *Where Are the Asian-American Movie Stars?*, HOLLYWOOD REPORTER (May 9, 2016) (describing prominent Asian American directors as “rare”), <http://www.hollywoodreporter.com/features/are-asian-american-movie-stars-890755> [<https://perma.cc/CL4H-LTMT>].

directors, 0.5 percent of casting directors, and 1 percent of screenwriters.⁴⁶ Many casting directors consider the “default” race of characters to be white,⁴⁷ which reduces representation of Asian Americans in television and movies. Much of the Asian American representation that is present on TV shows can be attributed to the presence of Asian Americans in decision-making roles: Aziz Ansari is a creator, writer, director, and actor for *Master of None*⁴⁸ and Ken Jeong is an executive producer, writer, and actor for *Dr. Ken*.⁴⁹

B. *The Whitewashing of Asian American Characters*

Even when Asian American characters do exist, casting directors frequently choose white actors to portray those characters. The phenomenon of white actors being cast as characters of color is called “whitewashing.”⁵⁰ Whitewashing has become an unfortunately common practice in Hollywood today.⁵¹

Even looking just at movies released since 2015, numerous examples of whitewashing exist. In *Aloha*, Emma Stone, a white actor, portrays a character named Allison Ng, who explains in the movie that she is one-quarter Chinese and one-quarter Hawaiian.⁵² In the Marvel Studios blockbuster *Doctor Strange*, another white actor, Tilda Swinton, plays The Ancient One, a comic book character portrayed as an old Tibetan man.⁵³ In the Oscar-nominated *The Martian*, Mackenzie Davis, a white actor, played Mindy Park, a Korean American character.⁵⁴ Unfortunately, these examples

46. Chong, *supra* note 25, at 34.

47. Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 11–12 (2007); *see also* Sun & Ford, *supra* note 45.

48. *Aziz Ansari Biography*, IMDB, <http://www.imdb.com/name/nm2106637/> [<https://perma.cc/W82N-VHAG>] (last visited Dec. 9, 2016).

49. *Ken Jeong Biography*, IMDB, <http://www.imdb.com/name/nm0421822/> [<https://perma.cc/ZB8P-ZTMN>] (last visited Dec. 9, 2016).

50. This article uses “whitewashing” to refer to the specific act of Asian American characters being portrayed as white.

51. *See* Hess, *supra* note 30.

52. Cara Buckley, *Emma Stone as Asian-American? Cameron Crowe Apologizes*, N.Y. TIMES (June 3, 2015), <http://artsbeat.blogs.nytimes.com/2015/06/03/emma-stone-as-asian-american-cameron-crowe-apologizes/> [<https://perma.cc/LH4D-SU4B>].

53. Gene Park, *‘Doctor Strange’ Is a Really Fun, Whitewashed Ride!*, WASH. POST (Nov. 4, 2016), <https://www.washingtonpost.com/news/comic-riffs/wp/2016/11/04/doctor-strange-is-a-really-fun-whitewashed-ride/> [<https://perma.cc/45FL-TQL8>]. Scott Derrickson, the director of *Doctor Strange*, defended his choice to have a white woman play The Ancient One to avoid portraying the offensive Asian stereotypes that the original character embodied. Jen Yamamoto, *‘Doctor Strange’ Director Owns Up to Whitewashing Controversy*, THE DAILY BEAST (Nov. 2, 2016), <https://www.thedailybeast.com/doctor-strange-director-owns-up-to-whitewashing-controversy> [<https://perma.cc/K777-CAZT>]. He later stated that he “didn’t really understand the level of pain” surrounding whitewashing of Asian characters. *Id.* Still, *Doctor Strange* has only one speaking part portrayed by an Asian actor despite taking place largely in Tibet and China. *See* Park, *supra* note 53.

54. Dave McNary, *‘The Martian’ Slammed over ‘White-Washing’ Asian-American Roles*,

are merely illustrative, not exhaustive.⁵⁵

The prevalence of whitewashing has sparked backlash on social media. In May 2016, #StarringJohnCho, a social media project, gained traction online.⁵⁶ The project aimed to bring attention to the lack of Asian American representation in Hollywood by modifying movie posters to feature the Korean American actor John Cho.⁵⁷ A similar social media campaign, #StarringConstanceWu, shortly followed to highlight the lack of Asian American women in Hollywood as well.⁵⁸ Even traditional media has recognized the problem with whitewashing: on John Oliver's TV show, *Last Week Tonight*, Oliver devoted a segment to Hollywood's problem of whitewashing.⁵⁹ Mainstream media outlets covered the segment in their online publications.⁶⁰ And, most notably, one white actor pulled out of a role playing an Asian character after users on social media brought the issue of whitewashing to his attention.⁶¹

Whitewashing of Asian American characters is not only outdated but also harmful. Asian Americans struggle in particular with being seen and heard in other spaces;⁶² removing them from television and movies only serves to further minimize Asian American perspectives. Moreover, many stereotypes of Asian Americans substantially relate to lacking a voice: the

VARIETY (Oct. 8, 2015), <http://variety.com/2015/film/news/the-martian-white-washing-asian-american-ridley-scott-1201614155/> [<https://perma.cc/QMM8-EHMN>]. Another Asian character, Venkat Kapoor, a character of Indian descent, was played by Chiwetel Ejiofor, a black actor. *Id.*

55. Other examples include a planned adaptation of the Japanese manga *Death Note*, a live-action adaptation of *Ghost in the Shell*, the 2013 film *Star Trek: Into Darkness*, and the 2012 film *Cloud Atlas*. See Hess, *supra* note 30; *Whitewashing, a Long History*, N.Y. TIMES, <http://www.nytimes.com/slideshow/2016/04/22/opinion/whitewashing-a-long-history/s/chow-ss-slide-HTTP.html> [<https://perma.cc/AB7P-XEEX>] (last visited Nov. 22, 2016).

56. Rogers, *supra* note 6.

57. *Id.*

58. Chloe Tejada, #StarringConstanceWu Highlights Hollywood's Ongoing Problem with Diversity, HUFFINGTON POST CAN. (May 18, 2016), http://www.huffingtonpost.ca/2016/05/18/starring-constance-wu_n_10023714.html [<https://perma.cc/XM5P-G8DT>].

59. *Last Week Tonight: Abortion Laws* (HBO television broadcast Feb. 21, 2016), https://www.youtube.com/watch?v=XebG4TO_xss.

60. See, e.g., Ned Ehrbar, *John Oliver Slams Hollywood Whitewashing*, CBS NEWS (Feb. 22, 2016), <http://www.cbsnews.com/news/john-oliver-slams-hollywood-whitewashing/> [<https://perma.cc/5SR8-YKJD>]; Bethonie Butler, *John Oliver's 'Last Week Tonight' Highlights the Absurdity of Hollywood Whitewashing*, WASH. POST (Feb. 22, 2016), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/02/22/john-olivers-last-week-tonight-highlights-the-absurdity-of-hollywood-whitewashing/> [<https://perma.cc/F826-ANK7>]; Sarene Leeds, *'Last Week Tonight' Weighs in on the Oscars with 'Hollywood Whitewashing' Segment*, WALL ST. J. (Feb. 22, 2016), <http://blogs.wsj.com/speakeasy/2016/02/22/last-week-tonight-weighs-in-on-the-oscars-with-hollywood-whitewashing-segment/> [<https://perma.cc/PR6F-E5GW>].

61. Jenna Amatulli, *Ed Skrein Turns Down 'Hellboy' Role to Prevent Whitewashing*, HUFFINGTON POST (Aug. 29, 2017), https://www.huffingtonpost.com/entry/ed-skrein-turns-down-hellboy-role-to-prevent-whitewashing_us_59a4751ce4b050afa90bf507 [<https://perma.cc/VL9P-7W9R>].

62. See *supra* notes 1–4 and accompanying text.

perpetual foreigner who cannot speak English,⁶³ the non-confrontational nerd,⁶⁴ and other general perceptions of Asian Americans as quiet and passive.⁶⁵ Thus, these stereotypes are reinforced not only by active portrayals⁶⁶ but also by a lack of portrayals. By removing a potential portrayal of an Asian American character, whitewashing robs Asian Americans of opportunities to combat these stereotypes. And, media portrayals may be especially critical in shaping the general population's perception of Asian Americans. Because the Asian American population is heavily concentrated in a few geographic areas,⁶⁷ many Americans live in areas where they have few interactions with Asian Americans in their daily lives.⁶⁸ As such, media portrayals may serve as the only basis for some people's perceptions of Asian Americans.⁶⁹ Instead of providing people with rich, full depictions of Asian Americans, whitewashed media serves only to reinforce damaging stereotypes: that Asian Americans are merely voice-less background players.

Most directly, whitewashing harms Asian Americans working in the entertainment industry. Whitewashing Asian American characters takes roles away from Asian American actors, making it more difficult for Asian Americans to find work in the entertainment industry.⁷⁰ This creates a perpetual cycle of underrepresentation: directors fail to cast Asian Americans because they are not "stars," and Asian American actors do not become stars because directors fail to cast them.⁷¹ It also increases scrutiny on Asian Americans working in the entertainment industry. The cancellation of Margaret Cho's sitcom *All American Girl* highlights this problem. In 1994, *All American Girl* was the first sitcom to feature an Asian American family.⁷² Jeff Yang, one of the only Asian American critics covering

63. See FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 79–130 (2002).

64. See Qin Zhang, *Asian Americans Beyond the Model Minority Stereotype: The Nerdy and the Left Out*, 3 J. INT'L & INTERCULTURAL COMM. 20, 25–26 (2010).

