



# Law, Knowledge, Culture

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The Production of  
Indigenous Knowledge in  
Intellectual Property Law

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## 6. A tale of two cases

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The previous chapter argued that governmental agendas, articulated through two key bureaucratic reports, have consolidated the extent that indigenous knowledge is positioned within legal discourse. This chapter will extend analysis of these dynamics by directly examining the importance of case law in facilitating the production of such categories. Furthermore the chapter will illustrate how judicial attempts at reconciling legal categories and legal language with indigenous knowledge are an inevitable and pragmatic response of governance.

Case law provides a space where the theoretical considerations highlighted in previous chapters can be considered through the practice of the law, constituting in its clearest form, legal action. Legal decisions are an event formative to the law itself.<sup>1</sup> In determining what the law says it becomes possible to recognise the limits and expectations of intellectual property law in relation to the indigenous knowledge category. This approach also inevitably reveals a hidden component that underpins copyright case law: the way in which the law seeks to determine (and even create) the essential core of the intangible matter that it seeks to protect.<sup>2</sup> However, the inevitably unstable nature of the intangible, and hence of intellectual property subject matter, means that determining the metaphysical nature of the intangible 'property' remains the key problematic for intellectual property law. Presented with 'indigenous knowledge' as the intangible subject matter and Aboriginal art as the tangible form, the law predominately determines the essential core of indigenous knowledge through tropes of 'tradition', 'Indigenous as Culture' and (cultural) difference. Significantly this solidifies the modern law by pointing out an external differentiation (rather than an inherent internal problem), but in doing so 'traditional'/indigenous knowledge remains unstable and therefore 'uncertain' legal subject matter. This alerts attention to where the disjuncture between recognising indigenous knowledge as a 'new' category occurs, and means that indigenous knowledge remains difficult to manage within an intellectual property discourse.

## MILPURRURRU & OTHERS V INDOFURN PTY LTD

The two cases *Milpurrruru & Others v Indofurn Pty Ltd*<sup>3</sup> and *Bulun Bulun & Others v R & T Textiles*<sup>4</sup> have much in common in terms of the application of copyright law, however they also have distinctive differences that underpin their significance as case law. *Milpurrruru* (the *carpets case*) tested the extent to which intellectual property law could respond to and accommodate indigenous needs to secure forms of knowledge, especially with the increased infringement of Aboriginal art. The case informs the debate about the inclusion of indigenous difference in law. *Bulun Bulun* sought to extend the possibility for intellectual property law to encompass differing forms of ownership to that envisaged by the legislative scheme. In *Bulun Bulun* the cultural specificity of copyright was the key issue.<sup>5</sup> Both cases offer an opportunity to consider the practical response of law when managing both the category of indigenous knowledge and its product, namely Aboriginal art. The direction that law moved through these innovative cases was also facilitated because the same judge heard both cases: Justice von Doussa's voice has also been instructive in establishing a distinct indigenous narrative within intellectual property law.

The *carpets case* involved the unauthorised reproduction of the artwork of eight Aboriginal artists onto carpets. It was heard in the Federal Court of Australia, Northern Territory District Registry in 1994. There were four applicants. The first three were the Aboriginal artists George Milpurrruru,<sup>6</sup> Banduk Marika (both from Arnhem Land) and Tim Payunka Tjapangati (from Central Australia) and the fourth applicant was the public trustee for the Northern Territory representing the estates of five deceased Aboriginal artists. From the outset the judgment notes that all the artists have had their artwork exhibited in national and state galleries and that their artwork is 'recognised nationally and internationally as exceptional'.<sup>7</sup> This affirms both the status of the artists within the contemporary art world and the quality of the work infringed.

The respondents to the claim of copyright infringement were the company Indofurn Pty Ltd (formally Beechrow Pty Ltd) and its three directors: Brian Bethune, George King and Robert Rylands.

Predominately the case centred around two key elements. Firstly, the respondents were alleged to have infringed work under the Australian *Copyright Act 1968* (Cth) when they reproduced Aboriginal artworks onto carpets without the artists' consent and imported the works into Australia for commercial sale. Secondly, they were sued for false and misleading advertising in respect to the marketing of the carpets, thus breaching the *Trade Practices Act 1974* (Cth) for wrongful attribution.<sup>8</sup> In particular

this part of the action related to the tags that were attached to the carpets stating that they were made by Aboriginal artists, and that the artists received royalties from each sale. Both statements were false.

The judicial interpretation offered in the case is significant and specifically relates to von Doussa's J response and mediation in terms of infringement and remedy. Infringement is a key issue in reading this case because in three of the works reproduced onto the carpets, the finding of infringement was debatable. Thus von Doussa J applied his own rationale and interpretation of the *Copyright Act 1968* (Cth) with regard to 'reproduction' in the context of the artwork. Determining infringement also provided a way to establish the originality of Aboriginal art, and thus confirm the legitimacy of its inclusion within the copyright framework.

In terms of remedy, von Doussa J awarded the damages communally to all the artists. In mediating the differences between the legal stipulations for individual damages and the indigenous claimants, His Honour recognised the disjuncture in awarding damages individually, owing to the claimants' differing perceptions of individual ownership. In addition, von Doussa J also awarded damages for 'cultural harm' herein acknowledging that the infringement had not only damaged the reputations or integrity of the artists in a western sense, but generated a 'cultural harm' that had no reference point in western law. This point was developed through the consideration that the infringement potentially had drastic repercussions for the artists within their community, where the responsibilities for safeguarding the use of the imagery differed significantly to those under western law. As von Doussa J observed within his judgment;

This misuse of her (Banduk Marika) artwork has caused her great upset. If it had become widely known in her community at the time she believes that her family could have ordered her to stop producing any works of art; they might have outcast her, they may have sought recompense from her – nowadays in money terms . . . I note in passing the observation in the paper 'Aboriginal Designs and Copyright' . . . that punishment of the Aboriginal law breaker may to a large extent be determined by the success or failure of action in the Anglo-Australian Courts.<sup>9</sup>

Von Doussa J showed relative innovation in developing the law to accommodate indigenous differences. The recognition of a 'cultural harm' speaks to the special status provided to the Aboriginal artists within the law but also the importance of judicial decisions in building such a position. In addition, it highlights the capacity for liberal legal traditions to accommodate communal membership in certain instances. From a legal perspective, the damages represent an attempt to bridge a cultural gap, simultaneously reconciling and realising indigenous expectations about legal action and justice.

## INFRINGEMENT

In all but three of the carpet reproductions direct infringement, as defined through the *Copyright Act 1968* (Cth), had taken place.<sup>10</sup> Direct infringement involves a determination of substantial similarity between the two works; in this case comparing the artworks with the carpets. As explained by McKeough et al, 'what amounts to a substantial part of a work must depend upon the nature of the work itself, and the characteristics or essential features which may *identify* the work'.<sup>11</sup> However in three works, substantial reproduction was a difficult question to be judicially determined. In the three of the eight paintings reproduced onto carpets direct infringement could not be made through a straightforward comparison. 'Wititj' by Paddy Dhatangu, 'Kangaroo and Shield People Dreaming' by Tim Payunka Tjapangati and 'Emu Dreaming' by Uta Uta Jangala presented more difficult questions with respect to identification and substantial reproduction and provide an apt example of how, faced with legal standards of identification, cultural factors come to be implicitly imbued within the judgment.

