Protection of indigenous art under copyright law

by Yana Yarovikova

718827

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Introduction

The protection of rights of indigenous peoples is an issue widely discussed by legal researchers and policy-makers. Indigenous peoples live in 70 countries all over the world and they are about 370 million now[1]. There is no specific definition of the indigenous people under the international law, though ILO Convention № 169 provides some peculiarities of such communities. Indigenous peoples are peoples who descent from population which inhabited the same area before "the time of conquest or colonization or the establishment of present state boundaries"[2] and who's social, political, economic, cultural institutions differ from the dominant ones.

Indigenous traditional knowledge is widely used today even outside of indigenous communities.[3] The experience of the indigenous peoples from all over the world can be useful in search of solutions associated with numerous problems like climate changing or rational use of natural resources, human physical and mental health. Peter K. Yu stated that "indigenous practice impacts on a wide variety of policy areas, including agricultural productivity, biological diversity, cultural patrimony, food security, environmental sustainability, business ethics, global competition, human rights, international trade, public health, scientific research, sustainable development, and wealth distribution".[4] The Rio Declaration on Environment and Development considers the indigenous knowledge and traditional practices might play "vital" role in sustainable development.[5] In some countries indigenous practice is a part of everyday life. For instance, in India about 80% of population resort to the Ayurvedic and other traditional medicines.[6] So there is a variety of approaches, practices, skills traditionally belong to indigenous communities.

There is no sole widely accepted definition of indigenous traditional knowledge. There is an umbrella legal term "indigenous intellectual property" used widely by World Intellectual Property Organization (WIPO).[7] Some acts provide slightly different terms like "the cultural and intellectual property rights of Indigenous peoples"[8] or "traditional cultural practices"[9] and some others. The elaboration of the definition drops out of the aims of this thesis, as it will mostly focus on the protection of indigenous artistic works.

The fundamental issue in the field of the indigenous traditional knowledge is the lack of its protection. The international law does not provide an integrated approach towards the protection

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[1] http://www.indigenouspeople.net/sidemenu.html

[2] ILO Convention № 169; available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100897.pdf; Art1 (b)

[3] http://www.unutki.org/default.php?doc_id=30

[4] PK Yu *Traditional Knowledge, Intellectual Property, and Indigenous Culture: an Introduction* available at http://www.peteryu.com/tk.pdf

[5] The Rio Declaration on Environment and Development; Rio de Janeiro, 3-14 June 1992; available at http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm; principle 22

[6] http://medical-dictionary.thefreedictionary.com/ayurvedic+medicine

[7] http://www.wipo.int/tools/en/gsearch.html?cx=000395567151317721298%3Aaqrs59qtjb0&cof=FORID%3A11&q=indigenous+intellectual+property

[8] Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples 1993; available at http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/mataatua.pdf

[9] The Convention on Biological Diversity 1992; available at http://www.cbd.int/convention/text/

of indigenous traditional knowledge. It is admitted that there is "the lack of protection of indigenous traditional knowledge at national, regional and international levels".[10]

So the general question is to what extent existing international legal tools can provide effective protection of indigenous traditional knowledge. This research concerns indigenous artistic work created in accordance with traditions and beliefs of indigenous people as the elements of indigenous traditional knowledge. The thesis, thus, refers to copyright law as a possible mean for the protection of indigenous artistic work. The central research question is to what extent the existing copyright law can be applied for advocacy of indigenous artwork. The research will present and examine the opportunities and limitations of copyright tools in the protection of indigenous artistic works.

In order to answer these questions, this thesis will examine the requirements of existing copyright protection and the features of indigenous art. It will investigate relevant international documents, cases and literature.

In the first chapter the key concepts of copyright law will be delineated. To fulfil this purpose the common copyright terms will be briefly explained with reference to international copyright treaties such as the Berne Convention and the Universal Copyright Convention. Then the notion of indigenous traditional knowledge as an umbrella term will be described in order to present the concept of indigenous art.

The second chapter will study a relevant case, namely the case *John Bulun Bulun & Anor v R & T Textiles Pty Ltd (1998)*. In this case Federal Court of Australia considered whether indigenous communal ownership to artwork could be recognized under Australian copyright law. The second chapter will describe this case in general and also provide the historical and anthropological background of the Australian community involved in the case – Yolngu people; and it will show what the meaning of the art from the indigenous point of view and whether concept of copyright law is compatible with indigenous view of their art. This case has become one of the most famous cases which considered whether there were conditions for protection of communal interest in indigenous artwork under copyright law. *Bulun Bulun & Textiles Pty Ltd* case was the closest to recognition of communal rights in an indigenous artwork. This case describes the difficulties in recognition of communal rights in artistic work. Additionally, this case provides a specific illustration of what indigenous artistic work is.

The third chapter will analyze the correlation between the concept copyright protection and the notion of indigenous art; it will study whether the means of copyright protection meet the needs of indigenous people for the protection of their art. This analysis will result in finding out the limitations and opportunities of copyright law in the protection of indigenous people. Furthermore, this chapter will present a human right approach towards intellectual property rights and its possible application to the protection of indigenous artistic works.

The final part of this work will delineate the most important findings about the protection of indigenous artwork. It will assume whether it is possible to overcome revealed limitations of

[10] Report on Indigenous Traditional Knowledge. Economic and Social Council. Available at http://www.un.org/esa/socdev/unpfii/documents/6_session_dodson.pdf

current copyright protection and will delineate the ultimate reasons why it is not effective tool in the case of advocacy of indigenous artwork. Then conclusion will also offer other possible alternatives to protection of indigenous artwork.

CHAPTER 1 Copyright and Indigenous Art: Defining the Concepts

1.1 Introduction

To answer the central research question of this thesis it is necessary to define the key concepts of copyright law and the notion of 'indigenous art'.

This chapter will designate the main terms of copyright protection. It will refer to international copyright treaties, national legislations and relevant cases to describe main elements of copyright protection and its prerequisites.

Since there is no generally accepted definition of indigenous traditional knowledge to delineate the term 'indigenous art' is a difficult task. I will refer to the broader concept of the indigenous traditional knowledge as widely applied by various researchers and institutions. To provide a more specific definition the concept of indigenous art will be described with reference to its historical background and the opinions of indigenous representatives.

1.2 International copyright treaties

There is no common regulation of copyright issues under international law. Every state establishes its own regulation and the work created or published within its territory falls under the national legislation. The author has to refer to the domestic copyright law of another country if he or she needs to protect the work abroad. So no "universal" copyright system exists. However, national laws "are stitched together by a series of international agreements prescribing the conditions under which countries must give recognition under their domestic laws to works of foreign origin".[11] The principle of "national treatment" is a crucial concept of current international copyright law. The Article 5 (1) of the Berne Convention for the Protection of Literary and Artistic Works[12] sets that "authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention". Thus, there is no wonder that in spite of lack of any universal copyright system international copyright law is highly influential and "national policy and legislation concerning copyright are conditioning both international communications developments and the international legal framework".[13]

The International legal framework is presented by the Berne Convention, the Universal Copyright Convention[14], WIPO Copyright Treaty[15] and other treaties. To describe the key

[11] C Joyce and others, *Copyright Law* (7th edn, Newark, NJ LexisNexis 2006) 30
[12] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886
[13] EW Ploman and LC Hamilton, *Copyright Intellectual property in the information age* (London: Routledge and Kegan Paul, 1980), 203
[14] Universal Copyright Convention, Paris, 1971

notions of copyright protection this section focuses on the Berne Convention and the Universal Copyright Convention, as these treaties deal mostly with artistic works while others refer to various species of intellectual property such as trademarks or patents and reiterate clauses of these two copyright conventions. For instance, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)[16] replicated the copyright provisions from Berne Convention. Thus, the Berne Convention might be acknowledged as a basic international copyright document.

The Berne Convention of 1886 was the first document concerning copyright protection and adopted within international law. On the one hand, it is based on the principle of national treatment. On the other, it has contributed much to development of copyright protection throughout the world. The Convention established the "concept of Convention "minima", which supplements the principle of national treatment by setting a "floor" below which signatory countries may not go in extending protection to qualifying foreign works".[17] Such minimum of requirements regards subject matter, formalities and others fundamental issues of copyright protection.

The Universal Copyright Convention (the UCC) was elaborated in 1952 by the United Nations Educational, Scientific and Cultural Organization (UNESCO) for countries which cannot provide the minimum level of copyright protection established by the Berne Convention. Signatory states of the Berne Convention also became a party to the UCC to ensure that their copyrights could exist in the states which were not parties of Berne Convention. The Article XVII (2) of the UCC points out that the Convention "shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that Convention".

The next sections will discuss the clauses of these conventions and the key concepts of copyright in a more detailed way. The concepts which will be described have been chosen as the most relevant to the possible application to the protection of indigenous artistic works.

1.3 Substantive copyright concepts

Copyright law has evolved historically as a system of protection distinct from the author's right system. The most significant difference between those two systems is that the copyright system emphasizes the protection of the artistic work and that the author's right system protects the author.[18] Nowadays the distinction between the copyright system and the author's right system is quite blurred. 'Copyright law' is a commonly accepted term for labelling the scope of legal tools necessary for the protection of the artistic work. In spite of all previously acknowledged

[15]WIPO Copyright Treaty, adopted by the Diplomatic Conference on December 20, 1996
[16]The Agreement on Trade Related Aspects of Intellectual Property Rights, 1 January 1996, Available at
[17] C Joyce and others, *Copyright Law* (7th edn, Newark, NJ LexisNexis 2006) 31
[18] JAL Sterling (ed) *World copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts and published editions in national, international ad regional law: with a glossary of legal ad technical terms, and a reference list of copyright and related rights laws throughout the world* (3rd edn London Sweet&Maxwell 2008) 18

differences from the author's right system, copyright law also concerns first of all the author's rights to protect his or her work.

Copyright law is supposed to strive for the balance between interests of author, other proprietors of copyright and community. The balance of existing copyright regime tends to be more commercial and less caring about interests of authors and society. However, this shift is not visible in legal copyright provisions; it becomes more visible in their implementation. The consideration of such implementation is not the primary goal of this thesis. However, it is important to keep in mind the idea what the common policy of copyright law is in practice.

The purpose of this work is to reveal whether the clauses of copyright law are consistent with the necessity of the indigenous artwork protection. To fulfil this purpose it is necessary to analyse the certain provisions of existing international copyright documents.

