

## The Making of Indigenous Knowledge in Intellectual Property Law in Australia

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*Abstract: The challenge of how to stop the unauthorized use of Indigenous knowledge has been firmly constituted as a problem to be solved by and managed through the legal domain. In this paper my questions are directed to the way Indigenous knowledge has been made into a category of intellectual property law and consequently how law has sought to define and manage the boundaries of Indigenous knowledge.*

It is clear that our laws and customs do not fit neatly into the preexisting categories of the western system. The legal system does not even know precisely what it is in our societies that is in need of protection. It is along way from being able to provide for such protection. *The existing legal system cannot properly embrace what it cannot define and that is what lies at the heart of the problem.*<sup>1</sup>

The circulations of and networks through which discussions of Indigenous knowledge and intellectual property flow have generated a wealth of material describing the ‘problems’ of intellectual property, the global challenge of protecting Indigenous knowledge and heritage and what the utility of international legal instruments may or may not be. Given how diverse the contexts are in which conversations about intellectual property and Indigenous knowledge are occurring it is surprising that there has been limited attention directed to the emergence of this field. That it is now virtually impossible to consider expressions of Indigenous interests in knowledge control and protection *outside* a legal discourse raises fundamental questions about the emergence of this subject, and in particular, the specific effects of its location within legal frameworks of meaning. Indeed the discourse is so large, with so many participants, at so many levels of political engagement and with varying levels of agency, that the subject has become its own referent.

My direct interest in this issue derives from work involving pragmatic negotiations with a range of stakeholders about the protection of Indigenous knowledge in an Australian context. The project in which I am currently involved with the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Intellectual Property Research Institute of Australia explores contested ownership and control of historical and contemporarily recorded Indigenous cultural knowledge. The project is focused on the significant amounts of copyright material (in particular ethnographic photographs, sound-recordings and films)

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that have been produced about Indigenous people in Australia over the period of colonization. Simply, the problem manifests itself because Indigenous people and communities have no legal rights in much of the material, meaning that they must constantly negotiate with the copyright owner for future use, reproduction, and in some more extreme instances, access. Factors such as distance and language as much as new legislative restrictions on reproduction and use of copyright material in the digital environment complicate matters considerably.

This project developed in response to the immediate need for strategic negotiations within law for communities and cultural institutions alike. Importantly, it prioritizes sustained and ongoing discussions with Indigenous people about questions of ownership of knowledge and the implications of knowledge as property. The result from this approach is the development of community specific strategies for the negotiation of ownership rights to material – increasing the capacity of Indigenous individuals and communities to utilize elements of copyright law in pragmatic ways as well as augmenting copyright with locally developed systems of control and knowledge management. This work *in situ* is being used to inform the development of policy advice and best-practice for cultural institutions, archives and libraries so that such institutions are better able to deal with Indigenous peoples needs, and importantly, begin the development of new relationships between users and owners of copyright material. Its practical focus takes these issues beyond mere theorizing about what the problem is - to imagining new possibilities and how strategies might incorporate legal and non-legal dimensions of knowledge ownership, control and reproduction.

For the purposes of this paper however, I want to take a step back from this project and return to the theoretical work that underpins it. This is for two reasons. Firstly, the theoretical work has provided the basic conceptual tools that help make sense of the problems that the project is seeking to address – namely specific Indigenous interests in copyright law. To this end, both cultural and critical legal theory have helped make sense of the real by unpacking the concomitant factors involved in making the very issues demanding attention. This has allowed the project to transcend certain normative boundaries about the extent of Indigenous interests in intellectual property law and to develop particular approaches that address those interests practically at the same time allowing for localized interests to inform nationwide policy. Secondly, and more generally, the expression of Indigenous rights in intellectual property mobilizes a range of political actors and advocates, but the thinking around what the complications and contests actually are, including their specificity, have become increasingly cloaked in rhetoric. The resulting hesitancy about what can feasibly be done about these matters also then limits the extent that Indigenous people are participants within this process which of course also affects the development and deployment of workable strategies. This paper is one attempt to broaden the space, and it seeks to do this by prompting reflection upon the ways in which Indigenous knowledge has been exposed to formal legal categorization, and the extent that this affects how Indigenous needs and expectations have been articulated and interpreted within law as well as broader social spaces.

Derived from both practical and theoretical positions, the focus for this paper is on the making of Indigenous knowledge as a category within intellectual property law in Australia. From the standpoint of someone who works on daily negotiations about copyright ownership of photographs, films, and sound recordings with Indigenous people,

anthropologists, linguists, historians, other researchers, as well as commercial interests, this paper will come as an unpredictable contribution. It traces the elements that have been significant in bringing Indigenous knowledge to a legal domain in Australia. It considers reasons behind the initial reluctance to see Indigenous interests in the same terms as standard copyright subject matter; the success of the early copyright cases where Indigenous knowledge, in the form of Aboriginal art, met the classificatory rubrics required for the identification of copyright subject matter; and how, once instituted as a legal category, law has (quite inevitably) sought to define and manage the boundaries of Indigenous knowledge.

The debates in Australia surrounding Aboriginal art are used as a point of departure to highlight the emergence of this legal category. The discussions in the late 1970s and early 1980s that concerned the development of 'protections' for Aboriginal art provide a vantage point to consider questions about how Indigenous knowledge was initially identified and then made into a category within intellectual property law. What will become clear through this discussion within an Australian context, is that this emergence was haphazard and in response to quite specific interests. From the outset, Indigenous knowledge was a difficult and unstable subject for law to identify and to develop strategies for management, and this resulted in partial strategies of recognition that were simultaneously inclusive and exclusive of Indigenous interests.

### **Creating an Indigenous subset within intellectual property law**

It would be reductionist to see the power of intellectual property in purely prohibitive terms. The law is always simultaneously prohibitive and productive: it creates realities and constitutes possibilities.<sup>2</sup>

The story of how Indigenous knowledge has become positioned within law is complicated, contradictory and incomplete. There is no isolated moment of identification. This is not to say however, that there isn't an undercurrent that is intimately intertwined in the construction of Indigenous knowledge as a category before law. For the development of this Indigenous category in intellectual property law can be located in instances of contestation and anxiety: specifically the way in which law struggles with the recognition of this 'new' subject matter. Extrapolating from critical histories of intellectual property development and expansion, it is possible to argue that the primary concern for the law in including Indigenous knowledge as protected subject matter arises through problems involving *identification* of intangible subject matter, and the *justification* of a right in property. Thus the difficulties presented to law, rather than being entirely new are actually part of a continuum – of law working through ongoing problems that it has been struggling with for years.<sup>3</sup>

In part, recognition of the exclusion of Indigenous knowledge from intellectual property law arose alongside critical consideration of the author-function in copyright, through which developed a concern for questioning cultural ownership.<sup>4</sup> Much of this analysis was preoccupied with exploring the cultural and legal significance of postmodern authorship and analyzed copyright against the western preoccupation with individual ownership. Along with this, questions of collective cultural ownership and issues of Indigenous ownership came to the fore. In an Australian context, legal actions by Aboriginal artists as legal owners further contributed to an examination of problems and limitations deriving from the largely western origins of the law.<sup>5</sup> It is important to emphasize that while Indigenous knowledge as new

subject matter presented problems for the law, these were, to an extent, problems that underlie intellectual property as a whole and as such were not 'new'. What was 'new' or different was the extent that law responded, and this was due to the multiplicity of cultural, political, economic and individual vectors that influenced the direction that the law took in relation to this new concern. It is at the point of identification, as a subset presenting difficult cultural and legal problems, that Indigenous knowledge became a category of attention in intellectual property law.

