Kim Gainer

CULTURAL PROPERTY VERSUS INTELLECTUAL PROPERTY: THE CULTURAL APPROPRIATION DEBATE

As scholars have noted, indigenous expressions, symbols, and ideas often constitute collective, intergenerational, religious, and spiritual properties which, by their nature, exclude them from protection under prevailing intellectual property laws. For indigenous peoples, then, there is little protection against the appropriation of intangible cultural "goods,' even if the appropriation is experienced by tribes as distortion, theft, offense, or misrepresentation, each with an attendant set of legal, social, and ethical issues. (Riley and Carpenter 865-866)

The history of literature arguably is a history of appropriation. Early written texts show traces of preceding oral traditions, and later written texts incorporate and reinvent earlier ones. In fact, sometimes it is neither possible nor desirable to read a text without being aware of its relationship to a previous one (think *Wide Sargasso Sea* and *The Wind Done Gone*, the not-so-secret sharers of *Jane Eyre* and *Gone with the Wind*). Because of the fact that we often read one text in the context of its predecessor(s), an academic industry has grown up around the subject of intertextuality.

Intellectual property issues may of course come into play whenever an appropriated text is under copyright, but one might think an author otherwise on safe footing when drawing upon earlier works. Alice Randall and her publisher had to defend *The Wind Done Gone* against charges of copyright infringement brought by the estate of Margaret Mitchell (Schur). Jean Rhys, however, encountered no opposition when she provided voices to Edward Rochester and his first wife, Antoinette Cosway, in *Wide Sargasso Sea*.

Still, accusations of misappropriation, albeit not in a legal sense, have been made against works derived from content that is not under copyright. The premiere of Giuseppe Verdi's *Aida* took place in 1871. When Elton John and Tim Rice adapted the story into the musical *Aida* in 1998, the opera's copyright had long expired. Yet in 2016, a production of the musical by university students was cancelled because of complaints about appropriation (Hetrick). This example, however, illustrates a definition of appropriation that hinges not on the existence of intellectual property but of cultural property, as this passage from the Music Theatre Bristol [UK] press release makes clear:

> The central issue surrounded the portrayal of Egyptian and Nubian people on stage. Whilst we ourselves are a small society, there were nevertheless fears that the play itself would be overwhelmingly cast Caucasian, and would subsequently be both culturally appropriative and racially offensive. … Our function as a university society is to provide enjoyable performance opportunities for all of our members. Thus we believe that as these discussions of racial and cultural appropriation may have continued throughout the year, this would detract greatly from the enjoyment of all students involved in the show, this being our primary societal focus.
>
> (Hetrick)

The debate that led up to the cancellation had largely hinged on the phenomenon of whitewashing—casting White actors in roles that might have gone to people of color. This argument was encapsulated in a Facebook post:

> The description of the main character says 'Nubian princess' but most of the people on the event are white. It's quite simply really: if you are going to put on a production set in a particular place with a particular cultural context, then you need to reflect that with the ethnicity of actors….If this show is to be put on and white washed - 'oh let's just add a bit of eyeliner' then I think that's disrespectful, dumb and embarrassing. White washing still exists, it's been done enough in Hollywood, look at Liz Taylor in Cleopatra or Emma stone in Aloha….
> (Millie Evans; qtd. in Faint and Kemp)

One individual responding to a story in *The Independent* about the controversy (Dean and Morgan) sarcastically tweeted that "The Egyptians sing in Italian too. If that's not cultural appropriation I don't what is" (Andrew Bell; qutd in Faint and Kemp). The tweeter is referring to the Verdi opera, not the John and Rice musical, but he does make the point that an author from one culture, writing in his own language, created a story populated by characters in another culture, and he implies that no one made a fuss at the time. He could have as equally well pointed out that, until recently, Whites were almost exclusively the singers of the roles in the opera *Aida*. The tweeter is using the term cultural appropriation in its denotative—and therefore most innocent—sense. The term can be "defined broadly as the use of a culture's symbols, artifacts, genres, rituals, or technologies by members of another culture" (Rogers 474). However, identifying "the conditions (historical, social, political, cultural, and economic) under which acts or appropriation occur" results in a four-part classification system that accounts for the objections to the Music Theatre Bristol production of *Aida*. Cultural appropriation may be a "Cultural exchange" that consists of "the **reciprocal exchange** of symbols, artifacts, rituals, genres, and/or technologies between cultures with **roughly equal levels of power**" (bolding added). Cultural appropriation may be "Transculturation." In such a case, it may be impossible to identify a source culture because of the intermingled contributions from several groups. By definition, no one culture can take pride of place when cultural appropriation takes the form of transculturation.

