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4. Embodied Trademarks: Mimesis and Alterity on American Commercial Frontiers

Since 1930, the mascot of Robertson's® Marmalade, England's Golliwog (who looks like Buckwheat, but a bit more naively attired) has appeared on over 20 million pieces of merchandise—from teapots to toothbrushes to T-shirts . . . When Golly was criticized in 1984 by some of England's "oversensitive" black population, a Robertson's spokesman righteously declared, "the Golly forms part of our national tradition and attacking it is an attack on a part of British culture."—Colson Whitehead, "Review of White on Black"¹

This anecdote condenses a series of relationships that are relatively unexplored in cultural anthropology and invisible in law and society scholarship. It bespeaks the central role of trademarks in what we might call the visual culture of the nation² and points to another politics—of ownership and protest, domination and resistance—that engages intellectual properties in increasingly commodified public spheres. Theoretically addressing the significance of this story, however, is no easy task. It resists easy accommodation within the dominant perspectives on the commodified imagery of late capitalism. Neither a modernist nostalgia for "our" "real" history (now lost in the proliferation of media imagery),³ nor the increasingly qualified demarcation of consumption as a potential site for critical creativity in the literature of cultural studies⁴ does justice to the dilemma posed by the Golly®.

In its reference to the historical images that circulate as floating signifiers in the condition of postmodernity, this story suggests that we attend to the consumption of commodified culture and recognize the signifying politics that embrace mass-media forms—concerns that are central to any analysis of the cultural characteristics of postmodernism.⁵ Opposition to the Golly, however, also reminds us of the necessity to acknowledge the historical experiences of specific subjects and the political interests of those who struggle to reinscribe or alter particular commodified images and their meanings. The movement to dislodge the Golly⁶

might also, therefore, be seen as a postcolonial practice—as those historically "othered" in imperialist social imaginaries protest the continuing circulation of indicia iconic of their former subjugation. The literature on postcolonialism, however, has not been particularly attentive to practical contentions over the commodification of colonial desire. Academic struggles to define the parameters of postcolonial terrain⁷ have yet to incorporate contemporary challenges to the circulation of those commodity/signs that still embody colonialism's others in the mediascapes of mass commerce. Such challenges suggest that one dimension of the relationship between the postmodern and the postcolonial is enacted in the representational exchange of the market.

The Golly is a trademark, a signifier that distinguishes the goods of one manufacturer from those of another. Trademarks may be logos, brand names, characteristic advertising images, or other (usually visual) forms that condense and convey meaning in commerce. The ubiquity of trademarks in national social arenas and their currency both as culture and as private property create generative conditions for struggles over significance; they are simultaneously shared in a commons of significance and jealously guarded in exclusive estates. The visual cultures of national mass markets are often saturated with signs of social difference.⁸ When these signs assume the form of marks used in trade, these indicia of cultural difference may be legally recognized as the private properties of those who claim them as marks of their own commercial distinction. I will draw upon both historical and contemporary American examples to show that when—as in the Golly anecdote—trademarks represent an embodied otherness with imperialist precedents, social struggles over their circulation and connotation add more nuanced dimensions to our understandings of contemporary relationships between mimesis and alterity.⁹

Mimicry, Alterity, and Embodiment

Earlier I suggested that most cultural anthropologists have been reluctant to engage the social, cultural, or political role of trademarks in local practices and that in this reticence we may find a tacit acknowledgment of the complications such commodity/signs pose for the disciplinary positioning of the anthropologist. One recent exception to the anthropological tendency to ignore trademarks as cultural forms is Michael Taussig's *Mimesis and Alterity*.¹⁰ Taussig traces the Western preoccupation with the mimetic abilities of savages and the European fascination

with being imitated by primitives. He sees in many turn-of-the-century trademarks a link between mimesis, primitivism, and technological development. It is the task of the animal, the child, the black, the primitive Other (however defined), and, of course, women “to register the rediscovery of the naturalness of the mimetic faculty in a technological age of mechanical reproduction.”¹¹ Such social others do indeed figure predominantly in the pantheon of late-nineteenth-century trademarks.¹² Tausig’s geographically and historically generalizing observations on mimesis and alterity do not make reference to the cultural influence of national political agendas. Nor do they isolate the local cultural idioms of imperialism in which socially specific relations between mimesis and alterity are articulated. In this chapter, I will be concerned with a particular configuration of this nexus in a particular era of U.S. nation-building.

Tausig’s definition of the mimetic faculty is indeed idiosyncratic,¹³ but fruitful for considering the power of trademarks. He describes the mimetic faculty as the ability to copy, imitate, yield into, and become other in such a way that the copy draws power from and influences the original.¹⁴ The representation gains or shares in the power of the represented and the image affects what it is an image of. But if imitation or sympathy is one principle of mimesis, sensuousness and contagion is the other. One gets “hold of something by way of its likeness—[mimesis involves] a copying or imitation, and a palpable, sensuous, connection between the very body of the perceiver and the perceived . . . making contact.”¹⁵ The fingerprint and “His Master’s Voice Talking Dog” (the RCA logo)¹⁶ are the vehicles Tausig uses to show how sympathy and contagion are fused:

Through contact (contagion) the finger makes the print (a copy). But the print is not only a copy. It is testimony to the fact that contact was made—and it is the combination of both facts that is essential to the use of fingerprinting to the police in detection and by the State in certifying identities. The Talking Dog also interfuses contagion with sympathy, the sensuous with imitation, because it is on account of its sensorium, allegedly sensitive to an uncanny degree, that it can faithfully register—i.e. receive the print—and distinguish faithful from unfaithful copies . . . the dog becomes the civilized man’s servant in the detection, and hence selling, of [the] good copy.¹⁷

These principles of imitation and contact are useful for thinking about the role of trademarks in commercial spheres of exchange. A mark must

attract the consumer to a particular source that, in mass markets, is often distant and likely unknown. A logo registers fidelity in at least two senses. It operates as a signature of authenticity that the good that bears it is true to its origins—that the good is a true or accurate copy. It is exactly the same as another good bearing the same mark, and different from other goods carrying other marks (these are both fictions, of course, but ones that are legally recognized and maintained). The mark also configures fidelity in a second sense: it registers a real contact, a making, a moment of imprinting by one for whom it acts as a kind of fingerprint: branding. But if the mark figures a fidelity, it also inspires fidelity in the form of brand loyalty. The consumer seeks it out, domesticates it, and provides it with protective shelter; he or she makes a form of bodily contact with it. The mark distinguishes the copy by connecting it to an originator and connecting the originator with a moment of consumption.

The trademark organizes the “magic of the mimetic faculty” in mass-mediated consumer societies: as the mass-reproduced stamp of an author(iz)ed site of origin that authenticates mass-produced goods as bearing the trademark owner’s singular distinction, the mark might be seen as channeling the cultural energy of mimesis into the form of the signature—an attempt to appropriate it under the proper name. A commercial surrogate identity, the trademark maintains and garners exchange value in the market, alluring consumers in its endless uniformity with promises of both standardization and distinction.

Laws of intellectual property generally—copyright, trademark, and publicity rights, in particular—constitute a political economy of mimesis in capitalist societies, constructing authors, regulating activities of reproduction, licensing copying, and prohibiting imitation, all in the service of maintaining the exchange value of texts. Such laws, I have argued, provide both generative conditions and prohibitive obstacles, managing mimesis (authorizing true copies and distinguishing between legitimate and illegitimate reproductions) while it polices alterity (prohibiting the resignifications of others).

Such legal forms always invite encounters with alterity: the other that always haunts the proper name,¹⁸ the difference that always already occupies the space of the signature¹⁹ that attempts to keep it at bay. Laws that construct the fiction of the singular, unique, and self-contained work (copyright), the mark of singular meaning and origin for the commodity (trademark), or enable celebrities to control the publicly recognized indicia of their personalities as their autonomous productions (publicity rights) prohibit intertextuality as they simultaneously deny it as a source of meaning and value. In its denial, legal discourse gives voice

carries the meaning that goes without saying—what you think of when you're not thinking anything special. The unmarked tense of verbs in English is the present . . . to indicate the past, you mark the verb . . . The unmarked forms of most English words also convey 'male.' Being male is the unmarked case. Endings like *ess* and *ette* mark words as 'female.' Unfortunately, they also tend to mark them for frivolousness . . . ”³⁶ Even the use of *he* as the sex-indefinite pronoun is an innovation that we can trace to the emergence of a bourgeois public sphere.³⁷ Gender, however, is only one form of socially marked difference and those of alternative genders only some of the many others who do not have the option of remaining unmarked. In the United States, the visual display of excessive corporeality marked the other in the national social imaginary—from the noble stoicism of the cigar-store Indian, the sexualized female abundance of the exotic always-elsewhere,³⁸ to the hyperembodied black mammy of a fictionally reconstructed South.³⁹ Such imagery became particularly pervasive in the early era of mass-reproduced consumer goods (1870–1910), during which mass subjects and national consumers were constituted in a complex network of hegemonic practices.⁴⁰

If the bourgeois public sphere offered only self-abstraction and disincorporation, the mass-mediated sphere of consumption provides opportunities to reclaim the body. An infinite realm of consumer choice purports to create conditions for a variety of identifications and a seemingly inexhaustible supply of bodily images offered for consumption, seizure, and occupation.⁴¹ The mass subject is visually oriented toward embodied others in acts of consumption that bind him or her to a national market. The visual culture of embodied others who have historically figured as trademarks and instances of their consumption, appropriation, rejection, and reappropriation in negotiating the boundaries of the nation will be drawn upon to illustrate a politics of authorial mimesis coming into contention with assertions of alterity.

Through the use of trademarks the bourgeois subject was able to secure privileges for his otherwise unmarked identity, provided that he marked his prosthetic self⁴² with a recognizable sign of distinction; commercial privilege might be marked by the corporeal indicia of publicly recognizable social others. If the bodily images available for identification in the public sphere figure as private properties protected by intellectual property laws, then the politics of identification in mass-mediated public spaces assumes new dimensions of complication. If trademarks are constitutive in the visual culture of mass markets and an orientation to corporeal representation is fundamental to contemporary subject-formation, what political difference does the law make when the

bodily images of cultural others circulate as marks of private commercial distinction? I will address this question by way of examples, moving through a century but focusing on two fin de siècle moments that exemplify the politics of social difference and commercial distinction in mass-mediated public spheres. In these examples, we see how advertising produced a sense of belonging to an imagined community of American consumers—a contemporary term of art—as well as contemporary challenges to the forms of inclusion and exclusion these earlier cultural practices effected.⁴³

In the late nineteenth century, U.S. trademark laws become federal in markets newly recognized as national. The emergence of trademark laws in the late nineteenth century needs to be understood within the context of mass manufacturing, mass communications, and mass immigration—and the resulting standardization of American culture.⁴⁴ The legal protection of imagery as private property provided a means for marrying mass production of goods, mass reproduction of cultural forms, and the mass interpellation necessary to transform a mass of immigrants into similar consumers. In this context, manufacturers, wholesalers, and, to a lesser degree, retailers needed to conjure a particularly American consumer upon which to focus marketing efforts. One way this was culturally accomplished was with marks of trade that all would recognize as binding them across the nation. In precisely the same period, we see pre-occupations with the concept of the frontier, the defining features of American civilization, and its distinction from, and annexation and containment of, the savage, the tribal, and the primitive. These processes were linked; the American was constituted in relation to the embodied otherness from which he or she could be distinguished and whose cultural and corporeal distinctions he or she would both recognize and consume.

The nominal disembodiment of the American citizen,⁴⁵ I would suggest, was created, in part, by a realm of national signification—mass-advertised trademarks—that denied or downplayed the cultural and ethnic differences of some Americans,⁴⁶ while it emphasized the cultural differences of others. It did so literally, through the medium of the (consuming) body and the embodiment, on a national scale, of others whose claims to an American subjectivity were complicated by contemporary relations of subjugation.⁴⁷ The “incorporation of America”⁴⁸ was integrally related to the corporeality of others.

Recent scholarship asserts that “whiteness” as a social identity must be articulated, and that whiteness and Americanness have been integrally related.⁴⁹ Nationalisms may be sexualized,⁵⁰ but they may also be (e) raced

and (en)gendered in processes in which a “white” subject-position comes to be forged and occupied while unacknowledged as such. In the late nineteenth century, dominant U.S. culture was preoccupied with the nature of civilization and its alters and with the prerequisites of nationhood and its connection to frontiers. The discourse of commerce, advertising, and the law of trademark projected images of barbarism, conquest, and servitude to construct the subject-positions of mass consumer and American citizen. Images and descriptions of African Americans, Indian peoples, Hispanic and mestizo subjects, as well as the perceived “tribal” groups colonized by U.S. imperial expansion (e.g., Filipinos, Hawaiians, and “Eskimos”) and references to the corporeal indicators of recent American incorporation (e.g., hula dancers, pineapples, igloos, fur parka bonnets, etc.) were mass-reproduced and projected on a national scale through the medium of trademarks (as well as design patents and label copyrights). Through magazine and streetcar advertising, trade cards, billboards, packaging, and premiums, concepts of savagery and civilization, primitivism and progress were legitimated. In their visual consumption of imagery and their bodily consumption of goods, Americans envisioned and incorporated the same signs of otherness that the national body politic was surveilling and incorporating.

In early federal trademark law, a mark had to be distinctive; it could not be confusing, and it could not be the name of the product itself. It had to be a mark that differentiated one’s wares from the goods of others—it distinguished one’s product in the market. The legal basis for the claim that such a mark is a form of property is the old mercantile notion of goodwill. The mark that accompanies all of one’s goods and makes them recognizable attracts the “loyalty” of consumers, and this loyalty and good feeling is a valuable asset: goodwill. The positive value of one’s trade is congealed in the exchange value of the sign. The trademark marks the point of origin of the good—and serves as a surrogate identity for the manufacturer—in a national market in which the distances between points of mass production and points of consumption might be vast.

Not wanting to stifle commerce by allocating exclusive rights to terms that were merely descriptive of goods, their place of origin, or their material qualities, courts would only recognize as marks those indicators sufficiently distant from the goods so that competitors would not be precluded from engaging in the same field of trade. A distributor could not claim “Idaho” as his or her mark for potatoes grown in that state, but “Arctic” might well be seen as sufficiently fantastic to mark one’s particular brand of citrus fruits. Marks had to be connotative as well as denota-

tive, but they could not be purely referential. As U.S. markets became national, marks needed to be recognizable to millions of people, from diverse ethnic backgrounds and language groups, many of whom were illiterate. The use of images to mark products was an early development, and manufacturers were taught the semiotics of marketing quite explicitly in numerous manuals. One such manual, intriguingly titled *Trademark Power: An Expedition into an Unprobed and Inviting Wilderness* (1916) by one Glen Buck,⁵¹ lists a series of equivalences that consumers could be expected to know; one of them is a figure of an Indian followed by an equal sign and a picture of a cigar.

Manufacturers were advised to choose marks that were as distant as possible from the nature of the goods they were actually selling. Indeed, an early article in one of the first widely distributed legal periodicals, the *Albany Law Journal*, suggested that foreign words, words in dead languages, and terms and images from areas of the world not empirically (but presumably mythically) known in the local market promised to be the best markers for a manufacturer’s wares. Their exoticism was precisely what rendered them “merely arbitrary designations for the sake of distinction.”⁵² Businesses were advised to establish a “strong mark” that was not “descriptive” nor “suggestive,” but “distinctive.” In their quest for distinction, it is not at all surprising that producers turned to bodily signs of social difference—those indicia that Americans, via World’s Fairs, were coming to recognize as the signs of the primitive other that marked their own civilization. Robert Rydell⁵³ demonstrates that the midway imposed an evolutionary framework upon the world’s peoples in U.S.-based international expositions between 1876 and 1916.⁵⁴ The proliferation of American Indian and “Polynesian” imagery and the ubiquity of black servants in the advertising and marketing of consumer goods at the turn of the century is quite remarkable.⁵⁵ Thus, publicly recognized signs of social difference created a pool of cultural resources within which manufacturers fished for their own distinction, that is, the distinction they could claim as their own.

Given what Tausig claims to be the “alleged primitivism of mimetism,” it is not surprising that manufacturers should capture the perceived mimetic abilities of others in the magic of the commodity’s own mimetic circulation. Those with perceived mimetic capacities—American Indians, Eskimos, children, especially twins, talking birds, animals, and “savages” of every stripe—figure prominently as trademarks. Creatures deemed by a dominant culture to have a “sixth sense”—these creatures served to judge similitude, while simultaneously marking difference. Moreover, such advertising was often “internally referential, an

to the anxiety that authorship always embodies—the anxiety that authors (be they designers of toothpaste labels, advertising copywriters, toy manufacturers, or game show hostesses) might not be the exclusive and originary source of meaning for those signifiers that circulate in their names or embody their personas in the public sphere.

To the extent that the commercial signature itself represents social others in forms that recall their enforced alterity, it is particularly likely to attract the authorial energies of those members of social groups who have an interest in contesting claims that stereotypical images of themselves be considered mere extensions of another's proper name. Ironically, as I will argue in closing this chapter, those persons who continue to bear identities marked by former colonizations, and who find those colonial identities currently commodified as marketing signs, must claim the author-function²⁰ and trade in the marks of their own cultural distinction if they are to appropriate these as forms to which they can make legally legitimate claims.

Marked and Unmarked Bodies

Scholars developing the concept of the “public sphere”²¹ advocate an attention to the quotidian cultural politics that engage commodity/signs.²² The trademark is both a commodity with an exchange value in its own right and a sign that condenses a relationship between a signifier, a signified, and a referent (linking, for example, a logo, a lifestyle, and a product). Michael Warner,²³ drawing heavily upon the work of Lauren Berlant, asserts the importance of mass media and their characteristic commodity forms in the construction of contemporary publics and subjectivities: “Nearly all of our pleasures come to us coded in some degree by the publicity of mass media. We have brandnames all over us.”²⁴ Trademarks, Warner suggests, are constitutive parts of a public sphere, constructing a common discourse to bind the subject to the nation and to its markets.²⁵ Some of “us” and “our” ancestors, however, *are*, in fact, brandnames: Cherokee[™], Oneida[®], Seminoles[®], Winnebago[®], Crazy Horse[®], Aunt Jemima[®], Geronimo[®], and Uncle Ben's[®]. Some of “us” may have national trademarks all over our bodies, others of “us” have bodies and nations that are all over the commercial landscape *as* trademarks.

Public sphere scholars suggest that to “think the nation” we must consider the characteristic mass media forms that interrelate collectivities and imagined national communities,²⁶ while forging corresponding

forms of subjectivity. Beginning in the eighteenth century, a bourgeois public sphere and a disembodied and universalized rational subject were created through the medium of print (a configuration of publicity in which the author played a distinct and central role, as I will explore in my concluding essay).²⁷ Subsequently, mass-mediated consumer capitalism has interpellated a subject (the “consumer”) with a more visual orientation and with more corporeal desires—desires met both by material consumption and by visual consumption of embodied others made available through mass media.²⁸

To understand the particularities of subjectivity in a mass-mediated public sphere, it is helpful to consider its differences from the eighteenth-century bourgeois public sphere celebrated by writers like Habermas.²⁹ To be a subject in the bourgeois public sphere required identification with a disembodied public subject. Embedded in the possibility of this public was a promise, “a utopian universality that would allow people to transcend the given realities of their bodies and their status.”³⁰ “No matter what particularities of culture, race, gender, or class we bring to bear on public discourse, the moment of apprehending something as public is one in which we imagine—if imperfectly—indifference to those particularities, to ourselves.”³¹ The promise of transcendence has never been fulfilled: “For the ability to abstract oneself in public discussion has always been an unequally available resource. Individuals have specific rhetorics of disincorporation; they are not simply rendered bodiless by exercising reason. The subject who could master this rhetoric in the bourgeois public sphere was implicitly—even explicitly—white, male, literate and propertied. These traits could go unmarked, while other features of bodies could only be acknowledged as the humiliating positivity of the particular.”³²

The bourgeois public sphere claimed no relation to the body, but the particular features of particular bodies did have significance. Access to the public sphere came in the whiteness and maleness that were denied as forms of positivity; “the white male qua public person was only abstract rather than white and male.”³³ Such asymmetries of embodiment and demarcation, were, as Nancy Fraser³⁴ has argued, constitutive of the liberal public sphere itself: “Differences in the social world [always] come coded as the difference between the unmarked and the marked The bourgeois public sphere has been structured from the outset by a logic of abstraction that provides a privilege for unmarked identities”³⁵ The term *marked* is, of course, a staple of linguistic theory: “It refers to the way language alters the base meaning of a word by adding a linguistic particle that has no meaning of its own. The unmarked form of a word

even as the frontier “closed” it was recreated as theater and amusement, fun and fantasy for the continuing consumption of Americans.⁶⁴ An aesthetic of “surfeit, gigantism, the colossal”⁶⁵ is a peculiarly American one that distinguishes a nation and the capacities of its citizenry to deal with the challenges posed by the ever-expanding frontiers of imperial ambition. Even as Turner introduced his famous “frontier thesis” at the American Historical Association meetings, held in conjunction with the 1893 Columbian Exposition, Buffalo Bill’s enormously popular Wild West Show was attracting crowds to the midway. The “last” frontier was recreated as theater, adventure, and myth,⁶⁶ even as new frontiers, north and south, across the Pacific and the Caribbean, were envisioned.

The spoils of imperial conquest—tepees, wigwams, tropical fruits, icebergs, igloos, and polar bears: magnified images of an alterity claimed in the spirit of national expansion—were first asserted as trademarks in national commerce and then erected in three-dimensional highway sculptures that mark the Midwest. All garnered goodwill but bore no referential relationship to the goods they advertised. Such creatures, from huge plaster buffalo to menacing Indians, still flank the nation’s highways. One such roadside colossus, built in Bemidji, Minnesota, in the bitter cold winter of 1937, commemorated a local legend, the great logging hero Paul Bunyan. Used by novelist John Dos Passos “to symbolize the American worker, grown larger-than-life in the strength of collective action, and thus feared by ‘the Chamber of Commerce,’”⁶⁷ he had achieved national folk-hero status as a workingman’s champion, standing firm against both big business and the weather during the Depression. In Bemidji, he was easily appropriated for local commercial needs, attracting tourists to an annual winter carnival. This oversized hero and the twentieth-century myths he inspired are characterized by Marling as “a distilled, collective response to the frontier.”⁶⁸

Legend has it that Paul Bunyan was born in Maine but found the East too small, and so headed West “with Babe, his big Blue Ox, whose hoof-prints carved the Great Lakes.”⁶⁹ But he fit the Midwest quite well, and in Minnesota at least three towns claim to be his birthplace, setting up larger and larger Bunyans to mark their hegemony.⁷⁰ In fact, Bunyan and his retinue appear to have their origins not in folk tradition, “but [in] the shiny byproducts of modern jazz-age advertising—of popular, mass culture.”⁷¹ Lumberjack stories were endowed with a single protagonist (between 1914 and 1922) who became the registered trademark for promoting the products of the Red River Lumber Company of Minnesota. The corporation made the quintessential workingman—its class other—its

property and the sign of its distinction. The colossus made him the town’s trademark for drawing commerce as well.