Critical legal and cultural scholars have been at the forefront of examining how, at the same time that law reduces (cultural) differences so that they are barely noticeable, it also relies upon them to understand the differing demands brought for legal interpretation, mediation and importantly, remedy. This is part of the necessarily cultural functions of law. Whilst law rejects difference presented to it in a radical way: it accommodates difference when it is presented through the guise of its own categories and terms of reference.<sup>6</sup> This is a reality of legal engagement with differentials, cultural or political, as law mediates a space that does not destabilize its own narrative of internal cohesion. As Elizabeth Povinelli has explored in the context of land rights and native title in Australia, this can result in the construction of specific categories of cultural differences – where a criteria of *authenticity* is established that demands a specific 'performance' of legal subjectivity.<sup>7</sup> In this sense, law becomes intimately engaged in establishing how certain legal subjectivities are recognized – to the extent that this then effects how individuals behave within legal contexts. At the same time however, this is never completely predictable, as individuals also use and modify law for their own strategic purposes.<sup>8</sup> This means that legal frameworks can also be adapted for purposeful strategies of recognition. Voicing a concern for Indigenous property within a legal framework of intellectual property strategically works to alert the law to a concern that it may have otherwise been blind. Because the challenge is set within the law's own terms of reference it must engage the challenge. To not do so would undermine the narrative of 'universalism'. Thus a possibility for utilizing law also depends upon recognizing the emancipatory potential of property.<sup>9</sup> Indeed it is important to acknowledge that whilst Indigenous advocates have been at the forefront of pointing to the limitations of western law, intellectual property has not been abandoned as a potentially useful political tool. In the contexts where I work Indigenous people are not asking for no property rights – instead a reworking of the property regime to accommodate differing interests and expectations. Property, and hence law, remain the primary vehicles through which Indigenous interests are being expressed and this is why it is important to look at the fundamental role of law in interpreting and constructing a frame of understanding about Indigenous knowledge and Indigenous culture(s) or in more plain terms the making of the very category of 'indigenous' within intellectual property law.<sup>10</sup>

The possibility for legal frameworks to deliver important entitlements and recognition that, whilst partial and incomplete, would nevertheless be difficult to gain elsewhere recognizes that within law, certain politics of demand are at play which emanate from discursive positions not necessarily (at least initially) informed by law or bureaucracy. In this sense, while law may become a key player in making meaning about a particular subject, there are a range of other elements involved in bringing a particular issue to the attention of law. For instance, in Australia, changing political environments, the rise of an international Aboriginal art market and the advocacy of individuals were instrumental factors in alerting law to the problem of inappropriate use of Aboriginal designs. It is significant that the copying of

Aboriginal designs had been encouraged and endorsed for at least a century – leading to a fundamental question: what was the shift that saw the copying of Aboriginal designs as a legal problem, rather than a state and socially sanctioned process informing a nationalist aesthetic? The making of this problem within a legal space was not necessarily predictable and thus suggests a range of changing circumstances that influenced how law came to identify the ‘problem’ of copying Aboriginal art.

The intersection of individuals, politics, changing economic and social environments – for instance, the articulation by Aboriginal artists and other advocates of the problem of copying and misuse of Aboriginal knowledge expressed in artistic forms - provided the necessary conditions for future textual production of this problem in legislation, bureaucracy and courts. However, once certain claims are allowed to resonate within legislative and adjudicative processes, the claims themselves take on new kinds of legitimacy (even though the nature of this legitimacy may be quite fragile).<sup>11</sup> In the silences of law, often around more complex issues of culture and cultural production, new kinds of narratives are used to fill the void and therefore new kinds of demands in terms of participation and legal subjectivities are also established.

*Political environments and individual influence*

By the late 1960s and throughout the 1970s, two distinct policy changes were evident in the way the Australian Government approached Indigenous people. The first was a change from a policy of assimilation to one of self-determination and the second was in regards to land rights. The policy shift to land rights was seen in the culmination of statutory land rights legislation in the Northern Territory and South Australia. Australian law was directly affected by these changing political environments, in effect establishing the possibility for law to engage in pragmatic negotiations that addressed social agendas including Indigenous rights.<sup>12</sup>

The land rights movement consolidated a politics concerned with redressing the imbalance between western law and the interests of Aboriginal and Torres Strait Islander people. That these politics have undergone change over the last thirty years is a testament to the dynamics of cultural production, political agendas, academic focus, and the sustained voice of Indigenous people. In this way, the land rights movement presented the opportunity for a dialogic space where the interests of Indigenous people were spoken, governmental objectives shaped, legal positions challenged and academic interests honed. While it should be emphasized that this space was never unilateral or bounded, the historical importance of the space enabled flows into various and multiple areas and generated, in particular, rethinking about the function of the law, with specific consideration of Indigenous people as citizens and therefore as (new kinds of) legal subjects.<sup>13</sup>

The complex demands of political movements influence the future direction and action of government and individuals. Recognizing Indigenous legal rights and the importance of land rights legislation changed the face and direction of Australian legal history. For on one level, the changes in governmental policy relating to Indigenous people necessitated a re-conceptualization in legal and political discourse of the relationship between many Indigenous people to land and the importance of cultural imagery expressed in artistic forms. However, while the development of land rights and native title disrupt traditional jurisprudence on property ownership and rights, such legislation remains inseparable from such jurisprudence. This is because the dominant paradigm of property remains the central

node through which such jurisprudence depends and from which new jurisprudence develops.

As a compliment to the increasing recognition of Indigenous people as citizens within a nationalist gaze, attention was also (re)drawn to the cultural practices and products of many Indigenous people. This included recognizing the economic value of Aboriginal art.<sup>14</sup> As Aboriginal artist Wandjuk Marika, from north-east Arnhem Land explained in 1976:

[w]e have found that within this culture, our art is appreciated and has material value. We have been very happy to sell our paintings and artifacts as this has enabled us to purchase the things that we now need so that our children can have enough to eat, go to school and learn to live as part of two cultures.<sup>15</sup>

In tracing the early events instrumental in alerting law to the concern for protecting Aboriginal art the changing economic value is important. Coupled with the advocacy of numerous individuals this changing economic status contributed to the convening of the first National Seminar on Aboriginal Arts in 1973. The seminar prompted renewed calls for consideration of Aboriginal art as 'legitimate' art in a western sense, complete with market signifiers. As noted by Marika, this material value provided important economic entitlements. The increasing economic value delivered benefits to Indigenous people and non-Indigenous people involved in selling or marketing the art. Nevertheless, the changing economic status did not necessarily diminish the propensity to view Indigenous people themselves through the lens of 'primitivism'.<sup>16</sup> The circulation of Indigenous products as commodities within a market place remained countenanced by the (mythological) position held by Indigenous people themselves who remained popularly represented in romantic, traditionalist and communal guises. These imagined subject positions paradoxically enhancing and increasing the value of the art as commodity.<sup>17</sup> Thus there existed a noticeable disjuncture where Indigenous cultural products circulated within a contemporary framework, whilst the Indigenous 'creators' remained on the periphery occupying subject positions that were difficult to transcend because they were informed by a range of colonial knowledges that produced particular images of Indigenous people and interpretations of Indigenous subjectivity.<sup>18</sup>