1.3.1 'the author'

The author is recognized to be an initial beneficiary of copyright. National legislation may contain particular provisions on ownership of rights in complex artworks such as films or computer programs. The Berne Convention is "primarily intended to protect the interests of the originators of literary and artistic works and does not make reference to other aspects or dimensions of copyright".[19] In contrast to the Berne Convention the UCC refers to "the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture".[20]

The author can be defined as "the individual who by creative contribution produces a work".[21] A broader approach describes the 'author' as "the person (who may be an individual or a legal person such as a corporate body) who is defined by the particular national law as the "author" of particular production".[22]

1.3.2. 'joint authorship'

Copyright law also acknowledges joint authorship. This term is used "to describe two or more authors collaborating in the production of a work".[23] The most typical example of such collaborative work is a film, but a book written by co-authors also might be an example. The Berne Convention does not describe this notion in detail; it only points out in the Article 7 the

[19] EW Ploman and LC Hamilton, *Copyright Intellectual property in the information age* (London: Routledge and Kegan Paul, 1980), 50
[20]Universal Copyright Convention, Art.I
[21] JAL Sterling (ed) *World copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts and published editions in national, international ad regional law: with a glossary of legal ad technical terms, and a reference list of copyright and related rights laws throughout the world* (3rd edn London Sweet&Maxwell 2008) 1209
[22]Ibid
[23]Ibid, 1233

calculation of the terms of protection. However, these terms are often mentioned under national legislations. For instance, the Australian Copyright Act 1968 defines "work of joint authorship" as "work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors".[24] This concept allows to protect rights of co-authors or co-creators of any copyright work.

1.3.3. 'the term of protection and the distinct types of rights'

The term of protection is another crucial element of copyright law. The minimum term of protection established by the Article 7 of the Berne Convention is fifty years after the death of author. The signatory countries may excess this minimum term. The duration of copyright has been a discussion since the first copyright laws were adopted. The copyright is supposed to be limited because of consumers' interests. However, it is important to underline that only economic rights within the scope of copyrights have this expiration period, but not the moral rights.

The Berne Convention distinguishes economic and moral rights granted to the author. Economic rights are also known as an exclusive right. This term applies "to an absolute right granted to an author or other person, being a right which gives the holder the sole power to authorise or prohibit the doing of the act covered by the right".[25] Moral rights are commonly considered as opposing to exclusive rights as they cannot be transferred to another person. Moral rights are the right to disclose the work (right to divulgation), the right to maintain integrity of the work (right to integrity), the right to be identified as the author of the work (right to paternity), and the right to retract the work from circulation (right of retraction). Moral rights are "understood as the rights accorded to the author of a work and related to the personality of the author and the integrity of the author and the work".[26]

The Article 6 (1) of the Berne Convention points out only the right to paternity and the right to integrity. The UCC does not mention moral rights at all, so it does not oblige participatory states to establish laws recognising moral rights. The Article IV of the UCC refers to "the basic rights ensuring the author's economic interests". As for national legislations most of common law jurisdictions recognize these two kinds of rights in compliance with the Berne Convention's provisions, while civil law jurisdictions acknowledge every mentioned moral right of author.

1.4 Prerequisites for copyright protection

[24] Australian Copyright Act No. 63of 1968; Section 10
[25] Ibid, 1226
[26] Ibid, 1236

Prerequisites for copyright protection are the crucial elements of copyright law since they constitute the conditions which artistic work is required to meet to obtain copyright protection.

The Article 5 of the Berne Convention points out that no formal procedure is necessary to exercise copyright. In contrast to intellectual property of other kinds, copyright exists automatically from the moment of the creation of the work. However, some national legislations have established a procedure which should be followed in order to exercise copyright. Such formalities might be a registration procedure or notification. For instance, registration at US Copyright Office is required within the US copyright system. The copyright notice is a formal notice marked on a copy of work. The Article III of the UCC set an international form of copyright notice – the name of author and year of first publication followed by well-known symbol "©". This notice implies that the specified work is protected under copyright law.

Other prerequisites are mentioned neither by the Berne Convention nor by the UCC, but they are widely acknowledged by legal scientists and applied in relevant cases. For instance, the US Copyright Act 1976 points out that "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device".[27] The requirement for fixation refers mostly to musical, dramatic and choreographic works. This requirement is the effect of the generally accepted concept of copyright law that protects the expression of an idea rather than the idea itself.

This concept was affirmed by various cases including the famous case *Baigent and Leigh v Random House Group* also known as "Da Vinci Code Case".[28] The Court has acknowledged one more time that copyright subsists not in ideas, but in the way of their expression. This case also refers to another copyright case *Designer Guild Limited v. Russell Williams* which stated that "originality, in the sense of the contribution of the author's skill and labour, tends to lie in the detail with which the basic idea is presented. Copyright law protects foxes better than hedgehogs. In this case, however, the elements which the judge found to have been copied went well beyond the banal and I think that the judge was amply justified in deciding that they formed a substantial part of the originality of the work".[29]

Originality is a crucial copyright concept as t is recognized to be a necessary condition for an artistic work to obtain copyright protection. The Berne Convention does not mention originality as a necessary element of copyright works, but national laws directly name or imply this requirement. The Australian Copyright Act 1968[30] refers to original literary, dramatic, musical and artistic works. The section 1 of the UK Copyright, Designs and Patent Acts[31] also points out

[27]An Act for the general revision of the Copyright Law, title 17 of the United States Code, January 1 1978; available at http://www.copyright.gov/title17/92chap1.html#102; Art. 102 (a)

[28] Baigent & Anor v The Random House Group Ltd (The Da Vinci Code) [2006] EWHC 719 (Ch) (07 April 2006); available at http://www.bailii.org/ew/cases/EWHC/Ch/2006/719.html

[29] Designer Guild Limited v. Russell Williams (Textiles) Limited (Trading As Washington Dc) [2000] UKHL 58; [2001] 1 All ER 700; [2000] 1 WLR 2416 (23rd November, 2000); available at http://media.labeled.labelmedia.co.uk

[30]Australian Copyright Act No. 63of 1968; http://www.comlaw.gov.au/Details/C2010C00476; Section 31-32

[31]UK Copyright, Designs and Patent Acts, 16 November 1988; available at http://www.legislation.gov.uk/ukpga/1988/48/section/1; Section 1(1)

that copyright subsists in original literary, dramatic, musical and artistic works. According to the Article 2 of the German Law on Copyright and Neighboring Rights "personal intellectual creations alone shall constitute works" which fall under the said law.[32] Latter provision indirectly refers to originality as "personal intellectual creations" implies that creation is a unique and original work.

The concept of originality might be interpreted within different approaches. From one point of view originality might be associated with novelty and aesthetic merit.[33] In the case *Burrow-Ciles Lithographic Co. v. Sarony* the Supreme Court stated that "a painting, a print, does embody the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the constitution in securing its exclusive use or sale to its author".[34]

The personality theory of copyright also refers to the originality concept which is broader than merely simple lack of copying.[35] This approach recognizes originality of a work if it has an imprint of unique personality of author or creator.

However, there is no surprise that in most of later cases courts have a tendency to acknowledge that any artistic work shall be protected under copyright law independently from its aesthetic merit. Creativity and artistic merit are highly inconstant and subjective criteria, thus, they are rather difficult to apply to copyright disputes. Law is to protect any author, genius or not, from copyright violations. Otherwise, it would contradict to principle of equality established by Universal Declaration of Human Rights [36] and also to its provision of the Article 27 (2). It points out that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". Therefore, there should not be any requirements restricted the right of author to seek the protection of his or her moral and material interests arisen from the work. So, it is necessary to recognize that "law and art speak quite different languages".[37] For instance, in the case *Hyperion Records Ltd v Sawkins* England and the Wales Court of Appeal stated:

> "The policy of copyright protection and its limited scope explain why the threshold requirement of an "original" work has been interpreted as not imposing objective standards of novelty, usefulness, inventiveness, aesthetic merit, quality or value. A work may be complete rubbish and utterly worthless, but copyright protection may be available for it, just as it is for the great masterpieces of imaginative literature, art and music. A work needs only to be "original" in the limited sense that the author

[32]Law on Copyright and Neighboring Rights; 9 September 1965, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=126255

[33]HB Abrams, *Originality and creativity in Copyright Law* (Law and Contemporary Problems; Vol. 55; No 2) available at http://scholarship.law.duke.edu; 7-10

[34]Burrow-Ciles Lithographic Co. v. Sarony; 111 U.S. 53, (March 17, 1884); available at http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=111&page=53

[35]P Jaszi, *Toward a theory of copyright: the metamorphoses of "authorship",* (1991 Duke Law Journal 455 1991); available at http://www.heinonline.org

[36]Universal Declaration of Human Rights, 10 December 1948; Art. 27 (2)

[37]P Alfrey, *Petrarch's Apes: Originality, Plagiarism and Copyright Principles within Visual Culture;* available at http://web.mit.edu/comm-forum/papers/alfrey.html

> originated it by his efforts rather than slavishly copying it from the work produced by the efforts of another person".[38]

Therefore, two main approaches could be named in order to define the requirement of originality. First broader approach implies assessment of creativity expressed in a work, another one just requires for the lack of copying in order to establish original character of the work. In the civil law jurisdictions it is a common requirement of a creative contribution, while the widely acknowledged rule in the UK is that "a work can be original if it is not copied and if it is a result of invested skill and labor".[39]

1.5 Copyright work

The notion 'copyright work' refers to any literary and artistic work which falls under the protection of copyright law. According to the Berne Convention for the Protection of Literary and Artistic Works the expression "literary and artistic works" shall include:

> "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science".[40]

Once a literary or artistic work meets the requirements mentioned above the author of such work can protect his or her rights within intellectual property law. The next chapters will examine whether the indigenous artistic work is capable to meet the requirements established by existing copyright law.

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[38] Hyperion Records Ltd v Sawkins [2005] EWCA Civ 565 (19 May 2005); available at http://www.bailii.org/ew/cases/EWCA/Civ/2005/565.html; para. 31

[39] JAL Sterling (ed) *World copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts and published editions in national, international ad regional law: with a glossary of legal ad technical terms, and a reference list of copyright and related rights laws throughout the world* (3rd edn London Sweet&Maxwell 2008) 1239

[40] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1986, Art.2

1.6 Indigenous traditional knowledge

Indigenous art is commonly seen as an element of the broader concept of indigenous traditional knowledge. Thus, first of all, this section will delineate this concept. Subsequently, next section will describe aboriginal or indigenous art.

The term "indigenous traditional knowledge" is extremely broad. The Permanent Forum on Indigenous Issues applies the term "indigenous traditional knowledge" to "traditional practices, culture, knowledge of plants and animals and knowledge of their methods of propagation … expressions of cultural values, beliefs, rituals and community laws".[41] The Report of the Permanent Forum on indigenous traditional knowledge emphasizes that "some of this knowledge is of highly sacred and secret nature and therefore extremely sensitive and culturally significant and not readily publicly available".[42]For the purpose of this thesis it should be mentioned that the phenomenon of indigenous artistic work has a comprehensive nature. It contains several elements of the said conception of the indigenous traditional knowledge. In particular, indigenous artistic work combines traditional practices, expressions of cultural values, beliefs and rituals, and sometimes even knowledge of environment.

