This article explores whether legislative or judicial recognition of Indigenous laws can usefully be extrapolated beyond the context of native title and land rights to inform legal understanding of Indigenous rights in art. Through a careful reading of the High Court's decision of *Mabo and Others v Queensland (No 2)* (1992), and subsequent case law, the article details the contexts in which Indigenous customary laws have been recognised as having survived the introduction of the common law. The article argues that it may be preferable for some Indigenous people to argue that traditional rights in art are separate from native title rights in land rather than a 'nature and incident' of such title. Some of the problems that may arise when Indigenous intellectual property laws are infringed are highlighted, and it is suggested that the Native Title Tribunal would be an appropriate venue for dispute resolution. The article concludes by arguing that recognition by the Australian legal system that aspects of Aboriginal law other than land rights have survived the colonisation process would not only aid Aboriginal people in the difficult task of maintaining their culture, but would also be consistent with Australia's obligations under international law.

Since the decision of the Federal Court in the *Indofurn* case,¹ debate about possible recognition of Aboriginal customary or collective rights in art has split into two very different currents. In the first, more passionate flow, Indigenous people and others have lobbied for Anglo-Australian legal recognition of a variety of 'special' rights. Proposals have been put forward for protection of Indigenous styles, words and folklore in ways which seem outside the traditional preoccupations of intellectual property law. Most notably in the 1997 *Our Culture, Our Future* discussion paper (which preceded the final report, published in 1998), the argument was put that proposals for recognition should reflect the fact that Indigenous laws view intellectual property issues as inseparable from questions of land ownership, and from other areas of political and cultural life.²

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¹ *Deceased Applicant* v *Indofurn* (1994) 54 FCR 240.
The other current of debate has followed a far more conservative, but arguably more ‘realistic’, channel. While claiming to be sympathetic to Indigenous needs, it has focused on the very real difficulties which confront any Indigenous plaintiff seeking recognition of Indigenous ownership of art within existing Anglo-Australian legal categories. These difficulties arguably suggest that any form of common law recognition will inevitably be limited, since a decision recognising or reflecting Indigenous law would have the effect of opening what RD Lumb once termed a Pandora’s Box.\

The split in legal and politico-legal debate reflects a widening rift between Indigenous and non-Indigenous perspectives regarding the issue of appropriation in broader cultural debate. The mass media is regularly engulfed by new ‘scandals’ surrounding Indigenous art. While the media life of each has been short, they have left a general impression that Aboriginal art is dominated by get-rich-quick merchants, naïve Indigenous artists and non-Indigenous shysters eager to hop on to the latest artistic bandwagon. The sub-textual message has often been that Indigenous artists are getting a level of recognition that they would not get on a truly ‘level playing field’. Even putting aside distortion and bad faith, it is clear that there is a genuine perceptual gulf between many Indigenous and non-Indigenous artists concerning what practices of appropriation are legally and ethically permissible.\

This paper will attempt to chart a way in which the perceptual and political gulf might be bridged through one type of legal change. Admittedly, legal change cannot by itself provide responses to conflicts which have arisen primarily in the cultural and ethical fields. Nevertheless, it has considerable symbolic and practical importance, and Indigenous expectations are often directed towards legal change. The paper will consider the extent to which principles of native title might form the basis for a legal recognition of the Working Group of Indigenous Populations. 28 July 1993, Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, E/CN.4/Sub.2/1993/28, para 31, p 9.


4 See, for example, regarding the Kathleen Petyarre ‘scandal’, The Australian, 15–16 November 1997, p 1, and G Greer. Sydney Morning Herald, ‘Spectrum’: 6 December 1997 Concerning the Wanda Koomatrie ‘scandal’, see ‘Aboriginal Book Hoax Angers Publishers’, The Australian, 13 March 1997 Other examples are the Elizabeth Durack ‘scandal’, the furore concerning Marlo Morgan’s book Mutant Messages Down Under, the Clifford Possum ‘scandal’, and the debates concerning the Indigenous identities of the writers Archie Weller and Mudrooroo (Colin Johnson). In addition, outside the sphere of art, there has been publicity given to the attempts by non-Aboriginal interests, particularly scientists and pharmaceutical companies, to collect the biological resources and expertise of Indigenous people in advance of a possible ‘Mabo-style’ claim.
Indigenous interests in art in a way which might be relatively consistent with Indigenous law.

The idea that Indigenous native title to land might apply outside land rights to other areas of law has been raised a number of times in academic debate since the *Mabo* decision. However, it has been considered only fleetingly — arguably even dismissively — in case law. The idea is based upon the recognition by Brennan J particularly, and more generally by the majority judges in *Mabo*, that the ‘nature and incidents’ of native title would be determined by reference to Indigenous laws and customs — a statement which is reflected in the *Native Title Act*, and has to some extent been elucidated and elaborated upon in native title case law since then.

In order to succeed, such a claim would have to meet the criteria generally established for a native title claim to land. It would have to show first that Indigenous rights in art survived the acquisition of sovereignty, either as a nature or incident of the survival of native title to land or possibly by analogy with — although separately to — the survival of such interests in land. Second, it would have to show that such rights have not been extinguished, either by the general course of dealings in land or more specifically by the enactment of intellectual property statutes of general application. Third, it would have to explain how the general rule that native title is inalienable except to the Crown could in practice apply to Indigenous rights in art; and fourth, it would need to consider what court could enforce such rights. More generally, it would have to address the following questions:

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6 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.


8 Brennan J, *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58, Deane and Gaudron JJ at 85, and Toohey J at 187. For relevant extracts, see n 16 below.

9 See, particularly, s 223(1) *Native Title Act* 1993 (Cth), which defines ‘native title’ as ‘the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal people or Torres Strait Islanders; and

(b) the Aboriginal people or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia’.

