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Interrogating Piracy

Race, Colonialism and Ownership

Adam Haupt

This chapter argues that mainstream media rhetoric on piracy serves narrow, corporate interests at the expense of the public interest, and especially so in colonial and postcolonial contexts. It will examine some of the fundamental assumptions that inform modern legal conceptions of intellectual property in order to draw attention to flawed arguments about the commodification of cultural expressions, such as music. Specifically, this work will explore the influence of John Locke's arguments about the principles of natural justice on the Statute of Anne, which was very influential on modern Western copyright laws, in order to argue that racial and gender-based exclusions were built into legal thinking about the ownership of tangible and intangible property. Ultimately, these exclusions coincided with the expansion of Western imperialism and colonial projects. The story of commons enclosure in England may thus be read as a precursor to Western imperialism as we know it today, where a corporate rhetoric on piracy masks contemporary strategies of commons enclosure and serves to illegalize postcolonial struggles against the inequities of Western cultural imperialism. By way of illustration, I will briefly explore the story of South African musician Solomon Linda – composer of the song 'Mbube', which became a Disney hit in *The Lion King* – to demonstrate how these early attitudes towards cultural expression and the ownership of ideas continue to be the basis of racist practices in the (post)colonial present.

In her book *Copyright and the Public Interest*, Gillian Davies discusses the underlying principles that govern modern copyright law.

She argues that the Statute of Anne was the ‘foundation upon which modern copyright in the Western World was built’ (Davies 2002: 9). The Statute, which ‘recognised the individual author as the fountainhead of protection’ and adopted limited terms of protection of published work (ibid.: 10), was influenced by the arguments of John Locke, who advanced four related arguments. First, Locke contended that ‘people had a natural right of property in their bodies’ and that, subsequently, they ‘owned the labour of their bodies and the results of their labour’ (ibid.: 14). The second principle follows from the first: ‘Remunerating a creator for the use of his work enables him to continue working and is natural justice in accord with the maxim that the labour is worthy of his hire’ (ibid.: 15). This just reward for labourer principle provides a stimulus to creativity, the third principle. The assumption made by Davies based on Locke’s ideas is that authors generate knowledge for financial gain and that the absence of a ‘just reward for labour’ would lead to a decline in published work. These three principles therefore serve social requirements, the fourth principle: ‘It is a social requirement in the public interest that authors and other right owners should be encouraged to publish their works so as to permit the widest possible dissemination of works to the public at large’ (ibid.: 16). Davies’s analysis highlights how the influence of Locke’s ideas in the formulation of the Statute led to a focus upon the individual author, which coincided with emerging capitalism’s privileging of individual accumulation of wealth through strategies such as commons enclosure. This focus on the individual author is understandable, given that the monopoly of the Stationers’ Company had to be broken in order to facilitate innovation, competition and the creation of new works. However, this emphasis on the individual auteur also coincided with the transition from feudalism to capitalism.

In 1968, Garrett Hardin had argued that English common fields needed to be enclosed and managed by private landowners in order to avoid irresponsible overutilization by the serfs (Hardin 1968). The assumption was that commoners could not be trusted to manage the commons themselves and that private landowners could be trusted

with the task of averting environmental disasters. This argument has been complicated by Dorothy Kidd, who contends that this purportedly necessary move benefited the landed gentry, which needed large tracts of land and cheap labour to engage in large-scale commercial farming (Kidd 2003). In the end, commoners were forced into wage labour. Taking this line of thinking further, Jane Humphreys writes that the proletarianization of commoners undermined the independence of women, particularly widows, who found it increasingly difficult to subsist on common resources (Humphreys 1990). In her research on gender biases in the work of John Locke, Lorenn Clarke concurs that Locke's understanding of property ownership is premised upon gender inequality:

Locke must insist on the natural inferiority of women due to their naturally disadvantaged position with respect to reproduction, while it is quite clear that that disadvantaged position can be brought about only by denying women access to the ownership and control of private property and thereby gaining the means to ensure their own survival and that of any children they might bear.

