



## *Appropriation Appropriated: Ethical, Artistic, and Legal Debates in Canada*

LAURA J MURRAY & KIRSTY ROBERTSON

**ABSTRACT (EN):** Although Appropriation Art is often used to illustrate how freedom of speech can be constrained by expansionist copyright, such a framing oversimplifies the complex and often contested ways visual culture is used, borrowed, and stolen. Using Canadian examples to unsettle the centrality of US-centred copyright debates, the authors examine Appropriation Art from three interlinked perspectives: first, as a historical phenomenon within the Euro-American, and specifically the Canadian, art world; second, as a term that came to prominence during the Canadian copyright debates of 2006, and became entangled with a history of artist activism as practiced by Canadian Artists' Representation (CARFAC); and third, as a heretofore unexamined tension between appropriation championed as an act of resistance to the US entertainment industry and government, and appropriation vilified a decade earlier in Canada during controversies about cultural appropriation and "appropriation of voice" from Indigenous and racialized people. Ultimately, appropriation, whether as an art practice or an object of potential copyright regulation, is not the same in Canada as it is in the US, or for that matter, in theory. It has a history, which must be recognized if the interests of the various parties involved are to be accommodated or at least adequately described.

**RÉSUMÉ (FR):** Même si l'art de l'appropriation est fréquemment utilisé pour illustrer la façon dont la liberté d'expression peut être limitée par le droit d'auteur expansionniste, cette vision simplifie démesurément les façons

complexes et souvent contestées par lesquelles la culture visuelle est utilisée, empruntée et volée. À l'aide d'exemples canadiens, pour perturber la trop grande concentration sur les débats de droit d'auteur propres aux États-Unis, les auteurs examinent l'art de l'appropriation sous trois angles interconnectés : premièrement, sous l'angle d'un phénomène historique du monde de l'art euro-américain, et plus spécialement canadien; deuxièmement, en tant que terme ayant occupé une place importante lors des débats sur le droit d'auteur canadien en 2006, et qui est devenu indissociable de l'histoire de l'activisme artistique tel que pratiqué par le Front des artistes canadiens (CARFAC); troisièmement, en tant que tension — jamais examinée jusqu'ici — entre l'appropriation, défendue comme acte de résistance contre l'industrie du divertissement et le gouvernement américains, et l'appropriation vilipendée il y a une décennie au Canada lors des controverses à propos de l'appropriation culturelle et « l'appropriation de la voix » des autochtones et autres personnes « racialisées ». Finalement, l'appropriation n'est pas, en tant que pratique artistique ou objet de réglementation potentielle du droit d'auteur, la même au Canada qu'aux États-Unis, ni d'ailleurs sur le plan théorique. Son histoire doit être reconnue pour que les intérêts des différentes parties impliquées soient pris en considération, ou tout au moins exprimés adéquatement.

## **A. INTRODUCTION**

It may seem ironic that the United States, the main engine behind stronger intellectual property protections in the international arena, should also be the site of the most conspicuous critiques of copyright. And yet the two phenomena are connected: with their strong individual rights tradition (extending past security of the person to the famous “pursuit of happiness”), Americans have a potent discourse with which to engage intellectual property from within and without. In addition to this unifying ideology, a common platform for debate as it were, the United States also has ample economic motivation, and institutional and media resources, to develop and express opposing positions on intellectual property. Thus, the United States produces both the most forceful corporate and popular assertions of intellectual property in terms of the right to property, as well as the most proliferating critiques of intellectual property in terms of the right to freedom of expression. As the US entertainment industry flexes its lobbying and legal muscles to defend or expand its rights, a remix aesthetic also

bolstered by rights claims flourishes not only in hip hop but also in design, software, fashion, cuisine, and the visual arts. Some of this activity is actually incentivized by a sense of resistance to copyright.

Despite the power and volume of this remix or “free culture” activity, its subtlety and range of application can be limited by its tendency to represent creative production and identity as disembodied and non-located, even while conceptualizing creative production and identity in specifically embodied and located ways. For example, an article reviewing the resistance in early 2012 to the proposed US *Stop Online Piracy Act* [SOPA] describes its proponents as “citizens of the Internet,” and challenges those who would control the Internet to meet their adversaries “where they live — online, in chat rooms and user forums and social networks, on Twitter and Facebook and Tumblr and Reddit and whatever comes next.”<sup>1</sup> This virtualization or universalization of a debate over a US Act may be politically effective in the short term and within that nation, but, whether it be polemical or inadvertent, it must be noted as problematic. These issues concern not only place or nation. More generally, as several scholars have observed, the celebration of the ease of creation in the discourse of “free culture” tends to efface labour, gender, environmental, and social justice issues.<sup>2</sup> Champions of digital freedoms represent creativity as an individual act of industry, intellect, inspiration, or rebellion, and, thus, without apparently recognizing the common ground, share with many champions of authors’ rights a rather metaphysical idea of individual genius.

Appropriation art — that is, art built with images or parts of images from popular culture or other artists — has often been invoked in these arenas as an example of the way freedom of speech can be constrained by expansionist copyright.<sup>3</sup> We argue, however, that such a framing of appropriation over-

---

1 Larry Downes, “Who Really Stopped SOPA, and Why?” *Forbes* (25 January 2012), online: [www.forbes.com/sites/larrydownes/2012/01/25/who-really-stopped-sopa-and-why/3](http://www.forbes.com/sites/larrydownes/2012/01/25/who-really-stopped-sopa-and-why/3).

2 See Laura J Murray, “Review of *RiP: A Remix Manifesto* by Brett Gaylor” (June 2009), online: [CultureMachine.net/index.php/cm/article/view/372](http://CultureMachine.net/index.php/cm/article/view/372); Boatema Boateng, “Whose Democracy? Rights-Based Discourse and Global Intellectual Property Rights Activism” and Richard Maxwell & Toby Miller, “The Environment and Global Media and Communication Policy,” both in Robin Mansell & Marc Raboy, eds, *The Handbook of Global Media and Communication Policy* (Oxford: Wiley-Blackwell, 2011) 261 and 467; Kathy Bowrey & Jane Anderson, “The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?” (2009) 18:4 *Soc & Leg Stud* 479.

