

# The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy

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Between March 21, 1992 and April 14, 1992 Canadians witnessed a remarkable proliferation of controversy on the pages of *The Globe and Mail*. The issue was “cultural appropriation” or “appropriation of voice” in fictional and nonfictional writing. Articles, editorials, and letters to the editor considered the propriety of depicting a culture other than one’s own, telling “someone else’s story”, and whether it was possible to “steal the culture of another.”<sup>1</sup> The debate was remarkable because of its emotional intensity, the absurdity of the analogies drawn in support of the respective arguments, and the inability of the protagonists to recognize each other’s terms of reference. Especially striking were the rhetorical tropes of possessive individualism adopted by all participants in the discussion.

I will use the controversy over cultural appropriation as a point of entry into a wider set of concerns. First, I will examine the philosophical premises about authorship, culture, and property that underlie this controversy and define the legal arena in which it is likely to be evaluated. The West has created categories of property—intellectual property, cultural property, and real property—that divide peoples and things according to the same colonizing discourses of possessive individualism that historically disempowered and disenfranchised Native peoples in North America. Exploring the internal logics of intellectual property and cultural property laws, I will question the concepts of culture and identity upon which they are based, using developments in contemporary cultural anthropology, legal pragmatism, and cultural criticism to put these concepts in issue. I will demonstrate that the law rips asunder what First Nations peoples view as integrally and relationally joined, but traditional Western understandings of culture, identity, and property are provoked, challenged, and undermined by the concept of Aboriginal Title in a fashion that is both necessary and long overdue.

## Whose Voice Is It Anyway?

The recent *Globe and Mail* debate began with an innocuous article calling attention to the Canada Council’s (the Council) concern with the issue of cultural

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I am grateful to Amanda Pask and Deborah Root for stimulating discussions of these issues. I would also like to thank Karen Clark for her research assistance and insightful commentary.

1. Although the controversy died down, references and allusions back to it can be found throughout 1992. Not having been in Canada since the end of 1992, I have not pursued the debates in the Canadian press since December 20, 1993.

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appropriation.<sup>2</sup> The term was defined to mean “the depiction of minorities or cultures other than one’s own, either in fiction or non-fiction.”<sup>3</sup> Following a report from its Advisory Committee for Racial Equality in the Arts, the Council deemed cultural appropriation “a serious issue,”<sup>4</sup> and acknowledged that “collaboration with minority groups”<sup>5</sup> was an advisable strategy to avoid perpetuating social stereotypes. Despite the fact that the Council had done nothing to change its existing policies, formulate guidelines, rules, or impose any restrictions on funding, the controversy evoked was swift and furious, and it quickly polarized upon familiar liberal terrain. I will suggest that these poles—which I will designate as Romantic individualism and Orientalism—operate as dangerous supplements<sup>6</sup> that define an imperialist conceptual terrain that structures our laws of property and may well structure all contemporary political claims for cultural autonomy and public recognition.

In a series of letters to the editor, the tyranny of the state over the individual was evoked, and the transcendent genius of the Romantic author and his unfettered imagination was affirmed.<sup>7</sup> Writers wasted no time evoking the totalitarian state, the memory of the Holocaust, and the Gulag. As Timothy Findley forcefully interjected:

Put it this way: I imagine—therefore I am. The rest—believe me—is silence. What has happened here? Does no one understand? In 1933 they burned 10,000 books at the gate of a German university because those books were written in unacceptable voices. German Jews, amongst others, had dared to speak for Germany in other than Aryan voices. Stop. Now. Before we do this again.”<sup>8</sup>

Joy Anne Jacoby evoked Russian anti-Semitism to urge the Council “to rethink the implications of imposing any policy of ‘voice appropriation’ lest they find themselves imitating the Russian approach to cultural censorship;”<sup>9</sup> Erna Paris titled

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2. Stephen Godfrey, “Canada Council Asks Whose Voice Is it Anyway?” *The Globe and Mail*, March 21, 1992 at C-1 and C-15.

3. *Ibid.* at C1.

4. *Ibid.*

5. *Ibid.*

6. The term “dangerous supplement” is borrowed from Jack Balkin, who borrows it from Jacques Derrida in “Deconstructive Practice and Legal Theory” (1987) 96 *Yale L. J.* 743.

7. I use the gendered pronoun deliberately here because I am referring to a cultural concept—the Romantic author—rather than any actual authors. The author in Western European history is a figure who occupies a decidedly male gendered position. For further discussion, I refer the reader to Sandra Gilbert & Susan Gubar, *The Madwoman in the Attic: the woman writer and the nineteenth-century literary imagination* (New Haven: Yale University Press, 1979).

8. Letter to the Editor, *The Globe and Mail*, March 28, 1992 at D-7. Reprinted in *OUT Magazine: Canada’s National Gay Arts/Entertainment Monthly*, June 1992. Canada’s gay and lesbian communities have been disproportionately affected by the Supreme Court of Canada’s recent decision to uphold Canada’s obscenity laws. See *R. v. Butler* (1992) 89 D.L.R. (4th) 449. A victory for mainstream feminists has become an opportunity for federal officials to seize and confiscate gay and lesbian erotica. This has created a climate of opposition to state censorship amongst gay and lesbian activists which perhaps accounts for the reprinting of Findley’s letter in a gay journal. As I will suggest, however, opposition to the repression of the alternative representations of minority groups cannot be maintained solely in the name of “Freedom of Expression” without thereby becoming complicit with the relations of power at work in the contemporary deployments of the term.

9. Letter to the Editor, *The Globe and Mail*, March 28, 1992 at D-7.

her intervention in the debate "A Letter to the Thought Police".<sup>10</sup>

Other critics proclaimed the absolute freedom of the author's imagination. Neil Bissoondath affirmed the autonomy of his ego in a quotation resplendent with the "I" of Romantic individualism:

I reject the idea of cultural appropriation completely...I reject anything that limits the imagination. No one has the right to tell me who I should or should not write about, and telling me what or how I do that amounts to censorship...I am a man of East-Indian descent and I have written from the viewpoint of women and black men, and I will continue to do so no matter who gets upset.<sup>11</sup>

Richard Outram declared that for the past 35 years he had been appropriating the "voices of men, women, dogs, cats, rats, bats, angels,...mermaids, elephants...[and] salamanders"<sup>12</sup> and that he had no intention of consulting with them or seeking their permission:

In common with every writer worthy of his or her vocation, I refuse absolutely to entertain any argument demanding that I do so, or that I am to be in any way restricted in my choice of subject matter. I will not, in short, submit to such censorship....<sup>13</sup>

Russell Smith confidently asserted that "appropriation of voice is what fiction is"<sup>14</sup> while Bill Driedger lamented that "if cultural appropriation had never been permitted Puccini could not have written *La Bohème*, Verdi's *Aida* would never have been performed, we would never have thrilled to Laurence Olivier in *Hamlet* and we would have been denied the music of *Anna and the King of Siam*."<sup>15</sup>

In these constructions of authorship, the writer is represented in Romantic terms as an autonomous individual who creates fictions with an imagination free of all constraint.<sup>16</sup> For such an author, everything in the world must be made available and accessible as an 'idea' that can be transformed into his 'expression' which thus becomes his 'work'.<sup>17</sup> Through his labour, he makes these 'ideas' his own; his possession of the 'work' is justified by his expressive activity. As long as the author does not copy another's expression, he is free to find his themes, plots, ideas, and characters anywhere he pleases, and to make these his own (this is also the model

10. *The Globe and Mail*, March 31, 1992 at A-16.

11. *Supra*, note 2 at C-15.

12. Letter to the Editor, *The Globe and Mail*, March 28, 1992 at D-7.

13. *Ibid.*

14. Letter to the Editor, *The Globe and Mail* April 3, 1992 at A-3.

15. Letter to the Editor, *The Globe and Mail*, March 28, 1992 at D-7.

16. For a discussion of the relationship between Romanticism and imperialism in the nineteenth century see Jonathan Arac & Harriet Ritvo, eds, *Macropolitics of Nineteenth-Century Literature: Nationalism, Exoticism, Imperialism* (Philadelphia: University of Pennsylvania Press, 1991). For a discussion that situates early copyright law in the larger context of colonialism and the relation between mimesis and alterity see Rosemary J. Coombe, "Occupying the Colonial Imagination/Preoccupations of Postcolonial Politics: A Critical History of Copyright" in Peter Jaszi & Martha Woodmansee, eds, *The Politics and Poetics of Intellectual Property in a Postcolonial Era* (Durham, NC: Duke University Press, forthcoming).

17. For a discussion of the similar and simultaneous logic of European colonialism see Timothy Mitchell, *Colonising Egypt* (Berkeley: University of California Press, 1988).

of authorship that dominates Anglo-American laws of copyright).<sup>18</sup> Any attempts to restrict his ability to do so are viewed as censorship and as an unjustifiable restriction on freedom of expression. The dialectic of possessive individualism and liberal democracy is thereby affirmed.<sup>19</sup>

But if the fictitious being of the Romantic author coloured one side of the debate, the essentializing voice of Orientalism dominated the other.<sup>20</sup> The article that began the debate was titled "Whose Voice is It Anyway?"<sup>21</sup> The question presupposed

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18. For critical considerations of "authorship" as it originated and continues to figure in our intellectual property laws (most obviously in copyright but also, I would contend in publicity rights, trademark and patent regimes), see Mark Rose, "The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship" (Summer 1988) 23 *Representations* 51; Mark Rose, *Authors and Owners* (Cambridge: Harvard University Press, 1993); Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17 *Eighteenth Century Studies* 425; Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of 'Authorship'" (1991) *Duke L. J.* 455; David Lange, "At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium" (1992) 55 *Law and Contemp. Problems* 139; Jessica Litman, "The Public Domain" (1990) 39 *Emory L. J.* 965; Litman, "Copyright as Myth" (1991) 53 *U. of Pitt. L. Rev.* 235; Peter Jaszi, "On the Author Effect: Contemporary Copyright and Collective Creativity" (1992) 10 *Cardozo Arts and Entertainment L. J.* 293; Martha Woodman see, "On the Author Effect: Recovering Collectivity" (1992) 10 *Cardozo Arts and Entertainment L. J.* 279. Many of these articles also consider the idea/expression dichotomy. For a recent discussion of the difficulties of maintaining the stability of the idea/expression distinction in copyright law, see Amy B. Cohen, "Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgements" (1990) 66 *Indiana L. J.* 175.
19. Critical legal scholars have written extensively about the inadequacies of Romantic individualism and its understanding of subjectivity, cultural agency, and freedom of speech, (albeit under the umbrella term of liberalism). J. M. Balkin, "Ideology as Constraint" (1991) 43 *Stan. L. Rev.* 1133; James Boyle, "Is Subjectivity Possible? The Postmodern Subject in Legal Theory" (1991) 62 *U. of Col. L. Rev.* 489; Boyle, "The Politics of Reason: Critical Legal Theory and Local Social Thought" (1985) 133 *U. of Penn. L. Rev.* 685. Paul Chevigny, *More Speech: Dialogue Rights and Modern Liberty* (Philadelphia: Temple University Press, 1988); Rosemary J. Coombe, "Publicity Rights and Political Aspiration: Mass Culture, Gender Identity, and Democracy" (1992) 26 *New Eng. L. Rev.* 1221; Rosemary J. Coombe, "Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue" (1991) 69 *Texas L. Rev.* 1853; Coombe, "Room for Manoeuvre: Toward a Theory of Practice in Critical Legal Studies" (1989) 14 *Law and Social Inquiry* 69; Coombe, "'Same As It Ever Was': Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill L. J.* 603; Drucilla Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation" (1988) 136 *U. of Penn. L. Rev.* 1135; Drucilla Cornell, "Toward a Modern/Postmodern Reconstruction of Ethics" (1985) 133 *U. of Penn. L. Rev.* 291; Cornell, *The Philosophy of the Limit* (New York: Routledge, Chapman and Hall, 1992); Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (New York: Routledge, Chapman and Hall, 1991); Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989); Owen Fiss, "Why the State?" (1987) 100 *Harv. L. Rev.* 781; Fiss, "Free Speech and Social Structure" (1986) 71 *Iowa L. Rev.* 1405; Alan Hutchinson, "Talking the Good Life" (1989) 1 *Yale J. of Law and Liberation* at 17; Mary Joe Frug, *Postmodern Legal Feminism* (New York: Routledge, Chapman and Hall, 1992); Martha Minow, "Identities" (1991) 3 *Yale J. of Law & Humanities* 97; Dennis Patterson, "Postmodernism/Feminism/Law" (1992) 77 *Cornell L. Rev.* 254; Gary Peller, "The Metaphysics of American Law" (1985) 73 *Cal. L. Rev.* 1152; Pierre Schlag, "The Problem of the Subject" (1991) 69 *Texas L. Rev.* 1627; "Fish v. Zapp: The Case of the Relatively Autonomous Self" (1988) 76 *Georgetown L. J.* 37 and other sources cited therein. No such list could claim to be exhaustive.
20. The term "Orientalism" is drawn from Edward Said's pathbreaking work of the same title (New York: Vintage Books, 1979). Although Said's work was concerned to explicate the rhetorical strategies and informing tropes of late eighteenth and early nineteenth Orientalist scholars, the term has come to stand for a mode of representing the other that projects upon non-Western peoples qualities and characteristics that are mirror opposites of the qualities the West claims for itself. Moreover, such approaches have a tendency to deny other societies their own histories, to present them as internally homogeneous and undifferentiated, 'timeless,' defined and subsumed by unchanging 'traditions,' and unable to creatively deal with outside influences, or interpret the impact of external forces. Often, to 'Orientalize' also means to represent others as both feminine and childlike, and in need of representation by Western authorities.
21. *Supra*, note 2.

that a “voice” was both unified and singular and could be possessed by an individual or a collective imagined as having similar abilities to possess its own expressions. This debate was connected to earlier public discussions in which Native writers insisted that white writers refrain from telling stories involving Indians so as to enable Native peoples to claim “their own history.”<sup>22</sup> Questions of “Who’s stealing whose stories and who’s speaking with whose voice”<sup>23</sup> had been posed by Native cultural activists as cases of “cultural theft, the theft of voice.”<sup>24</sup> Canadians were told that “stories show how a people, a culture, thinks”<sup>25</sup> and such stories could not be told by others, without endangering the authenticity and authority of cultural works. The Canadian publishing and broadcasting industries had long been accused of stealing the stories of Native peoples and thus destroying their essential meanings in authentic traditions. Native artists asked if “Canadians [had] run out of stories of their own”<sup>26</sup> and claimed that the telling of Native stories was theft, “as surely as the missionaries stole our religion and the politicians stole our land and the residential schools stole our language.”<sup>27</sup> As I will suggest later, however, the tropes of cultural essentialism and possessive individualism evoked here are belied by the very expressive forms for which Native peoples seek recognition and the specificity of the historical struggles in which they figure.