(Clarke 1977: 723)

Locke's view of property ownership is therefore in line with his patriarchal context, which privileged white male accumulation of property. The influence of his work goes beyond gender-based exclusions, though. Writing about the influence of Locke's philosophy on US interpretations of copyright law, K. J. Greene asserts:

John Locke's philosophical legacy deeply influenced the thinking of our Constitutional founders, who consistently equated liberty with property ownership. For example, Alexander Hamilton, a vehement stalwart for property protection by the State, asserted at the Constitutional Convention that the 'one great object of government is personal protection and the security of property.' Locke's theory of personal property asserted that 'every man has Property in his own Person [and thus] the Labour of his body and the work of his hands is properly his.' Taken literally, Locke's philosophy is the antithesis of

slavery, as a slave, by definition, does not own the labor of her or his own body.

(Greene 1999: 345)

As Mark Rose indicates, the key to 'Locke's thought was the axiom that an individual's "person" was his own property' (Rose 1993: 5). Hence, 'through labor an individual might convert raw materials of nature into private property' (ibid.). Under slavery, the US and the UK did not recognize black subjects' rights of property in their bodies and, therefore, did not believe that they were entitled to the fruits of their labour. If these rights were not recognized, it is not difficult to see how the logic of common field enclosure in England was extended to the 'New World': Africa, the Americas and Southeast Asia. If commoners in England were subjected to the paternalistic reasoning presented by Hardin in his justification for avoiding an assumed 'tragedy of the commons', it is possible to imagine how paternalistic relationships developed under European colonial rule, particularly when it came to approaches to managing natural resources and labour.

Greene writes that black subjects' intellectual property rights, much like their rights to tangible property, were not protected for specific reasons:

In practice, Blacks as a class received less protection for artistic musical works due to (1) inequalities of bargaining power, (2) the clash between the structural elements of copyright law and the oral predicate of Black culture, and (3) broad and pervasive social discrimination which both devalued Black contributions to the arts and created greater vulnerability to exploitation and appropriation of creative works. This phenomenon of cultural appropriation experienced by Black artists compares to the history of legal subordination experienced by African-Americans under property law principles.

(Greene 1999: 356–7)

He argues further that the exploitation of black subjects' intellectual property was comparable to their marginalization under property law. Copyright's focus on individual authors was uncomprehending of

collective, oral modes of knowledge production and cultural expression in a racist context that largely denigrated black contributions to society and made it difficult for black artists to negotiate contracts as equals. Despite these difficulties, slaves and freed slaves 'continued to produce original works' that 'went uncompensated' – thus undermining Locke's just reward for labour argument (Greene 1999: 358). Black subjects continued to innovate new cultural forms well into the twentieth century despite these racial disparities and regardless of the poor prospects of financial rewards. In this regard, Reebee Garafalo holds that black artists made a substantial contribution to popular music despite industry and audience racism, which ensured that 'black personnel [were] systematically excluded from positions of power within the industry and [that] the audience [was] artificially fragmented, in part along racial lines' (Garafalo 1994: 275).¹

The racist politics at the heart of the reception and consumption of work by black artists also lays the groundwork for understanding how cultural appropriation operates in popular culture. Jonathan Hart argues that cultural appropriation 'occurs when a member of one culture takes a cultural practice or theory of a member of another culture as if it were his own or as if the right of possession should not be questioned or contested' (Hart 1997: 138). The key issue at stake in discussions of cultural appropriation is uneven relations of power between those who are represented and those who have the necessary symbolic power to convert marginal communities' cultural expressions into symbolic capital (Haupt 2012; Skeggs 2004). From this perspective, Greene's reference to black artists' poor bargaining power makes sense.

