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Indigenous 'Intellectual Property'

A Conceptual Analysis

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1. Introductory Remarks: Placing Indigenous 'Intellectual Property'

El original es infiel a la traducciòn
[The original is unfaithful to the translation][1]

1.1. Land, Designs and Title Deeds: The 'Gove Land Rights Case'

In 1971, the *Gove* case[2] first tested the reliability of Indigenous Australians' proprietary claims over North-East Arnhem Land territory.[3] Three years before, the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968 (NT)* stated the excision of a large part of Gove Peninsula (Northern Territory) in favour of the mining company NABALCO (North Australia Bauxite and Aluminia Company Ltd). In March 1969, several representatives of Yolngu community[4] - which lived around the Methodist

[1] J. L. Borges, 'Sobre el "Vathek" de William Beckford' in *Obras Completas*, 2nd ed., Buenos Aires, Emecé, 1974, at 732.
[2] *Millirpum v Nabalco Pty Ltd* (1971) ('*Milirrpum* case', 'Gove land rights case').
[3] This study follows the current naming convention for 'Indigenous Australians' as the native population of Australia, and does not make use of 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-Indigenous 'everyone was simply a person, and each language had its own word for person'. See M. Langton & W. Jonas, *The Little Red, Yellow and Black (and Green and Blue and White) Book: A Short Guide to Indigenous Australia*, Canberra, AIATSIS, 1994, at 3. More in general, as is known, there is some argument over whether the notion of 'Indigenous' is capable of a precise, inclusive definition that can be applied in the same manner to all regions of the world. 'Indigenous' and 'indigenous peoples' will be used throughout this work without any intention to comment on this debate.
[4] This work follows the current practice of using the term 'Yolngu' ('person', in the Yolngu language) for the Indigenous population of North-East 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 W. L. Warner, *A Black Civilization: A Social Study of an Australian Tribe*, New York-London, Harper & Brothers, 1937, at 15. More broadly on the 'Murngin' naming issue, see B. Shore, *Culture in Mind: Cognition, Culture, and the Problem of Meaning*, New York, Oxford University Press, 1996, at 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 that identify more

mission of Yirkkala - sued both NABALCO and the Government of Commonwealth, complaining about the unconstitutionality of the mining lease agreed between the two parties. Yolngu people claimed they enjoyed legal and sovereign rights over Yirkkala and sought declarations to occupy the land free from interference pursuant to their rights. According to Yolngu people, the agreement violated the constitutional principle of fair compensation, and the right of Indigenous community to be previously informed and consulted in case of governmental decisions that could potentially harm the Gove Peninsula territory.[5] Yolngu were particularly concerned about the disruptive impact of mining activities on the Yirkkala environment, and to be limited - or even forbidden - to access sacred places, fundamentally bound to Indigenous cultural identity.

In 1970, two anthropologists - William Stanner and Roland Berndt - were involved in the preliminary proceedings of the lawsuit as 'expert witnesses' and asked to present to the Court a survey on the Indigenous 'land tenure' system.[6] Stanner travelled to Yirkkala (along with Yolngu appointed representative in the Court, Frank Purcell) and his account of the expedition - eventually presented at the monthly Seminar of Anthropology of the Australian National University - described a peculiar - to the eyes of a Western observer - episode:

> [w]e were then taken by the hand and led towards the singing. As we walked we were asked to look only at the ground and not to raise our heads until told to do so. We went into a patch of jungle, and then we were given a sudden command to look. At our feet were the holy *rangga* or emblems of the clan, effigies of the ancestral beings, twined together by long strings of coloured features. I could but look: it was not the time or place to start an inquisition into these symbols. A group of dancers, painted - as far as I could see - with similar or cognate design, then went through a

narrowly defined groups of peoples. On this point, see H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, Chicago, The University of Chicago Press, 1991, at 40-41.

[5] In 1963, a Selected Committee of the Australian House of Representatives had recommended the institution of a preliminary consultation system to involve the Indigenous community in the decision-making process surrounding the exploitation of North-East Arnhem Land territory. Moreover, the Committee supported the enactment of a compensatory mechanism in favour of Yolngu in case of enforced excision. The 1968 *Mining Ordinance* explicitly contradicted the Committee's recommendations.

[6] The *Milirrpum* case involved first professional anthropologists as 'expert witnesses' in a lawsuit concerning Indigenous land rights. See N. M. Williams, 'Stanner, *Millirpum*, and the Woodward Royal Commission', in M. Hinkson & J. Beckett (eds.), *An Appreciation of Difference: WEH Stanner: Anthropology and Aboriginal Australia*, Canberra, Aboriginal Studies Press, 2008, at 198-216. On the evolution of this judicial practice see (in general) P. Burke, *Law's Anthropology: From Ethnography to Expert Testimony in Native Title*, Canberra, Australian National University E Press, 2011.

> set of mimetic dances […] One of the men said to me: "now you understand". He meant that I had seen the holy *rangga* which, in a sense, *are the clan's title-deeds to its land*, and had heard what they stood for: so I could not but 'understand'.[7]

Thus, Stanner stated that *rangga* - sacred objects carrying ancestral designs used by Yolngu in secret ceremonies - identified Yolngu '*title deeds*' to their land.

Stanner's lexicon[8] - linking elements of Indigenous culture to a formal common law institute - was not completely new to the Australian ethnographic scolarship. In 1962, Mervyn Meggit described indeed Walbiri (Northern Territory) sacred objects as 'a part of community's title deeds on its land'.[9] Moreover, John von Sturmer referred that Aranda (Central Australia) used 'as a matter of course' the English phrase 'title deeds'. For example, they used to define the repository cave for sacred painted-objects as the 'vault in which title deeds are preserved'.[10]

The Court dismissed Stanner's analogy between '*rangga*' and 'title deeds'. Quite famously, Justice Richard Blackburn stated the non-proprietary nature of the relation between Yolngu and the land they inhabited:

> [i]n my opinion, therefore, there is so little resemblance between property, as our law, or what I know of any other law, understands the term, and the claims of the plaintiffs for their clans, that I must hold that *these claims are not in the nature of proprietary interests*.[11]

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[7] W. E. H. Stanner, 'The Yirkkala Land Case: Dress-rehearsal', in W. E. H. Stanner (ed.), *White Man Got No Dreaming. Essays 1938-1973*, Canberra-Norwalk (US), Australian National University Press, at 278 (italics added). The exhibition of Yolngu sacred *rangga* in the *Milirrpum* case is depicted in Werner Herzog's 1984 movie '*Where the Green Ants Dream*' ('*Wo die grünen Ameisen träumen*'). On the discrepancies between the historical events and the movie narrative see A. Hurley, 'Re-imagining Milirrpum v Nabalco in Werner Herzog's Where the Green Ants Dream', in A. T. Kenyon & P. D. Rush (eds.), *Passages: Law, Aesthetics, Politics*, Wollogong, University of Wollogong. 2006, at 1-26.

[8] In contrast to several accounts' reconstructions (see for example R. Mohr, 'Shifting Ground: Context and Change in Two Australian Legal Systems', *International Journal for the Semiotics of Law*, 15, 2002, at 4), the analogy between *rangga* and title deeds was explicitly proposed by Stanner and simply endorsed by Yolngu. Such analogy was indeed 'new' to the Indigenous community involved in the *Milirrpum* case. See N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, Stanford, Stanford University Press, 1987, at 187.

[9] See M. J. Meggit, *Desert People: A Study of Walbiri Aborigines of Central Australia*, Sydney, Angus and Robertson, 1962, at 288.

[10] Private communication reported in N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 191.

[11] *Milirrpum v Nabalco Pty Ltd* 1971, at 273 (italics added).

J. Blackburn ruled specifically that Australia had been considered 'desert and uncultivated' before European settlement, since there resided 'uncivilized inhabitants in a primitive state of society'. By the Australian law that applied at the time, there was no such thing as a 'native title'.

One of the questions that the 'Gove case' may raise concerns the link between Yolngu land and sacred designs:

> *Why did Yolngu exhibit* rangga *to prove their ownership of the Yirkkala territory?*

Or, more in general:

> *Is there any foundation - in Yolngu worldview and culture - that justifies Stanner's analogy between Yolngu sacred designs and title deeds?*

The focal premise of the present study is that an answer to these questions - a full understanding of the connection between Indigenous conceptions of 'land' and Indigenous 'cultural expressions' such as designs, songs, and dances - can possibly enrich the widespread debate over the protection of the so-called 'Indigenous knowledge' and 'Indigenous cultural expressions'. Also, it might provide a theoretical background to explain the difficulties faced by Western law in approaching this issue.

1.2. Indigenous 'Intellectual Property': History, Issues and Terminology

1.2.1. Historical Background

The attempts of protecting Indigenous peoples' cultural expressions have been recently identified as the last of three 'legal transplants' in the history of intellectual property law.[12]

[12] See A. Peukert, 'Intellectual Property: The Global Spread of a Legal Concept', in P. Drahos, G. Ghidini, & H. Ullrich (eds.), *Kritika: Essays on Intellectual Property*, Cheltenham (UK)-Northampton (MA), Edward Elgar Publishing, 2015, at 114-133. Peukert's notion of 'legal transplant' refers to 'the application

The first transplant occurred between 17th and 18th centuries, and extended the concept of 'real property' in land and tangible objects to 'intellectual creations'. In fact, the enactment of the 1624 Statute of Monopolies and 1709 Statute of Anne in the UK led the way for the process of inclusion of intellectual property among the typical departments of law[13] of European dominant legal systems. Along with such 'transplant', defined statutory '*rights*' replaced the system of feudal *privileges* (section 3.3). As a consequence, 'the justification of any private property had to be detached from God's and the sovereign's will and grounded in the individual'.[14] Since many similarities seemed to be found between the need for protection of authors and inventors and that of common

of a legal rule or principle to a different set of facts with respect to the ones for the regulation of which that rule or principle was originally established' (at 115). This meaning of 'legal transplant' differs significantly with respect to the classic notion famously established in Alan Watson and Otto-Kahn Freund's unrelated but contemporary works in the field of comparative law (the latter as 'legal transplantation'). Although expressing conflicting views on this topic, both authors designated a "legal transplant" as the figurative movement of a rule or principle across the border of its native state or region. On the contrary, Peukert's notion does not entail a spatial shift, since the 'transfers' can happen *within the same jurisdiction*, or within a region presenting a consistent legal background. A similar idea of 'transfer' is expressed in R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)', *The American Journal of Comparative Law*, 39 (1991), at 398: '[o]f all the legal changes that occur, perhaps one in a thousand is an original innovation'. On the concept of 'legal transplant' in its classic formulation see A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, Scottish Academic Press, 1974, at 21-30; and O. Kahn-Freund, 'On Use and Misuse of Comparative Law', *Modern Law Review* 37 (1) (1974), at 1-27.

[13] As is known, Ronald Dworkin named 'departments of law' the various areas or doctrines into which a legal system is compartmentalized. See R. Dworkin, *Law's Empire,* London, Fontana Press, 1986, at 251. On the inclusion of 'intellectual property law' among the classic departments of law (consistently with Dworking's conception) see A. George, *Constructing Intellectual Property*, New York, Cambridge University Press, 2012, at 24-25.

[14] A. Peukert, 'Intellectual Property: The Global Spread of a Legal Concept', at 137.

'owners', rights in 'intellectual property'[15] were justified by simply applying the already existing property theories.[16]

In a second historical phase, intellectual property was then transplanted from continental Europe to the rest of the world.[17] Although the process of world expansion started and took place preponderantly during the colonial era, its 'ratification' occurred only (relatively) recently through the enforcement of the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS) (1994) that has meant to set worldwide minimum standards of protection of the different categories of intellectual property rights.

The debut of the third and final transplant, involving the protection of Indigenous intangibles, can be traced back to 5 August 1963, when the very first copyright seminar in post-colonial Africa ('*Réunion africaine d'étude sur le droit d'auteur*') took place in

[15] Although terms such as 'copyright', 'patents', 'designs' and even occasionally 'intellectual property' had been frequently used before this historical phase, it seems incorrect to assume that these expressions were used in a consistent, meaningful way or that they referred to distinct areas of law. See on this point B. Sherman, & L. Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911*, Cambridge, Cambridge University Press, 2003, at 95, 207. For notable references to 'intellectual property' in ancient times see (among others) B. Bugbee, *The Genesis of American Patent and Copyright Law*, Washington (DC), Public Affairs Press, 1967, at 12-13. For the characterization of Bugbee's instances as 'atypical' see A. Moore, & K. Himma, 'Intellectual Property' in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2014) (at http://plato.stanford.edu/archives/win2014/entries/intellectual-property). The first occurrence of the expression 'intellectual property' dates to 1769, when a piece published in the *Monthly Review* used the phrase ('What a niggard this Doctor is of his own, and how profuse he is of other people's intellectual property'). However, the first example of the modern usage of 'intellectual property' can be traced back to 1808, when it was used as a heading title in a collection of essays ('New-England Association in Favour of Inventors and Discoverers, and Particularly for the Protection of Intellectual Property', *Medical Repository of Original Essays and Intelligence*, 11, at 303). The term can be also found in an 1845 Massachusetts Circuit Court ruling in the patent case *Davoll et al. v Brown*., in which Justice Woodbury wrote that 'only in this way can we protect intellectual property, the labors of the mind, productions and interests are as much a man's own […] as the wheat he cultivates, or the flocks he rears'. See *OED online*, ''intellectual, adj., and n.', 'intellectual property, n.'. In 19 and 20th centuries, historical events concerning the institutional frameworks of intellectual property contributed to spread the usage of the term. First, when the administrative secretariats established by the Paris Convention and the Berne Convention merged (1893), they located in Berne adopting 'intellectual property' in their new combined title, namely the 'United International Bureaux for the Protection of Intellectual Property'. The organization, subsequently relocated to Geneva (1960), was succeeded with the establishment of the World Intellectual Property Organization (WIPO, 1967) as an agency of the United Nations. According to Mark Lemley, it was only at this point that the term really began to be used in the United States - which had not been a party to the Berne Convention - and it did not enter popular usage until passage of the Bayh-Dole Act (1980). See M. Lemley, 'Property, Intellectual Property and Free Riding', *Texas Law Review*, 83 (2005), at 1033-4.

[16] See J. Kohler, *Autorrecht: eine zivilistische Abhandlung; zugleich ein Beitrag zur Lehre vom Eigenthum, vom Miteigenthum, vom Rechtsgeschäft und vom Individualrecht*, Jena, 1880, at 98-9.

[17] More broadly on the expansion of European intellectual property model see E. Fusar Poli, 'L'espansione del modello europeo. Linee e percorsi della 'proprietà intellettuale' fra '800 e '900', *AIDA: Annali italiani del diritto d'autore, della cultura e dello spettacolo* (2014), at 225-246.

Brazzaville, the capital of the Congolese Republic.[18] The so-called 'Brazzaville seminar' was intended as an answer to African countries' concerns for the preservation of 'African heritage and culture', expressed by a delegate from Congo at the 1960 General Conference of UNESCO. In that occasion, the Congolese delegate had significantly asserted that '[l]egislation derived from that of European countries does not cater to the problems of Africa'.[19] The 1963 seminar involved, in addition to some African experts, international participants from Europe and US. One of them, Eugen Ulmer, at that time professor of law in Munich and a central figure of the int ernational debate on copyright, was in charge of the opening lecture:

> M. Ulmer, expert, a fait un exposé général sur la protection du droit d'auteur dans le monde, en soulignant les deux idées essentielles, celle de la *propriété immatérielle* qui caractérise le droit d'auteur et celle de la nécessité d'encourager les auteurs dans leur *effort créateur*.[20]

Ulmer presented two 'essential ideas': the notion of '*droit d'auteur*' ('copyright') and the concept of '*propriété immatérielle*' ('immaterial property'), along with the necessity to support authors' '*effort créateur*' ('*creative efforts*'). However, both the idea of 'property', as related to intangibles, and the essential role of human creativity to grant protection to specific works are typical expressions of the global intellectual property regime[21], and originally unknown to Indigenous worldviews. Therefore, Ulmer's lesson

[18] For an early report on the seminar see J. Ntahokaja, 'Réunion africaine d'étude sur le droit d'auteur', *Le Droit d'Auteur*, 76, 10 (1963), at 250-259. See also Alexander Peukert, 'Intellectual Property: The Global Spread of a Legal Concept', at 126-127; and S. Bannerman, 'The World Intellectual Property Organization and Traditional Knowledge', in M. Rimmer (ed.), *Indigenous Intellectual Property. A Handbook of Contemporary Research*, Cheltenham (UK)-Northampton (MA), Edward Elgar Publishing, 2015, at 89-90.
[19] *Report of the Working Party on the Development of UNESCO's Activities in Tropical Africa*, in *Records of the UNESCO General Conference, 11th session* (Paris, 1960), §34; quoted in C. F. Johnson, 'The Origins of the Stockholm Protocol', *Bulletin of the Copyright Society of the United States of America*, 18 (1971), at 96-97.
[20] J. Ntahokaja, 'Réunion africaine d'étude sur le droit d'auteur', at 251 (italics added).
[21] 'Global intellectual property regime' refers to a bundle of multilateral, regional and bilateral treaties, as well as international organizations, and non-governmental actors. Its history goes back to the first multilateral intellectual property treaties, the 1883 *Paris Convention for the Protection of Industrial Property* and the 1886 *Berne Convention for the Protection of Literary and Artistic Works*. Nowadays, 'global intellectual property regime' refers prominently to the international regulatory system established by the TRIPS Agreement, eventually supplemented by other multilateral treaties. It includes: the *International Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples in Independent Countries* (1989), the *Convention on Biological Diversity* (CBD) (1993), the *International Treaty of Plant Genetic Resources for Food and Agriculture* (IT PGRFA) (2004), the *UNESCO Convention for the Safeguarding of Intangible Cultural Heritage* (2003), the *United Nations Declaration on the Rights of*

managed to link Indigenous Africans' demand for protection of their culture with an essentially 'Western' set of concepts. His manoeuvre resulted successful: in the Annex B of the *Conference Proceedings*, despite recognizing the peculiar nature of African cultural heritage - '*lequel puise son origine dans la nuit des temps et constitue une source de richesse spirituelle importante*' - the African delegates recommended the enforcement of a national legislation based on European and US copyright law.

Dating from the Brazzaville seminar, the state-centric, positivistic paradigm supported by the 'global intellectual property system' has equated 'intellectual property law' to the state legislation over intangible products of human mind.[22] As a consequence, Western legal systems have often failed to acknowledge the existence of Indigenous normative structures that do not operate (but rarely) at the level of the state, complying with a process of 'blank slate fallacy'.[23] The practical outcome of this approach has been a tendency to marginalize non-state orders through a 'colonization' of newly-discovered regulatory spaces and the imposition of transplanted regimes.

1.2.2. Different Regimes

Indigenous Peoples (UNDRIP) (2007), the *Nagoya Protocol on Access and Benefit Sharing* ('Nagoya protocol') (2010). Furthermore, the current framework includes a number of multilateral fora: the United Nations Permanent Forum on Indigenous Issues (UNPFII), the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), the United Nations Environment Program (UNEP), and the International Union for the Protection of New Varieties of Plants Convention (UPOV). On-going negotiation over the arrangement of international instruments are taking place under the auspices of WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGCTK).