As in other colonial projects, Indigenous people occupy difficult spaces in relation to liberalism, resultant in part from the various modes of constructing and making the 'Indigenous' subject known within society. In Australia, two examples include the homogeneity assigned to Indigenous people as a discrete group – despite the varying experiences and ambiguities of colonization, and the location of Indigenous people as existing predominately in traditional community locales – despite the involvement of church and state actively making communities through programs of relocation. The effects of essentializing Indigenous people have been profound and continue to have contemporary resonance. In the context of this discussion, the emphasis on the 'traditionality' of Aboriginal culture made it difficult initially to recognize individual and familial ownership of art and artistic styles as well as contemporary Aboriginal engagement with marketplaces and therefore to consider strategies to stop copying of Aboriginal work akin to those same strategies developed to alleviate unauthorized copying in other artistic communities. It wasn't until Aboriginal artists themselves started articulating their complaint within the same terms as other artists, and indeed comparing their experience to other popular artists, that a

shift in considering the problem, and that law possibly provided remedial avenues, began to occur.

Thus it is important to recognize that the space constructed for recognizing Indigenous subjects has never been unilateral or totally exclusionary. In this sense the excesses of subjectivity that the category of the 'traditional' cannot contain have provided the moments of discontinuity – where common elements could be identified, recognized and spoken by the artists themselves. For example, certain Indigenous spokespeople were able to articulate common causes of complaint in relation to the misuse of their artworks and the problem becomes knowable to law through a moment of translation: of translating the appropriation of the cultural product into a language of copy, permissions, and injury.<sup>19</sup>

In 1976, Wandjuk Marika wrote in the *Aboriginal News* of his anguish at finding his art reproduced onto tea towels. Marika explained his position, one that he subsequently became the key spokesperson and advocate for.

Some time ago, I happened to see a tea-towel with one of my paintings represented on it; this was one of the stories that my father had given me, and no-one else amongst my people would have painted it without my permission. But some unknown person copied my painting and had it reproduced in this way, without even first asking my permission. I was deeply upset and for some years was unable to paint.

It was then that I realised that I and my fellow Aboriginal artists needed some form of protection. It is not that we object to people reproducing our work, but it is essential that we be consulted first, for only we know if a particular painting is of special sacred significance, to be seen only by certain members of a tribe, and only we can give permission for our works of art to be reproduced. It is hard to imagine the works of great Australian artists such as Sydney Nolan or Pro Hart being reproduced without their permission. *We are only asking that we be granted the same recognition, that our works be respected and that we be acknowledged as the rightful owners of our own works of art.*<sup>20</sup>

It was through the statement of common complaint, of being granted the same recognition that initially influenced the responsiveness of the bureaucracy and latter law in relation to these 'inappropriate' uses of Indigenous imagery. It was certainly not remarkable that Marika's art was on tea-towels, for Aboriginal art had been copied and reproduced in all kinds of mundane ways informing a nationalist aesthetic and identity for nearly a century. Indeed there existed (and still exists) a lucrative market for products that feature Aboriginal artistic designs. Nevertheless, Marika's concern was instrumental in initiating the evolution of a space that *recognized the legitimacy of the complaint*: recognition of artistry and (even) ownership being the key elements contributing to the legitimacy. Law was pointed to an area to which it had previously been blind. Yet there remained a tension that was to later play out in court and, arguably, still exists contemporarily in national strategies developed for the protecting Indigenous artists – namely the construction of Indigenous artists as reproducers of 'traditional truths' on the one hand, and the identification of an artist as an individual 'author' necessary for admission into the normative framework upheld and endorsed by copyright law.<sup>21</sup>

*The Bureaucratic Response*

Following from the localized identification of a problem by Marika, his articulation of this within broader social spaces, and in keeping with the international interest in the *value* of folklore at the time, the Australian government instituted a working party to examine the implications of ‘protecting’ folklore.<sup>22</sup> The resulting *Report of the Working Party into the Protection of Aboriginal Folklore* (1981) is important because it represents the first co-ordinated governmental effort to deal with the issues that Marika, as well as other artists, had raised. The Report, produced in conjunction with four select governmental departments, presents a telling moment in the development of a strategy to address this issue that directly engaged with the scope of legal possibility, even if, at first instance, this possibility was not conceived in terms of copyright.<sup>23</sup> What is important is that through the Report, and the contributions made to it by the varying governmental department representatives, law becomes identified as a vehicle through which remedy can be attained, and this is fair enough given the status and reality of law’s capacity to influence and modify certain kinds of behavior. But in looking to law, other possibilities are foreclosed because the problem starts to take on characteristics that only law can deal with – for example rights in (a very specific model of) property. The foreclosing of other possibilities is precisely because law starts making the issue into one that it alone has jurisdiction over. The turn to law, instead of Yolngu strategies of control for instance, is also because of the changing dimensions of the perceived problem and that the controls over the reproduction of imagery within the Yolngu community that Marika is from were not easily translated into cross-cultural transactions around western market and commodity systems. The power dimensions inherent in producing the problem shifted the capacity for Marika to act, for example, there was little possibility for the company infringing Marika’s work to be brought to account within broader Yolngu systems of law, cultural production and knowledge management.

Whilst Marika’s claim for equal recognition and treatment of Aboriginal artists as artists produced a response from the government, there was still a reluctance to see Indigenous claims on the same terms. In this sense, those individuals responsible for writing the *Report of the Working Party* inevitably relied upon the available (colonialist and anthropological) interpretations of Aboriginality, leaving contemporary and inter-cultural Indigenous exchanges as peripheral ‘problems’. This ultimately produced an anxiety of purpose in employing law, namely whether the purpose of future legal initiatives aimed to secure the protection of Indigenous knowledge as a ‘tradition’, or to protect the economic interests of Indigenous people or both. Whilst the two purposes were not mutually exclusive, they did take the potential recommendations in different directions. Whilst the tension of purpose remained unresolved, it was nevertheless sidestepped when the Working Party interpreted the problems set by Marika as a ‘special’ problem for law. Significantly, copyright was initially dismissed as a viable solution (questions of determining authorship, artistic work and originality in ‘traditional culture’ being of key concern) – and hence the options resonated around the development of ‘special’ legislation. Not only was Indigenous subjectivity imagined in a particular way (homogenous, communal and traditional) – but so too were the distinct nature of the concerns (protecting traditions in folklore as against economic interests in art). This then means that participation by Indigenous people within the developing space articulating the problem (of inappropriate use) then demands that they identify with an impossible (and imaginary) standard of authentic ‘traditional’ culture. As a consequent of interpreting the problem as uniquely derived, Indigenous people become presented with “difficulties both in making claims and negotiating positions” in future developments.<sup>24</sup>