As Alan Hutchinson suggested, the three week newspaper debate generated more heat than light.<sup>28</sup> He proposed that in the struggle to eliminate invidious social inequalities, we need to hear the voices and understand the experiences of those who have been marginalized to cultivate imaginative means for dealing with domination. But, in making this argument, he too adopts the tropes of possessive individualism, in which authors ‘have identities’ which may or may not ensure ‘their own work’s authenticity’ (and Canada has a singular culture, albeit a conversational one):

It does matter who is speaking, but identity is neither entirely dispensable nor completely determinative...the hope is that by increasing the membership in the larger community of those who have previously been absent, the overall authority and authenticity of that body of work will be improved.<sup>29</sup>

Most of those who supported the Canada Council and its Advisory Committee for Racial Equality rested their arguments on a set of assumptions that, I will suggest, are equally problematic, equally Eurocentric, and employ the same tropes of possessive individualism as those of their opponents. Proponents of the Canada Council’s suggestion defended their position on the grounds of the integrity of cultural identity. Speaking on behalf of the Canada Council, director Joyce Zemans

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22. Lenore Keeshig-Tobias, “Stop Stealing Native Stories”, (January 26, 1990) *The Globe and Mail* A-7.

23. *Ibid.*

24. *Ibid.*

25. *Ibid.*

26. *Ibid.*

27. *Ibid.*

28. “Giving Smaller Voices a Chance to be Heard”, (April 14, 1992) *The Globe and Mail* A-16.

29. *Ibid.*

claimed that cultural appropriation is a serious issue because “we have a new need for authenticity. In our society today, there is a recognition that quality has to do with that authenticity of voice.”<sup>30</sup> Susan Crean, chair of the Writers Union of Canada, analogized the issue to a legal claim of copyright, in which any unlicensed use of authorial property is theft.<sup>31</sup>

It seems to be assumed in these arguments that Canada is either a country with its own culture or one in which there are multiple discrete cultures, but that one always has a singular culture of one’s own, that one has a history of one’s own, and that one possesses an authentic identity that speaks in a univocal voice fully constituted by one’s own cultural tradition. As I will argue in more detail, these are extremely contentious propositions that themselves embody contingent concepts integral to Western histories of colonialism and imperialism. Moreover, I will suggest that the concepts of culture, authenticity, and identity that define these arguments are constructed around the same philosophy of possessive individualism that define our legal categories of property.

The challenges that postcolonial struggles<sup>32</sup> pose for Canadian society cannot be met by our traditional reliance upon categories of thought inherited from a colonial era. The conceptual tools of modernity are ill-equipped to deal with the

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30. *Supra*, note 2, at C-1.

31. *Ibid* at C-15.

32. I have chosen deliberately to use the term postcolonial rather than the term multicultural, and the language of struggle rather than the currently fashionable discourse of cultural diversity, because these alternative terms emphasize rather than obscure the very real histories of colonialism from which all peoples in Canada are still emerging, and the very real relations of power and domination inherited from our diverse colonial pasts that continue to shape social relations of difference in this country. Multiculturalism seems to assume a social field of equivalent differences, that can be subsumed under a single policy of tolerance, without regard for the very real psychic, social, economic, and cultural damage done by histories of Western imperialism. For critical discussions of multiculturalism see, Kooglia Moodley, “Canadian Multiculturalism as Ideology” (1983) 6 *Ethnic and Racial Studies* 320, and Chandra Mohanty, “On Race and Voice: Challenges for Liberal Education in the 1990’s” (1990) 14 *Cultural Critique* 179. The literature discussing postcolonialism is vast. There is a general agreement that the reception and interpretation of two texts—Edward Said’s *Orientalism*, *supra*, note 20 and Frantz Fanon *Black Skin, White Masks* (New York: Grove Press, 1967)—mark the beginnings of the development of the discourse, but it has now expanded across several disciplinary fields. For a fine overview see Patricia Seed, “Colonial and Postcolonial Discourse” (1991) 26 *Latin Am. Research Rev.* 181. For recent criticism of the term and its range of extension see Arun P. Mukherjee, “Whose Post-Colonialism and Whose Postmodernism?” (1990) 30 (2) *World Lit. Written in English* 1; Ella Shohat, “Notes on the ‘Post-Colonial’” (1992) 32 *Social Text* 99; Helen Tiffin, “Post-Colonialism, Post-Modernism and the Rehabilitation of Post-Colonial History” (1988) 23(1) *J. of Commonwealth Lit.* 169; Ruth Frankenberg & Lata Mani, “Crosscurrents, Crosstalk: Race, ‘Postcoloniality’ and the Politics of Location” (1993) 17 *Cultural Studies*—(forthcoming) also reprinted in Smadar Lavie & Ted Swedenburg, eds, *Displacement, Diaspora and the Geographies of Identity* (Durham, NC: Duke University Press, forthcoming in 1994). Linda Hutcheon has written that “Canada [i]s still caught up in the machinations of Empire and colony, imperial metropolis and provincial hinterland”; a context in which the debates about post-colonialism have historically specific relevance, given the experience and ongoing manifestations of British Empire, and the arrival of immigrants from other post-colonial nations. Furthermore, she suggests that “when Canadian culture is called post-colonial today the reference is very rarely to the Native culture, which might be the more accurate historical use of the term ... Native and Métis writers are today demanding a voice (Cuthand; Armstrong; Campbell) and perhaps, given their articulations of the damage to Indian culture and people done by the colonizers (French and British) and the process of colonization, theirs should be considered the resisting, post-colonial voice of Canada.” See “‘Circling the Downspout of Empire’: Post-Colonialism and Postmodernism” (1989) 20 (4) *Ariel* 149 at 149 and 156.

conditions of postmodernity in which we all now live.<sup>33</sup> To make this argument, I will delineate the conceptual logic that developed in the nineteenth century colonial context to categorize art, culture, and authorial identity. This European art/culture system continues to dominate discourses about art, culture, and identity in the Western World, and seems to mark the contemporary limits of the legal imaginary.<sup>34</sup>

### The European Art/Culture System

In his influential work *The Predicament of Culture*, historian James Clifford discusses “the fate of tribal artifacts and cultural practices once they are relocated in Western museums, exchange systems, disciplinary archives, and discursive traditions”.<sup>35</sup> Clifford delineates an “art-culture system”, developed during the nineteenth century in the context of global colonialism and imperialism as a means of categorizing artistic and cultural goods. I will suggest that these categories continue to inform our laws of property, and that these categories may no longer be appropriate in a postcolonial context.

As many contemporary cultural critics suggest, the concepts of art and culture are mutually constitutive products of the European upheavals and expansions of the early nineteenth century, the ascendancy of bourgeois values, the spectre of mass society, imperialist expansion, and colonial rule.<sup>36</sup> To quickly summarize, art in the eighteenth century primarily referred to skill and industry, whereas culture designated a tendency to natural and organic growth—as in ‘sugar beet culture’. Only in the early nineteenth century was art as an imaginative expression abstracted from industry as a utilitarian one. The emergence of an abstract, capitalized Art,

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33. For longer discussions of the distinctions between modernity and postmodernity see Rosemary J. Coombe, “Beyond Modernity’s Meanings: Encountering the Postmodern in Cultural Anthropology” (1991) 11 *Culture* 111; Coombe, “Publicity Rights and Political Aspiration”, *supra*, note 19; Mike Featherstone, *Consumer Culture and Postmodernism*, (London: Sage Publications, 1991) at 1-12; David Harvey, *The Condition of Postmodernity* (Oxford: Basil Blackwell, 1989); and Fredric Jameson, *Postmodernism, or, The Cultural Logic of Late Capitalism* (Durham: Duke University Press, 1991). The term postmodern has been adopted into legal discourse in a rather idiosyncratic and restricted manner that concerns itself primarily with the social construction of the subject or self (see sources cited *supra*, note 19) but largely ignores the social, economic, and cultural conditions that define the space of postmodernity and its relationship to the globalization of capital or postcolonial politics. The vexed relation between postmodernism (a concept that privileges the Western World) and postcolonialism is addressed by Hutcheon, Tiffin, & Mukherjee, *supra*, note 32.

34. I use the term “imaginary” in the Lacanian sense to refer to an agent’s compulsion to seek “an identificatory image of its own stability and permanence (the imaginary)” in “the order of images, representations, doubles, and others.” Elizabeth Grosz, *Jacques Lacan: A Feminist Introduction* (New York: Routledge, Chapman and Hall, 1990) at 35.

35. James Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art* (Cambridge: Harvard University Press, 1988 ) at 215.

36. See Patrick Brantlinger, *Crusoe’s Footprints: Cultural Studies in Britain and America* (New York: Routledge, Chapman and Hall, 1990); James Clifford, *supra*, note 35; Rosemary J. Coombe, “Beyond Modernity’s Meanings”, *supra*, note 33; Renato Rosaldo, *Culture and Truth: Remaking Social Analysis* (Boston: Beacon Press, 1989); Raymond Williams, *Culture and Society—1780-1950* (New York: Columbia University Press, 1983); Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (New York: Oxford University Press, 1983). For a related discussion of the development of copyright, its concepts of authorship, expression, and work in terms of their relationship to European colonialism in Africa, India, and the Middle East, see Rosemary J. Coombe, “Occupying the Colonial Imagination”, *supra*, note 16.

equated with individual creativity and expressive genius, was developed in the same period as the concept of capitalized culture, as a noun or the end product of an abstract process of civilization. Tracing this development through the German, French, and English languages, Raymond Williams shows how the term 'culture' developed three sets of referents:

(i) the independent and abstract noun which describes a general process of intellectual, spiritual and aesthetic development,... (ii) the independent noun, whether used generally or specifically, which indicates a particular way of life, whether of a people, a period, a group, or humanity in general, from Herder and Klemm... (iii) the independent and abstract noun which describes the works and practices of intellectual and especially artistic activity...In English (i) and (iii) are still close; at times, for internal reasons, they are indistinguishable as in Arnold, *Culture and Anarchy* (1867); while sense (ii) was decisively introduced into English by Tylor, *Primitive Culture* (1870)... The decisive development of sense (iii) in English was in [late nineteenth and early twentieth centuries].<sup>37</sup>

It was possible by the end of the nineteenth century to speak of 'Culture' with a capital C—representing the height of human development, the most elevated of human expression as epitomized in European art and literature—as well as plural 'cultures' with a small c—imagined as coherent, authentic ways of life characterized by “wholeness, continuity and essence.”<sup>38</sup> These two concepts of culture dominate “the limits of a specific ideological consciousness, [marking] the conceptual points beyond which that consciousness cannot go, and between which it is condemned to oscillate.”<sup>39</sup> They may also mark the limits of the legal imaginary.

Clifford begins his discussion of Western classifications with a critical review of a 1984 exhibit at the Museum of Modern Art in New York (MOMA) titled “‘Primitivism’ in 20th Century Art: Affinity of the Tribal and the Modern” which documented the influence of tribal objects in the works of modernist masters such as Picasso, Brancusi, and Miro.<sup>40</sup> In the early twentieth century, the exhibit suggests, these modernists discover that primitive objects are in fact powerful art and their own work is influenced by the power of these forms. A common quality or essence joins the tribal to the modern in what is described under the universalizing rubric of 'affinity.' An identity of spirit and a similarity of creativity between the modern and the tribal, the contemporary and the primitive, is recognized and celebrated (a movement that continues to hold persuasive power in the Western World, if the recent television series *Millennium* is any indication).

The humanist appeal of the exhibit, however, rests upon a number of exclusions, evasions, and stereotypes. One could, for example, question the way modernism appropriates otherness, constitutes non-Western arts in its own image and thereby discovers universal ahistorical human capacities by denying particular histories, local contexts, indigenous meanings, and the very political conditions that enabled Western artists and authors to seize these goods for their own ends. Needless to

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37. Williams, *Keywords*, *ibid.* at 90-91.

38. Clifford, *supra*, note 35 at 233.

39. Clifford, *supra*, note 35 at 223 citing Fredric Jameson, *The Prisonhouse of Language: Narrative as a Socially Symbolic Act*. (Ithaca: Cornell University Press, 1981) at 47.

40. Clifford, *supra*, note 35 at 189-214.



say, the “imperialist contexts that surround the ‘discovery’ of tribal objects by modernist artists” just as “the planet’s peoples came massively under European political, economic, and evangelical dominion,” is not addressed in the MOMA exhibit. Indeed, the emphasis is upon the narrative of European “creative genius recognizing the greatness of tribal works,”<sup>41</sup> thereby bestowing upon these objects the status of ‘art’ in place of their former lowly designation as ethnographic specimens. As Clifford states, “[T]he capacity of art to transcend its cultural and historical context is asserted repeatedly.”<sup>42</sup> The category of art, however, is not a universal one, but an historically contingent European category, in which the artistic imagination is universalised in the European image under the name of a putatively ‘human’ Culture.