[22] See M. Forsyth, 'Making Room for Magic in Intellectual Property Policy' in P. Drahos, G. Ghidini, & H. Ullrich (eds.), *Kritika: Essays on Intellectual Property*, at 84-85; and M. Forsyth & S. Farran, *Weaving Intellectual Property Policy in Small Island Developing States*, Cambridge-Antwerp-Portland: Interstentia, 2015, at 2. On the 'fundamental positivistic element' of intellectual property law see P. Drahos, 'Intellectual Property and Human Rights', in D. Vaver (ed.), *Intellectual Property Rights: Critical Concepts in Law*, vol. 1, London-New York, Routledge, 2006, at 226.

[23] See M. Forsyth, 'Making Room for Magic in Intellectual Property Policy', at 84. As is known, the notion of 'blank slate fallacy' was originally presented in William Twining's studies on legal reception: having considered the 'standard case' of legal reception, which involves a transfer of legal institutions 'from an advanced (parent) civil or common law system to a less developed one', Twining illustrated the existence of a common assumption among legal exporters 'that the received law either fills a legal vacuum or replaces prior (typically outdated or traditional) law' even in the event that there was nothing to fill up or replace. See W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge, Cambridge University Press, 2009, at 285-286.

Western countries' interference in Indigenous practices surrounding 'intangible' cultural expressions seems to reflect a broader dimension of Western law as tied up in a colonial project that either excludes or assimilates others to its own terms.[24] Evaluations of Indigenous societies have been often articulated in terms of Anglo-European laws and economies, mostly with regard to the use of land. Particularly, *property law* has acquired a focal role in the process of marginalization of Indigenous normative regimes. Indigenous relations with land entailing (as will be discussed in Chapter 3) 'people-place' relations, have been translated into systems of 'property' and measured against the standard of Western property law, as if those relations were culturally and geographically non-specific. As Nicole Graham notes, Indigenous normative systems concerning land 'were not compared in terms of differentials but in terms of degree of attainment of a universal (English) standard'.[25] Therefore, Indigenous communities - at least in their dimension of 'property' - have been depicted as a 'primitive form' of English society.[26]

What about the 'property' of cultural expressions? Policies of this sort have typically found place where the dominant actors of economy and politics have acknowledged the cultural expressions held by Indigenous communities as valuable 'resources' for Western society. In fact, according to the literature, the global intellectual property system has promoted the establishment of so-called 'extractive property orders': namely, 'colonial' property systems which allow one group (the extractor group) to obtain control of assets belonging to a second group without the extractor group obtaining consent and offering proper compensation for the assets transfer.[27] As a consequence, Indigenous normative structures have been forced to adapt to the new rules and categories, and they have been changed in fundamental ways. Intellectual property regimes and Indigenous normative

[24] See P. Fitzpatrick & E. Darian-Smith, 'Laws of the Postcolonial: An Insistent Introduction', in P. Fitzpatrick & E. Darian-Smith (eds.), *Laws of the Postcolonial*, Ann Arbor, University of Michigan Press, 1999, at 1-3.

[25] N. Graham, *Lawscape: Property, Environment, Law*, London, Routledge, at 38.

[26] I. Keen, 'The Language of 'Rights' in the Analysis of Aboriginal Property Relations', presented at the conference *Australian Aboriginal Anthropology Today: Critical Perspectives from Europe. Sustainable Environments and New Economies in Aboriginal Australia* (January, 23, 2013). Available at: https://actesbranly.revues.org/547.

[27] P. Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 4. Drahos drew its notion of 'extractive property order' from the conceptual dichotomy between 'secure/productive' and 'extractive' 'institutions of private property' proposed in D. Acemoglu, S. Johnson, and J. A. Robinson, 'Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution', *The Quarterly Journal of Economics*, 117, 4 (2002), at 1234-1235. In Drahos' opinion, the concept of 'systems' or 'orders' do 'a better job' with respect to 'institutions' in describing an extractive property setting, since the former suggests the integrated complexity of property rules.

structures appear indeed as two fundamentally distinct ontological and epistemological systems.[28] This does not necessarily mean that overlaps between Western and Indigenous orders surrounding intangibles have to be excluded: a partial convergence between the two views has been indeed theorized drawing on Wittgenstein's notion of 'family resemblance' as both structures regulate human behaviour with respect to a range of intangibles (ideas, 'creations', inventions, processes, knowledge).[29] However, the different philosophical underpinnings and necessities entailed by the two different normative frameworks make any overlap more or less incomplete.[30]

Indigenous normative structures and Western intellectual property regimes are often presented as two 'irreconcilable' systems.[31] As Susan Scafidi points out with reference to the wider category of 'cultural property' (that includes Indigenous knowledge):

> Intellectual property protects the new and innovative; cultural property protects the old and venerated. Cultural products derive from ongoing expression and development of community symbols and practices, and are thus neither new nor old, but in a sense both. Any extension of intellectual property law to cultural products must take into account the singular configuration of this category of intangible property.[32]

[28] As Ian Keen points out, a disadvantage of proposing radical differences in ontological categories (and in beliefs and doctrines) about things that are "owned": namely, that this approach risks to preclude theories about how such relations come about, and an account of their variation (see I. Keen, 'The Language of Property: Analyses of Yolngu Relations to Country', in Y. Musharbash, and M. Barber (eds.), *Ethnography and the Production of Anthropological Knowledge: Essays in Honour of Nicolas Peterson*, Canberra, Australian National University E Press, 2011, at 109). An historical sensibility shows, as Edward Said famously argued, that 'all cultures are involved in one another; none is single and pure, all are hybrid, heterogeneous, extraordinarily differentiated, and unmonolithic' (E. Said, *Orientalism*, New York, Vintage Books, 1979, at xxv). As a consequence of their interactions, both intellectual property law and Indigenous normative systems are not pure and untainted, but are in a way *shifting towards each other*. In fact, after centuries of intensive contacts, most Indigenous communities has become increasingly incorporated within the wider Western society and (legal) culture. Both conceptual frameworks are thus unstable, internally heterogeneous, dynamic, and mutually constituting. On the asymmetrical nature of this shift, see K. Anker, *Cultural Diversity and Law: Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights*, Farnham, Ashgate, 2014, at 3. See also H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, Chicago, The University of Chicago Press, at 13.

[29] See A. George, *Constructing Intellectual Property*, at 257. On the notion of 'family resemblance' see Ludwig Wittgenstein, *Philosophical Investigations*, Oxford, Blackwell, 1953, at §67 (27e –28e).

[30] See J. C. Lai, *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?*, Cham-Heidelberg-New York-Dordrecht-London, Springer, 2014, at 60-61.

[31] See D. J. Gervais, 'Spiritual but not Intellectual? The Protection of Sacred Intangible Traditional Knowledge', *Cardozo Journal of International and Comparative Law*, 11 (2003), at 475.

[32] Susan Scafidi, 'Intellectual Property and Cultural Products', *Boston University Law Review*, 81 (2003), at 814.

According to the majority of modern scholars, intellectual property rights do not 'match' Indigenous needs of protection for their knowledge. The specific reasons for that have been variously identified. Chidi Oguamanam systematizes the arguments in favor of the so-called 'unfitness thesis' - the thesis according to which 'intellectual property' construct do not fit Indigenous normative structures - and dichotomizes the reasons for the discrepancy between intellectual property rights and Indigenous knowledge systems in:

1. *conceptual* reasons;
2. *practical* and *logistic* considerations.[33]

1.2.2.1. Conceptual Reasons

First, Oguamanam distinguishes three *conceptual* arguments which constitute the 'gap' between Western and Indigenous conceptions:

1. the Western 'property' notion has an *individualistic* nature, which contrasts to the *communal* nature of Indigenous 'property' of cultural expressions;
2. accordingly, it is complex to apply the concept of '*legal personality*' to Indigenous realities (and to identify an individual entitled to 'intellectual property rights');
3. Indigenous knowledge does *not* (always) constitute a complex of *original* information.

The first argument is of great interest for the purposes of the present work. Indigenous knowledge is usually seen as a '*community*' *property* derived from a '*communal*' *effort*.[34] Haight Farley notes, with regard to Indigenous Australian artworks:

[33] See C. Oguamanam, 'Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge', *Indiana Journal of Global Legal Studies*, 11, 2 (2002), at 141-6.
[34] See also the definition of 'cultural property' of Indigenous peoples in P. Gerstenblith, 'Identity and Cultural Property: The Protection of Cultural Property in the United States', *Boston University Law Review* 75 (1995), at 567. Gerstenblith presents a notion of 'cultural property' as composed of two conflicting

> most art work is essentially executed by a group. The making of art in the indigenous community is not the lonely, secluded, individual process idealized in the west, but instead a group process in which many people participate at various levels.[35]

Accordingly, each member of an Indigenous community would thus be entitled to share in it, while in the same context it seems hard to identify a person entitled to the right to exercise an exclusive claim. Since, as will be discussed, *individualism* is generally the model for entitlement to intellectual property rights within the conventional Western regimes, an 'ownership' structure based on 'community' would stand in sharp contrast to a knowledge-protection scheme that reifies the individual as the primary agent of intellectual advancement. On this point, the Federal Court of Northern Territory (Darwin) in the judicial decision of the *Bulun Bulun* case (1998) stated:

> [w]hilst it is superficially attractive to postulate that the common law should recognise communal title, it would be contrary to established legal principle for the common law to do so. 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 of Australia by the Crown. The question however is whether those Aboriginal laws can create binding obligations on persons outside the relevant Aboriginal community, either through recognition of those laws by the common law, or by their capacity to found equitable rights in rem […] Copyright is now entirely a creature of statute. Section 35(2) of the Copyright Act 1968 (Cth) provides that the author of an artistic work is the owner of the copyright which subsists by virtue of the Act. That provision effectively *precludes any notion of group ownership in an artistic work, unless the artistic work is a 'work of joint ownership' within the meaning of s10(1) of the Act.* In this case no evidence was led to suggest that anyone other than Mr Bulun Bulun was the creative author of the artistic work.[36]

elements: 'culture', which suggests a relationship between *group identity* and the objects it considers important; and 'property' which usually focuses on an *individual rights* paradigm.

[35] C. Haight Farley, 'Protecting Folklore: Is Intellectual Property the Answer?', *Connecticut Law Review*, 30, 1997, at 30.

[36] Italics added.

The collective nature of Indigenous rights in cultural expressions is also acknowledged in official documents. For example, the definition of 'traditional knowledge' provided in WIPO *List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found*[37] refers to 'traditional knowledge' as:

> belonged collectively to an indigenous or local community or to groups of individuals within such a community […] a particular individual member of a community, such as a certain traditional healer or individual farmer, might hold specific knowledge.

As can be noted, a conceptual tension exists between the 'collective' dimension of Indigenous knowledge and the fact that 'a particular individual' can hold an amount of such knowledge.[38] Accordingly, there exists a strong counter-argument to the thesis of the 'collectiveness' of Indigenous knowledge. Such orientation states that the conception of cultural expressions as 'collectively held' by all members of the community *does not pertain to the endemic setting of Indigenous societies*, where the attachment to cultural resources is indeed *fractionated*: in fact, according to this thesis, *the unequal distribution of such resources is instrumental to their function of ordering Indigenous mutual relations*. The extension to every member of a specific Indigenous community of what is otherwise a complex network of heterogeneous normative relations would instead be an effect of the complexity of the intercultural dimension of negotiation over intangibles, which attaches to Indigenous intangibles the additional function of '*cultural symbol*'.[39] However, since in the common conception Indigenous societies are based on a 'communal' or 'collective' organizational structure, they are said *to lack the requisite legal or juridical personality* on the basis of which they can hold intellectual property rights.

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[37] WIPO/GRTKF/IC/17/INF/9.

[38] Howard Morphy speaks about an 'apparent contradiction'. See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 49.

[39] See M. Carneiro da Cunha, *"Culture" and Culture: Traditional Knowledge and Intellectual Rights*, Chicago, Prickly Paradigm Press, 2009, at 79; and S. Harrison, 'Ritual as Intellectual Property', *Man* (New Series), 27, 2 (1992), at 231.

1.2.2.2. Practical and Logistic Reasons

Oguamanam identifies three arguments that ground the 'unfitness' of intellectual property law to Indigenous demands of protection for their knowledge in *practical* problems:

1. since Indigenous knowledge and cultural expressions exists mostly within *oral* cultures, it may be difficult to transform it into written (and recordable) form;
2. most intellectual property fields are premised on a 'fixed term' for the intellectual property rights granted to author. Indigenous knowledge is an *immemorial* and *trans-generational* experience that evolves *incrementally*[40], so that it is hard to state its clear 'origin' (localized in time) to calculate a term for such expiration;
3. Indigenous communities usually *lack the financial power* to register and preserve intellectual property rights.

1.2.2.3. Indigenous Cultural Expressions and Capitalism

A final (and crucial) point, surrounding the nature and theoretical foundation of intellectual property, shall be added to Oguamanan' list.

Intellectual property is 'a market instrument most suited to capitalist ideology'.[41] As real property law, intellectual property rights are capitalist creations, designed to serve the market economy and advance commercial interests as a matter of priority over cultural sensitivities.[42] According to David Vaver, '[t]he underlying aim [of intellectual property] is to protect ideas of practical application in industry, trade and commerce'.[43] For

[40] See K. Puri, 'Is Traditional or Cultural Knowledge a Form of Intellectual Property?', presented at the *Oxford University Intellectual Property Research Centre Seminar* (January, 18, 2000) (at http://www.oiprc.ox.ak.uk/EJWP0l00.pdf).
[41] C. Oguamanam, 'Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge', at 145.
[42] See R. J. Coombe, *The Cultural Life of Intellectual Property Rights: Authorship, Appropriation, and the Law*, Durham, Duke University Press, 1998.
[43] See D. Vaver, *Intellectual Property Law: Copyright, Patent, Trademarks*, Toronto, Irwin Law, 1997, at 119.

Chartrand, intellectual property rights operate more as 'instruments of commerce than of culture'.[44] In advancing commercial interests, intellectual property promotes the *commodification* of all things, including Indigenous knowledge.[45] The notion of 'commodity' can be interpreted here in its simplest meaning of 'something that is thought appropriate to buy and sell through a market'[46], while 'commodification' is typically understood as the process of bringing items (goods) or performances (services) under the logic of capitalist markets.[47]

Fixed and commodified as a physical manifestation of ideas, Indigenous cultural expressions - often viewed as 'sacred' objects - are then measured on an *economic scale of values* and auctioned accordingly. For Indigenous peoples, as will be seen, the capitalist orientation of conventional intellectual property law, along with its tendency to commodify and commercialize, is not an acceptable way of dealing with their knowledge and cosmological views.

1.2.3. Terminology

The importance of analysing the (essentially) Western terminology used to classify Indigenous cultural expressions in the realm of intellectual property law has been significantly stressed out in relation to both conceptual and political issues.[48] Several

[44] See H. H. Chartrand, 'Intellectual Property in the Global Village', *Government Information in Canada*, 1, 4 (1995),at http://www.usask.ca/library/.

[45] See (among others) M. Ritchie, K. Dawkins, & M. Vallianatos, 'Intellectual Property Rights and Biodiversity: The Industrialization of Natural Resources and Traditional Knowledge', *Journal of Civil Rights and Economic Development*, 11 (1996), at 441.

[46] The word 'commodity' derives from the Latin '*commoditatem*', meaning 'measure', 'fitness', 'convenience', 'complaisance'. The modern and concrete sense of 'commodity' (as 'a kind of thing produced for use or sale', 'an article of commerce', 'an object of trade') seems to have arisen in modern languages. See *Oxford Etymological Dictionary online*, 'commodity, n.'. According to Margaret Radin the term 'commodification' (used from 1970s), referring to the process of making a commodity out of something, can be narrowly or broadly construed. Narrowly construed, 'commodification' describes the actual buying and selling (or legally permitted buying and selling) of something. Broadly construed, 'commodification' includes also *market rhetoric*, as 'the practice of thinking about interactions as if they were sale transactions', and *market methodology*, as 'the use of monetary cost-benefit analysis to judge these interactions'. See M. J. Radin, 'Market-Inalienability', *Harvard Law Review*, 100, 8 (1987), at 1859.

[47] See A. Bonen & J. Coronado, 'Delineating the Process of Fictive Commodification in Advanced Capitalism', unpublished manuscript, 2011, at 4.

[48] See J. E. Anderson, Law, *Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law*, Cheltenham (UK)-Northampton (US), Edward Elgar, 2009, at 6-7.

authors refer to the difficulty in finding a legal qualification that fits Indigenous cultural expressions as the 'quicksand of definition'.[49]

The World Intellectual Property Organization (WIPO) classifies 'Indigenous knowledge' into three categories: genetic resources (GR), traditional knowledge (TK) and traditional cultural expressions (TCEs). Such classification, while helping in creating an order which makes the issue more manageable for those that need to develop remedies, needs to be understood as a *bureaucratic* product that serves particular ends.[50] In fact, these categories do not necessarily represent how Indigenous peoples experience their knowledge systems. These labels do not adequately capture the complexity of indigenous peoples' epistemology and ontology.

'Traditional Knowledge' (TK) is the term with the greater international currency, even if other expressions are widely spread: 'traditional ecological knowledge' (TEK), 'cultural knowledge' and 'folklore'.[51] However, there is as yet no accepted definition of traditional knowledge at the international level'.[52] The problem with the use of the 'traditional knowledge' label is twofold.[53] On the one side, it dichotomizes apparently 'Indigenous' way of knowing from the 'Western' one.[54] However, as Jane Anderson points out:

> [k]nowledge, and its expression and practice is more complicated than any form of binary allows and fundamental concerns about the intersections of relations of power in the production and circulation of knowledge are often understated or ignored. Labelling and classifying knowledge as 'types' ultimately produces organisational

[49] See: S. Frankel & P. Drahos, 'Indigenous Peoples Innovation and Intellectual Property: The Issues', in S. Frankel & P. Drahos (eds.), *Indigenous Peoples' Innovation. Intellectual Property Pathways to Development*, Canberra, Australian National University E Press, 2012, at 6; and P. Drahos, *Intellectual Property, Indigenous People, and Their Knowledge*, Cambridge, Cambridge University Press, 2014, at 23.
[50] J. E. Anderson, Law, *Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law*, at 10.
[51] See A. Agrawal, 'Indigenous Knowledge and the Politics of Classification', *International Social Science Journal*, 54 (2002), at 293.
[52] See the WIPO TK Glossary, available at www.wipo.int/tk/en/resources/glossary.html.
[53] More broadly on this point see J. E. Anderson, Law, *Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law*, at 7-11.
[54] This issue has been specifically engaged in two different papers: A. Agrawal, 'Dismantling the Divide Between Indigenous and Scientific Knowledge', *Development and Change*, 26 (1995), at 413-439; and M. Nakata, 'Indigenous Knowledge and the Cultural Interface: Underlying Issues at the Intersection of Knowledge and Information Systems', *International Federation of Libraries Association Journal*, 28 (2002), at 281-286.