A South African example of cultural appropriation is the song 'Mbube' by Solomon Linda. Linda received no royalty payments and died a pauper despite the fact that his song went on to become one

¹ This suggests that people do not produce work for exclusively financial reasons, given that African-American artists continued to produce artistic works despite their social and economic marginalization. Thus, despite the commodification of black cultural expression at the expense of African-Americans, one could argue that the profit motive is not the only driver of knowledge and cultural production.

of the most commercially successful songs in the history of popular culture (Ovesen and Haupt 2011). It seems likely that Linda also received no royalties for the many cover versions and adaptations of his composition, as suggested by the documentary *A Lion's Trail* (Verster 2002), largely because of his poor bargaining power and poor knowledge of his legal rights in the context of apartheid South Africa. As in the US, the politics of race in South Africa played a key role in the marginalization of black artists. This marginalization is underscored by the fact that the song became known as 'Wimoweh' and 'Wimba Way' before it resurfaced as 'The Lion Sleeps Tonight' in the Disney hit film *The Lion King*, a children's animation which presents Africa as an animal kingdom (Malan 2000; Ovesen and Haupt 2011). By the time the Linda composition made its way to the US and went on to become a big commercial success for a number of American musicians, the original Zulu title 'Mbube' (which means lion) had become the nonsensical 'Wimoweh' and 'Wimba Way'. This offers a good case in point of how cultural appropriation works. Perry Hall's analysis of the appropriation of African-American cultural forms seems relevant to African cultural expression as well. Hall contends that the 'pattern of separating the art from the people leads to an appropriation of aesthetic innovation that not only "exploits" Black cultural forms, commercially and otherwise, but also nullifies the cultural meaning those forms provide for African Americans'. It is in this way that these appropriations 'become ineffective as expressions and affirmations of the unique cultural experiences from which they arise' (Hall 1997: 31–2). In essence, the dislocation of cultural signifiers and expressions from the marginal communities that produce them allows more powerful communities – such as colonizers, slave-owning communities or their privileged descendants – who do not share the same lived experiences of these marginal communities to employ these signifiers and expressions for their own ends, often without the permission or knowledge of these communities.² The dislocation of 'Mbube' from the geographical and

² Further examples of cultural appropriation in contemporary popular culture may be found in the research of Steven Feld. For example, Feld's work on *Deep Forest* (2000)

cultural context in which it was produced and the absence of dialogue with Linda and his fellow artists in Africa enabled American musicians to appropriate the song and project a set of ideas about Africa onto the song (for example, ideas about lions sleeping in a jungle, as opposed to the more likely plains of the Serengeti or the Kalahari). The cultural appropriation of Linda's music parallels certain aspects of *The Lion King*, which tells the tale of a lion cub who must succeed his late father as the lion king. The protagonist needs to go through a rite of passage to save the kingdom from the period of darkness that prevails with his father's death. The film is more than just a variation of Shakespeare's *Hamlet* (Gooding-Williams 1995). Robert Gooding-Williams contends that the Disney film reflects Hegel's view that Africa:

is no historical part of the World; it has no movement or development to exhibit. Historical movements in it – that is in its northern part – belong to the Asiatic or European World. ... What we properly understand by Africa, is the Unhistorical, Undeveloped Spirit, still involved in the conditions of mere nature, and which had to be presented here only as on the threshold of the World's History.

(Hegel 1956: 99)

The legacy of Hegel's claims about Africa that legitimated the exploitation of Africa and the enslavement of its people resonates in neocolonial narratives like *The Lion King*. Gooding-Williams (1995) argues that the film recycles and reiterates Hegel's perspective of Africa by 'depicting Africa as a naturally existing and organically integrated "circle of life"'. The framing of Africa as 'natural', 'primitive', 'undeveloped' and 'unhistorical' makes it possible for the West to project a set of values

reveals unequal power relations between artists of the global North, which seems unable or unwilling to comprehend the concept of collective knowledge production, and communities from the global South. See also Feld's research on cultural appropriation on Herbie Hancock's 1973 album, *Headhunters* (Feld 1996). For a detailed discussion of cultural appropriation in contemporary South Africa, see *Static: Race and Representation in Post-Apartheid Music, Media and Film*, which argues that self-described 'zef-rave-rap' group *Die Antwoord* employs blackface (Haupt 2012). It is perhaps unsurprising that their surreal parodies found a receptive audience in the US, which has a long history of blackface theatre and cinema.

