Copyright and Tjuringa: Can Australian 'Dreaming' Be Owned?

Riccardo Mazzola[1]

1 Riccardo Mazzola (riccardomazzola89@gmail.com / riccardo.mazzola1@unimi.it) earned a PhD in March 2018 in *Legal Philosophy and Sociology* at the Università degli Studi di Milano (Italy), Faculty of Law, Department of Legal Sciences "Cesare Beccaria". In 2016, he spent 6 months at the Australian National University as a Visiting Scholar. This paper elaborates on the material presented at the *Seventh Multidisciplinary Meeting on Indigenous Peoples (EMPI VII)* on 13th May 2016. The author wish to thank all the participants and the reviewers for their useful comments and observations on early versions of this paper.

Abstract

This paper offers an analysis of the collisions between Indigenous (Australian) normative systems on intangible resources and the Western intellectual property regimes. This study focuses prominently on Yolngu people of North-East Arnhem Land. The first part of the paper tackles the 'inter-ethnic' use of a specific notion: 'tjuringa'. This is an Indigenous Australian term adopted by Western legal language to identify those Indigenous sacred objects that incorporate native knowledge. This concept provides for a key interpretive tool to understand the 'cosmological' connections that articulate the Indigenous Australian understanding of the production of their knowledge and their cultural objects. The second part of the paper outlines the standard structure of a Yolngu knowledge system, that is the Indigenous normative regime governing the creation and the management of the Yolngu knowledge. The third and last part of the paper explains what issues prevent an interpretation of tjuringa as intellectual property objects.

Keywords: Indigenous knowledge, Indigenous knowledge systems, intellectual property law, cultural property, Indigenous Australians.

1. Introduction: Culture, Copyright and Banknotes

[A] culture dominated by
ideas about property
ownership can only imagine
the absence of such ideas in specific ways[2].

In January 1788, eleven British ships known as the 'First Fleet' docked at Botany Bay, in the future Sidney area, with the purpose of founding the penal colony which eventually became the first European settlement in Australia. Two-hundred years later, in 1988, the Reserve Bank of Australia released a special ten-dollar banknote to commemorate that event: the so-called "$10 Bicentennial Note" displayed, along with the figure

2 STRATHERN, Marilyn (1988): *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia*. University of California Press, Berkeley-Los Angeles, p.18.

of an Indigenous Australian[3] youth, elements of Indigenous artworks, including a reproduction of a Morning Star Pole ("*banumbirr*"). This wooden pole had (and still has) a central role in the ceremonial rites of the Yolngu peoples of North-East Arnhem Land[4], commemorating the death of important persons and harmonizing inter-clan relationships.

Terry Yumbulul, a member of Galpu group, originally crafted and painted the pole. In 1986, Yumbulul signed a contract sublicensing his design through Aboriginal Artists Agency (AAA). The pole was put in permanent public display in the Australian Museum in Sydney before an agent commissioned by the Reserve Bank of Australia obtained from the AAA an authorization for purposes of copyright. The right to reproduce the pole was subsequently licensed to the Reserve Bank, which portrayed it on the Bicentennial Note. Yumbulul attracted considerable criticism from his community for allowing this to happen. The Galpu group's elders argued that the artist, as any authorized pole-maker, was duty bound by Galpu 'law'[5] to ensure that the pole was not used or reproduced in a way that would, in their judgment, undermine and bring into disrepute its significance. More specifically, Yumbulul was permitted to sell the work only if it would be permanently displayed to educate the white community about Indigenous Australian culture. However, he had not been given authority to allow such a sacred item to be reproduced on money. In 1991, Yumbulul took action in the Federal Court against the AAA and the Reserve Bank, asking to invalidate the assignment of copy-

3 This paper follows the current naming convention for "Indigenous Australians" as the native population of Australia, and does not use the widespread term "Aborigines". While the etymology of 'Aboriginal' refers to the fact of being somewhere "from the beginning", the name itself was a European invention and has represented an erasure of identities that came before the arrival of colonizers in Australia in 1788. As Marcia Langton and William Jonas commented, before the coming of non-Aborigines "everyone was simply a person, and each language had its own word for person". See LANGTON, Marcia and JONAS, William (1994): *The Little Red, Yellow and Black (and Green and Blue and White) Book: A Short Guide to Indigenous Australia*. AIATSIS, Canberra, p. 3.

4 This work follows the current practice of using the term "Yolngu" ("person", in the Yolngu language) for the Indigenous people of northeast Arnhem Land. In fact, an agreement among anthropologists for an appropriate collective name for this people was decided only as of late. The name 'Murngin' (literally, 'fire sparks') had first become famous after its use in W. Lloyd Warner's classic ethnography *A Black Civilization* (1937) to define the population around Milingimbi, a Methodist mission in central Arnhem Land. Other names referring to Arnhem Land people were 'Miwuyt', 'Wulamba', 'Malag', and 'Miwoidj'. See WARNER, William L. (1937): *A Black Civilization: A Social Study of an Australian Tribe*. Harper & Brothers, New York-London, p.15. More broadly on the 'Murngin' debate, see SHORE, Bradd (1996): Culture in Mind: Cognition, *Culture, and the Problem of Meaning*. Oxford University Press, New York, pp. 231-232. Moreover, not all those referred as "Yolngu" by linguists and ethnographers identify themselves in that way, since even today they most frequently refer to themselves by more specific names which identify more narrowly defined groups of peoples. See MORPHY, Howard (1991): *Ancestral Connections: Art and an Aboriginal System of Knowledge*. The University of Chicago Press, Chicago, pp. 40-41.