> categories that bear little resemblance to practical utility and the interchangeability of experience.[55]

On the other side, the term 'traditional' can perform a disservice because it can possibly refer to a knowledge system not open to innovation[56]: on the contrary, it is recognized that indigenous peoples' knowledge can be innovative. For instance, the WIPO draft article 'The Protection of Traditional Knowledge'[57] acknowledges that 'traditional knowledge systems are frameworks of innovation'. 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'.[58]

1.2.4. (Preliminary) Research Questions

The present book deals with the conceptual, ontological, and epistemological reasons that prevent the archetypical structure of Western property law - 'transplanted' to the 'cultural expressions' realm through the notion of 'intellectual property' - to fit Indigenous worldviews. This research indeed does not take such incompatibility for granted[59], but looks rather for its foundations:

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[55] See J. E. Anderson, Law, *Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law*, at 8.

[56] See P. Drahos, *Intellectual Property, Indigenous People, and Their Knowledge*, Cambridge, Cambridge University Press, 2014, at 26.

[57] Available at www.wipo.int/meetings/en.

[58] For an account of the controversies in applying the label of 'traditional' to Indigenous knowledge see, among others, N. Pires De Carvalho, 'From the Shaman's Hut to the Patent Office: A Road Under Construction', in C. R. Macmanis (ed.), *Biodiversity and the Law. Intellectual Property, Biotecnology and Traditional Knowledge*, London, Earthscan, 2007, at 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 S. Groth, *Negotiating Tradition. The Pragmatics of International Deliberations on Cultural Property*, Göttingen, Universitätsverlag, 2012, at 72-73.

[59] The incompatibility between Indigenous normative structures centred on intangible cultural expressions and intellectual property law has been also presented as 'incommensurability'. See among others (with specifi reference to the Australian background): J. McKeough & A. Stewart, 'Intellectual Property and The Dreaming', in E. Johnston, M. Hinton & D. Rigney (eds), *Indigenous Australians and the Law*, Sydney, Cavendish, 1996, at 53-54; M. Blakeney, 'Protecting the Cultural Expressions of Indigenous Peoples under the Intellectual Property Law - The Australian Experience', in F. W. Grosheide & J. J. Brinkhof (eds.), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge*, Antwerp-Oxford-New York, Interstentia, 2002, at 151-180; and T. Davies, 'Aboriginal Cultural Property', Law in Context, 14, 2 (1996), at 1-28; and K. Bowery, 'The Outer Limits of Copyright Law - Where Law Meets Philosophy and Culture', *Law and Critique*, 75, 12 (2001), at 75-98. The notion of

Why does western intellectual property result 'inherently unsuitable'[60] *to address Indigenous demands over the protection on their intangible and cultural resources?*

Why does the imposition of intellectual property regimes to Indigenous systems produce - according to ethnographic accounts - an 'oversimplification of more complex practices and beliefs'?[61]

Why does the classic language of 'property-ownership'[62] *seem unable to take into account Indigenous ways of conceiving intangibles and their management?*

'incommensurability' - addressed sometimes within the legal discourse as 'untranslatability' of legal concepts - refers to Western legal systems' unsuccessful attempts to recognize the existence of non-states 'legal' orders. According to the most common theories, such gap can be seen as an outcome of dominant legal systems' general inability to *understand* and adequately *conceptualize* the thoughts and practices of the members of culturally different minority groups. This gap would thus be an *unbridgeable* one, existing between culturally different conceptual schemes. Its most radical version entails that agents acting within each of those schemes can neither *possess* an adequate concept of culturally different phenomena, nor *acquire* it. Therefore, it comprises both a *difference in conceptual schemes* and a *cognitive inability* in overcoming that difference. As a result, any attempt of translating Indigenous normative structures into intellectual property terms would unavoidably result in a *transformation* of those norms and practices. On the shift of the notion of 'incommensurability' from the discourse of the philosophy of science to legal philosophy and comparative law spheres, see P. Glenn, 'Are Legal Traditions Commensurable?', *American Journal of Comparative Law*, 49, 1 (2001), at 133-135. On the conception of 'incommensurability' as both difference in conceptual scheme and cognitive inability in overcoming the difference, see A. J. Connolly, *Cultural Difference on Trial: The Nature and Limits of Judicial Understanding*, Farnham, Ashgate, 2010, at 2 (although explaining the incommensurabilists' position in details, Connolly's work is in fact a critical review of this literature and its premises).

[60] E. Daes, *Discrimination against Indigenous Peoples. Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* (UN Doc. E/CN.4/Sub.2/1993/28), at § 32.

[61] P. Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 159.

[62] The English language includes both 'property' and 'ownership'. Generally speaking, the term 'property' seem to have a wider application than 'ownership'. As Honoré notes, the term 'property' can be used both to refer to a 'bundle of legal rights' and also to the 'thing' that is the object of the legal rights. See A. Honoré, 'Ownership', in A. G. Guest (ed.), *Oxford Essays in Jurisprudence*, Oxford, Clarendon Press, 1961, at 128. However, in the ordinary language, 'property' and 'ownership' are thought to be *interchangeable*: As Snare points out, for example, the statement 'I own the car' and 'the car is my property' seem to convey the same information. See F. Snare, 'The Concept of Property', *American Philosophical Quarterly*, 9, 2 (1972), at 9. More broadly on this terminological distinction, see: A. Candian, A. Gambaro & B. Pozzo, *Property - Proprieté - Eigentum: Corso di diritto privato comparato*, Padova, CEDAM, 1992, at 16-20; S. Pugliese, 'Property', in *Enciclopedia giuridica Treccani*, vol. XXIV, Roma, 1991.

The ensuing reflections seek particularly to demonstrate the power of ethnographically grounded investigations[63] to overtake the abstractions that have dominated debates over incommensurability within legal scholarship. The idea that lies at the heart of this study is that - in order to find answers to the three questions above - is essential to change the main focus of the analysis: a shift towards the relation between Indigenous people and *land*, and an analysis of the way in which Western property law conceptualizes territorial rights is indeed required to understand the distinct - but connected - issue of Indigenous 'intellectual property'.

1.3. Indigenous 'Intellectual Property' and Land

1.3.1. Local Cosmologies, Local 'Intellectual Property'

The present work assumes that a study over Indigenous social life and culture necessarily involves an analysis over Indigenous relations to *land*. Indigenous way of living has indeed been characterized as a *chthonic* (from Greek '*χθόνιος*', 'in, under, or beneath the earth') worldview.[64] This label essentially identifies Indigenous peoples around the world as populations living in close harmony with the earth and nature.[65] The majority of Indigenous peoples conceive land not just as a place to dwell upon and a source of sustenance, but also as a *marker of identity*, and as *a central element of 'institutional' life*. Indigenous 'law', practices and beliefs are indeed, as will be seen, inextricably interwoven with land. Land is thus at the same time infused with all those

[63] Throughout this research, 'ethnography' will be used to refer to the study of particular groups, while 'anthropology' (or 'anthropological theory') will imply a comparison of cultural particularities that fits into a rather general scheme for explaining the human condition in all its cultural variety. On the "ethnography-theory divide", see P. Burke, *Law's Anthropology: From Ethnography to Expert Testimony in Native Title*, at 8. In 1963, Lévi-Strauss famously proposed a more articulate partition according to which 'ethnography' would identify the first of three different 'moments in time' along 'the same line of investigation': the observation and description of specific groups (ethnography), a comparative study of ethnographic materials (ethnology), and broader concerns about the general knowledge of man (anthropology). See C. Lévi-Strauss, *Structural Anthropology*, I, Harmondsworth, Penguin, 1963, at 356-359. On the limited effectiveness and the spurious nature of this partition see (among others) I. M. Lewis, *Social Anthropology in Perspective*, 2nd ed., Cambridge, Cambridge University Press, 1992, at 37; and C. Seymour-Smith, *Macmillan Dictionary of Anthropology*, London, Macmillan, 1986, at 99.

[64] See P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford, Oxford University Press, 2014, at 70.

[65] See E. Goldsmith, *The Way: An Ecological World View*, London, Rider, 1992, at xvii.

norms and beliefs.[66] As a consequence, it does not seem possible to understand the nature of Indigenous (chthonic) normative structures, cultural practices and 'cosmologies'[67] without grasping Indigenous conception of 'land'.

Indigenous Australian[68] cosmologies identify a significant example of chthonic traditions. The focus of these worldviews is primarily and foremost on land. However, quite significantly, the concept of 'land' embedded in Indigenous Australian metaphysics is not one of 'abstract' space. What is emphasized is indeed the particularity and diversity of each *place*:

> Western metaphysics is about space and time, but is not about place. Abstract theory of space and time do not, for example, concentrate on the nature of space-time continuum at Broken Hill, in New South Wales. One of the things that strikes the outsiders about Aboriginal cosmologies is their focus on explaining the origin of the physical features of particular areas of land. In Dreamtime stories ancestral beings in either animal or human form will often begin a journey in specific place and end it in another known place.[69]

The ancestral beings, central figures in Indigenous Australian cosmologies:

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[66] See P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, at 72.

[67] The term 'cosmology' communicate the idea that 'we are dealing with beliefs about the nature of the world that are thought to be true'. See P. Drahos, *Intellectual Property, Indigenous People, and Their Knowledge*, at 31.

[68] The expression 'Indigenous Australian' does not refer to a unitary people, or a nation with a unitary culture, and provide rather for an umbrella term covering very deep and wide differences. See M. Charlesworth, *Religious Inventions: Four Essays*, Cambridge-Melbourne, Cambridge University Press, 1997, at 54. However, certain cultural notions seem to be shared among Indigenous societies across the Australian continent. On this point see A. George, *The Construction of Intellectual Property*, at 267.

[69] See P. Drahos, *Intellectual Property, Indigenous People, and Their Knowledge*, at 33. The terms 'Dreamtime' and 'Dreaming', which refer commonly to Indigenous Australian cosmologies, can be traced back to a mistranslation of the word '*alcheringa*' - a compound word, which links '*alchera*', 'dream', to the suffix '*-ringa*', 'belonging to' - in the language of Aranda (Arunta) people (Central Australia). See W. B. Spencer & F. J. Gillen, *The Arunta*, London, MacMillan, 1927, at 591. A dispute on the real meaning of '*alcheringa*' thrilled many scholars of the day, but did not prevent the dissemination - dating from 1930s - of the English 'dreamtime' and of the equivalent word 'dreaming'. Previously, authors used to mention only the Indigenous term '*alcheringa*' without attempting to provide a translation: the most famous examples are probably Lucien Lévi-Bruhl's 1910 *How Natives Think* and Émile Durkheim's, 1912 *The Elementary Form of Religious Life*. According to Max Charlesworth, the terms 'Dreaming', 'The Dreaming', and 'Dreamtime' 'have now been appropriated by the Aborigines themselves'. See M. Charlesworth, 'Introduction', in M. Charlesworth, H. Morphy, D. Bell & K. Maddock (eds.), *Religion in Aboriginal Australia*, St Lucia, University of Queensland Press, 1989, at 9. For a historical background of the 'Dreaming' terminology see C. Dean, *The Australian Aboriginal 'Dreamtime': Its History, Cosmogenesis Cosmology and Ontology*, Geelong-Victoria, Gamahucher Press, 1996, at 2-18.

> travelled, foraged, camped, defecated, or menstruated, copulated, fought other beings […] Land and waters are full of signs of those activities, and of transformed substance of ancestral beings into rocks, creeks, hills, trees, waterholes, body of ochre, and so on. [70]

Through their 'geo-magical'[71] powers, ancestral beings created thus the topography of *specific* areas of land that the Indigenous Australian populations have come to know as their 'Country'. This term, which belongs to Aboriginal English[72], refers to 'land' or 'territory'. However, it has - as will be discussed in Chapter 3 - resonances that challenge the Western conception of 'land' as 'property'. In fact, 'Country' (a proper noun as well as a common noun, 'country') is, according to Indigenous Australian cosmologies, a *living entity* that has consciousness, and 'it is lived in and with'.[73]

Countries, through their topography, serve as a partial physical record of the events described in the stories proper to those cosmologies. The focal element in Indigenous Australian cosmologies, as seen, is the *diversity* and *particularism* of each *physical* piece of land with respect to the others: different groups of ancestors shaped indeed different pieces of Australian land (with some exceptions).[74] Accordingly, ancestral beings have been understood as *local forces* acting within a specific territory. Indigenous Australian cosmologies should be then interpreted as *locally specific* (rooted in 'places' within the Australian landscape) systems of beliefs.

The specificity of Indigenous cosmologies relative to the 'place' is a key interpretive assumption that lays the foundation for the structure of the so-called 'Indigenous knowledge systems': namely, Indigenous normative systems that regulate the process of production and diffusion of Indigenous knowledge, reified in cultural expressions such

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[70] I. Keen, 'Yolngu Religious Property', in T. Ingold, D. Riches & J. Woodburn (eds.), *Property, Power and Ideology in Hunting and Gathering Societies*, London, Berg, 1988, at 278.
[71] See P. Drahos, , *Intellectual Property, Indigenous People, and Their Knowledge*, at 34.
[72] 'Australian Aboriginal English' refers to a dialect of Standard Australian English used by a large section of the Indigenous Australian population. It is made up of a number of varieties that have developed differently in different parts of Australian. These varieties are generally said to fit along a continuum ranging from light forms, close to Standard Australian English, to heavy forms, closer to Kriol.
[73] D. B. Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness*, Canberra, Australian Heritage Commission, 1996, at 7.
[74] Exceptionally powerful beings (such as the 'Rainbow Serpent') feature in more than one cosmology, and are thus linked to more than one place. See P. Drahos, *Intellectual Property, Indigenous People, and Their Knowledge*, at 37.

as songs, dances, designs, and so on. As Peter Drahos exposes, the 'locality' of Indigenous cosmologies influences indeed the nature of Indigenous knowledge and cultural expressions in two ways:

- on the one side, Indigenous cosmologies are not just about the origin of a specific Country, but also explain *how people came to know about technologies* such as fish traps, firing techniques, or names and characteristics of plants and animals living upon that Country;
- on the other side, the details of the stories surrounding ancestors are transmitted through dances, song, storytelling and ritual, and passed down through generations. Both Indigenous 'inventions' and 'intellectual creations' (this terminology, as will be discussed, may results as a misleading one), in abstract comparable to Western intellectual property objects, are thus *linked to a specific piece of land* and its own cosmology.[75]

1.3.2. (New) Research Questions

The present research originated from a very general question:

> *Does intellectual property law provide for an adequate normative structure that 'fit' Indigenous way of conceiving intangibles?*

Given that many conceptual and practical difficulties prevent or make difficult an application of' 'intellectual property' constructs to Indigenous normative systems surrounding intangibles, a narrower issue turns up, carrying along a different and, in a sense, broader question:

[75] See Peter Drahos, *Intellectual Property, Indigenous People, and Their Knowledge*, at 27.

Does intellectual property provide an adequate normative structure to deal with the centrality of 'place' - inextricably linked to 'local' knowledge - in chthonic cultures?

As said, this sort of questions - surrounding Indigenous knowledge and cultural practices - necessarily requires a step back and a focus on land. Therefore, the basic question to be asked is rather:

Can the particularism and diversity of places at the core of Indigenous Australian cosmologies be conceived within the archetype of Western (real) property law?

In other words, what place have Indigenous 'places' in property law?

1.4. Property, Space, Place

The main intellectual debt of the first part of this study (developed in Chapter 1 and partially in Chapter 2) is to Nicole Graham's *Lawscape* (2011).[76]

In general terms, Graham's work discusses the impact of the Western archetype of 'property law' on the way in which 'land' is conceived. The author argues that (physical) landscapes are, in a way, *'shaped' by legal regulation*, and reflect the standard characteristics of property law. How is that?

According to Graham, property law operates through a narrative of:

- *abstraction* of land from its particularism;
- *fungibility* (or *alienability*) of land;
- *dephysicalization* of land.

This narrative implies that:

[76] The term 'lawscape' have been first used by Andreas Philppopulos-Mihalopoulos to refer generally to the continuum and differences between 'law' and 'physical places'. See A. Philppopulos-Mihalopoulos, 'In the Lawscape', in A. Philippopoulos-Mihalopoulos, *Law and the City*, London, Routledge, 2007, at 8-11.

- all spaces are - legally - the same;
- human life is ontologically separated from the places in which it is lived.[77]

The result of such process in postcolonial settings - where ideas about property are transported away from their Western (European) origin - is a system centred on a property law that is *maladapted* to different conceptions of land and fails to respond to the quite different conditions in which it is performed.

Two different conceptions of 'land' emerge from Graham's study:

- 'land' as '*space*';
- 'land' as '*place*'.[78]

In its classic formulation (typical of humanistic geography) such distinction has conceived 'space' and 'place' as fundamental concepts that doesn't mean the same. In fact:

- 'space' is something *abstract*, without any substantial meaning;
- 'place' refers to how people *are aware of* a certain piece of space.[79]

[77] See M. Davies, *Law Unlimited*, London, Routledge, 2017, at 142.

[78] As Keimpe Algra points out, also the ancient Greek did not have a single (common) noun that refers to locations. There were indeed three terms: 'χώρᾱ' (translated as 'space'), 'τόπος' ('place') and 'κενό' ('void'). However, 'χώρᾱ' and 'τόπος' were interchangeable. At first, the main difference between the two words appeared to be that 'τόπος' denoted *relative* location (in relation to the surroundings), while 'χώρᾱ' referred to a *larger extension* than 'τόπος'. Epicurus turned these words into technical terms, using 'χώρᾱ' as 'space, as 'room' when bodies are moving through it', and 'τόπος' as 'space when it is occupied by body (i.e. place)'. See K. A. Algra, *Concepts of Space in Greek Thought*, Leiden-New York-Köln, E. J. Brill, 1995, at 38-40. In the modern period a distinction between 'space' and 'place' continues to be made. Isaac Newton saw 'place' as 'a part of space which a body takes up' (I. Newton, 'On Absolute Space and Absolute Motion', in M. Čapek (ed.), *The Concepts of Space and Time*, Dordrecht and Boston, D. Reidel Publishing, 1976, at 97). According to John Locke, while space is 'the relation of distance between any two bodies or points', place is the 'relative position of anything' (J. Locke, 'Place, Extension and Duration', in J. J. C. Smart (ed.), *Problems of Space and Time*, New York, Macmillan, 1979, at 97, 101. On the redundancy of the distinction between 'space' and 'place' see A. Madanipour, *Designing the City of Reason: Foundations and Frameworks*, London-New York, Routledge, 2007, at 202.

[79] There exist other criteria to separate conceptually 'space' from 'place'. For example, Michel de Certeau refers 'place' to the 'locational instantiation' of 'what is considered to be customary, proper and even pre-established', while 'space' is instead composed of 'intersection of mobile elements'. See M. de Certeau, *The Practice of Everyday Life*, Berkeley, California University Press, 1984, at 117.

More precisely, the division between 'space' and 'place - an 'essential one' in Western metaphysics[80] - can be described in the extent to which human beings have given meaning to a specific area:

- 'space' is a location which has *no social connections for a human being*;
- 'place' is a location *created by human experiences*: 'place' exists of 'space' that is filled with meanings by human experiences.[81]

However, Graham distinction between 'space' and 'place' seems to be different from the classic one, since it concerns specifically the physicality of locations. In fact, according to Graham:

- 'space' refers to an *abstract* location;
- 'place' refers to a *physical* and *specific* location.