The “appreciation and interpretation of tribal objects takes place”, according to Clifford, “within a modern ‘system of objects’ which confers value on certain things and withholds it from others.”<sup>43</sup> Clifford delineates the “art-culture system” that developed in the nineteenth century as a way of categorizing expressive works of aesthetic value in a context of European imperialism and colonialism and the collection of objects in imperialist forays around the globe.<sup>44</sup> Using a classificatory grid, he demonstrates how two categories have dominated our understanding of expressive works and their proper placement, and two subsidiary categories have encompassed those objects not so easily subsumed by the dominant logic. First, he designates the zone of “authentic masterpieces” created by individual geniuses, the category of ‘art’ properly speaking. Secondly, he designates the category of “authentic artifacts” created by cultures imagined as collectivities.<sup>45</sup> Objects may, therefore, be exhibited in galleries, as examples of a human creative ability that transcend the limitations of time and place to speak to us about the ‘human’ condition; representing the highest point of human achievement, they are regarded as

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41. *Ibid.* at 196.

42. *Ibid.* at 195.

43. *Ibid.* at 198.

44. *Ibid.* at 215-51.

45. Clifford’s other two categories are inauthentic masterpieces (counterfeits and illicit copies) which would seem to include all works that infringe copyright, and inauthentic artifacts (mass produced objects and crafts) which would fall into the realm of items not protected by law, such as crafts, or given a lesser degree of protection due to their status as commercially produced objects (as industrial design). *Ibid.* at 223. Clifford points out that objects often pass from one zone to another, in terms of the way that they are socially valued. Hence, works that deliberately copy other works in artistic statements, such as the anti-art or anti-aesthetic movement in the 1980’s, are sought as original works of art by collectors, hence moving from the zone of inauthentic to the zone of authentic masterpieces as their artists achieve renown (See Hal Foster, *The Anti-Aesthetic: essays on postmodern culture* (Port Townsend: Bay Press, 1983) and Hal Foster, *Recodings: art, spectacle and cultural politics* (Port Townsend: Bay Press, 1985) for discussions of artistic work in this tradition). Similarly, examples of early commercial packaging may cease to be seen as inauthentic artifacts and become valued as authentic artifacts that embody the culture of a particular era in history. Some commercialized mass produced painting from the Third World may become valued either as the work of a culture, or eventually, as the work of an individual artist, as is currently the case with barbershop signs from West Africa. It is important to note here that the law assigns works a category and a degree of protection at the time of origin, not at shifting points of public reception. Hence, an artistic work that copies the work of another, regardless of the social critique or political point the artist believes she is making, is a copyright infringement and remains one even if the artworld comes to regard the work/copy as an authentic masterpiece. Works do not move through legal categories as quickly as they are revalued in the social world. Elsewhere I suggest that this works to the detriment of third world peoples. See Coombe, *Cultural Appropriations: Intellectual Property, Colonialism, and Contemporary Politics* (New York: Routledge, Chapman and Hall, forthcoming).

testaments to the greatness of their individual creators. Alternatively, objects may be exhibited in museums as the authentic works of a distinct collectivity, as integral to the harmonious life of an ahistorical community and incomprehensible outside of 'cultural context'—the defining features of authentic artifacts.

For an object to be accepted as an authentic artifact, it must locate itself in an untouched, pristine state that bespeaks a timeless essence in a particular cultural tradition. That which is recognized as authentic to a culture cannot bear any traces of that culture's contact with other cultures; particularly it must bear no marks of that society's history of colonialism which enabled such works to make their way into Western markets. The tribal life from which such objects magically spring are permitted no histories of their own, relegated to an ahistorical perceptual present, perceived as essential traditions that are vanishing, being destroyed, or tainted by the forces of modernization. The capacity of 'tribal' peoples to live in history, and to creatively interpret and expressively confront the historical circumstances in which they live, using their cultural traditions to do so, cannot be contemplated, except under marginalised categories like 'syncretism' which suggest impurity and decline; "aboriginals apparently must always inhabit a mythic time"<sup>46</sup>. Those cultural manifestations that may signal the creative *life* rather than the death of societies are excluded as inauthentic, or, alternatively, denied cultural, social, or political specificity by becoming incorporated into the universalizing discourse of art.

Tribal objects may transcend their original placement; for example, when African objects become elevated and recognized as art, these "artifacts are essentially defined as masterpieces, their makers as great artists. The discourse of connoisseurship reigns. ... personal names make their appearance..." i.e., art has signature.<sup>47</sup> When non-Western objects fully pass from the status of authentic artifact to the status of art, they also escape the ahistorical location of the 'tribal', albeit to enter into a 'universal' history, defined by the progression of works of great author/artists (the canon of civilization). They become part of a 'human' cultural heritage—Culture capitalized—rather than objects properly belonging to the 'cultures' defined by the discipline of anthropology in the nineteenth and early twentieth centuries.

These categories of art, Culture, and culture, and the domains of authentic masterpieces and authentic artifacts to which they relate, are mirrored in our legal categories for the valuation and protection of expressive objects. Laws of intellectual property (copyright in particular) and laws of cultural property reflect and secure the logic of the European art/culture system that Clifford outlines. Laws of copyright, for example, developed to protect the expressive works of authors and artists—increasingly perceived in Romantic terms of individual genius and transcendent creativity—in the service of promoting universal progress in the arts and sciences. Copyright laws protect works, understood to embody the unique personality of their individual authors, and the expressive component of the original is so venerated that even a reproduction or imitation of it is deemed a form of theft.

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46. Clifford, *supra*, note 35 at 201-02.

47. *Ibid.* at 204-06.

Although the history of copyright has been more critically investigated elsewhere,<sup>48</sup> a few points are central to my argument. The idea of an author's rights to control his expressive creations developed in a context that privileged a Lockean theory of the origin of property in labour in which the expressive creation is seen as the author's 'work' albeit mental work that creates an 'Original' arising spontaneously from the vital root of 'Genius'.<sup>49</sup> Originality in mental labour as opposed to manual labour enabled the author to claim not merely the physical object produced, but the literary or artistic expression itself—the 'work' properly defined.

As William Blackstone wrote in the late eighteenth century, in the context of literary copyright (although the same ideas were soon extended into the artistic sphere) the work is neither the physical book, nor the ideas contained in it, but the form of the expression which the author gives to those ideas.

The identity of a literary composition consists intirely in the *sentiment* and the *language*; the same conceptions, cloathed in the same words, must necessarily be the same composition: and whatever method be taken of conveying that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is so conveyed; and no other man can have a right to convey or transfer it without his consent....<sup>50</sup>

Literary or artistic works were incorporeal entities that sprang from the "fruitful mind" of an author,<sup>51</sup> one of many organic metaphors that proliferated in the Romantic ideology of creativity and resonated with Hegelian theories of personality. The work carries the imprint of the author's personality and always embodies his persona, wherever it surfaces, and whatever the sources of its content or the quality of the ideas it expresses—"even the humblest creative effort is protected because personality always contains something unique. It expresses its singularity...that which is one man's alone."<sup>52</sup>

In the same way that intellectual property laws (dominated by the expressive, inventive and possessive individual) legitimize personal control over the circulation of texts, laws of cultural property protect the material works of culture, namely, objects of artistic, archaeological, ethnological, or historical interest. Culture may be defined here in either of the two ways established in the nineteenth century—as the universal heritage of humankind—culture with a capital C—or in the plural

48. See especially Jaszi, "Towards a Theory of Copyright", *supra*, note 18; Rose, "The Author as Proprietor", *supra*, note 18; Woodman see "The Genius and the Copyright", *supra*, note 18. John Feather, "Publishers and Politicians: The Remaking of the Law of Copyright in Britain 1775-1842: The Rights of Authors" (1989) 25 *Publishing History* 45 argues that the centrality of authorship in copyright and the belief that the author should be the main beneficiary of literary work was not fully established in Britain until 1814 and reflects the ascendancy of Romantic reconceptualizations of the creative process. For further historical studies of 'authorship' see the entirety of (1992) 10(2) *Cardozo Arts and Entertainment L. J.* 279-725.

49. I am paraphrasing Edward Young, *Conjectures On Original Composition* (London: 1759) as cited in Rose, "The Author as Proprietor", *supra*, note 18.

50. William Blackstone, *Commentaries on the Laws of England*. 4 Volumes (Oxford: Clarendon Press, 1765-69) vol. 2 at 405-06.

51. William Enfield, *Observations on Literary Property* (London: 1774) at 21.

52. *Bleistein v. Donaldson Lithographing Co.* 188 U.S. 239 at 250 (1903) interpreting the nineteenth century cultural critic John Ruskin. These Romantic and pre-industrial concepts continue to dominate copyright doctrine even in a post-industrial age in which individual Romantic authors are increasingly difficult to find in the bureaucratic and corporate structures of today's culture industries.

anthropological sense, in which different cultures lay claim to different properties.<sup>53</sup> These two positions on the nature of the ‘culture’ that can rightfully possess the property at issue define the poles of an ongoing controversy in legal scholarship. John Henry Merryman, the most prolific of the legal scholars writing in this field, defends a position he defines as “cultural internationalism” which he describes in Enlightenment terms as a commitment to “the cultural heritage of all mankind” to which each people make their contribution and in which all people have an interest.<sup>54</sup> This attitude towards cultural property emerges from the law of war and the need to cease military activities when cultural objects are endangered, and to treat those responsible for offences against cultural property as having committed a crime against humanity. It is enshrined in *The Convention for the Protection of Cultural Property in the event of armed conflict* enacted in the Hague on May 14, 1954.<sup>55</sup>

The other position on cultural property that Merryman defines and denigrates is “cultural nationalism”<sup>56</sup> in which particular peoples have particular interests in particular properties, regardless of their current location and ownership. This attitude towards cultural property is embodied in *The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* of November 14, 1970<sup>57</sup> (hereinafter UNESCO 1970), in which “the parties agree to oppose the impoverishment of the cultural heritage of a nation through illicit import, export, and transfer of ownership of cultural property, agree that trade in cultural objects exported contrary to the law of the nation of origin is illicit and agree to prevent the importation of such objects and facilitate their return to source nations.”<sup>58</sup> As of 1986, 58 nations had become parties to UNESCO 1970; many of these signatories have policies that prevent all export of cultural property, thus making any international trafficking of cultural property ‘illicit’.<sup>59</sup>

Merryman derides cultural nationalism as motivated by ‘Romantic Byronism’—a curiously Eurocentric term that he indiscriminately applies to all nations with an interest in the preservation and repatriation of significant cultural objects.<sup>60</sup> For Merryman, such a position can only be seen as irrational because in

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53. An overview of the treaties that define the parameters of the international law of cultural property may be found in Joseph F. Edwards, “Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects” (1991) 22 *Toledo L. Rev.* 919.

54. John Henry Merryman, “Two Ways Of Thinking About Cultural Property” (1986) 80 *Am. J. of International L.* 831; John Henry Merryman, “The Public Interest in Cultural Property” (1989) 77 *Cal. L. Rev.* 339.

55. 249 U.N.T.S. 240.

56. It would appear that Merryman equates nationhood with statehood and is not prepared to recognize the existence of more than one nation within a sovereign state. Hence he finds demands for the repatriation of objects from cultural groups rather than nations to be ‘awkward’ and ‘embarrassing’ events. See “The Public Interest”, *supra*, note 54 at 351. He also sees one of the major values of cultural objects to be their embodiment of truth, envisioned as a source of certainty about the authenticity of the human cultural past—not in terms of an object’s role in the ongoing lives of peoples and communities. See Rebecca Clements, “Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law” (1991) 49 *U. of Tor. Faculty. of L. Rev.* 1 for a good discussion of the possibilities afforded to First Nations peoples for the repatriation of sacred objects under cultural property laws.

57. 823 U.N.T.S. 231, reprinted in 10 *International Legal Materials* 289 (1971) as cited in Merryman, “Two Ways of Thinking”, *supra*, note 54 at 833.

58. Merryman, “Two Ways of Thinking”, *supra*, note 54 at 843.

59. *Ibid.*

60. *Ibid.* at 833.

the “source nations” who dominate amongst signatories to UNESCO 1970, the supply of cultural artifacts far exceeds the internal demand—“they are rich in cultural artifacts beyond any conceivable use.”<sup>61</sup> Because such nations are relatively poor, he believes that they would be better off exporting such objects to locations where they are valued according to free market principles.

In addition to “Romantic Byronism,” Merryman cites the notion of national cultural patrimony and political symbolic uses of cultural property as possible reasons for the popularity of “Cultural Nationalism”, but he lumps such considerations together with “lack of cultural expertise and organization to deal with cultural property as a resource like other resources to be managed and exploited.”<sup>62</sup> The possibility that other peoples may entertain other values is considered no more nor less likely than their sheer ignorance and ineptitude in recognizing cultural property as an exportable resource. Merryman seems to find it offensive that source nations have the exclusive voice in determining whether or not cultural objects will be prohibited from export, when dealers, collectors, and museums are deprived of any input into the decision.<sup>63</sup> The interest of dealers, collectors, and museums in such decisions is self-evident; in market terms, they best recognise the value of such objects, and are in the best position to see that value realized on the market.

It is not that Merryman fails to recognize any other values than those of the market; rather, it is that the universal human values embodied in such cultural objects are assumed to be best recognized by those who will pay the market price. He suggests that a ‘cosmopolitan attitude’ would situate those objects where they could best be preserved, studied, and enjoyed. Cultural objects will move to the locus of highest probable protection through the market, because those who are prepared to pay most are most likely to preserve their investment.<sup>64</sup> He makes the case that many source nations retain cultural works that they do not adequately conserve or display and that if such works were removed to another nation, they would be better preserved, studied, and exhibited, or more widely viewed and enjoyed. As Merryman sees it:

... cultural nationalism finds no fault with the nation that hoards unused objects in this way, despite the existence of foreign markets for them.... They forbid export but put much of what they retain to no use. In this way they fail to spread their culture, they fail to exploit such objects as a valuable resource for trade, and they contribute to the cultural impoverishment of people in other parts of the world.<sup>65</sup>

Merryman seems to find it impossible to entertain the possibility that others might value objects for reasons beyond those of the market, or that there are alternative modes of attachment to objects which do not involve their commodification, objectification, and reification for the purposes of collection, observation, and display. One suspects, however, that Merryman would likely object to the movement of Rembrandts from the Netherlands to Lagos, despite the fact that Rembrandt’s

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61. *Ibid.* at 832.

