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## **“I make an oath and say as follows”: Yolngu judicial discourse on sacred art and copyright**

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### **Abstract**

The main claim of this study is that a dynamic repertoire of Indigenous linguistic conducts and judicial strategies exists in Yolngu (Australia) artworks misappropriation cases discussed before Australian courts, and that its examination helps to clarify Indigenous perspectives on the property of sacred art. This essay – covering an almost untouched field in the literature on “Indigenous intellectual property” – enlightens Yolngu judicial strategies as their answer to the conundrum between the risk of a loss of their cultural identity and the advantage potentially deriving from a state recognition of Indigenous “intellectual property” rights. This study mainly relies on Yolngu and other subjects’ affidavits released throughout five significant 1990s lawsuits. Affidavits clearly show the two-folded nature of Yolngu judicial discourse on sacred art and copyright, simultaneously insisting on and (implicitly) dismissing an interpretation of Indigenous paintings as “intellectual property”.

### **Key words**

Yolngu; intellectual property law; cultural misappropriation; Indigenous art

### **Resumen**

La principal afirmación de este estudio es que hay un repertorio dinámico de conductas lingüísticas y estrategias judiciales indígenas en los casos de malversación de obras de arte yolngu (Australia) que se presentaron en juzgados australianos. El análisis de esos repertorios ayuda a esclarecer las perspectivas indígenas sobre la propiedad de arte sagrado. Este artículo –que cubre un campo casi inédito en la literatura sobre

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propiedad intelectual indígena– arroja luz sobre las estrategias judiciales de los Yolngu como respuesta al dilema entre el peligro de una pérdida de su identidad cultural y la posible ventaja derivada de un reconocimiento del Estado de los derechos de propiedad intelectual indígenas. Nuestro estudio se basa principalmente en las declaraciones juradas de miembros del pueblo Yolngu y de otras personas. Dichas declaraciones se realizaron durante cinco casos judiciales significativos de los años 90. Las declaraciones juradas demuestran la naturaleza dual del discurso judicial de los Yolngu sobre arte sagrado y derechos de autor, insistiendo simultáneamente en, a la vez que (implícitamente) rechazando una interpretación de las pinturas indígenas como “propiedad intelectual”.

### **Palabras clave**

Yolngu; ley de propiedad intelectual; malversación cultural; arte indígena

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“When I use a word,” Humpty Dumpty said (...) “it means just what I choose it to mean — neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master — that's all.”

Carroll 1872, p. 72

## 1. Introduction

In the last two decades of 20th century, Australian Courts took on a significant number of copyright cases concerning unauthorized reproductions of Indigenous Australian<sup>1</sup> artworks and ritual elements. Yolngu people of North East Arnhem Land<sup>2</sup> were particularly involved in such sustained judicial activity and filed claims for copyright infringement resulted in five lawsuits: *Yangarriny Wunungmurra v Peter Stripes* (1981), *Bulun Bulun v Nejlam* (1989), *Yumbulul v Reserve Bank of Australia* (1991), *Milpururru v Indofurn Carpets* (1994), and *Bulun Bulun v R & T Textiles* (1998). Analyses have focused on Yolngu cases mostly highlighting the struggle in applying the status of “copyrighted works” to Indigenous paintings (Janke 2003, Anderson 2009, George 2012, pp. 191-196) as well as the broader social issues surrounding the lawsuits (Hardie 2015). What seems to be missing in the current literature is an investigation on how different perceptions of Indigenous artworks come together in intercultural negotiations – that is the nature of clashes between Yolngu culture and Australian property law in courts (F. Morphy 2008) – constituting a metacultural field (Kirshenblatt-Gimblett 1998, Carneiro da Cunha 2009).<sup>3</sup> What can be gained from a study of the communicative patterns and strategies that actors in intercultural negotiations engage in is indeed the possibility “to make more accurate statements about their positions and perceptions in cultural property debates” (Groth 2012, p. 4). Furthermore, such an analysis may enlighten wider issues as the translatability of western legal concepts – “property” or “intellectual property” – into culturally different frameworks, and support a critical reflection on the way in which judicial dialectics have constituted legal pluralism and cultural difference in post-colonial settings.

The main claim of this study is that a dynamic repertoire of Indigenous linguistic conducts and judicial strategies exists in the Yolngu copyright cases, and that its examination helps to clarify Indigenous perspectives on the property of sacred art. Also,

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<sup>1</sup> As is known, there is some arguments over whether the notion of “Indigenous people” is capable of an inclusive definition that can be applied to all regions of the world. Also, while a number of commonalities between “Indigenous Australians” exists, there is also a great diversity among different communities and societies, each with its own mixture of cultures, customs and languages. “Indigenous”, “Indigenous Australians” and “Aborigines” will be used throughout this essay without any intention to comment on this debate.

<sup>2</sup> This work follows the current practice of naming “Yolngu” the Indigenous population of North-East Arnhem Land. However, not all those referred as “Yolngu” by linguists and ethnographers identify themselves in that way, since they most frequently refer to themselves by more specific names that identify more narrowly defined groups of peoples (H. Morphy 1991, pp. 40-41).

<sup>3</sup> Analyses of this sort exist on the use of Indigenous Australian artifacts as proofs of land property (cfr. H. Morphy 1983, Anker 2014, Mazzola 2019).

this essay implies that perceptions of “property” and related issues can be grasped in their richness and complexity by combining “conventional” ethnographic works with the study of the context within which negotiations take place. More specifically, this essay enlightens Yolngu judicial strategies as their answer to the *conundrum* (F. Morphy 2008, p. 54) between the risk of a loss of their cultural identity – in case of an uncontested submission and commensuration to western law – and the advantage potentially deriving from a state recognition of Indigenous intellectual property rights. As will be shown, this conundrum has produced seemingly ambivalent judicial conducts: on the one side, Yolngu have creatively reconsidered their conceptual schemes *in order to fit western “property” categories* and benefit from the state recognition of a Yolngu “copyright” – by insisting on the *original* features of their sacred artworks. On the other side, Yolngu judicial language *has emphasized a number of fundamental differences* between western and Indigenous norms surrounding sacred art, and particularly its *connection* to land possession and cult. Indeed, as this study shows, the discourse on inalienability of sacred artworks due to their identification with land played a pivotal role in Yolngu dialectic, defined as an attempted “insistence on incommensurability” (F. Morphy 2007, p. 44).

As to the methodology, this study mainly relies on Yolngu and other subjects’ *affidavits* released throughout the five lawsuits.<sup>4</sup> Affidavits represents fundamental resources to understand the “dialectic” of legal pluralism (Anker 2014, p. 22) since they inform about Yolngu ideology on sacred art channelled into the intercultural negotiation dynamics and subsequently influenced by (western) lawyers’ conceptualizations, strategies and lexicon. Affidavits – as statements about *self-determination* as well as assertions of entitlements – clearly show the two-folded nature of Yolngu judicial discourse on sacred art and copyright, simultaneously insisting on and (implicitly) dismissing an interpretation of Indigenous paintings as “intellectual property”. The analysis of affidavits is paired with an examination of Yolngu cosmology, normativity and language surrounding sacred art and land as presented in most significant ethnographic field-works on Yolngu population.

Based on classic Yolngu ethnography, section 2 complies with the preliminary task to identify the status of sacred artworks in Yolngu cosmology,<sup>5</sup> particularly focusing on their “connection” to land and people. Section 3 analyses Yolngu affidavits mostly focusing on the challenges to the autochthon significance of artworks due to its transposition to the field of intercultural negotiation. Section 4 attempts then to “map” Yolngu dialectics and illustrates a *fil rouge* in the Indigenous approach to the judicial debate.