10 See particularly the *Copyright Act* 1968 (Cth) s 8; see *Johnny Bulun Bulun & Anor v R & T Textiles Pty Ltd*, 157 ALR 193, and see generally discussion of extinguishment below.
Would the recognition of Indigenous rights in art as a ‘nature or incident’ of native title fracture a ‘skeletal principle’ of the Anglo-Australian legal system?\(^\text{11}\)

Would Indigenous intellectual property laws, if recognised, be held to apply only within communities — a finding which would severely limit, if not destroy, the practical use of such a recognition?

Is the common law an appropriate or practical vehicle for such a recognition, or would the difficulties only be overcome by a statutory or *sui generis* legislative scheme?

Before turning to a detailed consideration of these issues, one point of definition should be addressed. The paper will, where necessary, refer to ‘Aboriginal laws’ and ‘Aboriginal intellectual property laws’. There is no suggestion in such usage that there exists a separate body of Aboriginal intellectual property laws which can be equated with Anglo-Australian laws. On the contrary, it would appear that many, if not most, Aboriginal laws view ‘intellectual property’ issues as inseparable from questions of land ownership — and, indeed, from other areas of political and cultural life. In addition, the term does not imply that there exists a unified body of ‘Aboriginal law’ across Australia. Clearly, the content of particular laws must be determined by reference to the laws and customs of the group concerned. Rather, the term is used to indicate that Aboriginal people possess laws which cover areas of life which from an Anglo-Australian perspective would be considered the domain of intellectual property law.

The following discussion will address, in relation to Indigenous rights to art, each of the above criteria for the establishment of a native title claim.

### The Survival of Aboriginal Intellectual Property Laws

As far as the Anglo-Australian courts are concerned, it is settled law that the Crown validly acquired sovereignty over land and waters in Australia either in 1788 or by various legislative or executive acts since then.\(^\text{12}\) It is also ‘settled’ law that the method of acquisition of sovereignty remains ‘settlement’, notwithstanding that the validity of ‘settlement’ as a method of acquisition of sovereignty appears to rest upon a version of the doctrine of *terra nullius*, the very doctrine rejected as racially discriminatory in the *Mabo* case.\(^\text{13}\)

The *Mabo* decision recognised for the first time that it was not necessarily a consequence of the acquisition of sovereignty that all Aboriginal customary

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\(^\text{11}\) See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, per Brennan J at 43: ‘However, recognition by our common law of the rights and interests in land of the Indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.’ This is discussed in the context of Indigenous rights to art in *Bulun Bulun* at 204.

\(^\text{12}\) *Mabo v Queensland (No 2)* (1992) 175 CLR 1, per Brennan J at 69.

laws were extinguished. The decision is a recognition of the possibility of survival of one set of rights — native title rights to land.\footnote{According to the judgment of Brennan J in the \textit{Mabo} decision, with whom Mason CJ and McHugh J concurred, it was clear upon consideration of the authorities that the common law recognised a rule at international law that native rights or interests in land were presumed to survive the acquisition of sovereignty, regardless of the method of such acquisition. There was no need for any act of recognition or acknowledgment of such interests by the Crown. Toohey J agreed that on the acquisition of sovereignty the Crown acquired a radical title only, but that '[p]revious interests in the land may be said to survive \textit{unless} it can be shown that the effect of annexation is to destroy them. That is, the onus rests with those claiming that traditional title does not exist.' Deane and Gaudron JJ took a somewhat different approach. They argued that, in cases of cession and conquest, the pre-existing laws of the relevant territory were presumed to survive the acquisition of sovereignty. When a colony was settled, however, so much of the common law was introduced as was applicable to the circumstances of the new colony, a principle which ‘left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law’. The local laws and customs for which ‘room was left’ included interests in property, which were ‘preserved and protected by the domestic law of the Colony after its establishment’. See generally \textit{Mabo v Queensland (No 2) (1992) 175 CLR} 1, per Brennan J at 57, Toohey J at 182–83, Deane and Gaudron JJ at 79, 82. For a view arguing that ‘the joint judgment of Gaudron and Deane JJ is admittedly inconsistent with the idea of the survival of native title’, see K Mulqueeny (1993), ‘Folk-law or Folklore: When a Law is Not a Law. Or Is It?’, in M Stephenson and S Ratnapala (eds) (1993) \textit{Mabo, A Judicial Revolution}, University of Queensland Press, p 168.}

However, the possibility is at least implicitly left open that other forms of Indigenous legal rights may have survived the acquisition of sovereignty.

There are two possible means by which it may be argued that Aboriginal intellectual property laws survived the acquisition of sovereignty by the British Crown. The first possibility is that such laws may have survived as a species of ‘rights’ recognised by the common law, just as the \textit{Mabo} decision recognised rights to land. According to this proposition, the reasoning and the common law principles applied by the majority in the \textit{Mabo} decision to recognise Aboriginal title to land may equally be applied to recognise, in certain instances at least, the survival of Aboriginal laws relating to art.\footnote{Arguably, the analyses and comments of Brennan and Toohey JJ are confined to interests in land. Deane and Gaudron JJ’s analysis, on the other hand, specifically allows for the survival of local laws or customs generally: see the \textit{Mabo} case at 79. In this respect, the judgment of Deane and Gaudron JJ appears more favourable to the survival of Aboriginal laws and customs relating to art. On the other hand, whereas Deane and Gaudron JJ require any local laws or customs to be ‘preserved and protected’ by the common law in order to survive, Brennan and Toohey JJ require no such recognition. Under Deane and Gaudron JJ’s analysis of this issue, one would have to inquire in the context of a particular dispute whether ‘room was left’ for the continued operation of Aboriginal laws relating to art.}
The second possibility is that Aboriginal intellectual property laws may, in individual cases, be recognised as a ‘nature or incident’ of land ownership. This follows particularly from the recognition in the Mabo decision that Aboriginal native title to land ‘has its origin in and is given its content by’ traditional Aboriginal laws and customs.