To what extent an infringement constitutes a substantial reproduction relies upon a distinction between the taking of the concept and the copying of the form of the expression, as ideas themselves are not protected by copyright.<sup>12</sup> Thus determining the issue of substantiality has both qualitative and quantitative elements where both the quality and quantity of the reproduction inform decisions regarding substantial infringement. However, such decisions are often made with 'an emphasis on the qualitative, rather than quantitative considerations'.<sup>13</sup> This is because greater weight is given to determining the copying of the concept itself rather than how much has been copied. With 'Wititj' and the corresponding Snake carpet, it was clear that there were discernable differences between the two works, namely Wititj involves four coils of one large python enclosing two smaller pythons, whereas the carpet consists of one large python as a border feature. These differences led the defendants, Indofurn Pty Ltd, to argue that the carpet was 'an adaptation' not an infringement.<sup>14</sup>

Von Doussa J rejected these claims. In interpreting the issue of substantiality he cited from *International Writing Institute Inc. v Rimila Pty Ltd* (1993):

Reproduction in a material form of a substantial part of a work in which copyright exists is determined by applying the test of substantial use of the features of the applicants work in which copyright exists . . . Though it is permissible to look at the quantity of what the respondent is alleged to have taken from the applicant's work, the test of substantial reproduction is essentially to look to

the quality of what has been taken, although depending on the facts of the case, the two will often overlap.<sup>15</sup>

For von Doussa's J purpose, the application of the precedent informs the process of determining the key principles to consider in deciding whether there had been any copying, and secondly whether the copying had been substantial. With Witiitj and the Snake carpet he found it clear that copying occurred in the following elements: the shape and construction of the python; the similar position in the placement of the larger python on the carpet; the white border line; and, the detail within the body of the python (a style named as rarrk by both the artists and expert witnesses).<sup>16</sup> However, as is evident from comparing the artwork to the carpet, the copying is not necessarily substantial.

In considering the question of substantiality, von Doussa J applied a qualitative judgment, deciding that 'there are striking visual similarities on a comparison of the artwork and the carpet'.<sup>17</sup> In this decision the quality of the copying rather than the quantity taken provided the means of identification, affirming that 'quality is more important than quantity'.<sup>18</sup> His Honour identified the depiction of the tail with rarrk as 'original and distinctive' thereby rejecting the respondent's argument 'that the particular depiction of the Witiitj on the carpet is common to many Aboriginal artworks and involves no originality'.<sup>19</sup> (This argument is only possible in an environment that already has the discursive markers of 'timeless tradition' that automatically precludes originality.)

The judgment of substantiality rests on an analysis of the plaintiff's work alone rather than looking at the defendant's to see what had been added to make it distinct from the original. Earlier I explained how in the nineteenth century, the law shifted its form, so that determining substantial copying effectively became a means to identify the originality of the applicant's work. Originality in turn helps determine and identify to some extent, the process of individuating an idea and expressing it in a work. Thus by only looking at the applicant's work, sensitive questions regarding the status of Aboriginal art as 'original' are curiously resolved.

Similar issues to those above were involved in determining whether the Green centre carpet was a substantial reproduction of 'Kangaroo and Shield People Dreaming'. Again there are striking differences between the artwork and the carpet, the carpet being a significantly simpler interpretation of the artwork. However, in terms of quality being the most important factor of identification, this simplicity is irrelevant. Initially von Doussa identifies the prominent shade of green both in the artwork and central to the carpet. He then sets about determining the extent to which the border feature of the carpet has been extracted from part of the original artwork

and thus not ‘simply a repetition of an elementary or common design pattern’.<sup>20</sup> Importantly His Honour notes that the copy comprises only five–ten per cent of the artwork, which has been repeated and modified. The judgment then incorporates the ‘expert’ evidence of Vivien Johnson who verified the uniqueness of the pattern; that it was not used by any other Aboriginal artist and that the design ‘adopts *common western desert symbols* as part of the design but that does not prevent the result having a *high degree of originality*’.<sup>21</sup> It is significant that Johnson phrases her expertise in the language of copyright and normalizes the description of Aboriginal art as original.<sup>22</sup> In turn, this assists von Doussa’s J decision that the carpet significantly copies the artwork, for the carpet replicates the work’s most ‘striking feature’.<sup>23</sup> In this regard, while the quantity reproduced may have only amounted to a proportion of five–ten per cent of the original work, nevertheless on a judgment of the quality of the copying, substantial reproduction was determined. Therefore copyright infringement (and originality) was affirmed.

In the case of Emu Dreaming and the Waterholes carpet, the above principles were also applied. When considered concurrently, the Waterholes carpet is again a simpler modification of the artwork, yet reproducing the most significant feature of the original work. Thus von Doussa J also held that the ‘waterholes carpet is a copy of a significant part of the original work’.<sup>24</sup>

In arriving at his decision with respect to these three artworks and the infringing carpets, von Doussa’s J judgment drew upon both academic (anthropological) expertise in the appreciation of Aboriginal art and the flexibility inherent in the application of legal principles concerning infringement. Yet under similar circumstances, a different judge could have found that there wasn’t an infringement in the case of these three artworks. This is precisely because such a judgment requires judicial interpretation, both in applying findings of quality, and understanding the cultural content of the original artworks.<sup>25</sup> This is the space where cultural and social influences are incorporated into law.

One element demonstrating the cultural considerations imbued within von Doussa’s J determination is the extent to which his judgment refers to the actual content of the artwork: what it depicts in terms of ‘tracks’, ‘dreamings’ and ‘sites’.

The original artwork is a very complex painting which incorporates numerous important sites, represented by concentric circles, joined by dreaming or journey tracks in a multi-coloured dot-painting style, characteristic of some of the leading artists of the Pintupi tribe in the 1970s and 1980s. The detailed pattern represents, as it were, a topographical map, recording many important sites and events that impacted upon the life of the artist.<sup>26</sup>

Von Doussa takes the disruption of these stories, owing to their significance to the artists and the artists' families and communities, as one of the significant elements in determining the quality of the copy. Thus cultural factors, seemingly sensitive to an indigenous reading of the works, are fundamental to determining the infringement.

The cultural sensitivity shown by the Judge was commented on by Colin Golvan, the Barrister who ran the case.<sup>27</sup> Golvan suggested that von Doussa's analysis was influenced by his 'cultural appreciation . . . of the artworks being reproduced'.<sup>28</sup> Golvan explains that where the Judge utilised legal reasoning, to some extent he also 'took some trouble to understand the content aspects and appreciate that what might appear to be simple artistry was more complicated. For example the parts that were copied included the idea of cross hatching which was part of the totemic imagery, and he wanted to deal with that'.<sup>29</sup>

The cultural considerations imbued in the judicial reasoning reveal an instance of how the law treats cultural difference. While moderated through the legal categories, judicial discretion allows for cultural difference to be accepted and incorporated into categories of identification. Even though liberal law seeks to avoid 'cultural judgments', with this case it must strategically engage with these. Thus (indigenous) 'culture' functions as an important means for understanding the infringement and also legitimising the subject matter. Embedding cultural considerations within the law also neutralises the implications. By this I mean that indigenous knowledge can be targeted effectively for techniques of management as it fits within the legal schema. Importantly the effort on behalf of von Doussa J to appreciate indigenous cultural difference is indicative of the judgment as a whole. This is further highlighted in the way in which von Doussa J developed the type and form of remedy to be awarded from the finding of substantial infringement.

## REMEDY

With the finding of the original 'quality' of the Aboriginal artworks and copyright infringement of these elements, it then became necessary to determine the damages to be awarded.<sup>30</sup> It is at this point that cultural considerations are perhaps most explicitly engaged even though it is contained within a framework of legal delivery such as 'remedy'. Significantly, damages were awarded communally to the artists, rather than on a pro rata basis to the number of carpets made. In reflecting his concern with cultural differences and demonstrating a willingness to imagine ways of incorporating these within intellectual property law, von Doussa J had informed

himself about the previous copyright cases involving Aboriginal art. His Honour was aware that following the 1989 case *Bulun Bulun v Nejlam Pty Ltd* counsel for the applicants, Colin Golvan and Martin Hardie had held a meeting with the artists involved in the case in order to determine how they wanted the compensation monies to be divided.<sup>31</sup> The artists decided that such a division was to be done in such a way where no one artist or family received more than any other.<sup>32</sup>

Awarding 'communal' damages recognised this as a form of remedy in the law for the first time. To this end, specific cultural differences distinguished through the awarding of damages communally function to codify these particular differences within the law. Indeed, this is a key example in the shoring up of the relationship between the indigenous and the communal. The codification of difference sets it out in spheres that can be managed – the field becomes knowable and contained: the direction of the narrative consistent.