5 As most Indigenous Australian groups' tongues, the Yolngu language does not possess an exact equivalent of English 'law'. They often translate the native term '*rom*' into English as 'law' or 'culture'. However, Ian Keen notes that '*rom*' may possess additional and narrower meanings: 'right practice', 'the (proper) way', 'religious law', and adds that 'the expression 'the way' would capture something of its 'religious' connotations'. See KEEN, Ian (1994): *Knowledge and Secrecy in an Aboriginal Religion*. Clarendon Press, Oxford, pp. 2, 312.

right, alleging he would not have authorized the license to the Reserve Bank had he fully understood the nature of it. However, while pointing out that "Australia's copyright law does not provide adequate recognition of Indigenous Australian community claims to regulate the reproduction and use of works which are essentially communal in origin"[6], the Court dismissed Yumbulul's claim.

Besides its judicial pattern, which prepared the way for important recognition of Indigenous Australian rights in years to come, the "ten-dollar note case" has brought to light significant theoretical issues as it exposed many conceptual and practical difficulties in applying 'western' Intellectual Property (IP) categories to describe and protect Indigenous artworks. This issue had a short career in Western scholarship, being mostly linked to anthropology and emerging as a different field of legal discussion only in the 1980s[7]. According to the majority of worldwide scholars, the state-centric, positivistic paradigm supported by the global IP system has equated IP law to the state legislation over intangible products of human mind. Consequently, western legal systems have often failed to acknowledge the existence of indigenous normative structures which only operate rarely at the level of the state. The practical outcome of this approach has been a tendency to marginalize non-state orders through a 'colonization' of newly discovered regulatory spaces by means of the imposition of transplanted regimes[8]. As a by-product of such policies, indigenous normative structures have been forced to adapt to the new rules and categories, and they have been changed in fundamental ways. In other words, when IP is available to be used and Indigenous peoples wish to enforce their claims on knowledge, they must act within a form in which they do not normally perceive themselves[9].

The general purpose of the present study is to present a closer look at the collisions between the Indigenous (Australian) and western ways to safeguard culture and knowledge. This research will prominently focus on the Yolngu people, due to the high

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6 *Yumbulul v. Reserve Bank of Australia* (1991), 21 IPR 481, par. 24. Historical narratives of the Yumbulul case can be found in: JANKE, Terry (2003): *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*. WIPO, Geneva, p.61; and Hardie, Martin (2015): "What Wandjuk Wanted?", in RIMMER Matthew (ed.), Indigenous Intellectual Property: A Handbook of Contemporary Research, Edward, Elgar Publishing, Cheltenham, UK, Northampton, MA, pp. 155-177, pp. 162-165.

7 See: Brush, Stephen B. (1993): "Indigenous Knowledge of Biological Resources and Intellectual Property Rights: The Role of Anthropology", *American Anthropologist*, Vol. 95, No. 3, pp. 653-671, p. 653.

8 See Forsyth, Miranda (2015): "Making Room for Magic in Intellectual Property Policy" in DRAHOS Peter, GHIDINI Gustavo, and ULLRICH Hans (eds.), Kritika: Essays on Intellectual Property, Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, pp. 84-113, pp. 84-85; On the 'fundamental positivistic element' of IP law, see Drahos, Peter (2006): "Intellectual Property and Human Rights" in VAVER David (ed.), Intellectual Property Rights: Critical Concepts in Law, Routledge, London, New York, pp. 225-226.

9 LAI, Jessica Christine (2014): *Indigenous Cultural Heritage and Intellectual Property Rights. Learning from New Zealand Experience?*. Springer, Heidelberg, New York, pp. 58-60.

quality of ethnographic research available on Yolngu culture and the large number of interactions among Yolngu society and Australian legal community. The strength and richness of the Yolngu case lies in its specificity, and in no way is this work suggesting that the Yolngu experience shall be adopted as a model to describe the generality of Indigenous cultures across Australia and worldwide.

In the first part of the paper, I present the 'inter-cultural dimension' of a specific notion: '*tjuringa*', an Indigenous term adopted by western legal language to identify Indigenous sacred objects incorporating native knowledge[10]. This concept will provide for a description of the 'interconnected' dimension of Indigenous Australian sacred knowledge. In the second part, I try to outline the structure of a system to govern creation and management of Yolngu knowledge. In the third and last part, I explain which problems prevent the interpretation of *tjuringa* as IP objects.

2. The Interconnected Nature of 'tjuringa'

The *Oxford English Dictionary* defines '*tjuringa*' (or '*churinga*') as a "sacred object"[11]. This Indigenous term was first used by the non-Indigenous to describe the native's sacred artworks and designs, such as Yumbulul's pole. However, the same word has become increasingly used by the Indigenous themselves in the uninterrupted dialogue with state institution[12]. Significantly, '*tjuringa*' originates directly from another expression, '*altjuringa*' ('*alchuringa*', '*alcheringa*'), translated as 'Dreaming' or 'Dreamtime'. An historical and etymological analysis of such Indigenous expressions might highlight the 'interconnected' nature of Indigenous Australians' knowledge system.

In 1904, a team of two anthropologists—the British Walter Baldwin Spencer and the Australian Francis James Gillen—famously included in the glossary to their work *The Northern Tribes of Central Australia*, the Arunta word '*alcheringa*'. They chose to translate '*alcheringa*' as 'dreamtime': ['*Alcheringa*' is the] name applied by the Arunta, Kaitsh

10 As will be discussed in Section 2, '*tjuringa*' is not a universal term included in all Indigenous Australian languages. It was originally learned from the *Aranda* (*Arunta*) people of Central Australia and eventually universalized—by Europeans—to describe Indigenous Australian sacred objects.