onto Africans that would justify their subjugation under colonialism – something which resonates with Eric Lott's research on blackface minstrelsy. Lott writes that cultural appropriation went beyond just 'borrowing' from marginal communities without their permission or knowledge. Blackface minstrelsy, in which white performers literally blackened their faces and adopted black accents, performed white, racist projections of black caricatures in music, theatre and cinema for white audiences. Lott writes that what 'was on display in minstrelsy was less black culture than a structured set of white responses to it which had grown out of northern and frontier social rituals and were passed through an inevitable filter of racist presupposition' (Lott 1993: 101). Ideologically, blackface therefore served a very particular political purpose as it revealed a great deal about white projections of blackness, notions of whiteness as well as colonizers' rationalization of racial oppression. Writing about racism in Western cinema, Robert Stam and Louise Spence argue: 'Europe constructed its self-image on the backs of its equally constructed Other – the "savage", the "cannibal" – much as phallocentrism sees its self-flattering image in the mirror of woman defined as lack' (Stam and Spence 1983: 4).

The analogy between phallocentric and racist projections of femininity and blackness, respectively, allows one to think about the kinds of racial and gender-based exclusions in the history of property and intellectual property as discussed by Clarke, Greene, Kidd and Humphreys. The exclusions discussed by these theorists reveal how white male economic power was built upon racial and gendered processes of marginalization. Likewise, the arguments by Lott, Hart, Hall and Gooding-Williams also allow one to think about the ways in which racist and sexist modes of representation reinforce white male hegemony. The power of the one interest group comes at the expense of the 'other'. *The Lion King* projects a set of neocolonial mythologies about Africa as unhistorical, undeveloped and natural onto the silver screen, while employing a popular song that was literally appropriated from Linda and reworked as if it were raw material without an attempt to engage its author or the actual cultural context in which the song

was produced. The song is treated as if it were in a state of nature, waiting to be 'dressed to advantage'. Mainstream white popular culture therefore constructs itself through white projections of blackness.

African-Americans' experience of cultural appropriation in the US becomes significant when considering that country's own approach to intellectual property during the emergence of black cultural forms, such as the blues, as well as the film and book publishing industries. According to Debora Halbert, the Lockean concept of landed property was used to explain the intangible right of intellectual property (Halbert 1997: 58–9). The irony is that the notion of ownership of tangible or intangible property rights did not apply to black subjects. A further irony is that the US did not protect foreign authors' copyright and that large-scale duplication of foreign work took place – in other words, the US was complicit in the piracy of large amounts of foreign work (Halbert 1997). It was not until the US made the transition from an industrial to an information economy in the mid-1980s that it began to use laws on copyright, trade agreements and multilateral agreements on intellectual property to globalize its own narrow interpretations of intellectual property rights (Halbert 1997; Haupt 2008). By the mid-1990s, the US was placing pressure on countries that it felt were not taking its concerns about piracy seriously. Ironically, as Halbert writes, the US 'accused China of failing to protect products as far ranging as Disney's *The Lion King* to Microsoft's computer programs' (Halbert 1997: 65). While the US effort to fight piracy on a global scale, be it P2P file-sharing or goods counterfeiting, has been presented as part of attempts to protect creators, its rhetoric has relied on the myth of the individual auteur (Alderman 2001; McCourt and Burkart 2003; Haupt 2008). In the case of alleged music piracy on P2P networks, it has claimed to act on behalf of musicians (Haupt 2008). However, such a claim rings hollow because the copyright holder is rarely the artist who created the work in question and because the rights holder is often a corporate entity, to which the 'just reward for labour' argument may hardly be said to apply (Schumacher 1995; McLaren 2002). This is a context in which only four holding companies dominate about 75 per

cent of the global market share in the music industry (Patry 2009: 120). It is therefore clear that corporate attempts to fight piracy are questionable, as they appear to be consolidating their own monopolist interests. They are thus not acting on behalf of artists or creators; historically, they have certainly not acted on behalf of black artists such as Solomon Linda.