Graham's work emphasizes specifically the relevance of the dichotomy between 'space' and 'place' through a focus on the modern function of property law. Western archetype of 'property' conceives 'land' as an abstract '*space*': *dephysicalized*, completely *fungible* and conceptually *detached from the people living upon it*. Accordingly, Graham presents the paradigm of modern Western 'property' as *anthropocentric*, and ultimately identify it

[80] J. Wainwright & T. J. Barnes, 'Nature, Economy, and the Space-Place Distinction', in *Environment and Planning D: Society and Space*, 27 (2009), at 966-986. For a review on the humanistic geography literature about the relationship between 'space' and 'place' see M. Hunziker, M. Buchecker & T. Hartig, 'Space and Place: Two Aspects of the Human-landscape Relationship', in F. Kienast, O. Wildi & S. Ghosh (eds.), *A Changing World. Challenges for Landscape Research*, Springer, 2007, at 47- 62.

[81] See Y. Tuan, *Space and Place: The Perspective of Experience*, at 4. In its analysis of the term 'landscape', K. R. Olwig argues that the term 'land' denotes both the 'place' and the people living in it, while 'scape' ('*schaffen*') means 'to form'; also, the term 'landscape' would be close to the Greek word 'χορός', referring to a 'dance', and thereby 'landscape' itself should be understood as a 'land' or 'place' shaped by somebody. See K. R. Olwig, *Landscape, Nature, and the Body Politic: From Britain's Renaissance to America's New World*, Madison (WI)-London, Madison University Press, 2002, at 18; and K. R. Olwig, 'Has 'Geography' Always Been Modern?: Choros, (Non)representation, Performance, and the Landscape', *Environment and Planning A*, 40, 8 (2007), at 1843-1861. For a taxonomy of the meaning of 'place' into four interacting categories ('supranational', 'national', 'local' and 'individual') see M. Saar & H. Palang, 'The Dimensions of Place Meanings', *Living Reviews in Landscape Research*, 3 (2009), at http://lrlr.landscapeonline.de.

with ‘a dichotomous model of the world that separates people from everything else, placing people in an imagined centre, their environment literally surrounds and is peripheral to them’.[82] Following this premise, Graham argues that anthropocentrism characterizes modern property law, according to which ‘place’, in itself, is *meaningless*: rather than adapt to the particularities and diversities of places, Western property articulates indeed a ‘universal and atopic people-place relation’.[83]

What emerges from Graham analysis is that the enforced universalism of concepts as ‘exclusive possession’ and ‘alienability’ have located colonial (and former colonial) ‘property laws’ within the ideologies of Western empires. It is indeed in this way, in their ideological rather ‘place-based’ foundation, that the property laws of countries such as Australia are ‘alien’ and ‘maladapted’ to Indigenous realities.[84] In fact, against the dominant cultural discourse of ownership as ‘proprietorship’ and ‘entitlement’ - that qualifies land as an abstract ‘space’ - Indigenous experiences have described ‘ownership’ as a ‘*responsibility*’ rather than a ‘right’.[85] For Indigenous people, the notion of ‘losing property’ means losing ‘place’: something that cannot be compensated because it is not an abstract ‘right’ but a *real and physical relationship* within a network of interconnected meanings.

Indigenous mode of ‘people-place’ subjectivity is self-evident in most expressions of the native cultures around the world. An example are the stories, artworks and songs of Indigenous Australians, which indicate a relation with land whereby people are connected to ‘place’ to the extent that they are, in fact, *identified* by and with places:

[82] N. Graham, *Lawscape: Property, Environment, Law*, London, Routledge, 2011, at 4.
[83] N. Graham, *Lawscape: Property, Environment, Law*, at 91.
[84] According to Alan Pottage, the Western ‘property’ archetype have proved itself inadequate also with reference to the new ‘properties’ appearing on the Western scenario. The problem, he argues, is that the ‘legal boundary between persons and things, rather like that between nature and culture, is no longer self-evident’. In a world where property rights are claimed in ‘human tissue, gametes and embryos by pharmaceutical corporations’, Pottage sees the boundary or division between persons and things as little more than a semantic exercise that the law has taken up: ‘Humans are neither person nor thing, or simultaneously person and thing, so that law quite literally makes the difference’. See A. Pottage, ‘Introduction: The Fabrication of Persons and Things’, in A. Pottage & M. Mundy (eds.), *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, Cambridge: Cambridge University Press, 2004, at 5.
[85] See N. Graham, *Lawscape: Property, Environment, Law*, at 92.

> [w]e are not merely on and in the land, we are of it, and we speak from this place of Creation of land, of law.[86]

> Our lands and territories are at the core of our existence - we are the land and the land is us.[87]

The modern (Western) usage of the word 'property' is, however, '*atopic*' and lacks any reference to place: here, people and 'spaces' remain distinct and separate.

The main question to be asked is then:

> *Why does the current archetype of Western 'property law' necessarily involve an 'atopic' conception of land, with no regard for the particularism and the diversity of 'places'?*

According to Graham, this is due to the law's insistence that 'property' is not about *physical things* but is about *people*. Thus, the gap between Western property regimes and Indigenous normative systems surrounding land and intangibles can be explained as the result of two conceptually (and historically) distinct steps relative to the legal construction of the relation between humans and 'spaces'. Graham conceives this relation as a:

1. '*person-thing*' relation;
2. '*person-person*' relation.[88]

[86] I. Watson, 'Buried Alive', *Law and Critique*, 13, 2002, at 268. Irene Watson belongs to the Tanganekald, Meintangk Boandik First Nations Peoples, of the Coorong and the south east of South Australia.
[87] *The Kimberly Declaration: The Voice of Indigenous Peoples, International Indigenous Peoples Summit on Sustainable Development*, 2002 (at http://www.ipcb.org/resolutions/htmls/kim_dec.html).
[88] Graham emphasizes a 'third step' in the Western conceptualization of the property relations, namely Karl Marx's conception of property as a *'thing-thing'* relation. This step identifies more precisely a deviation (and critique) to the 'person-person' model. According to Marx, modern property relations do not account for 'things' in a physical sense, but in the sense that 'things' are 'commodities'. Marx removes the 'person' from the property relation because, he argues, *people themselves have become objectified and commodified*. Marx criticizes dephysicalization as a three-stage process that *abstracts*, *inverts* and *fetishizes* physical reality. See N. Graham, *Lawscape: Property, Environment, Law*, at 147-8. It is clear that this understanding of 'property' - as a 'thing-thing' relation - *is not equivalent to its 'rephysicalization'*. On the contrary, this model regards 'dephysicalization' as the 'abstraction' of persons and things alike.

The first step (the conception of 'property' as a 'person-thing' relation) reflects the prior distinction between '*culture*' and '*nature*' that makes of 'environment' ('place') and 'property' two separate domains. The current anthropocentric model of property law insists that people are 'culture' and everything else is 'nature'. Therefore 'people' and 'land' are conceived as separate entities; and a relation of subjectivity between an individual and a place is not ontologically plausible: it is not possible to conceive 'people' *as* 'land'; 'people' rather *have* (or *own*) 'land'. This ontological separation, between 'people' and 'land', has caused the perception of land as a '*commodity*': as such, land 'has the indefinite quality of being fungible: infinitely tradeable, limited neither spatially nor temporally'.[89] In other words, according to the Western paradigm of 'property', 'land' has no (physical) qualities, but is rather a *tradeable thing*.

The second step (the conception of 'property' as a 'person-person' relation) is described as the '*dephysicalization*' of property. Graham writes:

> [i]n legal theory, 'dephysicalisation' means the removal of the physical 'thing' from the property relation and its replacement with an abstract 'right'. Dephysicalisation describes the shift from the person-thing model of property to the person-person model of property […][90]

The origin of the 'person-person' paradigm is traditionally traced back to a couple of well-known Wesley Newcombe Hohfeld's 1910s essays.[91] Hohfeld unequivocally and ultimately buried the centrality of the 'physical' to the meaning of property, as '[t]he cornerstone of [Hohfeld's] analysis of property was the notion that rights *in rem* (against the world) are in essence a multitude of rights *in personam* (against a person)'.[92]

[89] N. Graham, *Lawscape: Property, Environment, Law*, at 7.
[90] N. Graham, *Lawscape: Property, Environment, Law*, at 135. The term 'dephysicalization of property' was originally used by Kenneth Vandevelde to label an orientation of American courts at the end of 19th century, which generalized the notion of 'property' beyond the physical thing. See K. Vandevelde, 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property', *Buffalo Law Review*, 29 (1999), at 325–367.
[91] W. N. Hohfeld, 'Some Fundamental Legal Conception as Applied in Legal Reasoning', *Yale Law Journal*, 23 (1913), at 16-59; W. N. Hohfeld, 'Fundamental Legal Conception as Applied to Legal Reasoning', *Yale Law Journal*, 26 (1917), at 710-770. However, as will be discussed, some anticipations of the 'dephysicalization' discourse can be found in Jeremy Bentham and David Stuart Mill's works.
[92] M. Davies, *Property: Meanings, Histories, Theories*, Abingdon, Routledge-Cavendish, 2007, at 43.

According to Hohfeld, rights between persons - which compose a 'bundle of rights'[93] - constituted the entire property relation, and 'people-place' relations were simply irrelevant to property in legal discourse.

The substitution of the 'thing' with the 'rights' (or the 'bundle of rights') in the language of property influenced the approach of several anthropologists analysing the relation between Indigenous people and their land. In fact, for the most part ethnographers have construed the concept of Indigenous 'property' in terms of 'rights', 'obligations', and 'interests'.[94] The 'bundle of rights' concept has been identified as a 'convenient metaphor' to express the totality of property rights and obligations, or in relation to a 'master category bundle' such as 'private ownership', or particular property objects such as land, or in relation to intangible resources held by a particular person or social unit.[95] Chris Hann comments that:

> [r]ights and obligations associated with land, the key factor of production, and with concepts of ownership, both collective and private, can be unpacked with the help of the "bundle" metaphor.[96]

[93] Most commentators trace back the foundation of the predominant metaphor (in the common law literature of property) of 'bundle of rights' to Hohfeld's 1913 essay. See among others R. W. Gordon, 'Paradoxical property', in J. Brewer & S. Staves (eds.), *Early Modern Conceptions of Property*, London-New York, Routledge, 1995, at 96. However, as Chris Hann pointed out, the same expression was originally used in Sir Henry Maine's *Ancient Law* (1861), where is referred to *universitas*. See Chris M. Hann, 'The Embeddedness of Property', in C. M. Hann (ed.), *Property Relations: Renewing the Anthropological Tradition*, Cambridge, Cambridge University Press, 1998, at 2. For an analysis (and criticism) of the metaphor of 'bundle of rights', see J. E. Penner, 'The 'Bundle of Rights' Picture of Property', *UCLA Law Review*, 43, 3 (1996), at 711-820. The 'bundle of rights' metaphor is sometimes used interchangeably to the '*bundle of sticks*' one. However, it does seem that the two metaphors maintain a difference: while a 'bundle of rights' refers to position of advantage ('rights'), a 'bundle of sticks' appears more neutral, referring possibly also to disadvantageous positions of the owner (such as a 'duty'). In this sense, the distinction between the 'bundle of rights' and the 'bundle of sticks' metaphor seems similar to the distinction between 'property' and 'property rights' conceptualized in See S. R. Munzer, *A Theory of Property*, Cambridge (MA), Cambridge University Press, 1990, at 24.

[94] See I. Keen, 'The Language of 'Rights' in the Analysis of Aboriginal Property Relations', presented at the conference *Australian Aboriginal Anthropology Today: Critical Perspectives from Europe. Sustainable Environments and New Economies in Aboriginal Australia* (January, 23, 2013). Available at: https://actesbranly.revues.org/547.

[95] See F. von Benda-Beckmann, K. von Benda-Beckmann & M. G. Wiber, 'The Properties of Property', in T. van Meijl & F. von Benda-Beckmann (eds.), *Property Rights and Economic Development*, London, Kegan Paul International, 2006, at 7.

[96] C. Hann, 'A New Double Movement? Anthropological Perspectives on Property in the Age of Neoliberalism', *Socio-Economic Review*, 5, 2 (2007), at 308.

Quite famously, American anthropologist Edward A. Hoebel directly applied the 'person-person' view of property - along with the hohfeldian disaggregation of property law - to (what he called) 'primitive' societies. Starting from the assertion that 'there is law in primitive societies in the same sense as in our', Hoebel thought indeed that 'the basic tools of the student of jurisprudence, though originally designed to fit the needs of the student of civilized law, should therefore suitably serve the needs of the student of primitive man'.[97] Hoebel's approach seems to reflect a 'progressivist emphasising' of some objective patterns of behaviour that takes apart the popular image of Indigenous societies as chaotic and disorganised.[98]

Despite the predominance of the 'bundle of rights' metaphor, which carries along the 'person-person' view of property relations, this study argues that the use of Western archetype of property law as a universal interpretive tool is questionable, since it is *culturally specific*. The dephysicalization and economic commodification of land, as consequences of the atopia of law and the irrelevance of 'place', have also, as will be discussed, a strong influence on the legal approach to the issue of Indigenous 'intellectual property'.

1.5. Structure and Purpose of this Research

The section 2-4 of the present chapter provided the conceptual concerns of this research, and introduced some critical resources that will serve the rest of the work.

The *first part* of the research concerns the Western archetype of 'property', taking a closer look to the relation between Western property law and land in light of Graham's

[97] E. A. Hoebel, 'Fundamental Legal Concepts as Applied in the Study of Primitive Law', *Yale Law Journal* 51, 6 (1942), at 952-953.

[98] See P. Sutton, 'Science and Sensibility on a Foul Frontier: At Flinders Island, 1935' in B. Rigsby & N. Peterson (eds.), *Donald Thomson: The Man and Scholar*, Canberra, Academy of the Social Sciences in Australia, 2005, at 157. On the 'paternalism' of Hoebel's approach see M. Jori, 'Il giurista selvaggio: un contributo alla metodologia della descrizione sociale', *Sociologia del diritto*, 1 (1974), at 87. Other justifications have been found to justify the expansion and universalization of the 'bundle of rights' metaphor. For example, the use of the 'person-person' view of property in ethnography have in some cases prepared the way for future policies involving the recognition of certain Indigenous land rights. Ian Keen acknowledged such use of notions as 'jural order' and 'property' in Nancy Williams' *The Yolngu and Their Land* (1987). See I. Keen, 'The Language of Property: Analyses of Yolngu Relations to Country', in Y. Musharbash, and M. Barber (eds.), *Ethnography and the Production of Anthropological Knowledge: Essays in Honour of Nicolas Peterson*, Canberra, Australian National University E Press, 2011, at 110-111.

Lawscape thesis. It contends that the dominant meaning of 'property' is that proprietary relations are not about real things but abstract rights.

Chapter 2 (*'Property' as a 'Person-Thing Relation'*) discusses the *dichotomy between people and places* in which property law has its foundation. According to such distinction, 'place', or the physical ('natural') world, is predominantly conceived and experienced anthropocentrically, as *something separable and 'other' to human subjectivity*. The conceptual origins of the separation between 'people' and 'places' will be discussed both from an etymological standpoint, and addressing the prior ontological distinction between 'nature' and 'culture'.

Chapter 3 (*Property as a 'Person-Person' Relation*) discusses the *issue of the dephysicalization of property*, which implies the shift from the 'person-thing' to the 'person–person' model of property. This section presents the contributions of legal philosophy to the 'person-person' theory, introduced by Jeremy Bentham and D. S. Mill, and developed in Wesley N. Hohfeld's essays. As will be shown, for both Bentham and Mill, property is described in terms of its 'use value'. They conceive 'property' as part of the positivization of law and utilitarian political theory, and define 'property' as a *relation between persons rather than between persons and things*. The point of having a property right is then not the 'thing' attached to the right, it is the having of a 'right' against the 'rights' of all other persons. Eventually, Hohfeld qualifies the *legal relativity of property rights,* and present property relations as relations between persons. This idea of property ultimately eclipses 'place', since make property relations totally dependent and about people. The idea of a property dephysicalized is then furthered throughout the reflections of Felix Cohen, Frank Snare, Alf Ross and Karl Olivecrona. The final segment of Chapter 3 shows how this model of 'property' was the object of a 'transplant' from land and tangibles to intangible resources.

The *second part* of the research provides an account of the Indigenous Australian view about land and intangibles.

Chapter 4 (*'To Be in Place': Yolngu Territorial Cosmos*) shows how Indigenous conception of human subjectivity is defined not through the alienation of people from a place - obtained via the dichotomy 'people-place' essential to property law - but rather through *identification* or *association with a (specific) place*. Indigenous beliefs identify land with people who inhabits it, as a part of a cosmological entity named 'territorial

cosmos'[99]: 'land' and people are in fact better described as *different faces of the same entity*, rather than different entities. The Indigenous view, rejecting the subject-object antinomy typical of Western legality, highly considers 'ancestral' subjectivity and spiritual potency as residing in land. From a methodological standpoint, Chapter 3 (and the present work in general) acknowledges the high degree of variability in locally-specific Indigenous Australian cosmological and ecological systems. For reason of time (this work is the result of a three-years doctoral scholarship), the present study focalizes on the case of Yolngu people of North-East Arnhem Land, due to the high quality of ethnographic researches available on Yolngu culture, and the large number of interactions among Yolngu society and Australian legal community.[100] The strength and richness of an exposition based on Yolngu worldview lies in its specificity, and in no way this work is suggesting that Yolngu experience shall be adopted as a model to describe the generality of Indigenous cultures across the world.

Chapter 5 (*Yolngu 'Intellectual Property': Knowledge in Place*) focuses on the inextricable link between land and knowledge, ontologically consistent with the structure Yolngu territorial cosmos. In fact, Yolngu see land as a network of place-based 'cosmological' connections linking the landscape not just to people, but also to cultural products. Indigenous cosmologies, centred on 'place', influence in several ways the ontological and epistemological status of Yolngu intangibles. Chapter 5 discusses the *locality* of knowledge incorporated in Yolngu intangibles: such knowledge will be indeed qualified as a 'place-based' knowledge. It argues that Yolngu knowledge - and Yolngu intangibles - cannot be conceptually separated from Yolngu 'Country', in virtue of the cosmological connections that link the different parts of Yolngu territorial cosmos. As a consequence, the current Western archetype of 'property' entailed by the standard intellectual property model - denying the relevance of 'place' - unavoidably transform Indigenous cultural objects and knowledge in fundamental ways, since it separates them from the environment in which they originated. Quite significantly, chapter 4 instantiates

[99] See Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, 13.

[100] In the last two decades of 20th century, several copyright cases concerning misappropriations of Indigenous Australian artworks and ritual elements were discussed before Australian Courts. Yolngu people was particularly involved in such sustained judicial activity, and filed claims for copyright infringement eventually resulted in five independent lawsuits: *Yangarriny Wunungmurra v Peter Stripes* (1981), *Bulun Bulun v Nejlam* (1989), *Yumbulul v Reserve Bank of Australia* (1991), *Milpurrurru v Indofurn Carpets* (1994), and *Bulun Bulun v R & T Textiles* (1998).

a substantial deviation of the present research with respect to Graham's *Lawscape*. While Graham claims for a model of 'property' that acknowledges the *physicality* of places - as opposed to the abstract and dephysicalized model of the Western 'property' archetype - the present work emphasizes also *the link between the physicality of a place and the cosmology associated with it* in Indigenous worldview. In order to understand the fundamental gap between intellectual property law and Yolngu norms surrounding intangibles, in fact, it seems necessary to illuminate *the connection between the physical landscape and its cosmological 'extension'*. Such extension clarify indeed the relationship of identity between land and intangibles, along with the peculiar nature of the latter with respect to intellectual property object.