**Survival of Aboriginal Laws by Analogy**

There has been little case law since Mabo concerning the question of whether Indigenous laws other than native title to land have survived the acquisition of sovereignty. In part, this has been because the expression ‘native title’ is now defined, and arguably restricted, by the definition of ‘native title rights and interests’ contained in s 223(1) of the Native Title Act. This definition confines ‘native title’, at least for the purposes of determinations under the Act, to interests possessed ‘in relation to land or waters’.

According to Olney J in Yarmirr v Northern Territory:

> Not every traditional law and custom will necessarily relate to a people’s land or waters nor will it necessarily provide a connection with the land or waters. A law or custom of an Indigenous community, group or person, however much it is based on traditional observances of the community, group or person, will not be within the scope of the statutory definition unless it both relates to land or waters and gives rise to a connection with the land or waters.

Thus ‘native title’ cases have not generally strayed from a consideration of what, under Anglo-Australian law, would be regarded as rights to land or waters. However, Lee J in Ward v Western Australia at least leaves open a possibility that Indigenous rights may exist which are broader than traditional rights to land:

> Further, the Act is not concerned with whether there may be a broader-based conception of aboriginal rights than rights dependent upon aboriginal title to land ... In R v Van der Peet and R v Adams [1966] 3 SCR 101 it was held that aboriginal title to land was but one manifestation of a broader concept of aboriginal rights and that an aboriginal right may exist independently of aboriginal title. Proof of the existence of that right would not require proof of the elements required to establish aboriginal title. That development of Canadian...

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16 ‘[N]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory’: Mabo v Queensland (No 2) (1992) 175 CLR 1, per Brennan J at 58.

17 The relevant part of the definition states that ‘[t]he expression “native title” or “native title rights and interests” means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters’. See n 9 above.

jurisprudence owes much to s35(1) of the Constitution Act (Can) by which 'existing aboriginal rights' of the aboriginal peoples of Canada are 'recognised and affirmed': see Wik per Gummow J at CLR 182; Fego per Kirby J at 754–55.19

Even apart from the question of extinguishment, Mason CJ in Walker v New South Wales appears to have taken the view that customary Aboriginal criminal laws did not survive the acquisition of sovereignty.20 However, in comments which are admittedly obiter, Von Doussa J in Bulun Bulun v R & T Textiles appears to have taken the opposite view.21

In the Bulun Bulun case, the applicant pleaded, inter alia, that communal traditional rights in art were an incident of his clan's native title in its traditional land. Members of the applicant's clan were the traditional owners of relevant land under the Aboriginal Land Rights (Northern Territory) Act (Cth) 1976, but a determination of native title had not been made. The pleading therefore amounted to an invitation to find that the applicant's clan held native title in its land.

The Federal Court held that it was without jurisdiction to make a determination of native title in the proceedings. This was because there was no application for determination of native title pursuant to s 74 of the Native Title Act.22 In any case, Von Doussa J, without being final on the issue, considered that "[t]he principle that ownership of land and ownership of artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be characterised as "skeletal" and stand in the road of acceptance of the foreshadowed argument".23

However, the applicants argued in the alternative that equitable interests based upon customary law had survived the acquisition of sovereignty, even apart from the question of survival of native title rights to land. The Court was more favourably disposed towards this submission. According to Von Doussa J:

There seems no reason to doubt that customary Aboriginal laws relating to the ownership of artistic works survived the introduction of the common law of England in 1788. The Aboriginal peoples did not cease to observe their sui generis system of rights and obligations upon the acquisition of sovereignty by the Crown. The question however is whether those Aboriginal laws can create binding obligations on persons outside the relevant Aboriginal community, either through

19 Ward (on behalf of the Miriuwong and Gajerrong people) v Western Australia (1998) 159 ALR 483 at 507, per Lee J.
20 Walker v New South Wales (1994–95) 182 CLR 45 at 49–50 (High Court).
21 Johnny Bulun Bulun v R & T Textiles Pty Ltd, 157 ALR 193.
22 ibid, at 203.
23 ibid, at 204.
recognition of those laws by the common law, or by their capacity to found equitable rights in rem.\(^{24}\)

Stanley Yeo has argued that, despite the decision in \textit{Walker's} case,\(^{25}\) the approach of Brennan and Toohey JJ in \textit{Mabo} leads to ‘a presumption that native criminal jurisdictions were not disrupted by the advent of settlement’.\(^{26}\) This is because of the fact that international law at the time of acquisition of sovereignty ‘recognised that, where a territory was conquered, justice and expediency required the law of the conquered people to remain intact until expressly altered’.\(^{27}\) It also arises from the fact that, when speaking of the survival of Indigenous laws, the two judgments equate the law relating to settled colonies with that of conquered colonies\(^{28}\) — and therefore, ‘justice and expediency’ required the law of a ‘settled’ people to remain similarly intact. Third, it follows from the ‘underlying basis for the continuity of native laws [which] is the same whether the laws pertain to land or to social behaviour, that is, according justice to native peoples and recognising their fundamental human rights’.\(^{29}\) This basis was accepted by Brennan J as a justification for a change in a rule of the common law, providing that the adoption of such contemporary standards of justice and human rights would not ‘fracture the skeleton of principle which gives the body of our law its shape and internal consistency’.\(^{30}\)

Yeo argues that this underlying basis leads — in the arena of criminal law at least — to the conclusion that ‘the law should acknowledge the existence of Aboriginal systems of behavioural constraints with their deep underpinnings of religious and cultural values held dear to Aboriginal communities’.\(^{31}\)

The argument that Aboriginal criminal laws survive applies \textit{a fortiori} to the question of survival of traditional Aboriginal laws relating to art. If the law relating to settled colonies is to be equated with the law relating to conquered colonies, ‘justice and expediency’ would require Aboriginal laws relating to art

\(^{24}\) ibid.


\(^{26}\) S Yeo, ‘Native Criminal Jurisdiction After \textit{Mabo}’, (1994) 6 \textit{Current Issues in Criminal Justice} 12.