The *Aida* tweeter's understanding of cultural appropriation would not have been challenged by either of the two categories above, and a third category, "Cultural dominance," was not fundamentally part of the debate, either. (When cultural dominance is involved, one culture forces another to adopt foreign elements.) It is the final category, "Cultural exploitation," which the tweeter did not recognize as an issue behind the discomfort felt by those who objected to the Music Theatre Bristol production. Cultural exploitation is "the appropriation of elements of a subordinated culture by a dominant culture without substantive reciprocity, permission, and/or compensation" (Rogers 477). Because a power imbalance exists and because of the lack of reciprocity, cultural exploitation is the opposite of cultural exchange.

Implicit to the concept of cultural exploitation is a concept of ownership as understood within a postcolonial discourse in which, rightly or wrongly, "cultural property of colonized people" is viewed as having been coopted by colonizing powers (Cuthbert 257).

In the case of the Music Theatre Bristol production, the misappropriated properties were the roles. However ahistorical their understanding of theatrical casting, critics of the production felt that these roles belonged to people of color. Cultural ownership, however, can take many forms. Who, for example, owns the dreadlock hairstyle? At San Francisco State University, a confrontation took place between a white man and a woman of color over the fact that the white man was wearing a hairstyle associated with African Americans. The woman of color tells the white man that he cannot wear the style "because it's my culture" (Branson-Potts). Reacting to the incident, Bert Ashe posts an excerpt at *Slate* from his book *Twisted: My Dreadlock Chronicles* that describes an incident in which two White girls fawn over his hair and demand advice on how to grow their own hair into dreadlocks:

> Now, there are two schools of thought in regard to whites and Black culture. According to one prominent school, my reaction should be, "What do you mean, 'How'd I do it'? I have black hair—it locks because that's what black hair does." I'd say it snappishly, according to this school, irritably, weighed down by centuries of instances where, as (white) actor and playwright Danny Hoch once put it, white people demonstrate that they might love black style while not necessarily loving black people.
>
> It's the school of thought that says, *Why do* you *want it, white girl? Can't we have anything to ourselves? You want this too? Damn—leave me alone!* It's the school of thought that Richard Pryor had in mind when he suggested that Black men "hold their dicks" because "y'all have taken everything else."

Ashe opts to enact the other school of thought, the one in which Whites "help yourselves to the buffet of black culture—pick and choose." But, he adds,

> *Just make sure you credit the source*—that's what makes me crazy. Every kid in America wears ball caps, often backwards. But do they even know who popularized the style? The banjo is an African instrument—complete with an African name (*bahn*-jo)—but how many people know that? That's what was on the table, for me, when these all-too–well–meaning white girls, without a clue as to what they were really asking, essentially said, *Take our hands and lead us into blackness, please, sir. We've gotta have it.*
> *We've gotta have it. The woman videotaped accosting the white man wearing dreads did not articulate her point beyond "Because it's my culture," but her resentment may arise from the same source as Ashe's as he navigates a world in which young whites adopt dreadlocks in order to spend some time "walking on the wild side" only to "cut them to get a job, or because they were graduating, or some other rite of passage" (Ashe). She and Ashe feel that they own the style, but whites play with and abandon it, diminishing it by treating dreadlocks as a fad.*