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<sup>4</sup> As is known, affidavits are written declarations or statements of facts – typically introduced by the expression “I make an oath and say as follows” –, made voluntarily, and confirmed by the oath of the party making it, taken before an officer having authority to administer it. All judicial resources discussed in this paper are now available at the Indigenous Law Resources database of the Indigenous Law Centre (UNSW) and AustLII (<http://www.austlii.edu.au/au/other/IndigLRes/>) and the “Indigenous Document” section of Colin Golvan’s website ([www.colingolvan.com.au/archives/155](http://www.colingolvan.com.au/archives/155); accessed 6 September 2019).

<sup>5</sup> “Cosmology” is used here, as Drahos 2014 (p. 31) to communicate that “we are dealing with beliefs about the nature of the world that are thought to be true”.

## 2. Sacred Art as Land and People: Yolngu Territorial Cosmos

### 2.1. *Milirrpum v Nabalco Pty Ltd (1971)*

In 1971, the *Milirrpum v Nabalco* case (also known as the “Gove case”)<sup>6</sup> first tested the soundness of Indigenous land claims in Australia. In 1968, the Government of Commonwealth had approved a Mining Ordinance stating the excision of a large area of Gove Peninsula (Northern Territory) in favour of the mining company Nabalco. In 1969, representatives of Yolngu community inhabiting the Methodist mission of Yirrkala had subsequently sued both Nabalco and the Government complaining about the unconstitutionality of the lease. According to Yolngu, the agreement had indeed violated the constitutional principle of fair compensation and the right of the Indigenous community to be previously informed and consulted in case of potentially detrimental decisions to the Gove Peninsula territory. Yolngu were particularly concerned about the disruptive impact of mining activities to the environment, and to be limited or even forbidden to access sacred places fundamentally bound to Indigenous cultural identity. In 1970, Australian anthropologists William Stanner and Roland Berndt got involved in the preliminary proceedings as expert witnesses (Williams 2008, p. 199) and were asked to present the Court a survey on the Indigenous “land tenure” system. Stanner travelled to Yirrkala and interacted with the native population, later reporting (Stanner 1979, p. 338) that Yolngu showed him through a highly secret ceremony the holy *rangga* – “emblems of the clan, effigies of the ancestral beings, twined together by long strings of coloured features”. Stanner also adds that after the ceremony a Yolngu man said to him that now he should “understand”: “he meant that I had seen the holy *rangga* which, in a sense, are the clan’s title-deeds to its land, and had heard what they stood for: so I could not but understand”.

While the Court ultimately dismissed the analogy between *rangga* and title deeds, and stated the non-proprietary nature of the relation between Yolngu and the Yirrkala area,<sup>7</sup> the Gove case still inspires significant reflections surrounding the connection between land and sacred designs in the realm of an Indigenous culture. It may be asked whether a foundation in Yolngu worldview justifying the analogy between *rangga* and title deeds exists. Indeed, Stanner’s lexicon<sup>8</sup> linking elements of Indigenous culture (in this case: *rangga*) to formal common law institutes (title deeds) was not unprecedented to Australian ethnography. Mervyn Meggitt (1962, p. 288) already described Warlpiri (Northern Territory) sacred objects as “a part of community’s title deeds on its land”, while John von Sturmer referred that Aranda (Central Australia) used “as a matter of course” the English expression “title deeds”: for example, they used to define the repository cave for sacred objects as the “vault in which title deeds are preserved” (reported in Williams 1987, p. 91).

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<sup>6</sup> The historical survey of the Gove case is taken from Mazzola 2018 (pp. 15-6).

<sup>7</sup> “There is so little resemblance between property, as our law, or what I know of any other law, understands the term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests” (J. Blackburn in *Milirrpum v Nabalco*, 1971).

<sup>8</sup> Although doubts emerge in recent literature (Mohr 2002, p. 4), it seems that Stanner formulated the analogy between *rangga* and title deeds, while Yolngu simply endorsed it. Such an analogy was indeed “new” (Williams 1987, p. 187) to the Indigenous community involved in the *Milirrpum* case.

## 2.2. The *Likan* Concepts

A preliminary answer to the question whether a connection between art and land exists in Yolngu cosmology is found in Yolngu language (*matha*, tongue).<sup>9</sup> Keen (1994, p. 102) identifies a class of Yolngu "polysemous names" denoting the existence of "related concepts" labelled *likan* and translated in English as "joint", "connection" (literally referring to the junctions between different parts of the body: "elbow", "knee"; see H. Morphy 1991, p. 189).<sup>10</sup> The *likan* group includes at least four names: 1. *wa:nga*, meaning "land"; 2. *wangarr*, "ancestors", supernatural beings that created the land; 3. *rangga*, "sacred artworks"; 4. *djunggayi*, "caretaker" of sacred artworks. Also, the *likan* group includes the suffix *-watangu* referring to the "holder" (or "caretaker") of land and sacred artworks, and the verb *ngayathama*, "to hold", "to look after" land and sacred artworks.<sup>11</sup>

The *likan* concepts, as seen, enlighten a "link" between aspects of the "sacred" dimension of Yolngu worldview (*wangarr*), land (*wa:nga*), sacred artworks (*rangga*) and people (*djunggayi*). What does it mean, though, that *likan* concepts are – as Keen states – "related" to each other?

According to H. Morphy (1991, p. 292), Yolngu informants used mostly the English term "connection" in referring to the link between *likan* concepts and particularly to the relationship between *rangga* (sacred artworks) and designs portraying *wangarr* ancestors and land. Also, Drahos (2014, pp. 39-40) makes use of the word "connection" (and "connectionism") referring to Indigenous Australian conception of land. The way in which Drahos uses the term is an alternative one with respect to the lexicon of cognitive sciences. While the standard meaning of "connectionism" refers to an approach drawing on the "interaction of units" in the context of a specific social networks, as Drahos notes (2014, p. 40), the "network" resulted from *likan* notions stretches well beyond the conventional understanding of "social network": it includes indeed not only *human beings* (*djunggayi*), but also *animals, plants, ancestors* (*wangarr*), *artworks* (*rangga*) and the land itself (*wa:nga*). However, H. Morphy goes further and makes the point that to use words such as "representation" – instead of connection – to define the relationship between *rangga* and (depicted) land and ancestors would indeed "suggest a gap between signifier and signified that is not consistent with Yolngu ontology". Holy *rangga* and designs are not indeed mere "representations", but rather *another dimension* of *wangarr* and land. A sharp distinction between "land", *wangarr*, people and *rangga* has then no place in Yolngu worldview. Therefore, *likan* notions do not seem to identify different entities, but rather *different traits of the same entity* – named here "territorial cosmos" (following Drahos 2014, p. 13) – an "interconnected network of meanings" (H. Morphy 1991, p. 189) combining the physicality of land, people and tangible objects, and the "spiritual" dimension of *wangarr* ancestors.

<sup>9</sup> *Yolngu matha* is actually a cover term for a bunch of related "dialect groups" (Schebeck 1968) spoken in the three major coastal settlement of North-East Arnhem land (Northern Territory): Milingimbi, Galiwin'ku (Echo Island) and Yirrkala. On the complex translation of the *yolngu matha* notion through the usual linguistic criteria demarcating "language" and "dialects" see F. Morphy 1983 (p. 3).

<sup>10</sup> *Likan* is not then a generic word for "related concepts", but rather an example of the way in which Yolngu extend the meaning of a word to cover a series of things that have something in common.

<sup>11</sup> The English translation of *likan* concepts and its justification can be found in Keen (1988, p. 280; 1994, p. 102). For a different translation of several *likan* concepts see Lowe 2004.

A similar idea with respect to the “connectedness” between *likan* concept is enlightened by Nancy Munn’s notions of “objectifications” and “identifications”, and Fiona Magowan’s (1997) notion of “simultaneity”, particularly focusing on the relationship between people and land.