Paul Bunyan’s trademarked and touristic presence has not, however, gone unchallenged. The national commercial values he so colossally embodies are not universally celebrated, not even in Minnesota. As motorists traverse the northern state, a sign alerts them that they are entering the Red Lake Reservation and subject to the laws of another nation. The respect due the Chippewa peoples and their customs cannot be legislated, but the painted billboard that confronts drivers makes it clear that one is encountering (an)other form of national embodiment. Another huge image of Paul Bunyan appears on yet another highway, but this one is besieged; the Chippewa trickster figure of Nanabozho (elsewhere known as Nanabush) assaults Paul Bunyan with a gigantic walleye, thrashing him over the head with it.⁷² Chippewa peoples have longstanding conflicts with local logging concerns; the walleye may be seen as an emblem of their economic independence, arguably an indicia of their own autonomy in commerce. Native peoples borrow the monumentality and mode of publicity of the billboard trademark—its power of assault, as Walter Benjamin⁷³ saw it—to pitch one mythic figure against another. Asserting a sovereignty that is invisible to most travelers, they use the commodity form to mark the borders of another nation. Borrowing something of the enchantment of the commodity and its characteristic mode of address, they counter it with (an)other form of spiritual embodiment, alter/ing its claim to a singularity of meaning. Paul Bunyan, however, is not insulted, assaulted, or attacked without local resistance. The Red Lake billboard is routinely chopped down in nocturnal forays by local residents outraged by the sacrilege done to their local mascot; people on the reservation resurrect the sign again and again. Mimesis and alterity are embodied on national frontiers. Nanabush laughs.

Move further west, to urban California, and the nationalist politics of Chicano activists, to examine yet another instance of the embodied other meeting the commodity under its own signature. In Jose Antonio Buciaga’s work *Drink Cultura: Chicanismo*, the particularities of Chicano social life and identity are explored: “the ironies in the experience of living within, between, and sometimes outside of two cultures.”⁷⁴ The book’s front cover displays an obvious parody of the famous round red Coca-Cola® signs that graced thousands of U.S. streetcorner shops during the mid-twentieth century. The “Drink Cultura” image—a clear satire on the famous trademarked script—was a work that ironically challenged the universalizing and homogenizing pretensions of the mul-

tional corporation ("We'd like to teach the world to sing in perfect harmony") by associating the drinking of the soft drink with the consumption of *cacacac*—Brazilian "white lightning"—simultaneously alluding back to an older "Enjoy Cocaine" parody and giving it a regional twist. The "Drink Cultura" image was widely appropriated, appearing on T-shirted torsos throughout Central and South America in the 1980s. Burciaga's reappropriation of the work, however, is marked by yet another signature, the *c/s* sign that marks Chicano *placas*, or graffiti, in the southwestern United States. A Mexican American symbol that appears to have originated in South El Paso's Segundo Barrio, it means *con safos*, which translates literally as "with safety": "It was meant as a safety precaution, a barrio copyright, patent pending. No one else could use or dishonor the graffiti. It was an honorable code of conduct, a literary imprimatur. Like saying 'amen' it ended discussion. Above all it meant 'anything you say against me will bounce back to you.' Most kids respected a placa if signed with the *c/s*. Without that symbol, a placa would sooner or later get scribbled on or erased. Some kids would put a double *c/s* sign or put xxx after it, or a skull and cross bones, which physically threatened anyone who did not honor and respect the code."⁷⁵

The term originates in *Calo*, the Chicano dialect that combines Hispanicized English, Anglicized Spanish, and the use of archaic fifteenth-century Spanish words that remain in use in isolated pockets of northern Mexico and the Southwest. Although it is derisively called Tex-Mex or Spanglish in the United States, Barciaga values it as a "unique multicultural, political, societal and linguistic function and formation."⁷⁶

The sign of the *c/s* shields from attack, repels insults, and stands for itself. "Chicano artists and writers of the late sixties and early seventies often used the *c/s* symbol in signing their works, especially when the works were political or cultural in nature."⁷⁷ The trademark form is altered to assert a cultural difference, to assert (an)other body in the body politic and challenge the illusion of national homogeneity that might otherwise go unremarked in the public sphere. Even the term *Chicano* was originally considered an insulting imposition, blurring boundaries between distinct forms of essentialist embodiment. Both Hispanic and American Indian, it recognizes an ancestry of both conquerors and conquered, a link to an indigenous past (for many Mexicans it meant a *pochos*, or "spoiled fruit"). Ironically, many of those who first identified themselves as Chicanos forged that identity in opposition to particular trademarks, in boycotts nominated by particular brand names: "the Coors® boycott, the Gallo® wine boycott, the Farrah pants boycott, and the Frito Bandito® boycott."⁷⁸ Such boycotts were not led by Hispanics—

a government and media term that attempts to unite Latinos from diverse parts of the Americas without regard for racial, class, and political difference—but by Chicanos whose political consciousness was informed by a historical awareness of the exploitation of both Indian ancestors and campesino forebears.

When Burciaga reappropriates the "Drink Cultura" image—itself an appropriation of one of the most ubiquitous trademarks of U.S. global cultural hegemony—with the mark of *con safos*, he effects another signifying intervention into a historical chain of intertextuality marking a series of political realignments. But the power of capital should not be underestimated; when I tried to get Burciaga's permission to reproduce the cover of his book in a description of my own research, I found him reluctant. His publisher has received warnings from Coca Cola that the "Drink Cultura" image is considered a violation and dilution of their trademark. They threaten to enjoin any future imitations of the work; controlling mimesis, they will police alterity.

The newly signed-off "Drink Cultura," appropriated under the mark of Chicanismo, marks only a ceasefire on a particular terrain in which the significations of capital, the nation, and ethnic identity continue to evolve. Burciaga suggests that recent developments in Chicano political identity formation involve "independence from those feelings of shame, hate and guilt that we may have experienced because of Mexico."⁷⁹ The embrace of the mother country and the release from shame that Burciaga characterizes as a new aspect of Chicanismo may not be so secure from re-sign(nations) as the *con safos* intimates, however. Chicanos may well find their "return" to Mexico reinscribed with unanticipated signatures: "In Redwood City, California, the Mexican flag was hoisted over the Taco Bell® fast food restaurant . . . the local Mexican-American business community was angered and the flag was taken down. Taco Bell® is determined to make inroads into the Mexican community through its culture and economics."⁸⁰

More recently, the first Taco Bell was established in Mexico City. National borders, bodies politic, and the signs of national belonging are complicated in communities caught up in the global restructuring of capitalism.⁸¹ Redwood City, California, for example, is one end of an unofficial conduit for people, labor, and goods that stretches to the state of Michoacan in Mexico. Home to thousands of documented and undocumented rural Mexican workers and their children, this impoverished area lies adjacent to the wealthy mansions of Atherton, the university community of Palo Alto, the high-tech business developments of Menlo Park, and in the midst of the postindustrial success stories of the Silicon

alley. Relations between Redwood City and the villages of Michoacan cannot be described either as relations between two "communities" or as enter-periphery ties, as dependency and modernization theories would have it.⁸² Instead, the movement of Mexicans into and out of the area challenges our spatial images of discretely bounded nations and poses instead what anthropologist Roger Rouse refers to as a "transnational migratory circuit."⁸³

Mexicans and Latinos toil in restaurant kitchens, hotel back rooms, nurseries, and in the gardens of the affluent estates they border. They constitute a "postindustrial" proletariat whose relevant communities are constituted within mobile and spatially extended relationships. Their allegiances and commitments are oriented toward the continuation of this circuit rather than to any bounded community or to any nation-state:

Thus, people in the United States may spend large amounts of time and money trying to obtain papers without ever seeking citizenship because it is as Mexican citizens with the right to "permanent residence" that they will be best equipped to move back and forth between the two countries. And they may send their children back to Mexico to complete their educations or to visit . . . in part because they want to endow them with the bilingual and bicultural skills necessary to operate effectively on both sides of the border . . . [they] see their current lives and future possibilities as involving simultaneous engagements in places associated with markedly different forms of experience.⁸⁴

Rouse suggests we follow Americo Paredes in recognizing borders not simply as lines but as sensitized and productive zones: fractured realities of multiple histories, languages, and traditions come into confrontation or juxtaposition.⁸⁵ National borders are mobile and diffuse as immigration officials gain access to workplaces in the United States and U.S. capital interests penetrate ever further into rural Mexico. Working in the service sector and the informal economy, often traveling to their jobs on routes designed to minimize encounters with migration authorities, such Mexican migrants lived for years in fear of deportation (and many still do). Producing fast food (or cleaning up its consumption) in substandard conditions at less than minimum wage is the lot of daily life. At night they retire to Redwood City, where the spaces of Mexican village life are reinscribed on suburban terrain⁸⁶ and the food of the mother country may be one form of solace. When the forces of American capital moved into this neighborhood to tender inferior food at an imitation

taqueria under the sign of the Mexican flag, annoyance, if not anger, might well have been anticipated.

The prices at Taco Bell simultaneously invite and insult this community. Far lower than those that can be tendered by any local entrepreneur, they attract those whose jobs in this country pay less than minimum wage, teenagers, and large families with parents who work multiple jobs to make ends meet. Empty stomachs and empty pocketbooks convince many to forego the flavors of home, the smell of roasting corn, sizzling carnitas, and the tang of tomatillos, cilantro, and jalapeño in favor of dry, stiff, prepackaged shells filled with flavorless ground beef and mildly doctored ketchup. Such fare is savored in an ambience devoid of irony or sensitivity: "Orders are served in under five minutes and placed on a plastic tray with a paper placemat headlined, 'The Border Run.' It depicts an open highway in the desert leading to a Taco Bell and surrounded by highway signs that tell you to 'Crack It, Bust It, Jump It, Snap It or Cross It.' This, of course, is a subtle reference to crossing the border illegally or jumping a once-proposed fifteen-mile ditch south of San Diego. The hidden message is that eating at Taco Bell can be not only a treat but a real, live *Indiana Jones* adventure."⁸⁷ Many of the area's residents risk life and limb to make trips across the border and continue to face serious sanctions if they are found without papers; their daily movements are calibrated to the potential monitoring of those who police the border in the transnational frontiers of the American West. For these migrants, there is little entertainment in the sign of the nation-state tendered as one of the trademarked forms of their own alterity nor in the commodification of national borders as games of chance and amusement.

The Americanization and Anglicization of Mexican culture may well increase under the pressures of the North American Free Trade Agreement, but the signifying forces of U.S. and Canadian capital are by no means guaranteed cultural hegemony. In its daring, the sign of *con safos* does risk erasure when it affixes its signature to the corporate forms that mark commercial space and brand consumer experience, but forces of prohibition and publicity, censorship and censure dance dangerously for proprietors who evoke them, permitting the ongoing promiscuity of appropriation in the spaces of postmodernity. The very form of the *con safos*, the graffiti that operates as a form of signature in late capitalism, is itself an embodied performative. It is both imitative and contagious; it registers sympathy and contact to assert alternative bodies occupying alternative spaces. As a medium, it can be seen as a kind of counterpublicity because it mimics the logic of the trademark's communicative

mode; marking distinction while maintaining anonymity, it adopts the utopian promise of the brand name:⁸⁸ "by appearing everywhere, it aspires to the placeless publicity of mass print or televisualization. It thus abstracts away from the given body, which in the logic of graffiti is difficult to criminalize or minoritize because it is impossible to locate. Unlike the self-abstraction of normal publicity, however, graffiti retains its link to a body, in an almost parodic devotion to the sentimentality of the signature."⁸⁹ As literary theorist Susan Stewart has noted, graffiti seems to claim the imaginary uniqueness promised by commodities but continually deferred and delayed.⁹⁰ Marking an individual's past presence at the scene, graffiti re-mark a past point of bodily contact. Their presence on subway cars, high up on walls and under bridges ironically remarks upon the actual *difficulty* of access to mass communication modalities in a public sphere anachronistically attached to an Enlightenment egalitarian logic that purports to be committed to equality of communicative activity. In its emphasis on the individual name, graffiti comments upon the proliferation of the distinctive marks that pass for public speech in a consumer society—the private labels of the powerful that constitute the "culture" of late capitalism.⁹¹ As Stewart points out, contemporary consumer culture contains a tension; consumption is ubiquitously offered by a mass culture that insinuates itself pervasively as social signification in communities where consumption itself is a potential practice. In such social arenas, "graffiti as a phenomenon vividly take on the form and thematic of that tension as graffiti writers or artists address the relation that those cut off from consumption bear to consumerism."⁹² Moreover, in Los Angeles, at least, gang graffiti mark territory, the "nations" of youth subculture. Often called "tags," graffiti operate interstitially in a mass-produced consumer sphere. The street becomes an endless billboard for the marks of a nascent counterpublic.

Owners of trademarks must always cope with the presence of the other in the cultural spaces they attempt to colonize. The activities I examine might be seen as forms of counterpublicity, articulations that deploy consumer imagery and the bodily impact of the trademark to make the claims of alternative publics and other(ed) national allegiances. But the *con safos* and Nanabozho operate in different realms of embodiment, commodification, and nationhood. The organized control of mimesis is met with an alter that re-signs it, but in fundamentally distinct ways. The difference of the American Indian nation marked by the trickster is legitimated in a fashion that nationalist sentiments of Chicano activists or inner-city graffiti artists cannot be. The static and monumental bodily icons of the midwestern plains mark fixed and officially

recognized boundaries, whereas the stealthily ascribed signatures of mobile bodies mark continually contested territory, both cultural and geographic. The mimicry of commerce is met, in the first instance, with a counterpublicity of pride that proclaims its own alternative enchantments; in the second, counterpublicity is limited in communicative power by its deliberate indecipherability in a wider public sphere. The Taco Bell incident serves as a cautionary reminder of the power of capital to appropriate the indicia of national difference as exchange value, even as capital accumulation becomes increasingly less constrained by the borders of the nation-state. Some nations, as we shall see, have been significantly erased even as they have been adopted and mass-reproduced as marks of trade.

Fighting Redskins®

The dynamics of relationships between those whose social alterity was specularized and those who profited from its commodification in marks of trade have shifted dramatically as these objects of property have been turned into subjects and sites of politics. Specularizations of alterity have come under the intense scrutiny of civil rights movements since World War II. Peoples historically othered in imperialist social imaginaries protest the continuing circulation of indicia iconic of their former subjugation and contest the propriety of this continuing commodification of colonial desire. The multiple metamorphoses of Aunt Jemima, the abandonment of the Frito Bandito, protests over Sambo restaurants and Robertson's Golly(wog), are but a few of the struggles in which minority groups have focused attention on commodity/signs. Indigenous peoples in Hawaii, for example, seek to rescue such signs of their traditional culture as the hula and the luau from their commercial distortions in a tourist industry founded upon the consumption of their cultural distinction—exotic spoils of an unconstitutional territorial incorporation.⁹³ Whether these commodity/signs are commodifications of their heritage or stereotypical signs of their alterity, many peoples find "their own" representations legally owned by others.

Of those historically subjugated groups who have demanded an end to the commodification of their cultural difference in North American mass markets, Native Americans have faced the longest struggles. Long after the Frito Bandito has been laid to rest, and black mummies and little black Sambos have ceased to signify on American commercial terrain (although they have returned as a form of collectible nostalgia), In-

dians are still a privileged form of alterity in advertising.⁹⁴ From Red Man® chewing tobacco, Indian Spirit® air freshener, Indian-style™ popcorn, teams of Braves®, Red Indian® jeans, Warrior boxes, and Indian heads on everything from baking soda tins and neon beer signs to children's campgrounds, the corporeality of the "Indian" continues to mark the privileges of the incorporated in commerce.

Contesting legally legitimated claims that stereotypical images of themselves be considered merely the marketing vehicles of others, Native peoples have come up against commercial indifference, animosity, and public ridicule. The movement to end the use of Native American team names, logos, and mascots has been both protracted and politically revealing. Dismissed by some as evidence of "political correctness" gone to ridiculous extremes, the offensiveness of these signs is denied by many bewildered liberals, and they are even considered complimentary by a few team owners, journalists, and zealous fans. Protests about these signs have been greeted with a curious degree of misrecognition. An examination of these controversies reveals a great deal about the trademark as a vehicle for articulatory practice.

The Washington Redskins, Atlanta Braves, Cleveland Indians, Chicago Blackhawks, Kansas City Chiefs, Florida State University Seminoles, St. John University Redmen, Chief Illiniwek of the University of Illinois Fighting Illini, and Miami of Ohio University Redskins⁹⁵ are team names that bind fans across ethnic and generational lines. Along with associated logos and mascots, these names provide steady streams of income. The law bestows on their "owners" exclusive rights to circulate these marks in commercial (and many noncommercial) contexts and powers to enjoin their use by others. As a consequence, team insignia have become valuable properties in their own right. The exploitation of merchandising rights (the right to license one's exclusive rights under trademark laws) provides a significant and autonomous source of revenue.⁹⁶

It is tempting to reduce the reluctance to abandon such marks to economics and sentiment alone. Significant profits will be lost (or dispersed) if these marks are forgone, and there are now long traditions of fan activity associated with them. The cost of conceiving popularly appealing logos, nicknames, and color combinations is not incidental.⁹⁷ In earlier chapters, I have discussed the peculiarity of the legal determination that public meaning is a form of private property. Suffice it to say here that to the extent that fans become personally attached to these symbols, the value of such intimacies accrues to the mark's legal holder. To the extent that team owners view public recognition of these symbols

as valuable assets in their own right (goodwill), any prohibition on their use is seen as tantamount to an expropriation without compensation.

Neither economics nor emotion, however, fully accounts for the cultural power of such symbols or the almost willful refusal by team owners and fans to entertain Native people's concerns. Stereotypical commercial imagery has been abandoned under minority pressures before, despite predictable economic loss and acknowledged social popularity (the Frito Bandito, for example). The damage to a people's self-esteem effected by stereotypical imagery has been publicly acknowledged with respect to African, Mexican, and Asian Americans and offensive trademarks withdrawn from commerce. After surveying arguments on both sides of this debate, I will suggest that the financial interests and the social sentiments expressed in this controversy are epiphenomena of a deeper convergence of historical, psychosocial, and legal forces.

Native people's opposition to these marks is complex, multifaceted, and far from unanimous in terms of the seriousness accorded the issue or the grounds upon which it is (or is not) condemned.⁹⁸ Owners of these marks like to quote Indians who do not object to these marks to support their own reluctance to abandon them. Since the 1991 World Series made the "tomahawk chop" famous, for example, the market for toy "tomahawks" has soared. The Cherokee tribe of North Carolina owns and provides labor for the factory that produces the foam tomahawks used at Atlanta Braves games. Chief Jonathan Ed Taylor is quoted as saying that the Redskin name (and other usages of Indian symbols) "gives our people recognition. The most important thing is that it employs my people. It means our people will get work and not stand in welfare lines. Welfare lines are a lot more degrading than using the name Redskins."⁹⁹ Some Native peoples might feel less resentment about the exploitation of Indianness if more of the profits made their way back to Indian peoples to serve their social needs—implicitly suggesting the political propriety of licensing arrangements that might funnel funds back into Native communities.¹⁰⁰ Others, of course, might well view this as a form of cultural prostitution.

The most common basis for antagonism is the conviction that the names, logos, mascots, paraphernalia, and related fan activities represent racist stereotypes of Native Americans and their culture. Historic depictions of Indians as bloodthirsty, warlike savages are racist stereotypes that are perpetuated in these rituals and have the effect of "rendering Native American oppression invisible, justified, or even glorious."¹⁰¹ More complicated is concern about the negative influence of such imagery upon

the already fragile self-image of many Native Americans and especially the self-esteem of youth and children. In communities wracked by alarming rates of youth suicide, alcoholism, poverty, and chronic unemployment, cultural representation is not insignificant. Indian youth see few images of their people in the public sphere except for monstrous caricatures and cartoon figures with painted faces, grunting and whooping unintelligibly, usually savagely preparing for battle or engaged in preposterous or exaggerated rites set in no meaningful context.

The same complexity and range of response characterizes political sympathizers in this field. The use of such symbols may be seen as (unintentionally) disrespectful, demeaning, or discriminatory: an affront to Indian dignity, a mockery of sacred Native American symbols, or quite simply as virulent racism. Types of racism perceived in the athletic field range from the glaring and obvious to the more subtle and complex. Terms like *redskins*, which have historically figured as racial epithets, are more offensive than caricatures that are seen to effect a continuation of social stereotyping, while the appropriation of the names of Indian nations and the trivializing of rituals is felt to have the effect of ridiculing them and demeaning their social significance.

Most of the so-called Indianness drawn upon in sports arenas recalls the Wild West of Buffalo Bill and Hollywood lore—a stereotypical Plains warrior culture now hackneyed to the point that it no longer reflects any particular Indian nation or tradition. This is one reason they are offensive. They reiterate historical stereotypes of the Indian as a monolithic other without internal differentiation in languages, traditions, and ways of life. The Indian as a general category and concept has a long history in North America, as Robert Berkhofer, in his classic study *The White Man's Indian*,¹⁰² delineates. Divided into at least two thousand cultures and more societies at the time of “first contact,” the idea and image of the Indian as a singularity is and remains a “white” stereotype, which nonetheless has created its own realities as a result of white power and the necessity of Native Americans to respond to it.¹⁰³ Other aspects of this ensemble of signs are more directly offensive. To the extent that feathers were and are used in highly elaborated systems of political honor and prestige and achieve sacred status in particular contexts,¹⁰⁴ peace pipes are significant in wider systems of reciprocity and meaning involving tobacco, and wampum figures in historical political negotiations of great contemporary import, their appropriation as toys and jokes is more than merely insensitive.

Unlike the appropriation of such mascots as the Irish, Native American mascots were not selected by the ethnic group they supposedly rep-

resent, nor, like Vikings, Trojans, Spartans, Buccaneers, Pirates, and 49ers, are they mythic figures of the past—except perhaps in popular culture. This is perhaps the most complicated of the injuries effected by such sports fantasies. They make mythic and imaginary images of Native Americans more visible than they are as living peoples with contemporary concerns and pressing political problems, preserving “the crippling myth that Native Americans, their lands, their cultures, their sovereign powers, their very existence, are relics of the past.”¹⁰⁵

Critics of those who oppose the use of these marks and associated practices pose contradictory but revealing arguments. Many, like Paul Tagliabue, commissioner of the NFL, claim to be sensitive to Native American concerns, but simply do not believe these team names are in any way demeaning. Others argue that use of these names and images pay a form of tribute to Native Americans by alluding to their bravery and fighting spirit; in athletic competition, aggressiveness, dedication, courage, and pride are prized, and Indians are recognized to embody these traits. John Cooke, the Redskins’ executive vice president (and son of late owner Jack Kent Cooke) goes so far as to say that the team’s name “has come to represent the best of the culture—bravery, organization, the whole works. We honor Native Americans. We believe that [it] represents the finest things in Indian culture.”¹⁰⁶ Ted Turner, owner of the Atlanta Braves, asserts that the name Braves is “a compliment. Braves are warriors.”¹⁰⁷ Ironically, however, many of the same people who believe these are forms of tribute to Native American people simultaneously argue that these names and images don’t really refer and were never meant to refer to any particular people at all and that their meanings in the public sphere have entirely to do with the teams and their time-honored traditions.

There is a paradoxical sense in which all of these contradictory assertions are true—in which the use of Native American names and images is both insulting and complimentary, embodies both negative and positive traits, makes reference to Indians but refers to no people in particular, and symbolically has more to do with American audiences than with oppressed nations. To comprehend *how* this might be the case, however, it is necessary to understand the peculiar role of Indians in American colonial discourse and the continuing symbolic role of colonial tropes in the national imaginary. Berkhofer is not the only scholar, sympathizer, or activist to point out that white views of Indians have been inextricably bound up with an evaluation of their own society and culture and reflect ambivalence about European and American attitudes toward their own customs and civilization.¹⁰⁸ The singular space occupied by the generic

Indian was and to a large extent remains a space from which modernity is judged and an image with which to comment upon contemporary social relations. Not surprisingly, the figure of the (imaginary) Indian is internally contradictory:

Encompassing . . . contrasting modes of performance, the Plains warriors performed complex and contradictory roles of enemies and American heroes, of local specimens and national symbols. With or without their permission, Indians participate in the often violent struggle over what and who is or is not American. In the symbolic economy of Wild West violence especially, American Indians are richly polysemic. . . . Indians could signify reckless defiance in the face of oppression and tyranny [as they did for Anglo-Americans cross-dressing at the Boston Tea Party] . . . disenfranchised of a continent, American Indians could also signify holders of legitimate entitlement to either repatriation or revenge. From the time of Plymouth, the Indian appeared in the bad conscience of white mythology as a symbol of savage retribution, the dark agent of God's wrath.¹⁰⁹

Such a field of contested connotations is particularly apt for the arena of competitive national sport, not least because it reiterates and reinscribes discourses of American cultural colonialism—the American frontier as a contested space testing and consolidating the triumph of a pioneering male “American” spirit, always under threat from races and cultures beyond it.