Within the *Working Party Report* the disjuncture between economic interest and the preservation of cultural identity and integrity destabilized the expectation and function of intellectual property law with regard to Indigenous knowledge as new subject matter. In this sense, while advocating the possibility of using laws of intellectual property, notably copyright, the *Working Party Report* emphasized the limitations of these laws (for example that they were for individuals not collectivities, they were economic rights not cultural rights).<sup>25</sup> Here bureaucratic intervention is also engaged in producing knowledge about Indigenous people, knowledge production and cultural practices which sets them against the normative framework of individual artists and artistry. The *Working Party Report* is instrumental in circulating signifiers of difference that latter become useful for law in determining the extent that the 'new' subject can be protected through judicial means. My point here is not about the establishment of identifiers of difference, as this is quite inevitable – and considering the history of intellectual property law quite a familiar process. Rather, that establishing markers of difference has certain, though not always deliberate, effects. For example the signifiers oscillate around key words like 'cultural' and 'Aboriginal', which in their very enunciation makes meaning about an exclusive order of collectivity. This affects how the issue itself, as well as Indigenous participants are understood. For the Report ultimately concluded that "the reliance on copyright was not appropriate in order to protect Aboriginal folklore."<sup>26</sup> This was in part because 'folklore' was a vague descriptive term with no suitable legal equivalent. It was also because folklore embodied an unknowable 'cultural' dimension and this was difficult to quantify. To this end Indigenous cultural expression remained unidentified – and consequently law remained unable to define what its purpose should be – for example what it should be protecting, and from whom.

Despite being unable to determine what the issue actually is, the *Working Party Report* remains pivotal in presenting the issue as requiring legal authority and state intervention. For the key recommendation is for a 'special' law, to be complimented by new bureaucratic regimes such as Folklore Committee and a Commissioner of Folklore which would work together to determine claims. This production of the problem as requiring legal and bureaucratic remedy is significant as it normalizes the legislative approach as the way of considering and indeed ordering any future decisions regarding the problem of protecting Indigenous knowledge. The paradox is, that whilst legal intervention is what artists like Marika wanted and requested, the way in which law is mobilized to act on the problem starts its own processes of identification and categorization, and this carries its own costs in terms of understanding and possibility.

The *Report of the Working Party* establishes a certain kind of trajectory in regards to managing Indigenous interests in controlling intangible knowledge. It is a trajectory that highlights the instrumentality of legal frameworks of meaning making. To this end the *Report of the Working Party* can be seen as a strategic way of making reality thinkable and practicable as well as enabling frameworks for decisions to be made. The Report makes the problem of protecting Aboriginal 'folklore' open to remedy – providing an 'account' of the problem and generating ideas that might counter the problem. The Report also functions to legitimate Indigenous knowledge as a specific area of governmental attention. It is illustrative of how bureaucratic initiative is an important vehicle in establishing frameworks in which practices are developed that try to shape, mobilize and sculpt particular choices, needs and wants of Indigenous and non-Indigenous people whilst at the same time producing 'objects' for legal attention and

action, for example ‘folklore’, and later through other governmental reports, ‘Aboriginal arts and cultural expression’ and more recently ‘Indigenous cultural and intellectual property’.<sup>27</sup>

The *Report of the Working Party*, as the first governmental report on Indigenous interests in knowledge control and circulation is intrinsic to the genesis of a space through which the problem of misusing Indigenous knowledge is to be understood becomes made in such a way as to be amenable to discrete projects and further strategies of governance through legal frameworks of interpretation and meaning. But what are the drivers behind this process? The diverse range of individuals participating and even driving the process also illustrate the extent of possible players involved (for instance through party politics, Indigenous rights agendas, the academy, and later sympathetic judges and innovative artists and lawyers) and point to the types of actors that are part of the unique elements that informed law and bureaucracy.

These relational elements are significant because it ultimately means that state sanctioned bureaucracy and the courts themselves do not necessarily share intentionality. The point is that while they work together to create and establish certain ‘identifiers’ about particular subjects, the strategies that are eventually developed will not necessarily be in keeping with the assumed trajectory. In this instance an obvious example is that whilst the bureaucratic initiative, represented through the *Report*, concluded that copyright was not a solution, the courts, through the decision of a sympathetic judge, demonstrated to the contrary that it was. This was in part, because the *Report* was dealing with the problem in general, and the courts had a specific moment through which it was required to determine a solution. However, the shared ‘identifiers’ about Indigenous people and Indigenous knowledge remained relatively undisturbed, as the questions about ‘protecting’ Indigenous knowledge still oscillated around legal intervention, even if the style of that of intervention remained undecided.

Law makes systems of classification – grids and contents and classificatory schemes feed back into the process of adjudication and legislation.<sup>28</sup> Increasingly Indigenous knowledge is, for the purposes of governmental intervention, being generated and identified as a ‘type’ existing within a legal domain, produced through governmental reports, case law, academic interest and international concern. Indigenous knowledge is not ahistorical and uniformly coherent but the need for markers of difference that differentiate Indigenous knowledge from other kinds of subject matter have a dual function in rendering the subject relatively stable, by presuming that it is relatively ahistorical and coherent, and making it different from any other kind of knowledge that intellectual property law has had to historically deal with. The effect of legal rationality may appear relatively benign, for instance as an integral dimension in how law comes to act on the problem and find solutions that meet Indigenous requests for action, but this in turn feeds back into how Indigenous people and others voice their claims so that they are *legally* recognized.

Thus in considering the conditions of emergence for this category in law, including how other disciplines and forms of analysis have informed and then, in turn, become subordinate to the legal questions that the intersection of Indigenous knowledge and intellectual property generate, it is now time to turn to the production and consolidation of the category in case law.<sup>29</sup> This is because case law is “an event formative to law itself”<sup>30</sup> and an important place where juridical technologies facilitate the fabrication of legal subjects.<sup>31</sup> Through moments of

negotiation in and around a court of law over, for instance the originality of Aboriginal art, it becomes easier to see the ways in which law comes to work in its own formal processes and modes of identification over indigenous knowledge, making it fit in ways that suit modes of legal intervention. The mechanics of the court process also provides a place where we can see how the problem itself is transformed into more manageable ways and indeed it is because complex cultural productions are made to appear simple that difficulties later arise.<sup>32</sup>

### **Making a case of original Indigenous property**

In 1985 Aboriginal artist Yanggarny Wunungmurra and the Aboriginal Arts Agency commenced action for copyright infringement against a fabric designer/manufacturer and the proprietor of a retail shop.<sup>33</sup> The argument was that the copyright in the bark painting 'Long necked fresh water tortoises by the fish trap at Gaanan' had been infringed when reproduced onto fabric without the artist's consent. The case was settled with the first defendant, the designer, being ordered to pay damages and to supply a list of all persons to whom he had supplied fabric. The second defendant, the retailer, was ordered to deliver all the remaining material to the plaintiff. The case hardly made a ripple in the vast waters of copyright litigation. That very little is published about this case given the above discussion about the protection of Aboriginal art that had been consuming various elements of the Australian Government's Home Department is quite surprising.<sup>34</sup> That the Yolngu clan connection between Marika, Wunungmurra and the changes in access to law and legal mediation in Arnhem Land following the significant Gove land rights case, *Milpurrum v Nabalco*<sup>35</sup>, is similarly peculiar.<sup>36</sup> Vivian Johnson's assessment is that the case was not noticed because of the interest in 'folklore' at the time. I would also add that the localized instance of legal success in Arnhem Land remained just that – local. Australian politics has always been characterized by the way it picks up some local developments and innovations and ignores others. The marginal interest in the case (and others if they indeed existed) also illustrates that the emergence of an Indigenous author as artist and the consolidation of this category within a legal frame of copyright was not automatic. For whilst Wandjuk Marika was able to express his complaint in terms more readily recognizable to society at large, his work was still considered 'folklore' – and therefore outside the direct purview of copyright. That a claim of copyright infringement was successful and was not really noticed or discussed suggests a subtle reluctance to embrace the inclusion of Indigenous people and cultural products within an intellectual property regime – even when they did happen to meet the requirements of 'tradition'. This attention changed four years later when two Aboriginal artists Lin Onus, Johnny Bulun Bulun, and one Barrister, Colin Golvan reinvigorated a space of recognition in the context of a court.