\(^{28}\) \textit{Mabo v Queensland} (No 2) (1992) 175 CLR 1 per Brennan J at 57. ‘The preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land ... The preferable rule equates the Indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land and recognised in the Indigenous inhabitants of a settled colony the rights and interests recognised by the Privy Council in \textit{In Re Southern Rhodesia} as surviving to the benefit of the residents of a conquered colony.’

\(^{29}\) Yeo (1994) ‘Native Criminal Jurisdiction After \textit{Mabo}’, p 12.

\(^{30}\) \textit{Mabo v Queensland} (No 2) (1992) 175 CLR 1, per Brennan J at 29.

to survive, as well as such laws relating to land. This conclusion also follows from the underlying basis for the acknowledgment of ‘Aboriginal systems of behavioural constraints’ in contemporary standards of justice and human rights. The fact that Von Doussa J in Bulun Bulun regarded such laws as having survived the acquisition of sovereignty suggests that His Honour did not consider a recognition of such survival to fracture a ‘skeletal principle’ of the common law.

A possible problem is, however, posed by Yeo’s suggestion that the ‘form’ of Aboriginal criminal laws which survived the act of settlement would only apply within Aboriginal communities, and would not be of general application.\(^3\) If applied to art, Yeo’s analysis would render the survival of Aboriginal customary laws of little use to Aboriginal artists or communities, since such laws would not apply to the most common case of appropriation — that by a person from outside the relevant community. The comments of Von Doussa J in Bulun Bulun, already cited above,\(^3\) while not conclusive, appear to support the view that such laws would only apply within the relevant community.

It is arguable, however, that this restriction does not apply to laws relating to art. The reason why, in Yeo’s argument, Aboriginal criminal laws only survived the acquisition of sovereignty in this limited form is that English criminal law was clearly intended to be introduced from the moment of acquisition of sovereignty in order ‘to protect the personal safety and property interests of the settlers’.\(^4\) The ‘personal safety and property interests’ of the settlers would arguably have required the application of English criminal laws to disputes between non-Aboriginal colonists, and to disputes between Aboriginal people and non-Aboriginal colonists. It cannot be argued, however, that these same interests would have required the application of English intellectual property laws to disputes between Aboriginal and non-Aboriginal people. On the contrary, the interests of the colonists required that Aboriginal laws regarding their art be respected. An illustration of this is the fact that, among other laws promulgated by Governor Phillip during the first four years of the colony at Port Jackson, was one ‘that forbade the sale of Aboriginal artefacts in an attempt to stop the pilfering of vacant camps by convicts, which was a source of constant annoyance to the Aborigines’.\(^5\)

\(^{3}\) ‘It should be obvious from this discussion that the form of native criminal laws which survived settlement would not be of general application. Nevertheless, these laws are entitled to recognition within their spheres of operation in much the same way as the by-laws and regulations of statutory authorities and local councils are recognised.’: ibid, p 13. This comment of Yeo’s clearly applies to the approach of Deane and Gaudron JJ. It is not as clear, however, that it applies also to the approach of Brennan and Toohey JJ.

\(^{3}\) See n 24.


\(^{5}\) W Tench (1793) Sydney’s First Four Years Being a Reprint of A Narrative of an Expedition to Botany Bay and A Complete Account of the Settlement at Port Jackson, Angus & Robertson, reprinted 1974, quoted in T Flannery (1994) The Future Eaters, Reed Books, p 324.
Aboriginal laws relating to art also appear to have been ‘preserved and protected’ by the common law under the test applied by Deane and Gaudron JJ in the *Mabo* case. Under this test, only so much of English intellectual property law was introduced as was applicable to the circumstances of the new colony. This principle left room for the continued operation of local laws or customs relating to art ‘and even the incorporation of some of those laws and customs as part of the common law.’ Again, the question of whether ‘room was left’ should be considered with reference to the circumstances of the new colony. It was certainly against English interests at the time of Governor Phillip to disturb Aboriginal laws concerning art operating within Aboriginal communities. Indeed, Governor Phillip’s actions suggest that ‘room was left’ not only for the continued application of Aboriginal intellectual property laws to Aboriginal people themselves, but also to any determination of property rights under the introduced law. The paramount concern of the British Crown at this time appears to have been to preserve peace — or, as suggested in the oft-quoted instructions from the King to Governor Phillip to ‘live in amity and kindness’ — with the natives. The maintenance of this peace appears to have involved requiring colonists to respect, or act consistently with, Aboriginal laws relating to their works of art. It is submitted that this situation is also likely to apply to acquisitions of sovereignty over parts of Australia occurring after 1788, although of course the historical circumstances of each case would have to be considered separately.

**Aboriginal Art as a ‘Nature or Incident’ of Title to Land**

Alternatively, it is arguable that Aboriginal laws relating to art survive by virtue of the survival of Aboriginal native title to land. Such an argument would accord more closely than the argument by analogy with the perspectives of Aboriginal law. This is because, under at least some Aboriginal laws, rights in land and rights in art are inextricably entwined.

The close relationship between some Aboriginal laws relating to land and those relating to art has previously been explored by anthropologists. Howard Morphy has examined in particular detail the connection between land and art

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36 Deane and Gaudron JJ in *Mabo*; see n 15 above.
37 *Mabo* (1992) 175 CLR 1, per Deane and Gaudron JJ at 79.
38 ‘You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence’: Governor Phillip’s ‘Instructions’, dated 25 April 1787, *Historical Records of Australia*, Series 1, Vol 1, pp 13–14, and quoted in *R v Wedge* [1976] 1 NSWLR 581 at 585.
amongst the Yolngu of North-East Arnhem Land. Yolngu paintings are firstly, according to Morphy, functionally equivalent to ‘title deeds’ to the land:

Yolngu paintings are at the same time part of a complex system of meaning concerned with the relationship between living Yolngu and the Ancestral determinants of the Yolngu world and way of life. Part of their meaning concerns the relationship between people and the land, a relationship mediated by the Ancestral past. The two main ways in which meanings connected with land ownership are encoded in paintings are through clan designs, which precisely signify the clan ownership of a painting, and through representing features of the topography of the landscape itself in the form of the painting.