The ultimate claim advanced in the concluding remarks to this work (in Chapter 6) is that, since property law considers (physical) 'place' irrelevant, it cannot acknowledge *the cosmological connection implicit in land*. Given the entangled nature of the 'physical' and the 'cosmological' in the context of a chthonic tradition, the particularism of each environment identify the essence of the cultural practice enacted upon it. Therefore, the inability to conceive the physicality of a landscape carry along the impossibility to conceptualize - from a legal standpoint - the most significant aspect of Indigenous social and cultural life, including the process of regulation surrounding intangibles.

Part 1

The Western 'Property' Archetype

2. ‘Property’ as ‘Person-Thing’ Relation

> Être *est l’état de l’étant, de celui qui est qualque chose;* avoir *est l’état de l’ayant, de celui à qui qualque chose est*. *La differènce apparait ainsi. Entre les deux termes qu’il joint,* être *est établit un rapport intrinsèque d’identitè: c’est l’état consubstantial. Au contraire les duex termes joint par* avoir *demeurent distincts […] c’est le rapport de possédé au possesseur.*
>
> [*To be* is the state of that who is being, the one who is something. *To have* is the state of the possessor, the one for whom something is. The difference appears thus. Between the two terms it joins *to be* establishes an intrinsic relation of identity: it is the consubstantial state of being. On the contrary, the two terms joined by *to have* remain distinct […] it is the relation between the possessor and the possessed.][1]

2.1. Introduction

Property theory has highlighted two different conceptions of ‘property’:

- ‘property’ as ‘*thing*’ (as a ‘*material thing*’);
- ‘property’ as ‘*rights*’ (as a ‘*bundle of rights*’).[2]

This distinction is often framed as a dichotomy, either to accept the layman’s classification of ‘property’ as a ‘thing’, or to opt for the more ‘sophisticated’ conception

[1] É. Benveniste, ‘«Etre » et «avoir» dans leurs fonctions linguistiques’, *Bulletin de la Société de linguistique*, 55 (1960), at 113. Quoted (and translated) in G. Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society*, Annandale, Pluto Press, 1998, at 139-140.
[2] Stephen Munzer opposes a conception of ‘property’ as ‘*things*’ to a conception of ‘property’ as ‘*relations*’. See S. R. Munzer, *A Theory of Property*, at 16.

of 'property' as 'rights'.[3] However, although the conception of 'property' as a 'material thing' is attributed to a 'layman', it is not entirely unimportant.[4] For instance, Stephen Munzer states that such conception has a role in describing the transcendental characters (the condition for the existence) of property, and particularly its *materiality*: 'property must, at some point, involve material objects'.[5] According to Munzer, a certain degree of materiality (a physical manifestation) is necessary for property to exist. That is also true for immaterial goods, which exist for the law only if they maintain a physical counterpart:

> [i]ntangible property is not property in abstract things or ideas tout court. Copyrights and patents, for example, traditionally require some writing or drawing or model through which rights are claimed. Nor would the power to exclude be effectual unless there could be rules pertaining to physical manifestations of intangible property. An example would be a legal rule forbidding people to produce a patented machine without a license from the patent owner.[6]

Peter Drahos highlights the same issue, as referred to the Roman idea of 'incorporeal things':

> the idea of incorporeal things in Gaius and Justinian refers to legal rights. Rights are used by both to include those rights we would think of as property rights as well as contractual rights. The strong implication from Justinian is

[3] See (among others): S. R. Munzer, *A Theory of Property*, at 16; A. Gambaro, *La proprietà nel common law anglo-americano*, Padova, Cedam, at 16-17. For a general overview of the literature on this distinction see J. R. Nash, 'Packaging Property: The Effect of Paradigmatic Framing of Property Rights', *Tulane Law Review*, 83, 3 (2009), at 691-734. The same distinction is sometimes acknowledged in B. Ackerman, *Private Property and the Constitution*, New Haven, Yale University Press, 1977 (at 77). However, Ackerman does not present the identification of 'property' as a 'thing', but as a *set of rules* relative to the relationship between a person and a thing. Also, it should be acknowledged that the two paradigms of 'property' (as 'thing' and as 'rights') are not the only ones: for example, the paradigm of 'property' as 'tree' has been advanced. See A. Di Robilant, 'Property: A Bundle of Sticks or a Tree?', *Vanderbilt Law Review*, 66, 3 (2013), at 869-932.

[4] Some authors argue instead that the conception of 'property' as a 'material thing' is to be dismissed. See for instance C. B. Macpherson, 'The Meaning of Property', in C. B. Macpherson (ed.), *Property. Mainstream and Critical Positions*, Toronto, University of Toronto Press, 1978, at 2: 'property both in law and logic means rights, not things'.

[5] See S. R. Munzer, *A Theory of Property*, at 72.

[6] S. R. Munzer, *A Theory of Property*, at 72-3. Also, materiality is a condition for the existence of property because people need to exists materially in order to be owner. On the counter-example of 'phantoms' see S. R. Munzer, *A Theory of Property*, at 72-3.

> that incorporeal things *have corporeal counterparts*. Incorporeal things are thought, in other words, to *relate strongly to corporeal objects*.[7]

As seen (section 1.4), following *Lawscape*, this study translates the two different conceptions of 'property' as two distinct relations, namely:

- a '*person-thing*' relation (corresponding to the conception of 'property' as 'thing');
- a '*person-person*' relation (corresponding to the conception of 'property' as 'rights').

Nicole Graham identifies the 'person-thing' conception of 'property' as the *conceptual origin* of Western 'property' archetype. This dichotomy relies indeed on the a priori and foundational separation of 'nature' from 'culture' and proceeds by dividing the 'people-place' relationship into the *active agents* of the property relation - 'people' - and the passive objects of the property relation, 'things'. However, as will be discussed, the 'person-thing' conception of 'property' appears as *culturally specific* and maladapted to Indigenous realities, where the relation between 'people' and 'places' is more one of *subjectivity* or *identification* (which does not separate, but unifies, the two poles).

According to Graham, the 'person-person' conception of 'property' is instead a 'recalculation' or a *conceptual development* of the 'person-thing' conception, occurred over the course of 18th-20th centuries. Such 'second step' entails a '*dephysicalization*' of property, namely the removal of the physical 'thing' from the property relation and its replacement with an abstract 'bundle of rights'.

The present research argues that to put more analytical focus on the nature of the objects of ownership may unveil interesting ways in which 'things' influence the 'rights' that characterize the 'property' relation. This point was somehow anticipated in Anthony Honoré's work on property law:

[7] See P. Drahos, *A Philosophy of Intellectual Property*, Canberra, Australian National University E Press, 2016 [1994], at 22-3 (italics added).

> [o]ur investigation has revealed what we began by suspecting, that the notion of ownership and of the thing owned are *interdependent*. We are left not with an inclination to adopt a terminology which confines ownership to material objects, but with an understanding of a certain shift of meaning as ownership is applied to different classes of thing owned.[8]

Honoré's statement can be interpreted as suggesting that a more sensitive approach to the different classes of things that can be owned - with respect to the current structure of property law - is needed, since the nature of 'things' may influence and even change the standard characterization of the bundle of rights (that constitutes the 'ownership' of those things). As stated in the introductory remarks to the present work, the idea of 'interdependence' of rights and things proves fundamental for an investigation over Indigenous conceptions of 'land' and 'intellectual property' rights.

The present chapter takes on the first steps that have led to the current archetype of 'property law' in the Western legal tradition: the conception of 'property' as a 'person-thing' relation.

The *section 2.2* discusses the etymology of 'property', showing how the original meaning of the word appeared closer to the meaning of 'identity' rather that to its current 'legal' significance.

The *section 2.3* presents the foundational separation between culture and nature, from which the dichotomy between the 'person' ('owner') and the 'thing' ('thing owned') was derived. The section contends indeed that the paradigm of 'nature-culture' functions as the condition of, as well as a parallel to, the coupling of the 'people-things' conceptions in legal theory.

The section 2.4 shows the ultimate steps of the separation between 'person' and 'thing' in the modern legal theory, especially through the notion of 'alienability'.

2.2. 'Ownership' v 'Identity'

2.2.1. The Etymology of 'Property'

[8] A. Honoré, 'Ownership,'at 133 (italics added).

2.2.1.1. '*Res*'

What is 'property'? The attempt to identify and define 'property' in its normative sense, as a social institution, is ambitious.[9]

Disagreement over what the term 'property' means results in its sometimes being used in a manner that is both philosophically and legally ambiguous. According to Alan Pottage, the term 'property' (along with 'institution') is 'not immediately meaningful' today.[10] As many writers observe, 'property' is a concept which defies definitions.[11] It evidently falls into the category of 'essentially contested concepts', namely those ideas or concepts for which it is impossible to identify a clearly definable use of the term that can be held up as the correct or standard use.[12]

The most common remark that has been made in the quest for a theoretical definitions of 'property' is that the term 'real' - in the expression 'real property', a synonym to 'land law' - is oxymoronic.[13] The modern English word 'real' derives from the Latin *'res'* meaning 'thing'. Therefore, as Graham points out, the classical meaning of 'real property' seems to specify the real, tangible and physical nature of property interests in land.[14] The word 'real' in contemporary real property law contrasts thus with the fact that the 'thing' is actually *unreal*: within the rigid structure of the Western archetype of 'property', the

[9] According to Richard Pipes, 'property' can be studied from two distinct points of view: as a 'concept' and as an 'institution'. See R. Pipes, *Property and Freedom*, New York-Toronto, Vintage Books, 1999, at 4.
[10] See A. Pottage, 'Instituting Property', *Oxford Journal of Legal Studies*, 18 (1998), at 331.
[11] See J. Waldron, *The Right to Private Property*, Oxford, Clarendon Press, 1988, at 26. Quite famously, Waldron distinguishes between 'concept' and 'conceptions' of 'property', where 'concept' refers to the meaning of a term, and 'conceptions' to the various interpretations of that concept. According to Waldron, the concept of 'property' refers to 'a system of rules governing access to and control of material resources'. See J. Waldron, *The Right to Private Property*, at 326, 336. Jim Harris warns that 'deductions from purportedly universal definitions of the word "property" are to be deplored'. See J. Harris, *Property and Justice*, Oxford, Oxford University Press, 1996, at 12. See also J. E. Cribbet, 'Concepts in Transition: The Search for a New Definition of Property', *University of Illinois Law Review*, 1 (1986), at 1. On the 'elusiveness' and a 'deep scepticism about the meaning and terminology of property' see K. Gray, 'Property in Thin Air', *Cambridge Law Journal*, 50, 2 (1991), at 305.
[12] See W. B. Gallie, 'Essentially Contested Concepts', in M. Black (ed.), *The Importance of Language*, Englewood Cliffs (NJ), Prentice Hall, 1962, at 121–146. For a definition of 'property' (and 'intellectual property') as an 'essentially contested concept' see A. George, *Constructing Intellectual Property*, at 64.
[13] See N. Graham, *Lawscape: Property, Environment, Law*, at 25 (quoting an unpublished 2001 lecture of Terry Carney on 'Real Property').
[14] See N. Graham, *Lawscape: Property, Environment, Law*, at 25.

'thing' is indeed an abstract 'right' to (or a 'bungle of rights' insisting on) a thing, and not the physical thing itself.[15]

However, the identification of the '*res*' with a physical thing is not undisputed. As Yan Thomas notes, '*res*' denotes the 'legal qualification' of things, and not 'physical' things: as a consequence, '*res*' did not denotes neither a '*Sache*' ('object') nor a '*Gegenstand*' ('something that stands in front'), but rather an '*affair*'. Therefore, according to Thomas, '*res*' in its most common sense would correspond to Greek 'τα πραγματα'.[16] Italian jurist Carlo Maiorca, in a work devoted to the ownership of 'space', similarly argues that '*res*' is not a physical thing: in fact, the materiality of things is to be interpreted rather as a prerequisite of the legal notion of 'thing', and not of the everyday notion.[17]

2.2.1.2. '*Proprietas*'

Tracing the historical origin and development of the word 'property' may throw light on its contemporary meaning, as well as indicate the way in which modern Anglo-European relationships between 'people' and 'place' have changed over time.

The English word 'property' comes via the Old French[18] '*propreté*', which in turn comes from the Latin word '*proprietas*' meaning primarily 'proper to, one's own, or special character'.[19] The Old French and Latin meanings of these words are connected with the Greek word '*ἰδιώτης*', which - in delimiting a 'private' dimension of a human

[15] The thesis that the law conceives more incorporeal 'realities' than corporeal, tangible ones is put forward (among others) by French philosopher René-Georges Renard. On Renard's conception of the incorporeality of 'legal objects' see L. Passerini Glazel, 'Tetracotomía delle istituzioni in René-Georges Renard', in *Saggi in ricordo di Aristide Tanzi*, Milano, Giuffré, 2009, at 353-365. On the same issue see also F. Voltaggio Lucchesi, *I beni immateriali*, Milano, Giuffrè, 1962, at 32; W. J. Gordon, 'Intellectual Property', in P. Cane & M. Tushnet (eds.), *Oxford Handbook of Legal Studies*, Oxford, Oxford University Press, 2003, at 618; A. George, *Constructing Intellectual Property*, at 74.

[16] See Y. Thomas, 'La valeur de choses. Le droit romain hors la religion', *Annales. Histoire, Science Sociales*, 57, 6 (2002), at 1452. While sometimes used interchangeably by German speakers, the term '*Sache*' refers to a 'material' thing; '*Gegenstand*' denotes literally 'something that stands in front'.

[17] See C. Maiorca, *Lo spazio e I limiti della proprietà fondiaria*, Torino, Istituto giuridico, 1934, at 35-6.

[18] The Old French was the language spoken in Northern France from the 8th to the 14th century (starting from the 14th century, it acquired the name of '*langue d'oil*', contrasting with the '*langue d'oc*' spread in the south of France).

[19] See R. K. Barnhart & S. Steinmetz (ed.), *Chambers Dictionary of Etymology*, 1999, 'property, n.'; and K. Gray & S. Gray, *Elements of Land Law*, Oxford, Oxford University Press, 1987, at 8. According to Richard Pipes, the Byzantine jurisprudence evolved the term '*proprietas*' from what Roman jurists designated as '*dominium*'. See R. Pipes, *Property and Freedom*, at xv.

being, in contrast to a 'public' one - refers to the peculiar nature or specific character of something: in other words, a quality that makes something *distinguishable* from other things. Therefore, according to the original meaning of '*ἰδιώτης*', to say that 'this is my own' would suggest that a thing is *connected to my identity*.[20] 'Property' is here a synonym of 'attributes,' 'qualities,' 'features,' 'characteristics', and is defined as 'the characteristic quality of a person or thing'.[21] In other words, 'property' - in its original meaning - was more akin to the concept of '*propriety*' ('being proper').[22] According to Graham:

> the immediate connection here between 'people' and 'things' in the western origin of the concept suggests that 'property' and 'identity' were mutually formative.[23]

A 'distinct and particular link'[24] between the object and its owner seems thus implied by the original meaning of 'property'. The same assertion seems true also for the languages in which the equivalent term for 'property' is derived, as English, from Latin '*proper*': Italian ('*proprietà*'), French ('*propreté*'), Spanish ('*propriedad*'); and also for Russian '*sobstvennost*', which derives from '*sobstvennyi*', 'own' (also 'belonging to'; '*sebja*' means 'self'), Lettic '*īpašums*', from '*īpašs*', 'own' ('peculiar', 'special'; '*pats*' means 'self'); Avestan '*gaēϑa-*', 'being' (also 'material being', substance) [25]

2.2.2. 'To Be' and 'To Have'

[20] See R. Pipes, *Property and Freedom*, at 99.
[21] *Oxford English Dictionary (OED) online*, 'property, n.'.
[22] 'Property' is in fact the Anglo-Norman variation of 'propriety'. According to the Oxford English Dictionary, 'property' entered English first, while 'propriety' was reborrowed later.
[23] N. Graham, *Lawscape: Property, Environment, Law*, at 26.
[24] M. Davies, *Property: Meanings, Histories, Theories*, at 25.
[25] It should be noted, however, that in other Indo-European languages words for 'property' are linked to verbs for 'possess', 'have' and to concept such as 'money' or 'earnings'. For instance: Welsh '*meddiant*' comes from '*meddu*', 'posses'; Danish '*besiddelser*', Swedish '*besittningar*', Dutch '*bezit*' all comes from Danish '*besidde*' ('possess'); Lithuanian '*turtas*' - from '*tureti*' ('to have'); Lettic '*manta*' from Low German '*monte*' (or '*munte*'), 'coin' (as Lithuanian '*manta*', 'money'); Old High German (VII-XI centuries) '*haba*' from '*haben*' ('to have'); Church Slavonic '*sŭtęžanĭje*' from '*sŭtęžati*' ('possess'); Polish 'posiadłość' from 'posiadać' ('possess'). There are also peculiar cases, like Sanskrit '*dravya-*', meaning also 'material substance' and derived from '*dru*', 'wood' (as a kind of 'building material'). All the etymological reference listed above (also in text) come from C. D. Buck, *A Dictionary of the Selected Synonyms in the Principal Indo-European Languages*, Chicago, The University of Chicago Press, 1949, at 769-71.

Where applied to the 'people-land' relation, the conceptual proximity of 'property' (at least in its original meaning) to the idea of 'identity' seems to describe an *intrinsic bound between a place and the person (or people) living upon it*: such that the two were mutually identified, or 'fused' in a 'consubstantial state of being'.[26] This sense of property - as a 'people-place' relation - can be better described as the mode of subjectivity that uses the verb *to be*: 'people' *are (in)* 'place'.