Colin Golvan succinctly observes that von Doussa J 'was very concerned that the case was being put at a cultural level'.<sup>33</sup> This 'cultural level' thus becomes a key characteristic of the case, and confirms the capacity of the law to adapt to changing social circumstance. The judicial officer is thus the mediator between techniques managing the inclusion and identification of 'new' subject matter, and also pointing the law in directions where it could adequately treat cultural differences without explicitly being seen to do so.

The way in which the judgment appreciates cultural differences and then incorporates these into the current law, is striking. Thus law treats difference through absorbing it into already existing processes of identification and classification. While recognising the cultural differences presented to him in this case, von Doussa J also strategically limits how they can be interpreted through the law: the Court interprets the *Copyright Act 1968* (Cth) 'in a sensitive but basically orthodox manner'.<sup>34</sup> As the mediator, von Doussa, J reconciles indigenous knowledge 'to' *not* 'with' the law. As a consequence the story of indigenous intellectual property becomes part of the broader intellectual property narrative, but only as a sub-set: it is one of many incidences that constitute the grand intellectual property law narrative. The 'specialness' of indigenous concerns are absorbed into the intellectual property framework, where the production of the category of indigenous knowledge speaks more to the agenda of accommodating new intangible subject matter than accepting and appreciating the cultural circumstances and dynamics that result in the misuse of indigenous knowledge. Indigenous difference is not seen as particularly insurmountable – and it certainly does not challenge the legitimacy of the categories that identify copyright subject matter. This observation helps an appreciation

of the manifold ways in which efforts are directed at managing copyright categories of identification.

In order to expand upon this point it is illustrative to consider the development of an additional form of damages based on the notion of 'cultural harm'. What the development of this point shows is that in establishing a new reasoning for remedies in relation to the copyright infringement of Aboriginal art the issue of 'culture' was directly engaged and the 'specialness' of the category addressed.

Instrumental in positioning 'culture' within the law's eye, counsel for the artists, Colin Golvan, ran the argument that the harm sustained to the artists from the infringement of their work on carpets was more profound than could possibly be understood and recognised in western law. This was because the harm extended beyond the individual to the community. As the artists' affidavits explained, the damage caused by the infringement also affected the community where it potentially and significantly displaced the continuity and significance of the role and function of the artist.<sup>35</sup> Upon reflection Golvan explained this argument in the following way:

To describe . . . the harm, was that it was harm to the integrity of the image and was kind of quasi religious, so they were worried that ceremonies that surrounded the making of the particular artworks would be impeded, and also that their custodial functions were not being honoured, so that they might be seen by others in the clan group as not being proper custodians; that they can't manage. There is competition over these things, as the custodial rights brought with them status and all those things were terribly important.<sup>36</sup>

Von Doussa J was sympathetic to these diverging perceptions of harm and community. He developed his notion of 'cultural harm' because he considered that the other remedial avenues offered through the law were inadequate. For instance, on one level, the economic mode of measurement was not how the artists were measuring the harm. This is particularly clear where he states:

The applicants contend that the unauthorised use of the artwork was in effect the pirating of cultural heritage. That is so, but under copyright law damages can only be awarded insofar as the 'pirating' causes a *loss* to the copyright owner resulting from infringement of copyright. Nevertheless, in the *cultural environment of the artists* the infringement of those rights has, or is likely to have, far reaching effects on the copyright owner. Anger and distress suffered by those around the copyright owner constitute part of that person's injury and suffering.<sup>37</sup>

To this end, von Doussa established a new form of damages and in doing so established precedent for the law to consider the cultural specificity

of the harm caused to the artists and by extension, their families and communities.<sup>38</sup> In short, he extends the measurement of loss beyond the economic to the cultural. In finding a place for community, liberal expectations of justice are realised. However the specificity of the context, that the case derives from particular and unique locales of Arnhem Land and Central Australia, is overshadowed by the reliance and emphasis on the 'cultural'. The cultural becomes a universal explanatory tool for difference, curiously thin in detail about the unique and specific circumstances of the case at hand. For von Doussa reflected that the extent of damage constituted by the infringement to the communities to which the artists belonged was implicitly related to 'cultural environment' and cultural differences. Justifying these specific damages he referred to s115(4) (b) of the *Copyright Act 1968* (Cth), where remedies are to have 'regard to all their relevant matters'. Thus von Doussa J states that 'it is upon this consideration that the cultural issues which are so important to the artists and their communities, assume great importance'.<sup>39</sup> In short cultural issues are positioned as 'relevant matters'. Here 'culture' is called on to be present, but not to challenge the legitimacy of the framework. It is an explanatory mechanism but not a destabilising element.

The precedent created by von Doussa J for the notion of 'cultural harm' is significant. That he justifies this not only through the specific section of the Copyright Act with regard to all 'relevant matters' but also through a comparison to personal injury is worth noting. Referring to the personal injury case, *Williams v Settle* (1960)<sup>40</sup> von Doussa J cites the trial judge who observed in that particular case that the degree of injury was so flagrant that '[i]t was an intrusion into his life, deeper and graver than an intrusion into a man's property'.<sup>41</sup> Through this reasoning von Doussa J is able to juxtapose damage of a cultural nature to the harm experienced through personal injury whilst also extending cultural harm beyond property damage. The purpose to juxtapose otherwise differing associations between an individual and a community, is actually to stress the similarity. Understanding the cultural dimensions of harm for Aboriginal artists through the lens of personal injury presents a case where the law is able to accommodate difference through its own forms of rationalisation. Such rationalisation is contingent on the already existing construct, in this case personal injury, so that law can develop the notion of cultural harm. The positioning of cultural harm is dependent on the constructions around which it circulates wherein cultural harm is produced as akin to personal injury therefore circulating in a field of considerable case law and juridical consideration. It becomes a codified standard of identification.

The case reveals the practical possibility of law living up to expectations about its capacity to be inclusive and to an extent sympathetic to the

differences posed by indigenous knowledge. The flexibility in the judgment for cultural difference endorses these appreciations of law. Importantly, bringing indigenous subject matter to the law demonstrates the adaptability of the law: the law is inclusive, 'universal' and capable. Thus the indigenous category circulates within the broader narrative structure promoting the coherence and legitimacy of intellectual property law, whilst also highlighting the diversity and complexity of indigenous knowledge as copyright subject matter. Even remedies that recognise legal limitations are only valid when exercised within the law. They dually provide a way to recognise difference, but also to manage and contain it within a regulatory framework. The irony is that while recognising Aboriginal art as an original work imbued with cultural considerations, the law also recognises that the work is not just a commodity.

## BEYOND ABORIGINAL ART AS TANGIBLE GOOD

The recognition and inclusion of indigenous knowledge within intellectual property law is due to the value of Aboriginal art as a commodity. Importantly the judgment in the *carpets case* implicitly emphasises and relies upon the value of Aboriginal art within a western art space, to the extent that this also underpins the case. The historical emergence of Aboriginal art into a global art market has meant that copyright law has logically been utilised to protect the art from infringement, again reaffirming continuity in how to treat 'new' subject matter. The circulation of Aboriginal art within an economic realm of value has contributed significantly to the impetus to use intellectual property law to protect indigenous art forms. It is the similarity of form that at first instance allows for Aboriginal art to be considered copyright subject matter at all. In this way, 'legal practice supports a culture of commodification'.<sup>42</sup> This is also where the politics of law become more transparent; a key point to be developed in the following chapter.