Here I think Homi Bhabha's understanding of the stereotype as a major discursive strategy of colonial discourse helps us to understand the effectivity of the trademark and the regime of truth it exemplifies.¹¹⁰ In such discourses, the stereotype of the Indian is both an object of derision and an object of desire, disparaged and admired. From this perspective, the question of whether Native American names and images are positive or negative representations ceases to be the most salient one. Instead, Bhabha suggests that we explore the stereotype in terms of the *processes of subjectification* it makes possible and plausible:

To judge the stereotyped image on the basis of a prior political normativity is to dismiss it, not to displace it, which is only possible by engaging with its *effectivity*; with the repertoire of positions of power and resistance, domination and dependence that constructs colonial identification[s] [and] subjects (both colonizer and colonized) . . . In order to understand the productivity of colonial

power it is crucial to construct its regime of truth, not to subject its representations to normalizing judgement. Only then does it become possible to understand the *productive* ambivalence of the object of colonial discourse—that “otherness” which is at once an object of desire and derision, an articulation of difference contained within the fantasy of origin and identity.¹¹¹

If colonial discourse fixes otherness in an ideological discourse, it does so in a fashion that requires that that which is already known demands a continual and anxious repetition. The force of ambivalence is what gives the colonial stereotype its currency and longevity,¹¹² and perhaps this is the heart of the trademark's value. “Indian” trademarks, more obviously than other commodified stereotypes, resonate with an extensive history of national myth making in which both Indians' noble resistance and their ultimate defeat on expanding frontiers are repeatedly imagined and reenacted.¹¹³ They may, therefore, operate more meaningfully and more powerfully than other marks in the forging of “American” allegiances in the political aesthetics of spectator positioning. (Interestingly, Indian sports trademarks have little popularity or presence in either Canada or Australia despite their similar histories of “vanquishing” indigenous populations.)

These are essentially racial dramas in which myths of historical origin are performed. Ideas about modern national foundations—which often stress racial purity or cultural priority—are produced in relation to colonial stereotypes. Recognitions of difference are “disavowed by the fixation on an object that masks the difference and restores an original presence.”¹¹⁴ “The . . . stereotype gives access to an ‘identity’ which is predicated as much on mastery and pleasure as it is on anxiety and defence The stereotype, then, as the primary point of subjectification in colonial discourse, for both colonizer and colonized, is the scene of a similar fantasy and defence—the desire for an originality which is again threatened by the differences of race, colour and culture”¹¹⁵ Bhabha focuses on the scopophilic nature of the stereotype as a site (and sight) of subjectification in which identification with the positivity of whiteness is enabled by a disavowal of one's self as other through the fixation upon an other's absolute otherness: “In the act of disavowal and fixation the colonial subject is returned to the narcissism of the Imaginary and its identification of an ideal ego that is white and whole. For what these primal scenes illustrate is that looking/hearing/reading as sites of subjectification in colonial discourse are evidence of the importance of the visual and auditory imaginary for the *histories* of societies.”¹¹⁶

If, as I have suggested, a mass of immigrants from diverse cultures were interpellated as (white) "Americans" through the commodified specularization of alterity, there is also a sense in which a national childhood is nostalgically reenacted in these scenes of fixity and fantasy in sports arenas. The sentimental attachment that people have to these images may be related to the fantasy of purity of (American) origination they provide in the face of the persistent threat of the disruption of (immigrant, underclass, alien, female?) otherness they hold at bay. Can we resist speculating that perhaps all spectators—regardless of ethnicity, race, gender, sexuality, or generation—become symbolically white, male, and American in these objectifications of the scopoc drive?

At any particular moment in the social life of colonial discourse, the differences disavowed and the nature of the subjects produced will be historically specific, but there is no doubt that the figure of the Indian has been central to articulations of Americanness throughout U.S. history and to the racial tragedy that animates them. As theater historian and performance theorist Joseph Roach suggests, from at least the late eighteenth century, Native Americans "play a paradoxically central role in the formation of a self-consciously national drama."¹¹⁷ The role is paradoxical because they are permitted entry into this history "only as they are represented by white authors and actors. In such roles—cast as effigies—they become integral to the self-invention of 'the American people' but only through artistry and imagination."¹¹⁸ Americans constantly "seek native authenticity without having to deal with living autochthons"; the function of the surrogated aboriginal is always to vanish.

Walter Benn Michaels provides one example of this in his recent study of American nativist modernism, tracing changing ideas of national identity in literature from the turn of the century to 1925.¹¹⁹ American culture in this period took on new meanings as a logic of naturalization and assimilation gave way to one of essentialized cultural identities that were racially configured. I cannot do full justice to his nuanced study, but do wish to note his assertion that the nineteenth-century stereotype of "the vanishing race" was redeployed and romanticized when it was feared that "Nordic" peoples were dying out by their failure to reproduce themselves at the same rate as "Mediterraneans" and "Asiatics." The "rhetoric of racial extinction in America was the rhetoric of the vanishing American. To think of Nordics as a vanishing race was inevitably to identify them with the Indians" and to celebrate the Indian's alleged disappearance "as a mark of his racial integrity—better death than crossbreeding."¹²⁰ In the aesthetic quest for a pure source for an American culture, American Indians were transformed into Nordic ancestors: "if

the Indians had not been perceived as vanishing, they could not have become the exemplary instance of what it meant to have a culture . . . It is because the Indian's sun was perceived as setting that he could become, I want to argue, a kind of paradigm for increasingly powerful American notions of ethnic identity and eventually for the idea of an ethnicity [culture] that could be threatened or defended, repudiated or reclaimed."¹²¹

The origin of American identity is simultaneously the scene of the extinction of the Indian, and this cultural identity was essentially racial in its contours. Whiteness was rearticulated by an identification with the Indian that no longer functioned, as it did at the turn of the century, "as a *refusal* of American identity, in effect, as a refusal of American citizenship—it would come to function by the early 1920s as the *assertion* of an American identity that could be understood as going beyond citizenship."¹²² Indians, unlike aliens and their children who could become Americans, embodied "an Americanism that transcended the state," a purity and aristocracy of an originary Americanism that those of "dark blood" could not achieve. This imaginary Indian was always a male Indian, for the female Indian poses the potential threat of miscegenation. Michaels also explores elite fantasies of carrying on dynasties untreatened by the deracinating potential of femininity and the eroticizing of relations between men that served as a subliminal model for a racially purified Americanism.

Certainly such fantasies provoke suggestive resemblances and resonances for a consideration of sports spectatorship, but it would be indulgent and historically irresponsible to map this configuration directly onto contemporary athletic arenas without empirical study. Michaels's work does serve, though, as a cautionary example of the complexities of displacement, projection, and desire in the affective life of race so central to the American national imaginary. To the extent that sports spectacles may embody collective social memory, however, it is precisely their performative corporeality that we need attend to. As Roach reminds us, "kinesthetic imagination is a faculty of memory [that] . . . inhabits the realm of the virtual . . . its truth is the truth of stimulation, of fantasy"¹²³—although its social effects may be tangible indeed.

Sports trademarks do not stand as abstract icons in the public sphere but focus a kinetic interpellation of spectator/fans that links bodies in the production of esprit de corps—what Americans might call "team spirit."¹²⁴ Discussing such performative dimensions of homosocial bonding in sports, Milind Wakankar notes:

at the core of such collective activity is the establishment of the link between the male body and the mass through physio-psychosocial assemblages of series of actions . . . for the effective interpretation of the subject. The proximity of so many uniformed, uniforming, bodies-in-unison initiates a kind of silent communion . . . Since every action mimes another, collective mimesis sustains the possibility of collective regeneration. As Bourdieu explains, "collective bodily practice," by "symbolizing the social, contribute to somatizing it and . . . by the bodily and collective *mimesis* of a social orchestration, aim at reinforcing that orchestration."¹²⁵

Stereotypical trademarks seem to serve as totemic forms that mark and galvanize bodies in public rituals of homosocial bonding. Not only do fans inscribe these marks on their bodies by donning licensed goods, they engage in corporeal appropriations of alterity—imitations and imitations of imaginary indigenes. Surrounding and animating these trademarks are rituals such as the infamous "tomahawk chop," the "warwhoop," the smoking of "peace-pipes," the beating of the "tomtoms," the wearing of "warpaint" and "warbonnets" while on the "warpath," the assumption of an alleged Indian ferocity and bloodthirstiness in songs and dances, and even the ritual planting of flaming spears.¹²⁶ In addition to clothing and coffee mugs, bath towels, garbage containers, and even toilet paper are adorned with trademarked caricatures of Indians.¹²⁷

This is not the first instance in U.S. history in which living peoples have been metaphorically erased through appropriations of their alleged alterity in the forging of emergent identities. Indeed, there seems substantial evidence of such activity in working-class popular as well as elite literary culture. Eric Lott's work on blackface minstrelsy is pertinent here, for, like Bhabha, he is concerned with the contradictory impulses at work in stereotypicality, and the dominant racial subjectivities it enables. For our purposes, what is especially significant is his exploration of bodily caricature in popular cultural practice. Lott denies that the meanings of popular culture are ever purely reflective of or mimetic with political domination in the social field. The blackface mask "is less a repetition of power relations than a signifier for them—a distorted mirror, reflecting displacements and condensations and discontinuities between which and the social field there exist lags, unevennesses, multiple determinations."¹²⁸

Lott explores the simultaneously transgressive and oppressive dimensions of this racial cross-dressing that made possible the "formation of a self-consciously white working class"¹²⁹ and contributed to ideologies of

working-class manhood in the antebellum Northeast. Combining fear and fascination with degraded others in a mimicry of potent masculinity, feelings of racial superiority were indulged while class insecurities were assuaged, class resentments voiced, ethnic conflicts mediated, and a class identity articulated through the occupation of black bodies.¹³⁰ Among other things, blackface acts elevated the "black Irish" into white Americans: it was "an 'Americanizing' ritual of whitening through parodic distance."¹³¹ (Michael Rogin similarly finds Jewish assumptions of blackface to symbolically function as markers of assimilation into white America.)¹³² Again, this space of cultural cross-dressing is a largely masculine ideological field and not without its misogynist elements.

Cultural appropriation was, of course, central to the minstrel show—although blackface forms involved appropriation of immigrant Irish culture, southwestern humor, and frontier rituals of encounter—which was as significant as anything that might be identified as authentically black or African. Popular culture in America has always been "a site of conflicting interests, appropriations, indeed 'nationalities,' even in its allegedly national forms."¹³³ In these Americanizing rituals, however, black peoples themselves are absent and, significantly, erased. Lott shows how, from the very beginning of discussions and accounts of the form, the fact of white impersonation was forgotten. The performers became "those amusing darkies" or "the negroes" even in the most serious discussions of blackface and its meaning, as if the originals were in some way lost.¹³⁴

Behaviors that simultaneously involve forgetting and impersonation, or erasure and enactment, are not socially unusual. They mark a relation between surrogacy and effigy central to the creation of circum-Atlantic identities.¹³⁵ Roach, for example, argues that "public enactments of 'forgetting' or 'dramas of sacrificial substitution'"¹³⁶ in spectacles of cultural surrogation were crucial to the self-inventions of modern "cultures." Often the surrogated double is alien to the culture that stages it, and signs of the socially marginal provide the cultural idioms through which a community asserts identity. According to Peter Stallybrass and Allon White, "The result is a mobile, conflictual fusion of power, fear and desire in the construction of subjectivity: a psychological dependence upon precisely those Others which are being rigorously opposed and excluded at the social level. It is for this reason that what is *socially* peripheral is so frequently *symbolically* central."¹³⁷ As Roach eloquently phrases it, "the relentless search for the purity of origins is a voyage not of discovery, but of erasure."¹³⁸ What is erased, of course, is both the mixtures, blends, and hybridities in the histories of a people, and the contemporary social life of those others whose cultural forms are appropriated in the displace-

ment of memory into more amenable representations through which this collective identity is forged.¹³⁹

The violence instrumental to the creation of America is forgotten, as is the actual life of indigenous peoples, whose return is nonetheless staged by the occupation of their bodies in forms of caricature. Their difference is appropriated, as it were, in *effigy*: "a general phenomenon of collective memory . . . [t]he effigy is a contrivance that enables the processes regulating performance—kinesthetic imagination, vortices of behavior, and displaced transmission—to produce memory through surrogation."¹⁴⁰

Although as a noun it means a pictured likeness or crudely fabricated image, as a verb "it means to evoke an absence, to body something forth, especially something from a distant past."¹⁴¹ In sports arenas, then, I suggest that we see "more elusive but more powerful effigies fashioned from flesh. Such effigies are made by performances. They consist of a set of actions that hold open a place in memory into which many different people may step according to circumstances and occasions. I argue that performed effigies—those fabricated from human bodies and the associations they evoke—provide communities with a method of perpetuating themselves through specially nominated mediums or surrogates."¹⁴²

Just as blackface minstrelsy "functioned as a dominant cultural figuration of black people that covered up the people themselves,"¹⁴³ holding them captive to representations constructed by others—stereotypes it would take years to loosen—so too are indigenous peoples in North America disguised, dissimulated, and disempowered by representations that have less to do with their culture than a highly mediated set of white responses to it, filtered through racist presuppositions. The enactment of Indianness in athletic arenas, held constant by the totemic power of the trademark form, functions as a form of whiteface minstrelsy.¹⁴⁴ Hence the special disturbance Native peoples voice when African Americans don "Indian" regalia in the contexts of sports events and the hostility registered at the alleged hypocrisy of another historically oppressed and stereotyped minority engaged in such behavior. This disturbance registers an implicit recognition that not only is the black caricaturing the "Indian" in such moments, he is asserting his "whiteness" in so doing.

Blackface minstrelsy's disastrous consequences for black social representation are echoed in the continuing erasure in the public sphere of Native Americans as a living people by virtue of the ubiquity of the popular cultural stereotypes. Just as "black people had little room to contest publicly the social meanings generated out of their culture,"¹⁴⁵ an extended period of Native American political powerlessness has enabled these images and rituals to become ingrained in American memory. To-

day, many Indian and First Nations peoples feel that their presence as stereotypical images is more pervasive and compelling than the conditions of their lives, their poverty, and their political struggles. Mythic representations of them that are owned by others have greater precedence in the public sphere.

Legally, Native Americans are doubly disenfranchised by virtue of this history of powerlessness and representation, because laws of trademark focus on dominant public meanings in the allocation of rights.¹⁴⁶ Here, critics of Native people's complaints about stereotypical marks unconsciously articulate an underlying legal logic when they assert that whatever the mark might have represented originally (even assuming it was any particular person or people), it no longer has this meaning. Such nicknames, mascots, and rituals are not racist, they suggest, because they have acquired a separate meaning apart from whatever Indian origins they might have had; they are now primarily and most significantly part of the time-honored traditions of the teams they identify. So, for example, John Cooke asserts that the word *redskins* simply means football in Washington, D.C., and Paul Tagliabue may quite plausibly remark that "fans don't identify, for example, *Redskins* with Native Americans."¹⁴⁷ Other fans see these team names as attributes of their own familial, regional, or gender identities.

The legal doctrine of secondary meaning supports these claims. To the extent that a descriptive term by extensive use as a mark in commerce has come to be associated with a particular manufacturer, retailer, or service provider, it will be recognized as a signifier to which he or she has exclusive rights, by virtue of the fact that the public now associates the term with his or her wares. For Native peoples, however, these new meanings and their public recognition are products of (and an ongoing source of) the injustices they have historically suffered. Many Native American names, for example, are far more prominent due to their mass reproduction as trademarks than are their original referents. People hear the term *Winnipeg* used to refer to vehicles more often than they do to refer to a people, are more likely to know *Oneida* as a silverware than as a tribal group in Wisconsin, and recognize a *Pontiac* as a car, not as a great indigenous statesman in North American history. To tell them that these terms no longer refer to them is not to make a mistake of fact but simply to reiterate the injury. It is just one more of the many ways in which Native Americans are reminded of their symbolic status as an invisible and vanishing peoples,¹⁴⁸ whose images serve primarily as effigies in the national imagination. Victims of the frontier and symbols of its loss in the nation's imaginary, they have figured for so long as a meaningful absence

that their contemporary presence struggles to find visibility and voice in the public sphere. Commercial imitations of their embodied alterity—prosthetic selves¹⁴⁹ that belong to others—mark their continuing colonization in mass-mediated culture, precluding full political engagement in the public sphere.¹⁵⁰

We know, however, that “in the objectification of the scopic drive there is always the threatened return of the look.”¹⁵¹ If the powers bestowed by trademark laws serve primarily to protect the entrenched privileges of those who hold proprietary rights in these stereotypes, the economic and symbolic power of the trademark ironically also provides the site for emergent forms of counterpublicity. The very public recognition that makes a trademark so valuable provides public opportunities to effect a form of detournement,¹⁵² which American Indian media activists and their supporters have exploited. The annual nature of sports spectacles provides regular publicity opportunities and the on-field accomplishments of the teams brings them to media center-stage on an ongoing basis. At such times, the nicknames, mascots, and other marks of their distinction are pervasive, and anything relating to these teams is news that is likely to attract national media coverage. Ironically, then, Native Americans may receive more public attention and media respect (as well as new hostilities) for their grievances and social concerns at precisely the moment when these stereotypes are most prominent. As Vernon Bellecourt, head of the National Coalition Against Racism in Sports and Media, ruefully acknowledges, unlike so many other Native American issues, “a story about the offensiveness of the name of a football team will get coverage from coast to coast.”¹⁵³ Indeed, Native American activists have engaged in their own form of cross-dressing—as Quakers and Pilgrims—to get their message across. The real challenge for Native activists is to determine how to use the media attention that accrues goodwill for the trademark to dispel old stereotypes and to educate the public about a wider range of Indian concerns and issues.

A quarter century of protest has failed to erase racist stereotypes in professional sports arenas (although reforms at the levels of primary, high school, and college athletics have been effected, state legislatures have shown support, and media sympathy for the issue has grown).¹⁵⁴ Legal grounds are increasingly proffered for challenging the intellectual property rights in such images—including trademark expungement proceedings, defamation suits, passing off litigation, publicity rights claims, and state civil rights actions—the most ambitious of these being the effort to seek cancellation of federal registration for the “Redskins” trademark.¹⁵⁵ Legal challenges to the use of these marks (including con-

gressional intervention that thwarted attempts by the Washington Redskins to have a new stadium built on federal lands)¹⁵⁶ have thus far failed to induce any professional teams to change their names, but they too serve to keep the issue of racism toward Native Americans in the national spotlight. They also create negative publicity for team owners, a form of pressure that might ultimately yield other dividends for Indian peoples.

Consuming Crazy Horse

The law itself affords opportunities for counterpublicity efforts. Indian peoples are now recognizing the potentials as well as the dangers inherent in the proprietary forms of the bourgeois public sphere; mimicking the bourgeois author may prove to be an effective way to counter an enforced alterity and demand respectful recognition of difference. The sovereignty afforded the intellectual property holder in the late twentieth century is a powerful force with which to dispute authorial claims to own images of alterity. Ironically, the most successful way for indigenous peoples to challenge these stereotypical representations of themselves may be to claim them: to claim the misrecognitions of others as their own proprietary products. To do so they must occupy the author-function and seize the commodity form against the grain: to protest inappropriate commodifications and to assert a differential embodiment that is alter to or other than the fetishes of an earlier era of mass cultural enchantment. To counter what Ted Jojola nominates “image injustice” (and to maintain the limited forms of sovereignty they have achieved), Native Americans acknowledge the need to gain control of their own imagery as well as their own image in mass-media environments.¹⁵⁷ Self-determination involves self-definition.

Descendants of the Lakota statesman Crazy Horse, angered to learn of the appropriation of their revered ancestor’s name and image as a trademark by a manufacturer of malt liquor, have invoked the legal process to oppose this use of their heritage and to politically assert the legal significance of their own understandings of property and propriety.¹⁵⁸ Consultations in which I engaged in contemplation of this trial may serve to illustrate the ironies faced by those whose cultural distinction attracts the entrepreneurial energies of others. Using legal arguments that included the descending ownership of Tasunke Witko’s (Crazy Horse) publicity rights, Sioux peoples and their lawyers discovered that proprietary litigious strategies promised greater success than the more mean-

ingful claim that the Sioux are spiritually injured by the use of an ancestral name to market a substance that continues to poison the lives of many Native communities. Nonetheless, they have insisted on a recognition of proprietary claims that accord with tribal custom; by making these claims in tribal court—the forum best able to forge law in accordance with tribal norms—they assert the legitimacy of alternative national needs.

When Crazy Horse Original Malt Liquor was launched in 1992, protests (coming from figures as diverse as President Bush's surgeon general and the Pine Ridge Tribe's executive director) were first directed to Congress, resulting in federal legislation and state legislative proposals barring the use of the name.¹⁵⁹ Ferolito, Vultaggio & Sons, distributors of the beverage, countered by successfully challenging the Federal Bureau of Alcohol, Tobacco, and Firearms' labeling prohibition on First Amendment grounds.¹⁶⁰ Ferolito, Vultaggio & Sons are two Italian Americans from Brooklyn who create images and promotion campaigns for the beverage market. Like many postmodern entrepreneurs, they trade in imagery and symbolism to create new distinctions for goods that have become more or less functionally indistinguishable. They became particularly infamous for the "target marketing" of beverages with high alcohol content to African American and Hispanic men (groups that purchase most of the malt liquor consumed in the United States), a practice that "deliberately employs package designs, images, and phrases the advertisers believe will appeal to racial minorities by playing into fantasies of potency and conquest."¹⁶¹

Crazy Horse was a patriot and a religious leader who denounced the introduction of alcohol into Indian communities. The use of his name to market an especially alcoholic malt liquor¹⁶² coupled with a crude picture of an Indian chief and religious symbols was bound to draw outrage. Moreover, the product's label paid tribute to Crazy Horse in a fashion that denied the bloody politics of a history of genocide. Here is the copy: "The Black Hills of Dakota steeped in the History of the American West, home of proud Indian Nations a land where imagination conjures up images of Blue Clad Pony Soldiers and magnificent Native American warriors. A land still ruttled with wagon tracks of intrepid pioneers. A land where wailful winds whisper of Sitting Bull, Crazy Horse, and Custer. A land of character, of bravery, of tradition. A land that truly speaks of the spirit that is America."¹⁶³ We might, like Michael Dorris, wonder whether these were the same blue-clad lads who massacred two hundred freezing Dakota captives at Wounded Knee.¹⁶⁴ Crazy Horse was

in fact murdered by one of these pony soldiers *after* surrendering to their authority.

Reference to the Black Hills is more than simply geographical; this is the traditional holy place of the Lakota. It is indeed "home of Proud Indian Nations," but it is not merely "imagination [that] conjures up" these soldiers and their antagonists, nor ephemeral "wailful winds [that] whisper of Sitting Bull, Crazy Horse, and Custer." These memories, kept alive through invocations of these historical figures and their narratives, are social practices constitutive of contemporary and continuous "processes of identity-formation by Lakota people."¹⁶⁵ In the malt liquor's trade dress, however, this "land of character, of bravery, of tradition" is stripped of living inhabitants with human agency so that only the land "truly speaks of the spirit that is America." Such tropes work to position "Proud Indian Nations" in the past, a classical period of "magnificent warriors" and "intrepid pioneers." The only tradition deemed relevant today is the one to which "America" lays claim. One of their public relations consultants suggests that it would have been more offensive to celebrate the great American West without including Indians.¹⁶⁶ Indians are included here, however, more as features of landscape than as living peoples with historical memory.