62. *Ibid.* at 832 n. 5.

63. *Ibid.* at 844-45.

64. *Ibid.* at 849.

65. *Ibid.* at 847.

paintings might be “over-represented” in their country of origin where they cannot possibly be put to their full use, that the Dutch “fail to spread their culture” to the Third World, and that they thereby “contribute to the cultural impoverishment of people” in Africa. The existence of vast and seldom displayed holdings in European and North American museums does not appear to have led to any movement amongst “cultural internationalists” to establish better museums in Niamey, Lima, or Nanjing despite the vastly larger numbers of people whose “cultural impoverishment” might thereby be alleviated by exposure to the sublime. The “cosmopolitan” attitude Merryman espouses appears more Eurocentric than worldly, more monocultural than respectful of cultural difference, and less concerned with the purported “interests of all mankind”<sup>66</sup> than with the interests of maintaining Western hegemony.

A more sympathetic and sophisticated case for “cultural nationalism” is made by John Moustakas in a law review note titled “Group Rights in Cultural Property: Justifying Strict Inalienability.”<sup>67</sup> Concerned that Greece has been dispossessed of some of its greatest cultural and artistic patrimony, and that the “looting and pillage of cultural heritage continues wholesale”<sup>68</sup> as evidenced by thriving black markets, Moustakas argues that neither international conventions nor national laws have recognized that new concepts of ownership must be created to deal with emerging notions of national cultural identity. Existing laws in both national and international arenas presuppose the alienability of all property, including cultural property, according to market principles. Moustakas argues for recognition of strict market inalienability for cultural properties integrally related to group cultural identity, extending Margaret Jane Radin’s test of “property for personhood”<sup>69</sup> to collectivities conceived as persons.

The nexus between a cultural object and a group, culture, or nation should be “the essential measurement for determining whether group rights in cultural property will be effectuated to the fullest extent possible—by holding such objects strictly inalienable from the group.”<sup>70</sup> Just as:

...the term property for personhood might describe property so closely bound up with our individual identities that its loss ‘causes pain that cannot be relieved by the object’s replacement’, ... property for grouphood expresses something about the entire group’s relationship to certain property.... Some property can be essential to the preservation of group identity and group self-esteem.<sup>71</sup>

Against those who would argue that such a position is paternalistic, he argues that the concept of “communal flourishing” provides an important justification for

66. *Ibid.* at 850.

67. (1989) 74 Cornell L. Rev. 1179.

68. *Ibid.* at 1182. Ironically, Greece, the country of origin for classical Western or European culture, is often now portrayed as a nation that has degenerated from its classical origins such that it is no longer an appropriate custodian for those objects that define classical European Culture. For a discussion of Greek nationalism that defines the cultural struggles of Greek peoples in terms of these historical perceptions see Michael Herzfeld, *Anthropology Through the Looking Glass: Critical ethnography in the margins of Europe* (Cambridge: Cambridge University Press, 1987).

69. Margaret Jane Radin, “Property and Personhood” (1982) 34 Stan. L. Rev. 957 at 959ff.

70. Moustakas, *supra*, note 67 at 1184.

71. *Ibid.* at 1185 n. 17 referring to Radin, *supra*, n. 69 at 959.

holding such property inalienable.<sup>72</sup> Using the Parthenon Marbles (the term Elgin Marbles has the effect of ceding legitimacy to British seizure) as his example, Moustakas argues for recognition that some properties can only properly belong to groups as constitutive of group identity, that such properties cannot be alienated because future generations are unable to consent to transactions that threaten their existence as a group, and that commodification and fungibility are inappropriate ways to treat constitutive elements of grouphood and are inimical to communal flourishing.

'Cultural nationalism' employs the rhetoric of possessive individualism in its support for the rights of groups to claim certain objects as part of their essential identities. Anthropologist Richard Handler has written extensively about the logic of possessive individualism in contemporary claims to cultural property.<sup>73</sup> Drawing upon C.B. Macpherson's famous work,<sup>74</sup> Handler argues that possessive individualism—the relationship that links the individual to property as it was initially formulated in Locke's labour theory of value—increasingly dominates the language and logic of political claims to cultural autonomy. Focusing upon the idea of cultural property as manifested in sixty-odd years of historic preservation legislation in the province of Quebec, he explicates the tropes used to defend the protection of a unique cultural heritage. In discussing "le patrimoine", people in Quebec "envision national culture as property and the nation as a property-owning 'collective individual.'" <sup>75</sup>

The modern individual is a self-sufficient and self-contained monad who is complete as a human being:

Not only is one complete in oneself, one is *completely oneself*. By this I mean that we conceive of the individual person as having, as we say, "an identity." Identity means "oneness," though it is oneness of a special sort... "sameness in all that constitutes the objective reality of a thing."<sup>76</sup>

The second aspect of modern individualism that Handler points to is its possessive element. In modern culture, an individual is defined by the property he or she possesses and such individuals naturally seek to transform nature into forms of private property. Modernity has extended these qualities to nation states and ethnic groups who are imagined on the world stage and in political arenas as "collective individuals." Like other individuals, these collective individuals are

72. *Ibid.* at 1185.

73. See Richard Handler, "Who Owns the Past? History, Cultural Property, and the Logic of Possessive Individualism" in Brett Williams, ed., *The Politics of Culture* (Washington: Smithsonian Institution, 1991), 63-74; Handler, "On Having a Culture: Nationalism and the Preservation of Quebec's Patrimoine" in George W. Stocking, ed., *Objects and Others: Essays on Museums and Material Culture* (Madison: University of Wisconsin Press, 1985), 192-217. For others who have pointed out the peculiarity and contingency of Western individualism see Louis Dumont, *From Mandeville to Marx: The Genesis and Triumph of Economic Ideology* (Chicago: University of Chicago Press, 1977); Louis Dumont, *Essays on Individualism: Modern Ideology in Anthropological Perspective* (Chicago: University of Chicago Press, 1986) and of course, Alexis de Tocqueville, *Democracy in America*, trans. H. Reeve, esq., 4th ed., rev. & cor. from 18th Paris Ed. New York: J. & H. G. Langley, 1841.

74. C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962).

75. Handler, "On Having a Culture", *supra*, note 73 at 194.

76. Handler, "Who Owns the Past", *supra*, note 73 at 64.

imagined to be territorially and historically bounded, distinctive, internally homogeneous, and complete unto themselves.<sup>77</sup> In this worldview, each nation or group possesses a unique identity and culture which is constituted by its undisputed possession of property. Groups increasingly imagine themselves as individuals prizing their possession of culture and history:

...it is our culture and history, which belong to us alone, which make us what we are, which constitute our identity and assure our survival...within cultural nationalism a group's survival, its identity or objective oneness over time, depends upon the secure possession of a culture...[and] culture and history become synonymous because the group's history is preserved and embodied in material objects—cultural property.<sup>78</sup>

Material objects, therefore, come to epitomize collective identity—as articulated by a 1976 UNESCO panel in the principle that “cultural property is a basic element of a people's identity,”<sup>79</sup> used to legitimate the repatriation of objects of overriding importance to group identity. Being is equated with having (and excluding and controlling).

This collective individual is imagined like a biological organism to be precisely delimited both physically and in terms of a set of traits (its culture, heritage, or ‘personality’) that distinguishes it from all other collective individuals. The nation is said to ‘have’ or ‘possess’ a culture, just as its human constituents are described as ‘bearers’ of the national culture. From the nationalist perspective, the relationship between the nation and culture should be characterized by originality and authenticity. Cultural traits that come to the nation from outside are at best ‘borrowed’ and at worst polluting; by contrast, those aspects of national culture that come from within the nation, that are original to it, are ‘authentic’.<sup>80</sup>

The rhetoric of cultural nationalism clearly bears traces of the same logic that defines copyright. Each nation or group is perceived as an author who originates a culture from resources that come from within and can thus lay claim to exclusive possession of the expressive works that embody its personality. There is, however, a significant difference in the scope of the claims that can be made on behalf of a culture, and those that can be made on behalf of an individual author. Copyright laws enable individual authors not only to claim possession of their original works as discrete objects, but to claim possession and control over any and all reproductions of those works, or any substantial part thereof, in any medium.<sup>81</sup> Cultural property laws, however, enable proprietary claims to be made only to original objects or authentic artifacts. The Western extension of Culture to cultural others was

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77. Cultural property laws are not the only laws that envision culture in terms of monolithic traditions. Kristin Koptiuch writes movingly of the way the “cultural defence” has been constructed in criminal law as a means of espousing cultural relativism and a politically sensitive response to the dilemmas of cultural difference, but has done so using the tropes of a colonial discourse on the Orient that deems it ahistorical and essentializes Western constructions of racialised gender difference that permit sexual violence against Asian women. (Fellowship proposal to the Center for the History of Consciousness, Santa Cruz, 1992). Like Koptiuch I think it is important to excavate the colonial past stratified in Western forms of knowledge.

78. Handler, “Who Owns the Past”, *supra*, note 73 at 66.

79. *Ibid.* at 67.

80. Handler, “On Having a Culture”, *supra*, note 73 at 198.

81. These basic premises form the part of all copyright regimes and there is no particular reason to privilege any specific statutory enactment of these principles here.



limited to objects of property, not to forms of expression. The full authority of authorship, however, was confined to the Western World.

To make this concrete, let us return to the Picasso painting. When a primitive statue, produced in a collectivity for social reasons, makes its way into a Picasso painting, the statue itself may still embody the identity of the culture from which it sprang, but any reproduction of it (that resembles Picasso's 'work') may be legally recognized as the embodiment of Picasso's authorial personality. The possession of a culture is profoundly limited, whereas the possession of the author extends through time and space as his work is reproduced. Royalties flow, not to the statue's culture of origin, but to the estate of the Western author, where the fruits of his original work are realized for decades after his death.

In his discussion of 'possessive collectivism', Handler agrees with the principle of repatriation as a matter of fair play, but suggests that the cultural identity argument used to support it has the insidious effect of reproducing and extending Western cultural ideologies of possessive individualism on a global scale.<sup>82</sup> The problem with restitutionist arguments, he posits, is that they make use of metaphors "borrowed from the hegemonic culture that the restitutionists are attempting to resist."<sup>83</sup> Arguing from recent developments in anthropology, Handler forcefully asserts that cultures are not bounded, continuous over time, or internally homogeneous, that traditions are actively invented and negotiated and reimagined as social agents negotiate their political lives and relationships.<sup>84</sup> The culture that groups assert as belonging to them and as essentially embodied in particular pieces of property is, he suggests, not an objective thing that has possessed a continuous meaning and identity over time, but the product of current needs and interpretations.<sup>85</sup> It is, however, as politically dishonest to deny the objective identity of those making culturally nationalist claims as it is to assert an internationalism that privileges the nation-building imperialist enterprises of European countries in the name of 'universal human values' or the 'common heritage of mankind.' Both positions are interested human inventions.

### Contemporary Properties of Culture and Identity

The European art/culture system and the legal categories that support and sustain it constitute a limited vision of human expressive possibility and a limited understanding of our various modes of cultural attachment to the phenomena which give meaning to our lives. Ultimately, these categories serve only to culturally impoverish the Western self, while they Orientalize the other. By deeming expressive creations the private properties of authors who can thereby control the circulation of culturally meaningful texts through our intellectual property laws, we deprive ourselves of immense opportunities for creative 'worldmaking'<sup>86</sup>—a phenomenon

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82. Handler, "Who Owns the Past?", *supra*, note 73 at 67.

83. *Ibid.* at 68.

84. *Ibid.* at 68.

85. *Ibid.* at 69.

86. I borrow this term from Nelson Goodman, *Ways of Worldmaking* (Hassocks: Harvester Press, 1978).

I have explored more fully elsewhere.<sup>87</sup> Denying the social conditions and cultural influences that shape the author's expressive creativity, we invest him with a power that may border on censorship in the name of property.<sup>88</sup> By representing cultures in the image of the undivided possessive individual we obscure people's historical agency and transformations, their internal differences, the productivity of inter-cultural contact, and the ability of peoples to culturally express their position in a wider world. The Romantic author and authentic artifacts are both, perhaps, fictions of a world best foregone.

Anthropologists have spent the better part of the last decade discrediting the once pervasive disciplinary mode of representing cultures as homogeneous, static, or timeless, and as governed by uncontested systems of meaning, codes of conduct, or traditions conceived in juridical terms.<sup>89</sup> Recognising culture as contested, temporal and always emergent in worldly political struggle, they have emphasized the invention of tradition, and the cultural productivity generated by differences within cultures, at the borders between cultures, and in the ongoing negotiation of situated identities.

The creative negotiation of socially situated identities has also been a theme of contemporary pragmatism, exemplified in legal literature by Martha Minow and in cultural criticism by bell hooks. Minow points out that:

As a founding parent of pragmatism, [William] James would reject any approach to the riddle of identity that sought the essence of a person or group. Rather than search for essences or intrinsic qualities of people or concepts, the pragmatists looked to purposes and effects, consequences and functions.<sup>90</sup>

Minow suggests that most legal treatments of identity questions fail to acknowledge that the cultural, gender, racial, and ethnic identities of a person are not simply intrinsic to that person, but emerge from relationships between people in negotiations and interactions with others; "[t]he relative power enjoyed by some people

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87. See Coombe, "Objects of Property and Subjects of Politics", *supra*, note 19, and Coombe, "Publicity Rights and Political Aspiration", *supra*, note 19. See also Lange, "At Play in the Fields of the Word", *supra*, note 18.