Munn’s (1970) classic account of transformations of “subjects” into “objects in Warlpiri (Northern Territory) and Pitjantjatjara (Central Desert) ontologies makes use of this duality (subject-object) to construe a cosmology that posits intrinsic connections between “persons” and “things. According to Munn, Warlpiri and Pitjantjatjara people are embedded in a universe constituted in part by *objectifications* of ancestors in the form of their traces (which remains in the landscape) and in the form of ancestral designs painted on bodies. However, this underlying pattern of ancestral transformation has a *bi-directional* structure (Munn 1970, p. 156): it entails indeed not only an objectification of ancestors into the features of the landscapes and cultural objects, but also an *identification* of the living subjects with those features and objects.<sup>12</sup> Munn takes such transformations and relations of identification to be the grounds of the Walpiri and Pitjantjatjara universal order.

Magowan opposed Stanner’s (1967, pp. 260-2) account, according to which a “man said that a person and their totem were *like* one another” – a relation that Magowan calls of “simulation”. According to Magowan, Yolngu posit “a closer ontological relationship” between “subjects” and “objects” as one of “simultaneity”: a Yolngu person will indeed say “*I am the water*” or “*I am the tree*”<sup>13</sup> – and not “*I am like the water*”, “*I am like the tree*” (Magowan 1997, p. 24). Embedded in such statements are ideas about how Yolngu “view themselves as multiple, simultaneous entities encompassing and encompassed by the landscape and seascape” (Magowan 1997, p. 24).

### 2.3. *Inalienability*

The imagined link between *likan* notions constituting the field of territorial cosmos entails, it is argued, a narrative of *inalienability* of Yolngu land and sacred artworks.

While the notion of “alienability” seems intrinsic to the western “property-ownership” model (among others: Rose 1994, pp. 20-28; Graham 2011, p. 26)<sup>14</sup> – as well as a prominent tool to the enforced universalism that located (former) colonial “property laws” within the ideologies of Western empires – it is maladapted to describe Yolngu way of conceiving the relationship between subjects and (certain) objects.<sup>15</sup> Why is that?

The main point is that the right to alienate things constitutes the main step in a process of commodification – of bringing goods under the logic of capitalist markets (Bonen and

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<sup>12</sup> “Identification” is also one of the crucial elements of Descola’s “schemas” or “deeply internalized (...) cognitive and corporeal templates that govern the expression of an ethos”. According to Descola (2013, pp. 112-3), by identification “differences and continuities are established between a self and some other existing being, through the inference of analogies and contrasts”.

<sup>13</sup> However, Keen (2011, p. 113) notes that there is no equivalent to the verb “to be” in *yolngu matha*.

<sup>14</sup> According to Graham (2011, p. 140-1), the intrinsic “alienability” of property was unequivocally affirmed since Mill’s *Principles of Political Economy* (1878).

<sup>15</sup> More precisely, Keen (1988, 279) argues that land and sacred artworks are at “the top of a scale” or a “continuum” of inalienability. The “most alienable” objects are food and everyday objects, followed by publicly accessible rituals (*garma*) and artefacts (so-called “messengers”) along with some use-right in land. Finally, “esoteric ritual artefacts” and land are completely “inalienable”.

Coronado, 2011, *Delineating the Process of Fictive Commodification in Advanced Capitalism*. p. 4; unpublished work on file with author) – of “properties” that, as Graham (2011, p. 45) notes, *separates* active-alienating subjects from passive-alienated objects, and leaves no space for the objectification-identification network that Munn describes (§ 1.2). This can be explained, as Keen (2011, p. 210) does, by stating that the “ontological correlates” of a relation of property – “subject” and “object” – vary in parallel to the “consubstantial” relations (or relation of simultaneity) between “people”, “land”, and “artworks” in Yolngu cosmology. As a result, although different degrees of control over sacred artworks can be identified in Yolngu normativity and shared among Yolngu people – and although artworks and land can be occasionally transferred to different subjects with respect to their “holder” – they cannot be definitely alienated since they maintain a *tie* with their original producer or a place (entities that usually corresponds according to Yolngu cosmology). As seen, the reason for that is mainly the connection between artworks, land and people emphasized in Yolngu language and ontology through *likan* concepts: as a result of the processes of identification and objectification, artworks and land are indeed imbued with (human and ancestral) subjectivity. As Anne Barrow explains, “whereas [western legality] assumes the owning subject to be absolutely prior and distinct from the owned object, and conceives of that object merely as material resources available for use and exploitation, [Indigenous cosmology] sees (ancestral) subjectivity – and therefore spiritual potency – as residing in objects (country and sacred relics)” (Barron 1997, p. 48; see also H. Morphy 1991, pp. 48-9). Such a relation, which render land and artworks inalienable, becomes thus more akin “to the relation of a person to a part of the body and/or to a kin relationship” (Keen 2011, p. 110). *Yolngu matha* expresses indeed this relation of (what Keen calls) “possession” of artworks and land in the same ways as the relation between a person and parts of the body – as in *ngarra wana* (“my arm”) – “personal names, patrigroup identity, subsection identity, and occasionally, patrigroup country”. More precisely, in Australianist linguistic terminology *ngarra wana* is an example of an “inalienable possession” construction (F. Morphy 1983; see also Keen 2013) shared by many Indigenous Australian languages.<sup>16</sup>

#### 2.4. Indigenous Artworks as Intellectual Property Objects

Before entering the central segment of the study – surrounding Yolngu judicial language – and after an overview on the issues arising from the conception of Yolngu artworks as (generally) “property” (§ 1.2-1.3), the next lines will briefly address the gaps making (more precisely) intellectual property law and Indigenous norms governing the production and circulation of art more or less incompatible.<sup>17</sup>

The so-called “unfitness thesis” – according to which intellectual property constructs do not (and cannot) fit Indigenous normative structures – mainly relies on *two* “conceptual”

<sup>16</sup> There exists a wide literature on so-called “inalienable possessions”. See in general Weiner 1992. On Weiner’s theory see Godelier 1999 (pp. 32-39). On what “inalienability” means see also Radin 1993. On the relationship between inalienability and ownership “rights” see Coleman 2010.

<sup>17</sup> As is known, there exists a wide literature on this topic. For one of the most recent and significant contribution see the edited collection *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Rimmer 2015).

(Oguamanam 2004, p. 141) considerations:<sup>18</sup> 1. intellectual property has an *individualistic* nature, which contrasts to the *communal* nature of Indigenous “property” of artworks. Indigenous artworks performances are indeed usually conceived as a “community” property derived from a communal effort (Farley 1997, p. 30). As Oguamanam notes, since within Indigenous societies all members of the community are in principle entitled to *share* in the cultural object or performance, it seems hard to identify an individual entitled to the right to exercise an exclusive claim. As *individualism* is generally the model for entitlement to intellectual property rights within the conventional intellectual property regime, a community-based “ownership” stands then in sharp contrast to a scheme that conceptualizes the individual as the primary agent of intellectual advancement<sup>19</sup>. 2. Indigenous artworks do not always convey *original* information, since they are *inherited* from previous generations and sacred ancestors. This circumstance also makes difficult in most cases to identify a *human creator* of the artworks. As is recognized, *originality*<sup>20</sup> and *creatorship*<sup>21</sup> are two core criteria – necessary, although not sufficient elements – of intellectual property (George 2012, p. 80).

As a caveat to the use of the “unfitness thesis” in this paper, the discourse should probably be reframed by referring solely to copyright, namely the branch of intellectual property law directly involved in the 1990s lawsuits, and not to intellectual property in general. The reason is that it cannot be excluded that other forms of intellectual property may actually adapt in a persuasive way to Indigenous artworks’ peculiarity. A significant example is the regulatory setting of heraldry and insignia. According to Elizabeth Burns Coleman (2001, pp. 392-400) insignia and Indigenous paintings share at least four common features influencing the norms on their production and circulation: their identification of families or groups, their association with land, their ontological structure, and their association with patterns of authority. However, it should be noted, the inclusion of insignia-heraldry regulation within the “intellectual property” institutional category is not uncontested and mostly conceptualized as an atypical form or *quasi-intellectual property* (as belonging to the intellectual property “extended family”; George 2012, pp. 281-91).