Dreadlocks, baseball caps worn backward, the banjo—all can be viewed as cultural property, but no legal mechanism exists to enforce ownership of such property, regardless of the resentment felt by members of the marginalized group. The artisans of one cultural group writ large—Indigenous Americans—do in a sense derive some protection for their cultural property via the Indian Arts and Crafts Act of 1990, which, in summary, makes it

illegal to offer or display for sale, or sell any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States. (Indian Arts and Crafts Board)

This act, however, says nothing about imitating 'Indian' style or incorporating imitative elements into fashion, cuisine, music, literature, architecture, or any other facet of culture. It is purely a "truth-in-advertising law that prohibits misrepresentation in marketing" (Indian Arts and Crafts Board). It is not designed to prevent cultural appropriation as a whole, no matter how exploitative.

Nor does the Blackhorse v. Pro-Football, Inc. case on trademarks held by the Washington Redskins provide a model for the protection of cultural property. The Trademark Trial and Appeal Board has canceled Washington Redskins trademarks because of "disparagement" under the terms of the Lanham Act (Riley and Carpenter 911). Rulings favorable to the Blackhorse plaintiffs are being appealed on First Amendment grounds (Rasul). However, even if the Native American plaintiffs prevail through to the end of litigation, the loss of its trademarks will not prevent the Washington Redskins from keeping the team's name and mascot and from continuing to market the team and team-related products using the Redskins name and icon. The only legal effect will be to prevent the Redskins organization from charging licensing fees for Redskins-themed merchandise. Native Americans do not own the term redskin, nor any of the cartoonish depictions of their peoples, and cannot control their use any more than they can control the use of 'Indian' elements in any other cultural or commercial sphere. As Riley and Carpenter observe about this case and others, "The experience of cultural appropriation is broad and nuanced, while the law is typically narrow and obtuse" (865).

Leveraging media—traditional and otherwise—is one of the few ways to push back against appropriation, and the cancellation of the Music Theatre Bristol production of John and Rice's *Aida* is a case in point. A search of the web returns numerous hits of sites where critiques are taking place, although not necessarily with practical or immediate effect. One recent example of satirical pushback is the Honest Trailers' YouTube send up of the animated feature *Moana*, in which the voice-over declaims, "Enjoy the highest honor a culture can receive these days having your traditions commodified by the Disney corporation," the line accompanied by a picture from an advertisement of a child wearing a blouse and leggings designed to make it appear as if she were adorned with 'Polynesian' tattoos (Honest Trailers). In another case, it is not the spoof trailer but the movie itself that may be a send up of cultural appropriation. In the review "'Get Out' Takes Cultural Appropriation to the Cultural Harvest Level," Rebecca Carroll writes that in *Get Out* "white people want to simultaneously demonize us and appropriate our talents and gifts and resilience." The idea is expressed in other reviews, including an anonymous one entitled "The Underbelly of White Liberals & Horrific Cultural Appropriation in Get Out," which describes the movie as "an overall allegory for the idea of cultural appropriation."

On the other hand, other voices, like the tweeter in the *Aida* incident, speak in support of some version of cultural appropriation, sometimes in reaction to what they perceive as political correctness. Lionel Shriver, author of *We Need to Talk about Kevin*, gave a keynote speech entitled "Fiction and Identity Politics" as the Brisbane Writer Conference in

September of 2016. In this speech, she argues that "Taken to their logical conclusion, ideologies recently come into vogue challenge our right to write fiction at all" (Shriver). Specifically, she targets, in scare quotes, "cultural appropriation," leading off with an example of an incident at Bowdoin College, "a tequila-themed birthday party for a friend" during which the "hosts provided attendees with miniature sombreros, which—the horror—numerous partygoers wore." There is a question as to whether Shriver's account of the event and its consequences is accurate (for which see LaCapria at the Snopes fact-checking site, who gives the story a "Mostly False" rating). However, she presents the story as true and asserts that the "moral of the sombrero scandals is clear: *you're not supposed to try on other people's hats*. Yet that's what we're paid to do, isn't it? Step into other people's shoes, and try on their hats." To drive home her point, Shriver wore a sombrero during the speech (Nordland).