88. See Diane Conley, "Author, User, Scholar, Thief" (1991) 9 *Cardozo Arts and Entertainment L. J.* 15; Wendy Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory" (1989) 41 *Stan. L. Rev.* 1343; Gordon, "Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship" (1990) 57 *U. of Chi. L. Rev.* 1009; Litman, "Public Domain", *supra*, note 18; Litman, "Copyright as Myth", *supra*, note 18; David Lange, "Recognizing the Public Domain" (1981) 44 *Law and Contemp. Problems* 147; David Vaver, "Intellectual Property Today: Of Myths and Paradoxes" (1990) 69 *Can. Bar Rev.* 98.

89. Although it is impossible to draw up a complete list of works addressing these themes, the most general and influential of works include James Clifford, *The Predicament of Culture*, *supra*, note 35; George Marcus & James Clifford, *Writing Culture: The Poetics and Politics of Ethnography* (Berkeley: University of California Press, 1986); George Marcus & Michael Fischer, *Anthropology as Cultural Critique* (Chicago: University of Chicago Press, 1985); Renato Rosaldo, *Culture and Truth*, *supra*, note 36. For discussions in particular contexts see Janice Boddy, *Wombs and Alien Spirits: Women, Men and the Zar Cult in Northern Sudan* (Madison: University of Wisconsin Press, 1989); Rosemary J. Coombe, "Beyond Modernity's Meanings", *supra*, note 33; Coombe, "Same As It Ever Was", *supra*, note 19; Coombe, "Context, Tradition and Convention: The Politics of Constructing Legal Cultures" (1990) 13(2) *Association for Political and Legal Anthropology Newsletter* 15; Coombe, "Barren Ground: Reconceiving Honour and Shame in the Field of Mediterranean Ethnography" (1990) 32 *Anthropologica* 221.

90. Martha Minow, "Identities" (1991) 3 *Yale J. of Law & the Humanities* 97 at 97-98.

compared with others is partly manifested through the ability to name oneself and others and to influence the process of negotiation over questions of identity.”<sup>91</sup>

Lawyers and judges who address legal questions of identity should keep in mind its kaleidoscopic nature. They should examine the multiple contributions given to any definition of identity. They ought to examine the pattern of power relationships within which an identity is forged. And they need to explore the pattern of power relationships within which a question of identity is framed.... Who picks an identity and who is consigned to it?<sup>92</sup>

As we shall soon see, it is precisely the inability to name themselves and a continuous history of having their identities defined by others that First Nations peoples foreground when they oppose practices of cultural appropriation.

In an effort to create a critical consciousness of racism and its eradication, cultural critic bell hooks also adopts a pragmatic approach to questions of identity.<sup>93</sup> She asserts that cultural critics must confront the power and control over representations in the public sphere, because social identity is a process of identifying and constructing oneself as a social being through the mediation of images.<sup>94</sup> Hence minority peoples need to critically engage questions of their representation and its influence on questions of identity formation. As we shall see, Native peoples are particularly concerned with the ahistorical representations of “Indianness” that circulate in the public sphere and the manner in which such imagery mediates the capacities of others to recognize their contemporary identities as peoples with specific needs in the late twentieth century.

Hooks asserts that an identity politics, however necessary as a stage in the liberation of subordinated peoples, must “eschew essentialist notions of identity and fashion selves that emerge from the meeting of diverse epistemologies, habits of being, concrete class locations, and radical political commitments.”<sup>95</sup> A return to ‘identity’ and ‘culture’ is necessary, in hooks’ perspective, more as a means of locating oneself in a political practice, than in the embrace of the positivism projected by cultural nationalism.<sup>96</sup> Hooks links this political project to a feminist anti-essentialism which also links identity to a history and a politics rather than an essence:

Identity politics provides a decisive rejoinder to the generic human thesis, and the mainstream methodology of Western political theory...if we combine the concept of identity politics with a conception of the subject as positionality, we can conceive of the subject as non-essentialized and emergent from historical experience....<sup>97</sup>

In the face of white supremacy, issues of black identity cannot be dismissed, and critiques of essentialism must recognize the very different positions occupied by oppressed groups in society. Abstract and universalizing criticisms of essen-

91. *Ibid.* at 98-99 citing Angela Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42 *Stan. L. Rev.* 581 at 584.

92. *Ibid.* at 112.

93. bell hooks, *Yearning: Race, Gender, and Cultural Politics* (Toronto: Between the Lines Press, 1990).

94. *Ibid.* at 5.

95. *Ibid.* at 19.

96. *Ibid.* at 20.

97. *Ibid.* at 20 citing Linda Alcoff, “Cultural Feminism versus Post-structuralism: The Identity Crisis in Feminist Theory” (1988) 13 *Signs* 405 at 432-33.

tialism may appear to oppressed peoples as threatening—once again preventing,

...those who have suffered the crippling effects of colonization or domination to gain or regain a hearing.... It never surprises me when black folks respond to the critique of essentialism, especially when I denied the validity of identity politics by saying, "Yeah, it is easy to give up identity, when you've got one."<sup>98</sup>

Critiques of essentialism are useful, Hooks suggests, when they enable African Americans to examine differences within black culture—for example the impact that class and gender have on the experience of racism. They are also necessary to condemn notions of "natural" and "authentic" expressions of black culture which perpetuate static, ahistorical, and stereotyped images of black people's lives and possibilities.<sup>99</sup> As long as the specific history and experience of African Americans and the cultural sensibilities that emerge from that experience is kept in view, essentialism may be fruitfully criticized; "There is a radical difference between repudiation of the idea that there is a black 'essence' and recognition of the way that black identity has been specifically constituted in the experience of exile and struggle."<sup>100</sup>

First Nations peoples face similar dilemmas in their representation of identity in contemporary Canadian society. When they specify their unique histories, they are often accused of essentialism, but when they write or paint, their work is often criticized for not being 'authentic' or sufficiently 'Indian'.<sup>101</sup> When First Nations peoples make claims to 'their own' images, stories, and cultural themes, however, they do not do so as Romantic authors nor as timeless homogenous cultures insisting upon the maintenance of a vanishing authenticity. They do not lay claim to expressive works as possessive individuals, insisting upon permissions and royalties for the circulation of authorial personas in the public realm.<sup>102</sup> Nor is their assertion of cultural presence made in the name of an ahistorical collective essence, but in the name of living, changing, creative peoples engaged in very concrete contemporary political struggles.<sup>103</sup> The law, however, affords them little space to make

98. *Ibid.* at 28.

99. *Ibid.* at 28.

100. *Ibid.* at 29.

101. On accusations of essentialism see Loretta Todd, "What More Do They Want?" in Gerald McMaster & Lee-Ann Martin, eds, *Indigena: Contemporary Native Perspectives* (Vancouver/Toronto: Douglas & McIntyre, 1992) 71-79. Lee Maracle notes that publishers are absolved of charges of censorship when they choose not to publish Native works (often returning works to writers with "Too Indian" or "Not Indian enough" written on them by non-Native editors who presume the authority to judge the works' authenticity) while she is accused of "being a fascist censor" for objecting to non-Native use of Native themes and stories. See Lee Maracle, "Native Myths: Trickster Alive and Crowing" (Fall 1989) *Fuse Magazine* 29.

102. I do not wish to suggest here that artists and authors of First Nations ancestry do not wish to have their works valued on the market, or that they would eschew royalties for works produced as commodities for an exchange value on the market. That would be essentialist indeed! Instead, I am suggesting that in the debates surrounding cultural appropriation, Native peoples assert that there are other value systems than those of the market in which their images, themes, practices, and stories figure and that these modes of appreciation and valuation are embedded in specific histories and relationships that should be accorded respect. Copyright laws, of course, only protect individual authors against the copying of their individual expressions, and do not protect ideas, or cultural themes, practices, and historical experiences from expropriation by cultural others.

103. The best demonstration of this is to be found in Native art and literature where issues of identity are engaged in innovative fashions that often employ European cultural forms to examine the specificity

their claims<sup>104</sup>. As Amanda Pask explains in a brilliant discussion of the issue, Native peoples face a legal system that divides the world up in a fashion both foreign and hostile to their sense of felt need:

At every level the claims of aboriginal peoples to cultural rights fall outside the parameters of Western legal discourse. As neither state actors, nor individuals, their claims can be heard neither in the international regimes governing cultural property, nor in the domestic regimes governing intellectual property. This pattern repeats itself internally in each regime: in cultural property law the competing legal values that frame every question are those of national patrimony and the 'universal heritage of mankind'; in intellectual property the interests to be balanced are those of 'authors' conceived of on an individualistic model and 'the public' in their interest in preserving a common public domain. In all cases, aboriginal peoples must articulate their interests within frameworks which obliterate the position from which they speak.<sup>105</sup>

As Pask suggests, the opposition between private, personal interests and universal ones is understood to cover the field of all possible claims, and, as we have seen, when group rights are entertained, they are often conceived in individualistic terms that freeze and essentialize culture in the name of identity.

Even more debilitating for Native claims, perhaps, is the law's rigid demarcation between ideas and expressions, oral traditions and written forms, intangible works and cultural objects, personal property and real property. The law rips asunder what First Nations people view as integrally related, freezing into categories what Native peoples find flowing in relationships. They do not separate texts from ongoing creative production, or ongoing creativity from social relationships, or social relationships from a people's relationship to an ecological landscape that binds past and future generations in relations of spiritual significance.

The powerful conceptual framework of the European art/culture system seems so deeply embedded in our legal categories of intellectual and cultural property, that they seem immutable, but the claims of non-Western others to objects and representations may well force these Western categories under new forms of scrutiny. As new subjects engaged in postcolonial struggles occupy the categories bestowed

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of First Nations history as it figures in contemporary political struggles and the need to forge alliances with other subordinated groups. The Romantic notion of art for art's sake is often challenged, as is the art/culture system that relegates Native expressive forms to an ethnographic realm, or, alternatively, claims them as art, but only to deny their claims to cultural specificity and political engagement. For discussions see the various artists whose work is featured in McMaster & Martin, *supra*, note 101 and the essay by Cree art instructor Alfred Young Man, "The Metaphysics of North American Art" in McMaster & Martin, *supra*, note 101 at 81-99.

104. I do not wish to suggest that intellectual property laws hold no potential for protecting some of the interests of Native peoples. Individual Native artists may well afford themselves of copyright protections but collective rights, collective authors, and claims of intergenerational creation cannot be entertained. Trademark law, were it to be diligently enforced, might afford protection against false representations of "Indian" or "Native" production in the market. Section 9 of the *Trademarks Act* could be amended to prohibit representations of Native peoples and motifs in commercial contexts, unless the consent of band councils were obtained. Collectives of Native peoples might well use the common law tort of passing off to prevent misrepresentations of Native origins in advertising and sales. More general themes, narratives, and artistic styles, however, cannot be protected because they are likely to be viewed as ideas rather than expressions.

105. Amanda Pask, "Making Connections: Intellectual Property, Cultural Property, and Sovereignty in the Debates Concerning the Appropriation of Native Cultures in Canada" (1993) 8 *Intellectual Property J.* (forthcoming).

upon us by an ignoble past, they may well transform them and eventually perhaps help to crumble the colonial edifice upon which these categories are founded. To understand First Nations claims, we must venture beyond the European categories that constitute the colonial edifice of the law; only by considering Native claims “in context” will we be able to expand “the borders of the legal imagination”.<sup>106</sup>

### Listening to Native Claims “In Context”

The cultural appropriation debate raises numerous issues and engages many protagonists. I cannot engage all of these arguments here. Rather than attempt to construct a solution to a problem, I will suggest instead that my readers attempt to understand the issues differently. Whereas it may be impossible to delineate formal rules defining, sanctioning, and prohibiting specific acts of “cultural appropriation”, it is possible to enact and practice an ethics of appropriation that attends to the specificity of the historical circumstances in which certain claims are made, in which they must be assessed. I will attend to the specific claims about cultural appropriation made by Native peoples and suggest that we consider acts of cultural “borrowing” “in context”.

The call to consider claims “in context” has been explored by Martha Minow and Elizabeth Spelman as a characteristic that unites philosophical pragmatists, feminists, and critical race theorists.<sup>107</sup> In making decisions, an emphasis on context requires a sensitivity to the nuances of the particular historical situation in which a claim emerges and the distinctive needs of the persons involved. Against assumptions of liberal legal and political theory that treat principles as universal and the individual self as the proper unit of analysis, the call to context is a call to consider the structures of power in society and the systemic legacies of exclusion involving the group based characteristics of individuals.<sup>108</sup>

Minow and Spelman argue that attention to the contingencies of a situation—the particular cultural and historical background of the persons involved—neither incapacitates us from making moral judgments nor undermines the possibility of criticism across contexts.<sup>109</sup> Instead, a contextualist approach suggests that all human beings are always in social contexts and make judgments contextually, and that any form of abstraction to general principles involves a choice of relevant contexts. Exponents of abstraction, who stress the need to develop principles which apply across contexts (as did the letter writers cited earlier), are themselves situated in ways that limit their understandings and these limitations must be reflected upon in attempting to understand a context for judgment. Abstract theories of freedom of expression, authorship, ownership, and censorship, are “rooted in particular contexts and operate within context with real and particular effects that often benefit

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106. I borrow this phrase from Patrick Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1991) 36 McGill L. J. 382.

107. Martha Minow & Elizabeth Spelman, “In Context” in M. Brant & W. Weaver, eds, *Pragmatism in Law and Society* (Boulder, Co.: Westview Press, 1991) 247 at 247.

108. *Ibid.* at 248-49.

109. *Ibid.* at 249-55.

some people more than others.”<sup>110</sup> Contextualist approaches, moreover, generally do appeal to some more abstract moral or political theory to justify their procedures. Like Cornell West, I point to context here as a means of challenging a political theory that speaks in the name of abstract individual rights with the specific situated experiences of others whose lives bespeak the exclusions effected by those principles.<sup>111</sup>

Native peoples in Canada are making specific claims to stories, imagery, and themes based upon very specific historical trajectories and the specific needs of people engaged in the contemporary political struggles in which these stories strategically figure. I shall argue that the claims of First Nations peoples to control the circulation of Native cultural texts cannot be facilely analogized to prohibiting Shakespeare’s writing of *Hamlet* or the Third Reich’s prohibition of Jewish writing, under the rubric of freedom of speech, without doing violence to the integrity of Native struggles for political self-determination. Specific historical experiences and contemporary political struggles provide the relevant context for considering claims of cultural appropriation. Only by situating these claims in this context, can we understand how supposedly abstract, general, and universal principles (like authorship, art, culture, and identity) may operate to construct systematic structures of domination and exclusion in Canadian society. An evaluation and judgement of Native claims of cultural appropriation without this knowledge of context cannot but reinforce these larger patterns of injustice.