As Graham notes, drawing from legal historian David Seipp's investigations, the relationship between 'property' and 'identity' was an important one in medieval England and in the early common law view of land. Since '[l]and was also an important component of identity' and had 'a significance greater than the sum of its economic production and use value'[27], disputes over land were addressed by reference to *specific location* (and uses) - rather than to abstract legal categories – and to the experience of people inhabiting those locations. Land was, ultimately, recognised and valued *materially*, because the materiality and particularism of land was the *locus* in which the identity of people expressed itself.[28] A similar experience - the relevance of specific locations and uses in a 'judicial' context, implying a relation of identity between 'owners' and land - can be found in more recent times with reference to the 'civic uses' [*usi civici*] phenomenon in Italy. '*Usi civici*' is a generic expression that refers to a vast variety of communal (and promiscuous) use and exploitation of land.[29] Quite significantly, in order to obtain evidences of 'proprietary rights' in land, Italian Courts relied on people's historical

[26] G. Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society*, at 139-140.
[27] D. J. Seipp, 'The Concept of Property in the Early Common Law', *Law and History Review*, 12, 1 (1994), at 46. Quoted in N. Graham, *Lawscape: Property, Environment, Law*, at 26.
[28] See D. J. Seipp, 'The Concept of Property in the Early Common Law', at 46-9. However, a secondary and less common usage of the word 'property' existed in medieval England: a 'person's interest in having a thing'. Usually the connotation of this meaning was religious and overwhelmingly negative. As Seipp points out, '[d]ozens of surviving manuscripts from the fourteenth and fifteenth centuries praised monastic establishments for holding all goods in common and shunning 'property', or condemned them for doing the opposite. To have 'property' of goods (or goods 'in proper') was a sin, and monks guilty of this vice were denounced as 'proprietaries' or 'owners''. D. J. Seipp, 'The Concept of Property in the Early Common Law', at 69. Quoted in N. Graham, *Lawscape: Property, Environment, Law*, at 25 (quoted in N. Graham, *Lawscape: Property, Environment, Law*, at 27). Similarly, R. Pipes, *Property and Freedom*, at 25-6.
[29] See M. Masia, *Il controllo suill'uso delle terre: Analisi socio-giuridica sugli usi civici in Sardegna*, Cagliari, Cuec, 1992, at 18-9. Kinds of civic uses of land are, for instance (with specific reference to Sardinia), '*ademprivio*' (from '*ad impreu*', 'to be used') and '*cussorgia*' (from Latin '*cum sorte*', and equivalent to 'consortium').

memory and knowledge of the land rather than looking for standard title deeds (also given the very low odds of finding them).[30]

The meaning of 'property' as something linked to human subjectivity is today just a secondary definition of the word. In its modern usage, its primary meaning partitions the notion of 'property' from 'identity'. Nowadays, 'property' denotes in fact the (potential) *alienability* of the thing, rather than the mutual identification of the 'owner' and the 'owned'.[31] In fact, 'property', in today's usage, refers to an 'object' or 'thing' whose only relationship to the owner is that it is owned.

According to the original sense of 'property' (akin to the meaning of 'identity'), 'the thing possesses me', 'I belong to the thing' and 'I am identified by the thing'. But according to the modern sense of 'property', 'I possess the thing', 'the thing belongs to me'. This conceptual dichotomy highlights thus two meanings of 'property':

1. 'property' as '*quality*' or '*attribute*' (as 'propriety');
2. 'property' as '*ownership*'.[32]

The transition of the inner meaning of 'property' from an interdependence of 'ownership' and 'identity' to a unilateral relation indicates possibly a shift in the ideology of 'people-place' relations. Where 'place' once characterised and identified a 'person' (or 'people'), now the standard meaning of 'property' has made 'place' and 'person' *disconnected entities*.[33] However, still today, there exist individuals and communities who rationalise their property interest in terms of their identification with the land over generations. The most familiar case is the one of most Indigenous populations, which advance their claims

[30] See M. Masia, *Il controllo suill'uso delle terre: Analisi socio-giuridica sugli usi civici in Sardegna*, at 96-7; and V. Ferrari & M. Masia, '"Usi civici" e cultura giuridica: Profili sociologico-giuridici', in P. Nervi (ed.), *Cosa apprendere dalla proprietà collettiva: La consuetudine fra tradizione e modernità*, Padova: CEDAM, 2003, at 48-9.

[31] See N. Graham, *Lawscape: Property, Environment, Law*, at 26.

[32] Such distinction reflects in the German language, where '*Eigentum*' means 'property' in the sense of 'ownership', and '*Eigenschaft*' means 'property' in the sense of 'attribute, feature, characteristic'. See E. Waibl & P. Herdina, *Dictionary of Philosophical Terms. Volume 1: German-English/Detusch-Englisch*, München, K. G. Saur-Routledge, 1997, at 63-4. Both '*Eigentum*' and '*Eigenschaft*', today also used as synonyms, include '*Eigen*', a substantive participle of the verb '*eigan*', equivalent to '*haben*' ('to have'). '*Eigen*' is a word of the common Germanic stock that - starting from 1200s - was applied to lands in order to indicate that they were 'objects' *had* or *held* by someone. However, '*eigen*' may also refer more generally to something that is 'proper' to a 'subject'. See R. Hübner, *A History of Germanic Private Law*, Clark (NJ), The Lawbook Exchange, 2000, at 227.

[33] See N. Graham, *Lawscape: Property, Environment, Law*, at 27.

concerning land ownership by means of a rhetoric of *identification* ('we are the land'), rather than exclusively of *entitlement*.

Despite residual and persistent views of 'land property' as something material, specific, and identified with people, the dominant conception of 'property', in both legal and cultural discourses, is one of 'abstract' entitlements as between persons which are 'alienable' from, rather than 'proper to', a person. Indeed, the contemporary usage of the word 'property' refers almost always to something *fungible*, rather than something *distinctive*, and to something that is *detachable from*, rather than *attached to* or even *integrated with*, the identity of an individual or community.

Today, 'property' is *atopic* and lacks any reference to place. 'People' and 'place' remain distinct and separated entities. The modern sense of 'property' relation describes thus the sort of relation that uses the verb '*to have*', and not the verb 'to be': people *have* (or *own*) places. According to this conception of 'property', 'people' are regarded in the singular person, or 'the subject who has' and 'place' is regarded as a 'thing' or 'the object that is had'.[34] The 'gap' that interrupted the continuum between 'owner' and 'thing owned' - and that partitioned conceptually 'people' from 'place' - can be traced back to the fundamental distinction between 'nature' and 'culture' in Western philosophy and anthropology.

2.3. 'Nature' v 'Culture'

2.3.1. The 'Nature-Culture' Dichotomy

The 'nature-culture divide' originated from the scientific revolution of the 16th and 17th centuries. In Graham's words, more than an 'epistemological' revolution, this era carried 'a new ontological order' and a new kind of 'people-place' relation.[35] The paradigm of 'nature-culture' have mostly operated through a dichotomous logic, and have been characterised by *difference*, or even *opposition*, between the two concepts ('nature' and

[34] See G. Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society*, at 174.
[35] See N. Graham, *Lawscape: Property, Environment, Law*, at 32.

'culture').[36] Among others, French anthropologist Claude Levi-Strauss was firm in the argument of a divide, writing that there existed 'only two true models of concrete diversity: one on the plane of nature, namely that of the diversity of species, and the other on the cultural plane provided by the diversity of functions'.[37] The conceptual division of the world into the categories of 'nature' and 'culture' proved vital to the discourse of (scientific) 'method' in 16th and 17th centuries. In *The New Atlantis* (1626) Francis Bacon rejected knowledge 'received' through faith in favour of 'active' scientific inquiry.[38] Significantly, the idea of 'knowledge-as-science' advanced by Bacon is based on the specific concept of 'nature-as-object'. 'Humans' are thought to be separate from, outside and above the category of 'nature'. The idea of 'knowledge-as-science' implies a conception of humans as '*subjects*': the conductors of the scientific investigation. Conversely, the 'things' of nature are the '*objects*' of the investigation. It is not possible to be both the 'subject' and the 'object' in the ontology of science: something is either of culture or it is of nature; human or not human; the 'inquirer' or the 'object of inquiry'.[39]

The 'nature-culture' divide is rooted in anthropocentrism, which divides the world into two categories - 'human beings' and 'the rest' - and then collocates 'humans' at an imaginary centre of that world.[40] According to the anthropocentric model, understanding 'things' in the world is not based on what those 'things' actually are, but on how they *compared to manhood*. 'Everything else' is everything not human, which, according to the conceptual model of 'humanity' as the 'centre of the world', became simply 'the environment', that is 'the aggregate of surrounding things' (surrounding humans).[41]

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[36] Later, the argument became framed by the question of whether the two entities - nature and culture - function separately from one another, or if they were in a continuous relationship with each other. According to Graham, 'Nature and culture are thought to be as different as it is possible to be. They are opposite. They are not, therefore, two distinct concepts, but two poles of the same meta-concept, nature/culture'. See N. Graham, *Lawscape: Property, Environment, Law*, at 28.

[37] C. Lévi-Strauss, *The Savage Mind*, Paris, Librarie Plon, 1972, at 124.

[38] See F. Bacon, *The New Atlantis*, Cambridge, Cambridge University Press, 1990 [1626], at 34-5.

[39] An objection that could be raised against the assertion that the objects of all investigations are 'things' is that the scientific study of peoples (as individuals or communities) also exists. According to Graham, this sort of studies 'immediately renders them objects (e.g. cadavers, women, Indigenous peoples). In so doing, this inquiry situates these people in the category of nature, at the periphery of the anthropocentric model of the world as a biological species. The process imagines that it is possible to isolate the aspect of the object's being that is subject to the inquiry from the whole of the object's life (and/or death) as a person such as their intellect, culture, spirituality, family, community and psychology'. See N. Graham, *Lawscape: Property, Environment, Law*, at 29.

[40] M. Serres, *The Natural Contract* (trans. E. MacArthur & W. Paulson), Ann Arbor, University of Michigan Press, 1995, at 33.

[41] *The Macquarie Dictionary*, 1992. The term 'environment' derives from the Middle French (14th - 17th century) '*environnement*', 'the action of surrounding something'.

The relationship between humans and 'their' environment is expressed as an opposition between 'culture' and 'nature', as well as their *mutual constitution*. People are not 'human' just in the sense of being a *physically* determined species, but rather they are 'human' in the sense of being a *culturally* determined and distinguished species from all other uncultured species.[42] Natural things could be classified as much by *the cultural qualities they lacked* as much as by *the natural qualities they possessed*. Similarly, culture could be known as the *absence of nature* and the *loss of natural qualities*.[43]

Moreover, the coupling of the notions of 'nature' and 'culture' is based not simply on a binary structure but, more significantly, on a *hierarchical order*. Human subjectivity was defined not merely in opposition to its physical 'environment', but in virtue of its *superiority* to it, by being the 'masters and possessors of nature'.[44] The 'nature-culture' dualism is indeed encapsulated in the concept of 'human impact' (which also positions humans as acting on nature from the outside).[45] According to the anthropocentric vision of reality, the main function of human science is more than the development or acquisition of knowledge in and for itself; it is principally to use nature for the elevation of humanity.[46] The reification or '*thingness*' of nature - the conception of 'nature' as a 'thing', a purely external 'other' with respect to humanity - deprives nature of having meaning in itself.[47]

2.3.2. Improvement

[42] See N. Graham, *Lawscape: Property, Environment, Law*, at 28.
[43] As noted by Raymond Williams, 'culture' is a positive concept of activity, and the word 'culture' 'in all its early uses was a noun of process: the tending of something, basically crops or animals'. 'Culture' was not originally partitioned from the idea of 'nature', but related to it: as a matter of fact, nature was the physical and logical condition of this idea of culture. According to Williams, in the early 16th century, 'development, and this alongside the original meaning in husbandry, was the main sense until the late eighteenth century and early nineteenth century'. See R. Williams, *Keywords*, Glasgow, Fontana, 1976, at 77. Williams demonstrates how the extended usage of the word 'culture' distinguishes biology from social development. The extension of the word 'culture', from describing a physical activity pertaining to land and soil, to its use as *a metaphor for describing cultural status* foreshadowed the subsequent shift in the dominant signification of the word from meaning 'physical improvement' to meaning 'metaphysical improvement'.
[44] R. Descartes, *Discourse on Method and the Meditations*, Harmondsworth: Penguin, 1978 [1637], at 78.
[45] See L. Head, 'Cultural Ecology: The Problematic Human and the Terms of Engagement', *Progress in Human Geography*, 31, 6, at 838.
[46] See P. Grossi, *La proprietà e le proprietà nell'officina dello storico*, Milano, Giuffrè, 1988, at 367.
[47] See D. Harvey, *Justice, Nature and the Geography of Difference*, San Francisco, Wiley-Blackwell, 2000, at 134.

The key word in the realm of the 'nature-culture' divide is '*improvement*'. The notion of 'improvement', following the scientific revolution, was becoming a '*denatured concept*', deprived of its original meaning.[48] From agrarian improvement 'propelled by a sense of moral duty to exploit more efficiently the riches of the natural world' to 'a more explicitly pecuniary sense'.[49] The 17th century discourses of 'improvement' and 'progress' indicate indeed the development of a metaphysical sense of the word 'culture' that was profoundly abstracted from its physical sense. 'Improvement' discourse, although based on the very 'real' and physical relationship between 'people' and 'place' in agriculture, started to be principally used to establish the 'metaphysical subjectivity' of man as *transcending nature*. Therefore, 'improvement' put into everyday language and land use entails the ideological separation of 'nature' and 'culture'. Debate about 'improvement' revealed a dispute about both the concept of 'nature' and the concept of 'culture'. Resistance to the extension of the notion of 'culture-as-cultivation' to 'culture-as-transcendence' (transcendence of 'humans' from 'nature') undermined the epistemological and ontological claims of the new-born 'nature-culture' paradigm. According to this idea of 'human', culture is the *active realm* transforming a 'dormant' nature from something useless and menacing into something fruitful and known. Bacon's commentary suggests that without human intervention, nature alone is 'regarded like a deformed Chaos which brought discredit to the Commonwealth'.[50] As noted by Graham, the characterisation of nature as a 'deformed chaos', however, cannot convey an idea of 'nature' without an idea of 'culture' that has been abstracted from it. 'Nature' here signifies 'abnormality, imperfection, disorder and anarchy' only because it functions as referent to its opposite, positive term 'culture'.[51]

2.3.3. 'Nature', 'Culture' and Colonization

[48] See N. Graham, *Lawscape: Property, Environment, Law*, at 33.
[49] A. MacRae, 'Husbandry Manuals and the Language of Agrarian improvement', in M. Leslie & T. Raylor (eds), *Culture and Cultivation in Early Modern England: Writing and the Land*, London, Leicester University Press, 1992, at 36-7.
[50] Quoted in L. Brace, 'Husbanding the Earth and Hedging Out the Poor', in A. Buck, J. McLaren & N. Wright (eds.), *Land and Freedom: Law, Property Rights and the English Diaspora*, Aldershot, Ashgate, 2001, at 6.
[51] See N. Graham, *Lawscape: Property, Environment, Law*, at 35-6.

The 'nature-culture' duality 'perpetuates a fundamentally Cartesian and colonial model'[52] of the relationship between 'people' and 'places', in the sense that the separation is an essentially 'Western' one. This model seems maladapted to the non-Western 'others', particularly those deemed to be living close to nature. As a consequence, in most cases 'others' were 'exempted' from the culture-nature divide and, instead, were 'collapsed into nature as part of the flora and fauna'.[53]

An example of the assumptions behind the 'nature-culture' divide and of the distortions that this model can carry along - mainly assuming the existence of *one* dominant culture and relegating all others worldviews to the realm of 'nature' - is the *terra nullius* 'colonial' doctrine.[54] As is known, '*terra nullius*' (from Latin 'nobody's land') is used in international law to describe territory which has never been subject to the sovereignty of any state, and whose sovereignty may thus be acquired through simple occupation. This notion has proved significant in the justification and foundation of colonization progresses. The line of thought that culminated in the *terra nullius* doctrine has been traced back to William Blackstone assertion that:

> if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force.[55]

However, in areas such as Australia, or British North America, the idea of '*terra nullius*' was never one expressing the *absence* of Indigenous people from their lands; rather '*terra nullius*' was ultimately a 'code' - a fiction - for the absence of (Western) culture: namely, for the absence of *agricultural use* of those lands. Without agricultural use of land, the

[52] D. Byrne, 'Archaeological Heritage and Cultural Intimacy: An Interview with Michael Herzfeld', *Journal of Social Archaeology*, 11, 2 (2001), at 148.
[53] J. Weir, 'Country, Native Title and Ecology', in J. Weir (ed.), *Country, Native Title and Ecology*, Canberra, Australian National University E Press, 2012, at 12.
[54] As Kerruish notes, *terra nullius*, is certainly 'ill informed, instrumental and justificatory in its function but also containing European ideas of savagery and civilisation. Such ideas, coming out of a particular culture, prefer their own, misunderstand other cultures, other ways of living in a landscape'. See V. Kerruish, 'At the Court of the Strange God', *Law and Critique*, 13 (2002), at 281-2.
[55] Sir W. Blackstone, *Commentaries on the Laws of England*, Oxford, Clarendon Press, 1765, I, 4, at 106.

British saw no basis for property rights to that land.[56] This interpretation suggests the notion that Indigenous people are intuitively an *extension* of 'nature', and not 'culture' (as British).

2.4. 'Person' v 'Thing'

2.4.1. Land, Power and Capital

The 'nature-culture' divide - that carries along the 'people-place' paradigm - identifies the foundation for the elaboration of a model (or theory) of 'property' as a relation between 'persons' and 'things' (as two ontologically different entity). In fact, the anthropocentric division of the world into 'nature' and 'culture' formed the basis of the modern idea of 'property' in law. In a sense, 'property law fortified and actualised the paradigm of nature-culture'.[57]

As seen (section 2.2.2.1), the new method of science practiced since the 16th-17th century established the human 'subject' as the agent of knowledge of the studied 'object'. Similarly, the law of property established the human 'person' as the agent of dominion over the possessed 'thing'. In fact, as Alan Pottage points out, the distinction between persons and thing 'may be a keystone of the semantic architecture of Western law' and 'is a foundational theme in Western society'.[58] Moreover, property law 'have played an essential role in constituting and maintaining that distinction'.[59]

According to Nicole Graham, the legal conception of land as a 'thing' - an 'other' with respect to 'persons' - pertains historically to the late 17th century, when the transition from feudalism to capitalism, and particularly from a view of land as 'power' to a view of land as 'capital', took place.[60]

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[56] See J. C. Weaver, *The Great Land Rush and the Making of the Modern World 1650–1900*, Montreal, McGill-Queens University Press, 2003, at 134.
[57] N. Graham, *Lawscape: Property, Environment, Law*, at 38.
[58] A. Pottage, 'Introduction: The Fabrication of Persons and Things', at 3-4.
[59] A. Pottage, 'Introduction: The Fabrication of Persons and Things', at 4.
[60] See N. Graham, *Lawscape: Property, Environment, Law*, at 42.

2.4.1.1. Land-Power

In the feudal England, the social value of property was connected to the symbolism of 'power' and 'status' attached to land tenure. The Norman property regime, with its hierarchical super-structure, characterised feudal property interests as *political* interests. The power to enjoy land and its direct connection to political participation were generally more important at that time, at least theoretically, than its economic value. 'Property' was indeed the possession of rights to revenue 'rather than a right to any specific material thing'.[61] However, revenue conveyed not simply economic gain, but more importantly *political gain*. This distinction can be grasped by an explanation of the precise forms of power consisting in property rights:

> In the first place, the great bulk of property was then property in land, and a man's property in a piece of land was generally limited to certain uses of it and was not freely disposable […] A substantial segment of property consisted of those rights to a revenue, which were provided by such things as corporate charters, monopolies granted by the state, tax farming rights, and the incumbency of various political and ecclesiastical offices.[62]

According to Paolo Grossi, over the course of this historical phase the 'thing' (the land) was not a neutral and powerless object - it did not gain its value uniquely from the owner's power - but was rather a 'living reality' ['*realtà vivente*']. The anthropocentric order, which put humans above nature, seems thus subverted: the land was a central element for the economic life of human beings, and dictated the rules to be followed. Grossi speaks about a '*reicentric* order' (or 'reicentrism', the 'centrality of the thing') as opposed to the modern 'anthropocentric order'.[63]

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[61] C. B. Macpherson, 'Capitalism and the Changing Concept of Property', in E. Kamenka & R.S. Neale (eds.) *Feudalism, Capitalism and Beyond*, London, Edward Arnold, at 110.
[62] C. B. Macpherson, 'Capitalism and the Changing Concept of Property', at 110 (quoted in N. Graham, *Lawscape: Property, Environment, Law*, at 39). See also R. Pipes, *Property and Freedom*, at 25.
[63] P. Grossi, 'La proprietà collettiva e le sue dimensioni ambientale e sociale: Introduzione ai lavori', in P. Grossi, *"Un altro modo di possedere": L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Milano, Giuffrè, 2017 [1977], at 413; see also P. Grossi, *L'inaugurazione della proprietà moderna*. Napoli: Guida, 1980, at 21-2.