The 1989 case *Bulun Bulun v Nejlam Pty Ltd*<sup>37</sup> had important consequences for the incorporation of new subject matter into intellectual property law. Significantly, this challenge for intellectual property law in identifying 'new' copyright subject matter and cultural difference was mediated through 'white experts, canny lawyers and nice Judges.'<sup>38</sup> These mediators helped shift the issue from a bureaucratic folkloric curio into a broader legal frame – where resolution actually became a necessity.<sup>39</sup> At play here are a variety of elements, including individual personality and politics between artists popularly considered to be more traditional than urban Aboriginal artists. For Lin Onus, a recognized Koorie artist from Melbourne had developed strong artistic relations with artists in Arnhem Land. On discovering the infringement of Bulun Bulun's work, Onus pursued channels available to

him in his capacity as a popularly recognized artist and a representative on the Victorian Arts Council. He made the problem of the infringement visible in new ways and the serendipity of his actions is precisely how the Barrister, Colin Golvan, got involved in the case to start with. Golvan's response upon hearing about the problem on national radio was essentially pragmatic: he asked 'why wouldn't copyright work?'<sup>40</sup> Golvan had no initial knowledge of the *Report of the Working Party* but with a legal background his intention was in getting copyright law to assume a position of competence in relation to the 'familiar' issue of copied artworks. His later recitation of the case in international intellectual property journals effectively established a field of action and enunciation that was significant in authenticating a (successful) legal approach to the problem.<sup>41</sup>

Curiously, especially given the success of the *Wunungmurra* case, the prevailing intuition at the time of the first *Bulun Bulun* case was that Aboriginal art might not be 'original' enough in the relevant legal sense. According to Golvan proving originality of the work infringed was far and above the biggest potential hurdle that he and consequently the applicants believed that they would encounter in the argument for copyright infringement. The specific nature of this problem also occupied a range of commentators.<sup>42</sup> The initial commentary was that Aboriginal art was not original, because Aboriginal art was derived from community traditions, copied from an early version by countless (nameless) authors. This commentary and its circulation amongst legal academic and more specialized networks concerned with Indigenous rights, thus brought to the fore the potential disjuncture of the two categories for the identification of copyright subject matter: originality and authorship. The potentially destabilizing nature of supplanting these categories onto Indigenous knowledge and cultural production were also endorsed by very particular colonial and anthropologized constructions of Indigenous people and Indigenous cultural practice that had also informed the conclusion in the *Report of the Working Party* that copyright just wasn't a viable solution.

As a preliminary to the case, Golvan flew up to Maningrida in Arnhem Land and then went to the outstation Garmedie where *Bulun Bulun* lived.

We spent some time with him and talked to him about his work and watched him working. We even filmed him to verify the originality of the work. This probably seems a strange thing to say today, but at the time there was quite a lively discussion in copyright circles about whether Aboriginal artists could claim to be original authors of traditional artworks. There was some thinking that because it was a traditional art form - a kind of anthropological thinking - that the artist couldn't claim copyright in it, as all they were doing was copying an age old image.<sup>43</sup>

That the issue of originality was critical to the thinking about whether Aboriginal art could be included at all within an intellectual property discourse is peculiar considering the ambiguous position of 'originality' within the *Copyright Act 1968* (Cth).<sup>44</sup> Further, and this perhaps points most explicitly to the different subject positions held by Indigenous people and consequently Indigenous knowledge within these discussions, there was little if any comparison made to other cases within the long history of copyright that shared the difficulty of determining originality. For copyright the problem of originality is not 'new' and there are a substantial number of cases that have explicitly dealt with these difficulties including: translations; maps; sea charts; dictionaries; photographs, (and more recently) databases and telephone books.<sup>45</sup> However, in the context of Indigenous art the questions of

originality and authorship that arose were seen as totally distinct. The problem was not with laws processes of determining originality (which are really surprisingly low as there is no definition of originality in the copyright act) but rather vested in the unique Indigenous subject matter at hand. What is possible to describe as occurring were dual interpretations; one relying on the primacy of 'originality' as a category capable of identifying copyright subject matter and another explicitly reading the otherness and difference within Indigenous cultures as incommensurable with categories relied upon in law. This view of Indigenous cultures enhanced the anxiety mentioned earlier, where Indigenous people as legal subjects were positioned between two dislocated worlds, one of 'tradition' (where originality could not be identified) and another of modernity (that included identification of an individual 'author;' and an 'original' work).<sup>46</sup>

As other commentators have made note, law has been forced to consider the world beyond its boundaries through the specific moments where claims of legal expectation also incorporate arguments regarding cultural identity.<sup>47</sup> This position is enhanced in the consideration of the intuition that a problem of 'originality' may exist in relation to Indigenous subject matter. Here law could not escape from and was indeed informed by cultural factors, for instance anthropological knowledge and writing that emphasized the 'traditionality' of Indigenous societies and art histories that spoke to the repetition (in opposition to originality) of Aboriginal designs. That Indigenous artists engaged in the same 'mental labour' as other artists in terms of making works that could also be sold commercially was obscured by the differential position of Indigenous artists within Indigenous communities. Likewise, the extent that Indigenous people were making money from their art, and thus engaging in complex negotiations with markets, where the damage sustained to the artist by unauthorized copying could be measured for the benefit of law in financial terms, was obscured by the reluctance to see Aboriginal artists as individuals and as participants within the market. The reliance upon a concept of 'community' and the difficulty of 'individuation' precluded the vision of an Aboriginal artist as an 'author'. In a simplistic way, the argument ran along the lines that Indigenous artists, as they did not choose what to paint because it was 'traditionally' determined, the labor exerted was that of copy rather than creativity. Thus interpretations of Indigenous cultural production, made from a variety of perspectives and fields of 'expertise' that were predominately non-Indigenous, informed the initial hesitancy in the position that the law took.

One of the important reasons why Indigenous art was not seen as 'original' was because it was characterized as 'tribal' or 'primitive'.<sup>48</sup> Further, it was suggested that there was no identifiable 'author' in the sense that the artist was 'reproducing traditional truths' that had been handed down, thus voiding any arguments regarding creativity. Similarly, any aesthetic choices made by an artist were governed by custom and not choice: the idea of an 'intellectual commons' was not applicable in this context. At this point it is instructive to remember Mark Rose's consideration about the necessary conditions that allowed the relationship between the figure of the 'author' and the text to permeate society.<sup>49</sup> Rose observed that before an author could be perceived as a creator it was first necessary that society realized the author was doing more than replicating traditional truths.<sup>50</sup> So while this shift was crucial for the western formation of the author, it was still to occur in relation to figuring (and understanding) Indigenous people and cultures – there was yet to be an individuation that linked an Indigenous artist to a work that law recognized.