3 In his speaking engagements in the 1990s, slides and videos of appropriation were central to Lawrence Lessig’s assertions about the problems with expansionist copyright,

simplifies the complex and often contested ways in which visual culture is used, borrowed, and stolen. In this article, we seek to situate appropriation art both as a practice and a discourse in worlds outside US copyright debates. First, we look at it as a historical phenomenon within the Euro-American art world, and specifically the Canadian art world. Second, we examine how the term “appropriation art” fared when it came to prominence during the Canadian copyright debates of 2006, and became entangled with a history of artist activism as practiced by Canadian Artists’ Representation (CARFAC). And third, we discuss a heretofore unexamined tension between appropriation championed as an act of resistance to the US entertainment industry and government as it was in the 2006 copyright debates, and appropriation vilified a decade earlier in Canada during controversies about cultural appropriation and “appropriation of voice” from Indigenous and racialized people. Ultimately, appropriation, whether as an art practice or an object of potential copyright regulation, is not the same in Canada as it is in the United States, or, for that matter, in theory. As would be the case anywhere, it has a history that must be recognized if the interests of the various parties involved are to be accommodated or at least adequately described.

## B. APPROPRIATION ART: A VERY BRIEF HISTORY

Within the art world, and removed from intellectual property debates, appropriation has a long and storied history. Though it is occasionally traced back to copying and training practices in Renaissance studios,<sup>4</sup> more often its beginnings are placed at the start of the twentieth century, with the collage works of Pablo Picasso, Georges Braque, and others, who inserted the detritus of daily life — newspaper clippings and posters — into works that already unsettled traditional art in their abstraction.<sup>5</sup> A few years later,

---

although he more often used examples of direct political critique than specifically artistic examples; see also Negativland, “Negativland’s Tenets of Free Appropriation,” online: [www.negativland.com/news/?page\\_id=10](http://www.negativland.com/news/?page_id=10); commentaries on *Rogers v Koons*, 960 F(2d) 301 (2d Cir 1992) [*Rogers*] often argued that copyright was unduly constraining art: see James Traub, “Art Rogers vs. Jeff Koons” *Observatory* (21 January 2008), online: The Design Observer Group <http://observatory.designobserver.com/entry.html?entry=6467>.

- 4 The tradition of copying in art history should not be confused with appropriation or with forgery or theft. For more, see Sherrie Irvin, “Appropriation and Authorship in Contemporary Art” (2005) 45:2 *British Journal of Aesthetics* 123, especially 137.
- 5 They also tapped into the longer history of copying. Harry S Martin writes that “Raphael’s Judgment of Paris (c1515) triggered one of the most sustained and substantial sequences of copying and counter-copying in Western Art. Raphael’s painting became

Marcel Duchamp began to undermine the dominance of the elite art world by bringing “readymades” or already existing objects (among them a urinal, a snow shovel, and a wine rack) into the gallery. Through the years of the Second World War and into the 1960s, collage gained a political edge, in the anti-Fascist posters of John Heartfield, for example, or in the *détournement* practices of the French Situationists in Paris in 1968 (their work is often seen as a precursor of 1990s culture jamming). The word *appropriation* itself, however, was largely unused until it came to be associated with a kind of cutting-edge art practice popular in the 1980s that involved reworking mass and high culture for different ends. At this point, at least in terms of how appropriation was discussed by artists, questions of intellectual property were a far distant backdrop.

As Heidi Zuckerman Jacobson writes of Jeff Koons, who appropriated actual consumer objects (such as vacuum cleaners or basketballs) into his art:

In the 1980s, the anxious question around Koons was whether the difference between art and commodity had completely collapsed. The concept of appropriation, however, signaled that the artist had been granted the potential to assimilate popular culture and yet still intervene, thereby allowing art to be art and not something inherently corrupted.<sup>6</sup>

Artist Karl Haendel expands on Jacobson’s statement:

I was taught that appropriation artists took images from mass culture, thus freeing them from their original contexts and meanings, and re-presented them anew so that we could see how such images work to reinforce this or that dominant ideology. I got the sense that these artists were dutifully following a political imperative, clinically treating images around them with

---

lost but his employee, Marcantonio Raimondi, made an etched copy of it which survived. A few years after the copy was made, the general demand for copies of the original work was so great that Marco Dente da Ravenna made a slavish copy of it. Three centuries later, Manet used part of Raphael/Raimondi’s original as the basis for his work *Le Déjeuner Sur L’Herbe*. Manet used the group of three figures in the bottom right-hand corner of the original work as the heart of his new work, updating their clothing to contemporary garb and adding the naked women. Nearly a century later, Picasso paraphrased Manet’s work in an extensive series of paintings, drawings, sculptures and linocuts he executed between 1959 and 1961, *Les Dejeuners*”: *Harvard Law School, Image Rights*, online: [www.law.harvard.edu/faculty/martin/art\\_law/image\\_rights.htm](http://www.law.harvard.edu/faculty/martin/art_law/image_rights.htm).

6 Heidi Zuckerman Jacobson, “Steal This Essay” in Juan Roselione-Valadez et al, *Beg, Borrow, and Steal* (Miami: Rubell Family Collection, 2009) at 13.

the detachment and cool irony that such an important mission deserved. This seemed fine by me.<sup>7</sup>

In other words, appropriation was a way to challenge consumer norms and dominant ideologies, but it did not specifically thumb its nose at the law.