For the two Aboriginal communities represented in the *carpets case*, their art is understood as integral to the transference and reaffirmation of specific indigenous knowledges, traditions and heritage.<sup>43</sup> This nexus between art, land, heritage and spirituality serves to contextualise the practice and creation of Aboriginal art. Again art sits inside and astride the economic discourse because of its spiritual qualities, and clearly more so when identifiably 'traditional'.<sup>44</sup> However as cultural context is irrelevant to copyright law and not a factor for consideration, the fundamental differential for considering the methods of creativity between Aboriginal art and copyright material is relegated to the margins of the law. Aboriginal

art remains incorporated because it is viewed through the same prism of western art – it is understood through the copyright criteria of property, value, art, authenticity and the individual artist. The commonality of economic incentive overrides the ‘specialness’ of the category: the economic becomes the normalising element.

The Australian legislation requires no consideration of artistic merit – Aboriginal art qualifies for protection whether or not it has artistic merit; protection, as for any other subject matter, is contingent on the definitions supplied through the *Copyright Act 1968* (Cth). An artistic work defined in s10(1) is;

- (a) a painting, sculpture, drawing engraving or photograph, *whether the work is of artistic quality or not*;
- (b) a building or model of a building, whether the building or model is of artistic quality or not; or
- (c) a work of artistic craftsmanship to which neither of the last two preceding paragraphs applies; but does not include a circuit layout within the meaning of the *Circuit Layouts Act 1989*. [Emphasis mine]

Further, as McKeough et al point out, ‘works of artistic craftsmanship are treated as “artistic” only if they have aesthetic appeal, whereas works encompassed within paragraphs (a) and (b) have only to exhibit the originality and substance generally required in order for copyright to exist’.<sup>45</sup> Hence issues that I considered in depth earlier regarding markers that identify copyright subject matter, (the markers being originality and authorship), return to inform not only the inclusion of indigenous subject matter but also its production (and subsequent regulation) as a specific legal category. However, the greatest irony of the *carpets case* is that while all these elements are functioning, the judgment recognises through remedy, specifically ‘cultural harm’, that Aboriginal art is not just a tangible good. It is both cultural commodity and cultural product. The possibility for allowing a greater recognition of cultural difference and for the economic value of creating and using indigenous cultural products was precisely what the following case *Bulun Bulun & Others v R & T Textiles Pty Ltd* explored.

### ***BULUN BULUN & OTHERS V R & T TEXTILES PTY LTD***

While the *carpets case* (1994) confirmed the practical extent to which the law could respond to the infringement of Aboriginal art, *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) sought to extend the way in which communal ownership was recognised within the law. At first instance, proceedings were initiated by the artist Mr John Bulun Bulun, and also Mr

George Milpururru, acting on behalf of his and Bulun Bulun's community, the Ganalbingu people. *Bulun Bulun & Others v R & T Textiles Pty Ltd* can be seen as a kind of test case, which was only possible through the expectations of legal response generated through the earlier *carpets case*.<sup>46</sup>

In similar circumstances to the *carpets case*, the *Bulun Bulun & Others v R & T Textiles Pty Ltd* case arose after fabric printed in Indonesia was imported into Australia.<sup>47</sup> The fabric infringed the copyright of John Bulun Bulun's work 'Magpie Geese and Water Lilies at the Waterhole'. This particular work of Bulun Bulun's had been sold to a public museum in the Northern Territory and also reproduced, with the artist's consent, in a significant book on Aboriginal art.<sup>48</sup> It was also the painting that was at the centre of the earlier 1989 case *Bulun Bulun v Nejlam Pty Ltd*.<sup>49</sup>

Initially the proceedings issued by Mr Bulun Bulun and Mr Milpururru were against R & T Textiles and its three directors. However, soon after proceedings were issued the fabric company went into administration. An amended statement of claim was filed and the respondent company consented to final declarations and orders in relation to Bulun Bulun's claim. Copyright infringement was admitted before proceedings began with arrangements made between the parties for damages.<sup>50</sup>

With the approach of the date that had been set for the trial, it became apparent that no-one would be appearing on the respondent's behalf. Under such circumstances, the applicants brought the proceedings to the attention of the Minister for Aboriginal and Torres Strait Islander Affairs.<sup>51</sup> Consequently the Federal Government was granted leave to intervene against the applicant's claims.<sup>52</sup> In addition, the Attorney General for the Northern Territory was granted leave to make a submission, as *amicus curiae*.<sup>53</sup> Specifically this was with respect to the 'power of the Court to make a determination as to the existence of native title rights'.<sup>54</sup> The submission by the Attorney General was in response to the claim, advanced by counsel on behalf of Milpururru, that communal ownership of the painting arose by incidence of native title rights in the land that the painting represented. As is recorded in the judgment,

The Minister and the Attorney General were concerned with the pleadings claimed that: 1) the intellectual property rights in the artistic work were an incidence of native title; 2) being an incidence of native title the intellectual property rights constituted an interest in land; and 3) the Ganalbingu people were entitled to a determination in these proceedings that they were the native title holders of the Ganalbingu country. The outline of submissions presented by the applicants at the start of the trial appeared to support this interpretation of their claim.<sup>55</sup>

In general terms the intervention by the Government meant that the case could proceed. The intervention came about because the Government was

concerned specifically about the potential associations that could be drawn between intellectual property rights in the artistic works as arising out of native title. In this regard, the Government sought to limit such arguments, in itself indicating the unease felt owing to the possibility that, considering the leeway provided in the *carpets case* for cultural difference, such arguments could be accepted.<sup>56</sup> Moreover this unease highlights a tension between, on the one hand, recognising the rights of indigenous people and the difficulty of the law acquiescing to such rights, while on the other, that the recognition of such rights potentially could destabilise the coherence and stability of both bodies of law (intellectual property law and native title). In this sense, with the coherence of the law threatened, there was a pressing obligation to limit and curtail such possibility. The central argument made by the Government relied upon s213 (1) of the *Native Title Act 1993* (Cth) wherein states:

If for the purpose of any matter or proceeding before the Federal Court, it is necessary to make a determination of native title, *that determination must be made in accordance with the procedures in this Act.* [Emphasis mine]

The argument here was that no determination of native title could be made outside the *Native Title Act 1993* (Cth). Locating the problem as one within the statute secured the closure of each body of law, assisting to reify the object of focus and maintain the distinction between ‘real’ property and species of intangible property. Such a position was endorsed by von Doussa J where he stated that native title could only be determined through the *Native Title Act 1993* (Cth) alone, not the *Copyright Act 1968* (Cth). ‘This Court has no jurisdiction to make a determination in respect of the claimed native title rights’.<sup>57</sup> This reaffirmed that the judiciary does not make changes in the law: judges merely apply the law rather than creating it.<sup>58</sup> Further, judges do not explicitly respond to politics. Citing Brennan J in *Mabo* [No.2] von Doussa J continued his justification for excluding consideration of native title rights arising out of copyright in the artistic work, where;

[i]n order to be successful, the applicants’ foreshadowed argument that a right of ownership arises in artistic works and copyright attaching to them as an aspect of native title would appear to require that the Court accept that the inseparable nature of ownership in land and ownership in artistic works by Aboriginal people is recognised by the common law. The principle that ownership of land and ownership of [sic] artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be characterised as ‘skeletal’ and stand in the road of acceptance of the foreshadowed argument.<sup>59</sup>

Thus von Doussa J was able to uphold the governmental concerns through the justification of judicial interpretation that stressed the

importance of separate categories of law and the impossibility of crossing these boundaries owing to a (mythical) division between law and politics. Governmental intervention sought to have the distinct legal boundary between intellectual property law and native title law upheld. This speaks to the relationship between the law and governmental rationality, whereby such arguments displace the context and politics and are pared back to the basic principles of law; asserting legal power and control through perpetuating an effective narrative of the law where each body of law functions separately and independently. Through von Doussa's reasoning the law retreats to a position of coherence and stability rather than addressing the fuzziness in the margins, which is precisely where the indigenous claim was directed, where the law is not clear and definitive. Further debate around this issue of margins and separate legal jurisdictions was limited as counsel for the applicants chose not to pursue this claim vigorously. Instead they attempted a different tactic, testing the limits of the law in another way.