65. See *id.*; Joy L. Lei, *(Un)Necessary Toughness?: Those "Loud Black Girls" and Those "Quiet Asian Boys,"* 34 ANTHROPOLOGY & EDUC. Q. 158, 170 (2003).

66. See Zhang, *supra* note 64, at 31–35; see also Srividya Ramasubramanian, *Television Exposure, Model Minority Portrayals, and Asian-American Stereotypes: An Exploratory Study*, 26 J. INTERCULTURAL COMM. 4 (2011).

67. JANELLE WONG ET AL., *ASIAN AMERICAN POLITICAL PARTICIPATION: EMERGING CONSTITUENTS AND THEIR POLITICAL IDENTITIES* 3–4 (2011).

68. See Zhang, *supra* note 64, at 22.

69. *Id.*

70. See Hess, *supra* note 30; James & Ng, *supra* note 44.

71. See James & Ng, *supra* note 44.

72. *Rep Sweats, or, 'I Don't Know If I Like This, but I Need It to Win,' Code Switch*, NPR (June 22, 2016), <http://www.npr.org/sections/codeswitch/2016/06/22/482525049/on-the-podcast-rep-sweats-or-i-dont-know-if-i-like-this-but-i-need-it-to-win> [<https://perma.cc/CGS7-4V7Z>].

television at the time, reviewed *All American Girl*.⁷³ He panned the show.⁷⁴ The show was canceled, and Cho has cited Yang's poor review as a primary reason: if even the Asian American critic did not like the show, then who would?⁷⁵ With greater Asian American representation and participation in the media industry, perhaps less pressure would have been on both Cho and Yang to speak for all Asian Americans.

Though issues surrounding Asian American representation have begun to enter mainstream discourse, the problems persist.⁷⁶ Copyright law, then, may provide a means for creators to produce works that provide thoughtful representations of Asian Americans.

II. THE POTENTIAL ROLE OF MORAL RIGHTS AND FAIR USE

Moral rights protect creators' moral interests in their works, and creators have used moral rights to prevent others from making unwanted alterations to their art. In the United States, however, moral rights protection only extends to works of "visual art." If Congress expanded moral rights to cover works of popular culture, creators would be able to prevent whitewashing through copyright law. However, expanding moral rights is unlikely, as economic, not moral, concerns drive U.S. copyright policy. Even if moral rights are unlikely to be widely available to creators, copyright law, through the fair use doctrine, still may be helpful to creators concerned with representation. Fair use recognizes that some derivative works are socially desirable and permits those works that would otherwise constitute copyright infringement. As it currently exists, U.S. copyright law's robust fair use doctrine can promote diversity: works that reinterpret white characters as Asian American can be transformative works protected by fair use.

A. Preventing Whitewashing with Moral Rights

The U.S. copyright regime is a system rooted in economic principles calibrated to incentivize the production of creative works.⁷⁷ On the other

73. *Id.*

74. *Id.*

75. *Id.*

76. For example, while hosting the 2016 Oscars, Chris Rock made jokes at the expense of Asian children, playing off the stereotype that Asians are good at math. Weeks later, the Academy issued an apology expressing "regrets that any aspect of the Oscar telecast was offensive." Katey Rich, *Chris Rock's Oscars Asian Jokes Finally Prompt Academy Response*, VANITY FAIR (Mar. 15, 2016), <http://www.vanityfair.com/hollywood/2016/03/chris-rock-asian-jokes-response> [https://perma.cc/7J5R-2M4T].

77. Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 86 n.34 (1996); Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 67 (2007) ("[T]he exclusive rights contained in the U.S. Copyright Act were limited to 'economic' rights granted to authors in order to provide them with incentives to promote the arts and sciences"); see also COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY

hand, continental European copyright tradition places the artist's personal rights at its center.⁷⁸ *Droit moral*, or moral rights, originated in French law and protects authors' moral—not economic—interests in their works.⁷⁹

The Berne Convention for the Protection of Literary and Artistic Property (Berne Convention) is an international copyright treaty administered by the World Intellectual Property Association.⁸⁰ In 1928, the Berne Convention was amended to include a moral rights provision.⁸¹ Article 6bis codified moral rights:

Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.⁸²

Article 6bis includes two separate rights for authors: (1) the right of attribution, and (2) the right of integrity. The right of attribution gives authors the right to claim authorship for works they created, as well as to prevent their names from being associated with any works they did not create.⁸³ The right of integrity, the more pertinent aspect of moral rights, prevents others from “deforming, destroying, or otherwise altering the artist's work.”⁸⁴ As the name suggests, the right of integrity protects the reputation of the author and respect for the author's works.⁸⁵

Importantly, moral rights exist irrespective of copyright.⁸⁶ That is, even if creators have given up or transferred their copyright in a work, they still retain the ability to assert moral rights.⁸⁷ In some cases, a creator can explicitly contract those moral rights away, but that must be done separately from copyright.⁸⁸ By the same logic, only the creator of a work, and not the

7 (4th ed. 2015).

78. COHEN, *supra* note 77, at 11.

79. Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 38–39 (1997).

80. *Id.* at 42 n.44.

81. *Id.* at 42.

82. Berne Convention for the Protection of Literary and Artistic Works art. 6bis, *adopted* Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 (amended July 24, 1971).

83. Ciolino, *supra* note 79, at 40.

84. *Id.* at 40–41.

85. *Id.*

86. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 361, 370 (2006) (describing moral rights as “inalienable” and apart from the economic rights).

87. *E.g.*, 17 U.S.C. § 106A(e)(2) (2012) (“Transfer of ownership of [. . .] a copyright [. . .] shall not constitute a waiver of [moral rights]”); Ciolino, *supra* note 79, at 35 (“Moreover, Leonardo could enforce his moral rights regardless of whether he still owned the tangible painting or the copyright in the underlying work of authorship.”).

88. *See* Rigamonti, *supra* note 86, at 372–79 (describing intersection of contractual ability to waive various moral rights in different European jurisdictions).

physical owner of a work or the copyright holder, can assert moral rights.⁸⁹ Thus, moral rights can be a powerful legal tool for creators.

I. Moral Rights in the United States: The Visual Artists Rights Act

In 1988, the United States signed the Berne Convention,⁹⁰ which required it to recognize moral rights. Prior to signing the Berne Convention, U.S. copyright law had little, if any, recognition of moral rights.⁹¹ The United States first recognized moral rights by federal statute in 1990 with the passage of the Visual Artists Rights Act (VARA).⁹² Even still, VARA provides relatively narrow protection of moral rights.

Codified as § 106A of the Copyright Act, VARA recognizes both a right of attribution and a right of integrity.⁹³ Consistent with other jurisdictions, VARA's right of attribution gives authors the right to claim authorship of works⁹⁴ and prevent their names from attaching to works they did not create.⁹⁵ The VARA-granted right of integrity is twofold: (1) the right to "prevent any destruction to a work of recognized stature"⁹⁶ and (2) the right to "prevent any intentional distortion, mutilation, or other modification" of a work that would be prejudicial to the author's honor.⁹⁷

Though the rights afforded by VARA seem to be in line with European moral rights, VARA contains two major restrictions. The first and most significant restriction is that VARA only extends to "work[s] of visual art,"⁹⁸ which are narrowly defined as paintings, drawings, prints, sculptures, and still photographs produced for exhibition.⁹⁹ Further, these works must exist as single copies or limited editions of 200 or less.¹⁰⁰ The second restriction largely restates the first: a "reproduction, depiction, portrayal, or other use" of a "motion picture or other audio visual work" or "book" is not a distortion or mutilation under VARA.¹⁰¹

Under VARA, only the creator of a work can assert a claim based on

89. *Id.* at 359.

90. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

91. *See* Ciolino, *supra* note 79, at 43–45 (noting courts' resistance to moral rights and the use of legal doctrines other than copyright to enforce rights akin to moral rights).

92. *Id.* at 45–46.

93. 17 U.S.C. § 106A.

94. *Id.* § 106A(a)(1)(A).

95. *Id.* § 106A(a)(1)(B).

96. *Id.* § 106A(a)(3)(B).

97. *Id.* § 106A(a)(3)(A).

98. *Id.* § 106A(a).

99. *Id.* § 101.

100. *Id.*

101. *Id.* §§ 101(A)(i), 106A(c)(3).

moral rights.¹⁰² As such, moral rights expire with the death of the creator.¹⁰³ The rights conferred by VARA are not transferrable, though they can be extinguished by contract.¹⁰⁴ Finally, moral rights are not absolute; instead, they are subject to exclusions and exceptions.¹⁰⁵ Most notably, a use or modification that would otherwise be a violation of an author's moral rights is authorized if it is a fair use.¹⁰⁶

2. *An Expansive Moral Rights Framework*

The limited moral rights protections embodied in VARA are products of U.S. copyright law's emphasis on economic rights.¹⁰⁷ Other countries, such as France, have moral rights doctrines that apply to all types of works. Additionally, in countries where moral rights play a more central role, a greater variety of alterations can constitute a violation of the artist's right of integrity.¹⁰⁸

French law has codified the most extensive protections of moral rights in its intellectual property code.¹⁰⁹ Unlike VARA, which protects only works of "visual art," the French moral rights statute extends to "works of the mind," including literary works, lectures and speeches, dramatic works, choreographic works, movies and television, visual works, and even software and fashion.¹¹⁰ And courts have in fact enforced moral rights protections for many different types of works.¹¹¹

Moreover, French courts have recognized a large variety of alterations as violating an artist's right of integrity. For example, musicians might object to the use of their music in another creative work, the digital sampling of their music in another song, or the manipulation of their music by consumers.¹¹² Whereas U.S. courts would likely not sustain a VARA challenge if the protected work was merely recast in a derivative work,¹¹³ French courts have held that the creation of derivative works may in fact be

102. *Id.* § 106A(b).