This interconnection can be explained by the integrated worldview of indigenous peoples, which is not used to separate strictly various fields of social and cultural life. It can be described as an indigenous spirituality, which "derives from a philosophy that establishes the holistic notion of the interconnectedness of the elements of the earth and the universe, animate and inanimate, whereby people, the plants and animals, landforms and celestial bodies are interrelated".[43] The spirituality of indigenous people reveals itself also in the creation of artworks. Thus, spirituality might be acknowledged as an inherent characteristic of the indigenous artwork.

1.6.1. WIPO and traditional knowledge

The World Intellectual Property Organization (WIPO)[44] refers to the notion "traditional knowledge" in their documents and conferences.[45] In particular, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

[41]Report on Indigenous Traditional Knowledge, prepared by M. Dodson, Permanent Forum on Indigenous Issues, UN Economic and Social Council, 21 March 2007

[42] Ibid

[43]V Grieves, *Aboriginal spirituality: a baseline for indigenous knowledge development in Australia* (The Canadian Journal of Native Studies XXVIII, 2(2008):363-398)

[44]http://www.wipo.int/tools/en/gsearch.html?cx=000395567151317721298%3Aaqrs59qtjb0&cof=FORID%3A11&q=indigenous+intellectual+property

[45] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Eight Session, Geneva, June, 2005: Press Releases. International Conference on the Utilization of the Traditional Knowledge Digital Library as a Model for Protection of Traditional Knowledge. 2011;

(IGC) has recently elaborated the draft articles of a future treaty on the protection of traditional knowledge.[46]

Article 1 of the draft articles sets the subject matter of protection, so it is supposed to contain the definition of traditional knowledge. There were two main alternative viewpoints on the definition. The first one was supported by developing countries and proposed a broader conception of traditional knowledge. This one was supposed to include references to knowledge "that is dynamic and evolving …passed on from generation to generation" and knowledge "associated with biodiversity, traditional lifestyles and natural resources".[47]

Another viewpoint was taken by the European Union countries which argued that the definition should be more narrowed down. The broader concept implied a broader approach to the beneficiaries of protection. Under this concept protection should be applied to "indigenous peoples/communities and local communities". The Second alternative proposed to establish an exhaustive list of communities which could benefit from the system of protection of traditional knowledge. The broader concept would allow providing protection for indigenous people in countries which have not recognized the rights of indigenous people.

Both approaches, however, refer to a broader category than indigenous traditional knowledge. Indigenous traditional knowledge could be seen as one of the categories of traditional knowledge in general. Therefore it shares with traditional knowledge, the characteristic that the knowledge has been transferred from one generation to another. Another important feature of traditional knowledge is that it "usually means accumulated knowledge which, at the same time, provides indigenous peoples and local communities with a sense of identity".[48]

Therefore, putting together the said main features of indigenous traditional knowledge it might be defined as holistic systems of knowledge and practices which provide a sense of identity, form intangible cultural heritage of indigenous people and which have sacred meaning for them.

1.7 Indigenous art

This section will describe then notion of indigenous art. Various articles often refer to aboriginal art. This category might be amounted to indigenous art. This section will also refer to particular opinions of indigenous people representatives in order to designate the category of indigenous artwork in more detailed way.

[46]C Saez, *Divergences Clarified On Protection Of Traditional Knowledge At WIPO*, Intellectual Property Watch, 18 April 2012; available athttp://www.ip-watch.org/2012/04/18/divergences-clarified-on-protection-of-traditional-knowledge-at-wipo/
[47]Ibid
[48]WIPO Traditional Knowledge Documentation ToolKit, Consultation Draft, November 1, 2012; 21

From the holistic indigenous point of view there is not so much sense in dividing indigenous traditional knowledge into various fields as every sphere is tightly interconnected with another. However, for the purpose of this thesis it is necessary to delineate what indigenous art is.

Indigenous or aboriginal art might be considered form different perspectives – from a philosophical, ethnological, cultural, and economic perspective. This section will put together these different views in order to delineate what the subject matter is calling for protection.

Aboriginal art has not been recognized by, so-called, civilized countries for a long time, as art "was held to be one defining characteristic of 'civilised' societies, and it was generally assumed that Aboriginal people had no art"[49]. For instance, Australian colonists treated indigenous cultural expressions with anthropological or ethnographic interest, they "dealt not with arts, but artefacts[50]". This long period was also a period of active collection of objects created by indigenous people. What is important from the legal prospective is that "the acquirers of Aboriginal cultural heritage became the recognised owners".[51] Vivid illustration of such principle in work could be the following situation. Publishers of recorded and published aboriginal languages obtained the status of creators because they were the first who had produced the written versions. This principle was an undisguised neglect of indigenous rights.

Later, indigenous art was regarded as making craft objects. Indigenous art was seen as "souvenir art".[52] The works of indigenous people "were believed to be those most likely to gain mainstream acceptance because of their appearance as 'traditional', and therefore 'authentic', expressions of Aboriginal culture".[53] Indigenous people were seen as craftspeople, but not artists. Therefore, it is fairly logic that only one significant exhibition of Aboriginal art took place in the beginning of 1900s. It represented the bark paintings at the National Museum of Victoria, in Melbourne; the name of exhibition was "Primitive Art".[54]

The attitude to indigenous art has changed alongside with the changing attitude to indigenous people in general and the re-establishment of their role within the new international order. Another crucial moment was more specific; it was connected with the wide acceptance of aboriginal artist - Albert Namatjira. Albert Namatjira belongs to the Arrernte people, but he painted in accordance with the European tradition rather than the traditions of his people. Thus, he was recognized to paint "like a white man" and became "Australia's first indisputably famous Aboriginal artist".[55] Afterwards, there were number of indigenous artists who painted in the European tradition. These facts might be criticized and accessed as the departure from aboriginal traditions and evidence of successful assimilation process, but they turned out at long last to play an important role in revising the original traditional indigenous art itself.

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[49] *Protecting Australian Indigenous Art: ownership, copyright and marketing issues for NSW schools*; Published on the internet in 2006 by the Board of Studies NSW, GPO Box 5300, Sydney 2001, Australia; available at http://ab-ed.boardofstudies.nsw.edu.au/files/protecting-australian-indigenous-art.pdf
[50] Ibid
[51] Ibid
[52] Ibid
[53]Ibid
[54]http://museumvictoria.com.au/history/artists2.html
[55] Ibid

Indigenous art, as any other art, can be divided into categories of performing arts, music, writing, and visual arts. One of the specific features of indigenous art is its prevailing oral character. Plenty of rituals, musical and dancing practices, stories and myths are often not fixed on any tangible object. Thus, a number of indigenous art forms remains literally intangible until it is recorded or fixed by any other means. For instance, some cases are known when some researchers recorded aboriginal music, and later it was used without any consent given by the indigenous community.

Works of visual art are usually fixed in some permanent form. Nowadays, indigenous art, and especially visual art, is becoming more popular in the Western world as it is regarded to be very unusual and original. However, appreciation of aesthetic merit of aboriginal visual arts does not always necessarily to recognition of indigenous rights and compliance with their customs and traditions. Therefore, currently visual arts are most vulnerable kind of aboriginal art.

Visual arts of indigenous communities may consist of ochre painting, carving of practical objects, the ornate decoration of objects, rock painting and carving, bark painting, wood sculpting and the burning in of designs and others.[56] Aboriginal visual art differs in techniques and ideas a lot from the approach to visual art of the Western world. It is also characterized by its symbolism. Visual art is full of symbols which are known only to people of certain communities or even exclusively to several men inside this community.

Indigenous visual art is regarded to play a role in transferring indigenous history, beliefs and ideas. The messages of indigenous art are "often political and social as well as cultural".[57] Indigenous art may contain "oral histories/life stories; political commentary; establishing and demonstrating community ownership of stories; engaging with cultural reclamation and maintenance; entertainment; offering a form of personal and community healing (e.g. stories of the Stolen Generations); educating the broader community about Indigenous issues; educating Indigenous communities on local and national Indigenous issues".[58] The variety of ideas and meanings which lay behind every work of indigenous visual arts is striking, and it also makes it hard to elaborate one specific definition of indigenous art.

This comprehensive outlook of indigenous art might be illustrated vividly by the words of former chairperson of Australia's Aboriginal Art Movement, Valerie Napaljarri Martin:

> "The art means to carry on our stories, to know it belongs to my family and it belongs to my father and grandfather, so that everyone can know about us, so we can carry on, so our kids can carry on forever, even when we're gone. So non-indigenous people can know about us in the future, how we fought to keep our culture strong for the sake of our children's future. The art is about who you belong to, about what country you belong to, it's about the only way you can know and others will know too".[59]

[56] Ibid
[57] Protocols for producing Indigenous Australian visual arts (2nd edn Australia Council for the Arts 2007); available at www.australiacouncil.gov.au
[58] Ibid
[59] Australia's Aboriginal Art Movement; A culture emerging from the poverty trap through art; available at http://www.aboriginalartcollection.com/

1.8 Conclusion

Indigenous traditional knowledge and indigenous art are specific categories which are not easy to describe from the Western point of view. Indigenous people used to look at the art in a different way. Indigenous communities apprehend their art as a source of knowledge about nature, history, beliefs and ideas transferring from one generation to another. They regard the art to be sacred and of high significance for preservation of indigenous culture.

Attitude towards indigenous art has been changing throughout the centuries. Indigenous art has been accepted by the Western society since the view on the indigenous people has qualitatively shifted from the neglection of their concerns to appreciation of their rights and interests. However, there is a generally acknowledged lack of the protection of rights in indigenous artworks. Therefore, a current issue is to choose the most proper and efficient system of such protection. The first part of this chapter described the main elements of copyrights protection; the second one delineated the notion of indigenous art. The next chapter will present the case *John Bulun Bulun & Anor v R & T Textiles Pty Ltd.* This case is one of the most famous cases which considered the opportunities of copyright law to provide protection to indigenous people.

CHAPTER 2 Analysis of the case: *John Bulun Bulun & Anor v R & T Textiles Pty Ltd*

2.1 Introduction

The case *John Bulun Bulun & Anor v R & T Textiles Pty Ltd* was considered by Federal Court of Australia in 1998. It examined whether communal rights in indigenous artwork could be recognized. This case has become famous because it was the closest point to recognizing communal rights in indigenous artwork. Moreover, this case illustrates vividly the indigenous people understanding of art and its meaning.

First section of this chapter will provide the historical and anthropological background of the Australian community involved in the case – Yolngu people. Then their beliefs and ideas will be briefly presented in order to give an idea of indigenous appreciation of art. This chapter will present circumstances under which misuse of certain artistic work took place. One of such violations was brought before court and became known as *"T-shirt case"*[60]. Another violation led to consideration of case *Bulun Bulun & Anor v R & T Textiles Pty Ltd*. This chapter will describe the reasoning of parties and Federal Court of Australia in this case.