Ferolito & Vultaggio appeared to believe that they had merely taken something from the public domain and turned it into something of value; whatever symbolic value the name had was due to their own authorship of the trademark.¹⁶⁷ They argued that any ban on the mark would be a "confiscatory taking" of private property.¹⁶⁸ Ferolito & Vultaggio went further than simply claiming authorship of the mark. They also staged a protracted dialogue between authorship and alterity that inscribed many of the contradictions we saw to be characteristic of the use of Indian names and mascots in sports arenas. First they denounced the protest as trivial; the chief executive officer of the company suggested that the protesters "get a life."¹⁶⁹ Then they said that the name was chosen without any knowledge that Crazy Horse was a significant historical figure.¹⁷⁰ Later they issued a press release that "maintained that the name was deliberately chosen as a tribute to Crazy Horse,"¹⁷¹ going so far as to suggest that "they meant to celebrate a man who has been described as 'the greatest leader of his people in modern times,' a man respected for his leadership, pride, discipline, self reliance, and independence."¹⁷² A month later they claimed that "Crazy Horse was and is a true American hero, known and revered not for a spiritual or religious role, but as an independent self-reliant and proud leader."¹⁷³ Meanwhile, their public

relations firm issued a press release that insisted that "the acceptance of Crazy Horse's role, whatever his role may have been, among Native Americans, was not, and is not, universal."¹⁷⁴ Besides, it was asserted, Native American "attitudes" toward the name were not the only "attitudes" that should count.¹⁷⁵

Ultimately, they determined that if they could not dictate the meaning of this historical figure and fix his symbolic resonances, they would create another character for publicity purposes. They authored an alternative Crazy Horse and insisted upon a recognition of his legitimacy. Faced with the claims of historical others, they created another history, marking a counterhistory featuring a fictitious "warrior named Curley, who later adopted the colorful nickname Crazy Horse."¹⁷⁶ First an ordinary guy, he became a brilliant warrior who, "although he was religious, was not a spiritual leader in the Pope Paul or Martin Luther King concept."¹⁷⁷

Despite the personas they authored and authorized, the United States Patent and Trademark Office examiner refused to register their mark, finding that it violated a section of the Federal Trademark Act that bars the registration of marks deemed "immoral . . . or scandalous matter; or matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute."¹⁷⁸ Given the ambiguity of these terms and the diverging approaches courts have taken to their interpretation, it is highly unlikely that this ruling will go unchallenged or withstand constitutional scrutiny.

The decision to claim proprietary rights in Tasunke Witko's name and image was not one easily made. Crazy Horse refused ever to have his image imprinted by photography and would not even permit his image to be drawn:

Big Crow along with all other descendants of Crazy Horse had been raised in a tradition of silence that prevented any discussion of the family's relationship to Tasunke Witko. Crazy Horse himself was believed to have instituted this silence, telling his relatives that they must never speak about their relationship to him . . . In an interview in 1994, Big Crow explained why he had decided to break his promise after 42 years: "I'd been listening to people right next to me saying: 'Where are Crazy Horse's descendants? Why won't they stand up for him?' And I couldn't acknowledge who I really was. Finally, after efforts by others failed, I knew I had to stand up."¹⁷⁹

Named administrator of Tasunke Witko for the purposes of representing his estate in these legal proceedings, Big Crow filed a probate petition in

the Rosebud Sioux Tribal Court. But as he himself admitted, "In a spiritual sense, I can never go home again."¹⁸⁰

From the beginning, this was more than an ordinary publicity rights claim; attorneys working on the case were politically motivated to induce mainstream courts to recognize tribal customary and common law as legitimate sources of law.¹⁸¹ It has been a longstanding goal of indigenous activists to have tribal court judgments recognized in the federal courts and respected as sources of legal precedent in nontribal tribunals. As indigenous legal activists well understand, this aspiration is fraught with risk; it compels them to speak the languages of dominant others while inflecting the other's categories with unanticipated meanings and stretching them to accommodate injuries suffered by those who bear cultural difference.

The attorneys representing Crazy Horse, for instance, soon recognized that most of their concerns about inappropriate commercial appropriation might be analogized to various forms of property rights recognized outside of the tribal courts. To do so, however, was to assume risks of cultural misunderstanding both within and beyond Sioux reservations. For example, even to appoint an administrator for the Crazy Horse estate for these purposes was, arguably, to privatize an ancestral name of significance to a wider network of extended kin than those likely to be legally recognized as beneficiaries of the estate.¹⁸² Moreover, many of those closely related to Crazy Horse still maintained the pact of silence about their relationship. As a consequence, attorneys directing the suit were compelled to develop their litigation strategy publicly, in meetings that involved collaboration with communities in three reservations and in Rapid City. Elders expressed the pain they felt when encountering the malt liquor, and many refused even to touch the empty bottle when it was handed around at meetings. An emergent consciousness among tribal youth of the harm caused by the commodification of tradition was one outcome of these gatherings.¹⁸³

The use of the tribal court forum was both strategic and symbolic, or to put it another way, significance was part of the strategy. Attorneys made a clearly political statement when they brought an action against two East Coast marketing and manufacturing companies in a venue in the Black Hills—that fabled land of their adversary's advertising lore—in a court system that the defendants (and their lawyers) were almost certain to know nothing about and probably never imagined to have any jurisdiction over them. Moreover, the claim for damages was astutely rendered in traditional Sioux terms: a braid of tobacco, a racehorse, and

a four-point Pendleton blanket, for each state and month in which the malt liquor was sold. The image of these two Italian American entrepreneurs leading horses across the plains to show homage due to an Indian ancestral spirit is certainly more striking than the accompanying claim for punitive damages. Finally, by adding two other causes of action to the publicity rights claim—one from Anglo-American law (the intentional infliction of mental distress) and the other derived from tribal custom (defamation of the spirit)—attorneys for the estate compelled the defendants to venture into alien territory and view their own authorship through the lens of alterity. It may well take years for the jurisdictional issues in this case to be resolved,¹⁸⁴ but there is little doubt that it is one of the more fascinating instances of historical others interrogating the claims of postmodern authors.

Mimicking Authors at the Albers of Property

Ironically, proprietary counterclaims may afford more persuasive forms of counterpublicity than assertions that racial stereotyping and derogatory portrayals damage the public estimation of a people and the self-esteem of their children. Assertions of theft seem to have greater rhetorical value in American politics than assertions of harm. It would have been possible, for example, to demonstrate that Crazy Horse was held as a common law mark in trade by tribal peoples long before the malt liquor was put on the market. Both a local tourist monument and its merchandising operations as well as a rifle manufacturer had received tribal authorization for tributary uses of the name that returned revenues to tribal peoples.¹⁸⁵ To make such a claim “stick,” however, Sioux peoples would also be obliged to argue that the public was likely to be confused by the use of the mark in the new context because it suggested their endorsement. Given Native people’s experience of invisibility in American culture, however, such claims seem rather counterintuitive.

Indian activists concerned with these issues are aware that various intellectual property strategies are available to prevent the commercial exploitation of those “intangles” that Native Americans regard as their own. Most such strategies, however, involve characterizing their own historical usages of names and symbols as exercises of commercial possession, representing a course of conduct in Anglo-American proprietary terms to assert that these signifiers are marks in trade, service or certification marks, or collective marks that designate a group of producers or service providers. Families, tribal groups, tribal organizations, tribal gov-

ernments, or Indian-controlled companies may all adopt such tactics to claim preexisting rights in symbols commercially appropriated. Such rights would legally enable them to intervene to prevent cultural others from registering these symbols as trademarks or to cancel existing registrations as wrongfully registered.

When alterity is specularized, the return of the gaze may create alternative spectacles. For instance, trademark expungement proceedings—claims that the nominations of Cherokee, Seminole, Navajo, Oneida, and Winnebago, for example, are already the marks of nations and were held as properties by the governing bodies of national peoples prior to their appropriation in commerce¹⁸⁶—might provide auspicious avenues of future adversarial strategy. The public presentation to the Trademark Registrar of all signs and symbols that Native Americans hold as indicia of their nations—whose use in commerce disparages a people—has also been considered as a potential political strategy. Given that many of the more significant names, images, and symbols are held secret or in silent forms of guardianship, however, this option has distinct limitations. Sioux peoples might even publicly designate Neil Young to be their first “authorized licensee” and seek his assistance in denouncing disrespectful usages of the Crazy Horse name. Dramatic presentations to the International Trademark Association pose opportunities for a politics of publicity on a more global scale.

Under state statutory and common law dilution provisions, moreover, Native peoples could argue that the offensive commercial usage “diluted” the value and significance of their own marks. To do so, however, would involve characterizing their culture as property, a rhetorical strategy that is not without its risks, as I will argue. The Anglo-American legal system provides a number of spaces within which cultural difference may be asserted and legally recognized as distinction, but it provides little room to suggest that the cultural distinction of some social groups is being diluted by the commerce of others. As one American Indian activist remarked, you can legally protect a mark, but not a peoples’ being, against commercial dilution. American tribes and nations find that their own distinction as a people must be established as a property against the proprietary claims of others which otherwise take legal precedence. The ubiquitous generic Indian body in mass advertising will be more difficult to dislodge than specific names and symbols. If the mimetic faculty is the power to copy, imitate, yield into, and become other—and certainly we have seen how many sports arenas seem to provoke the activities of cultural cross-dressers—it is also the case that the copy draws power from and influences the original; the representation gains the power of the

represented and the image affects what it is an image of. For Indian peoples, this may mean that their contemporary social needs and political struggles are not recognized because they are publicly identified with (or subsumed by) the warbonneted caricatures first mass-produced in Buffalo Bill's Wild West Show¹⁸⁷ and ever since reproduced in nostalgia and commerce.

Tausig is optimistic about the "reschooling of the mimetic faculty" that contemporary advertising enables. But this is partly because he is generally oblivious to the *content* of the message, so enamored is he with the form. The corporeality of the knowledge he alludes to as being re-fashioned in late capitalism presupposes a universality and singularity of the human body that denies the ways history has written different bodies differentially, inscriptions that have often taken place in advertising media. The bodily incorporation of the advertising image is different when the image one consumes is a stereotyped version of one's self—when one's mass subjectivity, public subjectivity, and minority subject-position are conflictual. For those whose bodies are marked by a history of commodification (blacks in America) and those whose bodies are marked by alternative histories of fetishism (women and Native peoples), the "reschooled mimetic faculty" may not be the liberator Tausig presupposes. Still, if, as Tausig suggests, the mimicry of the other corrodes the very alterity by which an anthropology of culture was nourished,¹⁸⁸ others may well erode the cultural mimicry of alterity upon which capital continues to thrive.¹⁸⁹

Embodied distinctions continue to be claimed and contested on emergent national frontiers in those hybrid spaces forged from the histories of others and histories of othering that provoke ongoing struggles over publicity and the parameters of the public sphere. From Paul Bunyon to Crazy Horse, Golly to the Redskins, the instances explored in this chapter call our attention to the contested boundaries of nations and acts of inclusion and exclusion inscribed upon frontiers through the media of commodity/signs. They also testify to new dimensions of what we might deem the politics of mass publicity in a consumer society—strategies of property and impropriety and tactics of publicity and counter-publicity—in which authors and alters engage in dances of mimicry that simultaneously mask and reveal real financial and political stakes.

The modern public sphere presupposes a universality and singularity of the human body that denies the ways history has written different bodies differentially, inscriptions that have often taken place in mass culture itself. The postmodern celebration of pastiche and montage—mimetic juxtapositions of alterity in recordings and reworkings of re-

games of signification—must remain cognizant of the imperialist histories in which many commodified forms of available cultural difference were originally forged. Increasingly, it is necessary to attend to the post-colonial claims of those who refuse to put their alterity at the service of a mere mimetic multiplication of possibilities or abandon it to those who would celebrate a merely syncretic hybridity at the expense of historical consciousness and critique.

The mass-mediated public spheres of consumer societies bear traces of the historical trajectories that contain cultural forms; these shape the forms of subjectivity that may be politically recognized therein. The bodily incorporation of the advertising image is not a singular event; it is altered when the image one consumes is a mimetic version of one's self—when one's mass subjectivity, public subjectivity, and minority subject-position are conflictual. For those whose bodies are marked by a history of commodification (blacks in America) and those whose bodies are marked by alternative histories of fetishism (women and Native peoples), the mimesis of mass advertising must be altered in ever new and more imaginative ways. Ultimately, others must interrogate the cultural mimicry of alterity upon which capital thrives. The forms of mass publicity characteristic of late capitalism offer and compel a transformation of the magic of mimesis and its relation to alterity, presenting possibilities for new politics in public spheres.

5. The Properties of Culture and the Politics of Possessing Identity

... there is now a vigorous questioning of the search for the "authentic" indigenous voice that can speak for whole communities or cultures; it appears that more often than not this demand by colonizers for authenticity imposes an approach that simplifies and renders unitary the complexities of local life ... long and labored attempts to delineate the "true" boundaries of a tribe, the "authentic" history of Indian people, or the "real" (singular) identity of particular Native Americans only add to the process of misunderstanding that insistently translates indigenous histories, concepts of identity, and group membership in terms of distinctly nonindigenous categories and forms of thought.—Elizabeth Mertz, "A New Social Constructionism for Sociolegal Studies"¹

In 1992, a longstanding debate in Canadian arts communities erupted in the national public sphere. For three weeks that spring, Canadians witnessed a remarkable exchange on the pages of the *Globe and Mail*,² as controversy raged about the propriety of writers depicting a "culture other than one's own," when or if it was appropriate to tell "someone else's story," and whether it was possible to "steal the culture of another."³ Although the issues addressed continue to engage critical attention, the *Globe* debate was significant for it brought into sharp relief the limitations of addressing complex issues of culture and identity politics as matters of legal rights. It was also 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.

I was initially drawn to the debate because of its ironic implications for my own work in this volume. For too many years I had been crafting a volume I had provisionally titled *Cultural Appropriations*, and my advance publishing contract specified this as its title. Exploring the ways in which subaltern groups use mass-media texts, celebrity images, trademarks, and other legally protected commodity/signs to forge identities

and communities, I focused on the subcultural appropriation of authorial forms to construct alternative gender identities, challenge the parameters of nations and citizenship, express aspiration, and claim recognition. In short, I had developed the concept of *cultural appropriation* as my shorthand for cultural agency and subaltern struggle within media-saturated consumer societies. Imagine my consternation, then, to find the term "officially defined" by the Advisory Committee for Racial Equality in the Arts for no less august a body than the Canada Council. The term was deemed to mean "the depiction of minorities or cultures other than one's own, either in fiction or nonfiction," and designated a serious issue with which Council was compelled to contend.⁴

The ironies of my response to this appropriation and definition of the phrase prompted a reconsideration of the politics of certain knowledges; in this case, academic theory in law and anthropology. At first I was annoyed; a term I had used to connote progressive, subversive—or at least transgressive—forms of politics on behalf of subordinated social groups had been seized to exclusively denote the invidious practice of white elites stealing the cultural forms of others for their own prestige and profit. I was uncomfortably aware that I had formed a rather proprietary attachment to the term; my own feelings of violation rather too closely mirrored those voiced by corporations who were outraged when *their* trademarks were given unsanctioned meanings by others.

This controversy over cultural appropriation opens up 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 disoriented and disenfranchised Native peoples in North America. Exploring the internal logics of intellectual property and cultural property laws, I will question the exhausted concepts of culture and identity upon which they are based. Although the law rips asunder what Native peoples view as integrally and relationally joined, traditional Western understandings of culture, identity, and property are provoked, challenged, and undermined by the concept of aboriginal title. The limitations of legal categories for postcolonial struggles, I suggest, are apparent in responses to First Nations peoples' struggles for self-determination. In addressing First Nations claims here, I seek to avoid speaking "on behalf of" Native peoples, but to speak alongside First Nations activists who have put this issue on the political agenda, specifically addressing the dangers of receiving these

claims in traditional categories. Rather than solve the problem that has been identified as cultural appropriation (which, in any case, is never singular, but specific to particular peoples with particular historical trajectories), I suggest we rethink the terms in which we address the question and the ethical responsibilities entailed in its consideration.

Whose Voice Is It Anyway?

The recent *Globe and Mail* debate began with an innocuous article calling attention to the Canada Council's concern with the issue of cultural appropriation.⁵ Government grants, the Advisory Committee suggested, should not be made to writers who wrote about cultures other than their own unless the writer "collaborated" with members of the minority group. Such a strategy was advisable to avoid perpetuating the continuance or proliferation of social stereotypes. Although the choice of language was somewhat peculiar, most scholars were unlikely to find such a suggestion surprising. The public controversy provoked, however, was swift, furious, and quickly polarized upon familiar liberal terrain. I will suggest that these poles—which I will designate as Romantic individualism and Orientalism—operate as dangerous supplements⁶ that define an imperialist conceptual terrain that structures our laws of property and may well configure many postcolonial claims for cultural autonomy and political recognition.

As both a law professor and an anthropologist, I found myself conflictually situated with respect to the two discourses that dominated this debate. If my reservations about the proliferation of intellectual property protections made me suspicious of the authorial claims propounded on one side, my training in anthropology made me uneasy with the reification of culture that characterized the other. Struggling to establish political positions on issues of cultural representation that avoid these seductive stances, I found, was virtually impossible within a juridical framework.

In response to the report of the Council's acknowledgment of the issue of cultural appropriation, a series of letters to the editor decried the tyranny of the state over the individual and affirmed the transcendent genius of the Romantic author and his unfettered imagination.⁷ 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 these 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."⁸ 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";⁹ Erna Paris titled her intervention in the debate "A Letter to the Thought Police."¹⁰

Other critics proclaimed the absolute freedom of the author's imagination. Neil Bissoondath affirmed the autonomy of his ego in a passage 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."¹¹ Richard Outram declared that for the past thirty-five years he had been appropriating the "voices of men, women, dogs, cats, rats, bats, angels, mermaids, elephants . . . [and] salamanders"¹² 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 . . ."¹³ Russell Smith confidently asserted that "appropriation of voice is what fiction is,"¹⁴ while Bill Driedger lamented that "if cultural appropriation had never been permitted, Puccini could never 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."¹⁵

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.¹⁶ 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."¹⁷ Through his labor, he makes these "ideas" his own; his possession of the "work" is justified by his expressive activity. So 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 of authorship that dominates Anglo-American laws of copyright).¹⁸ 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.

It is, however, somewhat peculiar (and rather anachronistic) to find these affirmations made so forcefully in a context so far removed from the possessive market society in which they arose. The inevitability of market relations under which all writers were equally subjugated was presumably the condition that the Canada Council's subsidization policies were designed to eliminate as the singular social context in which all writers were compelled to toil and all aesthetic evaluations were to be made.

Critical legal scholars have written extensively about the inadequacies of Romantic individualism and its understanding of subjectivity, cultural agency, freedom of speech, and creativity (although usually under the umbrella term of liberalism, a term that is too complex to engage here).¹⁹ The social experiences of authors inevitably shape their voices, and there is no doubt that the voices of people with remarkably similar social experiences continue to dominate the cultural terrain. In a democratic society committed to multiculturalism and to promoting the social equality of diverse groups, it is surely the work of a federal agency allocating public funds to support the work of minority writers and artists who have been marginalized or silenced in the market so that Canadian culture more fully represents the cultural diversity of the country.²⁰

The Romantic individualism expounded by writers in this debate obstinately ignored the balance of power in Canadian publishing. In the worldview presented, everyone is implicitly equal in their capacity to write or be written about, to speak or be spoken for. Such a position purports to be apolitical, but manages only to be ahistorical and blind to relations of power. It ignores the very real social lines along which representation has been delineated and the difficulties faced by certain social groups to represent themselves and speak on their own behalf. Cultural representation and political representation are closely linked. It is, for example, inconceivable that a vehicle could be marketed as "a wandering Jew," but North Americans rarely bat an eyelash when a Jeep Cherokee passes them on the road or an advertisement for a Pontiac® automobile flashes across their television screens. More people may know Oneida® as a brand of silverware than as the name of a people and a nation.

For minorities in Canada who have experienced both discrimination and stereotyping, it must be insulting to have your identity analogized to that of mermaids and elephants and cold comfort to know that an au-

thor has no intention of speaking to salamanders or angels before he writes about them either. One can only assume that minority groups in Canada occupy the same mythical and inarticulate status in the writer's imagination. In such analogies, many Canadians are denied their humanity. They are not seen as fellow members of a multicultural community whose historical experiences have shaped their current political struggles, but as archetypes and characters, not recognized as human beings to be engaged in dialogue, they are reduced to cultural fodder for the Romantic imagination.²¹

Moreover, the very context in which the debate arose is conveniently elided. Puccini was not, after all, seeking funding from a government committed to multiculturalism when he wrote *La Bohème*, corporate producers would have "thrilled" us with Laurence Olivier in *Hamlet* with or without the Canada Council, and if the Canada Council were asked to fund a musical as blatantly paternalistic and condescending as *The King and I*,²² there should indeed be questions about the propriety of public funding for such a work. Market forces may dictate that sentimental works nostalgically evoking histories of colonialism will continue to be made, but government subsidization of the arts might well aspire to other criteria for excellence.

But if the fictitious being of the Romantic author colored one side of the debate, the essentializing voice of Orientalism dominated the other.²³ The article that began the debate was titled "Whose Voice Is It Anyway?"²⁴ The question presupposed 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 tell "their own stories."²⁵ Questions of "Who's stealing whose stories and who's speaking with whose voice?"²⁶ had been posed by Native cultural activists as "cases of cultural theft, the theft of voice."²⁷ Canadians were told that "stories show how a people, a culture, thinks,"²⁸ 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"²⁹ and claimed that the telling of Native stories was theft, "as surely as the missionaries stole our religion, the politicians stole our land, and the residential schools stole our language."³⁰ As I will sug-

gest 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 Canadian critical legal theorist Alan Hutchinson suggested, the three-week-long newspaper debate generated more heat than light.³¹ He proposes 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. In making this argument, however, he too adopts the tropes of possessive individualism, in which authors "have identities" that 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."³²

Most of those who supported the Council and its Advisory Committee 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. The integrity of cultural identity that grounded their claims effected a reification of alterity that mirrored the reification of authorship effected by their interlocutors. Speaking on behalf of the Canada Council, Director Joyce Zeeman claimed that cultural appropriation was a serious issue because "we have a need for authenticity. In our society today, there is a recognition that quality has to do with that authenticity of voice."³³ 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.³⁴

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 has a history of its own, and that one possesses an authentic identity that speaks in a univocal voice fully constituted by one's own cultural tradition. Anthropologists and cultural studies theorists today find themselves uneasy in the face of such arguments. It is possible to be simultaneously supportive of First Nations' struggles for self-representation and uncomfortable with the rhetorical strategies employed by many of those sympathetic to this end. For anthropologists today, such propositions about culture, authenticity, and identity are extremely contentious. They urge resistance to the siren call of authenticity, the reification of culture, and

the continuity of tradition, arguing that such ideas embody contingent concepts integral to Western histories of colonialism and imperialism.