Rather than a weakness or a departure from the ideal of distance and impersonality, acknowledging the human situation and the location of a problem in the midst of communities of actual people with views about it is a precondition of honesty in human judgments....The call to make judgements in context often seems misleading if it implies that we could ever make judgements outside of a context; the question is always what context matters or what context should we make matter for this moment...[I]n many contemporary political and legal discussions, the demand to look at the context often means a demand to look at...structures of power.... Rather than an injunction to immerse in the unique particularities of the situation, the emphasis on context often means identifying structures that extend far beyond the particular circumstance. But perhaps it is not so surprising that this should be named a contextual move against the backdrop—the context by default—created by Western liberal legal and political traditions that emphasize as ideals individual freedom, equality, universal reason, and abstract principles. Because persistent patterns of power, based on lines of gender, racial, class, and age differences, have remained resilient and at the same time elusive under traditional political and legal ideas, arguments for looking to context carry critical power. In this context, arguments for context highlight these patterns as worthy of attention and, at times, condemnation. Attention to context implies no particular political agenda, but it does signal a commitment to consider and reconsider the meaning of moral and philosophical purposes in light of shifting circumstance.<sup>112</sup>

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110. *Ibid.* at 258.

111. See discussion of West, *ibid.* at 257.

112. *Ibid.* at 269-70.

### Representation Without Representation: Visibility Without Voice

Native peoples discuss the issue of cultural appropriation in a manner that links issues of cultural representation with a history of political powerlessness. In North American commercial culture, imagery of Indians and the aura of "Indianness" is pervasive, but living human peoples with Native ancestry are treated as dead, dying, vanishing or victimized, and in need of others to speak on their behalf. I will try to avoid speaking "on behalf of" Native peoples here, employing direct quotations drawn from articles and public statements by Native authors wherever possible to delineate the context in which claims of cultural appropriation are made. It quickly becomes clear that issues of culture and the proper place of texts cannot be separated from issues of spirituality, political determination, and aboriginal title to traditional lands.

In July of 1990, representatives of 120 Indian Nations, international organizations and fraternal organizations met in Quito, Ecuador at the first indigenous continental gathering in history titled "500 Years of Indian Resistance". The Declaration of Purpose that emerged from the meeting set forth "the necessary conditions that permit the complete exercise of our self-determination and this in turn must be expressed as complete autonomy for our Peoples."<sup>113</sup> In the Declaration, territorial rights were deemed the "fundamental demand of the Indigenous Peoples of the Americas", to which end other goals were affirmed. These included,

our decision to defend our culture, education, and religion as fundamental to our identity as Peoples, reclaiming and maintaining our own forms of spiritual life and community coexistence, in an intimate relationship with our Mother Nature.<sup>114</sup>

This nexus of ecological, spiritual, cultural, and territorial concerns is central to any understanding of cultural appropriation. Thus, I will argue, simplistic reductions of Native concerns to trademark or copyright considerations and the assertion of intellectual property rights fail to reflect important dimensions of Native aspirations and impose colonial juridical categories on postcolonial struggles in a fashion that reenacts the cultural violence of colonization. As many Native writers strive to assert, knowledge of this history of cultural violence is a prerequisite to understanding the issues involved in cultural appropriation. Such cultural violence includes the seizure of land, government suppression of Indian religious practice, the prohibition on the speaking of Indian languages in residential schools, the expropriation of ceremonial objects for museum collections, the unauthorized excavation of indigenous graves and collection of material culture by archaeologists, the definition and description of Native culture by non-Native anthropologists, the loss of Indian status to children of mothers who married non-Natives, the apprehension of aboriginal children from reserves, the separation of families, the withholding from a generation of children of their very identity as First Nations people, and a related legacy of sexual abuse.

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<sup>113</sup> "Declaration of Quito, July 1990: Indigenous Alliance of the Americas on 500 Years of Resistance," (1991/2) 23 *Borderlines* 2-3.

<sup>114</sup> *Ibid.* at 3.



Central to all of these practices is the experience of having Native cultural identity extinguished, denied, suppressed, and/or classified, named, and designated by others. As Robert Allen Warrior, a member of the Osage nation writes,

Our primary focus as Indian people must be on establishing our right to a land base and a cultural and political status distinct from non-Natives.... 'We won't allow Canada to call us ethnic, a minority or a class.'...Indian people are forever being discovered and rediscovered, being surrounded by thicker and thicker layers of mythology. And every generation predicts our inevitable and tragic disappearance."<sup>115</sup>

This history cannot be fully explored here. I will, however, highlight some of those dimensions of Native experience in Canada that figure most prominently in Native discussions of cultural appropriation.

In 1887, Sir John A. Macdonald declared that "The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects"<sup>116</sup>. In 1920, Superintendent-General Duncan Campbell Scott was even more to the point: "I want to get rid of the Indian problem...Our objective is to continue until there is not a single Indian in Canada that has not been absorbed."<sup>117</sup>

After the 1812 War with United States, British colonizers no longer required aboriginal peoples as allies—or for that matter, as explorers or traders. Their value rapidly diminished, with the result that aboriginal tribes became stigmatized as obstacles to the progressive settlement of Canadian society. Moreover, by refusing to relinquish their identity and assimilate into 'higher levels' of 'civilization', aboriginal peoples were dismissed as an inferior and unequal species whose rights could be trampled on with impunity. Aboriginal lands were increasingly coveted by colonists intent on settlement and agriculture. Policy directives were formulated that dismissed aboriginal peoples as little more than impediments to be removed in the interests of progress and settlement.

A policy of assimilation evolved as part of this project to subdue and subordinate aboriginal peoples. From the early nineteenth century on, elimination of the 'Indian problem' was one of the colony's—later the Dominion's—foremost concerns. Authorities rejected extermination as a solution, but focused instead on a planned process of cultural change known as assimilation. Through assimilation, the dominant sector sought to undermine the cultural distinctiveness of aboriginal tribal society; to subject the indigenes to the rules, values, and sanctions of Euro-Canadian society; and to absorb the de-culturated minority into the mainstream through a process of 'anglo-conformity'. The means to achieve this outward compliance with Euro-Canadian society lay in the hands of missionaries, teachers, and law-makers.<sup>118</sup>

Aboriginal peoples' relations with the state have for years been governed by the Indian Acts of 1876<sup>119</sup> and 1951<sup>120</sup> and their implementation by the Indian Affairs Department (IAD). The original Victorian Act defined who, legally, was an Indian,

115. "The Sweetgrass Meaning of Solidarity: 500 Years of Resistance," (1991/2) 23 *Borderlines* 35 at 37.

116. As quoted in J. R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989) at 189.

117. As quoted in Miller, *ibid.* at 207.

118. Augie Fleras & Jean Leonard Elliott, *The 'Nations Within': Aboriginal State Relations in Canada, the United States, and New Zealand* (Toronto: Oxford University Press, 1992) at 40 (citations omitted).

119. *Act to Amend and Consolidate the Laws Respecting Indians* 1876 Statutes of Canada, 39 Victoria, Chapter 18.

120. *An Act Respecting Indians* 1951 Statutes of Canada, 15 George VI, Chapter 29.

and gave the IAD sweeping powers “to invade, control, and regulate every aspect of aboriginal life,”<sup>121</sup> curbing constitutional and citizenship rights in the paternalistic guise of Indian protection, while suppressing aboriginal languages, culture, and collective identity.

The 1876 Indian Act created the legal framework for the paternalistic administration of aboriginal affairs by a federal agency. The Act consolidated existing Indian legislation in the provinces and territories, and delineated the responsibilities of the federal government towards aboriginal peoples as stipulated in the BNA Act of 1867. It also established the principle of government control over and responsibility for managing aboriginal assets (land, funds, and properties). Perception of aboriginal peoples as wards of the state, in need of superior guidance and protection, gave rise to the colonialist/paternalistic character of the Department. Aboriginal people were seen as inferior legal minors who had to be pacified, controlled, managed, and educated in hopes of achieving the ultimate goal of enfranchisement (loss of Indian status) and absorption into society....

The Department’s early policy and administration were consistent with the provisions of the Indian Act. Foremost among its objectives were the protection (guardianship), settlement, and assimilation (through exposure to Christianity and the arts of civilization) of aboriginal peoples, and, through agricultural self-sufficiency, their transformation into productive citizens of the country. The success of the Department’s policy was to be measured by the numbers of enfranchised Natives—that is, those who formally renounced Indian status and assumed all the rights, duties, and obligations of citizenship in Canada.<sup>122</sup>

Indian identity has thus been defined and determined by a bureaucracy committed to its disappearance. “Reflecting the commitment to assimilate and ‘civilize’, Departmental policy has historically labelled aboriginal peoples a ‘problem’ whose cultural and social idiosyncrasies preclude smooth absorption into society.”<sup>123</sup> In other words, the existence of Indian ‘cultures’ was an obstacle to Indian people’s incorporation into a larger ‘universal’ human community as citizens of a nation state. Since World War II the strategy has shifted from cultural assimilation to the eradication of poverty—a process in which “the communal (read ‘communistic’) aspects of tribal life”<sup>124</sup> were seen as barriers to the process of modernization (which at this time was viewed as a universal process that would inevitably occur in the same fashion for peoples around the world). In both cases, any autonomous Native cultural identity was seen as an obstacle to government objectives.

Although government policies to assimilate aboriginal peoples and undermine their cultural autonomy were numerous, the residential school and agricultural work programmes, social welfare policies, and religious suppression figure prominently in the memories of First Nations peoples. Most Native peoples were cut off from their traditional land base and consequentially from cultural ways of life by the uprooting and resettlement that these programmes entailed. At the residential schools in which aboriginal children were routinely placed, Native languages were prohibited, and many people have memories of severe beatings and punishments for “speaking Indian”.<sup>125</sup>

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121. Fleras & Elliott, *supra*, note 118 at 74.

122. *Ibid.* at 76-77.

123. *Ibid.* at 79.

124. *Ibid.*

125. Joane Cardinal-Shubert, “In the Red” (Fall 1989) *Fuse* 20-28 at 21.

In the 1960s, provincial child welfare agencies were bestowed with increased powers to apprehend aboriginal children from reserves. Now "known as the 60s scoop,...some reserves lost almost all the children of that generation who were nearly exclusively adopted into white foster homes, many in the United States."<sup>126</sup> Many of these children lost all contact with their relatives and many were adopted into families that withheld information about their Native ancestry. Only years later would they become aware of their personal histories and seek knowledge of the cultural heritage they had been denied.

Another way in which the government controlled Indian identity was through the policy of denying Indian status to the children of Native married to non-aboriginal men. Some argue that this policy resulted in a social devaluation of aboriginal women and contributed to their negative self-esteem:

For those without status because of marriage with non-aboriginal males, penalties included deprivation of Indian rights, ostracism from involvement in band life, and exclusion from housing and jobs. Not even the repeal of the offending passage, section 12(1)(b), of the Indian Act in 1985 has eased the barriers for some women. In abolishing the discriminatory sections of the Indian Act that had stripped any Indian woman of status upon marriage to a non-Indian, Bill C-31 reinstated all non-status Indians who had lost status for financial, educational, or career reasons....To ensure band control over membership and resources, only women who had lost status because of marriage became eligible to join the band or to partake of reserve land or benefits. Although children of reinstated women were also entitled to band resources, they stand to lose this status unless they marry into 'status'.<sup>127</sup>

This long colonial history of having Indian identity legally defined by a government simultaneously determined to eliminate all vestiges of that identity in Canadian society has left a bitter residue of distrust. Native peoples express great anger at continually having their cultural identity named, defined, and affirmed by others, in a manner that freezes categories of Indianness for bureaucratic purposes both unrelated and oblivious to indigenous values.<sup>128</sup> Many Natives saw the Canadian government policy of not recognizing as Indians any Native women married to white men or their children as particularly imperialist.<sup>129</sup> In a commentary, both upon Imperial Oil's sponsorship of *The Spirit Sings* exhibition at the Glenbow museum,<sup>130</sup> and upon the government marriage policy, Hachivi Edgar Heap of Birds created a work for the Banff Centre in support of the Lubicon Cree. His work incorporated a billboard that read "Imperial Canada Doesn't Make Indians. Native People Recognize Themselves."<sup>131</sup>

126. Richard Hill, "One Part Per Million: White Appropriation and Native Voices" (Winter 1992) *Fuse* 12-22 at 15.

127. Fleras & Elliott *supra*, note 118 at 19.

128. As Commanche activist Paul Smith notes, Native peoples in North America are always being asked "How much Indian are you?". No one, however, "asks black people, 'How much black are you?'". Such racist notions of Indian identity are colonial impositions; they have nothing to do with Native understandings of community membership and belonging. See Paul Smith, "Lost in America" (1991-2) 23 *Borderlines* 17 at 17.

129. Hachivi Edgar Heap of Birds (1991/2) 23 *Borderlines* 19 at 19.

130. I will discuss the Glenbow controversy *infra* at text between footnotes 133-137.

131. *Supra*, note 129. Hachivi Edgar Heap of Birds is Associate Professor of Painting at the University of Oklahoma, headman of the Tsistsistas (Cheyenne) Elk Warrior Society.