103. *Id.* § 106A(d)(1).

104. *Id.* § 106A(e)(1).

105. *See id.* § 106A(a), (c).

106. *Id.* § 107.

107. *See* Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 247–48 (2006) ("The focus then becomes on the work, not the creator, and the achievement of economic goals and market efficiency for the works.") .

108. *See* Rigamonti, *supra* note 86, at 359–67.

109. Bird & Ponte, *supra* note 107, at 227.

110. Code de la Propriété Intellectuell (Code of Intellectual Property), ch. 1, art. L112-2 (Fr.); Bird & Ponte, *supra* note 107, at 227–28, 228 n.100.

111. *See, e.g.*, Bird & Ponte, *supra* note 107, at 231–34.

112. *Id.* at 230.

113. *See* 17 U.S.C. § 106A(c)(3).

a violation of the original creator's moral rights.¹¹⁴ Thus, the French moral rights scheme may provide a basis for challenges based on whitewashing in a movie or TV adaptation of a book.

One case study that illustrates the differences between French and U.S. moral rights is the fight over the colorization of a black and white film, *The Asphalt Jungle*. Turner Entertainment, a U.S. media company, and La Cinq, a French TV station, gained the rights to colorize *The Asphalt Jungle*, directed by John Huston.¹¹⁵ John Huston had lambasted the colorizing of classic films, comparing it to "pouring forty tablespoons of sugar water over a roast."¹¹⁶ Huston's heirs filed an action in France to block the broadcast of the colorized version.¹¹⁷ Because VARA does not extend to audiovisual works and only a creator can bring moral rights actions, Huston's heirs had no recourse in U.S. courts.¹¹⁸ The French Supreme Court, however, found that the colorization of the film, which was not in line with Huston's "artistic vision," violated Huston's moral right of integrity.¹¹⁹

Though U.S. courts have never formally recognized moral rights to this extent, they have entertained analogous moral rights-type reasoning in sustaining other actions. In *Gilliam v. ABC*,¹²⁰ decided before the United States signed the Berne Convention, the Second Circuit held that airing an edited version of a TV show constituted copyright infringement. The plaintiffs were the creators of the Monty Python comedy series.¹²¹ The BBC had a license to broadcast the series, and ABC had contracted with BBC to broadcast the series in the United States.¹²² ABC aired heavily truncated versions of Monty Python, with twenty-four of the ninety minutes omitted.¹²³ The district court found that the truncation "impaired the integrity" of the original work by causing it to "lose its iconoclastic verve."¹²⁴ The court also found that because ABC did not have a license to broadcast an edited version of the work,¹²⁵ ABC's broadcast infringed Monty Python's copyright.¹²⁶

114. See, e.g., Bird & Ponte, *supra* note 107, at 230 ("Musicians and composers may likewise try to stop the downloading of their music from online media services because of concerns about violations of their moral rights, including later manipulation of their work by end-users.").

115. *Id.* at 232.

116. *Id.* at 232 n.129.

117. *Id.* at 232–33.

118. *Id.* at 233.

119. See *id.*

120. 538 F.2d 14 (2d Cir. 1976).

121. *Id.* at 17.

122. *Id.*

123. *Id.* at 18.

124. *Id.*

125. The license only allowed edits "for insertion of commercials, applicable censorship or governmental . . . rules and regulations, and National Association of Broadcasters and time segment requirements." *Id.* at 18.

126. *Id.* at 21 ("We find, therefore, that unauthorized editing of the underlying work, if proven,

Then, while noting that U.S. copyright law did not recognize moral rights, the court considered the reputational harm suffered by the mutilation of the group's "rare brand of humor" in deciding to issue a preliminary injunction.¹²⁷ Thus, in its consideration of the potential harm suffered, the court made a moral rights-type argument: the edited version "impaired the integrity" of the work, and that distortion harmed the creators' artistic reputations on which they were "financially dependent."¹²⁸

As such, expanding moral rights in the United States to apply to "works of the mind" and non-physical alterations of those works would not be completely unprecedented. Among other things, this expansion would allow creators to make moral rights-based challenges to prevent adaptations of their works from whitewashing. Of course, such an expansion would have significant consequences for U.S. copyright law.¹²⁹

First, as moral rights are independent of other copyright rights, creators of all works would have significantly more control over their works.¹³⁰ This might create extremely high transaction costs for those trying to make downstream uses of a work, as they would have to negotiate with both the copyright holder and the original creator.¹³¹ These transaction costs may be prohibitive; instead of negotiating, secondary creators simply may not produce works.

Second, strengthening moral rights in this way may stunt the creation of socially progressive works.¹³² Parodic works, in particular, rely upon distorting mainstream works, often in a provocative way, to criticize the

would constitute an infringement of copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright.").

127. *Id.* at 24–25.

128. *Id.*

129. For a discussion of the merits of expanding moral rights in the United States, compare Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263 (2009) (challenging common rationales for expanding moral rights), with Roberta R. Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006) (arguing that a utilitarian view of copyright law is compatible with moral rights and suggesting a framework for expanding moral rights in the United States).

130. See Bird & Ponte, *supra* note 107, at 220.

131. See generally Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (explaining that having too many rights holders can lead to an underuse of resources); see also Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUDIES 67, 69 (1992) ("Transaction costs are minimized when all rights over the copyrighted work are concentrated in a single pair of hands.").

132. See Yonover, *supra* note 77, at 103–04 (describing parody's use as effective criticism and the potential chilling effect of moral rights); MIRA T. SUNDARA RAJAN, MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY 18 (2011) ("The presence of moral rights in legislation may inhibit the publication of creative works, while moral rights claims could penalize those who undertake to disseminate them."). But see Bird & Ponte, *supra* note 107, at 220 ("If artists feel more secure about the treatment they as creators and their creations will receive, they are more likely to create.").

status quo.¹³³ As these deviations from the original tend to be more shocking and less socially acceptable, they may be more vulnerable to moral rights claims.¹³⁴

Fair use, however, can address these concerns. Fair use aims to promote culturally productive works, recognizing the need for works of art to build on previous ones.¹³⁵ Thus, if the fair use doctrine serves as intended, works that are productive and add to the cultural exchange¹³⁶ will still survive moral rights challenges. Many culturally productive works may amount to criticism, which, as an enumerated purpose in the fair use doctrine,¹³⁷ is especially likely to be considered fair use. And courts would likely find suits brought to prevent legitimate criticism to be exceptional cases, subjecting the plaintiff to paying attorneys' fees.¹³⁸ This safeguard would help deter frivolous moral rights suits.

Finally, an expansive moral rights doctrine is simply at odds with the current conception of U.S. copyright law. Copyright doctrine currently focuses on creating a bundle of economic rights which will promote the creation of artistic works.¹³⁹ However, moral rights, which cannot be transacted for like all other copyright rights, are about protecting an artist's personal rights.¹⁴⁰ Thus, extending moral rights would run counter to the direction of hundreds of years of American copyright policy.

For this reason, realistically, Congress and courts are unlikely to create a more robust moral rights doctrine. Legislation specifically directed to films and television is even less likely to pass. The United States used to have limited preservation rights for classic films.¹⁴¹ But due to the influence of the media and entertainment industries, VARA eliminated those rights.¹⁴²

133. See Yonover, *supra* note 77, at 103; David Tan, *The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the "Transformative Use" Doctrine Twenty-Five Years On*, 26 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 311, 363–64 (2016) (“[I]n order to be able to speak effectively, one needs to be able to appropriate and transform the work of others[.]”).

134. See *id.* at 103 (“If parody is intended to criticize or mock an author's work, then almost inevitably an artist's 'honor or reputation' is on the line.”).

135. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–76 (1994); Leval, *supra* note 10, at 1109 (“[E]xcessively broad protection would stifle, rather than advance, the objective [of copyright law]”).

136. See COHEN, *supra* note 77, at 564–65 (describing “cultural interchange” fair use as “further[ing] the development of a common culture.”).

137. 17 U.S.C. § 107.

138. See 5 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 14.10[D][1] (Matthew Bender, Rev. Ed.) (noting that “attorney's fees have been awarded where the losing party has pursued action in bad faith”).

139. Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, 1 *U. OTTAWA L. & TECH. J.* 1, 3 (2003-2004).

140. Ciolino, *supra* note 79, at 38–39.

141. Patrick G. Zabatta, *Moral Rights and Musical Works: Are Composers Getting Berned?*, 43 *SYRACUSE L. REV.* 1095, 1104 n.61 (1992).

142. Bird & Ponte, *supra* note 107, at 233.

3. Moral Rights as a Framework for Whitewashing

Even though expansive moral rights reform is unlikely, at least considering what a moral rights challenge to whitewashing would look like can shed light on how the U.S. legal system could promote diversity. This section will imagine such a claim, assuming that the right of integrity extended to all “works of the mind.”

Though there are other contexts in which whitewashing of Asian characters occurs,¹⁴³ the most common scenario occurs when a movie adaptation of a story in another medium is created.¹⁴⁴ In these big studio adaptations, copyright infringement itself will not be an issue because the studio will have a license to make the adaptation. That said, if creators do not waive their moral rights, they could still seek to enjoin the production of a movie if it violated their rights of integrity.