11 See: "*churinga*, n.", in the *Oxford English Dictionary Online*. Retrieved from: http://www.oed.com.

12 Indigenous Australian artist Harold Thomas, who in the 1970s designed the famous "Aboriginal flag", referred to its creation as 'It's like it has a *tjuringa*—a sacred object—placed in it'. See: Jopson, Debra (3 September 1994), "Aboriginal Flag Has Many Roles, Says Designer", Sydney Morning Herald. An accurate reconstruction of the events which led to the 1997 "Aboriginal flag case" (*Harold Joseph Thomas v David George Brown & James Morrison Vallely Tennant*) can be found in BARKAN, Elazar (2001): *The Guilt of Nations: Restitution and Negotiating Historical Injustices*. W. W. Norton & Co., New York, pp. 250-251.

and Unmatjera tribes to the far past, or dreamtimes, in which their mythic ancestors lived. The word '*Alcheri*' means 'dream'[13].

Eventually, in *The Arunta* (1927), Spencer and Gillen proposed an etymological analysis of '*alcheringa*'. In their view, '*alcheringa*' was a compound word, which linked '*alchera*', 'dream', and the suffix '*-ringa*', 'belonging to'[14]. However, in the same work, the two authors appeared to mix up different meanings of '*alcheringa*'[15]. While identifying '*alchera*' as 'dream' (in its common sense) 'in the ordinary language of Arunta', they stated that "the word *Alchera* was always and only used in reference to past times during which the ancestors [...] wandered over the country"[16]. The reference to an 'ordinary language' among Arunta seemed to assume the existence of a special or ritual language, but Spencer and Gillen did not scrutinize this issue.

A dispute on the real meaning of '*alcheringa*' thrilled many scholars of the day[17], but did not prevent the dissemination of the English 'dreamtime' and of the equivalent word 'dreaming'[18]. In 1989, the Australian philosopher Max Charlesworth significantly pointed out that "the terms 'Dreaming', 'The Dreaming', and 'Dreamtime' 'have now been appropriated by the Aborigines themselves"[19]. The appropriation of the term by the Indigenous Australians brings about the phenomenon of different uses or different

13 SPENCER, Walter B., and GILLEN, Francis J. (1904): *The Northern Tribes of Central Australia*. Macmillan, London, p. 125. Actually, the first occurrence of '*alcheringa*' in an ethnographic work dates back to 1896, when in his *Report of the Work of the Horn Scientific Expedition to Central Australia*, Spencer explained that the Itirkawara myth refers to the Alcheringa 'or as Mr Gillen appropriately renders it, dream times'. See: SPENCER, Walter B. (1896): "Through Larapinta Land. A Narrative of the Expedition", in *Id*. (ed.), Report of the Work of the Horn Scientific Expedition to Central Australia, Mellville, Mullen and Slade, Melbourne, pp. 1-96, p. 50.

14 See: SPENCER, Walter B., and GILLEN, Francis J. (1927): *The Arunta*. MacMillan, London, p. 591.

15 See: DEAN, Colin (1996): *The Australian Aboriginal 'Dreamtime': Its History, Cosmogenesis Cosmology and Ontology*. Gamahucher Press, Geelong-Victoria, Australia, p. 13; and DRAHOS, Peter (2014): *Intellectual Property, Indigenous Peoples and Their Knowledge*. Cambridge University Press, Cambridge, p. 31.

16 Spencer and Gillen (1927), *op.cit*., p. 592. The authors quoted at pp. 593-594 a work by Lutheran missionary STHRELOW Carl (with Moritz von Leonhardi) (1904): *Die Aranda und Loritja-Stämme in Zentral-Australien*, in which '*alchera*' was defined as 'something that has no beginning'.

17 Among others, Australian anthropologist Adolphus P. Elkin believed that Spencer and Gillen obtained their information from Northern Aranda, while other informants among Western Aranda had a different view on the meaning of '*alcheringa*'. See: Elkin, Adolphus P. (1934): "Cult-Totemism and Mythology in Northern South Australia", *Oceania*, No. 5, pp. 171-192, p. 175. Elkin's thesis seems to assume the existence of different religious beliefs among Aranda on their mythical past. See: Dean (1996), *op.cit*., p.13.

18 Actually, the occurrence of 'dreamtime' and 'dreaming' in ethnographic work became common only from the early 1930s and more specifically, from Elkin's influential work *The Secret Life of Australian Aborigines* (1932). Previously, authors used to mention only the Aboriginal term '*alcheringa*' without attempting to provide a translation. The most famous instances of this orientation include Lucien Lévi-Bruhl's *How Natives Think* (1910) and Émile Durkheim's *The Elementary Form of Religious Life* (1912). However, the identification of 'dreaming' as synonymous of 'dreamtimes' is not undisputed. More specifically, the most common opinion asserts that 'dreaming' designates what happened during 'dreamtime'. See among others: Elkin, Adolphus P. (1932): The Secret Life of Australian Aborigines, *Oceania*, No. 3, pp. 119-138, p.129; and Dean (1996), *op.cit*., p. 18.

19 Charlesworth, Max (1989): "Introduction", in CHARLESWORTH Max, MORPHY Howard, BELL Diane, and MADDOCK Kenneth (eds.), Religion in Aboriginal Australia, University of Queensland Press, St. Lucia, pp. 1-19, p. 9.

meanings associated with it. Nowadays, '*altjuringa*' (and 'Dreaming') is undisputedly recognized as a plurivocal notion. Nevertheless, doubts arose regarding the exact number of meanings it possesses[20]. For the purposes of the present work, there are three relevant meanings which ethnographers have commonly attributed to '*altjuringa*':

(i) it is a *narrative mythical account of the foundation and shaping of the entire world by the ancestor* heroes who are uncreated and eternal[21];

(ii) it refers to the fact that *the essence or spiritual power of the ancestors is contained within the land* at certain sacred places, and in certain species of fauna and flora [22];

(iii) it refers to *the law*, the moral and social codes that are based upon the founding drama[23].

However, it is probably not helpful to think about these meanings as hermetically separated semantic fields, since they constantly intersect and mix with each other.