2.4.1.2. Land-Capital

During the transition from feudalism to capitalism, 'land was no longer considered to provide power but to be vulnerable to it, as object'.[64] The scientific revolution - matched by the legal revolution of the sixteenth and seventeenth centuries following the growth of the capitalist market economy - produced a shift relative the function of land in law, from being a foundation of power to being a '*commodity*', a '*resource*', a *'thing of wealth*'. In other words, land gradually became thought of as '*capital*' rather than as 'power'.[65] The *divisibility* and *alienability* of land linked to the capitalistic ideal of economy meant that 'property' could be thought to be the *land itself*, whereas in pre-capitalist England property was an intricate network of social and political relations and obligations:

> [a]s rights in land became more absolute, and parcels of land became more freely marketable commodities, it became natural to think of the land itself as property.[66]

As Graham notes, however, the shift from a conception of 'land' as 'power' to a conception of 'land' as 'capital' - which implied a 'physical' foundation of 'property' - land have ultimately transcended the physical realm:

> grounding law's authority in the physical foundation of land and resource ownership was antithetical to the hitherto apparently metaphysical and transcendental nature of law and divine or natural order of the universe […] Law and property needed to transcend the physical realm.[67]

Legal theory - and specifically property theory - developed and elaborated various models of 'land' ownership that effectively removed even the mention of it (of the term 'land') from its discourse. The use of the words 'thing' and 'object' were important and necessary to this end. As Bentham noted in 1789:

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[64] N. Graham, *Lawscape: Property, Environment, Law*, at 42.
[65] See R. Pipes, *Property and Freedom*, at 25-6.
[66] C. B. Macpherson, 'Capitalism and the Changing Concept of Property', at 111.
[67] N. Graham, *Lawscape: Property, Environment, Law*, at 43-4.

> [i]t is to be observed, that in common speech, in the phrase the object of a man's property, the words the object of are left out; and by an ellipsis, which, violent as it is, is now become more familiar than the phrase at length, they have made that part of it which consists of the words a man's property perform the office of the whole.[68]

Bentham's point was that the lexicon of his time replaced 'land' with 'object' or 'thing' to indicate the *irrelevance of the qualitative nature of the 'thing' to the law*: 'things' matter to property law only in so far as 'people' own them. The quality of 'thingness' (of 'being a thing') is that *it has no quality*. As noted by Graham, definitions of the word thing number 29 in the Macquarie Dictionary well illustrates this point:

> 1. A material object without life or consciousness; an inanimate object. 2. Some entity object, or creature which is not or cannot be specifically designated or precisely defined.[69]

Thus, 'property' was not the land, it was a '*non-qualitative object*', the 'thing'.[70]

2.4.2. Alienation

'Alienation' is a key notion to the conceptualization of 'property' as a 'person-thing' relation.[71]

As R. Williams points out, a change in the use of the word 'alienation' occurred in the 14th century. 'Alienation', originally referring to the severance of relations between an individual and God or between an individual or group and the state, came to refer to the (more neutral, from an ethical standpoint) '*transfer of rights, estates or money*'. Such transfer, however, was not regarded as being voluntary or intentional. Rather, 'alienation' was used during this time to describe 'transfer' in the *negative* sense of 'loss, force or

[68] J. Bentham, *An Introduction to the Principles of Morals and Legislation*, 1789. Quoted in C. B. Macpherson, 'Capitalism and the Changing Concept of Property', at 111.
[69] *The Macquarie Dictionary*, 1992. Quoted in N. Graham, *Lawscape: Property, Environment, Law*, at 44.
[70] N. Graham, *Lawscape: Property, Environment, Law*, at 45.
[71] As is known, 'alienation' comes from the Latin '*alius*', 'other', and '*alienus*', 'of or belonging to another person or place'. 'Alienation' is used in English to describe 'the state of estrangement or the act of estranging'. See R. Williams, *Keywords*, at 29.

impropriety'.[72] A positive meaning was then attached to 'alienation' in the 17th and 18th centuries with the increased prevalence of '*absolute*' private property view. In his *Commentaries*, Blackstone refers to 'property' as follows:

> [t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the *external things* of the world, *in total exclusion of the right of any other individual* in the universe.[73]

Blackstone defines 'property' as the 'external thing' for which owners have the right to 'in total exclusion' of others, including the right to *alienate* the 'thing', the 'object of property'.[74] As Graham states, the idea of 'alienation' - as one of the faculties of the owner with respect to the 'object' owned - seems specifically related to the Western archetype of property law:

> while alienation is well understood as a founding principle of modern property law, it is barely acknowledged that alienation is a relationship or dynamic referring *not to one thing but to two: the person and the thing are alienated from each other*.[75]

The point of Graham statement is that modern property discourse erases the bilateral (person-thing) aspect of alienation: the person is the active, *alienating subject* (AS), and the land is the passive, *alienated object* (AO) or 'thing' of the land market. In this sense, the modern discourse of property constructs 'land' as the opposite pole with respect to 'culture'. The notion of 'unilateral alienation' renders ultimately the modern paradigm of property *placeless*.

While the Western 'property' archetype instantiated a physical alienation of people from place, the two poles - 'person' and 'place' - are theoretically reunited via the justification of private property as labour. Locke's justification of property in labour, published anonymously in the 17th century, was indeed the 'legal' parallel to the

[72] See R. Williams, *Keywords*, at 29.
[73] Sir W. Blackstone, *Commentaries on the Laws of England*, II, 1 (italics added).
[74] The right to alienate one's property is also included among the eleven 'incidents' of ownership listed in A. Honoré, 'Ownership', at 111 (as an expression of the 'right to capital').
[75] N. Graham, *Lawscape: Property, Environment, Law*, at 45 (italics added).

justification of science as 'cultural improvement', and carries the same influence on the 'people-place' relations.[76] According to Locke's justification of property as a 'social institution', property rights are defined by acts of *transformation, cultivation* and *development of non-human nature* for use and profit, and include both the *power to exclude and control* in relation to other persons and the *freedom to alienate* or dispose of one's property as one chooses.[77] As is common knowledge, Locke's justification of private property rests on three premises:

1. 'every Man has a Property in his own Person […] [and] the Labour of his Body […] are properly his';[78]
2. mixing one's labour with the earth, annexes that person's labour to that land, creating exclusive title to the land and its produce;
3. 'men had agreed, that a little piece of yellow Metal, which would keep without wasting or decay'[79] enables unequal distribution and unlimited accumulation of property 'without injury to anyone'.[80]

Locke understands 'land' not as something active or as an agent of power, but as something *passive* and vulnerable to power: the anthropocentric model of 'person-thing' remains at the centre of his theory of property relations, where the 'person' is or has the power while the 'thing', the land, is '*powerless*'.[81] Locke's theory presents nature as 'things' valued solely through human labour, use and ownership, constructing an idea of nature in itself - lacking cultivation - as 'waste'.[82] Locke's justification of property decisively alienates 'people' from 'place', prioritising 'culture' (and cultivation) over 'nature' in the modern paradigm of 'property'.

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[76] Since the 1990s Locke's justification of property has also been regarded as a justification of British colonialism. See more broadly on this issue B. Arneil, 'Trade, Plantations and Property: John Locke and the Economic Defence of Colonialism', *Journal of the History of Ideas*, 55, 4 (1994), at 591–609.
[77] See C. M Rose, *Property & Persuasion: Essays on the History, Theory and Rhetoric of Ownership*, Boulder, Westview Press, 1994 at 20-28; and N. Graham, 'Owning the Earth' in Peter Burdon (ed.), *Exploring Wild Law: The Philosophy of Earth Jurisprudence*, Kent Town (South Australia), Wakefield Press, 2011, at 261.
[78] J. Locke, *Two Treatises on Government* (ed. P. Laslett), Cambridge, Cambridge University Press, 1988 [1689], at 287-8.
[79] J. Locke, *Two Treatises on Government*, at 294.
[80] J. Locke, *Two Treatises on Government*, at 302.
[81] See N. Graham, *Lawscape: Property, Environment, Law*, at 46.
[82] See J. Locke, *Two Treatises on Government*, at 299-302.

While metaphysically coupling 'persons' and 'things' through the process of labour, the actual and physical foundation of Locke's logic is their *alienation*. As Arneil points out, 'for if it were not possible to remove commoners from the commons, Indigenous communities from their nations and alienate land through "conquest or commerce"'[83] Locke's economy of property could not succeed.

[83] B. Arneil, 'Trade, Plantations and Property: John Locke and the Economic Defence of Colonialism', at 605. Quoted in N. Graham, *Lawscape: Property, Environment, Law*, at 46.

3. ‘Property’ as a ‘Person-Person Relation’

> A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law.[84]

3.1. Introduction

A key development in modern western property law is the so-called ‘dephysicalization’ of property. In legal theory, ‘dephysicalization’ means the removal of the physical ‘thing’ from the property relation and its replacement with an abstract ‘right’. The ‘dephysicalization’ of ‘property’ identifies ‘contemporary legal expression of the ‘nature-culture’ paradigm’[85] defines ‘property’ as a ‘person-person’ relation, and renders ‘place’ meaningless in contemporary legal disputes.

The *section 3.2* locates the concept of ‘dephysicalization’ - derived from the ‘person-person’ conception of ‘property’ - within the major theories of property law. Moreover, it argues that these theories - the theories that support a ‘dephisicalized’ conception of ‘property’ - play an important role in maintaining the modern paradigm of ‘property’ law and its inherent separation of ‘people’ and ‘place’.This section presents the contributions of Jeremy Bentham, John Stuart Mill, Wesley Newcombe Hohfeld, Felix Cohen, Frank Snare, Alf Ross and Karl Olivecrona to the ‘person-person’ theory of property. These theorists define ‘property’ as a *relation between persons* rather than between persons and things. In their conception, the point of having a property right is not to have the ‘thing’ attached to the right, it is the to have a ‘right’ against the ‘rights’ of all other persons. Moreover, while Cohen and Snare explicitly deny the ‘physicality’ of property, Ross and

[84] J. Bentham, ‘A Theory of Legislation’, in C.B. Macpherson (ed.), *Property: Mainstream and Critical Positions*, Toronto, University of Toronto Press, 1978 [1864], at 52.
[85] N. Graham, *Lawscape: Property, Environment, Law*, at 160.

Olivecrona identify it as an 'hollow' concept, with no semantic referent. The ideas advanced by those philosophers provoke ultimately the transformation of the 'property' relation in a relation essentially *between persons*. This conception of 'property' eclipses the 'people-place' relations, which have become entirely about 'people'.

The section 3.4 briefly describe how the conception of 'property' as a 'person-person' relation was 'transplanted' from land and tangibles to intangible resources, and tries to provide a description of the 'intellectual property' object.

3.2. The Dephysicalization of Property

3.2.1. Jeremy Bentham: 'Abstract' Property

Jeremy Bentham (1748-1842) conceived 'property' as a '*creation of law*', rather than as a material thing:

> The better to understand the advantages of law, let us endeavour to form a clear idea of property. We shall see that there is no such thing as natural property, and that it is entirely the work of law […] There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind. [86]

Bentham rejected particularly Sir William Blackstone's conceptualization of 'property rights', and regarded Blackstone's work as a 'striking example of the inability of the common law to provide adequate definitions of property'.[87] The main point in Blackstone's work conflicting with Bentham's view was that the first defined and classified 'property' into the categories of the 'real' and the 'personal':

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[86] J. Bentham, *Principles of Civil Code*, in J. Bentham, *The Theory of Legislation*, (ed. C. K. Ogden), London, Kegan Paul, Trench, Trübner & Co., 1931 [1864], at 111-2.

[87] M. Sokol, 'Bentham and Blackstone on Incorporeal Hereditaments', at 287. See generally on Bentham's critique of Blackstone conception of 'property': N. Graham, 'Restoring the "Real" to Real Property Law: A Return to Blackstone?', in W. Prest (ed.), *Blackstone and his Commentaries: Biography, Law, History*, Oxford, Hart Publishing, 2009 at 151-168 (partially reproduced in N. Graham, *Lawscape: Property, Environment, Law*, at 136-141)

> we must follow our former division of property into personal and real: *personal*, which consists in goods, money and all other moveable chatters, and things thereunto incident; a property, which may attend a man's person wherever he goes, and from thence receives its denomination: *real* property, which consists of such things as are permanent, fixed and immoveable; as lands, tenements, and hereditaments of all kinds, which are not annexed to the person, nor can be moved from the place in which they subsist.[88]

According to Bentham, this was an obsolete structure inherited from the feudal context. The problem in this division - as Bentham saw it - was that such definition and classification of 'property' failed to account for the changed economy, in which land no longer functioned as a source of wealth and power (section 2.4.1.2.-2.4.1.3). According to Bentham, Blackstone's view had become anachronistic and irrational.[89] From Bentham's perspective, Blackstone had indeed not only supported the 'irrational' division of 'real' and 'personal' property, he had also hierarchised it by privileging 'real' property over other forms of property.[90]

Bentham's critique of natural rights in property was part of his broader philosophy of legal positivism and utilitarianism, and its impact over the development of modern property was twofold. According to Graham, it:

1. produced the notion of 'property' as a 'person-person' relation;
2. 'transformed the *locus* of social wealth from land, to law or legal right'.[91]

Bentham's rejection of the 'person-thing' relation in Blackstone's 'natural rights' theory of property, along with the proposed integration of the distinct bodies of 'personal' property and 'real' property into one broad body of property rights achieved the separation of 'land' from the idea of 'property'. Historical reasons propelled for Bentham's theory, which introduced to the *dephysicalization* of 'property'. In Bentham's time, the economic and legal primacy of the category of 'real property' (with respect to

[88] Sir W. Blackstone, *Commentaries on the Laws of England*, II, 4.
[89] See N. Graham, *Lawscape: Property, Environment, Law*, at 137.
[90] See M. Sokol, 'Bentham and Blackstone on Incorporeal Hereditaments', at 294.
[91] N. Graham, *Lawscape: Property, Environment, Law*, at 138.

other forms of 'property') was diminishing and so law could no longer be conceptually dependent on 'any exterior reality' for its authority.[92] The particularities of reality had to be rejected or incorporated into a universal model of 'law' that would transcend the specific 'place', in favour of a more abstract conception of 'space'.[93] According to Bentham, property is essentially 'law' and nothing else, and it exist only as abstract logical forms:

> [p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.[94]

Bentham's theory of property separated 'people' and 'place', defining 'people' and 'culture' in opposition to 'land' and 'nature'. This separation occurred in a more extreme way than Locke's theory on the justification of property as a 'social institution' (section 2.2.3.2). According to Graham, in Locke's theory 'property' was the '*abstract sign or signifier*' and 'place' was the '*reality that was signified*'. Quite differently, Bentham's theory of property 'abstracted place even further by removing 'place' from the equation altogether […] All that property signified, according to Bentham, was property'.[95] The object, or 'thing' of real property - land - results erased by Bentham's insistence that it represents nothing at all, except the abstract 'right' to which it is attached. As Graham notes:

> this is precisely the conclusion of Bentham's positivist programme: that the meaning and origin of law is entirely self-referential, and that 'property is entirely a creature of law'.[96]

3.2.2. John Stuart Mill: 'Alienable' Property

[92] See P. Fitzpatrick, *The Mythology of Modern Law*, London, Routledge, 1992, at 56.
[93] See P. Fitzpatrick, *The Mythology of Modern Law*, at 56.
[94] J. Bentham, 'A Theory of Legislation', at 52. On the common origin of law and property in Bentham's theory see also G. J. Postema, *Bentham and the Common Law Tradition*, Oxford, Clarendon Press, 1986, at 184.
[95] N. Graham, *Lawscape: Property, Environment, Law*, at 139.
[96] See N. Graham, *Lawscape: Property, Environment, Law*, at 139.

As Bentham's theory of property, J. S. Mill (1806-1873) conceptualized an idea of 'property' that required the alienability of the physical. In fact, Mill's *Principles of Political Economy* (1878) put forward the idea that the absence of 'place' in property permits the *priority of the state and its economy*.[97] However, Mill's theory of property differs from Bentham's in that: contrarily to Bentham, Mill's 'property' has a *physical function*, even if it has no *physical value*.[98] Mill's utilitarianism does not erase 'things' from the equation of property because things have a *use value* that depend on their physical attributes as a 'thing':

> [w]hen the property is of a kind to which peculiar affections attach themselves, the compensation ought to exceed a bare pecuniary equivalent.[99]

Mill admitted thus that 'real' property exists in its physicality and particularity, while he simultaneously asserts that the real property right can be *alienated* and *exchanged*. Significantly, Mill's use of 'property' - of 'place' - transforms its very physicality or 'thingness' into a 'semi-real, semi-abstract space or meta-place'.[100] Mill's acknowledgment of the 'physical' remains indeed based on *morality*, and not on nature.[101] For Mill, nature is indeed valued in the pragmatic terms of its function in the utilitarian project. All private property is thus secondary to the needs of public property and the sovereignty of state:

> Landed property is felt even by those most tenacious of its rights, to be a different thing from other property […] [but] the claim of the landowners is altogether subordinate to the general policy of the state. The principle of property gives them no right to the land, but only a right to compensation for whatever portion of their interest in the land it may be the policy of the state to deprive them of.[102]

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[97] See N. Graham, *Lawscape: Property, Environment, Law*, at 141.
[98] See N. Graham, *Lawscape: Property, Environment, Law*, at 140.
[99] J. S. Mill, 'Principles of Political Economy' [1878], in C.B. Macpherson (ed.), *Property: Mainstream and Critical Positions*, at 97.
[100] N. Graham, *Lawscape: Property, Environment, Law*, at 141.
[101] Mill's idea of a use of the 'physical' in the property theory is consistent with 'a morally qualified utilitarianism, defined socially rather than individualistically'. See N. Graham, *Lawscape: Property, Environment, Law*, at 141.
[102] J. S. Mill, J.S., 'Principles of Political Economy' [1878], at 97.

In a sense, Mill's prioritisation of public property over private property is consistent with Bentham's positivist scheme of property rights because the physical loss of property as a 'thing', as 'reality', can be *neutralised by compensation or purchase* and thus can participate in the 'greater' economy of the state and security of its citizens. What matter to the purpose of the present research is that Mill's economy of property entails a complete *commodification* of the physical realm. The lack of physical particularity in public spaces, such as roads and railways - along with their more or less absolute fungibility - foreshadowed in Mill's thesis, anticipates thus cultural development of dephysicalized property in the following centuries.