Nonetheless, authorship and originality were important elements to these artworks. In a recent article, Nate Harrison notes that in the early 1980s, artists such as Sherrie Levine (who photographed and displayed identical copies of the work of well-known photographers)<sup>8</sup> or Richard Prince (who used, among other popular culture items, photographs of the Marlboro Man) may not have even been aware of any elements of the 1976 (US) *Copyright Act*.<sup>9</sup> He suggests, however, that such artists benefitted from the Act's use of the phrase "original works of authorship fixed in any tangible medium of expression" to define which sorts of expression are covered by copyright.<sup>10</sup> As he proposes, "*the work* displaced the author as the central determining character in copyright doctrine."<sup>11</sup> There was a parallel, that is, between the way that authorship was understood in the *Copyright Act* (where the actions leading up to the production of the work are obfuscated by the work itself), and the way it was understood in the art world, where the work of Sherrie Levine, Richard Prince, and others from the so-called Pictures Generation specifically set out to undermine ideas of originality, authenticity, and the centrality of a romanticized (male) author.<sup>12</sup>

Though appropriation art in the form of the recycling of popular culture, or the remaking of already existing artworks, was largely a US phenomenon, it had corollaries elsewhere, including Canada. In Canada,

---

7 Karl Haendel, "Complicated Sneakers" in Juan Roselione-Valadez et al, *Beg, Borrow, and Steal* (Miami: Rubell Family Collection, 2009) at 84.

8 Though Levine began by photographing the work of Edward Weston whose copyright belonged to his estate before being transferred to the University of Arizona (who broadly encourage fair use and tacitly approve of Levine's work), her career took off when she began "copying" the well-known photographs of Walker Evans, whose photographs of the Depression were in the public domain.

9 *The Copyright Act of 1976*, 17 USC § 101-810 (1976) [*Copyright Act*].

10 Nate Harrison, "The Pictures Generation, the Copyright Act of 1976, and the Reassertion of Authorship in Postmodernity," online: Art & Education [www.artandeducation.net/paper/the-pictures-generation-the-copyright-act-of-1976-and-the-reassertion-of-authorship-in-postmodernity](http://www.artandeducation.net/paper/the-pictures-generation-the-copyright-act-of-1976-and-the-reassertion-of-authorship-in-postmodernity).

11 *Ibid.*

12 *Ibid.*; for more on this topic, see also Craig Owens "The Discourse of Others: Feminists and Postmodernism" and Douglas Crimp "On the Museum's Ruins" both in Hal Foster, ed, *Postmodern Culture* (London: Pluto Press, 1985) 57 and 43.

General Idea's take on *LIFE Magazine* (titled *FILE Magazine*) (just one of the art trio's works using appropriation) and, somewhat later, Natalka Husar's paintings on Harlequin Romance novel covers attracted considerable interest. One might also look to Douglas Coupland's tongue-in-cheek *Canada Pictures* still lifes, which specifically use examples of Canadian corporate popular culture (Jos. Louis cakes, Capitaine Crouche cereal, Maple Leaf bologna), photographer Roy Arden's "economic landscapes" showing the recognizable interiors and products of big-box stores, or Colwyn Griffith's photos of dollar-store products and landscapes made from easily identified foodstuffs (Tic tacs, Rice Krispies, and so on). Additionally, Canada was the home of extremely popular and widespread "appropriations" in the numerous popular culture jamming campaigns of the 1990s. Though not part of the art world, Vancouver-based *Adbusters* magazine caught the public imagination with its subversive ads: taking the iconic Absolut Vodka outline and changing it to Absolut AA; changing the glossy black and white photograph of a sculpted male model used for the Calvin Klein "Obsession for Men" ads to one showcasing the torso of an overweight and hairy man, complete with the tag line "Reality for Men"; putting the famous Joe Camel character in a hospital gown, obviously dying from cancer. *Adbusters* has addressed questions of copyright and trademark violation by noting repeatedly that it would welcome any court cases as a chance to publicize the labour records of each company,<sup>13</sup> but apparently nobody has ever taken them up on the offer.

Returning to the art world, if one were to cite a trend in appropriation art in Canada, one might point to a certain self-referentiality. For example, while Diana Thorneycroft has perhaps received the most attention for her drawings of the violent deaths of Disney and other cartoon characters, her more recent work appropriates iconic Group of Seven paintings as a backdrop to a series of "awkward moments," including Santa and his sleigh trapped in a pine tree, and Winnie the Pooh surrounded by grizzlies. There is, in fact, a whole subset of the Canadian art world that creates works by recycling, commenting on, or critiquing the famous (at least in Canada) landscape art of the Group of Seven.<sup>14</sup> In 1996, artist Jin Me Yoon created

---

13 Kalle Lasn, *Culture Jam* (New York: Harper Collins, 2000). *Adbusters* also faced a great deal of criticism for aping the slick advertising techniques of the companies they hoped to critique.

14 The Group of Seven was a group of Canadian painters working primarily in Ontario in the 1920s and 1930s. They were known for painting seemingly uninhabited Northern

A Group of 67, including 67 passport-like portraits, front and back, of Korean immigrants in front of paintings by Lawren Harris (Group of Seven) and Emily Carr; in 2005 the Plug In Gallery in Winnipeg held a fundraiser where seventy-five artists “re-interpreted” the Group of Seven in an exhibition called “Fabulous Fakes”; Steven Loft asks “Group of Who?” in a series of talks attempting to dislodge the Group’s centrality and to create an alternate Aboriginal art history. In other words, while appropriation art in Canada is certainly present, the material used often operates as commentary on issues of identity, national representation, and so on. Such targets redefine the parameters of appropriation, revealing a quite different set of cultural and political circumstances than the standard (US-focused) account of appropriation art might acknowledge.