The crisis in identification for intellectual property law exposed an anxiety in the position that Indigenous people held in relation to modernity and the 'traditional'. As Golvan has explained, in taking the video of John Bulun Bulun working, "[w]e ascertained quickly that there was a lot of authorial content in what otherwise appeared to the untrained eye as simply being traditional art. For example it wasn't hard to see that what was described as a traditional act was in fact quite contemporary."<sup>51</sup> Herein lies one of the difficulties in reclaiming the category of originality for Indigenous works, and this difficulty was precisely because when it came to the question of originality, it was not clear how Aboriginal art fitted because of the differing and at times contradictory types of knowledge (colonial, anthropological, bureaucratic and Indigenous) that informed understandings and interpretations of its character. In this context judicial decisions became hard to make.<sup>52</sup>

Thus testing questions regarding the legitimacy of these categories for the law are raised. Prior to the cases mentioned, the problem of originality for Indigenous art was potentially the point that would destabilize the legitimacy of the legal categories of identification and justification of intangible subject matter. However, perhaps due to the defensive stance taken by Golvan in the case law, originality was never actually picked up as an issue in the court, despite the academic writing that had pointed to its potential as a significant hurdle. In the court originality in Aboriginal art was assumed, thus maintaining the coherence of legal frameworks and reaffirming that originality as a category effectively identifies suitable work for protection. But this generated alternative effects.

#### *Imbuing Aboriginal art with originality*

One of the byproducts of this treatment of the question of originality with regards to Aboriginal art was the production of a slippage in the symbolic meaning of 'original' already circulating in art and anthropological circles. For the term becomes modified and re-imagined in relation to a broader cultural space that speaks to the 'authenticity' of Aboriginal cultural practice as a whole. In assuming Aboriginal art's originality, which is an attempt by the law to sidestep the cultural contingency and limitations of the term and its method of identification, one effect is an enhanced authenticity of Aboriginal cultures. Thus when Indigenous people come before intellectual property law they must conform to the 'performance' of cultural difference and authentic culture that dually identifies the subject of protection whilst dislocating the subjectivity inherent to its production. Thus the slippage is that in authorizing this form of 'originality', the category of identification for the law moves from *identifying the product* of the intangible subject matter (the art), to *authenticating its genesis* in Aboriginal culture. This arises precisely because to deny Aboriginal art originality would suggest that the culture itself is not 'original' because the linkage between the art and the 'culture' had been so effectively made in representations to the court. So as if by default the opposite occurs: Aboriginal culture as a unitary whole is positioned as 'original'. This process of identification is heightened by the 'traditional' style of art that is at the centre of the case.

The second point to make is that affirming the originality of Aboriginal art effectively brings Aboriginal art into the sphere of intellectual property. Copyright law captures an element of the object through offering a classification of its form. Frameworks for decision making are made which result in the production of knowledge about the new category of law - not only within the art market but also within law too. To this end Aboriginal art becomes imbued with features that otherwise it might not have, for example the language of 'originality' did not form part of popular usage by Indigenous artists or in the art world prior to the cases.

Subsequent to these discussions however, there is the *apriori* assumption that Aboriginal art is 'original', in that it is the authentic expression of a unique cultural perspective. Thus one step in the categorization of Aboriginal art within an intellectual property discourse is completed, even if it does depend upon a narrow reading of Aboriginal cultural and artistic practice. Further, a concept of Indigenous knowledge is legitimately captured and produced as a legal category of attention and identification. But the slippage between the assumed originality of the art, and how this plays into the 'authentic' Aboriginal culture means that the category of identification for the law is necessarily caught up in not only identifying the copyright subject matter, but also linking that subject matter to a particular cultural milieu. The difficulty of separating the art from the *distinct* cultural space where it was produced heightens the anxiety between the positioning of Aboriginal people within both modernity and the evocation of the 'traditional', an anxiety acutely experienced, for example, by urban Aboriginal artists.<sup>53</sup>

It is inevitable that the space created to make the subject 'Indigenous intellectual property' intelligible involves attempts to make features of Indigenous epistemology recognizable to law whilst also supplanting laws own categories onto Indigenous cultural production. "In law there is always conflict and always loss: the stories of the two parties conflict or compete and do so not only in detail but in their shape and their language, in the deepest meanings from the speaker and to others."<sup>54</sup> This is most apparent in the way that the production of the legal category of Indigenous knowledge is exposed to a singularity of identification and justification. Thus Indigenous knowledge, presented in a stable and unitary form, is rendered open to modes of categorization that help *identify* the intangible subject matter to the law. This is achieved through deploying the object of legal protection such as art, dance, design onto Indigenous knowledge, and mediating the shift from the intangible to the tangible. Through this process, Indigenous experience of knowledge exchange is summarily transformed into intelligible and pre-existing categories produced both in law and through normative social mechanisms of recognition.

### **Conclusion: What law makes**

As Indigenous knowledge only recently became subject to legal attention both nationally and internationally this article has sought to illustrate how this emergence in Australian intellectual property law was influenced by a variety of social, political, individual and economic dimensions. There are always multiple elements at play in making complex social and cultural issues subject to legal determination, but once an issue is instituted within legal frameworks of classification and meaning making, law becomes a powerful forum for redistributing interpretations of what the problem actually is (for example, property rights in knowledge) and how to address it (for example developing new legislative initiatives). In this sense law becomes actively involved in constructing a subject that is amenable to its own forms of categorization. But this comes at a price, and this is manifest in the commensurate effects that law then also exerts upon the realms that influence it – for example, how claims to law are made and how new subjectivities are created.

The power to circulate what 'Indigenous intellectual property' is, how it includes and excludes aspects of interpretation of what constitutes Indigenous epistemology, political particularity and context directly effects how processes are conceptualized that deal with, and indeed name the problem that law has been invited to 'solve'. Whilst law is only one

mechanism involved in making complex social and political issues intelligible and amenable to intervention it is nevertheless a powerful vehicle which can circulate new meaning and influence perceptions of closure around a particular issue. This is at the expense of the complexity and contradiction that underpins the problem, or indeed, makes it in the first place. Governmental reports, case law and precedent, as well as academic articles that discuss and debate 'Indigenous intellectual property' also establish networks through which this concept is understood. However, what such reports, case law and articles produce is a conception that Indigenous knowledge is a relatively unitary category, and an established category of intellectual property law. Importantly this reification of the category in law even occurs when critiques focus on the inapplicability of intellectual property framework. The legal language dominates such discussions, to the extent that understanding the limitations necessitates engaging in the language of intellectual property to explain why the law won't work,<sup>55</sup> or why Indigenous knowledge doesn't fit the legal schema.<sup>56</sup>

The Australian example provides a unique 'moment' in the history of intellectual property law, and this is borne out through the repeated story-telling that draws on such case law.<sup>57</sup> It is also significant because what follows from this moment of recognition is a 'repetition' – where the subsequent cases, governmental reports and individual advocacy follow the legal trajectory already set for dealing with this issue.<sup>58</sup> Whilst there is modification and reinvigoration in the 'recognition' there is no disruption of the location of the issue in law. Consequently law becomes a primary vehicle for understanding, identifying and then circulating interpretations of 'Indigenous knowledge'. For all the later developments in this field following the *Working Party Report* and the 1989 *Bulun Bulun* case, both in Australia and internationally, the competence and authority of the legal domain remains affirmed and this has effects not only how meaning about the problem is made, but also how participants are constituted.