In the past decade, it has become more intellectually respectable, and certainly more fashionable, to focus on cultural improvisations, productive hybridities, the creative politics and poetics of identity creation, celebrating and affirming cultural conjunctures rather than timeless essences, creolized intercultural processes rather than stable cultural tradition. These culturally creative processes, however, are fabrications, and the cultural resources with which emergent identities are fashioned may be tightly embraced by others in alternative systems of value. This is vividly illustrated in George Lipsitz's otherwise politically sensitive book, *Time Passages*, discussing American memory and popular culture.³⁵ Lipsitz waxes ecstatic about the emancipatory cultural creativity of the "Mardi Gras Indians"—black youths who dress and dance in Plains Indians costume during elaborately rehearsed street pageantry in New Orleans. Their "Indianness" is drawn from the Buffalo Bill imagery ingrained in American mass culture. They know that they are not "real Indians," but one gets little sense whether they know there are any or believe, as a young child recently told me (as evidence of her worldly sophistication), that "there are no *real* Indians, just like there are no *real* witches, trolls, or fairies." In our constant utopian celebration of reinventions of difference, we must be careful not to simply reinscribe the privilege of the Romantic author and his unfettered rights to appropriate all cultural value and deem it his own creative work. As Annie Coombes suggests, hybridity is no guarantee of postcolonial self-determination; it is as available to the colonizing practices of capital as it is to local strategies of resistance.³⁶

Maintaining respect for cultural tradition, however, also risks reinscribing the authority of our own cultural categories, albeit in the guise of the liberal property holder. The concepts of culture, authenticity, and identity in the *Globe* debate were posed in proprietary terms, as debates about propriety so often are in contemporary politics. The argument was constructed around the same philosophy of possessive individualism that grounds our legal categories of property. The challenges that postcolonial struggles³⁷ pose for Canadian society may not be appropriately met by habitual reliance upon categories of thought inherited from a colonial era. 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 mark the contemporary limits of Western legal imaginaries.³⁸

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."³⁹ Clifford delineates an "art-culture system," developed over the nineteenth century in the context of global colonialism and imperialism as a means of categorizing arts and cultural goods. I will suggest that these categories continue to inform our laws of property, and that they may no longer be appropriate in postcolonial contexts.

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 specter of mass society, imperialist expansion, and colonial rule.⁴⁰ 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, 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 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 closer; 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 [the late nineteenth and early twentieth centuries].⁴¹

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."⁴² 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."⁴³ 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 (MoMA) in New York 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.⁴⁴ 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 television series *Millennium* was 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 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 domination" is not addressed in the MoMA exhibit. Indeed, the emphasis is on the narrative of European "creative genius recognising the greatness of tribal works,"⁴⁵ thereby bestowing upon these objects the status of "art" in place of their formerly lowly designation as ethnographic specimens. As Clifford states, "the capacity of art to transcend its cultural and historical context is asserted repeatedly."⁴⁶ The category of art, however, is not a universal one, but a historically contingent European category, in which the artistic imagination is universalized 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."⁴⁷ 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 imperialist forays in which objects were collected from around the globe.⁴⁸ Using a semiotic square or 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. Second, he designates the category of "authentic artifacts" created by cultures imagined as collectivities.⁴⁹ Objects may, therefore, be exhibited in galleries as examples of a human creative ability that transcends 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 testament to the greatness of their individual creators. Alternatively, objects may be exhibited in museums as the authentic works of a distinct collectivity, 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 may not be marked by that society's history of colonialism that 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; they are 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 marginalized categories like "syncretism" which suggest impurity and decline. "[A]boriginals apparently must always inhabit a mythic time."⁵⁰ Cultural manifestations that 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 "arti-

facts 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."⁵¹ 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, were 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.

Although the history of copyright has been more fully investigated elsewhere,⁵² a few points are central to the argument here. 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 labor in which the expressive creation is seen as authorial "work" that creates an "Original" arising spontaneously from the vital root of "Genius."⁵³ The originality pertaining to mental labor—as opposed to manual labor or mechanical activity—enabled the author to claim not merely the physical object produced, but the literary or artistic expression itself: the "work" legally defined.

As William Blackstone wrote in the late eighteenth century in the context of literary copyright (although the same ideas were soon extended into other artistic spheres), the work is neither the physical book, nor the ideas contained in it, but the form of the expression that the author gives to those ideas: "The identity of a literary composition consists entirely in the *sentiment* and the *language*; the same conceptions, clothed 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 . . . ⁵⁴

Literary or artistic works were incorporeal entities that sprang from the "fruitful mind" of an author,⁵⁵ 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." ⁵⁶

If the expressive, inventive, and possessive individual dominates intellectual property laws, legitimizing personal control over the circulation of texts, laws of cultural property protect the material works (objects of artistic, archaeological, ethnological, or historical interest) of culture. 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 anthropological sense, in which different cultures lay claim to different properties.⁵⁷ 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 all people have an interest.⁵⁸ This attitude toward 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 advances 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, 1954.⁵⁹

The other position on cultural property that Merryman defines and denigrates is "cultural nationalism,"⁶⁰ in which particular peoples have particular interests in particular properties, regardless of their current location and ownership. This attitude toward 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 (hereinafter UNESCO 1970),⁶¹ 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."⁶² As of 1986, fifty-eight 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."⁶³

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.⁶⁴ For Merryman, such a position can only be seen as irrational because in the "source nations" who dominate among signatories to UNESCO 1970, the supply of cultural artifacts far exceeds the internal demand—"they are rich in cultural artefacts beyond any conceivable use."⁶⁵ Because such nations are relatively poor, he believes 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."⁶⁶ The possibility that other peoples may entertain other values is considered no more or 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.⁶⁷ The interest of dealers, collectors, and museums in such decisions is self-evident; in market terms, they best recognize 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 appears that he assumes that the universal human values embodied in such cultural objects are best recognized by those who will pay the market price. A "cosmopolitan attitude" would situate objects where they could be best 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.⁶⁸ 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."⁶⁹

"Cultural internationalism" finds it inconceivable that others might value objects for reasons beyond those of the market, or that there are alternative modes of attachment to objects that do not involve their commodification, objectification, and reification for the purposes of collection, observation, and display. One suspects, however, that "cultural internationalists" would likely object to the movement of Rembrandts from the Netherlands to Lagos, despite the fact that Rembrandt's paintings might be "overrepresented" in their country of origin; the Dutch "fail to spread their culture" to the Third World, and thereby "contribute to the cultural impoverishment" of peoples in Africa and Asia. The existence of vast and seldom displayed holdings in European and North American museums (not to mention private homes) does not appear to have led to any movement among "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. The "cosmopolitan" attitude espoused here appears more Eurocentric than worldly; more monocultural than respectful of cultural difference, and less concerned with the purported "interests of all mankind"⁷⁰ than with the interests of maintaining Western hegemony.

A more sympathetic case for cultural nationalism is made by John Moustakas in a law review note titled "Group Rights in Cultural Property: Justifying Strict Inalienability?" 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,"⁷¹ 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 re-

lated to group cultural identity, extending legal theorist Margaret Jane Radin's test of "property for personhood"⁷² 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."⁷³ Just as "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 . . . essential to the preservation of group identity and self-esteem."⁷⁴

Against those who would argue that such a position is paternalistic, Moustakas argues that the concept of "communal flourishing" provides an important justification for holding such property inalienable.⁷⁵ 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 inimical to communal flourishing.

Cultural nationalism, however, also draws upon Western liberal traditions in its support for the rights of groups to claim certain objects as part of their essential identities. Drawing upon C. B. Macpherson's work,⁷⁶ anthropologist Richard Handler argues that the logic of possessive individualism—the relationship that links the individual to property as it was initially formulated in Locke's labor theory of value—increasingly dominates the language and logic of political claims to cultural autonomy and legal claims to cultural property.⁷⁷ Focusing on sixty 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.'"⁷⁸

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."⁷⁹ 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. In modernity, these qualities have been extended 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 imagined to be territorially and historically bounded, distinctive, internally homogeneous, and complete onto themselves.⁸⁰ In this worldview, each nation or group possesses a unique identity and culture that is constituted by its undisputed possession of property. Groups increasingly project images of 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."⁸¹

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,"⁸² 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."⁸³

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 em-

body 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.⁸⁴ 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 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, consider 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 is 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 or her original work are realized for fifty years after 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.⁸⁵ 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."⁸⁶ Handler, like most contemporary anthropologists, asserts that cultures are not bounded, continuous over time, or internally homogeneous, that traditions are actively invented, transformed, and reimagined as social agents negotiate their political lives and relationships.⁸⁷ The culture to which groups make claims 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.⁸⁸ 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 and to the phenomena that give meaning to our lives. Ultimately, these categories of authorship and alterity serve only to culturally impoverish the Western self, while they Orientalize others. 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.⁸⁹ Denying the social conditions and cultural influences that shape the author's expressive creativity, we invest him with powers of expropriation and censorship in the name of property. Representing cultures in the image of the undivided possessive individual, we obscure people's historical agency and transformations, their internal differences, the productivity of intercultural contact, and the ability of peoples to culturally express their position in a wider world. The Romantic author and the artifacts of an authentic alterity are both fictions of a world best forgone.

Anthropologists have spent well over a decade discrediting the modern 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. Recognizing 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: "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."⁹⁰

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: "The relative power enjoyed by some people 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."⁹¹ Thus, "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?"⁹² 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. 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.⁹³ Hence, minority peoples need to critically engage questions of their representation and its influence on questions of identity formation. As we have seen, 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."⁹⁴ A return to "identity" and "culture" is necessary, in hooks's perspective, more as a means of locating oneself in a political practice than in the embrace of the positivism projected by cultural nationalism.⁹⁵ Hooks links this political project to a feminist anti-essentialism that 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 . . ."⁹⁶ 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 criti-

image of the mining of mining,”⁵⁶ as, for example, in the ubiquitous imagery of black servants on boxes holding up boxes marked with their image holding up another box, marked with yet another black servant holding a box, and so on (e.g., Cream of Wheat ads). In short, the bodies a mass manufacturing subject might claim were not likely to be his own, but might be recognized as embodying his place in national commerce.

Manufacturers, wholesalers, and retailers were thus legally enabled to make proprietary claims upon such signs against the appropriations of others by virtue of the “distinction” they could claim in the market. To assert such rights, however, one also had to make assertions about the consuming public and its knowledge—the average consumer’s likelihood of confusion. One early case is suggestive. In an appeal from the Milwaukee County Court in 1879, one Mr. Leidersdorf brought action against a Mr. Flint to prevent him from using a trademark that imitated his own trademark. Both were tobacco dealers. For thirteen years the plaintiff had manufactured and sold a type of smoking tobacco in paper wrappers stamped with the words and name “Nigger-Hair Smoking Tobacco” and claimed exclusive rights in that mark. The mark, besides the name, included “a representation of the head of a negro surmounted with a copious crop of wool, and having a large ring pending from the nose and another from the ear.”⁵⁷ The complaint alleged that “the said tobacco is a low-priced tobacco, and is to a large extent bought and consumed by a class of people who cannot read, and whose necessities and manner of living do not require them to practice more than ordinary caution when purchasing the commodities most frequently procured; and to this class of people the said tobacco has become known and is easily recognized, largely by reason of the said peculiar and distinctive trade-mark aforesaid.”⁵⁸ The plaintiff claimed that the defendant’s mark imitated their own proprietary mark and was designed to confuse and deceive customers, divert trade, and steal the goodwill the plaintiff had garnered. Purchasers who thought they were buying the genuine “Nigger-Hair” found themselves with an inferior imitation.

What makes the manufacturer’s claim so remarkable today, beyond its obvious racist proprietary (if I may “coin a term”; “coined terms” are the “strongest marks” according to the lore of trademark management), is the fact that the so-called imitation mark was a representation *not* of an African American, but of “the head of an Indian with a ring in his ear, but none in his nose”⁵⁹ with the words “Big Indian” under the picture. The judges were asked to permit the ongoing sale of Big Indian tobacco, on the basis that there was no cause of action, but refused to dismiss the claim. Recognizing several points of resemblance between the marks,

the court decided it was possible that the public were actually deceived. They therefore decided to let the case go to trial. A public sphere in which the bodily features of a “Nigger” and an “Indian” might be seen as equivalents—one form of alterity mimetic with another, and one mark of distinctive alterity an imitation of the other—was affirmed as both plausible and probable.

To produce an adequate ethnohistory of national commerce, further work will need to be done with respect to the way particular images of alterity were associated with particular products and connotations. No doubt the symbolic field of alterity was both complex and further differentiated within national and regional markets as well as along product lines and points of circulation. The initial point being asserted here is merely that an American identity was simultaneously constituted in racial, ethnic, and commercial terms, using similar strategies to distinguish others and thereby to confer distinction upon the corporate self.

Contemporary Contestations

I want to move my focus forward through a century, to contemporary fields in which embodied distinctions are established and contested on frontiers on which the boundaries of the nation are still very much at stake. Benjamin Lee suggests that the nation-state may no longer be the defining unit for what constitutes a public in contemporary circumstances: “hybrid spaces created by diasporic migrations”⁶⁰—or, I would add, hybrid spaces produced by historic contestations and contingent compromises—may be more significant sites for struggles over publicity. Occupied by “bilingual and bicultural nomads,”⁶¹ these spaces are precisely those in which we see the boundaries of nations narrated and negotiated.⁶² Given the historical focus on the “frontier” as defining the space and the possibility of American democracy (and the 1893 World’s Fair as the venue at which Frederick Jackson Turner made this thesis famous), I will focus on frontiers as liminal spaces in which nations, citizens, and their differential embodiments were expressed in commercial idioms.

Consider the fantasy colossus, the visual trademark of nineteenth-century fairs that took the body to immense proportions to mark the portals and boundaries of the American horizontal sublime.⁶³ Indians, black mammys, bison, moose, and suffragettes marked the gateway to those “open spaces”—the frontier that defined the national imaginary of democracy in the late nineteenth century. As Karal Ann Marling shows,

cisms of essentialism 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.'" ⁹⁷ Critiques of essentialism are useful, hooks suggests, to the extent that 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 that perpetuate static, ahistorical, and stereotyped images of black people's lives and possibilities. ⁹⁸ As long as the specific history and experience of African Americans and the cultural sensibilities that emerge from that experience are 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." ⁹⁹

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." ¹⁰⁰ 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, homogeneous cultures insisting upon the maintenance of a vanishing authenticity. They do not lay claim to expressive works as possessive individuals, insisting on permissions and royalties for the circulation of authorial personas in the public realm. ¹⁰¹ 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. ¹⁰² The law, however, affords them little space to make their claims. ¹⁰³ As Amanda Pask explains, 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 it-

self 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. ¹⁰⁴

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 that do not separate texts from ongoing creative production, or ongoing creativity from social relationships, or social relationships from 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 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." ¹⁰⁵

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. Only in such contexts can they be adequately addressed.

The moral and political significance of considering claims "in context" has been explored by Martha Minow and Elizabeth Spelman as a conviction that unites philosophical pragmatists, feminists, and critical race theorists.¹⁰⁶ In decision making, 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.¹⁰⁷ In this sense, "context" is not a reified social totality, like traditional anthropological "cultures," but contingent social fields of agency emergent from specific political trajectories.

Minow and Spelman argue that attention to the contingencies of a situation—the particular cultural and historical backgrounds of the persons involved—neither incapacitates us from making moral judgments nor undermines the possibility of criticism across contexts.¹⁰⁸ 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 that apply across contexts, like the writers of letters to the editor 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, such as freedom of expression, authorship, ownership, and censorship, are "rooted in particular contexts and operate within context with real and particular effects that often benefit some people more than others."¹⁰⁹ 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.¹¹⁰

Native peoples in Canada make specific claims to stories, imagery, and themes based on very specific historical experiences and the specific

needs of people engaged in contemporary political struggles in which these stories strategically figure. The claims of First Nations peoples to control the circulation of Native cultural texts cannot be facetiously 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 current 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 (purportedly) universal principles (such as authorship, art, culture, and identity) may operate as systematic structures of domination and exclusion. An evaluation and judgment 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 peoples with views about it, is a precondition of honesty in human judgments . . . The call to make judgments in context often seems misleading if it implies that we could ever make judgments outside of a context; the question is always what context matters or what context should we make matter for this moment . . . in 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.¹¹¹

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—until very recently—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 autonomy of our Peoples."¹¹² 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."¹¹³

This nexus of ecological, spiritual, cultural, and territorial concerns is central to any understanding of cultural appropriation. Simplistic reductions of Native concerns to trademark or copyright considerations and the assertion of intellectual property rights fail to reflect the full 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. This 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 the 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 their very identity as First Nations people, and a related legacy of sexual abuse.

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."¹¹⁴ 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, "The great aim of our civilization has been to do away with the tribal system and assimilate the Indian people in all respects."¹¹⁵ 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."¹¹⁶

After the 1812 War with the 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.¹¹⁷

Aboriginal peoples' relations with the state have been governed for years by the Indian Acts of 1876¹¹⁸ and 1951¹¹⁹ and their implementation by the Indian Affairs Department (IAD). The original Victorian Act defined who, legally, was an Indian, and gave the IAD sweeping powers "to invade, control and regulate every aspect of aboriginal life,"¹²⁰ 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 [British North America] Act of 1867. It also established the principle of government control over and responsibilities 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.¹²¹

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 idiosyncracies preclude smooth absorption into society."¹²² In other words, Indian cultures were obstacles to Indian people's incorporation into a larger human community as citizens of nation-states. Since World War II the strategy has shifted from cultural assimilation to the eradication of poverty—a process in which "the communal (read 'communitistic') aspects of tribal life"¹²³ 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 distinction were numerous, the residential school and agricultural work programs, 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 consequently from cultural ways of life by the uprooting and resettlement that these programs 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."¹²⁴

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."¹²⁵ 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 women married to nonaboriginal 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 [legislation] . . . 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 . . . unless they marry into "status."¹²⁶

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.¹²⁷ 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.¹²⁸ In a commentary both on Imperial Oil's sponsorship of *The Spirit Sings* exhibition at the Glenbow Museum and on 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 Peoples Recognize Themselves."¹²⁹

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 1884¹³⁰ until 1951, and sweat lodge and sun dance ceremonies were prohibited until the cultural revivals of the 1960s.¹³¹ As it 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, Native peoples' specific histories and experiences of having those ceremonies prohibited is ignored, as New Age entrepreneurs profess spiritual resources to be the fruits of human Culture, freely available to all in need of spiritual sustenance.

Loss of ceremonial objects and reliquiae 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 a politics of self-recognition and self-determination. 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 fifteenth-, sixteenth-, and seventeenth-century North American Indian artifacts from around the world for an exhibit titled *The Spirit Sings*. The Lubicon Cree Indians, involved in bitter land claims disputes 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 those who profess a cosmopolitan interest in the preservation of a purportedly universal human Culture and the anthropological cultures it allegedly values.¹³²

Joane Cardinal-Schubert argues that the Glenbow exhibit took ceremonial reliquiae out of their contexts in community life, portrayed them as lifeless objects, and "pushed the notion that Native culture was dead, wrapped up, over and collected."¹³³ 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."¹³⁴ In so doing she drew ironic attention to the relationship between the claims of a "cultural internationalism" to guardianship of all objects having cultural meaning, the claims of Romantic authorship to the ideas they deem human Culture (or public domain), those expressions they claim as properties, and the status of those cultural others who can lay claim only to au-

thentic artifacts as evidence of their specific identities. Relationships between authorship and alterity were put into sharp relief.

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.¹³⁵ The development of the idea of *u'mista* among the Kwakiutl people is instructive. Several people were tried under the antipotlatch laws in 1922.¹³⁶ In these trials, it was agreed that those charged need not serve jail sentences if the 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."¹³⁷

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 antipotlatch provisions of the Indian Act,¹³⁸ and the revitalization of the potlatch ceremony in contemporary celebrations of cultural identity. For Webster, the need to repossess these ceremonial objects¹³⁹ is an integral part of the contemporary political struggle to reconstruct and redefine Native culture and identity:

We do not have a word for repatriation in the Kwak'waka 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.¹⁴⁰

For Webster, the repatriation of material culture is not the 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 the sun dance and the sweat lodge ceremonies. Entrepreneurs even offer to turn consumers into shamans if they purchase a weekend-long course of study!¹⁴¹ In some feminist circles, Indian spiritual themes are employed in the name of the essential female.¹⁴² Although many see these appropriations as simple romanticism, many others find them far more insidious. Paul Smith, a Comanche activist, for example, suggests that progressive non-Indians should be prepared "to call romanticism the thuggish racism it really is."¹⁴³

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 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 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: "We have many particular things which we hold in-tel 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 things are our 'secrets,' the things which bind us together in our identity 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."¹⁴⁴

The commodification of Indian spirituality is understood to pose the threat of cultural dissolution.¹⁴⁵ 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.¹⁴⁶

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.¹⁴⁷ Métis filmmaker and videomaker Loreta Todd defines this inability to speak on one's 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."¹⁴⁸

The experience of everywhere being seen but never being heard, of constantly being represented but never listened to, being treated like a historical artifact rather 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 or recognized (or rewarded in the market) for recounting their historical experiences that non-Native representation of these themes is so offensive.¹⁴⁹ 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 in making such responses, these critics reinscribe Native peoples as objects of human Culture, rather than authorial subjects in their own right—contributors to Culture, not mere objects of it—capable of the expressive work that defines us as human, rather than merely serving as cultural resources 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 historically experienced at government hands—on the basis of their recognized authorial talents. It is as if there were no Natives living in the community who could speak on their own behalf, as if these historical experiences had 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."¹⁵⁰ Or, as Gerald McMaster and Lee-Ann Martin 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."¹⁵¹

Possessive Individualism Revisited: 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 dominant metaphors of world political culture. Subaltern groups and less powerful nations must articulate their

political claims in "a language that power understands,"¹⁵² 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'"¹⁵³ possessed by persons and cultures.

Ultimately, the questions of whose voice it is, who speaks on behalf of whom, and whether one can steal the culture of another are not legal questions to be addressed in terms of asserting rights, but ethical ones to be addressed in terms of manifesting one's moral and political commitments. In contexts of postcolonial struggle, the postmodern claim that cultures are constructed, emergent, mobile, and contested may seem academically abstract and exceedingly empty. Such anti-essentialisms are themselves universalisms that only beg questions of position, perspective, privilege, and power. For whom is culture emergent and contested and in what circumstances? What are the politics of deploying such knowledge alongside the struggles of those for whom possession of a culture may be the last legitimate ground a liberal framework offers for political autonomy and long-delayed self-determinations? From what position can one confidently make such claims, and how and in what circumstances is the privilege of expressive self-fashioning assumed? Ultimately, questions of culture and its appropriation are political rather than ontological ones that will demand continuing identifications rather than formal resolutions—a situational ethics that will continuously compel attention to the dynamics of mimesis and alterity.

Peoples of First Nations ancestry may well be compelled to articulate their claims "in a language that power understands,"¹⁵⁴ 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"¹⁵⁵ when they employ the tropes of a dominant language, simultaneously engaging and subverting these metaphors through the character of the alternative claims they make in the voice of an authorial other.

The perils of making claims in the language of possessive individualism writ large, however, are real, 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 filmmakers, Métis videomaker Loretta Todd quoted Walter Benjamin; she was promptly accused of appropriating Western culture!¹⁵⁶

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 while 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.¹⁵⁷ Other artists have responded to questions about the propriety of their alleged employment of Native ritual themes in ways that appeared to question the representative status of their aboriginal interlocutors.¹⁵⁸ 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.

The 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 also is embedded in these discussions 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."¹⁵⁹

Curiously, however, there is an 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 white authors what gives them the authority to speak on behalf of artistic license, or what criteria of representativeness they fulfill 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 the law's division of intellectual property from 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.

In the fashion of a modernist avant-garde, many artists entertain self-conceptions of standing outside the political and economic contexts in which they have artistic agency, and thus as being immune to assertions of representing Western culture. Situating themselves outside of any cultural tradition, they attempt to evade inclusion within the history of Western art and its privileges. Some indigenous critics see this as an "escapist fantasy: Unless whites can acknowledge and respond to their histories of power and racism as it affects all areas of culture, as it inscribes itself in their own minds, an equal and meaningful dialogue is impossible."¹⁶⁰

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 on individual imaginations than on 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 the 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."¹⁶¹

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.¹⁶² 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 the public sphere. When non-Native artists claim that Native images are a part of our Cultural heritage, they are not wrong, but they are incredibly selective. To claim Native spiritual practices, and traditions of motif and design, as part of contemporary Culture—or in the name of one's personal history—while bypassing the history of racism, institutional abuse, poverty, and alienation that enabled its incorporation is simply to repeat the process by which the painful re-

alities 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 heritage universalized as Culture.