### C. APPROPRIATION ART AND CANADIAN COPYRIGHT

Until the copyright reforms of 2012, the status of parody and satire in Canadian copyright law was quite unclear. While one might suppose that these artistic modes are essentially a form of criticism, one of the stated purposes of fair dealing, and hence eligible for consideration as such, a Federal Court ruled emphatically in 1997 that the parodic use of the Michelin man figure on a union poster constituted infringement. It stated that “the defendants are not permitted to appropriate the plaintiff’s private property . . . as a vehicle for conveying their anti-Michelin message.”<sup>15</sup> The court noted the categorical nature of fair dealing and concluded that its provisions “should be restrictively interpreted as exceptions.” The 2004 *CCH Canadian Ltd. v Law Society of Upper Canada* case at the Supreme Court challenged this position in its affirmation that “the fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance

---

Ontario wilderness landscapes, and for working to develop a specifically “Canadian” form of painting. In more recent scholarship, the Group has been critiqued for forwarding a parochial and masculinist form of anti-modern nationality. Additionally, the supposedly empty landscapes were in fact occupied, both by indigenous groups and by the logging and tourism industries active at the time. Nevertheless, the Group of Seven is consistently mobilized by individuals and authoritative institutions (galleries, government, etc.) alike as exemplary of a certain kind of Canadian nationality. For more, see Lynda Jessup, “Bushwhackers in the Gallery: Antimodernism and the Group of Seven” in Lynda Jessup, ed, *Antimodernism and Artistic Experience: Policing the Boundaries of Modernity* (Toronto: University of Toronto Press, 2001) 130.

15 *Compagnie générale des établissements Michelin-Michelin et Cie v CAW-Canada*, [1997] 2 FC 306 at 366.

between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."<sup>16</sup>

While it would appear that this assertion would instruct lower courts to interpret "criticism" broadly, CCH did not refer specifically to parody or satire, and lower courts continued to cause problems for those practices.<sup>17</sup> This situation differed in both legal and cultural terms from the US environment where parody had been explicitly acknowledged as free speech and fair use in *Campbell v Acuff-Rose Music*.<sup>18</sup>

In 2006, the Canadian government introduced Bill C-60,<sup>19</sup> a copyright reform bill that included provisions for the protection of TPMs (technological protection measures) or DRM (digital rights management) that would have made it an infringing act to circumvent these digital locks for any reason, including fair dealing. It was this extra-legal barrier to appropriation art that provoked artists and cultural workers Gordon Duggan and Sarah Joyce to circulate an open letter on the Internet and through email calling on their colleagues in Canada to ask for copyright legislation that would "respect the reality of contemporary artistic practice"<sup>20</sup> by eschewing protection for DRM. The letter resulted in the formation of the Appropriation Art Coalition, eventually numbering over 600 artists, curators, directors, educators, writers, associations, and organizations from the arts sector.<sup>21</sup> The coalition contended that appropriation had important art historical precedent and social use and, as such, should be enabled rather than prohibited under copyright legislation. Allowing DRM to block copying would, in the words of an activist ally of the coalition, "criminalize . . . a recognized and legitimate art form."<sup>22</sup>

---

16 *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 at para 48 [CCH].

17 Laura Murray & Craig Berggold, "See You in Court: Can Canadians Practice Parody?" 32:2 *FUSE Magazine* (March 2009) 12.

18 *Campbell v Acuff-Rose Music*, 510 US 569 (1994).

19 Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess, 38th Parl, 2005.

20 Appropriation Art Coalition, "Re: Canadian Copyright and Cultural Reform" (2006), online: Digital Copyright Canada [www.digital-copyright.ca/node/2478](http://www.digital-copyright.ca/node/2478).

21 For further information, see Appropriation Art Coalition, "Appropriation Art: Statement About" (2006), online: [www.appropriationart.ca/statement/about](http://www.appropriationart.ca/statement/about).

22 Russell McOrmond, "Appropriation Art Coalition Condemns Proposed Copyright Bill C-61" (2008), online: Russell McOrmond's Blog [www.digital-copyright.ca/node/4716](http://www.digital-copyright.ca/node/4716). Collage and pastiche are not illegal if done with physical objects; the copyright implications arise when they are done using reproductions of images or objects rather than the original artifact.

While the Appropriation Art Coalition noted the historical lineage of the use of already existing work outlined above, the more immediate backdrop to the open letter and later deposition was an international constellation of artists shut down or taken to court in recent years for reproducing the work of others in their own work without permission. Despite the US Supreme Court's affirmation of the legitimacy of parody, many cases arose in which the nature of the unauthorized use could not be demonstrated to be parodic. Key figures included Jeff Koons, who lost the *String of Puppies* case brought by photographer Art Rogers because the judge felt that the work, a sculpture based on Roger's photograph, was satiric of a general culture of sentimentality rather than specifically parodic of the photograph.<sup>23</sup> The *Illegal Art Show*, an exhibition of "art and ideas on the legal fringes of intellectual property,"<sup>24</sup> was made up of works that repurposed iconic images and either anticipated or had already been met with accusations of IP infringement.<sup>25</sup> In the UK, Damien Hirst, whose sculpture *Hymn* replicated in giant form a children's anatomy set, paid an undisclosed sum to two children's charities in an out-of-court settlement.<sup>26</sup> Such cases created a cluster of examples on which artistic groups within and beyond the United States (advocating everything from fair copyright to copyleft or no copyright) drew to illustrate copyright's harmful effects on artistic expression.<sup>27</sup>

---

23 Rogers, above note 3.

24 Online: [www.illegal-art.org](http://www.illegal-art.org) (accessed 15 July 2009; website no longer operational); Art and Culture Center of Hollywood, "Illegal Art," online: <http://artandculturecenter.org/illegal-art>.

25 See Robert S Nelson, "Appropriation" in Robert S Nelson & Richard Shiff, eds, *Critical Terms for Art History*, 2d ed (Chicago: University of Chicago Press, 2003). Three of the artists in this exhibition, John Oswald, Natalka Husar, and Diana Thorneycroft, were Canadian. None of them were actually sued although in various ways their work was affected by threats or concerns about copyright. See also online: [www.plunderphonics.com](http://www.plunderphonics.com).