The next section will show how Yolngu judicial discourse – oscillating between two different characterizations of their art – paradoxically refers to artworks *both* as

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<sup>18</sup> An analytical exposition of intellectual property “gaps” affecting the protection of Indigenous artworks is found in World Intellectual Property Organization 2008.

<sup>19</sup> On this point, the Federal Court of Northern Territory (Darwin) in the *Bulun Bulun* case (1998) stated that “[w]hilst 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 (...) Section 35(2) of the Copyright Act 1968 (Cth) provides that the author of an artistic work is the owner of the copyright which subsists by virtue of the Act. *That provision effectively precludes any notion of group ownership in an artistic work, unless the artistic work is a ‘work of joint ownership’ within the meaning of s10(1) of the Act.*”<sup>19</sup> (italics added). The “collective” nature of possession in Indigenous artworks is also acknowledged in official documents and reports. See for instance, the definition of Traditional Knowledge in WIPO 2010.

<sup>20</sup> For some fundamental distinction relative to the notion of “originality” see the seminal cases *University of London Press Ltd. v University Tutorial Press Ltd* (1916) and *Ladbroke (Football) Ltd. v William Hill (Football) Ltd* (1964). Despite those guidelines, the nature of “originality” in copyright law and other IP doctrines tends to remain vague (George 2012, pp. 210-34).

<sup>21</sup> For an overview on the “creatorship” requirement in intellectual property law, see among others George 2012, p. 162.

individually created and original items and as collective-inherited goods that do not fit into intellectual property categories.

### 3. Negotiating Cosmology: The Yolngu Affidavits

#### 3.1. Yangarriny Wunungmurra v Peter Stripes (1981)

The so-called “Yangarriny case” first involved the infringement of an Indigenous artist’s copyright before an Australian Court.<sup>22</sup> In 1981, the Australian Gallery Directors Council set up the exhibition *Aboriginal Australia* featuring several Indigenous Australian artworks. The exhibition catalogue reproduced the original bark painting by Yolngu artist Yangarriny Wunungmurra *Long-necked Freshwater Tortoises by the Fish Trap at Ganaan [sic]*, purchased in 1975 from one of the catalogue’s authors. The picture reported in the catalogue was originally reproduced on fabric for retail sale by Peter Stripes Fabrics without authorization and, according to Wunungmurra, altered in some elements of the original design. In 1983, Yangarriny Wunungmurra, represented by the Aboriginal Artist Agency (AAA), took Peter Stripes Fabrics to the Federal Court for unauthorized use and modification of his painting in violation of the section 31.1(a) of the Copyright Act 1968.<sup>23</sup> The plaintiff claimed that his copyright in *Long-necked Freshwater Tortoises by the Fish Trap at Ganaan [sic]* had been infringed from the defendant, and sought orders including delivery up of the infringing fabric, damages and an account of profit. The Court finally set an amount of 1,500\$ damages, and the roll of fabric was delivered up and destroyed.

Wunungmurra enacted a judicial strategy that stressed out the halfway dimension of Yolngu artworks. On the one side, Wunungmurra and other artists discussed the case as a *violation of Wunungmurra’s copyright*, and particularly of the *exclusive right of the owner of a copyrighted work to reproduce and modify such work*. This choice raised many doubts over the possibility to apply IP concepts to Indigenous art, specifically relative to the legal requirement of “original authorship” typically ascribed to copyrighted works. As Nina Stevenson – one of AAA and Wunungmurra’s lawyers – stated in a public account of the controversy:

[a]lthough the arrangement of the elements and the expressions on the figures may vary between painters of the story, certain features [...] will always be the same. The concept of original authorship is somewhat inappropriate in this context. Could it ever be asserted that an Aboriginal plaintiff was not the author of a painting because the painting was, in effect, a copy and was not totally original to him? (Stevenson quoted in Johnson 1996, p. 15).

Other significant issues arose relative to damages:

[w]hat weight should be given to certain principles of Aboriginal law which make the act of infringement particularly distressing and insulting to Aboriginal people? (...) In

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<sup>22</sup> The material discussed and quoted here is found in Johnson 1996 (pp. 15-6).

<sup>23</sup> “For the purposes of this Act (...) copyright, in relation to a work, is the exclusive right: (a) in the case of a literary, dramatic or musical work, to do all or any of the following acts: (i) to reproduce the work in a material form; (ii) to publish the work; (iii) to perform the work in public; (iv) to communicate the work to the public; (vi) to make an adaptation of the work; (vii) to do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified in relation to the first mentioned work in subparagraphs (i) to (iv), inclusive”.

the case discussed above, the fabric designer had made some changes to these elements [the cross-hatching, the paneling, the way the figures are placed in painting]; changes in which in his opinion enhanced its aesthetic appeal, but which offended Aboriginal law. (Stevenson, quoted in Johnson 1996, p. 15)

On the other side, Indigenous plaintiffs exposed reason why Peter Stripes' infringement resulted particularly *distressing* and *insulting to Yolngu people*. Gawirrin Gumana, one of the artists involved in the lawsuit, significantly hinted at the *subjectification* of human in artworks stating that "[w]hen that man [Peter Stripes] does that [copyright infringement] it is like cutting off our skin" (affidavit, 1981; quoted in Johnson 1996, p. 16). Accordingly, Wunungmurra explained to the Court the "addictional" seriousness of the infringement, extending well beyond a violation of the artist's copyright:

[t]his is our foundation. That painting comes from Barama. Barama (...) gave us our singing, dancing, our country and all our places. He taught us laws and one law he taught us is to behave ourselves – not to steal other people's paintings; we must first ask older people for their permission (...). *Part of that painting belongs to the land*. If the same design or painting was used in a ceremonial ground, then it would only be for the eyes of initiated men. It is one of the most important things people could paint. (Affidavit of Y. Wunungmurra, 1981, italics added; quoted in Johnson 1996, p. 16)

Wunungmurra presented then his painting as a ceremonial object, directly ascribable to one of Yolngu sacred ancestor, Barama. He underlined the "sacredness" of the design, implying a profound statement of tribal identity and a connection to the land. However, as can be noted, the artist used the verb "to steal" in order to qualify Peter Stripes' conduct, implying a reference to a Yolngu "property" right in the artwork.<sup>24</sup>

### 3.2. *Bulun Bulun v Nejlam (1989)*

The *Nejlam* case, also known as the "T-shirts case", represented the first major breakthrough to public consciousness of the copyright issue in Indigenous Australian art (Johnson 1996, p. 17). It involved John (or Johnny) Bulun Bulun, a Yolngu well-known artist of the Ganalpuyngu language group, living in the settlement of Maningrida. In 1987, Flash Screenprinters, a T-shirt manufacturer based in Queensland, reproduced Bulun Bulun's painting *Magpie Geese and Waterlilies at the Waterhole* on a series of T-shirt, without asking for permission. The original version of the painting (1980) was reproduced in a 1984 Jennifer Isaac's book, which is where Flash possibly saw the image (Johnson 1996, p. 17). Eventually, Flash did not just call their copy of *At the Waterhole*, but even implied – by the use of "©" symbol – that they owned the copyright upon it. Many discussions relative to the opportunity for a judicial claim on copyright infringement – mostly centred on the originality requirement of Indigenous paintings (Johnson 1996, p. 17, Hardie 2015, pp. 162-5) – preceded Bulun Bulun's Court action. In 1989, the Federal Department for Aboriginal Affairs provided the funds needed to prepare the case, and Bulun Bulun brought an action for infringement of copyright and breaches of the Trade Practices Act 1974. However, the case never actually went to trial: further researches led the plaintiffs to discover thirteen other artists whose paintings had been reproduced on Flash T-shirt and whose names were added to the list of plaintiffs

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<sup>24</sup> On the impact of the metaphor of "theft" in the process of formation of the "intellectual property" notion see St Clair 2010 (p. 375).

in the case. The day before the scheduled court appearance, a meeting was held at Maningrida in which the parties agreed for a 150,000\$ settlement figure and the withdrawal of all infringing shirts from sale.