As an initial matter, large movie studios would almost certainly require creators contractually to waive their moral rights. Though creators may get consultation rights, producers customarily have “complete discretion in the alteration of the [work]’s story in adapting the story for the screen.”¹⁴⁵ Moreover, in countries that do recognize moral rights, creators are usually required to waive all their moral rights.¹⁴⁶ Thus, lesser known creators may lack the bargaining power relative to large movie studios to retain their moral rights.¹⁴⁷

Those authors with bargaining power, either due to elevated stature or contracting with a smaller film production company, who retain moral rights can assert a right of integrity violation. Creators claiming that whitewashing an Asian character violated their moral rights would have to show two main elements: (1) that the original work was distorted, mutilated, or otherwise modified, and (2) that the change was prejudicial to the creator’s honor.¹⁴⁸

143. See, e.g., Jesse Murray, *Before Rachel Dolezal, One Life to Live Brought Us Asian Blair*, PREVIOUSLY TV (July 6, 2015) (describing the recasting of an Asian soap opera character) <http://previously.tv/one-life-to-live/before-rachel-dolezal-one-life-to-live-brought-us-asian-blair/> [<https://perma.cc/VH9T-EYSQ>].

144. Asian character were portrayed by white actors in movie adaptations of *Doctor Strange*, a comic book; *The Martian*, a novel; *Ghost in the Shell*, an anime; and *21*, a true story about the MIT Blackjack Team.

145. Daniel M. Satorius, *From Book to Screen—Mining Literary Works in the Movie Business*, 24 ENT. & SPORTS L. 1, 34 (2006–2007).

146. *Id.* at 35; see also SUNDARA RAJAN, *supra* note 132, at 17 (“[C]ountries like Canada and the United Kingdom have seen the development of standard-form contracts in which complete waivers of moral rights are required before any publication activity will be undertaken.”).

147. Cf. RICHARD HOLMES & BERTRAND MOULLIER, RIGHTS, CAMERA, ACTION!—IP RIGHTS AND THE FILM-MAKING PROCESS 59–60 (2007) (noting the ability of a few “A list Hollywood directors” to get final cut approval rights); Robinson, *supra* note 47, at 7 n.7 (“Only the most powerful writers retain some contractual right to veto changes or at least be consulted before the studio makes significant alterations.”).

148. 17 U.S.C. § 106A(a)(3)(a).

Showing a modification does not present an issue. Changing a character's race is a clear modification to the original work.

Showing that a change was prejudicial to the creator's honor or reputation would be slightly more difficult but ultimately would not likely pose a problem. Creators could argue that the very act of changing the identity of the character changes the overall nature of the work in a way that diverges from the creator's "artistic vision."¹⁴⁹ Moreover, this claim can be bolstered by the racial dimension. Race has a charged history in America,¹⁵⁰ and decisions to change a character's race have been met with controversy.¹⁵¹ So, though courts have trended towards embracing a "colorblind" approach to race,¹⁵² a creator can point to the mere existence of controversy as evidence of potential reputational prejudice. Finally, specifically changing an Asian American character to a white character can provide further support that the creator will suffer actual reputational harm. As seen in mainstream and social media, whitewashing can create public backlash,¹⁵³ allowing creators to credibly argue that the threat of being labeled racist will mar their reputation and honor.

While this moral rights regime could be used to prevent whitewashing, there is also a risk that creators would bring moral rights claims when the racial change goes the other way: when white characters are recast or reimagined as characters of color. Indeed, these creators could point to similar public backlash when white characters are rewritten as characters of color.¹⁵⁴ Thus, concerns over this type of moral rights assertion necessitate

149. See *supra* note 119 and accompanying text.

150. See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 1-5 (2d. ed. 1994).

151. E.g., ANGELA C. PAO, NO SAFE SPACES 146-49 (2010) (describing a controversy that arose between a creator, Samuel Beckett, and the American Repertory Theater when two black actors were cast in a production of one of Samuel Beckett's plays); Lois L. Krieger, "Miss Saigon" and Missed Opportunity: Artistic Freedom, Employment Discrimination, and Casting for Cultural Identity in the Theater, 43 SYRACUSE L. REV. 839, 841-44 (1992) (describing Actors Equity's decision to prohibit a white actor from playing an Asian character in *Miss Saigon* and the controversy that followed).

152. Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 809-11 (2011) ("Inversely, courtroom proponents of colorblindness shifted from seeking to promote to seeking to defeat equitable racial change, and it was this reactionary version the courts ultimately embraced.")

153. See *supra* notes 56-60 and accompanying text.

154. For example, some people criticized 20th Century Fox when Michael B. Jordan, a black actor, was cast as the Human Torch, a white comic book character. Ben Child, *Fantastic Four Film-makers Respond to Criticism of Decision to Cast Black Actor*, THE GUARDIAN (June 4, 2015) <https://www.theguardian.com/film/2015/jun/04/fantastic-four-film-makers-respond-to-criticism-of-decision-to-cast-black-actor> [https://perma.cc/RD93-SVKF]. Notably, however, Stan Lee, the character's creator, enthusiastically approved the decision. Chris Lee, *Stan Lee Weighs in on Michael B. Jordan as the Human Torch in Fantastic Four*, EW (July 27, 2015) <http://www.ew.com/article/2015/07/27/stan-lee-michael-b-jordan-human-torch-fantastic-four> [https://perma.cc/TK23-MV4B]. Backlash to casting actors of color even occurs when the original character was not necessarily white. See Ellen E. Moore &

additional limitations.

B. Promoting Diversity with Fair Use

The primary safeguard to protect against moral rights claims from unduly stifling artistic creation would be the fair use doctrine. Fair use exists to prevent “excessively broad protection” that would “strangle the creative process.”¹⁵⁵ Courts¹⁵⁶ and scholars¹⁵⁷ have noted that fair use is a central feature of copyright’s purpose to “[p]romote the progress of . . . useful Arts.”¹⁵⁸ Thus, even though moral rights are generally separate from copyright, they are still subject to the fair use doctrine.¹⁵⁹

The fair use statute enumerates favored uses in its preamble: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”¹⁶⁰ While this list is not exhaustive of the potential fair uses, arguments that show a work serves one of these purposes are particularly effective. Courts weigh four factors against each other to determine fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the copyrighted work taken; and (4) the effect of the use on the market of the copyrighted work.¹⁶¹

Courts weigh these factors “in light of the purposes of copyright”;¹⁶² in practice, courts place greatest emphasis on the first and fourth factors: the purpose and character of the use and the use’s effect on the market.¹⁶³ In the context of a moral rights challenge where the creator of the secondary work will likely have a license with the original author, the effect on the market factor may be less important. Thus, the most important factor in the fair use inquiry will be the first factor.

Catherine Coleman, *Starving for Diversity: Ideological Implications of Race Representations in The Hunger Games*, 48 J. POPULAR CULTURE 948, 948–51 (2015) (describing fan reaction to casting several black actors for *The Hunger Games* movie); Aja Romano, *Mortal Instruments Fans Outraged over Casting of Asian Actor*, THE DAILY DOT (July 24, 2012) <http://www.dailydot.com/upstream/mortal-instruments-godfrey-gao-backlash/> [<https://perma.cc/B9HG-5K3M>] (noting fan backlash to the casting of Godfrey Gao, an actor of Southeast Asian descent, to play a character of Southeast Asian descent).

155. *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006) (quoting Leval, *supra* note 10135, at 1108–09).

156. *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994); *Blanch*, 467 F.3d at 250.

157. *E.g.*, Leval, *supra* note 10, at 1108–09; Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2546–47 (2009).

158. U.S. CONST. art. 1, § 8, cl. 8.

159. *See* 17 U.S.C. § 106A.

160. *Id.* § 107.

161. *Id.*

162. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

163. Ashten Kimbrough, Note, *Transformative Use vs. Market Impact: Why the Fourth Fair Use Factor Should Not Be Supplanted by Transformative Use as the Most Important Element in a Fair Use Analysis*, 63 ALABAMA L. REV. 625, 629 (2012).

The current framework for first factor analysis is rooted in the Supreme Court's decision in *Campbell v. Acuff-Rose Music*.¹⁶⁴ In *Campbell*, the Supreme Court explained that the "central inquiry" of the first factor was "whether the new work merely supersedes the objects of the original" or whether the new work alters the original with "new expression, meaning, or message."¹⁶⁵ The court boiled this down to whether the new work was "transformative."¹⁶⁶ Previously, the central question in the first factor had been "commercial" in nature, with commercial works presumed unfair.¹⁶⁷ Now, a finding that a work is transformative minimizes the importance of the commerciality of a work.¹⁶⁸ In fact, a finding that a work is transformative is nearly dispositive of the overall fair use determination.¹⁶⁹

1. Transformative Works

The focus on transformative works has shifted the emphasis of fair use to highlight productive uses. Transformative use may be found when creators transform the expression of preexisting works to "criticize, comment upon, or offer new insights about [the original work] and the social significance of others' expressions."¹⁷⁰ Professor Pamela Samuelson has identified three categories of transformative use: parodies, other works which criticize the original, and adaptations which serve as "an expression of artistic imagination."¹⁷¹ While some pop culture adaptations may be direct parodies, these works will most likely fit into the second or third groups.

Cases in which the new work imbues the original work with a new aesthetic purpose, but is not necessarily a parody of the original, can still be found transformative. This is the case when one artistic work draws upon another artistic work; courts have found works such as appropriation art,¹⁷² humorous internet videos,¹⁷³ and theatrical productions¹⁷⁴ transformative. In these cases, courts consider a variety of factors. Works in which the overall aesthetic "character" or the artistic purpose has been changed are more likely to be transformative.¹⁷⁵ In conducting this analysis, courts can consider an

164. See Tan, *supra* note 133, at 321.

165. *Campbell*, 510 U.S. at 579.