2.2 Historical and anthropological background of Yolngu people

The Ganalbingu is a tribe belongs to the Yolngu people linguistic group living in Arnhem Land. The Yolngu is a "patrilineal descent group the members of which acknowledge common ancestry, hold in common rights in land and share a common religious heritage".[61] The Yolngu literally means as "people" or "person". Yolngu culture is one of the ancient existing cultures which appeared more than 40,000 years ago.[62] It is still relatively strongly maintained due to their late regular interventions of Europeans in the way of living of Yolngu people.

First remarkable contact for the Aboriginal of the North-East of Australia with people from other continents was the Macassan contact which admittedly took place in the late 17th or early 18th century. Relationships between Macasans and the Yolngu mostly concerned trade of trepangs and pearls. Macasans imprinted on the Yolngu with particular elements like language, religious beliefs, cuisine, and art. However there are two contrary opinions on the extent of the Macassan

[60]Bulun Bulun v Nejlam PTY LTD (1989)
[61]J Reid, *A time to live, a time to grieve: patterns and processes of mourning among the Yolngu of Australia*, p. 319; Culture, Medicine and Psychiatry, December 1979, Volume 3, Issue 4, pp 319-346; available at http://link.springer.com
[62]http://ncl.net.au/play/about-yolgnu/

influence on local people.[63] Some investigators state that the influence was profound, others claim that changes were "accommodated in such a way that it does not disrupt Yolngu belief systems, or the core relationships between the people and the land".[64]

The first known contact of the Yolngu with Europeans took place on 4th February 1803 when ship "The Investigator" came to Caledon Bay, however, next 130 years visits of Europeans to this part of Australia was not regular until the 1920s when the Methodist mission stations were established.[65] Since this time assimilation process of the aboriginals has begun in this area. According to existing contrary evidences concerned the relationships between missionaries and the indigenous people they varied "from mutual respect to outright antagonism".[66]

During decades numbers of the local people lived for quite long periods of time at the missionaries' settlements. Sometimes these settlements were in hundreds kilometres from the place where the aboriginal used to live; people aspired to maintain natural link with their land through casual visits and performing specific rituals. More extreme way of assimilation was forced removal of the indigenous children from their homes.[67] However, the arrivals were rather tolerant to religious practices of the Yolngu and did not disturb their traditional way of life in aggressive way till the exploring of bauxite reserves on the Gove Peninsula started. The Gove Peninsula is the part of the land which traditionally belongs to the Yolngu. Since that moment the Yolngu people constantly has to struggle for preservation of their traditional style of life and recognition of their rights.

The indigenous land was threatened by construction of the mining town Nhulunbay, the plant and port at Melville Bay in the 1960s and 1970s. These events led to a Bark petition signed by the leaders of the Yolngu clans in 1963 and sent to the Commonwealth Parliament to Canberra. Bark petition expressed a protest of the indigenous people "that the procedures for the excision of this land and the fate of the people on it were never explained to them beforehand, and were kept secret from them" and "that the people of this area fear their needs and interest will be completely ignored as they have been ignored in the past".[68] Later the on-going neglect of the indigenous right to the land entailed the *Milirrpum v Nabalco Pty* Ltd case also known as the Gove case.[69] The final judgement if the Supreme Court of Northern Territory rejected the claim of the Yolngu to communal land ownership as the doctrine of native title could not acknowledged at that moment when doctrine of terra nullius was still widely supported and there were no legal grounds for recognition of the communal right to the land. Fortunately, this judgement was later overruled with the decision presented by High Court of Australia in case

[63]D Russel, *Aboriginal–Makassan interactions in the eighteenth and nineteenth centuries in northern Australia and contemporary sea rights claims*, Australian Aboriginal Studies, 2004/1; University of Wollongong; p. 10; available at http://www.aiatsis.gov.au

[64]P Stephenson, *The Outsiders Within: Telling Australia's Indigenous-Asian Story*, Sydney : University of New South Wales Press, 2007, p.42-42; available at http://books.google.ru

[65]D Haslem, *Ceremony. The Djungguwan of Northern Arnhem Land, Background material, a film Australia national interest program*, p.11-12; available at http://filmaustraliaceremony.com.au/pdf/background.pdf

[66] N Riesem, *Disrupting assimilation: soldiers, missionaries and aboriginal people in Arnhem land during World War II*, Melbourne Historical Journal, 2007, P.247-248; available at http://www.msp.unimelb.edu.au

[67]http://www.creativespirits.info/aboriginalculture/politics/stolen-generations-timeline

[68] Yirrkala bark petition, 1963; available at http://foundingdocs.gov.au/resources/transcripts/cth15_doc_1963.pdf

[69]Milirrpum v Nabalco Pty Ltd, (1971) 17 FLR 141; http://www.mabonativetitle.com/lr_22.shtml

Mabo v Queensland (No 2) in 1992.[70] The Yolngu custody over Arnhem Land was recognised by the Australian government earlier in 1977 with adopting the new Aboriginal Land Rights (Northern Territory) Act.[71] These were all steps of the outstation movement which has developed since early 1970s "as a means of stepping aside from White Australia in order to assert ownership of the land and establish an independent relationship with the wider socio-political entity".[72]

2.3 Beliefs and ideas of Yolngu people and their influence on art

Nowadays the Yolngu people live mainly in the old mission centre Yirrkala and in the outstations or homeland communities located around 200 kilometres around. These settlements are situated at the wetlands named Arafura Swamp that take a large part of this territory which can extend to 130,000 hectares during the wet season.[73] Every year at the end of monsoon season plenty of magpie geese appear in this area. Thus, the Ganalbingu people are also known as Magpie Goose people. Magpie goose is a black and white goose and it is connected with some indigenous beliefs. Water is a chief totem for the Ganalbingu.[74] The geese are sacred; their nests are believed to be a resting place for souls. The Ganalbingu hunt for geese in a limited way, but they collect the eggs and perform the ceremony called "Gurrbumbungu". Gathering the eggs and ceremony are thought to be conditions for the geese lay again. Other ceremony, named "Gurrumba Mapu", is connected with the birth of geese. Women paint themselves with a white colour as the white the geese; such colouring symbolizes breast milk. Two men dance the specific dance with cooked geese eggs and give then to the mothers and their babies to ensure their health.[75] The land, the animals living on this land and well-being of the Yolngu people are thought to be inseparably linked with each other. Therefore specific rituals, songs, dances and paintings refer exclusively to the totemic species like Magpie Goose and natural phenomena connected with the specific clan.

Another important concept in Yolngu worldview is the spiritual continuity of the present with past, living people with their ancestors. Yolngu strongly believe that they have one Ancestor named Barnda who created Djulibinyamurr, the sacred land for Yolngu, established the links between human beings and nature, Yolngu keep honouring Barnda much, as it is being regarded as the source of life force and people themselves and every vital element for people – names, language, law, ceremonies and rituals. The ceremonies are also recognized as a mean to transfer

[70] Mabo v Queensland [1988] HCA 69; (1989) 166 CLR 186 (8 December 1988); http://www.austlii.edu.au/au/cases/cth/HCA/1988/69.html

[71] NJ Riseman, *Defending Whose Country? Yolngu and the Northern Territory. Special Reconnaissance Unit in the Second World War 11*, University of Melbourne, A Journal of Historical Cultural Studies. Limina, Volume 13, 2007; p. 87; available at http://www.limina.arts.uwa.edu.au

[72] D Haslem, *Ceremony. The Djungguwan of Northern Arnhem Land, Background material, a film Australia national interest program*, p.12

[73] http://12canoes.com.au/

[74] http://www.goodstaff.com/gallery/Australian%20Tribal%20Art/Ganalbingu%20Tribe/index.html

[75] http://www.aboriginalartprints.com.au/works_enlargement.php?work_id=725

traditional knowledge to the young people, and "in certain cases, giving them authority, by instructing them in certain dance steps and ritual actions, and by delegating important tasks (to certain individuals), such as painting".[76]

The painting designs and the attitude towards them reflect greatly the Yolngu worldview. Paintings are often incised on wood and depict elements which of them have its original story. Paintings are considered to be sacred as they contain spiritual power of the Ancestral. The bark painting used to be considered as most valuable object from Yolngu point of view. For instance, Yirrkala bark petition was meaningful not only because of content of the written text, but because of message sent by Yolngu people by choosing a bark for it. People were willing to share their values and knowledge with Balanda (not Yolngu people).

Henry Morthy, an anthropologist who has lived with Yolngu people for a long time in order to obtain profound understanding of the indigenous art, analyzed the perception of painting by Yolngu people following way:

> "Yolngu paintings are Ancestral designs or manifestations in three senses. Firstly, the designs are ones that originally appeared on the body of the Ancestral being they represent and were designated by that Ancestral being as part of the sacred law (or property) of the group of human beings who subsequently occupied the land that the design is associated with. Continued ownership of that land is thereafter conditional on maintaining the rituals associated with the land. Secondly, paintings encode meanings that refer to the events in the Ancestral past that resulted in the creation of the landscape, including, of course, events that led to the creation of the design itself. Finally, designs are Ancestral in that they are thought to contain the power of the Ancestral being concerned and provide a source of Ancestral power for use in ritual. The power of the design may be used for specific purposes. For example, when painted on a dead person's coffin lid it may assist his soul on its journey to the lands of the dead. Or it may be used in a more general way to increase the fertility of the land or to strengthen the participants in a ceremony".[77]

2.4 Disputes around *Magpie Geese* and *Water Lilies at the Waterhole*

The artwork Magpie Geese and Water Lilies at the Waterhole depicts the elements of the Yolngu religious worldview. It was created by an aboriginal famous bark painter John Bulun Bulun who belongs to the Ganalbingu, Yolngu people. Mr. Bulun Bulun painted Magpie Geese and Water

[76] D Haslem, *Ceremony. The Djungguwan of Northern Arnhem Land, Background material, a film Australia national interest program*, p.19; available at http://filmaustraliaceremony.com.au/pdf/background.pdf

[77] H Morthy, *From Dull to Brilliant: The Aesthetics of Spiritual Power Among the Yolngu*, Man, New Series, Vol. 24, No. 1 (Mar., 1989), p. 25; available at http://www.jstor.org/stable/2802545

Lilies at the Waterhole in 1980 using the traditional techniques and ancestral motives with the permission granted by senior members of community. The artwork depicts magpie geese and water lilies located around a waterhole. The curved lines and intertwining forms, brown and red ochres, yellow, black and white colors are common features for Yolngu bark paintings.[78] The work was bought by Maningrida Arts and Crafts Centre which resold it then to the Northern Territory Museum of Arts and Sciences. A book by Jennifer Isaacs, "Arts of the Dreaming - Australia's Living Heritage" reproduced the work with the consent of Mr. Bulun Bulun.