Yolngu pre-judicial statements revealed the dual nature of sacred paintings in the inter-cultural dimension. Yolngu artists witnesses supported an interpretation of artworks as intellectual property objects insisting on the "distinctive" nature of the painting style:

[t]hese works are not copies of other works, but are all distinctive in their own ways (...). His [of Bulun Bulun] painting style is distinctive in particular ways. He adopts a particularly distinctive approach to the depiction of magpie geese. I know of no other artist who paints these birds as the Applicant does. (Affidavit of C. Godjuwa, 1989)

The artistic work is an original work. I did not copy the designs in the work from any source (...). I was taught to paint by my father, who is now deceased. He also taught my brothers. He taught us the style of painting which is traditional to our area, although each member of my family paints in a distinctive way. (Affidavit of R. Ngainjmira, 1989)

However, Yolngu plaintiffs did not deny the "traditional" (opposed to the "novel") and "interconnected" character of their paintings. Although presenting his paintings as "original works" in which he had a "copyright", Bulun Bulun stated:

[m]y particular responsibility as a ceremonial manager is to ensure that ceremonies and traditions are observed correctly, and my artwork is a significant part of this duty, as I am continuing the practice of showing designs of our clans dreaming. (Affidavit of J. Bulun Bulun, 1989, p. 3)

Bulun Bulun added that he was "restricted by customs as regards the subject matter" with which he may deal in painting (affidavit, 1989, p. 12). He also recalled the close connection between sacred paintings and land:

[m]y work is very closely associated with *an affinity for the land*. This affinity is at the essence of my religious beliefs (...). The impetus for the creation of works remain their importance in ceremony, and the creation of artworks is an important step in the preservation of important traditional customs. (Affidavit of J. Bulun Bulun, 1989, p. 7; italics added)

Such a connection was underlined in other depositions, in which land is used as a *metaphor* to describe the theft of Yolngu art: "[p]eople stealing our paintings is the same as invaders coming to our land without asking. It is the same as people stealing our land" (affidavit of P. Bandjurljurl, 1989).

### 3.3. Yumbulul v Reserve Bank of Australia (1991)

In 1987, the Reserve Bank of Australia sought the help of the AAA in the process of designing a commemorative ten-dollar note to in recognition of the 1988 bicentenary of European settlement. The note's designer, Harry Williamson, had seen a Morning Star Pole (*banumbirr*) – used in important Yolngu ceremonies – in the Australian Museum (Sydney), designed by Yolngu artist Terry Yumbulul under the authority given to him as a member of the Galpu group. Williamson wanted to use the pole in the design, and the Agency was asked to organize a license. Eventually, Yumbulul signed a license agreement that had the effect of giving the AAA permission to reproduce his work "by mechanical reproduction throughout the world and to license others to do so", under terms that would direct 85% of royalties back to him (this was the AAA standard form

of license agreement). The banknote was accordingly printed, after the Reserve Bank obtained a sub-license from the AAA. Yumbulul attracted considerable criticism from his community for allowing a license over the pole design to be agreed upon. According to the older members of his group, such use exceeded the authority he had been given. More specifically, Yumbulul had been trained by his community to prepare the pole and was permitted to sell the work where it would be permanently displayed to *educate* the wider community about Yolngu culture. However, he had not been given authority to allow such a sacred item to be reproduced on money. In 1991, Yumbulul took action against the AAA and the Reserve Bank, alleging that the AAA had used “false and misleading conduct” in obtaining his consent to grant it an exclusive license to his work. His action was ultimately dismissed, since the Court found that Yumbulul had mistakenly believed that the license to the Reserve Bank would impose limitations on the use of the pole similar to those in Yolngu law - in particular, limitations in force of the sacred character of the work in question. Nevertheless, the Court admitted that “Australia’s copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin”.

Over the course of the suit, Yumbulul’s primary concern was thus not to complain about a violation of his intellectual property rights, but rather to prove that the Reserve Bank’s license had violated Yolngu norms surrounding ceremonial paintings and designs. Accordingly, most of his dialectics concerned the structure of Yolngu sacred knowledge system. In his affidavit to the Court, Yumbulul presented a view of his rights to reproduce the Morning Star Pole as *traditionally inherited*:

The feathers represent the ray of the morning star, and are placed in accordance with tradition (...). The morning star concept is a very ancient ceremonial concept. My grandfather told me the story of the yam leaves and I have painted the design based on the story told to me by my grandfather. (Affidavit of T. Yumbulul, 1990, p. 5)

I was entitled to make the Pole by reason of my birth right on my mother’s side and I was entitled to sell the Pole by virtue of the fact that the recipient of the Pole, the Australian Museum, was, in my opinion, an appropriate place for display of the Pole. (Affidavit of T. Yumbulul, 1990, p. 6)

Yumbulul exposed then *two* supposed effects of the AAA and Reserve Bank’s misconducts, either of the two not at all concerned with intellectual property violations:

[1] I was particularly upset because I believe that the reproduction of the Morning Star Pole in this way was inappropriate (...). It is a caricature of my culture and religion, particularly as only I have the rights to depict the designs which are shown on the Pole in that way by virtue of my Yolngu heritage. I felt that it is my Yolngu rights which have been attacked. [2] Furthermore, I am offended from a Yolngu point of view, as I believe that it is insulting to my mother’s clan for the design to be reproduced by a person who does not have rights under our Yolngu law to do so. (Affidavit of T. Yumbulul, 1990, pp. 8-9).

According to Yumbulul, both the reproduction of the Morning Star Pole on banknotes, and the lack of authorization (from a Yolngu authority) to do so, represented serious offences to him and Yolngu people in general. However, the idea of a “western” copyright is not totally absent from Yumbulul’s affidavit. More specifically, he tried –

paradoxically – to present his work as “original” and to qualify himself as the sole author of it:

The particular yam leave design is unique to me. I have not copied anyone else’s version of this design. While other artists paint yam designs, I believe that my version of the yam design is unique to me. Each artist has his own interpretation of the yam tory and the yam spirit (...). I made it without any assistance from other person. (Affidavit of T. Yumbulul, 1990, p. 5)

According to Yumbulul, the creation of Morning Star Pole, although identifying a tradition handed down generation to generation, leaves enough space for artists’ creativity and original modifications. The Court accepted Yumbulul’s reconstruction and declared his work “original” according to Australian copyright law.

### 3.4. Milpurrurru v Indofurn Carpets (1994)

In 1993, three Aboriginal artists – George Milpurrurru, Banduk Marika, and Tim Tjapangati (assisted by the Public Trustee for the Northern Territory) – started an action before the Federal Court of Australia against Indofurn Ltd., a Perth based company. The artists alleged and subsequently proved that the respondent company had, since 1991, manufactured in Vietnam, imported into Australia, and then sold woollen carpets which reproduced artworks (or substantial parts of artworks) of each of the artists without the permission of the owner of the copyright. They sought remedies under the Copyright Act 1968 and the Trade Practices Act 1974.