166. *Id.*

167. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–49 (1984).

168. *Campbell*, 510 U.S. at 579.

169. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 605–06 (2008).

170. Samuelson, *supra* note 157, at 2548–49.

171. *Id.* at 2548–55.

172. *E.g.*, *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

173. *E.g.*, *Equals Three, LLC v. Jukin Media, Inc.*, No. 14–09041 (C.D. Cal. Oct. 13, 2015).

174. *E.g.*, *TCA Television Corp. v. McCollum*, No. 15–4325 (S.D.N.Y. Dec. 17, 2015).

175. See, *e.g.*, *Koons*, 467 F.3d at 253; *Cariou*, 714 F.3d at 706.

artist's stated purpose for creating a work.¹⁷⁶

For the whitewashing context, cases in which the new work places characters from old works in a different story are informative. Two factually similar cases in which courts arrive at divergent conclusions illustrate some nuances in the fair use context. In *Suntrust Bank v. Houghton Mifflin*, the court found that *The Wind Done Gone*, a retelling of *Gone with the Wind* (*GWTW*) from a different perspective, was fair use.¹⁷⁷ In contrast, in *Salinger v. Colting*, the court found that *60 Years Later: Coming Through the Rye*, a book about the main character of *Catcher in the Rye* in his old age, was not fair use.¹⁷⁸

In *Suntrust*, Alice Randall, an African-American novelist, told the story of *Gone with the Wind* from the perspective of one of the slaves on the O'Hara plantation.¹⁷⁹ The heirs of Margaret Mitchell, the author of *Gone with the Wind*, sued Randall for copyright infringement.¹⁸⁰ The Eleventh Circuit found that *The Wind Done Gone* was transformative. In so doing, the Eleventh Circuit highlighted the different roles that race and gender played in the two novels: "It is clear within the first fifty pages of Cynara's fictional diary that Randall's work flips *GWTW*'s traditional race roles, portrays powerful whites as stupid or feckless, and generally sets out to demystify *GWTW* and strip the romanticism from Mitchell's specific account of this period of our history."¹⁸¹ The court also noted that Scarlett O'Hara was white in the original and mixed race in the new work.¹⁸² Thus, the court found that the depictions of the characters in *The Wind Done Gone* were comments on the racist caricatures of the original as a "specific criticism of and rejoinder to the depiction of slavery and the relationship between blacks and whites in *GWTW*."¹⁸³

On the other hand, in *Salinger*, Fredrik Colting wrote *Sixty Years Later: Coming Through the Rye* to tell the story of Holden Caulfield, the protagonist of J.D. Salinger's *Catcher in the Rye*, sixty years after the events of *Catcher*.¹⁸⁴ *Sixty Years Later* copied the structure of *Catcher in the Rye* and had the same character at its center even though *Sixty Years Later* refers to

176. See, e.g., *Koons*, 467 F.3d at 247; *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1174 (9th Cir. 2013).

177. 268 F.3d 1257 (11th Cir. 2001).

178. 641 F. Supp. 250 (S.D.N.Y. 2009), *vacated on other grounds by* 607 F.3d 68 (2d Cir. 2010) (noting that the district court did not err in its fair use analysis).

179. *Suntrust Bank*, F.3d at 1270.

180. *Id.* at 1259.

181. *Id.* at 1270.

182. *Id.*

183. *Id.* at 1269.

184. *Salinger v. Colting*, 607 F.3d 68, 71–72 (2d Cir. 2010).

him as “Mr. C.”¹⁸⁵ The court held that *Sixty Years Later* was not commenting on anything in *Catcher in the Rye* but instead served to “satisfy Holden’s fans’ passion for Holden Caulfield’s disconnectedness, absurdity, and ridiculousness.”¹⁸⁶ Though Colting added Salinger himself as a character, which the court found gave the work some transformative purpose, the court held that the first factor weighed against fair use.¹⁸⁷

Some commenters have argued that the differing outcomes in *The Wind Done Gone* and *Sixty Years Later* are examples of the “unpredictability” of “fair use’s subjective first factor.”¹⁸⁸ However, the changes in *The Wind Done Gone* and *Sixty Years Later* are distinguishable. Certainly, both are cases that rework characters from popular novels and utilize many of the same story beats to do so. And both secondary authors claimed that their works were commenting on some aspect of the original: race relations in *The Wind Done Gone* and absurdity in *Sixty Years Later*. There are two interrelated differences between the secondary works: (1) *The Wind Done Gone* changes the race of a character, and (2) the commentary on race relations is closely tied to the specific changes made. Because of the charged nature of race in American society, the court may have been more willing to accept the argument that changing the race of a character was in fact done for a transformative purpose. Of course, merely changing the race of a character but otherwise making no changes and calling it “racial commentary” would not be transformative. But, at the very least, *The Wind Done Gone* indicates that racial changes can satisfy the transformative inquiry when the accompanying changes to the story support that racial commentary.

2. Character Copyrightability

Of course, secondary creators only need to show fair use of copyrighted materials. In other words, an artist may blatantly copy parts of another work if those parts are not subject to copyright protection. Ideas, as opposed to expression, are not copyrightable.¹⁸⁹ For narrative works, this means that common story tropes or story-telling structures are not protectable.¹⁹⁰ Copyright protection only extends to the specific expression of the story,

185. Salinger v. Colting, 641 F. Supp. 250 (S.D.N.Y. 2009).

186. *Id.* at 261.

187. *Id.*

188. See, e.g., Stacey M. Langone, *Sherlock Holmes and the Case of the Lucrative Fandom: Recognizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright*, 21 MICH. TELECOMM. & TECH. L. REV. 263, 294 (2015).

189. 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

190. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120–22 (2d Cir. 1930).

such as the words spoken or written, the specific placement of objects in the setting, and the specific characters.

While specific characters are protectable to some extent, character archetypes are not.¹⁹¹ First, “purely literary character[s]” are not entitled to copyright protection, but comic book, television, or movie characters may be if they contain “some unique elements of expression.”¹⁹² Characters must be “especially distinctive.”¹⁹³ Moreover, they must be “sufficiently delineated and display consistent, widely identifiable traits.”¹⁹⁴ Still, characters can be sufficiently distinctive even if they change appearance in certain contexts.¹⁹⁵ For example, characters may be sufficiently distinctive if they can be identified by their personality traits, skills, or actions.¹⁹⁶ Thus, even though it is the particular elements and traits which are required for copyrightability, the character is looked at as a whole to get a sense of whether it remains “identifiable.”¹⁹⁷

Thus, when a character is taken from an original work and then a particular aspect is changed, such as race, there is a question of whether copyright infringement has even occurred. This will depend on whether, even with the changes, the character still maintains the “identifiable character traits and attributes”¹⁹⁸ that lent copyright protection to the character in the first place. For instance, making Scarlett O’Hara, who was originally white with racist views, mixed-race with more progressive racial views might render the character essentially unidentifiable. If so, the use would not have even infringed the Scarlett O’Hara character copyright in the first place.

3. *Applicability to Racebending*¹⁹⁹

If original creators attempt to prevent white characters from being reimagined as Asian American, the new works’ creators can use the fair use

191. *See id.* at 121 (“If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress.”).

192. *DC Comics v. Towle*, 802 F.3d 1012, 1019, 1021 (9th Cir. 2015).

193. *Id.* at 1019.

194. *Id.*

195. *Id.* at 1020–21 (explaining that James Bond, Godzilla, and Batman are all copyrightable despite changing physical characteristics overtime).

196. *Id.*

197. *Id.*

198. *Id.* at 1021.

199. For simplicity, I use “racebending” in this Article to refer to changing the race of a white character. The term “racebending” was originally coined in response to whitewashing though has been used to refer to any instance of a content creator changing the race or ethnicity of a character. *See What Is “Racebending”?*, RACEBENDING.COM, <http://www.racebending.com/v4/about/what-is-racebending/> [<https://perma.cc/VQR6-W4XP>] (last visited Mar. 19, 2017).

doctrine to facilitate this transformative use. Even outside the context of moral rights, creators can employ fair use to affirmatively protect these works from claims of copyright infringement. This section will discuss what a fair use analysis might consider in these situations.

Changing a character's race particularly implicates two primary steps of the fair use inquiry: (1) Is the original character copyright infringed?; (2) Is the new work transformative? First, portraying a white character as Asian American still likely infringes the copyright in the original character. Because white identity is often seen as the default identity,²⁰⁰ whiteness is rarely a central trait for a character.²⁰¹ As a result, to the extent that a white character has sufficiently distinct characteristics to be copyrightable, representing that character as Asian American is unlikely to disrupt those traits. Thus, the new work will need to be found a fair use to be authorized.

Second, if the new work thoughtfully engages with the character's new racial identity, it is likely transformative and authorized by fair use. The new work may fit into two different categories of transformative works; it may either have a new artistic purpose, or it may comment on the original. If the original work has particularly poor racial stereotypes or a complete absence of Asian American characters, the creator of the new work can argue that the purpose of the work was to comment on this poor Asian American representation in the original, analogizing to *The Wind Done Gone*.²⁰² As courts view commenting favorably, these arguments are likely to be particularly powerful.

However, if the original work is not notable in its treatment of race, creators may have a difficult time arguing that their new works are commenting specifically on the original. Creators may still be able to advance a persuasive argument that their new work nevertheless adds "new expression, meaning, or message"²⁰³ by serving a new artistic purpose. Creators can argue that their purpose was to tell the story from a new point of view and increase Asian American representation. Here, the more deliberate and thoughtful the artist's treatment of the character's Asian American identity, the more likely the argument is to succeed.