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.—Gerald McMaster and Lee Ann Martin, Introduction to *Indigena: Contemporary Native Perspectives*¹⁶³

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 traditional European categories of art and culture and the possessive individualism that informs them. It is difficult for Native peoples to even speak about "rights"¹⁶⁴ to cultural practices or creative skills that are passed between individuals generationally through matrilineal inheritance.¹⁶⁵ Some stories are considered so powerful that one storyteller seeks permission before repeating a tale told by another.¹⁶⁶ To equate the need for such permissions to a copyright license is to reduce the social relationship between Native storytellers to one of contract and the alienation of market exchange relationships. These relationships, however, are ongoing ones that bind generations in a spiritual relationship with land, customs, and ancestors based on traditions of respect, not the 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 the exclusivity of possession and rights to alienate 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.¹⁶⁷

First Nations peoples are engaged in an ongoing struggle to articulate, define, exercise, and assert Aboriginal Title in terms not only of a relationship to territory, but of a relationship 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 relationships 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 seasons of the year. The Cree also have assumed that there will always be food from the land, so long as the *Eu*—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 . . . ?¹⁶⁸

In her language, La Duke indicates how foreign it is to her 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."¹⁶⁹ 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 they are 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 be-

ings 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, 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 many of the world's peoples. By listening seriously to claims of cultural appropriation in context and attending to the possibilities afforded by Aboriginal Title, we may better understand the properties of culture(s) and the politics of possessing identity in a contemporary world.

footwear giant did not advertise with black-owned media outlets. With the possible exception of such celebrity spokesmen as film director Spike Lee and basketball superstar Michael Jordan, both of whom received large sums in exchange for product endorsements, Nike simply was not sharing its profits with blacks" (*ibid.*, at 173).

- 124 *Ibid.*, at 98.
- 125 *Ibid.*, at 100.
- 126 *Ibid.*
- 127 *Ibid.*, at 102.
- 128 Barnett and Cavanagh, *supra* note 59, at 196–197.
- 129 Turner, *supra* note 88, at 178.
- 130 *Ibid.*, at 142.
- 131 *Ibid.*, at 169.
- 132 See the discussion of the concept of the mass subject, in chapter 4.
- 133 *Ibid.*, at xii and 84.
- 134 Turner, *supra* note 88, at 169–170.
- 135 *Ibid.*, at 5.

For further discussion of the role of the trademark in the configuration of African and African American identities and the politics of the black public sphere in globalizing conditions, see R. J. Coombe and P. Stoller, "X Marks the Spot: The Ambiguities of African Trading in the Commerce of Black Public Spheres" 7 *Public Culture* 249 (1994).

- 137 Bhabha, *supra* note 57, at 203.
- 138 The concept of hyperreality as developed by Jean Baudrillard and Umberto Eco is ably summarized in B. Woolley, *Virtual Worlds* 190–210 (1992).
- 139 The concept of the seduction used here is drawn from Jean Baudrillard, "On Seduction," in *Jean Baudrillard: Selected Writings* 199 (M. Poster, ed., 1988).
- 140 Cited in Turner, *supra* note 88, at 166.
- 141 The concept of the mediascape is borrowed from A. Appadurai, "Disjuncture and Difference in the Global Cultural Economy" 2(2) *Public Culture* 1 (1990).
- 142 S. Gregory, United contribution to "Race and Racism: A Symposium," 42 *Social Text* 16, 18 (1995).

4. Embodied Trademarks: Mimesis and Alterity on American Commercial Frontiers

- 1 C. Whitehead, "Review of White on Black," *Voice Literary Supplement* October 1993, at 25. Cited in "Miscellany," 5 *Public Culture* (1993).
- 2 See V. R. Dominguez, "Visual Nationalism: On Looking at National Symbols," 1 *Public Culture* 451 (1993); U. Hannerz and O. Lofgren, "Defining the National: An Introduction," 58(3–4) *Ethnos* 157 (1993); S. Hegeman, "Shopping for Identities: A View of Nations and the Weak Ethnicity of Objects," 3(2) *Public Culture* 71 (1991); O. Lofgren, "Materializing the Nation in Sweden and America," 58(3–4) *Ethnos* 161 (1993).
- 3 See, e.g., F. Jameson, *Postmodernism, or, The Cultural Logic of Late Capitalism* (1991).
- 4 For early and influential examples, see J. Fiske, "Cultural Studies and the Culture of Everyday Life," in *Cultural Studies* (L. Grossberg, C. Nelson, and P. Treichler, eds., 1992); J. Fiske, "The Cultural Economy of Fandom," in *The Adoring Audience* (1992).

Culture and Popular Media 30 (L. A. Lewis, ed., 1992); J. Fiske, *Understanding Popular Culture* (1989); J. Fiske, *Reading the Popular* (1989); A. McRobbie, *Postmodernism and Popular Culture* (1994); P. Willis, *Common Culture* (1990); S. Willis, "Hardcore: Subculture American Style," 19 *Critical Inquiry* 365 (1993); S. Willis, *A Primer for Everyday Life* (1992).

- 5 S. Connor, *Postmodernist Culture: An Introduction to Theories of the Contemporary* (1989); M. Featherstone, *Consumer Culture and Postmodernism* (1991); H. Jenkins III, *Textual Poachers: Television Fans and Participatory Culture* (1992); B. Jules-Rosette, "Simulations of Postmodernity: Images of Technology in African Tourist and Popular Art," 6 *Society for Visual Anthropology Review* 29 (1990); S. Lash, *Sociology of Postmodernism* (1990); D. Kellner, "Popular Culture and the Construction of Postmodern Identities," in *Modernity and Identity* 141 (S. Lash and J. Friedman, eds., 1992); McRobbie, *supra* note 4.
 - 6 Several town councils in Britain have addressed the matter, and at least one, Islington, voted to ban the trademark as a racist stereotype. Artist David Bailey's work has incorporated images of "the Golly" in a critical consideration of the character's role in British culture.
 - 7 D. Bahr, "Coming to Terms with the 'Postcolonial,'" in *Between the Lines: South Asians and Postcoloniality* 137 (D. Bahr and M. Vasudeva, eds., 1996); D. Bahr and M. Vasudeva, "Pedagogical Alternatives: Issues in Postcolonial Studies: Interview with Gauri Viswanathan," in *Between the Lines* (D. Bahr and M. Vasudeva, eds., 1996); H. K. Bhabha, "Postcolonial Authority and Postmodern Guilt," in *Cultural Studies* 56 (L. Grossberg, C. Nelson, and P. Treichler, eds., 1992); A. Coombes, "Inventing the 'Postcolonial': Hybridity and Constituency in Contemporary Curating," 18 *New Formations* 39 (1992); R. Frankenberg and L. Mani, "Crosscurrents, Crosswalks: Race, Postcoloniality and the Politics of Location," in *Displacement, Diaspora and the Geographies of Identity* 273 (S. Lavie and T. Swedenburg, eds., 1996); L. Hatcher, "Circling the Downspout of Empire: Post-Colonialism and Postmodernism," 20(4) *Ariel* 149 (1989); A. McClintock, "The Angel of Progress: Pitfalls of the Term 'Post-Colonialism,'" 31/32 *Social Text* 84 (1991); A. P. Mukherjee, "Whose Post-Colonialism and Whose Post-Modernism?," 30(2) *World Literature Written in English* 1 (1990); D. Scott, "Criticism and Culture: Theory and Postcolonial Claims on Anthropological Disciplinary," *Critique of Anthropology* 12 (4): 371–394 (1992); P. Seed, "Colonial and Postcolonial Discourse," 26 *Latin American Research Review* 181 (1991); E. Shohat, "Notes on the 'Post-Colonial,'" 31/32 *Social Text* 99 (1991); E. Shohat and R. Stamm, *Unthinking Eurocentrism* (1994); H. Tiffin, "Post-Colonialism, Post-Modernism, and the Rehabilitation of Post-Colonial History," 23 *The Journal of Commonwealth Literature* 169 (1988); Colonial Discourse and Post-Colonial Theory: A Reader (P. Williams and L. Chrisman, eds., 1994).
 - See, e.g., R. W. Steedman, *Shadows of the Indian: Stereotypes in American Culture* (1982); P. Van Nederveen, *White on Black: Images of Africa and Blacks in Western Popular Culture* (1992).
 - M. Taussig, *Mimesis and Alterity: An Alternative History of the Senses* (1993).
 - Ibid.*
 - Ibid.*, at 210.
- For examples, see A. McClintock, *Imperial Leather: Gender, Race and Sexuality in the Colonial Contest* (1995), and T. Jackson Lears, *Fables of Abundance: A Cultural History of Advertising in America* (1994).

- 13 M. Jay, "Unsympathetic Magic," 9(2) *Visual Anthropology Review* 79 (1993); P. Stoller, "Double Takes on Jay on Tausig," 10(1) *Visual Anthropology Review* (1994).
- 14 Tausig, *supra* note 9, at xiii.
- 15 *Ibid.*, at 21.
- 16 Actually, the dog is listening, not talking, as Jim Laski and Sean Cubitt pointed out to me.
- 17 Tausig, *supra* note 9, at 220.
- 18 H. K. Bhabha, *The Location of Culture* (1994).
- 19 P. Kamuf, *Signature Pieces: On the Institution of Authorship* (1988); S. Stewart, *Crimes of Writing: Problems in the Containment of Representation* (1991).
- 20 M. Foucault, "What is an Author?," in *The Foucault Reader* (P. Rabinow, ed., 1984).
- 21 See *The Phantom Public Sphere* (B. Robbins, ed., 1993).
- 22 N. Garnham, "The Mass Media, Cultural Identity, and the Public Sphere in the Modern World," 5 *Public Culture* 251 (1993); D. Polan, "The Public's Fear: or, Media as Monster in Habermas, Negt, and Kluge," in Robbins, *supra* note 21, at 33; M. Warner, "The Mass Public and the Mass Subject," in Robbins, *supra* note 21, at 234.
- 23 Warner, *supra* note 22.
- 24 *Ibid.*, at 242.
- 25 *Ibid.*, at 243.
- 26 B. Lee, "Going Public," 5 *Public Culture* 165 (1993).
- 27 N. Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in Robbins, *supra* note 21, at 1, and C. Calhoun, "Civil Society and the Public Sphere," 5 *Public Culture* 267 (1993).
- 28 Lee, *supra* note 26.
- 29 J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (T. Berger and F. Lawrence, trans., 1992).
- 30 Warner, *supra* note 22, at 239. For a discussion of bodily differentiation in Enlightenment thought, particularly in the French Revolutionary context, see J. B. Landes, "The Performance of Citizenship: Democracy, Gender, and Difference in the French Revolution," in *Democracy and Difference: Contesting the Boundaries of the Political* 295 (S. Benhabib, ed., 1996).
- 31 Warner, *supra* note 22, at 235.
- 32 *Ibid.*, at 239.
- 33 *Ibid.*
- 34 Fraser, *supra* note 27.
- 35 Warner, *supra* note 22, at 240.
- 36 D. Tannen, "Wears Jumpsuit. Sensible Shoes. Uses Husband's Last Name," *New York Times Magazine* 20 June 1993 at 18.
- 37 *Ibid.*, at 54.
- 38 C. Bongie, *Exotic Memories: Literature, Colonialism, and the Fin de Siècle* (1991).
- 39 L. Berlant, "National Brands/National Body: Imitation of Life," in Robbins, *supra* note 21, at 173; P. A. Turner, *Ceramic Uncles and Celluloid Mummies: Black Images and Their Influence on Culture* (1994). See D. Roberts, *The Myth of Aunt Jemima: Representations of Race and Region* (1994), for a discussion of the discursive relation between the South and the grotesque body.
- 40 S. Strasser, *Satisfaction Guaranteed: The Making of the American Mass Market* (1989), and R. S. Tedlow, *New and Improved: The Story of Mass Marketing in America* (1990).
- 41 Lee, *supra* note 26.

- 42 Berlant, *supra* note 39.
- 43 These examples are drawn from an ongoing study of the cultural politics of federal trademark law in the United States between 1870 and 1920.
- 44 G. Jowett, "The Emergence of Mass Society: The Standardization of American Culture 1830-1920," 7 *Perspectives* 207 (1982). Although I recognize the political difficulties involved in the use of the term *American* to refer to things pertaining only to the United States, the term was the indigenous term of national belonging in the period under examination. I have chosen to avoid using scare quotes around the term in every instance that I evoke it, on the understanding that I only evoke it insofar as it figures in national rhetoric, and do not endorse a political position in so doing.
- 45 Berlant, *supra* note 39.
- 46 See, e.g., A. R. Heinze, *Adapting to Abundance: Jewish Immigrants, Mass Consumption, and the Search for American Identity* (1990).
- 47 See, e.g., E. Lott, *Love and Theft: Blackface Minstrelsy and the American Working Class* (1993).
- 48 A. Trachtenberg, *The Incorporation of America: Society and Culture in the Gilded Age* (1982).
- 49 T. W. Allen, *The Invention of the White Race, Vol. 1: Racial Oppression and Social Control* (1994); *Critical White Studies* (R. Delgado and J. Stefancic, eds., 1997); R. Frankenberg, *The Social Construction of Whiteness* (1992); D. R. Roediger, *The Wages of Whiteness: Race and the American Working Class* (1991); C. Harris, "Whiteness as Property," 106 *Harvard Law Review* 1709 (1993); S. M. Wildman, *Privilege Revealed* (1996).
- 50 *Nationalisms and Sexualities* (A. Parker et al., eds., 1992).
- 51 G. Buck, *Trademark Power: An Expedition into an Unprobed and Inviting Wilderness* (1916).
- 52 "Trade-Marks," *Albany Law Journal* 171 (1875), reprinted in 9 *Irish Law Times and Solicitor's Journal* 171.
- 53 R. Rydell, *All the World's a Fair: Visions of Empire at American International Expositions, 1876-1916* (1984).
- 54 See also R. R. Badger, *The Great American Fair: The World's Columbian Exposition and American Culture* (1979), and B. Benedict, *The Anthropology of World's Fairs* (1983).
- 55 The same goods are now collectibles that carry a hefty price. See Turner, *supra* note 39.
- 56 Tausig, *supra* note 9, at 213.
- 57 B. Price and A. Stewart, *American Trade-Mark Cases Decided by the Courts of the United States, Both State and Federal and by the Commissioner of Patents, and Reported Between 1879 and 1887* 428 (1887).
- 58 *Ibid.*, at 429.
- 59 *Ibid.*
- 60 Lee, *supra* note 26, at 174.
- 61 *Ibid.*
- 62 *Nation and Narration* (H. Bhabha, ed., 1990).
- 63 K. A. Marling, *The Colossus of Roads: Myth and Symbol along the American Highway* (1984).
- 64 *Ibid.*
- 65 *Ibid.*, at 6.

66 *Ibid.*, at 20.

67 *Ibid.*, at 1.

68 *Ibid.*, at 9.

69 *Ibid.*

70 According to Marling:

In the 1930s, everybody knew Bemidji's mythical tales of the stupendous logging boss named Paul Bunyan. Novelist John Dos Passos appropriated the legend to symbolize the American worker, grown larger-than-life in the strength of collective action, and thus feared by "the Chamber of Commerce" and the business establishment. His *Nineteen Nineteen*, published in 1933, described . . . a martyred sawmill organizer . . . as like Paul Bunyan:

The I. W. W. put the idea of industrial democracy in Paul Bunyan's head; wobbly organizers said the forests ought to belong to the whole people, said Paul Bunyan ought to be paid in real money instead of in company scrip . . . When Paul Bunyan came back from making Europe safe for democracy . . . he joined the lumberjack's local to help make the Pacific slope safe for the working stiffs.

In 1936, Carl Sandburg devoted a canto of *The People*, Yes to an investigation of this populist hero . . . not an emblematic figure, a heroic individual . . . so while he delineated Bunyan in all his singularity—his gargantuan flapiacks, his titanic dinner table, his . . . campaigns against a monstrous species of mosquito—Sandburg cared less for the unique protagonist of the stories than for their smalltown storytellers. Who made Paul Bunyan? asked the poet . . . who invented a woodland hero mighty enough to challenge . . . the wintry wrath of nature itself . . . The people did, he declared. The anonymous folk concocted Paul Bunyan out of the genial humor of their collective imagination and mutual resilience of spirit. The Blue Snow tales were Depression-time parables, fables testifying to the force of the American will. Paul Bunyan got his massive stature from the frontier savvy and the native grit of a nation, from the energy of a whole people endowed with the indomitable legacy of the western pioneers. (*Ibid.*, at 1–2)

71 *Ibid.*, at 15.

72 I am very grateful to Brenda Child for bringing this to my attention.

73 See Tausig's discussion of Walter Benjamin, *supra* note 9.

74 J. A. Burciaga, *Drink Cultura: Chicanoismo* 5 (1993).

75 *Ibid.*, at 6–7.

76 *Ibid.*, at 7.

77 *Ibid.*, at 8.

78 *Ibid.*, at 26.

79 *Ibid.*, at 55.

80 *Ibid.*, at 21.

81 For a discussion of the economic polarizations effected by global capital restructuring and the emphasis on information technologies see S. Sassen, *The Global City: London, Tokyo, New York* (1991); S. Sassen, *Cities in a World Economy* (1994); M. Castells, *The Informational City* (1984); and *World Cities in a World System* (P. L. Knox and P. Taylor, eds., 1995). Keith Aoki and I have both been engaged in the effort to draw connections between the role of intellectual property in these new forms of capital formation and the social consequences engendered thereby. See R. J. Coombe, "Left Out on the Information Highway," 75 *Oregon Law Review* 237 (1996); K. Aoki, "(Intellectual) Property and Sovereignty: Notes toward a Cultural Geogra-

phy of Authorship," 48 *Stanford Law Review* 1293 (1996); R. J. Coombe, "Authorial Cartographies: Mapping Proprietary Borders in a Less-than-Brave New World," 48 *Stanford Law Review* 1357 (1996); R. Coombe, "The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization," 10 *American University Journal of International Law and Policy* 791 (1995).

82 See R. Rouse, "Mexican Migration and the Social Space of Postmodernism," 1 *Diaspora* 8 (1991).

83 R. Rouse, "Making Sense of Settlement: Class Transformation, Cultural Struggle, and Transnationalism among Mexican Migrants in the United States," 645 *Annals of the New York Academy of Sciences* 25 (1992).

84 Rouse, *supra* note 82, at 14.

85 *Ibid.*, at 15.

86 These constructions of space are explored in an unpublished manuscript by Roger Rouse titled "Men in Space." I thank him for sharing it with me.

87 Burciaga, *supra* note 74, at 24.

88 Stewart, *supra* note 19.

89 Warner, *supra* note 22, at 254. Warner overstates graffiti's placelessness, or perhaps simply generalizes as a characteristic of all graffiti such an abstraction from place. Graffiti in many contexts may bear very specific relationships to space and its occupation. For one example, see J. Petet, "The Writing on the Walls: The Graffiti of the Intifada," 11 *Cultural Anthropology* 139–159 (1996).

90 Stewart, *supra* note 19, 206–233.

91 For an extended discussion of the expressive politics of the trademark in one inner-city venue, see R. J. Coombe and P. Stoller, "X Marks the Spot: The Ambiguities of African Trading in the Commerce of Black Public Spheres," in *The Black Public Sphere* 233 (The Black Public Sphere Collective, ed., 1995).

92 Stewart, *supra* note 19, at 209.

93 For one discussion, see H.-K. Trask, "Lovely Hula Lands: Corporate Tourism and the Prostitution of Hawaiian Culture," 23 *Borderlines* 22 (winter 1991–92). See also H.-K. Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (1993).

94 See e.g., W. Churchill, *Indians Are Us? Culture and Genocide in Native North America* (1994). For a discussion of the rage to collect the racist kitsch of the early twentieth century, see Turner, *supra* note 39.

95 After using the name for sixty-eight years, Miami University's Board of Trustees voted to discard the name out of respect for the Miami Indian Tribe of Oklahoma in September 1996 as a response to a resolution passed by the Tribe (which reversed earlier resolutions in which the Tribe had endorsed the name). However, the Tribe did urge the university to keep using an image of an Indian chief as the team logo. See "Miami U. Abandons 'Redskins' Name," *The Chronicle of Higher Education* 4 October 1996 at A8.

96 Licensing revenues from trademarked merchandise are an increasing source of profit in both professional and college sports:

This phenomenon has transformed sports into a \$12 billion market. In 1992, analysts estimate that within the four professional leagues, Major League Baseball sold about \$2.4 billion in licensed merchandise, the National Football League sold about \$2.1 billion, the National Basketball Association reached \$1.4 billion, and the National Hockey League sold about \$600 million. Also benefiting from the growing public demand for sports merchandise, colleges

and universities have experienced a boom in sales of products bearing their logos. The Collegiate Licensing Company, which coordinates licensing agreements for 126 colleges and universities, estimates that college merchandising has reached nearly \$1.5 billion in sales during 1992. (B. C. Kelber, "Scaping the Redskins: Can Trademark Law Start Athletic Teams Bearing Native American Nicknames and Images on the Road to Racial Reform?" 17 *Hamline Law Review* 533, 549-550 [1994]). In 1992 it was also estimated that the Washington Redskins logo alone had a value to the team of more than \$1 million—through the year's sale of licensed merchandise after the Super Bowl triumph. See *ibid.*, and sources cited therein.

97 A report in *USA Today* estimated a cost of \$25,000 to \$100,000 in marketing and research efforts. See G. Mithocos, "Trying to Get a Handle: Possible Merchandise Bonanza Hinges on Selection," *USA Today* 17 September 1993 at 6c.

98 For an excellent survey of the arguments put forth on both sides of the controversy in a discussion of the likelihood of success of trademark expungement proceedings, see Kelber, *supra* note 96. Mr. Kelber cites a wealth of press reports on the issue. Another article, more exclusively concerned with the potential for canceling the Washington Redskins trademark registration, and which contains up-to-date media coverage of the controversy, is K. A. Pace, "The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?" *Pepperdine Law Review* 22: 7-55 (1994). Ward Churchill is one of the more vocal and prolific activists who argue that the commercialization of Native culture and tradition and its caricature is one of the most pernicious forces undermining Indian and First Nations' political self-determination. His writings on the topic are collected in Churchill, *supra* note 94. My own understanding of the issue was greatly enlightened by indigenous activists who attended the conference The Commercial Appropriation of Tradition: Legal Challenges and Legal Remedies, which I co-organized with Nell Newton and Peter Jaszi at the Washington College of Law, American University, April 15-18, 1994. I thank Vernon Bellecourt, Sam Deloria, Robert Gough, Michael Haney, Suzan Shown Harjo, Ted Jojola, Stuart Kaler, Chad Smith, Brian St. Laurent, Jonny Bearclub Stiffarm, and Charlene Teeters for the education.

99 In L. Shapiro, "Offensive Penalty Is Called on 'Redskins': Native Americans Protest the Name," *Washington Post* 3 November 1992 at D1.

100 James Billie, chairman of the Seminole Tribe of Florida, feels that Florida State University's use of the name "reflects a pride in Florida Seminole history." Oklahoma Seminoles are not nearly so happy, and it has been suggested that a licensing agreement could provide revenues to fund tribal needs for youth education programs. See J. Wheat, "Real Seminoles Resent the Profits FSU Makes off Their Tribal Name," *Miami Herald* 11 February 1993 at 7B. The licensing arrangement was mentioned to me by activists from the National Coalition Against Racism in Sports and Media in the spring of 1992.

101 Kelber, *supra* note 96, at 545.

102 R. F. Berkhofer Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* (1979).

103 *Ibid.*, at 3.

104 Tim Giago, editor in chief of *Indian Country Today*, says that the use of feathers in sports arenas is another example of how those things Indians hold sacred are in-

sulted: "The turkey feathers protruding from [sports spectators'] heads insult another spiritual practice of most Plains Indians. The eagle feather is sacred. It is given to the recipient in a religious ceremony, usually to honor, to thank, or to bless" (T. Giago, "Drop the Chop! Indian Nicknames Just Aren't Right," *New York Times* 13 March 1994). Feathers, however, have alternative meanings in the histories and imaginaries of European domination. Joseph Roach suggests that feathers historically figured as signs of abundance and excess or nonproductive expenditure. Like face painting (also associated with Indianness), it designated "a physical incorporation of excess expenditure, a luxurious emblem of distinction" (J. Roach, *Cities of the Dead: Circum-Atlantic Performance* 156 [1996]). The violent disappearance of the excessive other is a national mise-en-scène.