At the beginning of the present section, a close linguistic relationship between '*altjuringa*' and '*tjuringa*' was highlighted. This affinity entails an apparent semantic overlapping. In fact, according to Australian anthropologist Howard Morphy, Indigenous Australian art (including songs, dances, paintings, and sculptures) cannot be understood without the concept of 'Dreaming'[24]. Within the totemic cosmos of Indigenous Australians' culture, *tjuringa* commemorate a relationship between the sacred ancestors, the landscape, and the customs. Taking account of this complex relationship, Christopher B. Graber suggested defining Indigenous Australian art as a construction of a "totemic polygon" encompassing the Dreamtime ancestors, the Country, totemic customs, and the artist[25].

The Yolngu term often translated as 'dreaming' is '*wangarr*'. The primary meaning of '*wangarr*' is 'sacred ancestors', a class of extraordinary beings which shaped and formed the land during their ancestral travels. The 'interconnected' nature of Yolngu

20 For instance, Dean (1996, *op.cit.*, p. 18) recognized six different meanings of the term "Dreaming". François Dussart instead pointed out five different meanings. See: DUSSART, François (2000): *The Politics of Ritual in an Aboriginal Settlement*. Washington-London: Smithsonian Institution Press, 2000, p. 19.

21 See Charlesworth (1989), *op.cit.*, p. 11.

22 See: RADCLIFFE-BROWN, Alfred R. (1952): *Structure and Function in Primitive Society*. Routledge and Kegan Paul, London, p. 159.

23 See among others: STANNER, William E. H. (1934): "The Daly River Tribes A Report of Field Work in North Australia", *Oceania*, Vol. 3, No. 4, pp. 377-405, p. 401.

24 See: MORPHY, Howard (1998): *Aboriginal Art*. Phaidon, London.

25 Graber, Christoph B. (2009): "Can Modern Law Safeguard Archaic Cultural Expression? Observations from a Legal Sociological Perspective", in ANTONS Christoph (ed.), Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region, Kluwer Law International, Alphen aan den Rijn, pp. 159-176, p. 163.

'*wangarr*' (and its connection with sacred artworks and designs) is emphasized in Yolngu language, in which terms for 'sacred object' and 'land' belong to a group of related names and concepts, known as '*likan*' or '*joint*' (literally: '*elbow*'). This group includes:

- '*wa:nga*': 'land';
- '*wangarr*': 'sacred ancestors' (also 'dreaming');
- '*rangga*': 'sacred objects' (the Yolngu '*tjuringa*');
- '*nga:rra*': the 'ceremony' in which *rangga* are disclosed to novices;
- '*djungayi*' o '*djunggayarr*': the 'caretaker' of certain objects and ceremonies.

As Morphy points out, a sharp distinction between these concepts has no place in Yolngu ontology, where land and sacra identify two features of the same entity, rather than distinct and detached objects[26].

3. An Indigenous 'Dreaming-based' Knowledge System

Besides the aforementioned 'Yumbulul case', Yolngu people took part in many other significant lawsuits which led Australian legal scholarship to raise its consciousness toward Indigenous' claims over their knowledge and culture.[27] A few years after dismissing Yumbulul's requests, the Federal Court of Australia faced a case put forward by Johnny Bulun Bulun, an Indigenous artist. In accordance with the traditional laws and customs of the Ganalbingu peoples, he created a sacred image incorporated in a bark painting named 'Magpie Geese and Water Lilies at the Waterhole'. The artist's artwork was altered and copied, imported into Australia, and sold nationally by R & T Textile Ltd. Bulun Bulun and George Milpurrurru, a senior representative of the Ganalbingu peoples, commenced a copyright action against R & T Textile. Bulun Bulun released an *affidavit* to the Court in which he explained the complex relationship between Ganalbingu peoples and *tjuringa*. Here is an excerpt:

> "Barnda gave us our language and law. *Barnda gave to my ancestors the country and the ceremony and paintings associated with the country.* My ancestors had a

26 Morphy (1991), *op.cit.*, p. 189.

27 Five of the main Australian copyright cases concerning the relation between IP law and Indigenous artworks involved the Yolngu community: *Yangarriny Wunungmurra vs Peter Stripes Fabrics* (1985), *Bulun Bulun v Nejlam* (1989), *Yumbulul v Reserve Bank of Australia* (1991), *Milpurrurru and Others v Indofurn Pty Ltd and Others* (1993), and *Bulun Bulun v R & T Textiles* (1998).

> responsibility given to them by Barnda to perform the ceremony and to do the paintings which were granted to them. This is a part of *the continuing responsibility of the traditional Aboriginal owners* handed down from generation to generation [...]. If the *rituals and ceremonies attached to land ownership* are not fulfilled, that is if the responsibilities in respect of the Madayin are not maintained then traditional Aboriginal ownership rights lapse" [emphasis added][28].

Bulun Bulun's *affidavit* provides for three interesting starting points to analyze the content of Yolngu 'law' surrounding sacred objects:

(i) one of the *wangarr* ancestors gave the image to Yolngu;
(ii) Indigenous 'traditional owners' who obtained the image have responsibilities toward it;
(ii) the image is 'attached to land ownership'.

In the following segment of the paper, based on recent ethnographic research carried out in Eastern Arnhem Land[29], I will try to examine such statements.

In Yolngu cosmology, sacred images incorporate the knowledge of the Country: in Howard Morphy's view, Indigenous '*tjuringa*' are indeed a kind of "maps of land"[30]. They are maps in the sense that the land itself is a sign system, which is the result of the mythological actions and transformations of the *wangarr* ancestors. Indigenous sacred images commemorate the actions of the ancestral beings related to the landscape and enable people to maintain contact with the spiritual dimension of existence. This 'knowledge', incorporated in artworks, can hardly be labelled by means of lawyerly definition[31]. 'Traditional Knowledge' (TK) is the term with the greater currency in the context of international legal debate on the protection of Indigenous cultural heritage, even if 'there is as yet no accepted definition of traditional knowledge at the interna-

28 The excerpt can be found in JANKE, Terri (2003): Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions, *op.cit.*, pp. 54-56. See also *Bulun Bulun v R & T Textiles Pty Ltd.* (1998) 41 IPR 513.