Paintings, however, are from a Yolngu perspective more than mere ‘title deeds’ or representations of ownership of land. They are, in a significant sense, part of the land itself. To understand this, it is necessary to appreciate that both the paintings and the land are considered by the Yolngu to be creations of the Ancestral beings: ‘[f]rom a Yolngu perspective, paintings are not so much a means of representing the ancestral past as one dimension of the ancestral past: paintings are mardayin (sacred law); they are wangarr miny’tji (creations of the ancestral beings).’

Morphy’s exploration of the relationship between art and the land for the Yolngu concludes that, at the least, rights in paintings and rights in land are ‘two sides of the same coin’. The close relationship between art and land for the Ganalbingu people was recognised by Von Doussa J in the Bullun Bulun case.

A relationship of this type between art and land under particular Aboriginal laws is arguably sufficient to establish that the relevant laws are a ‘nature or incident’ of Aboriginal native title to land. The Mabo decision itself makes it clear that Aboriginal native title need not bear any resemblance to traditional common law concepts of property, and that the specific ‘nature and incidents’ of native title must be ascertained by reference to Indigenous laws and customs.


42 Morphy (1991) Ancestral Connections, p 49: ‘rights in mardayin [sacred law, one manifestation of which is painting] and rights in land are two sides of the same coin’.


44 Thus, according to Toohey J:

[It] would defeat the purpose of recognition and protection if only those existing rights and duties which were the same as, or which approximated to, those under English law could comprise traditional title; such a criterion is irrelevant to the purpose of protection ... A determination that a traditional right or duty amounts to a proprietary
common law would go in recognising as part of native title, Indigenous laws and customs which do not look to a traditional common lawyer like laws and customs to do with land.

Again, the native title cases since *Mabo* do not consider this issue in depth. Lee J in *Ward v WA* confirmed that:

>[such] Indigenous interests are not defined by reference to, nor moulded to equate with, the estates, rights or interests in land which form the law of real property at common law. Native title does not conform to traditional common law concepts and is to be regarded as unique, or ‘sui generis’ ... In particular the right or interest of Indigenous people in land may be the right of a community to use the land and not an individual proprietary right ... 45

In *Yanner v Eaton*, the High Court recognised that the right to hunt estuarine crocodiles could be an incident of native title. In so finding, Gummow J stated that:

The native title of a community of Indigenous Australians is comprised of the collective rights, powers and other interests of that community, which may be exercised by particular sub-groups or individuals in

interest, however that is defined, will not reveal the existence or non-existence of traditional title, except in so far as it indicates that reasonably coherent rights and duties were, and are, exercised in an area of land.’ (*Mabo* case at 187).

This argument is supported by Deane and Gaudron JJ:

>[T]he pre-existing native interests with respect to land which were assumed by the common law to be recognised and fully respected under the law of a newly annexed British territory were not confined to interests which were analogous to common law concepts of estates in land or proprietary interests. Nor were they confined by reference to a requirement that the existing local social organisation conform, in its usages and its conceptions of rights and duties, to English or European modes or legal notions ... What the common law required was that the interest under the local law or custom involve an established entitlement of an identified community, group or (rarely) individual to the occupation or use of particular land and that entitlement or use be of sufficient significance to establish a locally recognised special relationship between the particular community, group or individual and that land. (*Mabo* case at 85)

And, more succinctly, by Brennan J:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a question of fact by reference to those laws and customs. (*Mabo* case at 58)

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accordance with that community’s traditional laws and customs. Each collective right, power or other interest is an ‘incident’ of that Indigenous community’s native title.46

It is therefore clear that, although occupancy of the land at the time of acquisition of sovereignty is a ‘threshold question’,47 the content of traditional Aboriginal title to land can vary. It may be, for example, ‘an entitlement of an individual, through his or her family, band or tribe, to a limited special use of land in a context where notions of property in land and distinctions between ownership, possession and use are all but unknown ... In contrast, it may be a community title which is practically “equivalent to full ownership”.48 The determining factor in every case is the content, or the ‘nature and incidents’, of the title existing under traditional Aboriginal law.

At a philosophical level, there is no reason why the ‘nature and incidents’ of native title should be restricted to rights that would be considered by a traditional common lawyer to be rights relating to land. The notion that art and land are irreconcilably ‘different’ — and hence that there is a clear dividing-line between rights and interests in land and those in intangible, including intellectual, property — can be shown to be dependent upon a cultural construction of ‘the truth’.49 Thus neither the notion that art and land are ‘different’ (typically characteristic of the approach of non-Aboriginal law) nor the notion that they are ‘the same’ (characteristic of traditional Aboriginal law) represent the whole truth.50 To a large degree, the answer to the question of whether art and land are ‘the same’ or ‘different’ depends upon the point of view from which and the senses in which the question is asked, and the Mabo decision requires us to approach the issue of the ‘nature and incidents’ of native title from the point of view of Aboriginal law.

Second, it is arguable that s 223(1) of the Native Title Act does not pose an insurmountable barrier to the recognition of Indigenous intellectual property rights as part of native title. Certainly this section confines ‘native title’ to interests that exist ‘in relation to land or waters’. This, however, merely raises the same question in another form. The question then becomes what types of interests may be said to exist ‘in relation to land or waters’, and more

46 Yanner v Eaton (1999) 166 ALR 258 at 278.
47 ‘It is the fact of the presence of Indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights. Presence would be insufficient to establish title if it was coincidental only or truly random, having no connection with or meaning in relation to a society’s economic, cultural or religious life. It is presence amounting to occupancy which is the foundation of the title and which attracts protection ... Thus traditional title is rooted in physical presence.’: Mabo v Queensland (No 2) (1992) 175 CLR 1, per Toohey J at 188. See also Deane and Gaudron JJ at 85.
48 ibid, per Deane and Gaudron JJ at 88.
50 ibid, p 10.
particularly whether this issue is to be determined from an Indigenous or non-Indigenous legal perspective. Again the oft-repeated ‘nature and incidents’ argument suggests that the question should be resolved from an Indigenous perspective.