Unfortunately other cases of using the work were not so respectful to the rights of creator. First, Magpie Geese and Water Lilies at the Waterhole was copied by a company named Nejlam Pty Ltd which produced t-shirts with image of the work. This case was brought by Mr. Bulun Bulun to the court and refereed to the Copyright Act of 1968 (the "Copyright Act") and the Trade Practices Act of 1974. The case *Bulun Bulun v. Nejlam Investments and Others*[79] known also as *t-shirt case* was the remarkable case concerned copyright of the indigenous artist violated by improper reproduction of his work. The case was not reported widely as it was settled out of court for $150,000. The case regarded mostly to the consideration of protection of the artwork created by the artist as an individual; and it did not refer to communal rights of the indigenous people. However, it was a clear message about the potential protection of indigenous artistic works under the intellectual property law.

Another improper use of the work took place when the company R & T Textiles applied the art work by Mr. Bulun Bulun to the design of fabric. This violation had led to the case *John Bulun Bulun & Anor v R & T Textiles Pty Ltd (1998)* considered by Federal Court of Australia.[80] Mr. Bulun Bulun claimed that the company violated the copyright in his painting.

Mr. Bulun Bulun found out about the existence of the fabric representing his painting due to Mr. Martin Hardie who accidently noticed this fabric in Darwin. Mr. Hardie bought piece of the fabric in order to show it to Mr. Bulun Bulun. In case study prepared for WIPO Terri Janke mentioned that the fabric was "used by the Northern Territory's Chief Minister's Department as uniforms for the Department's protocol staff to wear on special occasions".[81] The fabric was produced in Indonesia, and then imported in Australia where it was overall distributed.

2.4.1.'course of case and reasoning of parties'

The Company admitted the fact of infringement of copyright referring to their unawareness of copyright owned by Mr. Bulun Bulun. The fabric was withdrawn from sales, the declaration of occurred infringement was stated by the Company, and the injunctions against future infringement were issued.

[78]http://www.colingolvan.com.au/law-articles-and-essays/131-meeting-at-the-waterhole
[79]http://www.folklife.si.edu/resources/unesco/puri.htm#_edn4
[80] H Martin, *The Bulun Bulun Case: John Bulun Bulun & Anor v R & T Textiles Pty Ltd (1998)* 4(16) Indigenous Law Bulletin 24
[81]T Janke, *Minding Culture: Case-Studies on Intellectual Property and Traditional Cultural Expressions*,prepared for the World Intellectual Property Organization (WIPO); Case Study 3 Bulun Bulun & Anor v R & T Textiles Pty Ltd; p.2; available at http://www.wipo.int/tk/en//studies/cultural/minding-culture/studies

Since these acknowledgements the Company was excluded from the proceedings which continued due to claims of Mr. Milpurrurru who strived for rights of the indigenous community. The initial claims were amended and now included the allegation that "the Ganalbingu people are the traditional Aboriginal owners of Ganalbingu country who have the right to permit and control the production and reproduction of the artistic work under the law and custom of the Ganalbingu people".[82] The amended claim also pleaded that "that the Ganalbingu people are the traditional Aboriginal owners of the corpus of ritual knowledge from which the artistic work is derived, including the subject matter of the artistic work and the artistic work itself".[83] Thus, Mr. Milpurrurru, the representative of the Ganalbingu people, claimed that the indigenous owners should be recognized as the equitable owners of the copyright in the artistic work.

Therefore, the case *John Bulun Bulun & Anor v R & T Textiles Pty Ltd* switched to a consideration of the issues of the indigenous knowledge reflected in the particular artwork. The Court faced to a matter whether the existing Australian law could provide recognition and protection to the communal right to indigenous knowledge. The Minister of Aboriginal and Torres Strait Islander Affairs and the Attorney General of the Northern Territory was involved and made submissions on legal issues relating to the Native Title Act of 1993 and the Aboriginal Land Rights Act of 1978.

Mr. Bulun Bulun in his affidavit evidence described how his painting Magpie Geese and Water Lilies at the Waterhole is connected with the traditional knowledge of his community. He pointed out that the creation of artworks is a part of his duty he had as a traditional aboriginal owner of Djulibinyamurr. Djulibinyamurr is believed to be the place where his lineage of the Ganalbingu people was created. Mr. Bulun Bulun says: "It is the equivalent of my "warro" or soul" and "the hole or well from which I derive my life and power".[84] Barnda, the ancestral of Ganalbingu people, created Djulibinyamurr, gave the people language, law, country and the ceremonies and paintings associated with the country. Thus, "designs and paintings originate from the creative acts of Barnda", so the paintings are regarded to be a manifestation of the ancestral past and accomplishment of the responsibility "given to them by Barnda to do the paintings which were granted to them".[85]

Magpie Geese and Water Lilies at the Waterhole is full of inside meaning and it is required to produce such artworks in accordance with the rituals, ceremonies and laws of the Ganalbingu people:

> "To produce "at the Waterhole" without strict observance of the law governing its production diminishes its importance and interferes adversely with the relationship and trust established between myself, my ancestors and Barnda. … The continuance of that relationship depends upon the continuance and observance of our customs and law, it keeps the people and land healthy and strong. This work has within it much that

[82]Australian Law Reports, John Bulun Bulun & Anor v R & T Textiles Pty Ltd (von Doussa J.), 157 ALR 193; p. 248-249; available at http://www.utexas.edu/law/journals/tlr/sources/Issue%2090.1/Walker/Walker.fn075.Bulun%20v%20R%20and%20T%20Textiles.pdf
[83]Ibid
[84]Ibid. p.249-250
[85]ibid

> it is sacred and important to our people about heritage and right to claim Djulibinyamurr as our land. It is like the title of our people to his land.
>
> Unauthorised reproduction of "at the Waterhole" threatens the whole system and ways that underpin the stability and continuance of Yolngu society".[86]

2.4.2. 'reasoning of the Court'

The crucial question in the deliberation over this case was the fiduciary relationship between Mr. Bulun Bulun and the Ganalbingu people. The Court recognized that such relationship appeared because of the permission to use the Ganalbingu knowledge to create the painting. The Court stated that Mr. Bulun Bulun as a fiduciary was required to comply with the customary law of the community and undertake appropriate actions if any infringement of copyright took place:

> "The law and customs of the Ganalbingu people require that the use of the ritual knowledge and the artistic work be in accordance with the requirements of law and custom, and that the author of the artistic work do whatever is necessary to prevent any misuse. 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".[87]

The Court established that the author had taken necessary actions through bringing the case to the Court. The Court dismissed the claims brought by Mr. Milpurrurru due to the existence of fiduciary obligations owed by Mr. Bulun Bulun to the Ganalbingu people and fulfillment of these obligations. However, the Court mentioned that "in other circumstances if the copyright owner of 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 remedial action through the courts by the clan".[88] As for an equitable ownership in copyright artwork the Court stated that the existing laws namely the Copyright Act 1968 "precludes any notion of communal or group ownership in an artistic work unless that work is a "work of joint authorship"[89], which implies the result of collaboration of two or more authors. The Court also referred to earlier cases which acknowledged the inadequacies of statutory clauses as a means of protecting communal ownership.

Though the Court did not provide any direct protection to indigenous knowledge but this case is significant as the Court acknowledged the fiduciary relationship referring to Ganalbingu customary law and regarding to communal interests. The case attracted attention to the issues of the indigenous culture and its recognition and protection. The question is being currently discussed whether the indigenous knowledge could be protected within intellectual property rights system if it was amended, or the protection of the indigenous knowledge is per se

[86]Ibid. p.251
[87]Australian Law Reports, John Bulun Bulun & Anor v R & T Textiles Pty Ltd (von Doussa J.), 157 ALR 193; p. 262
[88]Ibid, p. 264
[89]Ibid, p.244-245

incompatible with the Western concept of copyright, patents and other intellectual property schemes. Moreover, the case revealed the possible interrelation between legal issues such as native title to land and right to protection of indigenous knowledge. The judgment in the case *Mabo v Queensland* which recognised native title to land also led to broad discussions whether intellectual property rights should be considered as an incident of native title as the bond between land and indigenous knowledge is used to be so tight.[90]

2.5 Conclusion

The case *John Bulun Bulun & Anor v R & T Textiles Pty Ltd* switched from classical copyright dispute to the consideration of the indigenous communal rights. This case has become very famous in the field of indigenous traditional knowledge since the Court implied in its reasoning that communal right in artwork should be recognized. Moreover, it assumed that Australian legal system would permit for indigenous clan to bring an action to protect the artwork under other circumstances.

On the whole, this case provides us with the following main observations. First, the recognition of communal ownership in indigenous artwork is supposed to be an adequate means of protection for indigenous interests. Second, the Court concluded that communal ownership in artwork cannot be recognized under existing copyright law. The Court did not describe the reasons for it at great length, so the next chapter will analyze the incompatible issues within copyright law and protection of indigenous art.

[90]E Arcioni, *Defining native title - Indigenous cultural knowledge and the Native Title Act*, Southern Cross University Law Review, 7, 2003, 50-88; p. 7-8, available at http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1017&context=lawpapers;DMellor, T Janke, *Valuing art, respecting culture, Protocols for working with the Australian indigenous visual arts and craft sector,* available at http://raphub.reconciliation.org.au/wp-content/uploads/2013/03/Respect-Valuing-art-respecting-culture-National-Association-of-the-Visual-Arts1.pdf

CHAPTER 3 Analysis and Conclusions

3.1 Introduction

The first two chapters presented the concepts of copyright law and indigenous art. This chapter will compare these concepts in order to find out the contradictory clauses between them. It will examine then what the limitations and opportunities of copyright law are in protection of indigenous art. Copyright law has established the requirements which an artwork should meet in order to obtain copyright protection. Additionally, it offers specific conditions under which copyright protection is realized.

Such limitations can be analyzed from two general points of view. First, it should be examined whether the peculiarities of indigenous artwork meet the requirements established by copyright law. Secondly, it is important to find out whether the concept of copyright law meets the expectations and needs of indigenous people. The following section will compare the clauses of copyright protection and the peculiarities of indigenous art.

3.2 The contradictions between copyright concept and indigenous interest in artwork

The copyright law is supposed to strive for a balance between the individual interests and the communal concerns. The western classical mindset proceeds from the contraposition of individual and communal profits. The analysis of indigenous people worldview shows that there is no strict division between individual and communal interests from their point of view. This crucial difference may explain the tension between copyright law provisions and indigenous opinion how indigenous art should be protected.