26 Hirst himself has also made claims of infringement — for example a case that saw a sixteen-year-old graffiti artist, Cartrain, ordered to cease and desist making collages with images of one of Hirst's infamous works — *For the Love of God*, a diamond encrusted skull (which was itself the target of another artist who claimed that Hirst was copying his crystal-encrusted skulls). In turn, three British artists responded to Hirst's accusations, by creating collages that copied Cartrain's collages (including the skull) with one change: a title of a book in the collage had been changed from *How To Be a Detective* to *Copyright and Intellectual Property Law*. See "Artists Flout Copyright Law to Attack Damien Hirst" *The Telegraph* (13 February 2009), online: [The Telegraph www.telegraph.co.uk/culture/art/4609976/Artists-flout-copyright-law-to-attack-Damien-Hirst.html](http://www.telegraph.co.uk/culture/art/4609976/Artists-flout-copyright-law-to-attack-Damien-Hirst.html).

27 More recent cases include injunctions for Richard Prince's reworkings of photographer Patrick Cariou's images of Jamaican Rastafarians. Prince was ordered to destroy the

In this vein, the Appropriation Art Coalition asserted the special status and special needs of art. It promoted acknowledgement of art's exceptionalism through exceptions in the law to allow artists access to or latitude to reproduce otherwise protected material. "Lobbyists for the copyright industry claim that copyright owners need greater control over works," the coalition writes. "This is a misrepresentation of copyright. Copyright is meant to protect and encourage creativity not suppress and restrict it."<sup>28</sup> In effect, because "contemporary culture should not be immune to critical commentary,"<sup>29</sup> the coalition prioritized freedom of expression over owners' rights.

#### **D. APPROPRIATION ART COALITION v CANADIAN ARTISTS' REPRESENTATION**

This position brought the Appropriation Art Coalition in direct conflict with the copyright reform positions of CARFAC (Canadian Artists' Representation), a union established in the 1960s to represent Canadian artists. CARFAC has from its inception argued that artists deserve to be paid for their work, and that copyright is a key instrument for achieving this. CARFAC was arguing *against* fair dealing and other user rights, and in favour of protecting digital rights management. The argument was (and is) that all uses of artists' images ought to be cleared and paid for, and fair dealing ought to be minimized as, in fact, "unfair." To CARFAC, the Appropriation Art Coalition position that the freedom to make art be considered before livelihood was anathema. CARFAC and its copyright wing CARCC (the Canadian Artists Representation Copyright Collective, which is, unlike RIAA and other such pro-copyright bodies, associated with labour and union rights rather than big business) asserted that artists were already precarious, and that

---

images, though the case was overturned on appeal. See Charlotte Burns, "Patrick Cariou Wins Copyright Case Against Richard Prince and Gagosian" *The Art Newspaper* (21 March 2011), online: The Art Newspaper [www.theartnewspaper.com/articles/Patrick+Cariou+wins+copyright+case+against+Richard+Prince+and+Gagosian/23387](http://www.theartnewspaper.com/articles/Patrick+Cariou+wins+copyright+case+against+Richard+Prince+and+Gagosian/23387). A second instance involves an out-of-court settlement between Shepard Fairey and The Associated Press in a dispute over who owned the rights to the iconic Obama "Hope" poster: see David Kravets, "Associated Press Settles Copyright Lawsuit Against Obama 'Hope' Artist" *Wired* (12 January 2011), online: *Wired* [www.wired.com/threatlevel/2011/01/hope-image-flap](http://www.wired.com/threatlevel/2011/01/hope-image-flap).

28 Gordon Duggan & Sarah Joyce, "Letter to Ministers 01\_08" (2008), online: Government of Canada: Copyright Consultations [www.ic.gc.ca/eic/site/008.nsf/eng/02734.html](http://www.ic.gc.ca/eic/site/008.nsf/eng/02734.html).

29 Above note 21.

the creation of art could not take place if the work of their hands was being, we could say, appropriated.<sup>30</sup>

For CARFAC, the crux of the argument was and is this: artists tend to be disadvantaged members of society. Statistics from 2005 show that, on average, artists in Canada earn 37% less than the average wage, coming in at \$22,731 CDN, compared with \$36,301 for the average Canadian worker.<sup>31</sup> Additionally, Karl Beveridge, then head of CARFAC, noted in an interview during this controversy that the work of artists is used in a number of venues — publications (museum and scholarly), classrooms, films, and elsewhere — but artists are not always (or even not often) compensated for these uses. For Beveridge, this constituted an exploitation of the artist that could be rectified through better protections.<sup>32</sup> The idea that artists could gain publicity through the free circulation of their images was, to him, just further exploitation.

The argument between CARFAC and the Appropriation Art Coalition erupted briefly. Emails were exchanged, articles were written, and then coverage died down. However, the positions of the two groups were clear, and suggest two distinct approaches to the relationship between copyright and art. Bill Patry takes note of the way that in the highly contested terrain of copyright, artists cannot even seem to agree among themselves:

This division of opinion within the art community is interesting for another reason: artists have been the most fervent advocates of moral rights, which are based on the Romantic inseparability of the artist and his or her work. Appropriation art seems to deny that connection, and with it the concepts of author and originality. But can one have it both ways? Can one have moral rights without authors, works, and copies?<sup>33</sup>