29 Especially in Drahos' (2014) cited study, *Intellectual Property, Indigenous Peoples and Their Knowledge*.

30 Morphy (1998), *op.cit.*, p. 103.

31 Some authors referred to the difficulty in finding a legal qualification which fit Indigenous Australian knowledge as the 'quicksand of definition'. See: FRANKEL, Susy, and DRAHOS, Peter (2012): "Indigenous Peoples Innovation and Intellectual Property: The Issues", in Id. (ed.), Indigenous Peoples' Innovation. Intellectual Property Pathways to Development, ANU E Press, Canberra, ch. 1; and Drahos (2014), *op.cit.*, p. 23.

tional level'[32]. However, 'traditional' can be of disservice because it can possibly refer to a knowledge system not open to innovation: on the contrary, it is commonly recognized that indigenous peoples' knowledge can be innovative[33].

This article argues that it is possible to identify *four* traits which characterize Yolngu knowledge, including the following:

(i) a '*place-based*' knowledge;
(ii) inscribed in a 'scheme of *cosmological connection*';
(iii) based on *observation* and *memory*;
(iv) *handed down* from generation to generation.

A systematic analysis of these features may shine a light on the inner structure of the Yolngu systems which govern creation and sharing of sacred artworks.

3.1. Indigenous Knowledge as a Place-based Knowledge[34]

The Yolngu '*wangarr*' differs from western metaphysics; while the latter is about space and time, the former polarizes on *places*. In fact, Indigenous Australian cosmologies focus on explaining the origin of specific areas of land. In *wangarr* stories ('*dhuwa*'), ancestral beings always began a journey from one place to another, while exercising their power to transform the landscape. Thus, Yolngu *wangarr* speaks of events that are made concrete by virtue of their being embodied in the Country, which through its topography serves as a partial physical record of these events. Australian anthropologist Ian Keen argued that, since a watchful presence of 'mythical ancestors' remains in

32 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2016): Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expression (WIPO/GRTKF/IC/30/INF/7), p.40. The same glossary provides a very broad definition of TK as embracing 'the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge'.

33 For instance, the WIPO draft article "The Protection of Traditional Knowledge" acknowledges that "traditional knowledge systems are frameworks of innovation". Retrieved from: http://www.wipo.int/meetings/en. Moreover, the Convention on Biological Diversity (CBD) in Article 8(j) requires its members to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities". For an account of the controversies in applying the label of 'traditional' to Indigenous knowledge see, among others, Pires De Carvalho, Nuno (2007): "From the Shaman's Hut to the Patent Office: A Road Under Construction", in MACMANIS Charles R. (ed.), Biodiversity and the Law. Intellectual Property, Biotecnology and Traditional Knowledge, Earthscan, London, pp. 241-279, pp. 242-244. For a survey of the difficulties in introducing the term 'tradition' in the context of discussions on TK promoted by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore see GROTH, Stephan (2012): *Negotiating Tradition. The Pragmatics of International Deliberations on Cultural Property*. Universitätsverlag, Göttingen, pp. 72-73.

34 For the use of the expressions 'place-based knowledge' and 'place-based innovation' see: Drahos, Peter (2011): "When Cosmology Meets Property: Indigenous Peoples' Innovation and Intellectual Property", *Prometheus*, Vol. 29, pp. 233-252, p.241; and Frankel and Drahos (2012), *op.cit.*, ch. 1.

the Country, Indigenous cosmologies maintain a certain degree of materiality.[35] Moreover, quite crucially, Indigenous 'Dreaming' seems committed to events which are simultaneously part of a distant past and the present. In other words, *wangarr* ancestors did not leave the Country, but remain a part of it.[36] The topographical features of the Country are thus places where the ancestors remain active. Therefore, knowledge incorporated in sacred images is at the same time a knowledge which *originated from* the Country, as it can be traced to the acts of powerful ancestors in shaping the land, and a knowledge *about* the Country, since it reproduces and 'map' the land inhabited by the clan.

3.2. Indigenous Knowledge as a Scheme of Cosmological Connection

The relationship between Indigenous knowledge (reified in sacred images) and Country manifests itself in a more articulate manner. I take advantage here of the alternative use of the word 'connectionism' carried out by Peter Drahos[37]. Usually 'connectionism' refers to an approach of cognitive science, which draws on interaction of units in the context of a specific network. The 'network' of Indigenous Australian communities stretches well beyond the conventional understanding of 'social network', since it includes not only human beings, but also animals, plants, the ancestors and the land itself[38]. In Yolngu society, the threads, which shape the connections between different units, once again, the events told by *wangarr* stories. Indigenous knowledge operates thus to create an intricate web of relations as well as to help individuals orient into it. This 'scheme of cosmological connection', characterized by the variety of the

35 See: KEEN, Ian (2004): *Aboriginal Economy and Society: Australia at the Threshold of Colonisation*. Oxford University Press, South Melbourne, p.211. Peter Drahos contended that the word 'spiritual', frequently used to describe the relationship that Indigenous Australians have with their land probably misses the real nature of their cosmologies. See: Drahos (2014), *op.cit.*, p. 26.