105 D. Pierson, "Redskins Nickname Will Be Protest Target," *Chicago Tribune* 19 January 1992 at C2, cited in Kelber, *supra* note 96, at 545.

106 Cited in Shapiro, *supra* note 99, at D1.

107 Cited in D. Burkhardt, "Turner Won't Change Braves' Name, but Wouldn't Mind Shopping the Chop," *Atlanta Journal* 3 December 1991 at F8.

108 See also D. Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (1994); R. H. Pearce, *Savagism and Civilization: A Study of the Indian and the American Mind* (1968 [1953]); D. Root, *Cannibal Culture: Art, Appropriation, and the Commodification of Difference* (1996).

109 Roach, *supra* note 104, at 205.

110 Bhabha, *supra* note 18, at 66-84.

111 *Ibid.*, at 67.

112 *Ibid.*, at 66.

113 For an extensive history of this trope as it repeats itself across the continent and eventually into the Philippines, the Caribbean, and Indochina, see R. Drinnon, *Facing West: The Metaphysics of Indian-Hating and Empire Building* (1980).

114 Bhabha, *supra* note 18, at 74.

115 *Ibid.*, at 75.

116 *Ibid.*, at 76.

117 Roach, *supra* note 104, at 187.

118 *Ibid.*

119 W. B. Michaels, *Our America: Nativism, Modernism, and Pluralism* (1996).

120 *Ibid.*, at 12.

121 *Ibid.*, at 38.

122 *Ibid.*, at 45.

123 Roach, *supra* note 104, at 27.

124 P. Bourdieu, "Programme for a Sociology of Sport," in *Other Worlds: Essays Towards a Reflexive Sociology* 156, 167 (P. Bourdieu, ed., 1990).

125 M. Wankar, "Body, Crowd, Identity: Genealogy of a Hindu Nationalist Ascetics," 14(4) *Social Text* 45, 59 (1995), citing Bourdieu, *ibid.*, at 167.

126 This is a composite of the many ritualized behaviors that accompany games played by teams with "Indian" names (by both fans and fans of opposing teams). No single event would encompass all of these, and some of these performances are specific to particular teams.

127 See illustrations in Churchill, *supra* note 94, at 71.

128 Lott, *supra* note 47, at 8.

129 *Ibid.*

- 130 *Ibid.*, at 68–69.
- 131 *Ibid.*, at 96.
- 132 See “Blackface, White Noise: The Jewish Jazz Singer Finds His Voice,” 18 *Critical Inquiry* 425, 431–434 (spring 1992).
- 133 *Ibid.*, at 92.
- 134 *Ibid.*, at 98. For example, the expressed fear that American culture might be a slave culture that owed too much to “Ethiopia” conveniently forgot that the forms of blackness this cultural form evoked were all fictions constructed by white imper-sonators.
- 135 Roach, *supra* note 104.
- 136 *Ibid.*, at 3.
- 137 P. Stallybrass and A. White, *The Politics and Poetics of Transgression* 5 (1986).
- 138 Roach, *supra* note 104, at 6.
- 139 To elaborate: “the vast scale of the project of whiteness—and the scope of the con-tacts among cultures it required—limited the degree to which its foils could be eradicated from the memory of those who had the deepest motivation and the sur-est means to forget them. At the same time, it fostered complex and ingenious schemes to displace, refashion, and transfer those persistent memories into [more amenable] representations . . . In that sense, circum-Atlantic performance is a monumental study in the pleasures and torments of incomplete forgetting” (*ibid.*, at 6–7).
- 140 *Ibid.*, at 36.
- 141 *Ibid.*
- 142 *Ibid.*
- 143 Loti, *supra* note 47, at 99.
- 144 There is a long history in North America of cultural cross-dressing of which the Boston Tea Party, with its howling “Indians” and “blacks,” is perhaps the most fa-mous example. Masked bands of “Indians” were part of nineteenth-century chari-varis in which contemporary social mores and behaviors were commented upon. There are also many instances of whites representing themselves as Indian sages, translating Indianness for white audiences while fulfilling stereotypical antipa-thions of authentic Indianness (getting far more attention in the public sphere than actual Native activists struggling for their people’s political rights and economic survival). New Age shamanism and some ecofeminisms provide recent examples.
- 145 Loti, *supra* note 47, at 102.
- 146 In addition, legal doctrines of laches and estoppel (which preclude one from exer-cising one’s rights if too long a delay has occurred after one’s rights have been vio-lated) serve, at least in this area, to ensure that the disempowered remain that way and that the advantages that one group exercises at the expense of another, by vir-tue of its political powerlessness, become entrenched as property rights.
- 147 Cited in Kelber, *supra* note 96, at 548.
- 148 In *Cannibal Culture*, *supra* note 108, Deborah Root’s “attempt to construct a topog-raphy of the West’s will to aestheticize and consume cultural difference” (at xiii), the author identifies a variety of sites where the cannibalization of difference is manifested. Although sports arenas are not addressed, her general comments on cultural appropriation and cultural cross-dressing are apropos. Most so-called ap-preciation of cultural difference is “done with mirrors . . . what is usually available are the morphological forms that connote difference . . . difference in effigy, as it

- were” (*ibid.*, at 69). She relates this “appreciation” to “an insidious salvage para-digm, which assumes such cultures to be dying or dead” (*ibid.*, at 96). Because of their supposedly inevitable disappearance, all adoption of their forms may seem like a form of favor—a eulogy of sorts. But “the desire to appropriate meaning from another cultural tradition is not just another romanticized nostalgia for sup-posedly dead cultures but can also be a way of marking death and conquest and doing so on the bodies and communities of living people.” *Ibid.*
- Root also points to the importance of the Indian as victim in this narrative and its Christian underpinnings. It is Indians’ inevitable victimization that makes them heroic, but such heroism presupposes that issues of land and conquest have all, al-ready, been settled. Never entirely abject, the victim in Christian tradition also sug-gests a certain moral and spiritual superiority connected with virtuous struggle. It is virtuous, however, only because it is doomed; such ways of “honoring” Native peoples imply no connection with actual Native peoples or any political connec-tion to their contemporary social needs or political struggles (*ibid.*, at 99–101).
- Joseph Roach sees this emphasis on vanishing as part of a larger project of legiti-mating manifest destiny, “in which the inevitability of Anglocentric displacement of indigenous peoples and rival colonial interests takes on the golden penumbra of a creation myth, in “which the expanding frontier and America emerged as coex-tensive imaginative spaces” (Roach, *supra* note 104, at 188, citing R. Slotkin, *Regen-eration Through Violence: The Mythology of the American Frontier* [1973], and W. H. Truettner, *The West as America: Rinterpreting Images of the Frontier* [1991]). He also mentions the ongoing exploitation in popular entertainment of a sentimental fascination with “the last of” stories as part of a genealogy of popular Indian death scenes that he sees as a form of “national wish fulfillment in genocidal fantasies” (*ibid.*, at 189).
- 149 See Berlant, *supra* note 39, for the development of the concept of the trademark as prosthesis in mass culture.
- 150 One particularly amazing example of this occurred in Canada. After the barricades had been dismantled in the Mohawk territories besieged by the Canadian Armed Forces (and the Quebec provincial police) in the Oka standoff of 1990, it was re-ported that a white entrepreneur in Quebec was seeking to market a “Mohawk Warriors” board game and to trademark the monks (e.g., Lasagne) of the central First Nations’ agents in the standoff for licensing purposes. Even contemporary politics involving Native peoples, it would appear, are quickly appropriated as the stuff of play and fantasy. See L. Roth, “Media and the Commodification of Crisis” in *Media, Crisis and Democracy: Essays on Mass Communications and the Disrup-tion of Social Order* (M. Raboy and B. Dafenais, eds., 1992).
- 151 Bhabha, *supra* note 18, at 81.
- 152 I borrow this term from the Situationists. For a brief discussion of the concept, see S. Plant, *The Situationist Internationale* (1993).
- 153 Cited in D. Grow, “The Way to Redskins Owner’s Heart Is through His Wallet,” *Star Tribune* (Minneapolis) 11 September 1992 at 3B.
- 154 For an overview of reform efforts and achievements at state, local, and federal lev-els, see Kelber, *supra* note 96.
- 155 If successful, the action would end the exclusive rights that the Washington team has in this appellation. This will not, however, preclude others from using the term, but will only prevent the team’s ability to enforce its rights against others (and thus

diminish licensing revenues), but it is assumed that the loss of these rights would devalue the trademark so dramatically that the term would be voluntarily abandoned. This raises the real possibility that more teams will use the term, at least locally, and for this reason, some supporters have opposed the proceeding. Ironically, any prohibition upon the logo would massively increase the value of the remaining licensed merchandise as these become collector's items. The action is likely to be held up in constitutional wrangling for years; one of the defenses to the suit is that the section of the Federal Trademark Act upon which the expungement proceeds is an unconstitutional restriction on commercial speech. For an analysis rejecting this legal argument, see Kelber, *supra* note 96. For an argument in support of this argument, see Pace, *supra* note 98. For more general discussions of the use of trademark law for political purposes, see S. R. Baird, "Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks," 83 *Trademark Reporter* 661 (1993), and P. E. Loving, "Native American Team Names in Athletics: It's Time to Trade These Marks," 13 *Loyola of Los Angeles Entertainment Law Journal* 1 (1992).

As a consequence, the team announced their intentions to move the stadium to Maryland and build it on private lands. Because nearly all stadium construction requires public funding or the posting of bonds, state legislatures are in positions to deny funds and make such bonds difficult to obtain by prohibiting discrimination against Native Americans, use of disparaging images, and mockery of Native American symbols. State civil rights powers also create opportunities to control such imagery in association with public schools and other publicly funded institutions.

157 See T. Jojola, "Negative Image Exploited to Undercut Indian Self-Government," *Albuquerque Journal* 27 June 1993 at B3.

158 Acting on behalf of the estate of Crazy Horse, Seth Big Crow and his activist attorneys have deliberately constructed the legal case as part of a multiple strategy: to educate and to build opposition to the marketing of the malt liquor among Lakota people; as a vehicle to engender cohesion and community pride; as part of a broader effort to gain greater legitimacy for tribal courts within tribes, in part by encouraging greater use of tribal customary law in tribal courts; and to strengthen tribal court systems as centers of resistance to the jurispahic influence of state and federal laws. More generally, this case is part of a multivocal, multilocal struggle of Indian people in the late twentieth century to destabilize the stereotypes that make up the dominant society's image of "Indianness" and replace these ahistorical, timeless, static, passive, decontextualized, Orientalized images with the multilayered, multipurpose, individual and collective identities claimed by Indian people and tribes in the late-twentieth century. (N. J. Newton, "Memory and Misrepresentation: Representing Crazy Horse," 27 *Connecticut Law Review* 1003 [1995])

159 See *ibid.*, at 1019 n.63, for citations to these public laws and state bills. Legislation was introduced in Minnesota and California, and in Washington sales were banned on the basis of that state's restriction upon the use of religious figures in alcohol promotion.

160 The justification used for banning the name was the high incidence of alcoholism on Indian reservations. However, because the product was not marketed on reservations, the use of the name was considered a protected form of commercial

speech and the barring of the name on the product not seem to be directly related to the purpose of preventing alcohol abuse among Native Americans. See Hornell Brewing Co. v. Brady, 819 F. Supp. 1227 (E.D.N.Y. 1993).

161 See Newton, *supra* note 158, at 1025, nn.85-93, for a survey of sources that describe the controversies over target marketing in inner cities, including efforts by public interest groups concerned with the health consequences and racial and sexual stereotyping effected by these practices.

162 A single bottle of the high-octane malt liquor contains as much alcohol as a six-pack of more conventional beers. Hornell Brewing Company has a history of marketing especially high-alcohol-content beverages in minority communities. In 1991 it withdrew Powermaster from the shelves after protests from the black communities in which it was most heavily marketed. Crazy Horse replaced it on the shelves in March 1992.

163 No doubt this copy is legally protected by the copyright rights of the G. Heileman and Hornell Brewing Company. In the United States, the fact that I have reproduced it in a noncommercial context for the purposes of criticism and commentary would bring it under the defense of fair use. In Canada, the fact that I had used it in its entirety would count against my claim that this was a fair dealing for the purpose of criticism, but because it is necessary to reproduce the whole to make the criticism and I have acknowledged the source (a beer bottle), I am probably safe from liability for infringement.

164 M. Dorris, "Noble Savages? We'll Drink to That." Op-Ed. *New York Times* 21 April 1992 at A23.

165 Newton, *supra* note 158, at 1018.

166 Jim Mattox, interviewed by Catherine Crier, *Crier and Company*, CNN transcript #62 (27 May 1992).

167 Letter from Hank Shafan of Ferolito, Vullaggio, & Sons to Hon. Frank Wolf (6 November 1992) at 2. On television, communications lawyer Diane Zipursky declared that because Crazy Horse is dead, there are no rights to the name, and "so it is out there, free for anybody to want to use" (in interview by Catherine Crier, *Crier & Company*, CNN transcript #62 [27 May 1992]). This shows a remarkable ignorance of publicity rights, but one, I would argue, that is symptomatic of a national tendency to regard all things "Indian" as public domain—phenomena for fantasy. I discuss this further in the next chapter.

168 Shafan, *supra* note 167.

169 Quoted in G. W. Prince, "Tall Order: The Making and Marketing of Arizona Iced Tea," *Beverage World*, June 1994.

170 D. Grow, "Relative of Crazy Horse Questions Brewer's 'Honor,'" *Star Tribune* (Minneapolis) 21 April 1995 at B3, notes that in a deposition and testimony at a hearing protesting state bans on malt liquor, Mr. Vullaggio said that he was unaware that Crazy Horse had been an honored Dakota chief. This does not explain why, then, it was corporately determined that the malt liquor would not be marketed in the Black Hills or in areas with substantial Indian populations. At the Commercial Appropriation of Tradition conference, Robert Gough, attorney for Seth Big Crow, shared with us a series of press releases prepared by Beverage Distribution Consultants, who became the public author for Ferolito & Vullaggio, and the Hornell Brewing Company. In one of these, it is claimed that the Original Crazy Horse Malt Liquor is not marketed in South Dakota, North Dakota, Minnesota, Montana, Ne-

braska, Arizona, and eight other states with substantial numbers of Indian residents. See *Backgrounder, Is Socially-Acceptable Marketing in America Changing? Products and Marketing Considered Tasteless by Some, Are Decried as Offensive by Others. Whose Attitudes Should Count?* (undated press release prepared by Hank Shafran and Mark Rodman, associates of Beverage Distribution Consultants; *hereinafter Whose Attitudes Should Count?*).

171 Newton, *supra* note 158, at 1027, citing press release dated 19 May 1992 prepared by Beverage Distribution Consultants.

172 *Ibid.*

173 Press release, *Statement of the Marketers of the Original Crazy Horse Malt Liquor* 20 June 1992, prepared by Beverage Distribution Consultants.

174 *Whose Attitudes Should Count?* *supra* note 170.

175 *Ibid.*

176 Newton, *supra* note 158, at 1018.

177 Memorandum to Sen. Alfonse D'Amato, from John Ferolito and Don Vulaggio (24 September 1992) (addendum to press release, prepared by Beverage Distribution Consultants dated 26 September 1992).

178 15 U.S.C. § 1052 (a) (1988).

179 Newton, *supra* note 158, at 1021.

180 Quoted in M. Vaillancourt, "Big Crow's First Stand: Descendant of Crazy Horse Goes Public to Keep Legendary Warrior's Name off High-Octane Beer," *Boston Globe* 4 December 1994 at A85.

181 Newton, *supra* note 158, at 1022.

182 As Newton notes: "Relatives of Tassunke Witko live on the Pine Ridge, Cheyenne River, and Rosebud Reservations as well as in the large Rapid City, South Dakota, off-reservation Indian community. . . . Although there was some objection to the appointment of Mr. Big Crow as the sole administrator by the Pine Ridge Council, family members from Pine Ridge and Rosebud who attended the hearing did not object to the appointment; family members from Cheyenne River did not attend but had communicated with Big Crow (the Cheyenne River Sioux Tribe has subsequently entered the case as an amicus). . . . The [tribal] court dismissed the Pine Ridge Council's objections on the grounds that only family members could contest the appointment" (*ibid.*, at 1020 and 1022).

183 *Ibid.*, at 1023.

184 In re Tassunke Witko, Civ. No. 93-204 (Memorandum decision, October 25, 1994). In the Tribal District Court, it was determined that the court had no jurisdiction over the defendants. However, the decision was appealed to the Rosebud Sioux Supreme Court, which determined that the tribal court did have jurisdiction if the jurisdictional facts were true: the claim arose on the reservation, the defendant purposefully directed conduct at the forum by committing intentional torts, and the defendant by virtue of marketing the product in forty states could not be said to be unduly inconvenienced by having to travel to the reservation. See Law Professors Amicus Brief on Behalf of Petitioners, In re Tassunke Witko, Civ. No. 93-204 (Ct. App. Rosebud Sx. Tri., March 10, 1995) (submitted by Joseph William Singer and Nell Jessop Newton). Thus, the case was remanded to the trial court to engage in the necessary fact finding. Meanwhile, the federal court agreed that fact finding was necessary, but opined that it was unlikely that a tribal court had jurisdiction over non-Indians. As Nell Newton maintains, even a victory in the tribal court on the

merits is fraught with risk; the tribal court's jurisdiction will undoubtedly be challenged in federal court, and there "the case may be used as a vehicle to deny all tribes civil jurisdiction over non-Indians" (Newton, *supra* note 158, at 1052).

185 The historical disenfranchisement of Native peoples in North America, however, has made it impossible for them to monitor those signifiers they consider their own and thus for them to demonstrate the history of policing that both common law and statutory law require of mark holders. For instance, at the time of the Crazy Horse litigation, there were at least thirty-three commercial usages of his name that had been found by the attorneys, including for nightclubs and restaurants in Paris and Washington, D.C. Given that tribal peoples were politically disenfranchised from using civil courts to make trademark and unfair competition claims as legally designated "wards of the state" until the 1960s, however, it seems hardly just to expect them to have threatened to exercise rights they could not possibly enforce. Moreover, the isolation of reservations from most mainstream media, their relative poverty, the poor communications infrastructures that link reservations to the rest of the country, and residents' lack of access even to law libraries that would inform them of their rights until relatively recently all militate against maintaining the same standards for trademark management and policing that commercial entities must meet. Even at the time of this litigation the lawyers working on the reservation did not have published law reports, access to computerized legal databases, or even a fax machine with which to help prepare themselves for trial. People living on reservations do not know when others are attempting to register Native American symbols as trademarks; fortunately, many American Indian law students do have access to the relevant databases and might assume the role of monitoring attempted registrations.

186 Newton locates 94 names of products that use the term *Cherokee* in a 1995 Trademarkscan-U.S. Federal database search, 35 references to *Navajo*, and 208 appropriations of Sioux peoples' nominations (which include the Dakota and the Lakota). *Supra* note 158 at 1008, n.19.

187 See D. Trotter, "Colonial Subjects," 32 (3) *Critical Quarterly* 3 (1990).

188 Tassunig, *supra* note 9, at 8.

189 Tassunig discusses the appropriation of the "talking dog" in Cuna molas (traditional works of appliqué and embroidery) and how it brings "intense pleasure—the catching of the breath, the delighted laugh, the stirring of curiosity—that this particular mola brings to Western viewers today, including myself, all the more so when held side by side with its Western original" (*supra* note 9, at 22). Why, he asks, this laugh?—"the (not so) simple fact that observing mimesis is pleasurable. And just as surely there is an element of colonialist mastery in this laughter . . . how difficult it is to pry mimesis loose from pervasive intimations of primitiveness. But there is also the possibility that this sudden laugh from nowhere registers a tremor in cultural identity, and not only in identity but in the security of Being itself" (*ibid.* at 226). Tassunig asks why the existence of "our" signs in "their" worlds fascinates us so. Rejecting explanations that point simply to an unusual juxtaposition or the effect of surreal pastiche, and similarly suspicious of those who see in every local use of the Western sign an act of "resistance to a dominant order," he finds in these moments some potential for humanity (that he rather wishes to universalize). I would suggest a more culturally specific possibility; it is perhaps the power of the trademark in our own culture, its ability to interpellate us as mass

subjects, that creates the "flash of recognition" that Taussig alludes to. In other words, we so rarely recognize this power *as* power, these properties *as* properties, that it is only when these marks are in the possession of others that we recognize our own routine misrecognitions of the nature of "culture" in late capitalism.

5. The Properties of Culture and the Politics of Possessing Identity

- 1 E. Mertz, "A New Social Constructionism for Sociological Studies," 28 *Law and Society Review* 1243, 1254 (1994).
- 2 Between 21 March and 14 April 1992, articles, editorials, and letters to the editor considered the issue of "cultural appropriation" or "appropriation of voice" in fictional and nonfictional writing.
- 3 Although the controversy died down, references and allusions back to it can be found throughout 1992, as, for example, in a books column by Philip Marchand titled "When Appropriation Becomes Inappropriate," *The Toronto Star* 23 November 1992 at B5. I have not pursued the debates in the Canadian press since 1992.
- 4 S. Godfrey, "Canada Council Asks Whose Voice Is It Anyway?," *Globe and Mail* 21 March 1992 at C1 and C15.
- 5 *Ibid.*
- 6 The term *dangerous supplement* is borrowed from Jack Balkin, who borrows it from Jacques Derrida, in "Deconstructive Practice and Legal Theory," 96 *Yale Law Journal* 743 (1987).
- 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 S. Gilbert and S. Gubar, *The Madwoman in the Attic* (1979).
- 8 T. Findley, Letter to the Editor, *Globe and Mail* 28 March 1992 at D7. Reprinted in our *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 decision to uphold Canada's obscenity laws. See (1992) R. v. Butler, 89 D.L.R. (4th) 449 (S.C.C.). 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 among gay and lesbian activists that perhaps accounts for the reprinting of Findley's letter in a gay journal. As I will suggest, however, opposition to repression of 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 Jacoby, Letter to the Editor, *Globe and Mail* 28 March 1992 at D7.
- 10 *Globe and Mail* 31 March 1992 at A16.
- 11 Godfrey, *supra* note 4, at C15.
- 12 Outram, Letter to the Editor, *Globe and Mail* 28 March 1992 at D7.
- 13 *Ibid.*
- 14 Smith, Letter to the Editor, *Globe and Mail* 3 April 1992 at A5.
- 15 Driedger, Letter to the Editor, *Globe and Mail* 28 March 1992 at D7.

16 For discussions of the relationship between Romanticism and imperialism in the nineteenth century, see *Macropolitics of Nineteenth-Century Literature: Nationalism, Exoticism, Imperialism* (J. Arac and H. Ritvo, eds., 1991). The relationship between copyright and colonialism as forms of governance is explored in my, *Copyright, Colonialism, and the Evangelical Impulse* (forthcoming from the University of Minnesota Press).

17 For a discussion of the similar and simultaneous logic of European colonialism, see T. Mitchell, *Colonising Egypt* (1988).

18 For a discussion of the difficulties of maintaining the stability of the idea/expression distinction in copyright law, see A. B. Cohen, "Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgements," 66 *Indiana Law Journal* 175 (1990).