3.2.1. 'beneficiaries of copyright protection'

Copyright law points out that an author is an initial beneficiary of copyright law defining it as "the individual who by creative contribution produces a work".[91] The broader definition refers to

[91] JAL Sterling (ed)б *World copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts and published editions in national, international ad regional law: with a glossary of legal ad technical terms, and a reference list of copyright and related rights laws throughout the world* (3rd edn London Sweet&Maxwell 2008) 1209

"the person (who may be an individual or a legal person such as a corporate body) who is defined by the particular national law as the "author" of particular production".[92]

Indigenous artwork is a result not only of creative contribution of artist, but the contribution of its whole community. The previous chapter described the case *John Bulun Bulun & Anor v R & T Textiles Pty Ltd* and presented the idea that indigenous artwork is an attainment of whole society and not just individual artist. Mr. Bulun Bulun strongly believes that his particular work Magpie Geese and Water Lilies at the Waterhole was originated from "creative acts of Barnda"[93] who is an Ancestor of Ganalbingu people. Moreover, the artist is convinced that the creation of artworks is a part of his duty as an aboriginal belonging to Ganalbingu people. Though the individual creator of indigenous artwork is known he cannot be considered as the only one beneficiary of artwork protection. The idea of the individual interests in artwork is an alien idea for indigenous people since indigenous art contains messages equally important for whole indigenous community and its every member.

The broader concept of authorship may seem to be more suitable in the case of indigenous people if they are to consider as a legal entity under international law and national legislation. However, it is still not clear whether indigenous community may be recognized as a legal entity now. The formation of indigenous people as legal entity is currently evolving process.[94] Thus, the broader approach to the authorship cannot be applied to indigenous people.

The concept of joint authorship is also inappropriate one for the indigenous art protection as it assumes direct collaboration in creation of artwork which is not the case with indigenous art.

3.2.2. 'duration of copyright protection and indigenous art'

Time restriction of copyright protection is a common copyright provision. The minimum term of protection established by the Article 7 of the Berne Convention is fifty years after the death of author. The duration of copyright protection expresses the compromise between individual concerns of author and public interests in access to artwork and use of it. There is no need for such compromise from the indigenous people point of view. However, there is a strong need for protection of indigenous art from any of its misuse without any expiration date.

Indigenous art is a part of indigenous traditional knowledge which transfers the messages of high importance from one generation to another and provides a sense of identity to the indigenous community. Indigenous people are not interested in expiration of protection of artwork, as they do not need to have it in public domain as it is already a part of indigenous cultural heritage. Thus, it is important to secure indigenous art from any improper use for unrestricted period of time.

[92] Ibid
[93] ibid
[94] A Meijknecht, *Towards International Personality: The position of Minorities and Indigenous Peoples in International Law,* (Antwerpen, 2001, Intersentia Hart)

3.2.3 'economic and moral rights' division'

The economic and moral rights are distinguished by the Berne Convention. As it was described in the first chapter economic rights are alienable; and on contrary the moral one are not alienable. The modern copyright system mainly focuses on the regulation of economic rights and their transferring.

Two principles are acknowledged to underline the indigenous approach towards the economic benefit from their products and ideas. First, the right to order the artwork should rest with the owners and creators. Second, any economic benefits which "arise from such activity should return in fair proportion to the owners and creators".[95]

The idea of economic right implies that it can belong not solely to creator but to any other proprietor. It contradicts the expectations of indigenous people to keep the right to order the artwork and receive economic benefits from any of action regarding to the indigenous art.

The expectations of indigenous people imply that the permission of indigenous artists should be necessary every time any other party is going to use the artwork. The concept of free, informed and prior consent is widely applied to the indigenous right to land. It seems to be sensible to adapt this concept to seeking for the permission of indigenous community when it concerns the use of their art. This concept will be discussed in the next section.

Therefore, the economic and moral rights' division is not an appropriate concept for protection of indigenous art. Moreover, there are no tools within copyright law which can provide adequate conditions to elaborate the concept of consent.

3.2.4. 'prerequisites for copyright protection'

There are no formalities required directly by international copyright law. The issue of formal prerequisites is quite contradictory one. On the one hand, the existence of any formalities could become an additional obstacle in the obtaining protection. On the other, the lack of any formal requirements would make more difficult to have enough evidence if any dispute concerns artwork is brought to the court. As for indigenous art it is also difficult to define unambiguously what is the best option for its protection. There are examples of voluntary systems of registration established for some types of indigenous knowledge. For instance, Traditional Knowledge Digital Library[96] has been created in 2001 in India in order to collect the particular elements of traditional knowledge. It mostly concerns the knowledge about medicinal plants and their application. The Traditional Knowledge Digital Library (TKDL) has already proved its efficiency; the biopiracy claims have been satisfied because of data contained in the TKDL.[97]

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[95] *Protecting Australian Indigenous Art: ownership, copyright and marketing issues for NSW schools*; Published on the internet in 2006 by the Board of Studies NSW, GPO Box 5300, Sydney 2001, Australia; available at http://ab-ed.boardofstudies.nsw.edu.au/files/protecting-australian-indigenous-art.pdf

[96] http://www.tkdl.res.in/tkdl/langdefault/common/

[97] MA Hirwade, *Protecting Traditional Knowledge Digitally: A Case Study of TKDL*; RTM Nagpur University, Nagpur

Such initiatives might be helpful in obtaining protection of indigenous knowledge. However, it requires a long period of time, and as for indigenous art it is difficult to imagine that it is possible to describe and systematize all indigenous artworks or even their types. Art is the constantly evolving and constantly changing phenomena, so some formal registration of new creations may be supplementary, but it cannot be the ultimate solution to the problem of indigenous art protection.

The requirement for fixation established by national legislations is not applicable to the indigenous artworks apart from visual ones. Most of other species of indigenous art has an oral character as its inherent feature. Performance of stories, dances, songs or comprehensive artistic rituals are not fixed on any material form. It makes indigenous artworks more vulnerable to their misuse, as the "person who records or writes down information, including important cultural material, will be considered to have put it into material form and is therefore recognised as the author and copyright owner".[98] The issue of fixation should be specified when the indigenous art is to be protected. Namely, it should be mentioned that fixation of indigenous artwork by any means without a consent initially given by the indigenous community cannot create alone any rights for such person. However, such provision would contradict to the following copyright principle. Copyright law protects rather expression of idea than idea itself. So, it cannot protect the unrecorded performances of indigenous art.

Another crucial contradiction between copyright law and indigenous art is the issue of originality. It is a widely acknowledged inherent feature of copyright works. As it was described in the first chapter originality can be interpreted within two approaches. The broader approach implies the assessment of creativity and novelty of artwork, another one requires only the lack of simple copying of other artworks. Neither of mentioned approaches might be commonly applied to indigenous artwork.

Indigenous art is rich of traditional symbols, and it often contains plenty of messages about history, beliefs and customs of indigenous community. Thus, both the idea and its expression in indigenous artwork may repeat previous artworks; and it does not lessen its aesthetic merit or importance from indigenous people point of view. So, indigenous art commonly cannot be assessed within the originality approach.

3.3 The necessity for the recognition of indigenous communal ownership in artwork

[98] T Janke and R Quiggin, *Indigenous cultural and intellectual property and customary law,* Aboriginal Customary Laws – Background Paper 12, 458-459

The previous section has showed that there is a tension between specific copyright law provisions and the peculiarities of indigenous art. This section will analyze some of potential provisions of a system which could provide recognition of communal ownership in artwork.

The copyright law has been created first of all for the protection of the author's interests and rights. However, since the field of art has been commercialized much and the artworks have been considered now rather goods than a part of cultural heritage, copyright law has shifted its focus from author's rights to the rights of any other proprietors and their transfer. Even if it is not so obvious from analysis of provisions of copyright legal documents, it is acknowledged that "the ship of copyright policy is anchored more than ever in utilitarian waters".[99] Under such circumstances copyright law currently is not always an efficient protection tool even for Western authors and other creators.

It would be an exaggeration to state that indigenous people have no material interests in their creation. However, they first of all concern about the damages caused by the improper use of their artworks to the cultural integrity of the work and their broader belief system and, further, constitutes a breach of their Aboriginal law for which they may be held responsible".[100]

Misuse of indigenous art affects not only the individual interests of the creator, but the major interests of the whole community. That's why it is necessary to establish such a system which could provide the right to the community to protect its interests in indigenous artworks. Thus, the recognition of communal rights in the indigenous artwork is currently considering to be a proper alternative for protection of indigenous art. This concept would allow the representatives of indigenous people to bring the case before the court or fulfill other actions in order to protect communal right in artwork if it was violated by any improper use.

The requirement of free, prior and informed consent could be better elaborated within the concept of communal ownership of indigenous artwork. This requirement has been established with reference to recognition the indigenous right to land. UN Declaration on the Rights of Indigenous Peoples and ILO Convention point out that free, prior and informed consent should be obtained under specific circumstances. Although this requirement is widely acknowledged by courts and researchers it is not still clear how it should be implemented. However, it seems quite useful to apply this requirement to indigenous art. Specific type of an agreement could be developed to fulfill this requirement. Such an agreement may include permission of the indigenous community to use a particular artwork and approve the certain actions with it. Any actions undertaken without such agreement would be considered undertaken without free, prior and informed consent and, thus, recognized to constitute a violation of communal right in indigenous artwork.

The existing agreements in copyright law could be adapted to the needs of indigenous communities and then offered as practical tools for the regulation of the access to indigenous artistic work and use of it. For instance, license agreements in copyright law grant a permission

[99] DJ Gervais, *Intellectual Property and Human Rights: Learning to live together*. (E. Elgar, 2008)
[100] A Van den Bosch and R Rentschler, A*uthorship, Authenticity, and Intellectual Property in Aboriginal Art, (The Journal of Arts Management, Law, and Society, 2010)*

to use a certain artwork under specified circumstances. To some extent copyright law practices could be applied to developing the concept of indigenous communal ownership in artistic work.

The reasons of inapplicability of copyright law to indigenous art have been already explained. The case *John Bulun Bulun & Anor v R & T Textiles Pty Ltd (1998)* was the closest one to recognition of communal ownership in artwork. The Court recognized the existence of fiduciary relationship between the artist and his community. Such fiduciary relationship implies that the indigenous people have the interests in indigenous artwork. The Court pointed out that recognition of communal ownership in an artistic work is impossible under the existing copyright law as it allows the communal ownership only in the case of joint authorship. In spite of the fact that the Court dismissed the claims for the equitable communal ownership this case has become the stride for indigenous people in the striving for acknowledgement of their communal rights in indigenous artwork.

Therefore, there is a conflict between copyright system and indigenous art. On the one hand, there is a number of contradictions between requirements of copyright law and specific features of indigenous artworks. On the other, existing copyright law cannot provide the adequate tools for indigenous art protection, as it calls for recognition of communal ownership in artistic work.