36 Some expressions have been coined to deal with this feature of Indigenous Australian Dreaming. For instance, William Stanner proposed the neologism 'everywhen'. See: STANNER, William E. H. (1990): "The Dreaming", in William Edwards (ed.), Traditional Aboriginal Society, Macmillan, London, pp. 225-236, p.226. François Dussart calls it 'the Ancestral Present'. See: DUSSART, François (2000): The Politics of Ritual in an Aboriginal Settlement, *op.cit.*, p. 19. Max Charlesworth pointed out that Aboriginal Dreaming can be represented not as 'a horizontal line extending back chronologically through a series of pasts, but rather [as] a vertical line in which the past underlies and is within the present'. See: CHARLESWORTH, Max (1997): *Religious Inventions: Four Essays*. Cambridge University Press, Cambridge, p.74. For a wider discussion on this point, see: SWAIN, Tony (1993): *A Place for Strangers: Towards a History of Australian Aboriginal Being*. Cambridge University Press, Cambridge, pp. 14-22.

37 See: Drahos (2014), *op.cit.*, pp. 39-40.

38 William Stanner speaks about a 'totemic association'. See: Stanner, William E. H. (1989): "Religion, Totemism and Symbolism", in CHARLESWORTH Max, MORPHY Howard, BELL Diane, and MADDOCK Kenneth (eds.), Religion in Aboriginal Australia, University of Queensland Press, St. Lucia, pp. 137-172, pp. 137-139.

types of unity in the network and the density of connections[39], can hardly be grasped by outsiders.

3.3. Indigenous Knowledge as Based on Observation and Memory

The 'life' of Indigenous Australian knowledge knows three distinct phases:

- first, the knowledge is *acquired* through the observation of the Country;
- then, the knowledge is (or must be) *preserved* by the community;
- last, the knowledge is *transmitted* to the next generation.

The observation of the land, by virtue of the previously examined scheme of cosmological connection, entails the ability to orient within at least two epistemic levels. The first level concerns the physical world; the second one regards the presence of sacred ancestors within the land. For example, the sighting of a snake could be interpreted as a random event or it can be judged as a manifestation of the Rainbow serpent, one of the ancestors of the Yolngu peoples[40]. Therefore, to 'observe', the Country requires a great degree of care and the ability to constantly shift between such different epistemic conceptions of reality, and may also produce practical benefit: for the Indigenous Australian living in direct contact with the nature[41], knowing the land, the animals, and the plants has a great importance and directly affects their chance of survival[42]. The only way to be trained to acquire a deep knowledge of the land is to observe it directly, to become *intimate* with it[43]. After this knowledge is acquired through observation, it must be memorized and preserved. Indigenous Australian communities designate some of their members as persons in charge of keeping such knowledge.

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39 Aboriginal knowledge has been defined also as 'relational' and 'detailed'. See: Van Beek, Walter, and Jara, Fabiola (2002): "Granular Knowledge. Cultural Problems with Intellectual Property and Protection", in GROSHEIDE Willem, and BRINKHOF Jan J. (eds.), Intellectual Property Law, Intersentia, Antwerp, Oxford, New York, 2002, pp. 35-59, p.39.

40 See Drahos (2014), *op.cit.*, p.43.

41 Although most Indigenous Australians live in cities, country towns, coastal areas, or rural areas, some of them still live in remote areas and reserves, which are today run by councils. Other Indigenous families have been able to return to their ancestral land, and although they may not be able to live like their ancestors, they have been able to re-establish or maintain the ancestral connection with the land, where the knowledge systems described here were developed.

42 From this point of view, Indigenous knowledge, or a part of it, can be defined as 'practical knowledge'. See: Van Beek and Jara (2002), *op.cit.*, p. 39.

43 The relationship of intimacy between individuals and the Country within the Indigenous context is so strong that in some cases, representatives of specific communities involved in litigations with western counterparts asked the Court to move the trial from the courtroom to their land. On this issue see, among others: Anderson, Louise (2003): "The Law and the Desert: Alternative Methods of Delivering Justice", *Journal of Law and Society*, Vol. 30, pp. 120-136.

3.4. Indigenous Knowledge as Handed Down from Generation to Generation

Indigenous knowledge is an extremely powerful instrument, which must be governed carefully[44]. According to a classic ethnographic study by A. P. Elkin, not all individuals possess the ability to interact with the Country in such a complex way; on the contrary, only some members of the community have an innate predisposition to observe and remember[45]. These peoples are included in a system of knowledge transmission, after a long period of apprenticeship devoted to enhancing their abilities. Others are excluded from this system, by means of a mechanism of *secrecy*.

The existence of an apprenticeship-based system of transmission highlights important features of Indigenous Australian knowledge. More specifically, it qualifies Indigenous Australian knowledge as 'personal'[46]; by virtue of the aforementioned relationship of intimacy with the Country, knowledge that can be inferred by observation can hardly be generalized and codified, but it must be *directly* taught from someone who actually lived the experience of 'knowing' the Country[47]. Moreover, such 'traditional' transmission of knowledge allows one to grasp the structure of the Yolngu 'Dreaming-based' system. Drahos[48] suggested imagining these systems as concentric circles made up of individuals. Those in the innermost circle are the most knowledgeable peoples (often referred as 'the elders'). They have arrived in the inner circle after a life-long process of initiation. Other individuals who occupy the outer rings are at different stages of their apprenticeship. What distinguishes different circles is not just the amount of knowledge possessed by a person, but also *her duty toward knowledge*. In fact, Indigenous knowledge systems appear as a part of an unbroken chain of custody, so that those who come after will know how to interact with the Country. While elders have the primary duty to continue this chain, other members of the community are

44 KEEN, Ian (1994): *Knowledge and Secrecy in an Aboriginal Religion*. Clarendon Press, Oxford, p.106.

45 See ELKIN, Adolphus P. (1977): *Aboriginal Men of High Degree*. University of Queensland Press, St. Lucia, pp. 10-15. This concept may be considered an outdated/traditional understanding and it has come under debate. Notwithstanding this, in favor of Elkin's thesis, see the recent works Drahos (2014), *op.cit.*, p. 158; and KELLY, Linne (2015): *Knowledge and Power in Prehistoric Societies: Orality, Memory and the Transmission of Culture*. Cambridge University Press, Cambridge, pp. 133-135.