- 
- 30 CARCC, "About CARCC," online: [www.carcc.ca](http://www.carcc.ca). As their website states, "CARCC was established in 1990 by CARFAC, *Canadian Artists' Representation / Le Front des artistes canadiens*, a professional association that works for visual artists. CARCC was founded to put into practice the principles concerning artists' copyrights for which CARFAC continues to advocate — the professional practice of using written agreements (licences) and the payment of appropriate fees for the use of copyright. CARCC is a corporation separate from CARFAC, but controlled by CARFAC, which is CARCC's sole shareholder. Members of CARFAC's executive committee form CARCC's board of directors."
- 31 James Adams, "Starving Artists? Study Shows That's Not Far from the Mark," *Globe and Mail* (5 February 2009) R1.
- 32 Karl Beveridge, interviewed by Kirsty Robertson, Toronto, 30 September 2006.
- 33 William Patry, "Appropriation Art and Copies" (20 October 2005), online: The Patry Copyright Blog <http://williampatry.blogspot.com/2005/10/appropriation-art-and-copies.html>. Moral rights were not explicitly prominent in this controversy, where CARFAC

What CARFAC and the Appropriation Art Coalition had in common is the call for protection of the besieged artist. But to that end, CARFAC called for tighter regulation, and the Appropriation Art Coalition called for none. No doubt in private conversation many CARFAC members would acknowledge the need for fair dealing, and Appropriation Art Coalition members would want to reserve the right to make money from their work, but the debate became entirely binarized in this time and place.

The mobilization of appropriation discourse in Canada at a time when legal and technological protections were being proposed for corporate-owned cultural products, protections that threatened to reduce possibilities for collage, pastiche, parody, and satire, was powerful. It unsettled a previous binary geometry of copyright debates in which artists were conventionally positioned as owners defending their work against those who might appropriate it in unauthorized ways, and it tied arts issues into broader consumer rights discourses. Ultimately, if indirectly, the champions of appropriation art scored a legislative win with the inclusion of parody and satire as fair dealing purposes in Bill C-32,<sup>34</sup> the copyright reform bill passed in 2012. (The status of appropriation art that is not parody or satire remains unclear.) In 2006 such a victory would have been almost unimaginable. But although it has been achieved, conflicts between artists about what kind of copyright will serve them best have by no means been resolved.

## E. APPROPRIATION AS COLONIALISM

The AAC/CARFAC controversy is not the only recent debate over appropriation in the Canadian art world. A search for “Appropriation Art and Canada” on Google brings up a huge number of results. Scrolling through the first few pages, one finds an equal number pointing to the Appropriation Art Coalition and to the cultural appropriation of Indigenous culture. Canada’s passionate “appropriation of voice” debates of the 1980s and 1990s are an example even more telling than the AAC/CARFAC controversies of the tensions in Canada between different modes of understanding cultural pro-

---

emphasized economic rights and the Appropriation Art Coalition emphasized constitutional rights (freedom of expression) and borrowed US discourses in which moral rights have little place. And yet CARFAC has been a big promoter of moral rights, so this is one ground of difference between the two sides.

34 Bill C-32, *An Act to amend the Copyright Act*, 3d Sess, 40th Parl, 2010 (reintroduced as Bill C-11 in 1st Sess, 41st Parl, 2011).

duction. The conception of appropriation art mobilized by the Appropriation Art Coalition takes it as an article of faith that artists need free access to cultural goods, and sees the law as a means to ensure this, but the story of the earlier appropriation disputes reveals a rather different value system and set of tools for resolving differences. The connection between the controversies of the 2000s and those of the preceding decades goes beyond a shared word: they both manifest a conflict between a vision of the artist as an individual and a vision of the artist as part of a collective, between a vision of the artist as self-made and the artist as made by history.

As Jonathan Hart explains in a seminal definition, “cultural appropriation occurs when a member of one culture takes a cultural practice or theory of a member of another culture as if it were his or her own or as if the right of possession should not be questioned or contested.”<sup>35</sup> In fact, several of the artists mentioned above in the context of the history of appropriation art (Picasso and Braque, for example) show up in this light as themselves appropriators of more than commercial mass culture. In the early twentieth century, avant-garde artists now central to canonical Western art history (the Cubists, the Fauves, and Die Brücke, for example), turned for inspiration to so-called “primitive” cultures, and specifically to the African masks at the Musée d’Ethnographie du Trocadéro in Paris. Though rarely given credit, the African works, always decontextualized, show up in a number of works, including one of Picasso’s most famous paintings, *Les Femmes d’Alger (O. J.)* (1911), in which a semi-abstract painted group of nude prostitutes crouch in a variety of uncomfortable positions, the two on the right-hand side sporting faces obviously influenced (if not copied) from the masks. Picasso, it is said, always denied the influence. The issue of his “copying”<sup>36</sup> came to a head in the controversy surrounding the 1984 Museum of Modern Art (New York) exhibition *Primitivism in Twentieth Century Art*, which certainly acknowledged that Picasso and others had drawn on African and other (including North American Aboriginal) cultures. The exhibition, however, was accused of valuing the non-European masks, artworks,

---

35 Jonathan Hart, “Translating and Resisting Empire: Cultural Appropriation and Postcolonial Studies” in Bruce H Ziff & Pratima V Rao, eds, *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick: Rutgers University Press, 1997) 137 at 138.

36 Picasso’s use of African masks is often remarked upon, but only since the 1980s has it been criticized. Often, Picasso’s use of masks is taken as an extension of his use of “everyday” objects in his collages, and thus the words “copying,” “stealing,” and “misuse” often indicate the stance that the writer, rather than Picasso, was/is taking. Here it is used with the knowledge that the copying was not without consequences.

and artifacts only insofar as they were inspirational to European artists. In other words, the appropriation was legitimized even as it was revealed; the legacy of colonialism that had brought the objects to Paris was erased.<sup>37</sup>

In Canada and elsewhere in the 1980s and particularly in the 1990s, appropriation was a term much contested and mobilized primarily in connection with identity politics, stolen and misused Indigenous culture, and controversy over museum collections and displays. Appropriation came to be seen as a continuation in the present day of nineteenth- and early twentieth-century practices of illegitimate collection and salvage ethnography (the practice of collecting material from “disappearing” tribes).<sup>38</sup> Many of the collections of Aboriginal artifacts in North American, European, and Austral-Asian museums are the spoils of salvage collecting, itself the result of decimation of indigenous populations through disease, and the imposition of harsh punishments for the practice of culture (which, in several cases, such as potlatches on the Northwest Coast or sun dance ceremonies in the United States, was made illegal). The implementation of residential schooling and other assimilationist policies throughout North America, Australia, and New Zealand derived from and reinforced assumptions that Indigenous cultures had died or were dying out, and thus that their “remains” ought to be preserved behind glass.