The government suppressed aboriginal spiritual practices as a central means to achieve its policies of cultural assimilation and to destroy the social integration of Native communities. For example, the Northwest coast Potlatch ceremony was outlawed from 1884<sup>132</sup> until 1951, and sweat lodge and sun dance ceremonies were prohibited until the cultural revivals of the 1960s.<sup>133</sup> As will become clear, this history of government-directed alienation of Native peoples from cultural traditions is now being repeated. Now, however, First Nations peoples feel themselves alienated from their histories by artists and entrepreneurs, who appropriate these same ceremonies as spiritual commodities to be bought and sold on the market. Again, the specific history and pain of ceremonial prohibition is ignored when New Age entrepreneurs profess spiritual resources to be the fruits of a 'human Culture' freely available to all in need of spiritual sustenance.

Loss of ceremonial objects and reliquae accompanied the displacement of Native languages and ceremonies. Systematically collected by museums and private collectors, they were valued as authentic artifacts of a dying culture and a "vanishing race". When Indian expressive works were appreciated, in other words, it was in terms of their historical value as representative of an anthropological culture, not as the ongoing expressions of peoples engaged in contemporary struggles. This "imperialist nostalgia"—the longing for the return of something one is engaged in colonizing and destroying—continues today. Witness the controversy over the 1988 Glenbow Museum exhibit, in which Native peoples complained that they were being treated like historical artifacts, rather than human contemporaries. As part of the Olympic Arts Festival, the Museum gathered 15th, 16th, and 17th century North American Indian artifacts from around the world for an exhibit entitled "The Spirit Sings". The Lubicon Cree Indians, involved in a bitter land claim dispute with the federal and provincial governments for fifty years, launched a boycott against the exhibit. They found it particularly hypocritical that the oil companies sponsoring the exhibit should publicly celebrate Indian material culture while (through their oil drilling activities in northern Alberta) they were actively engaged in decimating Native ways of life. Objectifying, displaying, and glorifying the proud cultural past of peoples whose contemporary lands and livelihoods were being doomed to extinction by those doing the celebrating puts into crude relief the relationship between universal human Culture and the anthropological cultures it allegedly values.<sup>134</sup>

Joane Cardinal-Shubert argues that the Glenbow exhibit took ceremonial reliquiae out of their contexts in community life, portrayed them as lifeless objects

132. *An Act to Further Amend the "Indian Act, 1880"* 1884 Statutes of Canada, 47 Victoria, Chapter 27.

133. Cardinal-Shubert, *supra*, note 125 at 21.

134. See the discussion in interviews by L. Doolittle, H. Elton & M. Laviolette, "Appropriation: When Does Borrowing Become Stealing?" (1987) *Last Issue* 5(1): 20 at 30-33. Further background may be found in Michael M. Ames, "Free Indians from their Ethnological Fate: The Emergence of the Indian Point of View in Exhibitions of Indians" (1987) 5(2) *Muse* 14. Many international museums did eventually refuse to lend objects to the Museum in support of the Lubicon boycott, and there is certainly evidence that museums are beginning to take the claims of subaltern peoples with regard to objects and representations far more seriously. See, for example, *Turning the Page: Forging New Partnerships Between Museums and First Peoples* (Ottawa: Assembly of First Nations and the Canadian Museums Association, 1992) and of course, the 'recent' Royal Ontario Museum exhibit *Fluff and Feathers*, which is actually five years old, first opening in Brantford at the Woodlands Cultural Centre in 1988.

and “pushed the notion that Native culture was dead, wrapped up, over and collected.”<sup>135</sup> Native artists from across the continent participated in protest exhibits at the nearby Wallace and Walter Phillips galleries. In one particularly trenchant authorial “work” Rebecca Belmore sat herself down under a sign that read “Glenbow Museum presents” and titled her self/work “Artifact #671-B”.<sup>136</sup> In so doing she drew ironic attention to the relationship between the claims of “cultural internationalism” to guardianship of all objects having cultural meaning, the claims of Romantic authorship to the ideas it deems human Culture (or public domain), those expressions it claims as properties, and the status of those cultural others who can lay claim only to authentic artifacts as evidence of their specific identities.

The resurgence and revival of Native cultural pride and ceremonial practice in the 1960s by a newly politicized people made the return of expropriated cultural objects imperative, for their presence in these religious practices was felt to give contemporary community life historical meaning and continuity.<sup>137</sup> The development of the idea of *u'mista* amongst the Kwakiutl people is instructive. Several people were tried under the anti-Potlatch laws in 1922.<sup>138</sup> In these trials, it was agreed that those charged need not serve jail sentences if participating villages would forfeit their ceremonial objects.

The federal government paid the owners a total of fourteen hundred and fifty dollars and fifty cents for several hundred objects, which were crated and shipped to Ottawa. There, what came to be known as the Potlatch Collection, was divided between the Victoria Memorial Museum, later the National Museum of Man and now the Canadian Museum of Civilization, and the Royal Ontario Museum.<sup>139</sup>

Kwakiutl anthropologist and curator Gloria Cranmer Webster is involved in the movement to “repatriate” these objects that developed momentum after the 1951 repeal of the anti-Potlatch provisions of the Indian Act,<sup>140</sup> and the revitalization of the Potlatch ceremony in contemporary celebrations of cultural identity. For Webster, the need to repossess these ceremonial objects<sup>141</sup> is an integral part of the

135. *Supra*, note 125 at 23.

136. A photograph of this performance/work may be found on the last page of *Turning the Page*, *supra*, note 134 at 19.

137. See Cardinal-Shubert *supra*, note 125 and Rebecca Clements, “Misconceptions of Culture”, *supra*, note 56.

138. The case is discussed in great depth in Douglas Cole & Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990). The case does not appear to have been reported.

139. “From Colonization to Repatriation” in McMaster & Martin, eds, *Indigena*, *supra*, note 101 at 25-38.

140. *An Act Respecting Indians* 1951 Statutes of Canada, 15 George VI, Chapter 29.

141. To quote Webster:

“...In the late 1960s we still remembered what had happened more than forty years earlier. We began to work towards the return of our treasures from the museums. The National Museum of Man agreed to repatriate its part of the collection on the condition that museums were built in Alert Bay and Cape Mudge which were to divide the collection. The Kwakiutl Museum opened in Cape Mudge in 1979 and the U'mista Cultural Centre opened in Alert Bay a year later. A request to the Royal Ontario Museum for the return of its part of the collection was not met until 1988 and we're still waiting for the balance of the collection to be returned from the Museum of the American Indian, that is in New York” (*supra*, note 139 at 37).

For a recent discussion of repatriation efforts and legal frameworks in the United States see Stephen Platzman, “Objects of Controversy: The Native American Right To Repatriation” (1992) 41 Am. Univ. L. Rev. 517.

contemporary political struggle to reconstruct and redefine Native culture and identity:

We do not have a word for repatriation in the Kwak'wala language. The closest we come to it is the word u'mista which describes the return of people taken captive in raids. It also means the return of something important. We are working towards the u'mista of much that was almost lost to us. The return of the potlatch collection is one u'mista.... We are taking back from many sources information about our culture and our history to help us rebuild our world that was almost shattered during the bad times [when, she says earlier], "it was believed we were truly the 'vanishing race'." Our aim is the complete u'mista or repatriation of everything we lost when our world was turned upside down as our old people say. The u'mista of our lands is part of our goal and there is some urgency to do it before the provincial government allows any more clear-cut logging, destroying salmon-spawning streams which effect the livelihood of many of our people.<sup>142</sup>

For Webster, the repatriation of material culture is not a possessive or proprietary claim to the essence of an undivided traditional identity—as cultural nationalists might see it—but part of a larger contemporary struggle for Native self-determination that includes cultural as well as territorial control in the quest for political sovereignty.

But if ceremonial objects have been decontextualized—alienated and removed from the cultural practices of historical communities and collected to be displayed as frozen objects in the museums that document Western imperialism—ceremonial practices themselves are now alienated in a fashion that many Native peoples find just as insidious. "New Age" religious organizations sell "Indian spirituality"—marketing participation in "Indian ceremonials" like sun dance and the sweat lodge ceremonies. Some entrepreneurs even offer to turn consumers into shamans if they purchase a weekend-long course of study!<sup>143</sup> In some feminist circles, Indian spiritual themes are employed in the name of the essential female.<sup>144</sup> While many see these appropriations as simple romanticism, many people find them far more insidious. For example, Paul Smith, a Commanche activist, suggests that progressive non-Indians should be prepared "to call romanticism the thuggish racism it really is."<sup>145</sup>

The use of Native motifs, imagery, and themes in the "spirituality" marketed as New Age religion is particularly offensive, both because of its commodification and its distortion of Native traditions. That which is spiritual cannot be sold and must be treated with care and respect. Many non-Native peoples also feel that spirituality should not be 'owned' but they believe that it must therefore belong to all people equally—as part of the public cultural domain fully available for the sustenance of all humanity (and, as we shall see, as ideas available for reworking into authorial expressions). For Native peoples, however, spirituality is not a thing that can be reified or abstracted from real human communities integrally balanced in a relationship with the earth.

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142. *Supra*, note 139 at 37.

143. Referred to in Smith, *supra*, note 128.

144. See Cardinal-Schubert, *supra*, note 125.

145. Paul Smith, "Lost in America", *supra*, note 128 at 18.

We have many particular things which we hold internal to our cultures. These things are spiritual in nature...They are *ours* and they are *not* for sale. Because of this, I suppose it's accurate to say that such matters are our "secrets", the things which bind us together in our identities as distinct peoples. It's not that we never make outsiders aware of our secrets, but *we*—not *they*—decide what, how much, and to what purpose this knowledge is to be put. That's absolutely essential to our cultural integrity, and thus to our survival as peoples.... Respect for and balance between all things, that's our most fundamental spiritual concept.<sup>146</sup>

The commodification of Indian spirituality is understood to pose the threat of cultural dissolution.<sup>147</sup> Spiritual knowledge cannot be objectified and exchanged as a commodity or learned as an act of self-discovery:

White people are often eager to learn about our spirituality, apparently seeing it as the latest self-help opportunity. Counter to this notion, however, is the way spirituality in its transference as knowledge and experience is constructed in First Nations cultures. It is based on respect and is meant to be taught in somewhat specific and often personal ways, the meanings of which are ruined by translation into a classroom or mass venue. The same is true for spiritual images that get used in ways wildly out of their cultural context. I can't tell you how hurtful it is to have a sacred image come back to you horribly disfigured by a white artist. If a First Nations artist chooses to use our culture in a new or different way, then that will be a subject for debate within our culture. If a white artist uses and invariably alters our cultural images, then this is an intervention in our culture, another of many.<sup>148</sup>

Ward Churchill argues that representations and misrepresentations of indigenous spirituality are so ubiquitous in academies of higher learning that Native peoples cannot represent their experiences of their religious traditions without being contradicted and corrected by non-Native "experts" who have assumed the power to define what is and is not truly Indian.<sup>149</sup> Métis film and videomaker Loretta Todd, defines this inability to speak on your own behalf as constitutive of the experience of cultural appropriation:

For me, the definition of appropriation originates in its inversion, cultural autonomy. Cultural autonomy signifies a right to one's origins and histories as told from within the culture and not as mediated from without. Appropriation occurs when someone else speaks for, tells, defines, describes, represents, uses, or recruits the images, stories, experiences, dreams of others for their own. Appropriation also occurs when someone else becomes the expert on your experience.<sup>150</sup>

The experience of everywhere being seen, but never being heard, of constantly being represented, but never listened to, being treated like an historical artifact rather

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146. Barbara Owl, a White Earth Anishnabe, cited in Ward Churchill, "Colonialism, Genocide and the Expropriation of Indigenous Spiritual Tradition in Contemporary Academia" (1991/2) 23 *Borderlines* 39 at 41.

147. Former American Indian Movement (AIM) leader Russell Means suggests that this appropriation is a form of cultural genocide, *ibid.* at 41.

148. Hill, *supra*, note 126 at 17-18.

149. *Supra*, note 146. Churchill makes several unsubstantiated claims about the reception of Castaneda and Andrews in universities and an incomprehensible attack on ethnomethodology that give me pause, but the sincerity of the conviction that Native peoples have continually been misrepresented by non-Native academics cannot be doubted.

150. L. Todd, "Notes on Appropriation" (1990) 16 *Parellelogramme* 24 at 24.

than a human being to be engaged in dialogue is a central theme in many complaints of cultural appropriation. As Ojibway poet Lenore Keeshig-Tobias suggests, it is precisely because Native people are so seldom publicly heard, recognised (or rewarded in the market) for recounting their historical experiences that non-Native representation of these themes is so offensive.<sup>151</sup> The Canadian public seems intensely interested in things Indian, but they seem to have no interest in hearing Native peoples speak on their own behalf. When Native writers try to assert that they are better situated to tell these stories, they are accused of trying to shackle the artistic imagination of authors and as advocating censorship, but what these critics do in making such responses is to reinscribe Native peoples as objects of human Culture, rather than authorial subjects in their own right—contributors to Culture, rather than merely objects of it—capable of the expressive work that defines us as human, rather than merely serving as sources of ideas for the expressive works and proprietary claims of others.

After years of having their languages outlawed and their cultural specificity suppressed for the purposes of extinguishing it, First Nations peoples now watch the Canadian government subsidize non-Native citizens (through arts grants and film subsidies) to sympathetically portray Indian culture and convey the momentous tragedies that Indians experienced at government hands. It is as if there were no Natives living in the community who could speak on their own behalf and as if these historical experiences have not left very real psychic scars on real human beings in our communities. As Keeshig-Tobias puts it, “people...would rather look to an ideal Native living in never-never land than confront the reality of what being Native means today in Canadian society.”<sup>152</sup> Or, as Gerald McMaster and Lee-Ann Martin simply ask:

We wish to know and you need to understand why it is that you want to own our stories, our art, our beautiful crafts, our ceremonies, but you do not appreciate or wish to recognize that these things of beauty arise out of the beauty of our people.<sup>153</sup>

### **Possessive Individualism Revisited: Art, Authorship, and Cultural Identity**

Earlier I suggested that by considering Native claims of cultural appropriation “in context,” the assertions of cultural identity, authenticity, authorial freedom, artistic license, freedom of expression, and censorship in this debate might take on different dimensions. Issues that appeared black and white might emerge cast in very complex shadows. First Nations peoples, I have suggested, are often forced to make their claims using categories that are antithetical to their needs, and foreign to their aspirations.