In her affidavit, Banduk Marika expressed his concerns for the unauthorized reproduction of his artwork. Such concerns mostly regarded the *desecration* of Yolngu sacred stories and culture, rather than the violation of an individualistic proprietary interest:

[t]he reproduction of the image on carpet has caused me great distress because I believe it desecrates the story which is partly told by the imagery in the waterhole artwork. (Affidavit of B. Marika, 1994, § 4)

I am very concerned that harm has been done to the spirit depicted in the story and I am most adamant that the reproduction of the artwork in this way be stopped as I believe it destroys respect for the art and culture in question. (Affidavit of B. Marika 1994, p. § 6)

Marika also underlined the importance of the connection between artworks and land:

*[m]y rights to use this image arise by virtue of my membership of the landowning group. The right to use the image is one of the incidents arising out of land ownership (...). When the Djangkawu handed over this land to the Rirratjingu they did so on the condition that we continued to perform the ceremonies, produce the paintings and the ceremonial objects that commemorate their acts and journeys. Yolngu guard their rights in paintings and the land equally. Aboriginal art allows our relationship with the land to be encoded, and whether the production of artworks is for sale or ceremony, it is an assertion of the rights that are held in the land.* (Affidavit of B. Marika, 1994, § 6; quoted in Janke 2003, p. 11; italics added)

Quite significantly, the artist explicitly denied any character of “novelty” or “originality” in their artworks:

[b]ecause of my strongly traditional training, unlike some other Aboriginal Artists, I do not use any colors other than the ones which are traditional to us: black, white, red and yellow, which colors I make from ochres and crushed roots (...) I paint only those shapes and creatures which our laws have required us to paint, depicting dreamtime events. (Affidavit of B. Wangurra, 1994, § 3-4)

Particularly, Milpurrurru's affidavit provided a clear picture of the collision between western and Indigenous norms and attitude surrounding the making of artworks. On the one hand, the artist stated that he "owned" his paintings (first affidavit, 1994, p. 2), and referred to himself as the "creator" and the "originator" of his works. (first affidavit, 1994, p. 3). On the other hand, Milpurrurru underlined the nature of Yolngu artworks as follows:

[m]y paintings are my soul, my *warro* [spirit], and are not just bits of ochre and bark, even if I paint them for sale. Sometimes I sing the story of the painting while I am painting it. I think this is what makes our paintings special because they have us in them (...). *They are like part of the land to me.* They keep us strong and our culture alive and meaningful. (First affidavit of G. Milpurrurru, 1994, p. 3)

A subsequent Milpurrurru's affidavit described the harms provoked by the defendant's misconducts. According to Milpurrurru, both dimensions of Yolngu sacred artworks – as intellectual property objects and "interconnected" ritual elements – resulted offended for different reasons by means of the unauthorized copying of the artworks:

[t]he reproduction of the painting on the carpets by the respondents is a grave insult to me. This was *firstly* because my rights as an artist to have my work respected and not copied without my permission have been infringed, and *secondly* because the infringement undermines and insults my position as the boss of the story and the country from which the story comes from. The painting and the land they come from are the foundations of our law, religion, and culture (...). This applies to all Yolngu people and their *madayin* (sacred objects and ceremonial art) as we all observe our law and believe in it. (Second affidavit of G. Milpurrurru, 1994, pp. 2-3)

Moreover, Milpurrurru added a list of consequences/sanctions *internal* to Yolngu society for the artists which allowed a misappropriation of sacred art to happen:

[p]eople have been killed for breaking our law and stealing other people's things such as a painting like this. In the past if somebody violated our law or stole a painting (that is, used it without permission) that person or his family would face the death penalty. Nowadays we ask for compensation from a person who infringes our law in this way (...). These rules are still very strictly applied in Yolngu society as they form the basis of our system of land ownership, law and society. The only difference is that we charge people who violate our law and steal our *madayin* whether it be sacred objects or paintings. (Second affidavit of G. Milpurrurru, 1994, p. 4)

Significantly, the dual conception of Yolngu cultural objects advanced in Indigenous witnesses and plaintiffs' statements reflected in the Court's decision, and the existence of Indigenous sanctions (internal to Yolngu community) proved crucial in this respect. In December 1994, Justice Von Doussa delivered indeed a landmark judgement referred to by lawyers as the "Mabo decision of Aboriginal culture" (Johnson 1996, p. 39).<sup>25</sup> The

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<sup>25</sup> As is known, the judicial decision *Mabo v Queensland (No 2)* (1992), also known as "Mabo decision", was a landmark High Court of Australia decision first recognizing Indigenous "native title".

Federal Court awarded the artists damages of 188,000\$ for infringement of the copyright in their artworks. However, Justice Von Doussa also awarded the artists the sum of 70,000\$ for additional damages to reflect the *cultural hurt and harm* they had suffered as a result of the unauthorized reproduction. The Court acknowledged that the unauthorized use of the artworks has (or it was likely to have) far reaching effect given the cultural environment in which they live.

### 3.5. Bulun Bulun v R & T Textiles (1998)

This case concerned John Bulun Bulun's work *Magpie Geese and Waterlilies at the Waterhole*, subject of an earlier action in *Bulun Bulun v Nejlam* (1989). In mid-90s Bulun Bulun's painting was altered and copied onto fabric (in Indonesia), imported into Australia and sold nationally by R & T Textiles. Bulun Bulun and George Milpurrurru (already a plaintiff in the 1994 lawsuit *Milpurrurru v Indofurn Carpets*) took an action against R & T Textiles in the Federal Court of Australia.

The peculiar nature of Yolngu claims, aimed to enlighten the *collective nature* of the "ownership" in Indigenous cultural objects, influenced the plaintiffs' dialectics. Although qualifying himself as the "legal owner of the copyright subsisting in the artistic work", Bulun Bulun provided indeed a detailed description of Yolngu conception of "rights" in sacred artworks:

[m]y traditional Aboriginal ownership rights are handed down to me from my father, who is turn had them handed to him by his father. (Affidavit of J. Bulun Bulun, 1997, p. 3)

Barnda, or Gumang (long neck tortoise) [*wangarr* ancestors] first emerged from inside the earth at Djulibinyamurr and came out to walk across the earth from there (...). 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 which were granted to them. This is a 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. (Affidavit of J. Bulun Bulun, 1997, pp. 4-5)

Barnda was then identified with the "original creator" of Bulun Bulun's paintings:

[m]y creator ancestor passed on to me the elements for the artworks I produce for sale and ceremony. Barnda not only creates the people and landscape, but our designs and artworks originate from the creative acts of Barnda (...). The land and the legacy of Barnda go hand in hand. Land is given to Yolngu people along with responsibility for all of the *Madayin* (corpus of ritual knowledge) associated with the land. In fact for Yolngu, the ownership of land has with it the corresponding obligations to create and foster the artworks, designs, songs and other aspects of ritual and ceremony *that go with the land*. (Affidavit of J. Bulun Bulun, 1997, p. 6; italics added)

The link between artworks and land was once again underlined:

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 ownership obligation. *A painting such as this is not separate from my rights in my land. It is a part of my bundle of rights in the land and must be produced in accordance with Ganalbingu custom and law.* Interference with the painting or another aspect of the *Madayin* associated with Djulibinyamurr is

tantamount to interference with the land itself as it is an essential part of the legacy of the land. (Affidavit of J. Bulun Bulun, 1997, p. 7; italics added)

According to Bulun Bulun, the relationship between sacred artworks and land (along with other aspects of Yolngu culture) worsen the impact of the unauthorized reproduction of Indigenous works on Yolngu society:

[i]t is the ultimate act of destruction under our law and custom – it upsets the whole religious, political and legal balance underpinning Yolngu society. It destroys the relationship and the maintenance of the trust established between the creator ancestor and their human descendants and also between traditional Aboriginal owners. This relationship controls all aspects of society and life, for example ownership of country, relations with other clans, marriage and ceremonial life and Its attributes. If the life source is damaged or interfered with in any way the power and stability derived from it and the power and stability which has continued from the time of creation is diminished and may collapse. (Affidavit of J. Bulun Bulun, 1997, p. 5)

Unauthorized reproduction of *At the Waterhole* threatens the whole system and ways that underpin the stability and continuance of Yolngu society. It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor. It interferes with our custom and ritual, and threaten our rights as traditional Aboriginal owners of the land and impedes in the carrying out of the obligations that go with this ownership and which require us to tell and remember the story of Barnda, as it has been passed down and respected over countless generations. (Affidavit of J. Bulun Bulun, 1997, pp. 8-9)

R & T Textiles admitted copyright infringement of Bulun Bulun's artwork and consent orders were entered into. However, the Court – per Justice Von Doussa – answered to the plaintiffs' claim relative to the connection between land and artworks:

[t]he principle that ownership of land and ownership of artistic works are separate statutory and common law institutions *is a fundamental principle of the Australian legal system which may well be well characterized as 'skeletal'* and stands in the road of acceptance of the foreshadowed argument. (*Bulun Bulun v R. & T. Textiles*, 1998, p. 256; italics added)

Von Doussa relied on J. Brennan's statement in the *Mabo* decision, according to which "recognition by our common law of the rights and interests in land of indigenous inhabitants of a settled colony would be precluded *if the recognition were to fracture a skeletal principle of our legal system*" (*Mabo and Others v Queensland (No. 2)*, 1992, p. 524; italics added).