In certain respects, this brief consideration of piracy in relation to the history of cultural appropriation in music demonstrates Michael Hardt and Antonio Negri's assertion that 'the wealth collectively produced by the workers becomes the private property of the capitalist' (Hardt and Negri 2004: 188). This is a significant insight because commons enclosure facilitated industrialization and the creation of a wage-dependent underclass that could no longer access the commons to subsist. It also extended to colonies, where people were enslaved to generate wealth for emerging industries and markets (Rockman 2012). During the second enclosure movement, which is the name James Boyle gives to the shift towards narrow and monopolist tendencies during the emerging information age, we see the enclosure of the information commons on the internet, which was collectively produced by hackers (Boyle 2003, 2008). I would argue that this second enclosure movement actually had a precursor: black cultural expression, which was collectively produced in the era of slavery as a means of coming to terms with a range of racialized atrocities (Gilroy 1993) only to be appropriated and commodified at the expense of its black contributors. In other words, the linguistic commons created by the word play of what Henry Louis Gates calls Signifyin(g) (Gates 1988) gave birth to the blues, jazz and hip-hop (Schur 2009), all of which were commodified and appropriated by the mainstream music industry at the expense of its contributors. In light of the racialized injustices that inhere in the history of ownership, and given that dominant approaches to intellectual property have yet to interrogate individualist notions of knowledge production that do not adequately acknowledge the value of collective knowledge production and the commons, the assumed moral high ground upon which the term 'piracy' rests seems somewhat shaky.

This chapter has argued that media industries' rhetoric of piracy does not acknowledge the racial and gendered exclusions or inequities that form an important part of the history of the ownership of both tangible and intangible property. Disney's use of South African Solomon Linda's 'Mbube' on the soundtrack of its 1990s blockbuster *The Lion King* is rather ironic. A film that perpetuates racial stereotypes about Africa itself employs a song that offers an example of how cultural appropriation works along racial lines as well as in unequal relations of power between the global North and the global South. The fact that the Linda family's case against Disney was eventually settled for an undisclosed amount following the death of Linda himself as well as of one of his daughters does little to dispel this impression (Ovesen and Haupt 2011). In the end, scholarship on commons enclosure is compelled to assume a racial dimension. Boyle's work on the second enclosure movement, which took place in conjunction with the onset of the information age, should perhaps be called the third enclosure movement. If the first enclosure movement commenced with the appropriation of the common fields of England – supposedly to avoid a tragedy of the commons – then the second enclosure movement took place when England proceeded to enclose commons well beyond its borders as the British Empire began to expand globally. This enclosure movement involved the appropriation of tangible property in the form of land and the enslavement of Africans – Locke's argument regarding stimulus for creativity thus did not extend to black subjects, who were denied rights of property in their bodies and, consequently, were denied the right to enjoy the fruits of their labour. As a result, this second enclosure movement also entailed the appropriation of intangible property, be it prose, poetry, music or dance. The key difference between the second and third enclosure movements is that key colonial powers competed with each other for various parts of the commons during the colonial era, whereas today those former colonial powers cooperate with each other to secure hegemony on a global scale through multilateral organizations such as the United Nations, the World Trade Organization (WTO), the World Bank and

the International Monetary Fund (IMF) (Hardt and Negri 2000). Hardt and Negri call this new era of cooperation Empire, which refers to 'a new notion of right, or rather, a new inscription of authority and a new design of the production of norms and legal instruments of coercion that guarantee contracts and resolve conflicts' (Hardt and Negri 2000: 9). It is this shift away from competition and conflict between former colonial entities which ensures that relations of power between former colonizers and the colonized remain more or less in place in the post-independence era. In *The Wretched of the Earth*, Frantz Fanon argues that the new black ruling class in postcolonial African states plays a key role in ensuring that the corporate interests of the West prevail – partly by acting as a buffer between Western corporations and the black majority in the former colonies (Fanon 1968). From Hardt and Negri's perspective, these elites would ensure their countries' participation in these circuits of power through multilateral agreements via organizations like the WTO and WIPO (World Intellectual Property Organization). Disney's *Lion King*, along with its appropriation of 'Mbube', therefore sells its audience a view of Africa that purchases consent for asymmetrical relations of power between North and South, black and white. In the end, industry concerns about piracy mask the ways in which racialized inequities are perpetuated by an approach to intellectual property that continues to serve narrow, neocolonial interests in a supposedly postcolonial era.

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