In his discussion of cultural nationalism and the Eurocentric concepts that dominate that discourse, Handler eventually concedes that despite the epistemological bankruptcy of the metaphors of possessive individualism, they have become the

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151. Keeshig-Tobias, “Stop Stealing Native Stories”, *supra*, note 22 at A-8.

152. Keeshig-Tobias, *ibid.*

153. “Introduction” in *Indigena*, *supra*, note 101 at p. 17.



dominant metaphors of world political culture. Subaltern groups and less powerful nations must articulate their political claims in “a language that power understands,”<sup>154</sup> and the language that power understands engages the possessive and expressive individualism of the European art/culture system as its conceptual limits. He regrets the fact that “in a world made meaningful in terms of our individualistic moral and legal codes”, disputants in the contemporary “culture wars...have agreed to a worldview in which culture has come to be represented as and by ‘things’”<sup>155</sup> possessed by persons and cultures.

First Nations peoples may well be compelled to articulate their claims “in a language that power understands”<sup>156</sup> but in the substance of their claims they contest the logic of possessive individualism, even as they give voice to its metaphors. Native peoples engage in “double voiced rhetoric”<sup>157</sup> when they employ the tropes of a dominant language—simultaneously engaging and subverting these metaphors through the character of the claims they make in the voice of the Other.

The perils of making claims in the language of possessive individualism, writ large, however, are real ones, as Native peoples in Canada have discovered. For example, in a presentation on Native cultural autonomy and the appropriation of aboriginal imagery at a meeting of independent film makers, Metis videomaker Loretta Todd quoted Walter Benjamin; she was promptly accused of appropriating Western culture!<sup>158</sup> She responded that she *was* part of Western culture—as a product of colonization, how could she be otherwise?—and Benjamin was part of that culture. Her interlocutors informed her that white use of Native imagery was equivalent to her use of Benjamin, because Native imagery was now simply a part of contemporary culture—with a Capital C.<sup>159</sup>

Other white Toronto artists, self-proclaimed “environmentalist tribesmen” (as a group they title themselves the Fastwurms) responded to questions about the propriety of their employment of Native ritual themes by slandering their aboriginal critic as “a self-appointed spokesperson for Native artists.”<sup>160</sup> In speaking for a culture to which one makes a proprietary claim, one always risks allegations that the identity one must possess to make such claims is not the undivided one demanded of the property holding possessive individual. Cree writer Richard Hill comments upon the domination of public discourse about Native issues by non-Native speakers who then attempt to silence Native interventions in the debate by questioning their authenticity and representativeness:

After all, I’m well aware of how many First Nations people support the demands for sovereignty over our own culture, including such articulate writers as Lenore Keeshig-Tobias and Loretta Todd, to name just two. I hope to add my own writing to this discourse

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154. Handler, “Who Owns the Past?”, *supra*, note 73 at 71.

155. Handler, “On Having a Culture”, *supra*, note 73 at 215.

156. Handler, “Who Owns the Past?”, *supra*, note 73 at 71.

157. For a discussion of this phenomenon in literary works by First Nations authors see Barbara Godard, “The Politics of Representation: Some Native Canadian Women Writers” in W. H. New, ed., *Native Writers and Canadian Writing* (Vancouver: University of British Columbia Press, 1990) 183-205.

158. Loretta Todd, “Notes on Appropriation”, *supra*, note 150 at 24.

159. *Ibid.*

160. Dai Skuse, Kim Kozzi, & Napoleon Brousseau, Letter to the Editor, (1989-90) 13 Parellelogramme 2.

because each voice that is raised makes it much more difficult for white people to disregard us, as the FastWurms did with Cardinal-Shubert by naming her concerns “a personal gripe.” This denial and trivialization of personal experiences of racism is infuriating. Their accusation that Cardinal-Shubert appointed herself to represent her own culture can be recognized as an attempt to alienate her from the “good Indians” they imply exist, silently supporting the Fastwurm’s appropriations.<sup>161</sup>

This tactic of deeming some people of aboriginal ancestry to be “real Indians” while denying the ability of others to speak on behalf of Native concerns is reminiscent of the historical policies of colonial authorities who arbitrarily conferred and withheld Indian status on spurious grounds that did not recognize indigenous practices defining community membership. There is also embedded in this argument the notion that all Native peoples must agree for them to have a position that can be recognized as “Native” but as Paul Smith reminds us, “We have differences in political opinion. After all, we come from hundreds of nations and histories.”<sup>162</sup>

Curiously, however, there is a constant insistence that aboriginal peoples must represent a fully coherent position that expresses an authentic identity forged from an uncomplicated past that bespeaks a pristine cultural tradition before their voice will be recognized as Native. No one, of course, asks non-Native authors what gives them the authority to speak on behalf of artistic licence or what criteria of representativeness they fulfil in order to make claims in the name of the authorial imagination. Nor do we expect uniform positions on the parameters of freedom of speech. The ability to speak on behalf of “universal” values is assumed, even as we argue what their contents might be, whereas people of aboriginal ancestry are often challenged when they name themselves and their experiences. In many ways, this logic mirrors that of the law and its categorizations. In dividing intellectual property and cultural property, authors with intellect are distinguished from cultures with property. Those who have intellect are entitled to speak on behalf of universal principles of reason, whereas those who have culture speak only on behalf of a cultural tradition that must be unified and homogeneous before we will accord it any respect. Such arguments are generally used, moreover, to silence and delegitimize particularly unwelcome Native voices, rather than to invite more participants to contribute their viewpoints and join the debate.

Artists have recently demonstrated more concern with issues of cultural appropriation, and the colonial histories that inform their work, but they have done so in a manner that focuses more attention on the cultural influences upon individual imaginations than upon the lives and contemporary circumstances of Native peoples. When Toronto artist Andy Fabo was chastised for his use of the symbolism of the sweat lodge ceremony, he defended his work against Cardinal-Shubert’s accusation of ‘cultural plagiarism’ on personal grounds:

The first art museum that I ever visited was The Museum of The Plains Indians in Browning, Montana. I was eight years old at the time and for better or worse, the experience had an incredible impact on me.”<sup>163</sup>

161. Hill, “One Part Per Million”, *supra*, note 126 at 13.

162. Smith, *supra*, note 128 at 18.

163. Andy Fabo, Letter to the Editor (1989-90) 13 Parellelogramme 4.

The museum figures here less as an edifice of imperialism than as the mysterious origin of a personal fetish—as indeed an artist might personally experience it. For a gay artist concerned with questions of AIDS, healing, and otherness, the sweat lodge might indeed constitute a powerful symbolic image, but Fabo's use of it illustrated no knowledge of the legacy of power that enabled him to exploit its symbolic excess.

Liz Magore, another artist whose work has figured prominently in debates about appropriation recently foregrounded the issue in her photography. As Richard Hill describes her show:

I notice the photographs on the nearby wall in black and white that depicted a man paddling a canoe, a blond hippie looking woman in a headband, people camping on the beach, etc...the title of the photo of the blonde woman was called "Cheyenne type".... This must be done ironically but how can I say for sure whether Magore's work was ironic. Maybe she was trying to point out the overlap of cultures, or the richness of First Nations culture as a resource for white artists. I left the work not knowing quite what was going on.... Perhaps it was merely another case of white people talking about themselves using First Nations culture as their medium? Sometime later I read a statement by Magore about the photographs mentioned above. She said that she wanted to deal with her personal history of appropriating from First Nations cultures "slowly and gently," and indeed she does. So slowly and gently, in fact, that the work loses any serious claim to criticality. In effect, it seems to do more to prop up old stereotypes than to aggressively call them into question. This is especially true when the work is shot in the context of a national gallery which inevitably lends its authority to the piece.... She defends her project on the grounds that although the photos are embarrassing, a disavowal of my own history is equally uncomfortable....<sup>164</sup>

Artists who address such issues seem more concerned with delineating the influence of Native images in their own personal histories and in the dominant culture from which they draw their artistic inspiration than in acknowledging the actual histories of colonization in which those images came to figure as part of a national consciousness. When non-Native artists claim that Native images are a part of the cultural heritage, they are not wrong, but they are incredibly selective. To claim Native spiritual practices, traditions of motif and design, as part of contemporary culture (while bypassing the history of racism, institutional abuse, poverty, and alienation, that so incorporated it) in the name of one's personal history, is simply to repeat the process by which the painful realities of contemporary Native life are continually ignored by those who feel more comfortable claiming the artifacts they have left behind. Once again the Romantic author claims the expressive power to represent cultural others in the name of a universalized cultural heritage.

### Aboriginal Title

Self-determination and sovereignty include human, political, land, religious, artistic, and moral rights. Taking ownership of these stories involves a claim to Aboriginal title over images, culture, and stories.<sup>165</sup>

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164. Hill, *supra*, note 126 at 20.

165. McMaster & Martin, "Introduction", *supra*, note 101 at 17.

In discussions of cultural appropriation, First Nations peoples strive to assert that the relationships that stories, images, motifs, and designs have to their communities cannot be subsumed under our traditional European categories of art and culture and the possessive individualism that informs them. It is difficult for Native peoples even to speak about 'rights'<sup>166</sup> to cultural practices or creative skills that are passed between individuals generationally through matrilineal inheritance.<sup>167</sup> Some stories are considered so powerful that one story teller seeks permission before repeating a tale told by another.<sup>168</sup> To equate the need for such permissions to a copyright license is to reduce the social relationship between Native story tellers to one of contract and the alienation of market exchange relationships. These relationships, however, are ongoing ones which bind generations in a spiritual relationship with land, customs, and ancestors based upon traditions of respect, not values of exchange.

When Loretta Todd discusses First Nations concepts of ownership in the context of cultural appropriation, she discusses property in terms of relationships that are far wider than exclusivity of possession and rights of alienation that dominate European concepts.

Without the sense of private property that ascended with European culture, we evolved concepts of property that recognized the interdependence of communities, families, and nations and favoured the guardianship of the earth as opposed to its conquest. There was a sense of ownership, but not one that pre-empted the rights and privileges of others or the rights of the earth and the life it sustained.... Ownership was bound up with history.... Communities, families, individuals, and nations created songs, dances, rituals, objects, and stories that were considered to be property, but not property as understood by the Europeans. Material wealth was re-distributed, but history and stories belonged to the originator and could be given or shared with others as a way of preserving, extending, and witnessing history and expressing one's worldview.<sup>169</sup>

First Nations peoples are engaged in an ongoing struggle to articulate, define, exercise, and assert Aboriginal Title, not only in terms of a relationship to territory, but in connection to the cultural forms that express the historical meaning of that relationship in specific communities. For Native peoples in Canada, culture is not a fixed and frozen entity that can be objectified in reified forms that express its identity, but an ongoing living process that cannot be severed from the ecological nexus in which it lives and grows. As Winona La Duke expresses this:

There are many things Cree people have taken for granted over countless generations. That the rivers will always flow, the sun and moon will alternate, and there will be six

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166. David Alexis writes that rights are a further imposition upon Native peoples:

"Indian people do not think in terms of rights but in terms of responsibility. Whatever flows from the fulfilment of those responsibilities are the gifts in life. The demanding of status from one's mere existence is ludicrous. The so-called fishing rights won by Indian people are not a gift bestowed by white people because of recognition by the white people of those rights. Those so-called "rights" are the result of traditional people fulfilling responsibilities to fisheries through traditional ceremony and lifestyle...a gift from the creation [that results from] a fulfilment of responsibility through Indian belief." "Obscurity as a Lifestyle" (1991-2) 23 *Borderlines* 15.

167. Cardinal-Shubert, *supra*, note 125 at 20.

168. Keeshig-Tobias, *supra*, note 22.

169. Todd, "Notes on Appropriation", *supra*, note 150 at 26.

seasons of the year. The Cree also have assumed that there will always be food from the land, so long as the Eeu—the Cree, do not abuse their part of the relationship to the animals and the land.... To me this is the essence of culture and the essence of the meaning of life. From where I sit on James Bay, it seems almost trivial to talk about other things—so called religion, literature, spirituality, and economics.... If [due to the activities of Hydro Quebec and Ontario Hydro] there are no longer six seasons of the year, the waters no longer flow in their order, and places where people have prayed, been buried, and harvested their food cease to exist as “land”, is that not the essence of cultural destruction...?”<sup>170</sup>

In her language, La Duke indicates how foreign it is to divide issues of ‘so called’ culture—religion, literature, and spirituality—from discussions of ‘land’—whose very position in quotation marks indicates the strangeness of using a noun that alienates it as a thing separate from social and cultural relationships.

As Loretta Todd states, “Aboriginal Title is the term under which we negotiate with the colonizers...which asserts a reality that existed before Native peoples were positioned as Other.”<sup>171</sup> In coming to acknowledge and affirm this reality, non-Native peoples must begin to recognize the contingency and peculiarity of their own concepts of property and the colonial foundations on which it is built. The abstraction, commodification, and separation of land from people’s social lives and from the cultural forms in which we express meaning and value as human beings living in communities, represent only a peculiar, partial, and limited way of dividing up the world. The range of Western beliefs that define intellectual and cultural property laws—that ideas can easily be separated from expressions, that expressions are the singular products of the individual minds of Romantic authors, and that these expressive works can be abstracted from the meaningful worlds in which they figure to circulate as the signs of unique personality, that cultures have essences embodied in objects that represent unbroken traditions—are not universal values that express the full range of human possibility, but particular, interested fictions emergent from a history of colonialism that has disempowered most of the peoples on this planet. By listening seriously to claims of cultural appropriation in context, and attending to the possibilities afforded by Aboriginal Title, we will better understand the properties of culture(s) and the politics of possessing identity in a contemporary world.

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170. Winona La Duke, “The Culture of Hydroelectric Power” (1991-2) 23 *Borderlines* 42 at 43.

171. Todd, *supra*, note 150 at 32.