Quite interestingly, then, the *Bulun Bulun v R & T Textiles* decision entailed the following steps in its deductive process: 1. state law<sup>26</sup> may in principle acknowledge the existence of Indigenous "rights" that are not originally recognized by the State; 2. state law, however, cannot acknowledge the existence of Indigenous rights that "fracture a skeletal principle" of state law; 3. the principle of separation between "ownership of land" and "ownership of artistic works" is a skeletal one in Australian law; 4. as a result, state law cannot acknowledge the "connection" between land and artworks inherent to

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<sup>26</sup> "State law" is here an a-technical expression indicating non-Indigenous law without addressing, e. g., the distinction between having rights granted by Parliament and creating rights in the common law or equity. On this distinction applied to the Indigenous "intellectual property" issue see Hardie 2015 (p. 164).

Yolngu cosmology. Von Doussa's statement explicates that Yolngu territorial cosmos construction has no place in a western set of property rights.

After *Bulun Bulun*, a second applicant, George Milpurrurru, continued (in the same proceedings) in his own right furthering an additional claim with respect to the infringement of *Bulun Bulun*'s intellectual property rights. More precisely, he stated that Yolngu "traditional owners" had certain rights in the copyright in the artistic work, separated from the individual rights of *Bulun Bulun*:

[t]he Second Applicant brings these proceedings in his own right and as a representative of the traditional Aboriginal owners. The Second Applicant is a senior member of the Ganalbingu people, and at all material times along with the other traditional Aboriginal owners had the right to permit and control the production and reproduction of the subject matter of the artistic work, and the artistic work itself, under the custom and law of the Ganalbingu people. (*Bulun Bulun v R & t Textiles*, Consolidated and Amended State of Claim, 1997, pp. 8-9)

... the Second Applicant and the people he represents, claim damages for the interference with the enjoyment of their traditional Aboriginal ownership of Ganalbingu country including the subject matter of the artistic work and the artistic work itself. (*Bulun Bulun v R & T Textiles*, Consolidated and Amended State of Claim, 1997, p. 2)

Milpurrurru presented rights in sacred artworks and ritual elements as *shared* among Yolngu society members. While the artist has undoubtedly specific rights relating to the performance of sacred art, he should always respond to the group. The same issue can be examined in light of Djardie Ashley's affidavit. This document is a significant one, since it revealed the existence among Yolngu of the *djungayi* (one of the *likan* notion), a figure appointed to monitor artists' activity on behalf of the community, particularly related to the traditional style of designs:

[s]ometimes Balanda (non Yolngu people) refer to *Djungayi* as meaning manager. Other times Balanda (non Yolngu people) refer to a *Djungayi* as a policemen. This is because amongst a *Djungayi*'s responsibilities is the obligation to ensure that the owners of certain land and *Madayin* associated with that land are dealt with in accordance to Yolngu custom, law and tradition, A *Djungayi* sometimes might have to issue a warning to advice a traditional Aboriginal owner about the way certain land or the *Madayin* associated with that land is used. A *Djungayi* has an important role to play in maintaining the integrity of the land and *Madayin*. (Affidavit of Djardie Ashley, 1997, p. 2)

Many of these people should be consulted if for example *Bulun Bulun* wants to do something physically at Djulibnyamurr or with some aspect of the *Madayin* related to Djullbinyamurr. For example, if he wants to introduce a further inside aspect of the *Madayin* into paintings for commercial sale he would discuss it with me. (Affidavit of Djardie Ashley, 1997, p. 4)<sup>27</sup>

#### 4. Mapping Yolngu Language in Copyright Infringement Cases

Yolngu affidavits constituted a first and raw (enforced) adaptation of the Indigenous worldview to the constructs of property law, and possibly represented a specific judicial

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<sup>27</sup> As a matter of fact, "Bulun Bulun was pretty critical of Djardie Ashley's affidavit as he thought it might be going too far in limiting his rights as an individual artist" (M. Hardie, personal communication).

strategy. The following lines attempt to fix the main themes of Yolngu judicial discourse on sacred art and copyright.

As seen, an analysis of Yolngu statements on the nature of sacred artworks reveals them as mostly *contradictory*. Yolngu plaintiffs and witnesses presented paintings as the intellectual property of the artist, although eventually denying their “proprietary” nature remarking the role of artworks in the territorial cosmos network (not necessarily in this order). As mentioned in § 2, Yolngu view of land and artworks is indeed not compatible to the western archetype of “property” that makes “commodities” out of sacred paintings and transforms them into alienable objects.

The *first* discourse – the assimilation of Indigenous artworks to intellectual property objects – operates on a two-folded level: 1. Yolngu plaintiffs and witnesses made a large use of the intellectual property lexicon, referring to artists as “owners” (Yangarriny; Bulun Bulun) – or the “sole” owners – of the paintings; to their relationship with artworks as “ownership”, “property right”, “copyright” (Yangarriny; Milpurrurru), “exclusive right” (Yangarriny); and to artworks as “copyrighted works” (Yangarriny). Also, they significantly used the term “theft” and the verb “to steal” (Yangarriny) to refer to the unauthorized appropriation of Yolngu ancestral designs, entailing an unequivocal reference to artworks as “property”. 2. Yolngu insisted on the *originality* of the artworks, as the result of the artists’ activity of creation and substantial modification of the previous versions of the paintings (Yumbulul: design “unique to the artist”; Bulun Bulun: “distinctive” style); and the role of the artist as the “creator” or “originator” (Milpurrurru; Bulun Bulun).

The *second* discourse, seemingly contradicting the “copyrightable” nature of Yolngu art, operates through two different level of exposition: 1. Yolngu widely employed *metaphors* to explain the affinity between paintings and people – “stealing paintings” as “cutting off the artist skin” (Yangarriny); paintings as the artist’s “spirit” or “soul” (Milpurrurru) – and paintings and land – “stealing paintings” as “stealing land” (Bulun Bulun). 2. Yolngu *directly* addressed the existence of territorial cosmos and made it flow into their judicial discourse. Such a narrative seemingly dismantled the construction of Yolngu artworks as “properties” by explicitly denying their distinctive or original character (Yumbulul, Wangurra), featuring paintings as *transgenerational*, *collectively created* (Yumbulul, Bulun Bulun) and *inherited* objects (Bulun Bulun); and the artist as a mere executor of the ancestor’s will. Also, Yolngu plaintiffs and witnesses remarked their discomfort in conceiving art and land as separate entities, by hinting at their artwork as a “part of the land” (Milpurrurru) or possessing “affinity” with the land (Bulun Bulun), and to their “rights” in artworks as “incidents” arising from the property of land (Marika).

It is easy to note, as said, then that the main outcome of Yolngu affidavits is a peculiar and paradoxical narrative, *simultaneously* constructing the ontological status of sacred artworks as an inalienable dimension of territorial cosmos and as original and individually created intellectually property objects. As seen (§ 1-2) the two conceptions are actually *incompatible*, since the property archetype unavoidably disrupts the cosmological connections linking artworks, people and land in Yolngu worldview. How can then the two conceptions *coexist* within the same discourse and apparently *combine*

in describing the same objects and the cultural framework in which they are produced? Here are *four* possible explanations.