Shriver sees "cultural appropriation" as pervasive:

> In the latest ethos, which has spun well beyond college campuses in short order, any tradition, any experience, any costume, any way of doing and saying things, that is associated with a minority or disadvantaged group is ring-fenced: look-but-don't-touch. Those who embrace a vast range of "identities" – ethnicities, nationalities, races, sexual and gender categories, classes of economic under-privilege and disability – are now encouraged to be possessive of their experience and to regard other peoples' attempts to participate in their lives and traditions, either actively or imaginatively, as a form of theft.

After cataloguing authors whose output presumably would have been crimped had they been subjected to the latest ethos—Malcolm Lowry, Graham Greene, Matthew Kneale, Dalton Trumbo, Maria McCann, John Howard Griffin—Shriver zeroes in on the phrase "without permission" from a definition of cultural appropriation formulated by Fordham Law professor Susan Scafidi and asks how authors are to set about "seek[ing] 'permission' to use a character from another race or culture, or to employ the vernacular of a group to which we don't belong?" She ridicules the notion of seeking permission, writing, "Do we set up a stand on the corner and approach passers-by with a clipboard, getting signatures that grant limited rights to employ an Indonesian character in Chapter Twelve, the way political volunteers get a candidate on the ballot?" Ultimately, she argues, that charges of cultural appropriation "is part of a larger climate of super-sensitivity, giving rise to proliferating prohibitions supposedly in the interest of social justice that constrain fiction writers and prospectively makes our work impossible."

Shriver's speech provoked an intense conversation, both at the conference, where a "right of reply" session was quickly organized (Nordland), and on the web. In her speech, Shriver referred to writer Ken Kalfus, although not by name, when she charged that "the reviewer in the Washington Post…groundlessly accused this book [*The Mandibles*] of being 'racist' because it doesn't toe a strict Democratic Party line in its political outlook" (Shriver). Kalfus replied, "I mentioned a couple of offensive racial characterizations—without contesting Shriver's freedom to write about Black and Latino characters. My complaints had nothing to do with cultural appropriation." He then elaborates on the racial characterizations mentioned in his earlier review. One example is that of an African American social worker,

one of only two Black characters in the novel, and the "only character who speaks sub-standard English." After a Mexican-born president (stereotyped, according to Kalfus) refuses to pay the nation's debts, the Black women declares, "I don't see why the gubment ever pay anything back. Pass a law say, 'We don't got to.' Kalfus observes in response to this passage that

> It was once common in newspapers, fiction and nonfiction to report the speech of "ordinary" people in standard English, while voicing minorities in dialect or vernacular, as they might sound to White ears; this still happens from time to time, unfortunately. By recording only the speech of minority characters in sub-standard English, you stigmatize the entire ethnic group as something other than normal. No one speaks perfectly. Respect for your characters suggests that if you record one's solecisms, dropped consonants, drawl or brogue, you will faithfully record everybody else's, too.

What Kalfus argues is that the issue is not one of cultural appropriation but of respect. As Jia Tolentino writes in an article in *The New Yorker*, "…there are all sorts of ways to borrow another person's position: respectfully and transformatively, in ignorance or with disdain" (Tolentino).

In her speech, Shriver asked, "However are we fiction writers to seek 'permission' to use a character from another race or culture, or to employ the vernacular of a group to which we don't belong?" Perhaps Kalfus and Tolentino offer an answer to Shriver's rhetorical question: proffer respect in exchange for that 'permission'. Among the many cultural appropriation stories from 2016 are the events at Standing Rock, where Native Americans and supporters protested the Dakota Access Pipeline. No fewer than thirty-four documentary film crews descended upon the encampment, which gave rise to discussion of how the story should be told and by whom. The Native Americans did not necessarily object to the presence of non-native crews, but as Josue Rivas observed, "It might seem cool to take a photograph of the chief in his headdress, but it's so freaking disrespectful" (Anderson). Mr. Rivas continued, "Respect the feathers," which is as much to say, respect my culture. In lieu of legal protection, demanding respect for one's culture in the end may be the only meaningful defense against cultural appropriation.

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