The specific stereotypes associated with Asian Americans can lead to especially powerful arguments that coopting preexisting white characters is fair use. Because Asian Americans are seen as perpetually foreign, creators can argue that changing the race of an existing character, as opposed to

200. See Monica McDermott & Frank L. Samson, *White Racial and Ethnic Identity in the United States*, 31 ANN. REV. SOCIOLOGY 245 (2005); Robinson, *supra* note 47, at 11.

201. See, e.g., MARY F. BREWER, STAGING WHITENESS 190 (2005) (noting that "white" is not mentioned as a character trait).

202. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001).

203. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

inventing a new one, was necessary to highlight and emphasize the relatability of the Asian American character. Thus, using the cultural capital of the preexisting character was important for the new artistic purpose. Richer representations of race will make this new artistic purpose more evident, so courts will be more likely to find these arguments credible.

On the other hand, whitewashing tends to be justified by economic rationales²⁰⁴ as opposed to artistic ones. Directors indicate that they hire white actors to play Asian roles because they are “bankable” or that there were no qualified Asian actors to play the role.²⁰⁵ These creators of whitewashed works will have a much harder time succeeding in showing fair use because neither of these justifications have anything to do with “artistic purpose” or commentary.

Courts may also be receptive to the notion that the new work is directed at a different audience. That is, unlike *Salinger*, which merely catered to fans of the original,²⁰⁶ the purpose of the more diverse work is to cater to the minority community’s interests, attracting an entirely new audience.²⁰⁷ Creators of whitewashed works may be able to make a similar claim that they are trying to be relatable to a different audience.²⁰⁸ However, once more the whitewashed case is less likely to succeed due to the “market failure” rationale of fair use, which posits that fair use should favor works that fill a niche that the market fails to support.²⁰⁹ Market failures may occur when transaction costs are too high, when a creator cannot capture all of a work’s benefits, or when “non-monetizable interests such as free speech” are implicated.²¹⁰ Though the market has failed to support works that prominently feature Asian Americans, the same is not true for works that prominently feature white people.²¹¹ So, once more, whitewashed works are

204. Keith Chow, *Why Won't Hollywood Cast Asian Actors?*, N.Y. TIMES (Apr. 22, 2016), <http://www.nytimes.com/2016/04/23/opinion/why-wont-hollywood-cast-asian-actors.html> [<https://perma.cc/PQP8-PHCZ>].

205. *Id.*

206. *Salinger v. Colting*, 641 F. Supp. 250, 261 (S.D.N.Y. 2009); *see also* *Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).

207. *See, e.g.*, Luke Graham, *Is Marvel's Diversity Strategy Paying Off?*, CNBC (July 11, 2016), <https://www.cnbc.com/2016/07/11/is-marvels-diversity-strategy-paying-off.html> [<https://perma.cc/LF8T-PVH4>] (describing the diversification of Marvel’s superhero comic books as a way to market to new audiences).

208. Simply arguing that they are trying to capture a *wider* audience, on the other hand, would likely fail. Increasing the accessibility of a work, without an underlying change in purpose, is not transformative. *See* *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

209. *See* Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 J. GENDER, SOC. POL'Y & L. 461, 507–08 (2006); Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1605 (1982).

210. *See supra* note 209.

211. *See* Chow, *supra* note 204 (“[Filmmakers] insist that movies with minorities in lead roles are gambles.”); *see also* Hess, *supra* note 30 (explaining that Hollywood has failed to produce an adequate

less likely to raise a successful fair use defense.

Thus, regardless of the moral rights framework, fair use may be used to protect creators who wish to utilize aspects of copyrighted properties in racially progressive ways. Because works that change race in a thoughtful, purposeful way are more likely to be transformative, copyright law is more likely to favor richer representations of race. Moreover, large movie studios that whitewash characters in otherwise faithful adaptations will have a harder time asserting a successful fair use defense.

III. DUELING CASES: *AVATAR: THE LAST AIRBENDER* AND *MS. MARVEL*

Two recent pop culture adaptations serve as case studies for how this moral rights and fair use framework might serve to promote Asian American representation. In the movie *Avatar: The Last Airbender*, characters from the television show from which it was adapted were whitewashed. In the comic book *Ms. Marvel*, a Pakistani American girl assumed the identity of a traditionally white superhero. The differences in these works' treatments of race and in their creators' motivations should allow copyright law to prohibit the former and authorize the latter.²¹² The way these works treat race is fairly representative of the broader set of "whitewashed" and "racebent" works. Discussion of these cases will follow a two-step inquiry: (1) Does the artist have a moral rights claim? and (2) Does fair use serve as a defense?

A. *The Whitewashed Case: Avatar: The Last Airbender*

Avatar: The Last Airbender began as an animated television show set in "a fantastical Asian world" on Nickelodeon.²¹³ That world comprised four "nations," where each nation had the ability to manipulate a different element (fire, earth, air, and water). The nations drew inspiration from a variety of Asian and indigenous people's cultures, including Japanese, Chinese, Korean, and Inuit.²¹⁴ The series' creators noted that they were inspired by "Japanese anime, Hong Kong action & Kung Fu cinema, yoga, and Eastern philosophies."²¹⁵ The manipulation of elements, or "bending," was modeled

number of roles for Asian American actors but not white actors).

212. To fully explore the issues of copyright law, the following analyses imagine scenarios in which the secondary works were not authorized by the copyright holders. Additionally, the analysis is confined to issues of copyright law.

213. Press Release, Nick Premieres Avatar in Hour Special Feb. 21 (Feb. 18, 2005), https://web.archive.org/web/20050508192912/http://news.awn.com/index.php?ltype=cat&category1=Television&newsitem_no=13156 [<https://perma.cc/5PP6-JZQV>].

214. Lori Kido Lopez, *Fan Activists and the Politics of Race in The Last Airbender*, 15 INT'L J. CULTURAL STUDIES 431, 435 (2011).

215. Eduardo Vasconcellos, *Interview: Avatar's Bryan Konietzko and Michael Dante Dimartino*, IGN (Sept. 6, 2007), <http://www.ign.com/articles/2007/09/06/interview-avatars-bryan-konietzko-and-michael-dante-dimartino> [<https://perma.cc/9EK4-VNC9>].

after different styles of kung fu.²¹⁶ An animatic editor of the original series confirmed that “some of the characters were even modeled after Asian members of the crew.”²¹⁷ Thus, Asian cultures were integral to the characters, world, and cultures of the animated series.

Capitalizing on the success of the television show, Paramount Pictures announced a live-action movie adaptation of *Avatar* in 2007.²¹⁸ The movie first sparked controversy when a casting call for the four leads specified “Caucasian or any other ethnicity.”²¹⁹ Soon after, the core cast leaked, and none of the actors were of Asian descent.²²⁰ The movie followed the plot structure of the first season of the television show, centered on the same set of characters. It utilized Asian-inspired settings, and many of the extras and background characters were portrayed by people of color.

1. Moral Rights in Avatar

Under a more expansive moral rights doctrine, the original creators would likely be successful with a moral rights claim. The changes at issue here are far greater than the changes to *The Asphalt Jungle*, which involved mere colorization of a black-and-white film. This is a screen adaptation of a television show in which the races of the main characters were distorted. As such, a clear “alteration or distortion” occurred.

Similarly, the creators would likely have little issue showing that such distortions were prejudicial. First, just as John Huston had spoken out against colorization of films, the creators of *Avatar* noted initially that the show was envisioned as an action series based on “Eastern culture, *rather than* Western

216. *Id.*

217. Dao Le, Statement, RACEBENDING.COM (July 31, 2009), <http://www.racebending.com/v4/campaigns/airbender/statement-from-dao-le-animatic-editor/> [<https://perma.cc/26Q9-XEMD>].

218. David Lieberman, *Nickelodeon Pins Hopes on 'Avatar,'* USA Today (Sept. 20, 2007), http://usatoday30.usatoday.com/money/media/2007-09-20-avatar_N.htm [<https://perma.cc/GZX3-FSXM>].

219. Nina Shen Rastogi, *Please Submit All Ethnicities,* SLATE (Jul. 30, 2012), http://www.slate.com/articles/arts/culturebox/2012/07/casting_and_race_the_tricky_business_of_writing_casting_notices.html [<https://perma.cc/D49U-MZD3>].

220. Nicole Sperling, *Shyamalan Lines up His Cast for 'The Last Airbender,'* EW (Dec. 9, 2008), <https://web.archive.org/web/20090116082509/http://hollywoodinsider.ew.com/2008/12/shyamalan-casts.html?xid=rss-hollywoodinsider-Shyamalan%20lines%20up%20his%20cast%20for%20%27The%20Last%20Airbender%27> [<https://perma.cc/P9SW-67QP>]. Later, Jesse McCartney, who was set to play the central villain, was replaced with Dev Patel, an Indian American actor. Nicole Sperling, *Dev Patel Replaces Jesse McCartney in 'The Last Airbender,'* EW (Feb. 2, 2009), <http://www.ew.com/article/2009/02/02/dev-patel-repla> [<https://perma.cc/6DQY-XMAZ>]. Additionally, Noah Ringer, who played the lead Aang, is “of American Indian heritage.” Karen Valby, *Noah Ringer of 'The Last Airbender' Has Nothing up His Sleeve,* EW (Nov. 3, 2010), <https://web.archive.org/web/20160222001121/http://www.ew.com/article/2010/11/03/noah-ringer-last-airbender-cowboys-aliens> [<https://perma.cc/N2TJ-Z28N>].

culture.”²²¹ While this is not as clear a statement against whitewashing as Huston’s was against colorization, it indicates that incorporating Western influence would not cohere with their artistic vision. Though the creators did not condemn the casting, one dissociated himself from it.²²² Additionally, the strong fan backlash to the movie’s casting decisions further highlights the potential reputational prejudice. Fans organized against the casting, engaging in numerous campaigns to make their dissatisfaction known.²²³

On a more general level, the movie was critically panned²²⁴ with mixed commercial success.²²⁵ This further underscores the potential for harm to the original creators’ professional reputation caused by the movie.²²⁶ The movie’s strong association with the TV show could damage the show’s and the show’s creators’ reputations. Thus, a court would likely find a violation of the right of integrity.