*First*, as anticipated in the *Introduction*, Yolngu strategy seemingly aimed to emphasize the conundrum (F. Morphy 2008, p. 54) between the risk of a loss of cultural identity due to a "proPERTIZATION" of their art – erasing the territorial cosmos network – and the economic advantage deriving from a state recognition of an Indigenous "property" on their artworks. So, two distinct attitude correspond to such a double approach of Yolngu plaintiffs to the copyright infringement cases: if the perspective of a grander protection for their artworks encouraged Yolngu to creatively and incrementally (step-by-step; Hardie 2015; and personal communication)<sup>28</sup> reconsider their conceptual schemes to fit intellectual property constructs – designs from "inherited" to "created" and from "traditional" to "original"; author from "executor" to "creator" – the fear to be culturally eradicated<sup>29</sup> transposed in the affidavits lexicon as an *insistence on incommensurability* (F. Morphy 2007, p. 44) emphasizing conceptual differences between property and territorial cosmos. The attempted "proPERTIZATION" of Yolngu art and the insistence on the gap between western law and Indigenous cosmology do not seem to be in a relationship of hierarchy – one of the argumentations do not seem to be a residual one with respect to the other – but they rather work in parallel making the case for an "intercultural" scenario encompassing both western and Yolngu worldview.

*Second*, to speak of a judicial "strategy" also imply that (non-Yolngu) lawyers played a role in the construction of the affidavit language. It is then to be asked how much of the said contradiction is the result of lawyers for the plaintiffs introducing words or expressions that the plaintiffs did not themselves use. Usually the lawyer will, of course, indeed read the final version of the witness statement back to the witness – or the witness will be given a copy to read. But this "new" version will be opaque to the witness in many ways, even if their command of English is good (C. Golvan, personal communication; F. Morphy, personal communication).<sup>30</sup> For such a document is a *hybrid*. Very hard to disentangle after the fact of course, or to trace back single statements, alternatively, to Yolngu plaintiffs or to non-Indigenous lawyers. However, in at least one case an affidavit was definitely an outcome of the lawyer's "translating" the witness language: Bulun Bulun's 1989 affidavit – stating that "[m]y work is very closely associated with an affinity for the land" – is identical to a different one released by another plaintiff in the Blue Mud Bay case (*Northern Territory of Australia v Arnhem Land Aboriginal Land Trust*, 2008). The Blue Mud Bay case affidavit was certainly subject to

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<sup>28</sup> The "incremental" nature of Yolngu intellectual property claims may explain why in certain lawsuits Yolngu did not address (or explicitly denies) aspects of their "copyright" on sacred artworks: namely, because those aspects were to be addressed in subsequent and different cases, according to a "step-by-step" plan.

<sup>29</sup> And culturally diminished: "Yes, in the cases we had to fit the Aboriginal categories, concepts or things produced into Western legal categories such as originality. But, from our perspective the way they had been previously thought of was basically racist. What this meant was that people could not see the original aspects of the individual artist's work" (M. Hardie, personal communication).

<sup>30</sup> However, this is not always true: "by the time we got to the final case, it was myself that wrote the crucial parts of the Statement of Claim based upon the ideas that I had developed after long discussions with the artists. This was not done quickly, and at times not even as part of a particular case. I spent a long time staying with people, particularly Bulun Bulun, in developing the ideas that formed the main parts of the affidavits" (M. Hardie, personal communication).

“re-writing” from the lawyers, as F. Morphy (2008; and personal communication) noticed in her analysis of the lawsuit.

*Third*, another possible explanation of the “contradiction” can be that Yolngu paintings unlawfully reproduced are not “entirely sacred” objects, but something which is in “some ways like” a sacred object; products that derive from the same ancestral origin place than *rangga*, but that can be more on the side of the individual. The issue is explained in H. Morphy (1991, p. 43) that refers to some Yolngu artworks as “messenger”: namely, paintings that (entirely or partially) reproduce the content of sacred *rangga*, but that are thought to be exhibited to non-Yolngu people to educate them about Yolngu culture and worldview. In a way, as affidavit, also Yolngu paintings – whose misappropriation triggered the five lawsuits – appear here as hybrid and intercultural objects (Anker 2014, p. 142). A caveat that alert about this possibility is Wunungmurra’s 1981 affidavit stating that “*part of that painting belongs to the land*” (italics added). If the painting were a *rangga*, the statement would probably not have had the “part of” reference (H. Morphy, personal communication), but would have hinted at the design as being “the land” (seemingly to Magowan’s construction). So, although in one sense Yolngu contradiction is a conundrum, in another sense it seems also a balancing act between ancestral determination and the human transmission of knowledge which in this case is played out in a cross-cultural legal context.

*Finally*, from a more theoretical (and less pragmatic) standpoint, it cannot be excluded that both western intellectual property archetype and Yolngu territorial cosmos only *partially* described what Yolngu artists *actually felt* towards their creations. Indeed, despite the “territorial cosmos” interconnected significance, “the artists themselves thought of themselves as operating (...) individually within a tradition, just as Western artists have over the centuries. They saw the works as theirs to sell and deal with within the broad guidelines of their tradition. They did not feel that somehow their income had to be divided up as if they were not individual creators” (Martin Hardie, personal communication). As copyright, Yolngu “sacred” dimension would represent (or have been described in affidavits as) a form of law, a system of permissions and prohibition, rather than a simply spiritual concept (the idea of interrelation between law and the sacred is embedded in Yolngu term *madayin*; and referred by some authors such as Agamben (1995, pp. 104-112). Those two sets of permissions and prohibitions (copyright and territorial cosmos) have interacted in the attempt to reflect the highly complex mixture between cosmological and individualistic views of art. In this sense, intellectual property law and territorial cosmos appear in a relationship of *complementary opposition*, identifying two mutually exclusive classes which exhaust the universe of discourse (Dumont 1966) about the regulation of artworks’ production and circulation in Yolngu society.

## 5. Concluding Remarks

This paper took on the issue of Yolngu discourse on sacred art and copyright in judicial statements.

First, the exposition described – basing on classic Yolngu ethnographies – Yolngu view of artworks as entities intrinsically “connected” to people and land, and incapsulated into the “territorial cosmos” construction. As said, such a view of the relationship

between human, artworks and places results disrupted by the "property" vision of sacred art and land severing ancestral connections and objectification-identification processes.

Second, the paper reported the main excerpts of Yolngu affidavits in five significant 1990s lawsuit concerning misappropriation of Indigenous artworks: *Yangarriny Wunungmurra v Peter Stripes* (1981), *Bulun Bulun v Nejlam* (1989), *Yumbulul v Reserve Bank of Australia* (1991), *Milpururru v Indofurn Carpets* (1994), and *Bulun Bulun v R & T Textiles* (1998). As a result of the survey, Yolngu affidavits appeared mostly as contradictory, either on the legal status of artist – seen simultaneously as "owners" and mere executors of ancestral patterns – and the legal status of artworks – seen both as "properties" and inalienable portions of the land or the artist himself.

Third, the essay investigated the reason for such a contradictoriness, concluding that: the main reason for Yolngu statements on their artworks being (seemingly) ambiguous is the conundrum that Indigenous plaintiffs faced between the risk of a loss of their cultural identity and the potential benefit of state recognition of a "property right" on Yolngu art; also, the conundrum appeared as emphasized in the judicial strategy adopted by Yolngu representatives and (non-Yolngu) lawyers, deliberately adopting intellectual property lexicon and metaphors to address Yolngu paintings and artists; a different reason for the ambiguity of Yolngu affidavits is the "spurious" nature of paintings, cross-cultural and hybrid objects devoted to the dialogue between the western and Yolngu components of Australian society; finally, a reason for the contradictoriness can be found in the nature of copyright law and Yolngu norms as different sets of prohibitions and permissions in a relationship of complementary opposition, both necessary to exhaust the universe of discourse about the regulation of artworks' production and circulation in Yolngu society..

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