46 See: Van Beek and Jara (2002), *op.cit.*, pp. 38-39. Susan Frankel and Peter Drahos speak about "uncodified knowledge". See: Frankel and Drahos (2012), *op.cit.*, ch. 1

47 Hungarian philosopher and chemist Michael Polanyi conceptualized a kind of 'knowledge' that can be acquired and transmitted only by means of direct contact between master and apprentice. See: POLANYI, Michael (1969): *Personal Knowledge. Towards a Post-Critical Philosophy*. Routledge, London, p.53.

48 Drahos (2014), *op.cit.*, pp. 8-9.

bound to other kind of duties: for instance, artists must perform the ceremonies prescribed by the Dreaming, and thus they must create sacred artworks.

It is easy to realize that the concepts that dominate the use of knowledge in these contexts is not that of 'right', which characterize the Western ownership model, but rather the ones of 'duty' and 'permission'. Even if it was not impossible to describe Indigenous systems in terms of correlative 'rights' and 'duties' (by identifying with the land itself or with the ancestors, the ones who are entitled to these rights), access to knowledge, along with the use of *tjuringa*, is generally governed by conditional permission, rather than what a lawyer would call a transfer of a legal title[49]. Peoples with the sufficient degree of knowledge, such as the artists, thus have permission to create a *tjuringa* and a duty to use it in a certain way.

4. Tjuringa as Intellectual Property

In this section, I will try to overlay the model of Indigenous knowledge systems provided in section 2 with the classic model of an IP regime. I argue that such overlap can hardly be carried out with reference to *tjuringa* because IP imposes a conceptual partition of the totemic cosmos which reunites Indigenous art, 'Dreaming' tales and the Country. This conceptual partition has no place in the Indigenous conception.

Many authors tried to identify the 'essence' of IP. Paul Torremans and John Holyoak succinctly defined IP as follows:

> "Intellectual property rights are first of all property rights. Second, they are property rights of something intangible. And finally, they protect innovations and creations and reward innovative and creative activity"[50].

49 This peculiar feature of Indigenous knowledge systems became apparent during recent cases of cultural interaction between the Indigenous Australian worldview and the Western ownership conception. For instance, the Waitangi Tribunal report *Ko Aotearoa tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (2011) mentions at p. 44 the Maori word '*kaitiaki*', which is translated as 'custodian': "Each *taonga* work has *kaitiaki* [custodians]—those whose lineage or calling creates an obligation to safeguard the *taonga* itself and the *māturanga* [knowledge] that underlies it". Also, some expressions from the Yolngu language, used by Indigenous representative during 1990s litigation cases similarly denoted a different cultural background: '*nayi watangu*' ('keeper of the land') and '*djungaya*' ('guardians'). See: Janke (2003), *op.cit.*, p. 45.

50 TORREMANS, Paul, and HOLYOAK, John (1998): *Intellectual Property Law.* Butterworth, London, p.12.

In 2012, Alexandra George[51] identified four 'core criteria', essential features that characterize IP objects:

(i) an IP object is an *ideational object* (a specific kind of thought);
(ii) it can be represented in a *documented form*;
(iii) it is created by an *author*;
(iv) it bears a degree of *originality*.

If these are the essential parameters we must bear in mind to recognize IP objects, many problems arise when they are applied to *tjuringa*. Although *tjuringa* may fulfill the first two prerequisites, since Indigenous sacred artworks are usually both (in some way) 'ideational objects' and fixed on a material support[52], the conception of authorship found in Indigenous culture often bears little resemblance to the one operated by western societies. In fact, as was already pointed out, Indigenous 'authors' reproduce works which have been provided to them by deities or ancestors. Therefore, *tjuringa* created by Indigenous artists cannot be traced to identifiable, individual authors that would be recognized by copyright law. Moreover, the incremental and collaborative nature of contributions by various creators may be made over numerous generations, resulting in a chronological period of creation and pattern of authorship too wide to be recognized by IP law. As it can easily be understood, this pattern also affects the opportunity to recognize a certain degree of originality in *tjuringa*. In Indigenous terms, the fact that they copy the work of other artists working within the tradition in not offensive, because generally there is no expectation that an artist within the tradition will be "original" in the work he creates. Conversely, western legal discourse has promoted originality as a precondition of cultural value. In IP law, this criterion of value is reflected in that a work must be 'original' before it can be protected by copyright[53].

Adopting George's perspective may thus explain the reasons for excluding *tjuringa* from the category of IP objects. Indigenous knowledge systems, which traditionally

51 GEORGE, Alexandra (2012): *Constructing Intellectual Property*. Cambridge University Press, Cambridge, p.144.

52 However, this is not always true. As George points out, '[s]ome of the traditional lore did not require a documented form, particularly where heritage was passed from generation to generation through the medium of oral history and performance traditions (especially in pre-literate societies)'. See: GEORGE (2012), *op.cit.*, p. 279. See also: MCDONALD, Ian (1998): *Protecting Indigenous Intellectual Property. A Discussion Paper*. Australian Copyright Council, Redfern, p.41.

53 Nevertheless, the issue of originality has been overcome in some significant Australian legal cases. For instance, Justice Von Doussa in *Milpurrurru and Others v Indofurn Pty Ltd and Others* (1993) (130 ALR 659) stated that: "Although the artworks follow traditional Indigenous Australian form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality".

regulate the use of *turinga* in Indigenous Australian communities, do not demand creatorship or originality in the sense required by IP laws.