It might be objected that this line of reasoning can be extended to almost any aspect of traditional Aboriginal life or culture since, under traditional Aboriginal law, rules governing crime, family law and social relationships, art and intellectual property and so forth are all viewed as intimately connected with the fundamental relationship to land. Professor Lumb, for example, stated soon after the *Mabo* decision that this question ‘opens up a Pandora’s Box’. However, Brennan J in *Mabo* placed the caveat that ‘recognition by our common law of the rights and interests in land of the Indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system’.

The question of what types of rights and interests may be considered ‘skeletal’ has received little judicial consideration since *Mabo*. Brennan J in *Mabo* itself did not set down any guidelines for determining when recognition of a particular law or custom would fracture a ‘skeletal principle’. Von Doussa J in *Bulun Bulun*, however, suggested that the principle that ownership of land and ownership of art are separate ‘may well’ be characterised as skeletal. There is as yet little guidance on the apparently new jurisprudential distinction between ‘skeletal’ and ‘non-skeletal’ principles of the common law. In the *Mabo* case itself, the doctrine of *terra nullius*, despite being fundamental to the then generally understood basis for the European occupation of the Australian continent, was clearly considered not a ‘skeletal’ principle. Although the argument is perhaps somewhat circular, it is possible that even a well-established principle of the common law might nevertheless not be considered ‘skeletal’ if it is out of step with current standards of human rights and international law. One might consider, therefore, whether the non-recognition of Indigenous cultural and intellectual property rights is out of step with such international standards and laws. If this question is answered in the affirmative, as it arguably should be, then an Australian court might be justified in characterising the distinction between ownership of land and art for these purposes as ‘non-skeletal’.

51 As Morphy puts it, ‘there is the nagging feeling that social phenomena are so interconnected that any starting point results in a journey through the whole sociocultural system, so that almost any sociocultural phenomenon can be made into a central institution that connects with everything else’: Morphy (1991) *Ancestral Connections*, p 291.


53 *Mabo* (1992) 175 CLR 1 per Brennan J at 43.


55 Note, for example, the International Covenant on Economic Social and Cultural Rights (ICESCR) and the Draft Declaration on the Rights of Indigenous Peoples (see generally H McRae et al. (1997) *Indigenous Legal Issues*, pp 474–75.)
Alternatively, one might consider the practical social and political effect of a finding that Indigenous art and land may for some purposes be equated. It is suggested that the political and social effects of the *Mabo* decision were far greater than any recognition of such rights is likely to be. This consideration, however, did not lead the High Court in *Mabo* to characterise *terra nullius* as 'non-skeletal'. It is arguable that the wholesale recognition of all Aboriginal social life as incidents of native title to land could, from this point of view, fracture skeletal principles of Australian law. However, there does not seem to be any reason why the recognition that Aboriginal rights in art had survived the acquisition of sovereignty as incidents of native title should have such a drastic effect.

**Alienability**

The proposition that native title is not alienable outside the native system otherwise than by surrender to the Crown\(^6\) has several consequences for Indigenous laws relating to art. If such laws were recognised as a 'nature and incident' of native title, rather than as a separate species of rights recognised by the common law, the proposition suggests that rights in works of art under Aboriginal law are not able to be alienated or surrendered except to the Crown. This would be the case regardless of whether the physical work of art was alienated or of what agreement was reached over copyright. Thus, even if the copyright in the relevant work of art were assigned by the artist, the assignee would not be able to act with respect to the work in a manner inconsistent with Aboriginal law.

The effect of this would arguably be somewhat similar to the effect of a grant of moral rights to the creators of artistic or other works.\(^5\) The major difference would be that such rights would belong to and be enforceable by the owners under Aboriginal law, rather than by the individual creator. The only exception to this would be a surrender of rights in art to the Crown, which would have to take place according to the procedures in s 21 of the *Native Title Act*.

**Extinguishment of Aboriginal Rights in Art**

The proposition that Indigenous legal rights in art have been extinguished since the acquisition of sovereignty, particularly by the passage of intellectual property statutes of general application, poses perhaps the most difficult barrier for Indigenous people seeking recognition of such rights. Certainly Von

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\(^5\) *Mabo* (1992) 175 CLR 1, per Deane and Gaudron JJ at 88; *Ward v WA* (1998) 159 ALR 483 at 500. Under s 21(1)(a) of the *Native Title Act*, native title holders were able to surrender their title to the relevant government in exchange for statutory title or some other consideration. For a discussion of the 1998 amendments to s 21, see R Bartlett (2000) *Native Title in Australia*, Butterworths, Ch. 20.

Doussa J in *Bulun Bulun* was of the opinion that any Indigenous systems of collective ownership of artistic works had been extinguished:

If the common law had not been amended ... by statute, an interesting question would arise as to whether Aboriginal laws and customs could be incorporated into the common law. However, the common law has since been subsumed by statute. The common law right until first publication was abolished when the law of copyright was codified by the *Copyright Act* of 1911 in the United Kingdom. That Act, subject to some modifications, became the law in Australia by s 8 of the *Copyright Act* 1912 (Cth). Copyright is now entirely a creature of statute ... The exclusive domain of the *Copyright Act* 1968 in Australia is expressed in s 8 (subject only to the qualification in s 8A) namely that 'copyright does not subsist otherwise than by virtue of this Act'.