Moreover, copyright laws are "based on individual rights and emphasize economic over cultural rights".[101] Copyright system focuses on a single, identifiable creator or another proprietor, whereas indigenous people seek for recognition of their communal right in the artistic artwork. The next section will represent human rights approach to intellectual property regime and its possible application to protection of indigenous art. It will be analyzed whether this approach might be applied to the development of communal ownership in artistic works.

3.4. A human rights approach to intellectual property system and its application to the protection of indigenous art

A human rights approach to intellectual property implies the application of human rights tools to protection of intellectual property rights. Moreover, given the commercialization intellectual property regime human rights approach is supposed to "bring values back" to the system". [102]

The protection within human rights approach is supposed to be provided on the basis of common protection given to cultural rights the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (the ICCPR), the International Covenant on Economic, Social and Cultural Rights (the ICESCR). Since the issue of indigenous communal rights is under the examination Declaration on the Rights of Indigenous People is to be included in this list.

[101] Aboriginal and Torres Strait Islander Peoples' Intellectual Property Rights 92
[102] DJ Gervais, Intellectual Property and Human Rights: Learning to live together. (E. Elgar, 2008)

The Article 27 of the Universal Declaration of Human Rights has established the right "freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits" and "the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". Several articles of Declaration on the Rights of Indigenous People fix the provisions on cultural rights of indigenous people in more detailed way.

Though these provisions are not legally binding for states, they can play a role of framework for developing the regime for protection of indigenous knowledge and communal rights in artistic work as its element. However, it is important to refer to international treaties.

As for international treaties the ICESCR is acknowledged to be a major international treaty concerning cultural rights. The Article 15 of the ICESCR endorses the right of everyone to take part in cultural life established by the Universal Declaration. Other clauses of this article set the right to enjoy the benefits of scientific progress and its applications and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Given these provisions it is argued that a human rights approach differs from the principles of intellectual property law. In particular, human rights approach requires that "the type and level of protection afforded under any intellectual property regime directly facilitate and promote scientific progress and its applications and do so in a manner that will broadly benefit members of society on an individual, as well as collective level".[103] However, the provision of the Article 15 (1, b) sets the right to benefit of scientific progress which is the only one field of cultural life. Additionally, next clause regarding to literary or artistic production refers to the "author". As it was already explained this notion is not consistent with communal interests. The protection established by these provisions is limited. Therefore, provisions of the ICESCR cannot be very helpful in elaborating communal ownership in artistic works.

The Article 27 of the ICCPR has set the right of ethnic, religious or linguistic minorities to enjoy their own culture. This provision is based on a broader concept of culture including "language, religion, cultural heritage and other characteristics" [104] of said communities. The Article 27 of the ICCPR has not been recognized to establish collective rights, but only an individual right with collective dimension. The words "in community with others" indicate the collective dimension of the said right.[105]

Another debate around this article directly concerns the issue of indigenous people. This debate affects a crucial question whether indigenous people should be considered as minorities or not. There are no formal contradictories in law to apply the Article 27 to indigenous people and to use it as a precondition for developing norms regarding to indigenous communal rights in artistic work. However, it is quite clear that the said issues do not solely belong to the legal field, but depend on the political concerns as well.

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[103] AR Chapman, *A human rights perspective on intellectual property, scientific progress, and access to the benefits of science*, (American Association for the Advancement of Science, Washington, D.C.)
[104] YM Donders, *Towards a Right to Cultural Identity?*, (Intersentia, 2002) 332
[105] Ibid

Some researchers do not separate human rights approach and copyright regime when it concerns the indigenous art.[106] Whereas some of researchers[107] are searching for the link between intellectual property rights and human rights, Professor Rosemary Coombe is reasoning the following way:

> "What would it mean to recognize intellectual property rights as international human rights? This is a speculative question because although there is a case to be made that intellectual property rights (IPRs) are already human rights, they are rarely approached in this fashion, either by governments or by the holders of such rights."[108]

Thus, there is no contradiction to apply both provisions of human rights law and intellectual property regulations in order to investigate possible solutions for tackling the problem of indigenous communal ownership in artistic work. However, the problem is that "intellectual property lawyers tend to have a little involvement with human rights law"[109] whereas there are few human rights lawyers who are familiar with intellectual property system.

The human rights framework has already developed to some extent the regulation of indigenous rights and it has acknowledged the existence of collective rights as the third generation of human rights. Thus, presumably, the recognition of indigenous communal rights in artistic works is rather possible within human rights law.

Another possible way for the recognition of communal ownership in artistic work is the interrelation between native title to land and right to protection of indigenous knowledge. The judgment in the case *Mabo v Queensland* which recognised native title to land caused the debates whether rights to indigenous knowledge and its protection should be considered as an incident of native title to land as the bond between land and indigenous knowledge is used to be so tight.[110]

Therefore, there is not the only one option to recognize indigenous communal ownership in artworks within human rights approach. Copyright law can be still helpful in developing the concept of communal ownership in artistic work since the issue of indigenous art is a point of intersection between different systems. Namely, the agreement which could be used for obtaining consent of indigenous community might be elaborated on the basis of agreements

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[106] DJ Gervais, *Intellectual Property and Human Rights: Learning to live together*. (E. Elgar, 2008); Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1283985; R J. Coombe, Intellectual Property, Human Rights, and Sovereignty. New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity, Indiana Journal of Global Legal Studies 6 (1): 59-115; Available at http://www.jstor.org

[107] LR Helfer, *Human Rights and Intellectual Property: Conflict or Coexistance* (Minnesot Intellectual Proerty Review, Vol. 5:1), 47-61; P Cullet, *Human Rights and Intellectual Property Rights* (IELRC Working Paper 2004- 4)

[108] R J. Coombe, *Intellectual Property, Human Rights, and Sovereignty. New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, Indiana Journal of Global Legal Studies 6 (1): 59-115

[109] AR Chapman, *A human rights perspective on intellectual property, scientific progress, and access to the benefits of science*, (American Association for the Advancement of Science, Washington, D.C.)

[110] E Arcioni, *Defining native title - Indigenous cultural knowledge and the Native Title Act*, Southern Cross University Law Review, 7, 2003, 50-88; p. 7-8, available at http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1017&context=lawpapers; D Mellor, T Janke, *Valuing art, respecting culture, Protocols for working with the Australian indigenous visual arts and craft sector,* available at http://raphub.reconciliation.org.au/wp-content/uploads/2013/03/Respect-Valuing-art-respecting-culture-National-Association-of-the-Visual-Arts1.pdf

existing in copyright law. The most important rule is to strive for better understanding of needs and expectations of indigenous people and apply various tools in order to create a viable and supporting system for the protection of indigenous interests. As Permanent Forum on Indigenous Issues came up to following conclusion:

> "It is time to recognize that indigenous traditional knowledge is not simply an intellectual property issue. Likewise, it is not simply a human rights issue, a trade issue nor an amalgamation of these issues. The proper protection of indigenous traditional knowledge is an indigenous issue and indigenous peoples should be central to this process."[111]

[111] Report on Indigenous Traditional Knowledge, prepared by M. Dodson, Permanent Forum on Indigenous Issues, UN Economic and Social Council, 21 March 2007

Conclusion

Indigenous traditional knowledge and indigenous art are original phenomena which are often not easy to describe from the Western point of view. Indigenous people understand art in a different way. Such communities apprehend their art as a source of knowledge about nature, history, beliefs and ideas transferred from one generation to another. They consider art to be a necessary condition to preserve their indigenous self-identity and to maintain the existence of the indigenous community itself.

Attitude of the Western society towards indigenous art has been changing throughout centuries. Indigenous art has been recognized as a means of artistic expression since the view on the indigenous peoples has changed and their concerns became more valued. However, there is a still lack of protection of indigenous rights in artistic works.

Indigenous rights in artistic works have been considered within number of cases including one of the most famous - case *John Bulun Bulun & Anor v R & T Textiles Pty Ltd*. This case has become very famous because the Court pointed out that communal right in artwork should be recognized. This case provided us with following major conclusions. First, the recognition of communal ownership in indigenous artwork is expected to be an adequate mean of protection for indigenous interests. Second, the Court stated that communal ownership in artistic work cannot be recognized under existing copyright law.

To develop these statements relevant literature, reports and cases were examined in order to argue that the protection of indigenous art is not compatible with most of the basic provisions of copyright law. On one hand, specific features of indigenous artistic works do not meet the requirements of copyright law. On the other hand, existing copyright law cannot offer tools for protection which would be adequate to the needs the expectations of indigenous people.

In particular, following contradictions between copyright law and indigenous art make the copyright law is an ineffective tool for the protection of indigenous artistic works.

Indigenous artistic work does not meet the key requirements of copyright law such as fixation and originality. The notion of authorship established by copyright law is not suitable for indigenous people. Furthermore, copyright law focuses on the economic value of art whereas indigenous art concerns mostly about preservation of culture. Copyright law regulates how copyrights are transferred since it makes a distinction between moral and economic rights with emphasis on the economic ones. Indigenous mindset precludes itself from such distinction since indigenous people used to believe that the right to order the artwork should stay with its owners. Another crucial contradiction is the difference between individual and collective approaches. Copyright law refers to individual property rights whereas indigenous people are striving for recognition of equitable communal rights in artistic works.

Such contradictions are the ultimate reasons why the existing copyright law is not capable to offer adequate protection for indigenous artwork. Indigenous people call for recognition of an equitable communal ownership in artistic work. This need cannot be realized within the copyright law, but there is an opportunity within the human rights law. Since the indigenous art is a complex issue, it requires development of a special legal regime for its protection, where an

implementation of practices from intellectual property law can take place if they can provide an adequate protection. It is important to keep in mind that there are existing needs of particular people, and law is to seek for tools to protect their interests.

Development of the abovementioned regime requires a profound and thorough further research. First of all, it is necessary to elaborate a proper notion to describe the subject matter which is to be protected. Then, all available alternatives for protection should be examined. Apart from options described in this thesis there are other possible concepts. There is an opinion that a sui generis system should be used for protection of traditional knowledge and indigenous art.[112] Another option is an implementation of indigenous customary law.

In order to elaborate the proper system of protection there is a need for specialists who would be aware of intellectual property rights and human rights law. Such system should be developed with the active participation of number of indigenous communities. For this purpose mutual training of lawyers, decision-makers and indigenous people is required. Lawyers and decision-makers need to learn as much as possible about the mindset of indigenous people, their needs and expectations, whereas indigenous representatives have to investigate what opportunities might be applied for the protection of indigenous rights in artistic works.

Practices from copyright law should be applied as supplements to the said regime. Limited number of the copyright provisions might be useful in developing future regime, but they would not be considered as the main and ultimate source for the protection of indigenous artwork. Taking in account the abovementioned contradictions the practices from copyright law should be examined in the most careful way before it is adapted to the protection of indigenous artwork.