As already stated, George Milpurrurru pursued his claim on behalf of himself and in his capacity as a representative of the Ganalbingu people. Through his affidavit, he claimed that as the traditional Aboriginal inhabitants of a specific part of Arnhem Land, the Ganalbingu people have an equitable ownership of copyright in Bulun Bulun's painting and that the artist owed a fiduciary duty to the Ganalbingu people in relation to the copyright.<sup>60</sup> In essence, what was argued was that the ownership of the imagery depicted by Bulun Bulun was not 'owned' in the western sense solely (or individually) by Bulun Bulun, but that it was held in trust for all the members of the Ganalbingu people. In such circumstances as an infringement arose, the Ganalbingu people could claim copyright in the work if the artist failed to act. The argument was one where the court was directed to how the copyright infringements affected interests beyond that of the copyright owner. This directly flowed from the acknowledgement in the *carpets case* that the community had a legitimate position in relation to the infringement of an artwork. The Court was asked to recognise the rights of the Ganalbingu people in the artwork – disrupting the notion of individual authorship and ownership – owing to the effects upon the community caused by the infringement.<sup>61</sup>

The case presented an opportunity for the presiding Judge to expand upon his previous judicial reasoning where the damage to the community was reflected through the notion of 'cultural harm'. Von Doussa J was encouraged to consider a more sustained recognition of communal rights as a category that helped identify indigenous rights in intellectual property. Thus in this case, the significant element for intellectual property law circled back to the issue of 'culture', in particular the cultural differences

extant within the Ganalbingu community and the reproduction of cultural imagery and how this presented a 'special' case for law to absorb.

The shape that the case took determining the copyright infringement became a secondary element of the case: for this was already admitted and Bulun Bulun was no longer a party.<sup>62</sup> Instead the case focused on the way that copyright law conceived of an owner and importantly the different constructions of ownership that could arise from the different cultural positions held by indigenous people, represented by Milpurrurru and the Ganalbingu people. Thus the case essentially revolved around the issue of determining the extent to which cultural difference could be absorbed into the schema of copyright law by pushing the classification of 'joint-ownership' to incorporate 'community-ownership'.

## JOINT OWNERSHIP AND COMMUNAL OWNERSHIP

As part of the case, and in an effort to come to terms with the different notions of ownership proffered by the applicants, von Doussa J heard extensive evidence about the importance of Ganalbingu law and custom and included a site visit in the hearing.<sup>63</sup> These aspects suggest that von Doussa J was concerned to provide a space within the case and by association within the law, for the hearing and speaking of different cultural positions. The potentially troubling legal questions regarding the admissibility of oral evidence were resolved early by von Doussa J through direction to precedent in other Australian cases, specifically native title, but also the Canadian case *Delgamuukw*.<sup>64</sup> His Honour decided that evidence of customary laws was a crucial element for determining damages and appreciating the manifold cultural effects of infringement. However customary laws could not disrupt the linearity of legal determinations, or the objects that constitute such judgments.

The Court was unable to entertain the possibility of communal title existing within the Copyright Act. Von Doussa J noted that,

Whilst it is superficially attractive to postulate that the common law should recognise communal title, it would be contrary to established legal principle for the common law to do so.<sup>65</sup>

Specifically he explained that while there may have been scope for continued recognition of 'indigenous intellectual property' law from the time of European occupation of Australia in 1788 until at least the codification of copyright law in the *Copyright Act 1912* (Cth), copyright is now entirely a creature of statute.<sup>66</sup> In this sense then, '[t]he exclusive domain of the

*Copyright Act 1968* (Cth) in Australia is expressed in section 8 . . . namely that “copyright does not subsist otherwise than virtue of this Act”.<sup>67</sup> At this point mainstream jurisprudential arguments about copyright law return to inform von Doussa’s decision. By relying on the authority of the common law jurisprudence, the possibility of accepting an alternative appreciation of title was foreclosed. Kathy Bowrey has argued that the reference to copyright being a creature of statute ‘affirms the sovereignty of the Commonwealth Parliament and the authority of positive law over common law and customary law’.<sup>68</sup> Bowrey continues by noting that,

Our positivised copyright law is presented as rational and coherent, (potentially) culturally inclusive, open and impartial. In this sense copyright is not just a body of law dealing with the intellectual property rights of authors, artists and alike. Copyright is also constructed as symbolic of all liberal law.<sup>69</sup>

The possibility for indigenous rights to be addressed is foreclosed. Indeed, the reluctance of the law to recognise the capacity to endorse indigenous rights highlights precisely what a major shift would be required and that quite possibly, the security and stability of the law would be undermined. This illustrates how the push for recognition of communal ownership not only destabilised traditional jurisprudence, but also the liberal traditions of governance.

Insofar as the current *Copyright Act 1968* (Cth) is concerned, s35(2) states that what subsists by virtue of that Act is that the *author* of an artistic work is the *owner* of the copyright – the two are imbricated in each other. It follows that a work of ‘joint-authorship’ is where a work has been produced by the collaboration of two or more authors where ‘the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors’.<sup>70</sup> Citing the case *Kenrick v Lawrence*<sup>71</sup> where ‘a person who supplies an artistic idea to an artist who then executes the work is not, on that ground alone, a joint author with the artist’<sup>72</sup> von Doussa J explained that therefore the *Copyright Act 1968* (Cth) effectively precluded any notion of group ownership in a work unless it was within the meaning of joint-ownership as defined in the Act. Herein the Copyright Act, as an arm of government, regulates the inclusion of new meanings: the responsibility of judicial discretion and its effects are hidden behind the seamless regulation of the Act.

Hence, the difference and subsequent difficulty of applying intellectual property laws to indigenous knowledge is realised. For while it is generally assumed in intellectual property law, that the material form is the idea expressed and that the idea has come from a space or domain where ideas freely flow, within Yolngu and more specifically, Ganalbingu community cultural practice, the realm where the idea has come from is strictly

controlled by customary law. Bulun Bulun explains this complex relationship in his affidavit,

Barnda not only created the place we call Djulibinuyamurr but it populated the country as well. Barnda gave the place its name, created the people who follow him and named those people. Barnda gave us our language and our law. Barnda gave to my ancestors the country and the ceremony and paintings associated with the country. My ancestors had a responsibility given to them by Barnda to perform the ceremony and to do the paintings that were granted to them. This is part of the continuing responsibility of the traditional Aboriginal owners handed down from generation to generation . . . The continuity of our traditions and ways including our traditional Aboriginal ownership depends upon us respecting and honouring the things entrusted to us by Barnda.<sup>73</sup>

The art at the centre of the *Bulun Bulun* case is not just art, and therefore the same judicial principles have difficulty in application and transference. Primary legal assumptions are shown to be culturally contingent. For example in the context of Yolngu cultural practice, there can not be assumed to be an ‘intellectual commons’ where ideas are freely chosen and then expressed.<sup>74</sup> Instead, and this highlights the different elements that are taken to be indigenous property in cultural expression, the intangible produced into tangible form comes from a space that is strictly patrolled and regulated according to community and familial traditions and status. For example only John Bulun Bulun could paint ‘At the waterhole’ even though the imagery existed for the whole community:

[t]he creation of artworks such as ‘At the waterhole’ is part of my responsibility in fulfilling the obligations I have as a traditional Aboriginal owner of Djulibinyamurr. I am permitted by my law to create this artwork, but it is also my duty and responsibility to create such works, as part of my traditional Aboriginal land obligation.<sup>75</sup>

The argument for communal ownership derived from the distinct cultural position held by the Ganalbingu people – that the community had group ownership in the work precisely because Bulun Bulun was permitted through customary law and obligation to reproduce the imagery to a material form. In dismissing these claims it is evident that the capacity of the law to include such significant differences must initially begin by destabilising the fundamental premise upon which intellectual property law functions – that intangible subject matter is freely available and only requires one’s labour to make it into a thing of property. Thus the indigenous position put through the *Bulun Bulun* case is an untenable position for the law not least because, as has been illustrated in other areas,<sup>76</sup> it is quite disinterested

in (re)addressing cultural bias. The mythologising process of the law is perpetuated through a refusal to acknowledge the culturally contingent nature of categories and premises. Under such circumstances, the law retreats to a position of uniformity.