The test for whether extinguishment of native title rights has occurred is still that enunciated by the High Court in the *Mabo* case. In this case, Brennan J (with whom Mason CJ and McHugh J agreed) argues that it operated whenever there was a 'clear and plain intention' to extinguish, while Deane and Gaudron JJ and Toohey J argue that there was actually a presumption against extinguishment. The 'clear and plain intention' test is not altered by the *Native Title Act*. Olney J in *Yarmirr* considered that in 1998 'the full meaning of the concept of extinguishment in the law of native title remains to be determined', but set out nevertheless a number of propositions gleaned from the *Mabo* and *Wik* decisions and relevant to the concept of extinguishment. These are that:

First, the common law will not recognise a native title which has been extinguished. Secondly, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the legislature or the executive. Thirdly, a clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of native title. Fourthly, if inconsistency is held to exist between the rights and interests conferred by native title and rights and interests conferred under statutory grants, the native title rights and interests must yield, to

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58 *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 157 ALR 193 at 205
59 *Mabo* (1992) 175 CLR 1, per Brennan J at 64.
60 ibid, per Deane and Gaudron JJ at 95, Toohey J at 193–95.
61 Sections 14 and 19 of the *Native Title Act* validate or provide for the validation of past acts which may have previously been invalid because of the *Racial Discrimination Act* (Cth) 1975. The effect of the validation of various categories of such previously invalid past acts upon native title is set out in s 15 of the *Native Title Act*. These sections have no effect upon past acts (whether occurring before or after 1975) which were valid, so that the question of whether or not such valid past acts extinguish native title must be determined at common law.
62 *Wik Peoples v Queensland* (1996) 187 CLR 1
the extent of the inconsistency, to the rights of the grantee. Fifthly, extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established. and sixthly, a native title which confers a mere usufruct may leave room for other persons to use the land either contemporaneously or from time to time.63

Of these, perhaps the most significant for current purposes is the third. This raises the question of whether a law has the effect of extinguishing native title, or whether it merely regulates it or creates a legal regime consistent with it.

The question of whether a legislative act extinguished or merely regulated native title was considered by the High Court in Yanner v Eaton.64 In this case the respondent contended that any native title right which the appellant may have enjoyed had been extinguished by s 7(1) of the Fauna Act. This Act provided that:

All fauna. save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna. is the property of the Crown and under the control of the Fauna Authority.65

The majority in the High Court held that this legislation did not have the effect of extinguishing the appellant’s native title rights. It held that the legislation merely regulated such rights. This was because the effect of the legislation was to forbid the taking or keeping of fauna except pursuant to licence. It did not operate to vest absolute property in such fauna in the Crown.

The Court held that:

[Merely] regulating the way in which rights and interests may be exercised is not inconsistent with their continued existence. Indeed, regulating the way in which a right may be exercised presupposes that the right exists. No doubt, of course, regulation may shade into prohibition and the line between the two may be difficult to discern ... But in deciding whether an alleged inconsistency is made out, it will usually be necessary to keep well in mind that native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land.66

The question arises then whether, contrary to the opinion of a single judge of the Federal Court in the Bulun Bulun case, the passage of intellectual property statutes had the effect of merely regulating, rather than extinguishing Indigenous intellectual property laws.

Several questions arise in considering this issue. First, there is the question of whether extinguishment of native title rights to land also

64 Yanner v Eaton (1999) 166 ALR 258.
65 ibid. at 261.
66 ibid. at 269.
extinguishes such rights in art. If such rights are viewed as a ‘nature or incident’ of native title rights to land, then presumably extinguishment of land rights would also extinguish rights in art. On the other hand, if rights in art exist independently of native title rights in land, there is no necessary reason why extinguishment of rights in land should also extinguish rights in art. Second, and more generally, there is the question of how the issue of ‘inconsistency’ is to be judged, given that intellectual property statutes of ‘general’ application have existed for decades alongside traditional Aboriginal laws.

Stanley Yeo considers that native criminal jurisdictions have been extinguished on the ‘clear and plain intention’ test, both by virtue of subsequent legislation and by executive acts. He considers that section 24 of the Australian Courts Act 1828, which introduced the general provisions of the criminal law of England to the colony, had the effect of extinguishing native criminal laws, because (in contrast to the position under English land law) ‘English criminal law did not accommodate a subsidiary set of native criminal laws operating alongside it.’ Subsequent legislation in the common law jurisdictions, and in particular the enactment of criminal codes, would also have been ‘clear and plain manifestations of legislative intention to extinguish native criminal jurisdictions which may have survived settlement’. In addition, he considers that the executive practice of prosecuting Aboriginal accused persons ‘for the whole range of offences recognised by common law or statute constitutes executive acts which are clearly and plainly inconsistent with native criminal laws governing the same matters’. In the intellectual property sphere, the question is whether Australian intellectual property statutes accommodated a subsidiary or alternative set of intellectual property laws. The Copyright Act merely states that ‘copyright’ does not subsist otherwise than by virtue of that Act. It does not state that no intellectual property laws subsist otherwise than under that Act. It is arguable that Indigenous laws relating to art are not ‘copyright’. As the Mabo decision and subsequent cases have recognised, they are a sui generis right which cannot be equated exactly with land law, copyright law or indeed any single other branch of Anglo-Australian law. Therefore it is arguable that this section does not per se extinguish such Indigenous laws.

Admittedly, this section would extinguish Indigenous laws relating to art to the extent that its operation is inconsistent with the continued existence of such laws. However, such laws are arguably not so closely analogous to

68 This section provides that all laws and statutes in force within the realm of England at the time of its passing shall be applied in the administration of justice in the courts of New South Wales so far as those laws and statutes could reasonably be applied within the colony: ibid, pp 13–14.
69 ibid, p 14.
70 ibid, but see the contrary view of Professor Garth Nettheim, referred to therein.
71 ibid, p 15, but again note the contrary view of Professor Garth Nettheim, referred to therein.
copyright that they may be said to be inconsistent with the operation of the Copyright Act. They are communal in nature; they are not restricted in duration; and they arise not from a social interest in individual creativity and endeavour but from Indigenous law arising from a connection with the land.