Activism through the 1960s and 1970s on the part of groups like AIM (American Indian Movement) and those who organized the interventionist and critical Indian Pavilion at Expo 67 in Montreal did little to change these beliefs in mainstream North American culture. It was not until the late 1980s that concerted activism and a number of controversial exhibitions, conferences, artworks, writings, performances, blockades, and political actions (for example, the Oka Uprising) came together in a battle over representation, often focused on the idea (itself springing from identity politics) that Aboriginal peoples needed to be able to speak for and represent themselves.<sup>39</sup>

---

37 Simon Gikadi, “Picasso, Africa and the Schemata of Difference” in Sarah Nuttall, ed, *Beautiful/Ugly: African and Diaspora Aesthetics* (Durham: Duke University Press, 2006) 30 at 47–48.

38 See James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* (Cambridge: Harvard University Press, 1988), and Ruth Phillips & Christopher Steiner, eds, *Unpacking Culture: Art Commodity in Colonial Postcolonial* (Berkeley: University of California Press, 1999).

39 See Lee-Ann Martin, *The Politics of Inclusion and Exclusion: Contemporary Native Art and Public Art Museums in Canada: A Report* (Ottawa: Canada Council, 1991); Lynda Jessup & Shannon Bagg, eds, *On Aboriginal Representation in the Gallery* (Hull: Canadian Museum

In just two examples among many, Aboriginal groups protested the exhibition *The Spirit Sings* (1988) organized by the Glenbow Museum in Calgary alongside the Winter Olympics (also held in Calgary) for two reasons: first, the exhibition was sponsored by Shell Canada, which was then drilling on land under claim by the Lubicon Cree, and second because the exhibition was made up of only ancient native artifacts that refused to acknowledge a continued vibrancy of native life.<sup>40</sup> Aboriginal peoples had little to no say in how they were portrayed in this exhibition: no Aboriginal curators were involved. Not long afterwards, the exhibition *Into the Heart of Africa* opened in Toronto, showing artifacts gathered by Canadian missionaries and soldiers while in Africa.<sup>41</sup> This exhibition too drew extensive protests, including the formation of a Coalition for the Truth About Africa, that released a pamphlet stating: “Why, in the first seventy-seven years history of the ROM, does the first ‘African’ exhibit have to be from a colonial perspective?”<sup>42</sup>

Indigenous writers during this same period understood “voice” as the object of appropriation. In response, some white writers and artists articulated rights to imaginative freedom in absolute terms not dissimilar to the claims of free culture advocates. Novelist Russell Smith asserted that “appropriation of voice is what fiction is,”<sup>43</sup> and Erna Paris wrote “A Letter to the Thought Police.”<sup>44</sup> Indigenous writers spoke back: Jeannette Armstrong invited non-Native people to

[i]magine yourselves in this condition and imagine the writers of that dominating culture berating you for speaking out about appropriation of cultural

---

of Civilization, 2002); and Lee-Ann Martin, ed, *Making a Noise! Aboriginal Perspectives on Art, Art History, Critical Writing and Community* (Banff: The Banff Centre for the Arts, 2005).

- 40 Kirsty Robertson & J Keri Cronin, “Aboriginal Representation and the Canadian Art World” in J Keri Cronin & Kirsty Robertson, eds, *Imagining Resistance: Visual Culture and Activism in Canada* (Kitchener: Wilfrid Laurier University Press, 2011).
- 41 Carol Tator, Frances Henry, & Winston Mattis, “Into the Heart of Africa” in *Challenging Racism in the Arts: Case Studies of Controversy and Conflict* (Toronto: University of Toronto Press, 1998).
- 42 Coalition for the Truth About Africa, quoted in *ibid* at 41.
- 43 Russell Smith, quoted in Rosemary Coombe, “The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy” (July 1993) 6:2 *Can JL & Jur* 249 at 251.
- 44 An excellent summary and reflection on these debates can be found in Richard Fung, “Working Through Cultural Appropriation” 16:5-6 *FUSE Magazine* (Summer 1993) 16. See also Kristjana Gunnars, “Transcultural Appropriation: Problems and Perspectives” in *Stranger at the Door: Writers and the Act of Writing* (Waterloo, ON: Wilfrid Laurier University Press, 2004).

voice and using the words “freedom of speech” to condone further systemic violence, in the form of entertainment literature about *your* culture and *your* values and all the while, yourself being disempowered and rendered voiceless through such “freedoms.”<sup>45</sup>

Such critiques of appropriation took on directly the liberal values that subtend celebration of appropriation today.

The interesting difference between these debates and the AAC/CARFAC controversy is that, by and large, it was the collective rights argument that won out over the individualist freedom of expression argument. The debates profoundly influenced museum culture in Canada (and also in varying ways in Australia, New Zealand, and parts of Europe and South America). And whereas in the United States, related activism took place in governmental arenas, leading to the passage of NAGPRA (*Native American Graves Protection and Repatriation Act*) in 1990,<sup>46</sup> changes in Canada were provoked by shaming, and negotiated through lengthy consultation, concerted activism, and the publication of academic and popular texts (fiction and non-fiction). Although Indigenous Canadians have since been active in advocating Indigenous intellectual property rights in International Law, in collaboration with non-Indigenous cultural workers,<sup>47</sup> legal reform and lawsuits were not an important tool for artists and other cultural workers attempting to halt cultural appropriation in the Canadian context. Instead, highly publicized cases of repatriation of stolen artifacts, organization of a series of exhibitions and workshops (such as *Indigena*, *Writing Thru Race*, and *Reservation X*), and the formation of the Aboriginal Curatorial Collective led to changes in funding, museum policy, and widespread awareness in the art world and beyond that appropriation was/is not always a positive encounter.