Thus the difficulty and applicability of definitions from the Copyright Act regarding joint authorship under these conditions is exposed. It is the construction of Bulun Bulun as the 'author' in the copyright sense that gives rise to these problems. For if Bulun Bulun painted the work and is the 'executor' of the work, it is his contribution in the 'action' of painting that makes him the author. To be a contributor to the work, in any way besides an action of painting, precludes the possibility of ownership. The stringent controls and regulations in the Ganalbingu community intrinsically affect the action of the painting: painting is only possible through the direct sanction of the community. It is precisely this perspective of ownership that provides the difficulty in reconciling the form of ownership directed by the Copyright Act. However in the circumstances of the case, and recognising these considerable and insurmountable issues of difference, counsel attempted to weave another way around the obstacle presented by definitions of joint-ownership in the Copyright Act. The subsequent position presented was that the Ganalbingu community had an equitable interest arising out of Bulun Bulun's copyright. In this sense, the challenge was phrased in the law's own language.

## EQUITABLE INTEREST

To this end, the central concern in the case then moved to the claim for equitable interest in Bulun Bulun's copyright where equitable interest was argued to arise incidentally to the Ganalbingu people's traditional use and occupation of the land. Specifically the equitable claim pursued was that an artist comes under a fiduciary obligation to the community or its senior members when an artist reduces part of its ritual knowledge to a material form. As such the property that is created as soon as the ritual knowledge is expressed in material form is not solely the responsibility of the person who made it into that form, but rather the whole community. As von Doussa J explains, '[t]hat the claim was ultimately confined to one for recognition of an equitable interest in the legal copyright of Mr Bulun Bulun is an acknowledgement that no other possible avenue had emerged from the researches of counsel'.<sup>77</sup> With the argument pushed to equity no rupture in the coherence of intellectual property's positivist narrative occurred: the centrality of notions of ownership and authorship, and importantly 'labour' remained intact and 'stable'.

In order to consider whether the Ganalbingu people had an equitable interest in Bulun Bulun's copyright, von Doussa J first considered whether an express trust could be found and secondly whether Bulun Bulun held the copyright as a fiduciary. Bulun Bulun's claim is positioned centrally within legalese. An express trust is an express obligation in legal terms evidenced by an agreement in writing or by practice dealing with economic proceeds.<sup>78</sup> The existence of an express trust depends upon the intention of the creator and this functions in certain circumstances, for instance when the work is a commodity. An obligation is made in contractual or economic terms and linked to western notions of property. Consequently von Doussa J found that there was no express trust because '[n]otions of copyright ownership have not developed under Ganalbingu law'.<sup>79</sup> This explicitly illustrates a position of incommensurability – for the legal standard cannot be applied. In addition, von Doussa J points to the different ways in which the work could be used in an economic sense without community approval thus excluding the possibility of an express trust, for:

[t]here is no usual or customary practice whereby artworks are held in trust for the Ganalbingu people. In the present case neither Mr Bulun Bulun's djungaye or Mr Milpurruru suggest that the commercial sale of the artwork by Mr Bulun Bulun was contrary to customary law, or to the terms of the permission which was given to him to produce the artwork. In these circumstances that fact of the sale and the retention of the proceeds for his own use is inconsistent with their being an intention on the part of Mr Bulun Bulun to create an express trust. Further the fact that the artwork was sold commercially, and has been the subject of reproduction with the apparent permission of those who control its reproduction, in *Arts of the Dreaming: Australian Living Heritage* forecloses any possibility of arguing that the imagery in the artwork is of a secret or sacred nature that it could be inferred that the artist must have had the intention in accordance with customary law to hold the artwork for the benefit of the Ganalbingu people.<sup>80</sup>

Subsequently, His Honour considered the existence of a fiduciary relationship arising from the nature of the ownership of artistic works among the Ganalbingu people.<sup>81</sup> In doing so he explained 'the factors and relationships giving rise to a fiduciary relationship are nowhere exhaustively defined'.<sup>82</sup> Owing to the lack of definitional security, the 'indigenous' circumstance is offered a new kind of space. His Honour, citing Mason J in *Hospital Products*<sup>83</sup> and Toohey J in *Mabo*<sup>84</sup> set the parameters for how his interpretation of a fiduciary duty within the specifics of the case could be understood. Toohey J in *Mabo* notes:

Underlying such relationships is the scope for one party to exercise a discretion which is capable of affecting the legal position of the other. One party has a special opportunity to abuse the interests of the other. The discretion will be an incident of the first party's office or position.<sup>85</sup>

Within such parameters, von Doussa J explains that the complexity of the relationship arises out of Bulun Bulun's use of a corpus of ritual knowledge. He states:

The relationship between Mr Bulun Bulun as the *author* and *legal title holder* of the artistic work and the Ganalbingu people is unique. The 'transaction' between them out of which a fiduciary relationship is said to arise is the use with permission by Mr Bulun Bulun of ritual knowledge of the Ganalbingu people, and the embodiment of that knowledge within the artistic work. That use has been permitted in accordance with the law and customs of the Ganalbingu people.<sup>86</sup>

In this instance, it is clear that von Doussa J reflects upon the customary evidence provided where 'customary evidence may be used as a foundation of rights, interests and obligations'.<sup>87</sup> Therefore His Honour finds that a fiduciary relationship between Bulun Bulun and the Ganalbingu people existed whereby:

the artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture and ritual knowledge. However this fiduciary relationship does not vest any equitable interest in the copyright in the Ganalbingu people. Rather their right, in the event of a breach of obligation by the fiduciary is a right in personam to bring action against the fiduciary to enforce the obligation.<sup>88</sup>

Directing further attention to precedent in relevant case law and an African decision concerning tribal property,<sup>89</sup> His Honour found other members of the group may be able to initiate proceedings to preserve the property where the head of the group fails to act.

Importantly, the turn to the legal conception of constructive trust maintains the coherence of intellectual property law as a whole. The concern for developing a solution is shifted away from intellectual property law to trust. Constructive trust is a body of law developed to have more fluidity so as to provide remedial relief in the interest of mitigating against the 'harsh' outcomes of property transactions.<sup>90</sup> That other legal jurisdictions have used trust to reconcile indigenous people interests recognises a more general failing in formal law for the recognition of indigenous rights. Such problems stimulate law to take action and in this regard equity is a body of law that can provide some solace and in doing so save face, legally and politically, as law is seen as responsive rather than inactive. In this way law recognises the problem and produces the solutions. This is achieved through the governable space that directs attention and intervention making the challenge legally knowable and workable. Thus the solutions are articulated at the legal level, because the problem has already been composed as legal in scope. What remains unclear however is whether law created the problem

through the categorising of issues itself. The governable space allows for a displacement of the responsibility of the law in general instead positing a consideration for how the individual categories include and characterise indigenous issues. Paradoxically, everyone and no-one is to blame in law for the problem, and the solution of ‘constructive trust’ shifts the view to the productive action of the law to develop a solution – the effectivity of the law through the function and action of governmental programmes to garner solutions to complicated cultural issues is affirmed.