In contrast to the position concerning Indigenous criminal law,* there is also arguably little evidence that the operation of executive practice since the passing of intellectual property statutes indicates a clear and plain intention sufficient to extinguish Indigenous law. It is not enough to argue that the whole course of conduct by the Australian government and its authorised officers, including for example the policy of assimilation,73 suggests an intention to extinguish Aboriginal intellectual property law. The Mabo case is authority for the proposition that such policies alone are insufficient evidence of a ‘clear and plain intention’ to extinguish such interests. There is also no evidence of any executive decision to apply intellectual property laws to Aboriginal people to the exclusion of traditional law.

This is not to suggest that there could be no case in which Aboriginal laws relating to art were extinguished. Where the relevant community has lost its traditional connection with the land, its rights in art under traditional law may also have been extinguished. On the other hand, it is possible that rights in art would not be extinguished where the community or group continued to uphold traditional laws relating to the use of works of art by reference to a continuing spiritual, although now legally extinct, connection with the land. This possibility suggests that it would be preferable for Aboriginal people to argue that their traditional rights in art continue to exist independent of native title rights in land, rather than as a ‘nature and incident’ of such title.

**Coexistence**

If Indigenous laws relating to art can coexist with the general law of intellectual property, a question arises concerning the appropriate court to govern any dispute. If the dispute involved an appropriation of a work by a person resident in or physically present in the relevant community at the time of the appropriation, arguably Aboriginal dispute resolution mechanisms should resolve the matter. This solution would, however, only be possible if legislation were introduced recognising Aboriginal customary law within territorial and jurisdictional limits.74

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72 For example, note the view of the Federal Court that it should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognise itself: see Jacky Anzac Jadurin v R (1982) 44 ALR 429. While not ‘condoning’ such punishments, the courts nevertheless take them into account in sentencing: see R v Jungarai (1981) 9 NTR 30 at 30–31, and generally H McRae et al (1991) *Aboriginal Legal Issues*, p 275.


Any matter that relates to ‘native title’ must be determined by the Federal Court or by a recognised state or territory body. Thus, if rights in art are viewed as a ‘nature and incident’ of native title, the Native Title Act processes would have to be followed. The original Native Title Act provided for a relatively high degree of informality in Tribunal and Court processes. Since the 1998 amendments, however, these processes have become more formal, although the Federal Court still has a discretion not to subject itself to the rules of evidence. The rules governing the conduct of native title applications before the Native Title Tribunal and the Federal Court nevertheless remain more suited to the reception of Aboriginal evidence than is the formal adversarial process.

It is suggested that the Federal Court would also be the appropriate body to hear matters concerning Indigenous rights in art conceived of as separate from native title. This is not only because of the Court’s existing native title jurisdiction and expertise, but also because of its jurisdiction in general intellectual property law.

It is submitted that the questions of survival and extinguishment of laws relating to art are likely to be easier than the question of survival of native title to land. This is because, in most cases, the question will simply be whether the relevant group has maintained its traditional laws relating to art, a question which should be capable of resolution by reference to evidence from Aboriginal people. There are unlikely to be the complex issues relating to dealing with art by non-Aboriginal people such as those raised in native title claims by non-Aboriginal dealings with land.

The question of whether Aboriginal laws relating to art have been infringed by an alleged non-Aboriginal appropriator may, however, raise conceptual difficulties. These would arise particularly where a traditional Aboriginal community claims its law has been infringed by an appropriation of a story, style, or ‘idea’, rather than of an identifiable work of art. Ideally, such a matter should be resolved by mediation. Where a case is contested, the law of breach of confidence may provide more guidance for the court than would copyright law, with its ‘idea-expression’ dichotomy, its restriction to

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75 Native Title Act, ss 81 and 207A(2), see also R Bartlett (2000) Native Title in Australia, Butterworths, p 140.

76 Under the 1993 legislation, the Federal Court, in conducting appeals in relation to native title disputes, ‘must take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders’ and ‘is not bound by technicalities, legal forms or rules of evidence’ (s 82). The Native Title Act contained provisions facilitating the reception of evidence, including secret evidence, from Aboriginal people. For example, the Federal Court could, in its discretion, direct an assessor to assist the court in the gathering of evidence or in other matters, and could receive into evidence the transcript of other proceedings before any court, the Native Title Tribunal or any other person or body, and draw any conclusions it thought proper from such evidence (ss 83, 86). The Federal Court could prohibit or restrict disclosure of evidence (s 92).

77 Native Title Act, s 82(1); see generally Bartlett (2000) Native Title in Australia, p 141.
individual ownership and other characteristics which are foreign to Indigenous law. Nevertheless, such issues are not greatly different to those regularly dealt with by the Federal Court in intellectual property claims, and there is no reason why the Tribunal or Federal Court could not determine that an infringement of the community’s property rights had occurred in the case of such an appropriation.

Just as many native title applications are dealt with by mediation, there are some grounds for hoping that the Native Title Tribunal would be able to resolve the majority of matters through its formal mediation process. Such a solution may often be cheaper and quicker than an action for breach of copyright. There is, as noted above, no reason why questions of appropriation of Aboriginal art should be as difficult for the Native Title Tribunal as those relating to native title to land have been.

In any case, the acceptance by the Anglo-Australian legal system of the relevance of Aboriginal law to a dispute arising from an alleged appropriation of Aboriginal art would be of considerable symbolic significance to Aboriginal people. The political and other consequences of the Mabo decision suggest that one should not underestimate the value of symbolic change. Recognition that aspects of Aboriginal law other than land rights have survived the colonisation process would not only aid Aboriginal people in the difficult task of maintaining their culture, but would also be consistent with Australia’s obligations under international law.78

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78 See *Mabo* (1992) 175 CLR 1, per Brennan J at 42.