[112] Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge. Available at http://www.wipo.int/export/sites/www/tk/en/tk/ffm/report/final/pdf/part1.pdf

Bibliography

Legislation and documents of international organizations

An Act for the general revision of the Copyright Law, title 17 of the United States Code, January 1 1978; available at http://www.copyright.gov/title17/92chap1.html#102; Art. 102 (a)

Australian Copyright Act No. 63of 1968; http://www.comlaw.gov.au/Details/C2010C00476; Section 31-32

Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886

ILO Convention № 169
available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100897.pdf

Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge. Available at http://www.wipo.int/export/sites/www/tk/en/tk/ffm/report/final/pdf/part1.pdf

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Eight Session, Geneva, June, 2005: Press Releases. International Conference on the Utilization of the Traditional Knowledge Digital Library as a Model for Protection of Traditional Knowledge. 2011;

Law on Copyright and Neighboring Rights; 9 September 1965
available at http://www.wipo.int/wipolex/en/text.jsp?file_id=126255

Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples 1993
available at
http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/mataatua.pdf

Protocols for producing Indigenous Australian visual arts (2nd edn Australia Council for the Arts 2007); available at www.australiacouncil.gov.au

Report on Indigenous Traditional Knowledge, prepared by M. Dodson, Permanent Forum on Indigenous Issues, UN Economic and Social Council, 21 March 2007
available at http://www.un.org/esa/socdev/unpfii/documents/6_session_dodson.pdf

T Janke, *Minding Culture: Case-Studies on Intellectual Property and Traditional Cultural Expressions*,prepared for the World Intellectual Property Organization (WIPO); Case Study 3 Bulun Bulun & Anor v R & T Textiles Pty Ltd
available at http://www.wipo.int/tk/en//studies/cultural/minding-culture/studies

The Agreement on Trade Related Aspects of Intellectual Property Rights, 1 January 1996,

The Convention on Biological Diversity 1992;
available at http://www.cbd.int/convention/text/

The Rio Declaration on Environment and Development; Rio de Janeiro, 3-14 June 1992;
available at http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm

UK Copyright, Designs and Patent Acts, 16 November 1988; available at http://www.legislation.gov.uk/ukpga/1988/48/section/1

Universal Copyright Convention

Universal Declaration of Human Rights, 10 December 1948

WIPO Copyright Treaty, adopted by the Diplomatic Conference on December 20, 1996

WIPO Traditional Knowledge Documentation ToolKit, Consultation Draft, November 1, 2012

Yirrkala bark petition, 1963; available at
http://foundingdocs.gov.au/resources/transcripts/cth15_doc_1963.pdf

Cases

Baigent & Anor v The Random House Group Ltd (The Da Vinci Code) [2006] EWHC 719 (Ch) (07 April 2006);
available at http://www.bailii.org/ew/cases/EWHC/Ch/2006/719.html

Burrow-Ciles Lithographic Co. v. Sarony; 111 U.S. 53, (March 17, 1884); available at
http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=111&page=53

Designer Guild Limited v. Russell Williams (Textiles) Limited (Trading As Washington Dc) [2000] UKHL 58;
available at http://media.labeled.labelmedia.co.uk

Hyperion Records Ltd v Sawkins [2005] EWCA Civ 565 (19 May 2005);
available at http://www.bailii.org/ew/cases/EWCA/Civ/2005/565.html

John Bulun Bulun & Anor v R & T Textiles Pty Ltd (von Doussa J.), Australian Law Reports, 157 ALR 193; p. 248-249;
available at
http://www.utexas.edu/law/journals/tlr/sources/Issue%2090.1/Walker/Walker.fn075.Bulun%20v%20R%20and%20T%20Textiles.pdf

Mabo v Queensland [1988] HCA 69; (1989) 166 CLR 186 (8 December 1988);
available at http://www.austlii.edu.au/au/cases/cth/HCA/1988/69.html

Milirrpum v Nabalco Pty Ltd, (1971) 17 FLR 141;
available at http://www.mabonativetitle.com/lr_22.shtml

Secondary materials: monographs and articles

A Mejknecht, *Towards International Personality: The position of Minorities and Indigenous Peoples in International Law,* (Antwerpen, 2001, Intersentia Hart)

A Van den Bosch and R Rentschler, A*uthorship, Authenticity, and Intellectual Property in Aboriginal Art, (The Journal of Arts Management, Law, and Society, 2010)*

AR Chapman, *A human rights perspective on intellectual property, scientific progress, and access to the benefits of science,* (American Association for the Advancement of Science, Washington, D.C.)

C Joyce and others, *Copyright Law* (7th edn, Newark, NJ LexisNexis 2006)

C Saez, *Divergences Clarified On Protection Of Traditional Knowledge At WIPO,* Intellectual Property Watch, 18 April 2012; available athttp://www.ip-watch.org/2012/04/18/divergences-clarified-on-protection-of-traditional-knowledge-at-wipo/

D Haslem, *Ceremony. The Djungguwan of Northern Arnhem Land, Background material, a film Australia national interest program*; available at
http://filmaustraliaceremony.com.au/pdf/background.pdf

D Mellor and T Janke, *Valuing art, respecting culture, Protocols for working with the Australian indigenous visual arts and craft sector,* available at http://raphub.reconciliation.org.au/wp-content/uploads/2013/03/Respect-Valuing-art-respecting-culture-National-Association-of-the-Visual-Arts1.pdf

D Mellor, T Janke, *Valuing art, respecting culture, Protocols for working with the Australian indigenous visual arts and craft sector,* available at http://raphub.reconciliation.org.au/wp-content/uploads/2013/03/Respect-Valuing-art-respecting-culture-National-Association-of-the-Visual-Arts1.pdf

D Russel, *Aboriginal–Makassan interactions in the eighteenth and nineteenth centuries in northern Australia and contemporary sea rights claims*, Australian Aboriginal Studies, 2004/1; University of Wollongong; p. 10; available at http://www.aiatsis.gov.au

DJ Gervais, *Intellectual Property and Human Rights: Learning to live together*. (E. Elgar, 2008)

E Arcioni, *Defining native title - Indigenous cultural knowledge and the Native Title Act*, Southern Cross University Law Review, 7, 2003, 50-88; p. 7-8, available at http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1017&context=lawpapers;

E Arcioni, *Defining native title - Indigenous cultural knowledge and the Native Title Act*, Southern Cross University Law Review, 7, 2003, 50-88; p. 7-8, available at http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1017&context=lawpapers;

EW Ploman and LC Hamilton, *Copyright Intellectual property in the information age* (London: Routledge and Kegan Paul, 1980),

H Martin, *The Bulun Bulun Case: John Bulun Bulun & Anor v R & T Textiles Pty Ltd (1998)* 4(16) Indigenous Law Bulletin 24

H Morthy, *From Dull to Brilliant: The Aesthetics of Spiritual Power Among the Yolngu;* Man, New Series, Vol. 24, No. 1 (Mar., 1989), p. 25; available at http://www.jstor.org/stable/2802545

HB Abrams, *Originality and creativity in Copyright Law* (Law and Contemporary Problems; Vol. 55; No 2) available at http://scholarship.law.duke.edu;

J Reid, *A time to live, a time to grieve: patterns and processes of mourning among the Yolngu of Australia*, p. 319; Culture, Medicine and Psychiatry, December 1979, Volume 3, Issue 4, pp 319-346; available at http://link.springer.com

JAL Sterling (ed) *World copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts and published editions in national, international ad regional law: with a glossary of legal ad technical terms, and a reference list of copyright and related rights laws throughout the world* (3rd edn London Sweet&Maxwell 2008)

LR Helfer, *Human Rights and Intellectual Property: Conflict or Coexistance* (Minnesot Intellectual Property Review, Vol. 5:1), 47-61;

MA Hirwade, *Protecting Traditional Knowledge Digitally: A Case Study of TKDL*; RTM Nagpur University, Nagpur

N Riesem, *Disrupting assimilation: soldiers, missionaries and aboriginal people in Arnhem land during World War II*, Melbourne Historical Journal, 2007, P.247-248; available at http://www.msp.unimelb.edu.au

NJ Riseman, *Defending Whose Country? Yolngu and the Northern Territory. Special Reconnaissance Unit in the Second World War 11*, University of Melbourne, A Journal of Historical Cultural Studies. Limina, Volume 13, 2007; p. 87; available at http://www.limina.arts.uwa.edu.au

P Alfrey, *Petrarch's Apes: Originality, Plagiarism and Copyright Principles within Visual Culture;* available at http://web.mit.edu/comm-forum/papers/alfrey.html

P Cullet, *Human Rights and Intellectual Property Rights* (IELRC Working Paper 2004- 4)

P Jaszi, *Toward a theory of copyright: the metamorphoses of "authorship*", (1991 Duke Law Journal 455 1991); available at http://www.heinonline.org

P Stephenson, The Outsiders Within: Telling Australia's Indigenous-Asian Story, Sydney : University of New South Wales Press, 2007**,** p.42-42; available at http://books.google.ru

PK Yu *Traditional Knowledge, Intellectual Property, and Indigenous Culture: an Introduction* available at http://www.peteryu.com/tk.pdf

Protecting Australian Indigenous Art: ownership, copyright and marketing issues for NSW schools; Published on the internet in 2006 by the Board of Studies NSW, GPO Box 5300, Sydney 2001, Australia; available at http://ab-ed.boardofstudies.nsw.edu.au/files/protecting-australian-indigenous-art.pdf

RJ. Coombe, *Intellectual Property, Human Rights, and Sovereignty. New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity,* Indiana Journal of Global Legal Studies 6 (1): 59-115

T Janke and R Quiggin, *Indigenous cultural and intellectual property and customary law*, Aboriginal Customary Laws – Background Paper 12

V Grieves, *Aboriginal spirituality: a baseline for indigenous knowledge development in Australia* (The Canadian Journal of Native Studies XXVIII, 2 (2008)

YM Donders, *Towards a Right to Cultural Identity?*, (Intersentia, 2002)

Secondary materials: online sources

http://www.aboriginalartcollection.com/

http://medical-dictionary.thefreedictionary.com/ayurvedic+medicine

http://www.tkdl.res.in/tkdl/langdefault/common/

http://www.unutki.org/default.php?doc_id=30

http://12canoes.com.au/

http://museumvictoria.com.au/history/artists2.html

http://ncl.net.au/play/about-yolgnu/

http://www.aboriginalartprints.com.au/works_enlargement.php?work_id=725

http://www.colingolvan.com.au/law-articles-and-essays/131-meeting-at-the-waterhole

http://www.creativespirits.info/aboriginalculture/politics/stolen-generations-timeline

http://www.folklife.si.edu/resources/unesco/puri.htm#_edn4

http://www.goodstaff.com/gallery/Australian%20Tribal%20Art/Ganalbingu%20Tribe/index.html

http://www.indigenouspeople.net/sidemenu.html

http://www.wipo.int