Consequently, von Doussa J found that an artist’s fiduciary obligation existed and it had two features. Firstly there was an obligation not to exploit the work contrary to Ganalbingu law and custom. Secondly, where a third party infringes Ganalbingu law, the fiduciary must take action to restrain and remedy any infringement. As already stated, this does not grant the community any direct equitable interest in the copyright, rather the community’s primary remedy is to force the fiduciary to act. However von Doussa J noted the following where he recognised that in some cases the artist may not be able to act:

In other circumstances if . . . an artistic work which embodies ritual knowledge of an Aboriginal clan is being used inappropriately, and the copyright owner fails or refuses to take appropriate action to enforce the copyright, the Australian legal system will permit remediation through the courts by the clan.<sup>91</sup>

Von Doussa J leaves open what such circumstances may include for the community to act.

## JUDICIAL DISCRETION AND LEGAL BOUNDARIES

The *Bulun Bulun* case demonstrates the extent to which the power and authority to maintain the legal boundaries of copyright remain within the limits of judicial discretion. Thus the cultural specificity of copyright can be contained to the sphere where it speaks to itself rather than recognising the significance of indigenous claims in broader areas of law. Certainly von Doussa J was sensitive to the cultural differences to which he was exposed, but ultimately he only viewed these through the prism of copyright law. In doing so von Doussa J was active in maintaining consistency in the borders of copyright law. While he recognised cultural difference, for instance in the form of fiduciary duty of the copyright owner, he foreclosed the discussions that would have extended the recognition of the cultural specificity of copyright law. Instead he moved the discussion to other areas of law such as equity and constructive trust, effectively maintaining the coherence of intellectual property law, for its core categories remained unchallenged.<sup>92</sup>

That said, it is worth being mindful of the way in which, through this case copyright does, to an extent, take on board the reality of Aboriginal art as greater than a commodity. This however only functions at the margins of the law. The fuzziness at the margins provides for the possibility of both accepting and dismissing elements of cultural difference, and this is determined both by degree and judicial discretion. For example, von Doussa recognises that the material expression of ritual knowledge and the responsibility of the community is beyond the jurisdiction of copyright.<sup>93</sup> Thus he understands the art as more than a commodity but limits how this can be understood in the law, primarily because the law minimises issues of cultural difference when these potentially expose the contingency of its own categories and processes of identification. This is similarly the case when von Doussa J observes that:

customary Aboriginal laws relating to ownership of artistic works survived the introduction of the common law of England in 1788. The Aboriginal people did not cease to observe their *sui generis* system of rights and obligations upon the acquisition of sovereignty of Australia by the Crown. The question however is whether those Aboriginal laws can create binding obligations on persons outside the relevant Aboriginal community, either by recognition of those laws by the common law, or by their capacity to found equitable rights in *rem*.<sup>94</sup>

The possible existence and continued function of a system of indigenous collective ownership of artistic works remains an abstract problem to be considered through the common law. However, and it is here that such recognition is relegated to the margins of copyright law, the statute governing the Copyright Act precludes such possibility – ‘If the common law had not been amended in the meantime by statute an interesting question would arise as to whether Aboriginal customs and laws could be incorporated into the common law’.<sup>95</sup> Thus the reality of Aboriginal responsibility in art is acknowledged but cannot be formally recognised through copyright. The creature that is ‘statute’ effectively consolidates and confirms the limits of the law and the legal values that identify intangible subject matter.

So it is in the margins that the law grapples with appreciating cultural differences. However these are brought into the judgment as ‘background’ rather than ‘facts’ of the case. This provides a way of managing what is centrally within the purview of the law. In the same way that, ‘law and facts are not separate because what counts as a fact is made so by the law’<sup>96</sup> what is made background material is similarly relegated so by the law. However, categories that function to identify and classify indigenous subject matter maintain their purpose and the questions that remain are ones about the metaphysical dimensions of property. This is precisely where the politics of law become more transparent.

## NOTES

1. M. Davies, *Delimiting the Law: Postmodernism and the Politics of the Law*, Pluto Press: Chicago and London, 1996 at 94.
2. See discussion in Chapter 2.
3. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209.
4. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513.
5. K. Bowrey, 'The Outer Limits of Copyright Law – Where Law meets Philosophy and Culture', (2001) 12 *Law and Critique* 75 at 79.
6. George Milpurrruru has since died and for this reason the case is also known as *Deceased Applicant v Indofurn*.
7. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 212.
8. ss.52, 53(c) and (d) and 55.
9. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 215.
10. Infringement of copyright may be direct as described in ss.13 (2), 36 (1), 101 (1) *Copyright Act 1968* (Cth) or indirect as described in ss.37, 38, 39 (1), 102, 103.
11. J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Material* (third edition), The Lawbook Company: Sydney, 2002, at 169 [emphasis mine].
12. *Ibid.*, at 168.
13. S. Ricketson, *Intellectual Property: Cases, Materials and Commentary*, Butterworths: Australia, 1994, at 185.
14. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 227.
15. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 227–228.
16. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 226.
17. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 226.
18. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 228 citing *Ravenscroft v Herbert and New English Library* (1998) RPC 193 at 203.
19. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 226.
20. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 230.
21. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 230. Law demands that participants conform to particular frameworks. 'Expert' evidence is one example. Expert evidence often functions to confirm the legitimacy and authority of legal modes of identification, for instance – originality. There are additional questions here about the production of the 'expert' that the court recognises in the first place. It is notable that indigenous people are not produced as 'experts' for the court. For readings on the importance of expertise in liberalism see: T. Mitchell, *Rule of Experts: Egypt, Technopolitics, Modernity*, University of California Press: Berkeley, 2002; N. Rose, 'Government, authority and expertise in advanced liberalism' (1993) 22(3) *Economy and Society* 283; P. O'Malley, 'Uncertain subjects: risks, liberalism and contract' (2000) 29(4) *Economy and Society* 460.
22. Affidavits provide an authoritative 'truth'. The creation of affidavits is a highly structured activity that ultimately produces an additional (truth) narrative to the court.
23. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 230.
24. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 231.
25. Remembering my discussion of the cultural conditions of law in Chapter 1.
26. *Milpurrruru & Others v Indofurn Pty Ltd* (1994) at 30 IPR 209 at 229. See also at 230–231 for a similar reading of the Waterholes carpet.
27. It is significant that the same Barrister, Colin Golvan ran all the copyright cases in the 1980s and 1990s.
28. C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. On file with author.
29. *Ibid.*
30. Whilst this case is also important because of the substantial damages that were awarded (\$188,000), this was arguably purely procedural in the sense that it was well known that