2. Fair Use in Avatar

Then, any fair use defense would fail. The movie is a mere adaptation of the TV show, without any particularly clear difference in aesthetic or purpose. As such, the movie is clearly not a transformative use of the TV show.

The movie has two clear changes from the TV show: an adaptation to a live-action movie and a change in the race of the main cast. Neither evince a transformation of expression. First, simply adapting a narrative to a different medium is not transformative without an accompanying change in purpose or character.²²⁷ Merely repackaging a work into “a new mode of

221. Interview with Bryan Konietzko and Michael Dante Dimartino, NICKSPLOT.COM (Oct. 12, 2005) (emphasis added), <http://web.archive.org/web/20071217111256/http://www.nicksplat.com/Whatsup/200510/12000135.html> [https://perma.cc/ATY2-W225].

222. *Questions Related to The Last Airbender*, RACEBENDING.COM (“I have NOTHING TO DO WITH THE CASTING WHATSOEVER for the feature film.”), <http://www.racebending.com/v4/faq/faq-airbender/> [https://perma.cc/GH27-P59T].

223. See Lopez, *supra* note 214, at 434–35.

224. Brandon Ancil, *Did the ‘Airbender’ Adaptation Ever Have a Chance?*, CNN (July 1, 2010), <http://www.cnn.com/2010/SHOWBIZ/Movies/07/01/go.airbender/> [https://perma.cc/4PB4-4NU2].

225. The movie grossed 320 million dollars worldwide, on a 150 million dollar production cost and 130 million dollar marketing budget. See *The Last Airbender*, BOX OFFICE MOJO.COM, <http://www.boxofficemojo.com/movies/?id=lastairbender.htm> [https://perma.cc/UPB8-K9XN]; Claudia Eller, *‘Last Airbender’ Carries Shyamalan into New Territory*, L.A. TIMES (June 25, 2010), <http://articles.latimes.com/2010/jun/25/business/la-fi-ct-airbender-20100625> [https://perma.cc/2PGH-4BUF].

226. See *Mass. Museum of Contemporary Art Found. v. Buchel*, 593 F.3d 38, 60 (1st Cir. 2010) (citing negative critical reviews as evidence that could support a right of integrity claim).

227. See *Gaylord v. United States*, 595 F.3d 1364, 1373 (Fed. Cir. 2010) (finding a stamp depicting a photograph of the Korean War Memorial not transformative, in part because it served the same purpose).

presentation” is not a transformative use.²²⁸ Given the adherence to the original, with plotlines, dialogue, and settings directly used,²²⁹ the movie has little opportunity to express a transformative purpose. Indeed, the purpose for creating the movie was largely to exploit the success of the original. Executives behind the movie referenced the TV show’s commercial success and expressed hopes that the movie and TV show would drive demand for each other.²³⁰ That the intended audience of the two works is identical further weighs against transformative use.²³¹

Second, the racial change here is also not transformative. In casting the movie, director M. Night Shyamalan admitted that the racial change was without aesthetic purpose. He explained that the casting process was done “without an agenda” and that he was not casting for a particular identity.²³² This expressly dismisses any potential transformative intent, which weighs against a finding that the work as a whole is transformative. One could potentially read in his statements that his purpose was to create a fluid, or ambiguous, sense of culture.²³³ However, this is also not a transformative purpose, as it is identical to the purpose he ascribes to the original show: “The great thing about anime is that it’s ambiguous. The features of the characters are an intentional mix of all features.”²³⁴

Finally, the substance of the film itself further evidences the lack of transformative purpose. Transformative use may be found even when the creator expresses no explicit transformative purpose, so long as a transformative purpose may “reasonably be perceived.”²³⁵ In *Cariou v. Prince*, the court found appropriation art transformative because the changes made to the original photographs altered the aesthetic character—from “serene” to “jarring.”²³⁶ No such altered aesthetic character is readily visible in *Avatar*. The movie does not make any mention of the characters’ race, nor

228. *Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 143 (2d Cir. 1998) (finding that repackaging *Seinfeld* facts into a trivia game merely exploited the value of the original).

229. In an interview, M. Night Shyamalan described one aspect of the movie: “Like straight up, I literally just took episode 13 [of the television show] and put it in the movie. I just picked it out and put it in the movie.” Meredith Woerner, *Shyamalan Addresses *Airbender*’s Race Controversy and Answers Your Questions*, io9 (Mar. 3, 2010), <http://io9.gizmodo.com/5504967/shyamalan-addresses-airbenders-race-controversy-and-answers-your-questions> [<https://perma.cc/N23V-H5VK>].

230. See Lieberman, *supra* note 218 (“The movies will kick the business into high gear[.] . . . That will send people back to the network for more in the animated series.”).

231. See *Castle Rock*, 150 F.3d at 142 (“*The SAT*’s purpose, as evidenced definitively by the statements of the book’s creators and by the book itself, is to repackage *Seinfeld* to entertain *Seinfeld* viewers.”).

232. See Woerner, *supra* note 229.

233. *Id.* (noting that one of the actors had a “slightly mixed quality to him” and that the conception of the nations went through various cultural and racial backgrounds).

234. *Id.*

235. See *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

236. *Id.* at 702.

do the characters interact differently with the world around them because of their race. The movie also does not entirely reimagine the world—only the main characters have been whitewashed, whereas the background characters are still portrayed as minorities.²³⁷

Thus, a court would not find any transformation in the movie to weigh in favor of fair use under the first factor. As none of the other factors would outweigh the first factor,²³⁸ a court would not find the movie to be a fair use of the television show. As such, the creators of the television show would likely succeed in asserting a moral rights violation against the movie under an expanded moral rights regime.

B. *The Racebent Case: Ms. Marvel*

In 1977, the comic book *Ms. Marvel* began, featuring Carol Danvers as the titular superhero.²³⁹ Since then, Ms. Marvel has appeared in numerous comic book series within the greater Marvel universe, undergoing multiple reboots to her storyline,²⁴⁰ as is common with comic book superheroes. Throughout this entire history, Ms. Marvel is portrayed as a white woman with blonde hair who wears a recognizable red, yellow, and either black or blue costume. Her powers include enhanced strength, flight, and the ability to shoot blasts of energy.²⁴¹

Then, in 2014, a new comic series, also titled *Ms. Marvel*,²⁴² began. The series features Kamala Khan, a Pakistani American teenager from New Jersey, and the first Muslim character to headline a Marvel comic book.²⁴³ Early in the series, Kamala meets Carol Danvers's Ms. Marvel and ends up

237. See *The Last Airbender—A Timeline of Protest*, RACEBENDING.COM (Feb. 18, 2011), <http://www.racebending.com/v4/campaigns/airbender/the-last-airbender-timeline/> [<https://perma.cc/8YW4-5NXW>].

238. The underlying work, the television show, is highly expressive in nature, and so the second factor would weigh against fair use. The movie incorporates the entire first season of the television show, and so the third factor also would weigh against fair use. Finally, it is unlikely that the movie supplants demand for the television show, and so the fourth factor likely would not weigh against fair use.

239. Alex Abad-Santos, *The Insane, Sexist History and Feminist Triumphs of Captain Marvel*, VOX (Jul. 23, 2016), <http://www.vox.com/2014/11/5/7138099/captain-marvel-background-history-movie> [<https://perma.cc/BVA2-8HG6>].

240. See *id.* The Marvel universe refers to the shared setting in which many Marvel comics take place.

241. *Ms. Marvel (Carol Danvers)*, MARVEL.COM, [http://marvel.com/universe/Ms_Marvel_\(Carol_Danvers\)](http://marvel.com/universe/Ms_Marvel_(Carol_Danvers)) [<https://perma.cc/VL83-NUCM>].

242. G. Willow Wilson & Adrian Alphona, *No Normal*, MS. MARVEL VOL. 1 (Marvel Comics 2014).

243. Noelene Clark, *New Ms. Marvel Isn't the First Muslim—or Religious—Superhero*, L.A. TIMES HERO COMPLEX (Nov. 6, 2013), <http://herocomplex.latimes.com/comics/new-ms-marvel-isnt-the-first-muslim-or-religious-superhero/#/0> [<https://perma.cc/F4VD-NM68>].

with the power to shapeshift.²⁴⁴ She adopts the moniker “Ms. Marvel”²⁴⁵ and frequently shapeshifts into the image of Carol Danvers’s Ms. Marvel—a blonde, white woman in full costume.²⁴⁶ The storylines frequently draw on Kamala’s youth and religion,²⁴⁷ and they are not simply rehashes of Carol Danvers’s stories.