Thus this paper represents one instance in an ongoing critical work derived from the following questions: what are the cultural, political and legal shifts that have produced the category of Indigenous knowledge within the field of intellectual property law? And, how does legal power produce a domain specifically occupied by a concept of 'Indigenous knowledge' and how does it seek to manage such a domain?<sup>59</sup> As claims for cultural property are always complicated, and almost always invested with politics, it is time to start assessing the effects of property claims as they are inevitably positioned within legal relations of power. A significant challenge for this field is that law has become the primary mediator for Indigenous interests when the problem itself is historically informed by diverse relationships between individual, cultural, economic and political relations. What this means is that the complexities of knowledge circulation and control within and through Indigenous societies (and in Australia these are not all of one kind) have been sheered off in order to uphold a logic about property and ownership in knowledge. In this sense every society has ways historically and contemporarily of managing and controlling knowledge circulation and distribution, and these have always been multiple and messy. But when law becomes the primary domain for reconciling competing interests, these same interests will be modified in ways that correspond with what is possible within the legal space. This will inevitably be at the expense of the complexity that informs them. Thus, as James Leach reminds us, it is essential to understand the distorting nature of property itself when thinking about the implications and the costs of property ownership in knowledge.<sup>60</sup>

In the field of Indigenous rights and intellectual property, as well as in my daily work, law matters considerably. This is because, quite simply, law produces ways of seeing, of interpreting and understanding events and issues – it makes realities that require action. Rethinking the construction of categories of law provides new and diverse ways of thinking about law, legal process and legal power that reflect upon the complexity of legal engagement within any given sociality. In this sense, social, individual and political elements always effect how law comes to make frameworks for decision making but, conversely law also distributes meaning back into these same spaces at the expense of the inherent intricacy, and often contradiction that informs them. That we appear increasingly relying upon law to solve quite complicated social and cultural problems that have their genesis in a variety of unequal power relations is certainly illustrative of the extent that legalism permeates social consciousness. “To identify a problem as a legal need is to make a particular judgment about appropriate solutions to that problem and then to recast the conception of the problem to accord with the nature of the proposed solution”<sup>61</sup>, and to recognize this is necessarily the first step in understanding why we must talk about what law itself makes, and through what processes a category of legal attention even becomes possible.

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<sup>1</sup> Dodson, “Indigenous Peoples and Intellectual Property Rights”, 32 [emphasis mine].

<sup>2</sup> Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*, 87.

<sup>3</sup> Sherman and Bently, *The Making of Modern Intellectual Property: The British Experience 1760-1911*; Bowrey, “Who’s writing copyrights history?”; Drahos, *A Philosophy of Intellectual Property*; Deazley, “Re-reading Donaldson (1774) in the Twenty First Century and Why It Matters”; Anderson, *The Production of Indigenous Knowledge in Intellectual Property Law*.

<sup>4</sup> See for example: Foucault, “What is an Author?”; Rose, *Authors and Owners: The Invention of Copyright*; Saunders, *Authorship and Copyright*; Woodmansee and Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*; Gaines, *Contested Culture: The Image, The Voice and The Law*.

<sup>5</sup> *Yanggarrny Wunungmurra v Peter Stripes* (1985) Federal Court, unreported; *Bulun Bulun v Nejlam Pty Ltd* (1989) Federal Court, unreported; *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481; *Milpurrurru & Ors v Indofurn Pty Ltd and Ors* (1994) 30 IPR 209; *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513; *Bulurru Australia v Oliver* [2000] NSWSC 58.

<sup>6</sup> See Edmond, “Thick Decisions: expertise, advocacy and reasonableness in the Federal Court of Australia”; Fitzpatrick, *Mythology of Modern Law*; Fitzpatrick, *Modernism and the Grounds of Law*.

<sup>7</sup> See Povinelli, “The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship”. For an expansion see Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*.

<sup>8</sup> Bowrey, *Law and Internet Cultures*; Bowrey and Rimmer, ‘Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law’; Litman, *Digital Copyright: Protecting Intellectual Property on the Internet*, 195.

<sup>9</sup> Kerruish, “Reconciliation, Property and Rights”, 195; Pearson, “Aboriginal law and colonial law since Mabo”; O’Faircheallaigh, “Negotiating Major Agreements: The ‘Cape York Model’”.

<sup>10</sup> I thank Tim Rowse for ongoing discussion with me about this point.

<sup>11</sup> Murphy, “Legal fabrications and the case of cultural property”, 129.

<sup>12</sup> See: *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Pitjantjatjarra Land Rights Act 1981* (South Australia).

<sup>13</sup> Curthoys, "Citizenship, race and gender"; McGrath, "Beneath the Skin: Citizenship, Rights and Aboriginal Women"; and generally, Peterson and Sanders eds, *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities*; Rowse, "Indigenous Citizenship and Self-Determination: The Problem of Shared Responsibilities", 79-100.

<sup>14</sup> Thomas, *Possessions: Indigenous Art/ Colonial Culture*; Myers, *Painting Culture: The Making of an Aboriginal High Art*.

<sup>15</sup> Marika, "Copyright on Aboriginal Art", 7.

<sup>16</sup> Comments by Marcia Langton extend this observation: "In sharp contrast to the 'typical Australian' as the blue eyed surfie, popular images of Indigenous Australians tend to be negative, but also essentialised. These negative stereotypes are based on a belief that there are ineluctable features of 'Aboriginality' based on the tradition of 'primitivism'. Langton, *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian*, 8. See also: Michaels, "Bad Aboriginal Art"; Davila, "Aboriginality: A lugubrious Game?"; Thomas, "Art against Primitivism: Richard Bell's Post Aryanism".

<sup>17</sup> Povinelli observes, "the art market is hardly the only national social field that generates stress on Indigenous subjects while purporting to support their spiritually imbued customary law, encouraging them to occupy complex sites of negation while leaving unexamined why many people within the nation might desire to do so. Povinelli, "Consuming Geist: Popontology and the Spirit of Capital in Indigenous Australia", 253.

<sup>18</sup> Wright, "Intellectual Property and the 'Imaginary Aboriginal'".

<sup>19</sup> Translation is a process of power. Asad, *Genealogies of Religion: Disciplines and Reasons of Power in Christianity and Islam*.

<sup>20</sup> Marika, 'Copyright on Aboriginal Art', 7.

<sup>21</sup> This tension is still evident in how legislative responses to Indigenous interests are constructed, cf Australia's proposed communal moral rights bill. See Anderson, "The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill".