- the defendants had no money and declared bankruptcy soon after this judgment was handed down. No monies were ever paid to the artists.
31. C. Golvan, interview by author, 19 June 2002 supra n.28.
  32. Ibid.
  33. Ibid.
  34. G. Bird, 'Koori Cultural Heritage: Reclaiming the Past?' in Bird, G., G. Martin and J. Neilsen (eds), *Majah: Indigenous Peoples and the Law*, The Federation Press: Sydney, 1996, at 119.
  35. See the affidavits of Banduk Marika and Tim Payunka Tjapangati incorporated into *Milpururru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 215 and 230. Also see Banduk Marika's comments in C. Eatock and K. Mordaunt, *Copyrites*, Australian Film Finance Corporation Limited, 1997.
  36. C. Golvan, interview by author, 19 June 2002 supra n. 28.
  37. *Milpururru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 244 [emphasis mine].
  38. Remembering the arguments in the making of intellectual property law about how to measure the loss of this unique form of property. Part One, Chapter 2.
  39. *Milpururru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 246.
  40. *Milpururru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 244–245.
  41. *Milpururru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 245 citing *Williams v Settle* [1960] 1 WLR 1072 at 1082.
  42. K. Bowrey, 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture', supra n.5 at 97.
  43. See for instance Marika's comments in C. Eatock and K. Mordaunt, *Copyrites* Australian Film Finance Corporation Limited, 1997. Also F. Myers, *Painting Culture: The Making of an Aboriginal High Art*, Duke University Press: Durham and London, 2002; J. Isaacs, *Spirit Country: Contemporary Australian Aboriginal Art*, Hardie Grant Books: Australia, 1999.
  44. That is untainted by 'commercial' exposure or interference. This way of reading 'traditional' art is repeated in many scholars' work. In particular see K. Puri's 'Is traditional or cultural knowledge a form of intellectual property?' (2000) *Oxford Electronic Journal of Intellectual Property Rights* at [www.oiprcx.ac.uk/EJWP0100.pdf](http://www.oiprcx.ac.uk/EJWP0100.pdf). As Puri states, 'traditional means untouched, untainted and pure. Traditional is entwined with primitive people who lacked materialism and were unimpressed by commodities and conveniences European societies had to offer.' Many writers in this area consistently evoke an impossible dichotomy between indigenous (primitive) people and the western individual. At best this is naïve, at worst it creates impossible positions for indigenous people to negotiate and claim legitimate recognition.
  45. J. McKeough, K. Bowrey, and P. Griffith, *Intellectual Property: Commentary and Materials*, supra n.11 at 100.
  46. The legal argument is progressed because of the participation of several key artists involved in the earlier cases.
  47. The case could only proceed because the material had been imported into Australia. Australian copyright law has no jurisdiction outside of Australia – so for instance, the claim could not be heard in the country where the material was manufactured.
  48. J. Isaacs, *Arts of the Dreaming: Australia's Living Heritage*, Lansdowne Press: Sydney, 1994.
  49. *Bulun Bulun v Nejlam Pty Ltd*, (1989) Federal Court, unreported.
  50. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 516.
  51. J. McKeough, K. Bowrey, and P. Griffith, *Intellectual Property: Commentary and Materials*, supra n.11 at 132.
  52. Political changes that occurred within Australia are highly significant. The change of government in 1998 to the conservative Liberal Party disrupted the previously progressive attitude to Aboriginal rights, to land claims, and consequently in intellectual property. The political fear of the potential linkage between native title and intellectual property also needs to be understood in the context of the politics of native title, where, as an example, there was a flurry of government attention, and the introduction in 1998

- of an amendment to the *Native Title Act* (1993) that significantly wound back the rights that could be claimed, and increased the conditions through which Aboriginal people could be identified as legitimate claimants.
53. *Amicus curae* means friend of the court and allows a party to make a submission on one point that is raised by the applicant. *Amicus curae* can only be granted by the presiding judge.
  54. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 522.
  55. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 523. In their final form, the applicants' submissions did not seek to have the Court declare that the Ganalbingu people had native title in their land.
  56. This case was a site that mobilised political over-determination of indigenous rights more generally.
  57. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 523. For a critique of this approach see: K. Howden, 'Indigenous Traditional Knowledge and Native Title', (2001) 24 (1) *UNSW Law Journal* 60; S. Gray, 'Peeking into Pandora's Box: Common Law Recognition of Native Title to Aboriginal Art', (2000) 9 (2) *Griffith Law Review* 227. For an interesting reversal of this argument, see the discussion of 'cultural knowledge' in the native title High Court decision *State of Western Australia v Ward* [2002] HCA 28 (8 August 2002).
  58. See: M. Davies, *Delimiting the Law: Postmodernism and the Politics of the Law* supra n.1. Creating a new form of remedy (for example 'cultural' harm in the *carpets case*) was entirely different to a process of challenging and changing the statute.
  59. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 524.
  60. These legal categories and legal language functioned as a strategic way of framing Milpururru's claims. It is unlikely that Milpururru spoke in such terms. As Colin Golvan readily accepts, 'the process of drafting affidavits is tricky because it is a classic case of the reduction of knowledge.' See C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. Milpururru's claims were translated into legalese and thus the law's own parameters of logic.
  61. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 516.
  62. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 516.
  63. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 521.
  64. The Canadian case cited is *Delgamuukw v British Columbia* (1997) 153 DLR (4<sup>th</sup>) 193. The Australian cases cited include: *Mabo v Queensland* [No.2] (1992) 175 CLR 1; *Walker v New South Wales* (1994) 182 CLR 45; *Coe v Commonwealth of Australia* (1993) 118 ALR 193; *Wik Peoples v State of Queensland* (1996) 187 CLR 1. His Honour concludes that 'Australian Courts cannot treat as irrelevant the rights, interests and obligations of Aboriginal people embodied within customary law. Evidence of customary law may be used as a basis for the foundation of the rights recognised within the Australian legal system. Native title is a clear example.' *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 517.
  65. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 524.
  66. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513, at 525, citing J. McKeough and A. Stewart, *Intellectual Property in Australia*, Butterworths: Sydney, 1991 at [504].
  67. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 524.
  68. K. Bowrey, 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture', supra n.5 at 83.
  69. *Ibid.*, at 83.
  70. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 525.
  71. *Kenrick v Lawrence* (1890) 25 QBD 99.
  72. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 525.
  73. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 518.
  74. This is not only restricted to expressions of knowledge in art but also in music and dance. Matthew Rimmer has explored these inter-relations in the context of the Bangarra Dance Company and Manyarrun Clan. Bangarra Dance Company is based

- on the artistic collaboration of David and Stephen Page and the Manyarrun Clan. As he explains, 'Bangarra Dance Theatre must be faithful to the particular experiences of Indigenous peoples, and yet at the same time reach a universal audience. It seeks to avoid the twin traps of being trapped in the ghetto, and being totally absorbed into an international commodity culture. Bangarra Dance Theatre has a prodigious task in educating people about Indigenous heritage, about retaining the languages, the stories and the lands.' M. Rimmer, *The Pirates' Bizarre* PhD Dissertation UNSW, 2001 unpublished at 296. See also: M. Rimmer, 'Bangarra Dance Theatre: Copyright Law and Indigenous Culture', (2000) 9 (2) *Griffith Law Review* 275.
75. J. Bulun Bulun, affidavit evidence presented in the case and reprinted in the judgment, *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 518–520.
  76. The most obvious example being the legal fiction of *terra nullius* that still underpins Australian law in regards to assertions of indigenous sovereignty.
  77. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 524.
  78. The existence of an express trust depends upon the intentions of the creator. *Registrar, Accident Compensation Tribunal v FCT* (1993) 178 CLR 145 at 166. See also: J. Gibson, 'Justice of Precedent, Justness of Equity: Equitable Protection and Remedies for Indigenous Intellectual Property', (2001) 6 (1) *Australian Indigenous Law Reporter* 1.
  79. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 527.
  80. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 527.
  81. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 527–530.
  82. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 528.
  83. *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 41.
  84. *Mabo v Queensland* [No.2] (1992) 175 CLR 1.
  85. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 528 citing Toohey J in *Mabo v Queensland* [No.2] (1992) 175 CLR 1 at 200.
  86. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 530 [emphasis mine].
  87. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 529.
  88. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 530.
  89. The case concerning tribal property was from Ghana, *Kwan v Nyieni* (1959) 1 GLR 67, 'where the Court of Appeal of Ghana held that members of the tribal group were entitled to initiate proceedings for the purpose of preserving family property in the event of the failure of the head of the tribal group to do so'. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 529.
  90. See: *Muschinki v Dodds* (1985) 160 CLR 583 at 614 (per Dean J). See also: M. Cope, *Constructive Trusts*, The Law Book Company: Sydney, 1992; J. Dodds, 'The New Constructive Trust: An Analysis of its Nature and Scope', (1988) 16 *Melbourne University Law Review* 482; P. O'Connor, 'Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust', (1996) 30 *Melbourne University Law Review* 735; D. Wright, *The Remedial Constructive Trust*, Butterworths: Chatswood, 1998.
  91. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 532.
  92. It is worth noting that von Doussa J may have done this to protect his 'innovations', securing them from the probability of appeal – if not in this case, perhaps in a later one.
  93. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 524.
  94. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 524.
  95. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 525.
  96. M. Davies, *Delimiting the Law: Postmodernism and the Politics of the Law*, supra n.1 at 45.