I. Moral Rights in Ms. Marvel

Again, under a more expansive moral rights framework a court may sustain a moral rights claim against the 2014 comic series.²⁴⁸ As with *Avatar*, there is a clear distortion of the original work. The new series inserts Carol Danvers, as her own character, into a new story and depicts Kamala Khan literally distorting herself into the image of Carol Danvers. Assuming a standard for distortions similar to the French framework,²⁴⁹ the changes made here qualify.

The closer question is whether such a modification was prejudicial to the honor or reputation of the creators. *Ms. Marvel* received incredibly positive critical reviews, many of which specifically identified the racial and religious changes as positives,²⁵⁰ which would weigh against a finding of prejudice.²⁵¹ Still, one could likely show that some people would think less of the character Ms. Marvel because of the changes. One positive review recognized that the focus on Kamala Khan’s personal struggles “might not sit well with mainstream superhero fans.”²⁵² Further, one could point to the general backlash against changing the race of popular white characters to show that this change could generate similar backlash against Ms. Marvel.²⁵³

Finally, one could argue that representing Ms. Marvel as specifically Muslim could harm the original work’s reputation among some of the

244. Wilson & Alphona, *supra* note 242, at 14–23.

245. *Id.* at 80.

246. *See generally id.*

247. *See* Etelka Lehoczky, *Rebooted Comic Heroine Is an Elegant, Believable ‘Marvel,’* NPR BOOKS (Oct. 16, 2014), <http://www.npr.org/2014/10/16/354592028/shazam-rebooted-comic-heroine-is-a-marvel>.

248. As an initial matter, there is no evidence that the creators of the Ms. Marvel character actually have any issues with the new series.

249. *See supra* notes 112–114 and accompanying text.

250. *See, e.g.,* Anthony McGlynn, *Why Kamala Khan Is the Most Important Superhero in the World*, THE MARY SUE (Dec. 10, 2014), <http://www.themarysue.com/kamala-khan-important/> [<https://perma.cc/7KRR-JSBK>]; Noah Berlatsky, *What Makes the Muslim Ms. Marvel Awesome: She’s Just Like Everyone*, ATLANTIC (Mar. 20, 2014), <http://www.theatlantic.com/entertainment/archive/2014/03/what-makes-the-muslim-em-ms-marvel-em-awesome-shes-just-like-everyone/284517/> [<https://perma.cc/RH6J-H58R>].

251. *Cf.* Mass. MOCA v. Buchel, 593 F.3d 38, 60 (1st Cir. 2010) (noting that negative reviews supported a finding that the artist’s reputation had been harmed).

252. Lehoczky, *supra* note 247.

253. *See supra* note 154.

population. Regrettably, Islamophobia is commonly espoused in mainstream discourse.²⁵⁴ And so, a creator could claim that changing Ms. Marvel's religion will immediately lower some people's regard for the character. Due to widespread anti-Muslim sentiment, such a claim may in fact prevail. As such, a court may find that *Ms. Marvel* could be prejudicial to the original creators' reputation.

2. Fair Use in Ms. Marvel

Regardless of the outcome of a moral rights claim, a court would likely find the 2014 *Ms. Marvel* to be an authorized fair use of the Carol Danvers character. As the storylines, settings, and supporting characters are not taken from the original, the primary issue is whether *Ms. Marvel*, the series, is a fair use of Ms. Marvel, the character.

As an initial matter, Ms. Marvel is a copyrightable character, and without fair use, *Ms. Marvel* certainly infringes that copyright. As a graphic comic book character, the image of Carol Danvers is subject to copyright.²⁵⁵ Though *Ms. Marvel* changes the superhero entirely—Kamala Khan is in fact a different person than Carol Danvers—it still uses the image of Carol Danvers, with her identifiable physical traits and costume.²⁵⁶ Moreover, *Ms. Marvel* also depicts Carol Danvers as her own character, apart from Kamala Khan.²⁵⁷ Thus, as *Ms. Marvel* treats Carol Danvers and Kamala Khan as two separate characters, as opposed to Kamala Khan being an updated Ms. Marvel, the new series substantially uses copyrightable expression from the original work.

However, the new series' use of Carol Danvers is likely fair. The new work uses Carol Danvers's image in two separate ways: (1) when Kamala Khan transforms into Ms. Marvel's image and (2) when Carol Danvers appears as her own separate character. First, Kamala Khan shapeshifting into Ms. Marvel has a clear transformative purpose and aesthetic. Though Kamala uses the name "Ms. Marvel,"²⁵⁸ the changes to her race and religion serve to express an entirely different purpose. Her race and religion are thoughtfully explored in the story; prayer, headscarves, and cultural insensitivity are explored in the first few pages of the first issue.²⁵⁹ And so,

254. Bill Chambers, *2015—Islamophobia Goes Mainstream in America*, CHICAGO MONITOR (Dec. 28, 2015), <http://chicagomonitor.com/2015/12/2015-islamophobia-goes-mainstream-in-america/> [<https://perma.cc/F4M4-5KFB>].

255. See *DC Comics v. Towle*, 802 F.3d 1012, 1019, 1021 (9th Cir. 2015).

256. See, e.g., Wilson & Alphona, *supra* note 242, at 23, 80.

257. E.g., *id.* at 18.

258. Copyright protection is not available for names. NIMMER, *supra* note 138, at § 2.01[B][3].

259. See Wilson & Alphona, *supra* note 242, at 2–8. Another issue recognizes that Kamala is a child of immigrants and explores her extended family in Pakistan. Brett White, *Ms. Marvel #12 Introduces All-New Pakistani Superhero*, CBR.COM (Oct. 28, 2016), <http://www.cbr.com/ms-marvel-12-introduces-all->

the story lays groundwork to establish race and religion as integral to Kamala's character. In establishing this, the story then uses her transformation into Carol Danvers, a white, idealized superhero, to discuss questions of identity.²⁶⁰ The new series uses these transformations to comment on assimilation and Kamala, whose struggles as a teenager alienated by her culture are keenly depicted. At one point, Kamala reflects, "Being someone else isn't liberating. It's exhausting. I always thought that if I had amazing hair, if I could pull off great boots, if I could fly—that would make me happy."²⁶¹

Because the series is so deliberate in its treatment of Kamala's identity, the transformative purpose of using Carol Danvers's image—a blue-eyed, blonde-haired white woman—is readily apparent. The comic's "new meaning" and artistic purpose is to express the experience of a young, Muslim Pakistani American teenager. This new purpose is entirely different from the original work's purpose, which does not prominently feature racial or religious identity. The juxtaposition of Kamala Khan with the original Carol Danvers character furthers this purpose. And, the new work even explicitly comments on how the idealistic, mainstream, white image perpetuated by Carol Danvers can have an alienating, harmful effect on impressionable minority Americans.

Second, the depiction of Carol Danvers as a separate character is utilized to comment upon Kamala's existence as an outsider. Carol Danvers first appears in the series as a character in the fan fiction that Kamala is writing.²⁶² Carol Danvers's other appearance is as part of Kamala's vision. In that scene, Kamala first recounts a story of her family being seen as "dumb inferior brown people," and then says that she wants to "be beautiful and awesome and butt-kicking and less complicated," that she wants to be Carol Danvers.²⁶³ Thus, these depictions of Carol Danvers serve as commentary for how Kamala Khan, and many other minority children, interact with American culture. She connects to American culture through these superheroes but at the same time recognizes that she is different from the culture she consumes. The new series needed to use an established superhero in American culture to properly make this commentary, contrasting Ms. Marvel as Kamala Khan with Ms. Marvel as Carol Danvers. Using Carol Danvers as a story device to elucidate the experiences of a Pakistani American teenager is a salient new artistic purpose. Thus, a court is likely to

new-pakistani-superhero/ [https://perma.cc/W94W-H8EH].

260. See McGlynn, *supra* note 250 (discussing a scene in which Kamala wishes to transform into Carol Danvers and, upon doing so, regrets her wish).

261. Berlatsky, *supra* note 250.

262. Wilson & Alphona, *supra* note 242, at 5–6.

263. *Id.* at 18–19.

find that the uses of the Carol Danvers character are transformative.

Moreover, the stark lack of mainstream comic books starring Muslim American or Pakistani American superheroes²⁶⁴ would serve as further indication that *Ms. Marvel* constitutes fair use. The lack of such superhero comics could indicate that this is an area in which the market, due to improper perceptions of executives, is failing to support. The failure of the market to satisfy *Ms. Marvel*'s niche combined with its transformative purpose would likely result in a finding of fair use. Thus, copyright law would allow the *Ms. Marvel* series even if the creators did not have authority from the original copyright holders.

As such, the adaptation of *Ms. Marvel* can provide guidance for creators seeking to use established characters to tell a new, more diverse story without infringing the original's copyright. So long as the new stories use the established character to provide original, thoughtful commentary and not to merely create a palette-swapped clone of the original, fair use should permit these stories. Thus, Asian American representation could be served by creators who are ready to tell new, rich, uniquely Asian American stories but lack the express authority from copyright holders.

CONCLUSION

In many ways, Asian Americans are an afterthought in American society. This is especially clear in the lack of Asian Americans in popular culture. Recent efforts have started to bring this issue to mainstream consciousness, but the problems of whitewashing and a lack of Asian American characters persist.

While moral rights may not be available to prevent movie studios from whitewashing Asian American characters, fair use in its present existence can be used to protect creative works which seek to diversify existing properties. Seizing on the existing trends in fair use jurisprudence to authorize works which evince a different artistic purpose and fulfill a creative gap that the market has not met, courts should find fair use in works that engage in a racial change in a thoughtful, deliberate manner. Such an approach harmonizes copyright's central purpose to promote artistic progress with social value of increasing minority representation.

264. See Clark, *supra* note 243.