19 J. Balkin, "Ideology as Constraint," 43 *Stanford Law Review* 1133 (1991); J. Boyle, "The Politics of Reason," 133 *University of Pennsylvania Law Review* 685 (1985); J. Boyle, "Is Subjectivity Possible? The Post-Modern Subject in Legal Theory," 62 *University of Colorado Law Review* 489 (1991); P. Chevigny, *More Speech: Dialogue Rights and Modern Liberty* (1988); R. J. Coombe, "Room for Manoeuvre: Toward a Theory of Practice in Critical Legal Studies," 14 *Law and Social Inquiry* 69 (1989); R. J. Coombe, "Same as It Ever Was: Rethinking the Politics of Legal Interpretation," 34 *McGill Law Journal* 604 (1989) (*hereinafter* Coombe, "Same as It Ever Was"); D. Cornell, "Toward a Modern/Postmodern Reconstruction of Ethics," 133 *University of Pennsylvania Law Review* 291 (1985); D. Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (1991); D. Cornell, *The Philosophy of the Limit* (1992); D. Cornell, *Transformations* (1993); S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989); O. Fiss, "Free Speech and Social Structure," 71 *Iowa Law Review* 1405 (1986); O. Fiss, "Why the State?," 100 *Harvard Law Review* 781 (1987); M. J. Frug, *Postmodern Legal Feminism* (1992); M. Minow, "Identities," 3 *Yale Journal of Law & the Humanities* 97 (1991); D. Patterson, "Postmodernism /Feminism /Law," 77 *Cornell Law Review* 254 (1992); G. Peller, "The Metaphysics of American Law," 73 *California Law Review* 1152 (1985); P. Schlag, "Fish v. Zapp: The Case of the Relatively Autonomous Self," 76 *Georgetown Law Journal* 37 (1987); P. Schlag, "The Problem of the Subject," 69 *Texas Law Review* 1627 (1991), and other sources cited therein. I cannot claim that this list is exhaustive.

20 Allan Hutchinson makes similar points in his article, "Giving Smaller Voices a Chance to Be Heard," *Globe and Mail* 14 April 1992 at A16.

21 It has been suggested that the term multiculturalism is inappropriate as an umbrella term within which to consider Native claims to self-determination or cultural autonomy.

The principle of aboriginality may be defined in essentially political terms, as a statement of power that acknowledges the special status of the original occupants of a territory and aims at restoring rights and entitlements that flow from recognition of this unique relationship with the state. . . . This politicized view of aboriginality has several implications. There is a sense in which the aboriginal people retain their original, inherent sovereignty, because the Canadian Constitution does not necessarily apply to them, because they are exempt from federal/provincial laws, and because treaties are viewed as nation-to-nation agreements specifying separate jurisdictions. Programs and policies that apply to other Cana-

dian minority groups are dismissed as inapplicable—even counterproductive—to aboriginal ambitions. Any move to integration as one ethnic component in a Canadian multicultural mosaic is rejected as diminishing entitlement as “first among equals” . . . In rejecting an ethnic or immigrant dimension, aboriginal people prefer to define themselves as a “sovereign” entity within the federal state, with collective rights guaranteed by virtue of their ancestral occupation and arising from first principles. (A. Eleras and J. L. Elliott, *The “Nations Within”: Aboriginal-State Relations in Canada, the United States, and New Zealand*, 30 [1992])

This would suggest that respect for and recognition of Native cultural autonomy must rest upon different grounds than the mere value of cultural diversity.

22 Many Thai people consider this film a blatant example of Western imperialism that is condescending in its attitudes toward Thais and perpetuates many stereotypes about Oriental peoples.

23 The term Orientalism is drawn from Edward Said’s pathbreaking work of the same title (1979). Although Said’s work was concerned to explicate the rhetorical strategies and informing tropes of late-eighteenth- and early-nineteenth-century 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.

24 Godfrey, *supra* note 4.

25 L. Keeshig-Tobias, “Stop Stealing Native Stories,” *Globe and Mail* 26 January 1990 at A8.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

31 Hutchinson, *supra* note 20, at A16.

32 *Ibid.*

33 Godfrey, *supra* note 4, at C1.

34 *Ibid.*, at C15.

35 G. Lipsitz, *Time Passages: Collective Memory and American Popular Culture* (1990).

36 A. Coombes, “Inventing the ‘Postcolonial’: Hybridity and Constituency in Contemporary Curating,” 18 *New Formations* 39 (1992).

37 I have deliberately chosen 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 K. Moodley, “Canadian Multiculturalism as Ideology,” 6 *Ethnic and Racial Studies* 320 (1983), and C. Mohanty, “On Race and Voice: Challenges for Liberal Education in the 1990s,” 14 *Cultural Critique* 179 (1990). The literature discussing postcolonialism is vast. There is general agreement that the reception and interpretation of two texts—E. Said, *Orientalism*, *supra* note 23, and F. Fanon, *Black Skin, White Masks* (1967)—mark the beginnings of the development of the discourse, but it has now expanded across several disciplinary fields. For a fine overview, see P. Seed, “Colonial and Postcolonial Discourse,” 26 *Latin American Research Review* 181 (1991). For recent criticisms of the term and its range of extension, see D. Bahri, “Coming to Terms with the ‘Post-colonial,’” in *Between the Lines: South Asians and Postcoloniality* 137 (D. Bahri and M. Vasudeva, eds., 1996); A. P. Mukherjee, “Whose Post-Colonialism and Whose Postmodernism?” 30(2) *World Literature Written in English* 1 (1990); E. Shohat, “Notes on the ‘Post-Colonial,’” 32 *Social Text* 99 (1991); H. Tiffin, “Post-Colonialism, Post-Modernism, and the Rehabilitation of Post-Colonial History,” 23(1) *Journal of Commonwealth Literature* 169 (1988); R. Frankenberg and L. Mann, “Crosscurrents, Crosstalk: Race, ‘Postcoloniality’ and the Politics of Location,” in *Displacement, Diaspora and the Geographies of Identity* 273 (S. Lavie and T. Swedenburg, eds., 1996). A collection of influential essays is contained in *Colonial Discourse and Post-Colonial Theory: A Reader* (P. Williams and L. Chrisman, eds., 1994). Lynda 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 postcolonialism have historically specific relevance, given the experience and ongoing manifestations of British Empire, and the arrival of immigrants from other postcolonial nations. Furthermore, she suggests that when Canadian culture is called postcolonial 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, postcolonial voice of Canada. See L. Hutcheon, “Circling the Downspout of Empire: Post-Colonialism and Postmodernism,” 20(4) *Arlet* 149 at 156 (1989).

38 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” (E. Grosz, *Jacques Lacan: A Feminist Introduction* [1990]).

39 J. Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* 215 (1988).

40 See P. Brantlinger, *Crusoe’s Footprints: Cultural Studies in Britain and America* (1990); Clifford, *ibid.*; R. J. Coombe, “Beyond Modernity’s Meanings: Encountering the Post-modern in Cultural Anthropology,” 11 *Culture* 111 (1991) (hereinafter Coombe, “Beyond Modernity’s Meanings”); R. Rosaldo, *Culture and Truth: The Remaking of Social Analysis* (1989); R. Williams, *Culture and Society 1780–1950* (1983), R. Williams, *Keywords: A Vocabulary of Culture and Society* (1983) (hereinafter Williams, *Keywords*).

41 Williams, *Keywords*, at 90–91.

42 Clifford, *supra* note 39, at 233.
43 *Ibid.*, at 223, citing F. Jameson, *The Prisonhouse of Language: Narrative as a Socially Symbolic Act* 47 (1981).

44 *Ibid.*, at 189–214.

45 *Ibid.*, at 196.

46 *Ibid.*, at 195.

47 *Ibid.*, at 198.

48 *Ibid.*, at 215–251.

49 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 those of the anti-art or anti-aesthetic movement in the 1980s, are sought as original works of art by collectors, thus moving from the zone of inauthentic to the zone of authentic masterpieces as their artists achieve renown. See *The Anti-Aesthetic: Essays on Post-Modern Culture* (H. Foster, ed., 1983), and *Recodings: Art, Spectacle, Cultural Politics* (H. Foster, ed., 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 he or she is making, is a copyright infringement and remains one even if the art world 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.

50 Clifford, *supra* note 39, at 201–202.

51 *Ibid.*, at 205–206.

52 J. Feather, "Publishers and Politicians: The Remaking of the Law of Copyright in Britain 1775–1842," 25 *Publishing History* 45 (1989), 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 10(2) *Cardozo Arts and Entertainment Law Journal* 279–725 (1992), reprinted in *The Construction of Authorship: Textual Appropriation in Law and Literature* (M. Woodmansee and P. Jaszi, eds., 1994).

53 I am paraphrasing E. Young, *Conjectures on Original Composition* (1796). The essay may be found in B. Kaplan, *An Unhurried View of Copyright* 27 (1967).

54 W. Blackstone, *Commentaries on the Laws of England* 405–406 (1765–69).

55 W. Einfield, *Observations on Literary Property* 21 (1774).

56 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903) interpreting the

nineteenth-century artist John Ruskin, a central figure in the Romantic movement. These Romantic and preindustrial concepts continue to dominate copyright doctrine even in a postindustrial age in which individual Romantic authors are increasingly difficult to find in the bureaucratic and corporate structures of today's culture industries.

57 An overview of the treaties that define the parameters of the international law of cultural property may be found in J. F. Edwards, "Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects," 22 *Toledo Law Review* 919 (1991).

58 J. H. Merryman, "Two Ways of Thinking about Cultural Property," 80 *American Journal of International Law* 831 (1986) (*hereinafter* Merryman, "Two Ways of Thinking"), and J. H. Merryman, "The Public Interest in Cultural Property," 77 *California Law Review* 339 (1989) (*hereinafter* Merryman, "The Public Interest").

59 249 U.N.T.S. 240.

60 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 Merryman, "The Public Interest," *supra* note 58, 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 R. Clements, "Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law," 49 *University of Toronto Faculty of Law Review* 1 (1991), for a good discussion of the possibilities afforded to First Nations peoples for the repatriation of sacred objects under cultural property laws.

61 823 U.N.T.S. 23, reprinted in 10 *International Legal Materials* 289 (1971), as cited in Merryman, "Two Ways of Thinking," *supra* note 58, at 833.

62 Merryman, "Two Ways of Thinking," *supra* note 58, at 843.

63 *Ibid.*

64 *Ibid.*, at 833.

65 *Ibid.*, at 832.

66 *Ibid.*, at 832 n.5.

67 *Ibid.*, at 844–845.

68 *Ibid.*, at 849.

69 *Ibid.*, at 847.

70 *Ibid.*, at 850.

71 J. Moustakas, "Group Rights in Cultural Property: Justifying Strict Inalienability," 74 *Cornell Law Review* 1179, 1182 (1989). Ironically, Greece, the country of origin for classical Western or European culture, now is often 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 M. Herzfeld, *Anthropology through the Looking Glass* (1989).

72 M. Radin, "Property and Personhood," 34 *Stanford Law Review* 957, 959ff. (1982).

73 Moustakas, *supra* note 71, at 1184.

74 *Ibid.*, at 1185, citing Radin, *supra* note 72, at 959.

75 *Ibid.*, at 1185.

- 76 C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (1962).
- 77 See R. Handler, "Who Owns the Past? History, Cultural Property, and the Logic of Possessive Individualism," in *The Politics of Culture* 63 (B. Williams, ed., 1991) (*hereinafter* Handler, "Who Owns the Past?"); R. Handler, "On Having a Culture: Nationalism and the Preservation of Quebec's Patrimoine," in *Objects and Others: Essays on Museums and Material Culture* 197 (G. W. Stocking, ed., 1985) (*hereinafter* Handler, "On Having a Culture"). Others who have pointed out the peculiarity and contingency of Western individualism include L. Dumont, *From Mandeville to Marx: The Genesis and Triumph of Economic Ideology* (1977); L. Dumont, *Essays on Individualism: Modern Ideology in Anthropological Perspective* (1986); and, of course, A. de Tocqueville, *Democracy in America* (H. Reeve, trans., 4th ed., rev. and corrected from 18th Paris ed., 1841).
- 78 Handler, *On Having a Culture*, *supra* note 77, at 194.
- 79 Handler, "Who Owns the Past?", *supra* note 77, at 64.
- 80 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 defense" 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 racialized gender difference that permit sexual violence against Asian women. See K. Koptiuch, "Cultural Defense and Criminological Displacements: Gender, Race, and (Trans)Nation in the Legal Surveillance of U.S. Diaspora Asians," in *Displacement, Diaspora, and Geographies of Identity* 215 (S. Lavie and T. Swedenburg, eds., 1996). Like Koptiuch, I think it is important to excavate the colonial past stratified in Western forms of knowledge.
- 81 Handler, "Who Owns the Past?", *supra* note 77, at 66.
- 82 Cited in *ibid.*, at 67.
- 83 Handler, *On Having a Culture*, *supra* note 77, at 198.
- 84 These basic premises form part of all copyright regimes, and there is no particular reason to privilege any specific statutory enactment of these principles here.
- 85 Handler, "Who Owns the Past?", *supra* note 77, at 67.
- 86 *Ibid.*, at 68.
- 87 *Ibid.*
- 88 *Ibid.*, at 69.
- 89 I borrow this term from N. Goodman, *Ways of Worldmaking* (1978).
- 90 Minow, *supra* note 19, at 97-98.
- 91 *Ibid.*, at 98-99, citing A. Harris, "Race and Essentialism in Feminist Legal Theory," 42 *Stanford Law Review* 584 (1990).
- 92 *Ibid.*, at 112.
- 93 b. hooks, *Yearning: Race, Gender, and Cultural Politics* (1990), at 5.
- 94 *Ibid.*, at 19.
- 95 *Ibid.*, at 20.
- 96 *Ibid.*, citing L. Alcoff, "Cultural Feminism vs. Poststructuralism: The Identity Crisis in Feminist Theory," 13 *Signs* 405 at 433 (1988).
- 97 *Ibid.*, at 28.
- 98 *Ibid.*
- 99 *Ibid.*, at 29.

- 100 On accusations of essentialism, see L. Todd, "What More Do They Want?", in *Indigena: Contemporary Native Perspectives* 71-79 (G. McMaster and L. Martin, eds., 1992). 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 L. Maracle, "Native Myths: Trickster Alive and Growing," *Fuse* 29 (fall 1989).
- 101 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, protect only 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.
- 102 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 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 political statement. For discussions, see the various artists whose work is featured in *Indigena*, *supra* note 100, and the essay by Cree art instructor A. Young Man, "The Metaphysics of North American Art," in *Indigena*, *supra* note 100, at 81-99.
- 103 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 avail themselves of copyright protections, but 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 Trademark 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. Doctrines of consumer confusion might be deployed, however, to prevent representations that suggest First Nations origins to the average consumer. Peter Weinrich, executive director of the Canadian Crafts Council, for instance, found the issue of adopting the stories of others to be less aptly named "cultural appropriation" than the very real ongoing practice of "non-native people stealing traditional designs of the Haida and reproducing them for economic gain." In the absence of copyright protections, he asks, "what are we going to do about providing a community with rights over its own traditions?"

104 A. Pask, "Making Connections: Intellectual Property, Cultural Property, and Sovereignty in the Debates Concerning the Appropriation of Native Cultures in Canada," 8 *Intellectual Property Journal* 57, 64 (1993).

105 I borrow this phrase from P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination," 36 *McGill Law Journal* 382 (1991).

106 M. Minow and E. V. Spelman, "In Context," in *Pragmatism in Law and Society* 247 (M. Brant and W. Weaver, eds., 1991).

107 *Ibid.*, at 248–249.

108 *Ibid.*, at 249–255.

109 *Ibid.*, at 258.

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

111 *Ibid.*, at 269–270.

112 "Declaration of Quito, July 1990: Indigenous Alliance of the Americas on 500 Years of Resistance," 23 *Borderlines* 23 (1991/92).

113 *Ibid.*, at 3.

114 "The Sweetgrass Meaning of Solidarity: 500 Years of Resistance," 23 *Borderlines* 35, 37 (1991/92).

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

116 As quoted in *ibid.*, at 207.

117 Fleras and Elliott, *supra* note 21, at 41 (citations omitted).

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

119 An Act Respecting Indians, Statutes of Canada 15 George VI Chapter 29, (1951).

120 Fleras and Elliott, *supra* note 21, at 74.

121 *Ibid.*, at 76–77.

122 *Ibid.*, at 79.

123 *Ibid.*

124 J. Cardinal-Schubert, "In the Red," *Fuse* 20, 21 (fall 1989).

125 R. Hill, "One Part per Million: White Appropriation and Native Voices," 15 *Fuse* 12 (winter 1992).

126 Fleras and Elliott, *supra* note 21, at 19.

127 As Comanche activist Paul Smith notes, Native peoples in North America are always being asked "How much Indian are you?" No one, however, "asks a black how much black blood she has." Such racist notions of Indian identity are colonial impositions; they have nothing to do with Native understandings of community membership and belonging. See P. Smith, "Lost in America," 23 *Borderlines* 17 (1991/92).

128 "Hachivi Edgar Heap of Birds," 23 *Borderlines* 19 (1991/92).

129 *Ibid.* Hachivi Edgar Heap of Birds is assistant professor of painting at the University of Oklahoma and headman of the Tsistas (Cheyenne) Elk Warrior Society.

130 An Act to Further Amend the "Indian Act, 1880," Statutes of Canada, 47 Victoria, Chapter 27 (1884).

131 Cardinal-Schubert, *supra* note 124, at 21.

132 See the discussion in "Appropriation: When Does Borrowing Become Stealing?" 5(1) *Last Issue* 20, 30–33 (1987). Further background may be found in M. M. Ames, "Free Indians from Their Ethnological Fate: The Emergence of the Indian Point of View in Exhibitions of Indians," 5(2) *Muse* 14 (1987). 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, e.g., *Turning the Page: Forging New Partnerships Between Museums and First Peoples* (Assembly of First Nations and the Canadian Museums Association, 1992) (hereinafter *Turning the Page*), 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.

133 Cardinal-Schubert, *supra* note 124 at 23.

134 A photograph of this performance/work may be found on the last page of *Turning the Page*, *supra* note 132, at 19.

135 See Cardinal-Schubert, *supra* note 124, and Clements, *supra* note 60.

136 The case is discussed in great depth in D. Cole, *An Iron Hand upon the People: The Law against the Potlatch on the Northwest Coast* (1990). The case does not appear to have been reported.

137 "From Colonization to Repatriation," in *Indigena*, *supra* note 100, at 25–38.

138 Act Respecting Indians, Statutes of Canada, 15 George VI, Chapter 29 (1951).

139 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 Kwagiwut 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 137, at 37). For a recent discussion of repatriation efforts and legal frameworks in the United States, see S. Platzman, "Objects of Controversy: The Native American Right to Repatriation," 41 *American University Law Review* 517 (1992).

140 *Ibid.*

141 Referred to in Smith, *supra* note 127.

142 See Cardinal-Schubert, *supra* note 124.

143 Smith, *supra* note 127, at 18.

144 B. Owl, a White Earth Anishnabe, cited in W. Churchill, "Colonialism, Genocide and the Expropriation of Indigenous Spiritual Tradition in Contemporary Academia," 23 *Borderlines* 39, 41 (1991/92).

145 American Indian Movement leader Russell Means suggests that this appropriation is a form of cultural genocide. *Ibid.*, at 41.

146 Hill, *supra* note 125, at 17–18.

147 Churchill, *supra* note 144. 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.

148 L. Todd, "Notes on Appropriation," 16 *Parallogramme* 24 (1990).

149 Keesing-Tobias, *supra* note 25, at A8.

150 *Ibid.*

151 G. McMaster and L. Martin, Introduction, in *Indigena*, *supra* note 100, at 17.

- 152 Handler, "Who Owns the Past?" *supra* note 77, at 71.
- 153 Handler, "On Having a Culture," *supra* note 77, at 25.
- 154 Handler, "Who Owns the Past?" *supra* note 77, at 71.
- 155 For a discussion of this phenomenon in literary works by First Nations authors, see B. T. Godard, "The Politics of Representation: Some Native Canadian Women Writers" in *Native Writers and Canadian Writing* 183-205 (W. H. New, ed., 1990).
- 156 L. Todd, "Notes on Appropriation," *supra* note 148, at 24.
- 157 *Ibid.*
- 158 See, e.g., Cardinal-Schubert, *supra* note 124; D. Skuse et al., Letter to the Editor, 13(3) *Fuse* 2 (1989-90); Hill, *supra* note 125; D. Skuse and K. Kozzi, Letter to the Editor, 15(6) *Fuse* 4 (1992). I make absolutely no comment on the substance of any allegations made in these articles and correspondences.
- 159 Smith, *supra* note 127, at 18.
- 160 Hill, *supra* note 125, at 14.
- 161 A. Fabo, Letter to the Editor, 13 *Fuse* 2,4 (1989-90).
- 162 Liz Magor, another artist whose work has figured prominently in debates about appropriation, foregrounded the issue in her photography. Richard Hill describes his experience of viewing 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 . . . (Hill, *supra* note 125, at 20).
- 163 McMaster and Martin, *supra* note 151, at 17.
- 164 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 fulfillment 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 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 creation [that results from] a fulfillment of responsibilities through Indian belief" (D. Alexis, "Obscurity as a Lifestyle," 23 *Borderlines* 15 [1991-92]).
- 165 Cardinal-Schubert, *supra* note 124, at 20.

6. Dialogic Democracy I: Authorship and Alterity in Public Spheres

- 166 Keesing-Tobias, *supra* note 25.
- 167 Todd, "Notes on Appropriation," *supra* note 148, at 26.
- 168 W. La Duke, "The Culture of Hydroelectric Power," 23 *Borderlines* 42-45 (1991-92).
- 169 Todd, "Notes on Appropriation," *supra* note 148, at 32.
- 1 P. Schlag, "Missing Pieces: A Cognitive Approach to Law," 67 *Texas Law Review* 1195, 1248 (1989).
- 2 "Introduction: Politics, Ethics and the Legality of the Contingent," in *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* 3 (C. Douzinas, P. Goodrich, and Y. Hachamovitch, eds., 1994).
- 3 P. Chevigny, *More Speech: Dialogue Rights and Modern Liberty* 4 (1988), citing F. Schauer, *Free Speech: A Philosophical Enquiry* (1982). Increasingly it seems that arguments in favor of the preservation of democracy are preferred. See O. Fiss, "Free Speech and Social Structure," 71 *Iowa Law Review* 1405 (1986), reprinted in O. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (1996).
- 4 Dom Caristi is one contemporary scholar who finds "self-fulfillment" to merit the greatest weight of the various first principles that have been proffered for freedom of speech and deems access to media an important means to achieve it. See D. Caristi, *Expanding Free Expression in the Market Place: Broadcasting and the Public Forum* (1992).
- 5 S. Stewart, *Crimes of Writing: Problems in the Containment of Representation* 4 (1991).
- 6 My misgivings about the political consequences of the pervasive rhetoric of information in digitalized environments are further elaborated in "Authorial Cartographies: Mapping Proprietary Borders in a Less-than-Brave New World," 48(5) *Stanford Law Review* 1357 (1996).
- 7 Cited in Stewart, *supra* note 5.
- 8 In my view, Geertz is insufficiently sensitive to the consequences that representations of a people may have in those people's lives. Struggles over representations of difference implicate anthropologists who are positioned to present authoritative renderings of difference in diverse arenas.
- 9 W. M. Reddy, "Postmodernism and the Public Sphere: Implications for an Historical Ethnography," 7(2) *Cultural Anthropology* 135, 140 (1992), citing C. Geertz, *Works and Lives: The Anthropologist as Author* 130 (1988).
- 10 *Ibid.*
- 11 For a critical discussion of the language of crisis and postmodernity, see R. J. Coombe, "Finding and Losing One's Self in the Topoi: Placing and Displacing the Postmodern Subject in Law," 29(4) *Law and Society Review* 599 (1995).
- 12 Reddy, *supra* note 9, 135-136.
- 13 *Ibid.*, at 136.
- 14 *Ibid.* (I use the masculine pronoun deliberately when discussing the author and the bourgeois subject.)
- 15 *Ibid.*, at 143.
- 16 See P. Kamuf, *Signature Pieces: On the Institution of Authorship* (1988), for a discussion of Rousseau's struggles to control and contain his signature in the late eighteenth century.