In the context of the history of appropriation art we sketched earlier, we can see from this wave of controversy and soul-searching that appro-

---

45 Jeanette C Armstrong, “The Disempowerment of First North American Native Peoples and Empowerment Through Their Writing” in Daniel David Moses & Terry Goldie, eds, *An Anthology of Canadian Native Literature in English* (Don Mills, ON: Oxford University Press, 2005) 242 at 243.

46 *Native American Graves Protection and Repatriation Act*, Pub L No 101-601, 104 Stat 3048 (1990).

47 The Creators’ Rights Alliance (see online: [www.cra-adc.ca](http://www.cra-adc.ca)) has been involved in WIPO negotiations on traditional knowledge, and in July 2010, the Assembly of First Nations passed *Support for an International Knowledge and Intellectual Property Rights Regime*, Resolution no 36/2010, Assembly of First Nations, Annual General Assembly (20–22 July 2010, Winnipeg, MB), online: AFN [www.afn.ca/uploads/files/aga-res-10.pdf](http://www.afn.ca/uploads/files/aga-res-10.pdf).

priation, while it claims to attack power, actually comes from a position of power. While artists such as Prince and Levine were engaging in postmodern attempts to unseat the centrality of the genius author, Indigenous artists were only beginning to have the privilege of occupying that position. A lengthy history of placing Aboriginal cultural objects in ethnographic rather than art museums, of failing to record or acknowledge the names of artists or the families and histories to which the objects belonged, coupled with a dismissal of work that had been “touched” by Western culture as thus “in-authentic” or “tourist art” profoundly influenced the ways that Aboriginal art was made, collected, confiscated, and suppressed in Canada.<sup>48</sup> Reclamation of past histories through repatriation and naming (for example, giving individual names to anonymous faces in the thousands of photographs collected of Aboriginal peoples, or to artists who created artifacts now held in museums)<sup>49</sup> manifested very different interactions with the idea of authorship than those of appropriation artists of the period. Harrison notes that “Levine and Prince took individual control of the mass-authored image, and in so doing, reaffirmed the ground upon which the romantic author stands,”<sup>50</sup> but this was not an option open to those for whom entire cultures had been simultaneously suppressed and appropriated.

In thinking through the way that appropriation as a right rubs up against appropriation as (mis)representation and oppression, the limited politics of the dominant “appropriation art” discourses become apparent. Indigenous artists and artists of colour fought hard to control certain forms of representation and demand their own right to represent themselves. For the most part, changes did not come about through copyright (although Indigenous artists have used copyright or trademark insofar as they were able), but rather through hard-won changes to institutional, organizational, and artistic practice. One can hope that one of the main things achieved by these labours by Indigenous and non-Indigenous cultural workers is a recognition that multiple conceptions of creative process and ownership

---

48 Ruth Phillips, *Museum Pieces: Toward the Indigenization of Canadian Museums* (Montreal & Kingston: McGill-Queens University Press, 2011). See also Ruth Phillips, *Trading Identities: The Souvenir in Native North American Art from the Northeast, 1700–1900* (Seattle: University of Washington Press, 1998).

49 See, for example, the work of photographer Jeff Thomas. See also Jeff Thomas & Anna Hudson, “Edmund Morris: Speaking of First Nations” in Lynda Jessup & Shannon Bagg, eds, *On Aboriginal Representation in the Gallery* (Hull: Canadian Museum of Civilization, 2002) 127.

50 Harrison, above note 10.

of culture exist and must coexist—an acknowledgment often missing in copyright discussions.

We give the final word to the recent appropriation art of two Aboriginal artists based in Canada—Sonny Assu and Brian Jungen. In his piece *Coke Salish*, Sonny Assu (Li'wilda'xw of the We Wai Kai First Nation [Cape Mudge]) uses the recognizable Coca-Cola font and red background for a billboard-like sign. Instead of spelling out “Enjoy Coca-Cola,” however, the sign reads “Enjoy Coast-Salish Territory,” an assertion that the city of Vancouver is built on disputed land. Assu’s *Breakfast Series* of reworked cereal boxes (including *Treaty Flakes/Frosted Flakes*, *Bannock Pops/Corn Pops*, *Lucky Beads/Lucky Charms*, *Salmon Loops/Fruit Loops*, and *Salmon Crisp/Sugar Crisp*) is, according to his website “conceptually and aesthetically designed to challenge the authenticity of Indigenous art while simultaneously reflecting upon our western civilization’s consumption culture.”<sup>51</sup> Brian Jungen (Swiss-Dunn-Za heritage) is famous for his series *Prototypes for New Understanding*, a group of Nike Air Jordans deconstructed and re-sewn into Northwest Coast-style masks, which takes questions of consumption, authenticity, appropriation, and indigeneity even further. The Nike swooshes and jumping Jordan logos are clearly visible on Jungen’s now much-sought works. The work of Assu and Jungen clearly references the multiple histories of appropriation acknowledged in this article. Perhaps one could say that these Indigenous artists have appropriated appropriation art, and thereby found considerable success in the art scene. While they make the classic move of appropriating corporate logos, their critiques have multiple targets—perhaps even including the glibness of anti-corporate appropriation art. Whatever their intentions, these artists have more agility in simultaneously defending and critiquing many sorts of rights than most copyright discourses and debates.

---

51 Sonny Assu, “General Artist Statement,” online: <http://sonnyassu.com/pages/general-artist-statement>.