<sup>22</sup> National attention to folklore was paralleled by international attention. The 1967 Stockholm Revision Conference of the Berne Convention discussed the inclusion of provisions relating to folklore – but considered the term 'folklore' too difficult to define. The UNESCO – WIPO *Tunis Model Law on Copyright for Developing Countries* 1976 discussed the way in which 'national folklore' should be protected. In July 1977 WIPO and UNESCO convened a 'Committee of Experts on the Legal Protection of Folklore'. In February 1980 and 1981 WIPO and UNESCO convened meetings of a 'Working Group on the Intellectual Property aspects of Folklore Protection'. The Report of the Working Group culminated in the UNESCO-WIPO *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* 1982.

<sup>23</sup> The four departments were: Attorney General's Department, Department of Aboriginal Affairs, Department of Home Affairs and the Environment and Department of Prime Minister and Cabinet.

<sup>24</sup> Wright, "Intellectual Property and the 'Imaginary Aboriginal', 140.

<sup>25</sup> Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*.

<sup>26</sup> Golvan, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun", 347.

<sup>27</sup> The three significant reports in Australia that deal with this issue create their own terminology that then circulates pervasively until the next report reinvents the terms of the debate. For instance in 1981 *Report of the Working Party* the discussion revolved around the term 'folklore', in the 1994 *Stopping the Rip-Offs Report*, the terminology was 'Aboriginal arts and cultural expression' and in 1998 the *Our Culture: Our Future Report* the terminology became Indigenous Cultural and Intellectual Property. The shifts illustrate the changing political dimensions as well as interested parties involved in describing and interpreting the 'problem'.

<sup>28</sup> Murphy, "Legal fabrications and the case of cultural property", 122.

<sup>29</sup> For instance, the focus on the requirements of 'originality' and 'authorship' have pre-occupied many writers in this area.

<sup>30</sup> Davies, *Delimiting the Law: Postmodernism and the Politics of Law*.

<sup>31</sup> Murphy, "Legal fabrications and the case of cultural property", 120.

- <sup>32</sup> Leach, "Understanding modes of creativity in relation to ownership regimes and cultural flows".
- <sup>33</sup> *Yanggarny Wunungmurra v Peter Stipes* (1985) Federal Court, unreported. See: Stevenson, "Case Note: Infringement in Copyright in Aboriginal Artworks".
- <sup>34</sup> We can tell the case provoked little comment for several reasons. Firstly it was not reported in the intellectual property case reports and secondly, there is very little reflection on the case in the wealth of literature dealing with Aboriginal art and copyright. Vivien Johnson makes the note that "the case was not seen as important because the focus was on folklore not copyright." Johnson, *Copyrites: Aboriginal art in the age of reproductive technologies*, 15.
- <sup>35</sup> *Milpirrum v Nabalco* (1971) 17 FLR 141.
- <sup>36</sup> Yunupingu, "From the Bark Petition to Native Title" *Land Rights: Past Present and Future – Conference Papers*; Hookey, 'The Gove Land rights Case'; For an appreciation of the connection between art and land see: Morphy, *Ancestral Connections: Art and Aboriginal Systems of Knowledge*; Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for its Recognition*; Cane, *Pila Nguru: The Spinifex People*.
- <sup>37</sup> *Bulun Bulun v Nejlam Pty Ltd* (1989) Federal Court, unreported.
- <sup>38</sup> Davies, "Aboriginal Cultural Property?", 6.
- <sup>39</sup> Golvan heard Lin Onus on Australia's national radio Radio National AM program, called up the program and was put in contact with Onus – the visibility of the issue on national radio also indicated its changing status as an issue.
- <sup>40</sup> Golvan, Interview by Anderson, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne.
- <sup>41</sup> Davies, "Aboriginal Cultural Property?"
- <sup>42</sup> Maddock, "Copyright and Traditional Designs: An Aboriginal Dilemma", 8.
- <sup>43</sup> Golvan, Interview.
- <sup>44</sup> There is no definition of originality in Australia's *Copyright Act 1968* (Cth).
- <sup>45</sup> This is not a new problem. See: *Sayre v Moore* (1785) 1 East 361, 102 Eng. Rep. 139; *Cary v Kearsley* (1802) 4 Esp. 168, 170 Eng. Rep. 679; *Spiers v Brown* (1858) 6 WR 352; *University of London Press Ltd v University Tutorial Press Ltd* (1916) 2 Ch 602; *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479. *Kalamazoo (Aust) Pty Ltd v Compact Business Systems P/L* (1985) 5 IPR 213; *Telstra Corporation Limited v Desktop Marketing Systems Pty Ltd* [2001] FCA 612; *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112.
- <sup>46</sup> Perrin, "Approaching Anxiety: The Insistence of the Postcolonial in the Declaration of the Rights of Indigenous People".
- <sup>47</sup> Sarat and Simon, *Cultural Analysis, Cultural Studies and the Law*; Mezey, "Approaches to the Cultural study of Law: Law as Culture".
- <sup>48</sup> Sherman, "From the Non-original to the Ab-original", 122. The literature circulating at the time pointing out the difficulty of originality and Aboriginal art includes, Puri, "Copyright Protection of Folklore: A New Zealand Perspective"; Puri, "Copyright Protection for Australian Aborigines in Light of Mabo"; Ellinson "Unauthorised Reproduction of Traditional Aboriginal Art".
- <sup>49</sup> Rose, "The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship".
- <sup>50</sup> Rose, "The Author as Proprietor", 29.
- <sup>51</sup> Golvan, Interview.
- <sup>52</sup> *Milpurrurru & Ors v Indofurn Pty Ltd and Ors* [1994] 30 IPR 209.
- <sup>53</sup> As Gordon Bennett has explained: "I didn't go to art college to graduate as an 'Aboriginal Artist'. I did want to explore my Aboriginality, however, and it is a subject of my work as much as colonialism and the narratives and language that frame it, and the language that has consistently framed me. Acutely aware of the frame, I graduated as a straight honours student ... to find myself positioned and contained by the language of 'primitivism' as an 'Urban Aboriginal Artist'." G. Bennett, "The Manifest Toe", 58. See also: Bell, "Bell's Theorem: Aboriginal Art: it's a white thing." Bell went on to win the prestigious Telstra National Aboriginal and Torres Strait Islander Art Award in 2003 for his artwork *Aboriginal Art: It's a White Thing*.
- <sup>54</sup> Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism*, 262.
- <sup>55</sup> Ellinson, "Unauthorised Reproduction of Traditional Aboriginal Art"; Blakeney, "Bioprospecting and the Protection of Traditional Medicinal Knowledge of Indigenous Peoples: An Australian Perspective"; Blakeney, "Protecting the Cultural Expressions of Indigenous Peoples under Intellectual Property Law – The Australian Experience".

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<sup>56</sup> Dodson, "Indigenous Peoples and Intellectual Property Rights"; Ford, "An Indigenous Perspective on Intellectual Property".

<sup>57</sup> Sell and May, 'Moments in Law: Contestation and Settlement in the History of Intellectual Property'.

<sup>58</sup> Deleuze, *Difference and Repetition*.

<sup>59</sup> Anderson, *Law Knowledge and Culture: The Production of Indigenous Knowledge in Intellectual Property Law*.

<sup>63</sup> Leach, "Understanding modes of creativity in relation to ownership regimes and cultural flows".

<sup>64</sup> O'Malley, *Law Capitalism and Democracy*, 104.

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