Considering the discrepancy between *tjuringa* and IP objects, one might ask why such incommensurability exists. In my opinion, the reasons must be found in the 'holistic' or (more specifically) 'interconnected' conceptualization of Indigenous works of art, expressed by the notion of the 'totemic polygon'. As noted, such a concept implies a close connection between different aspects of Indigenous culture: namely, the ancestors, the Country, the totemic customs, and the artist himself. Other scholars recognized the existence of such a complex dimension of Indigenous Australian art, with particular reference to the relation between *tjuringa* and the Country[54]. I argue that the effect of cultural clash between the western 'property-ownership' model and Indigenous worldviews has been to *partition* in various ways the Indigenous 'interconnected' cosmos: the most obvious example being that land issues (real property law) have become separated from knowledge issues (IP law). This partition has no place in the model of the Indigenous Australian knowledge system provided in section 2.

An example of the 'breaking apart' role of western legal tradition can be found in *Milpurrurru v Indofurn Pty Ltd* (1993). In this significant legal case, imported carpets reproduced Indigenous Australian *tjuringa* that were altered by the carpet manufacturer, thereby distorting the cultural message of the works. Various artists instituted a copyright action against the company which had imported the carpets, Indofurn Pty Ltd, succe ssfully winning their case. During the judicial proceeding, some plaintiffs seemed uncomfortable in talking about their rights in land and in artworks as two separate issues.[55] However, the Court raised an objection to the claim that Australian common law should recognize a connection between an interest in land and interest in a related artwork. According to Justice Von Doussa:

> "The principle that ownership of land and ownership of artistic works are separate statutory and common law institutions is a fundamental principle of the

54 Drahos speaks of 'territorial cosmos' as "duty-based ancestral systems in which knowledge and land had become integrated". See: Drahos (2014), *op.cit.*, p. 13. Kirsten Anker points out that a 'metonymic relationship' exists between land and Indigenous artworks. See: Anker, Kirsten, "The Truth in Painting: Cultural Artefacts as Proofs of Native Title", *Law Text Culture*, Vol. 9, pp. 91-124, p.98. I take the liberty to mention a short work of mine concerning the same topic: Mazzola, Riccardo (2015): "Atto probatorio vs. atto ostensivo. Fra epistemologia ed antropologia giuridica", *Rivista Internazionale di Filosofia del Diritto*, Vol. 91, pp. 301-308.

55 Banduk Marika, one of the artists involved in the case, declared in his *affidavit* that his 'rights to use this image arise by virtue of my membership of the land owning group. The right to use the image is one of the incidents arising out of land ownership'. See Janke (2003), *op.cit.*, p. 11.

Australian legal system which may well be well characterized as 'skeletal' and stands in the road of acceptance of the foreshadowed argument"[56].

With this statement, the Court *extrapolated* the *tjuringa* from its context, that of a wider totemic cosmos. In denying the connection between the Indigenous Australian art and the Country (where Dreaming ancestors live), the Court applied to the *tjuringa* a concept of 'property' unknown to Indigenous culture. When deprived of its link with the Country, a *tjuringa* becomes a different object, similar to western artwork. The changing conceptualization of 'property' applied to *tjuringa*, due to the removal of the sacred artwork from its usual context, determines the relevance of originality and authorship, which are not conceived as essential features according to Indigenous knowledge systems.

5. Conclusion

This paper has discussed the structure of Indigenous Australian knowledge systems. It has presented a general 'Indigenous Australian' way of managing and creating knowledge, subject to more or less minor changes, and referred more specifically to Yolngu groups. First, it presented the (westernized) notion of '*tjuringa*'. Then, it discussed the 'interconnected' nature of *tjuringa*, as a part of a wider cosmos, and the way in which such conceptualization influences the structure of Indigenous Australian regimes surrounding intangibles. In fact, the main purpose of this work was to connect Indigenous Australian (Yolngu) art and sacred knowledge to a more complex dimension, identified by the notion of 'territorial cosmos'. Section 1-4 have outlined four main points surrounding the Indigenous conceptualization of knowledge:

(i) Indigenous *tjuringa* cannot be understood without referring to *altjuringa* ('Dreaming', '*wangarr*');

(ii) the *tjuringa* incorporate Indigenous knowledge, which is a place-based knowledge inscribed into a scheme of cosmological connection, is founded on observation

56 See: *Milpurrurru and Others v Indofurn Pty Ltd and Others*, *op.cit.*; Justice Von Doussa quoted Justice Brennan in the groundbreaking case on Aboriginal ownership of land *Mabo v Queensland* (No 2) (1992): "However, recognition by our common law of the rights and interests in land of indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system". See *Mabo v Queensland* (No 2) (1992) HCA 23; (1992) 175 CLR 1.

and memory, and is 'traditional' as it is handed down from generation to generation;

(iii) the *tjuringa* belong to a wider cosmos, in which sacred ancestors and land are also connected;

(iv) the superimposition of IP law onto such cosmos provokes a partition of the 'interconnected' worldview of Indigenous Australians.

Points (iii) and (iv) are of utmost importance for the study of the relationship between Indigenous knowledge and IP law. In fact, they circumscribe the exact meaning of 'commodification' of Indigenous Australian art. More specifically, to 'commodify' Indigenous artworks (to make them into commodities by way of applying IP constructs to Indigenous normative structure) denotes here a process of 'extraction' of such artworks from the cultural environment in which they were conceived and produced: that is, the territorial cosmos. IP categories commute the 'interconnected' version of an Indigenous *tjuringa* into a 'western' piece of art, with no connection to land. Therefore, a clear delimitation of the Indigenous Australian worldview, and particularly of the Indigenous territorial cosmos (implying a vision of artworks as closely linked to 'land' and 'religion') ultimately helps to understand IP law difficulties in 'fitting' into Indigenous regimes.