3.2.3. Wesley Newcomb Hohfeld: 'Relative' Property

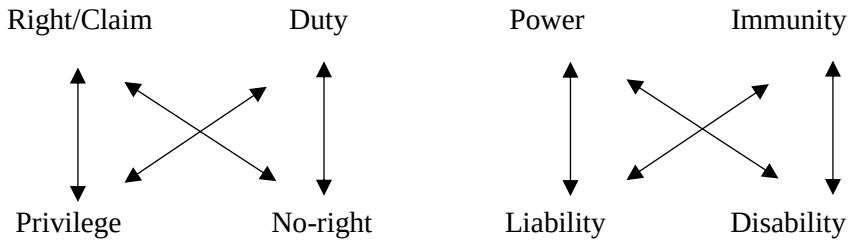
A consequence of the dephysicalization of property - originally conceived in Bentham and Mill's theories - was that the concept of 'property' itself 'became infinitely expandable'.[103] Over the course of 1880s and 1890s the physical (real) 'premise' of Blackstone's 'property' (section 3.2) was broken by American courts' practice: in fact, a variety of new property interests for the first time received recognition by American courts'. Since the distinction between 'real' and 'personal' property was eroding, determinations of what constituted legitimate 'property' varied from case to case.[104] 'Property rights' were extended from rights over 'things' to rights over any valuable interests, even if no physical things exist (for example, goodwill). According to Kenneth Vandevelde, such indeterminacy of property was the reason for - as well as the context of - the property theory of American legal scholar Wesley Newcomb Hohfeld (1879-1918).

Hohfeld contributed two essays to the growing controversy over the definition of 'right' in 1913 and 1917 (section 1.4). His main concern was to clarify and simplify the concept of 'right', subject to major changes in the legal practice of his time. Hohfeld's analysis is thus engaged in an analytical and definitional enterprise, and not concerned

[103] B. Maurer, 'Forget Locke? From Proprietor to Risk-Bearer in New Logics of Finance', *Public Culture*, 11 (1999), at 370.
[104] See K. Vandevelde, 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property', at 333.

with substantive or empirical enquiry into the concept of a 'right', or to prescribe particular social structures and values around the idea of (dephysicalized) 'property' (as Bentham and Mill did). Hohfeld sought instead to revise and adapt the language of 'law 'in order to correct and stabilise the 'unfortunate tendency to confuse and blend' the true and definitive model of property.[105] Hohfeld's work aims to provide a conceptual understanding for the use of terms such as 'right', 'duty', 'power' and others in practice, facilitating a better understanding of their nature. Hohfeld's main point was that property law takes into consideration the 'aggregate of abstract legal relations' rather than referring to 'figurative or fictional' categories of property according to distinctions between physical things.[106] As a result, 'property' was no longer defined absolutely, by categories of 'real' or 'personal' things, because these 'things' were now, as 'things', *meaningless*.[107] On the contrary, Hohfeld presented 'property' as *relative*, namely by relating the rights of persons to each other.

Hohfeld's first essay, published in 1913, articulates a set of basic property rights, described as 'the lowest common denominators of the law' which are believed to define the regime of modern or 'new' property.[108] He identified more precisely *four sets of legal relations*, classified in two couples of pairs (**fig. 1**). The first two pairs of legal positions, 'right (claim)-duty' and 'liberty-no right', are 'first order' relations. The following two pairs, 'power-liability' and 'immunity-disablity', are 'second order' relations.[109] Hohfeld notions might be presented in a slightly modified version of Glanville Williams' table[110]:



[105] W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning', at 23.
[106] See W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning', at 23.
[107] See N. Graham, *Lawscape: Property, Environment, Law*, at 142.
[108] See W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning', at 58.
[109] See M. H. Kramer, 'Rights Without Trimmings' in M. H. Kramer, N. E. Simmonds & Hillel Steiner, *A Debate Over Rights, Philosophical Enquiries*, Oxford University Press, 2002, at 20. According to Kramer, *first order relations* are applied directly to human conduct and social intercourses, without mediation of any second order relation. On the other hand, *second order relations* are applied directly to human entitlements and only indirectly to human conduct and social intercourses
[110] See G. Williams, 'The Concept of Legal Liberty', at 1135.

Fig. 1

The eight 'fundamental conceptions' are lay down in a scheme of 'correlatives' - 'two legal positions that entail each other' - connected vertically, and 'opposites'[111] - 'two legal positions that deny each other' - connected diagonally.[112]

The common feature of Hohfeld's 'rights' was that they were all legal relations *between persons*, rather than between persons and things. In a statement 'that is 'strikingly similar' to a statement by Bentham on the definition of property'[113], Hohfeld states that:

> [t]he term 'property', although in common parlance frequently applied to a tract of land or chattel, in its legal signification means only the rights of the owner in relation to it. It denotes a right over a determinate thing.[114]

Therefore, according to Hohfeld, rights between persons constituted the entire 'property' relation.[115] The relations between 'persons' and 'thing' - including the 'people-place' relations - were simply irrelevant to property in legal discourse. The shift from a 'person-thing' model of 'property' to a 'person-person' structure is highlighted also from a terminological point of view in Hohfeld works. In fact, Hohfeld replaces:

- the concept of 'right *in personam*' with the expression *'paucital right'*;
- the concept of 'right *in rem*' with an 'aggregate' of *'multital rights'*.

According to Hohfeld, 'rights' held by a person against one or a few definite persons are '*paucital*' (equivalent to *in personam*), and rights held by a person against a large indefinite class of people are '*multital*' (equivalent to *in rem*). A property claim, for

[111] The expression 'opposites' is solely Hohfeld's, while a large number of other authors call them 'jural contradictories'. See G. Williams, 'The Concept of Legal Liberty', *Columbia Law Review*, 56 (1956), at 1133; and M. H. Kramer, 'Rights Without Trimmings', at 8.
[112] See M. H. Kramer, 'Rights Without Trimmings', at 8.
[113] N. Graham, *Lawscape: Property, Environment, Law*, at 143.
[114] W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning', at 22.
[115] See (among others): A. L. Corbin, 'Legal Analysis and Terminology', *Yale Law Journal*, 29 (1919) at 165; D. J. Hislop, 'The Hohfeldian System of Fundamental Legal Conceptions', *Archiv für Rechts- und Sozialphilosophie*, 53 (1967), at 59; A. R. Anderson, 'The Logic of Hohfeldian Proposition', Logique et Analyse, 12 (1970), at 31. Broadly on this issue see G. M. Azzoni, 'Interpretazioni di Hohfeld', *Materiali per una storia della cultura giuridica*, 24 (1994), at 454-5.

example, is ‘multital’ because a landowner has the right to exclude not only specific people from his land but the ‘whole world’. The fundamental shift provided by Hohfeld’s analysis - with respect to the ‘physical’ conceptualization of ‘property’ - is thus provided by the assertion that rights *in rem* (against the world) are in essence *a multitude of rights* (‘multital’ rights) *in personam* (against a person).[116]

The consequences of the Hohfeldian view of property were both *legal* and *cultural*:

- from the *legal* perspective, if the property relation excludes the ‘physical’ completely (if the ‘thing’ is irrelevant to it), then it ‘may have become indistinguishable from contract and tort’.[117]
- from the *cultural* perspective, ‘property’, after its dephysicalization, no longer prescribes or regulates ‘people-place’ relations as a specific and important relationship concerning law.[118]

3.2.4. Felix S. Cohen: ‘Non-Material’ Property

In his 1954 paper ‘*Dialogue on Private Property’*, Felix S. Cohen criticizes the idea that the notion of ‘property’ refer to material objects.[119] F. Cohen’s dissertation seems to develop and expand what his father, the philosopher Morris Cohen, concisely exposed in 1927: namely, that ‘[a]nyone who frees himself from the crudest materialism recognizes that as a legal term property denotes not material things but certain rights’.[120]

The main point in F. Cohen’s essay is that property, although being ‘real’, is not ‘material’: ‘reality’, in fact, does not implies ‘materiality’. As Cohen writes:

> In this case the current common sense is the metaphysical doctrine of Duns Scotus, William of Occam, and other 14th and 15th century scholastics who held that all reality is tangible and exists in space. That idea runs through a great deal of common

[116] M. Davies, *Property: Meanings, Histories, Theories*, Abingdon, Routledge-Cavendish, 2007, at 43.
[117] See D. Lametti, ‘The Concept of Property: Relations Through Objects of Social Wealth’, *University of Toronto Law Review*, 2003, at 339.
[118] See N. Graham, *Lawscape: Property, Environment, Law*, at 143.
[119] F. S. Cohen, ‘Dialogue on Private Property’, *Rutgers Law Review*, 9, 2 (1954), at 357-87.
[120] M. R. Cohen, ‘Property and Sovereignty’, *Cornell Law Review*, 13, 1 (1927), at 11-2.

> law doctrine. Take, for example, the ceremony of livery of seizin, by which in transferring a possessory estate in land you actually pick up a piece of the sod and soil and hand to the grantee; or take the old common law rule that a mortgage consists of a piece of paper, and if this piece of paper is destroyed, the mortgage disappears. Why should we assume that all reality exists in space? Do our differences of opinion exist in space? Why not recognize that spacial existence is only one of many realms of reality and that in dealing with the law we cannot limit ourselves entirely to the realm of spacial or physical existence?[121]

The first example provided in the paper (written as a dialogue) is comparison between an American and a (Communist) Russian factory. According to F. Cohen, there is a difference between the two factories: namely, that while the American factory is a 'private property', the Russian factory is not. However, this difference cannot be perceived by sight and 'would not show up in a photograph'. The topic is then furthered when F. Cohen asks to the second speaker how can the real existence of property be demonstrated:

> - Well, here is a book that is my property. You can see it, feel it, weigh it. What better proof could there be of the existence of private property?
> - I can see the shape and color of the book very well, but I don't see its propertiness.[122]

According to F. Cohen, even if in the ordinary language we can use the term 'property' to refer to material objects, the objects itself - its shape and appearance - does not manifests the fact that a property right exists.

If 'property' does not refer to material objects, what is then 'property'? F. Cohen argues that 'property' is ultimately a 'set of relations'. However, property 'relations' do not *directly* involve physical objects: they are not 'physical relations' between a 'person' and a 'thing'. They are rather relations *between persons*:

[121] F. S. Cohen, 'Dialogue on Private Property', at 361.
[122] F. S. Cohen, 'Dialogue on Private Property', at 359.

> Can we agree then that this institution of property that we are trying to understand may or may not involve external physical objects, but always does involve relations between people […] Property […] is basically *a set of relations among men*, which may or may not involve external physical objects.[123]

More specifically, F. Cohen propose to define 'property' everything (say, 'X') that can be marked with a sign as 'To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state'. Therefore, according to F. Cohen it is possible to name an object 'property'; nevertheless, by doing this, we are referring automatically to relations between people.

3.2.5. Frank Snare: 'Imperceptible' Property

Frank Snare's 'The Concept of Property' (1972) mainly argues that the notion of 'property' cannot be reduced to material objects or states. As the most well-known example of this orientation, Snare tries to imagine how a Martian descended on Earth cold perceive the institution of 'property':

> A Martian visiting our planet would understand little of what goes on in our everyday life if he missed the fact that much of our behavior is guided by, and is only intelligible within the context of, this institution [of property]. For example, he would completely miss what we are doing when we sell an automobile or give a gift or steal an apple. After all, a stolen apple doesn't look any different from any other apple.[124]

The alien cannot distinguish an apple from a 'stolen' apple, since the fact that an apple has been robbed does not make it, from a purely physical point of view, different from a non-robbed apple. According to Snare, that is particularly true if related to visual perception: if a photograph of both apples (robbed and non-robbed) is taken, no difference could be noted.

[123] F. S. Cohen, 'Dialogue on Private Property', at 363.
[124] Frank Snare, 'The Concept of Property', at 200.

Snare also argues against the equivalence between 'property' and 'possession', specifically addressing the use of the possessive adjective 'my':

> the personal "possessive" pronouns can sometimes be used in ways which do not imply any property relationships. For example I might use phrases such as "my hand," "my person," "my labor," or "my essay" where I could have just as easily said "the hand which is attached to me and which is, in the best of circumstances, under my direct control," or "the person who is me," or "the work I did," or "the essay I wrote," where the none of these imply ownership. A slave's hand is his hand - whose else would it be? - and yet it is his master's property and not his own.[125]

In other words, while 'my' usually anticipates a name that designates a 'property', it may also refer to something that is not 'owned', in a legal sense, by the user. This is the case of the slave's hand.

According to Snare, the existence of 'property' does not involve something 'material' or 'physical', and it can only occur where rules or conventions exist. He specifically compares the notion of 'property' to the concept of 'pawn' in the chess game:

> Our claim is that when one says that A owns P he is presupposing a set of conventions which are intended to regulate the behavior of A, as well as others, with respect to P. In a similar manner the concept of pawn presupposes a set of conventions which are intended to guide our actions in the chess game.[126]

Therefore, Snare argues that the 'property' concept is ultimately a set of rules or 'rights'. He specifically identifies three of them:

1. a *right of use*: A has the right to use P;
2. a *right of exclusion*: other individuals (not A) can use P only if A authorizes that;

[125] Frank Snare, 'The Concept of Property', at 200.
[126] Frank Snare, 'The Concept of Property', at 201-2.

3. a *right of transfer*: A can permanently transfer right at 1 and 2 to other individuals.[127]

The identification of the nature of 'property' in the three 'rights' above clearly states how, according to Snare, 'property' has to be defined as a set of rules and not as a material object.

3.2.6. Alf Ross and Karl Olivecrona: 'Hollow' Property

3.2.6.1. Alf Ross

In his famous 1951 paper 'Tû-Tû', the Danish legal philosopher Alf Ross addressed the issue of what meaning is to be attached to words as 'rights', 'duty', 'ownership'.[128] Contrarily to Hohfeld, which sought to revise the language of 'law' to address more precisely the notion of 'right', Ross was concerned with a *substantive enquiry*, looking for the semantic referents of certain legal concepts.

In 'Tû-Tû', Ross depicted the imaginary 'Noîsulli Islands' in the South Pacific, where 'Noît-cif' tribe lives.[129] In the language of Noît-cif there exits the concept of '*tû-tû*'. If a member of that tribe does something wrong, such as encountering his mother-in-law, or killing a totem animal, or eating the food prepared for the chief, becomes '*tû-tû*'. As a consequence of becoming '*tû-tû*', a person is excluded from tribal ceremonies, and is subject to a ceremony of purification.

Ross observes that the following statements are true in the language of Noît-cif:

1. 'If a person x has encountered their mother in law, x is *tû-tû*.',
2. 'If a person x has killed a totem animal, x is *tû-tû*.';
3. 'If a person x has eaten the food prepared for the chief, x is *tû-tû*';
4. 'If a person x is *tû-tû*, x is subject to the ceremony of purification'.

[127] Snare also identifies other rules which he calls 'peripheral' to the notion of 'property': 'punishment rules', 'damage rules', 'liability rules'
[128] See A. Ross, 'Tû-Tû', *Harvard Law Review*, 70 (1957), at 812-825 (the paper appeared first in Danish).
[129] As can be easily noted, if read back-to-front 'Noîsulli' becomes 'illusion', and 'Noît-cif' 'fiction'.

Ross asks eventually, what is then '*tû-tû*', and he replies that it is: 'of course *nothing at all*, a word devoid of any meaning whatever […] The talk about *tû-tû* is pure nonsense'.[130] In other words, according to Ross, '*tû-tû*' has *no semantic reference*, although the expressions in which it appears are meaningful. Ross observes:

> the pronouncement of the assertion 'x is *tû-tû*' clearly occurs in definite semantic connection with a complex situation of which two parts can be distinguished: (i) The state of affairs in which x has either eaten of the chief's food or has killed a totem animal or has encountered his mother-in-law, etc. This state of affairs will hereinafter be referred to as $affairs_1$. (ii) The state of affairs in which the valid norm which requires ceremonial purification is applicable to x, more precisely stated as the state of affairs in which if x does not submit himself to the ceremony he will in all probability be exposed to a given reaction on the part of the community. This state of affairs will hereinafter be referred to as $affairs_2$.[131]

In order to show that '*tû-tû*' has no semantic reference, Ross considers the aforementioned propositions 3 and 4:

1. 'If a person x has eaten the food prepared for the chief, x is *tû-tû*';
2. 'If a person x is *tû-tû*, x is subject to the ceremony of purification'.

According to Ross, there are several ways of pinpointing the semantic reference of '*tû-tû*':

1. '*tû-tû*' may may either be identified with $affairs_1$ or $affairs_2$;
2. '*tû-tû*' may be understood as referring solely to $affairs_1$;
3. '*tû-tû*' may be understood as referring solely to $affairs_2$.

The first solution (1) is unsatisfactory, since '*tû-tû*' would have two different meanings, and the argument based on the proposition 3 and 4 would not be logically valid due to the

[130] A. Ross, 'Tû-Tû', at 812 (italics added).
[131] A. Ross, 'Tû-Tû', at 814.

fallacy of *quattuor terminorum*.[132] The second option (2) will not be effective equally, since it would make the proposition 3 analytically void. Similarly, if affairs$_2$ is only considered, the proposition 4 would become analytically void. Therefore, Ross concludes, '*tû-tû*' has no semantic reference, the state of being '*tû-tû*' does not really exist, and the word '*tû-tû*' is meaningless. The notion of '*tû-tû*' only function as a *placeholder* between the different way a person may become *tû-tû* and the consequences that are attached to this illusory state of being.

The imaginary anthropological language of '*tû-tû*' allows Ross to make the same point about the meaning of 'legal' terms, like 'right', 'duty', 'ownership'. In Ross' opinion, these words are as meaningless as '*tû-tû*', and their role is just that of *intermediary* in legal argument chains. What follows concerns specifically the word 'ownership'.

Property law includes *several ways to obtain ownership* (purchase, inheritance, prescription, execution, winning a bet, exchange, earning, etc.), and attaches *many legal consequences to being an owner*, such as the duty for everybody except the owner not to destroy the owned good, and the competence of the owner to transfer the ownership, or to create a more limited right (e.g. through licence) with respect to the owned object. The point here is that the legal consequences of 'ownership' might be attached *directly* to all the different ways in which 'ownership' can be acquired. For example:

> if one has inherited a good, all other persons have the duty not to destroy this good.

In this way, 'ownership' as a legal notion is taken away from the picture. However, Ross argue, it is *more economical* to work with an *intermediate category* - the category of 'ownership' - that forms the intermediary between the rules that specify under which circumstances particular legal consequences obtain, and the rules that specify which legal consequences obtain if the conditions of the former rules are satisfied (**fig. 2**). As a result, according to Ross, 'legal status' words such as 'ownership' lack semantic reference. Their meanings are *empty*, and they are nothing more than intermediaries in arguments from the conditions that specify when these words are applicable to the consequences of their

[132] See also B. Brożek, 'On *Tû-Tû*', *Revus: Journal for Constitutional Theory and Philosophy of Law*, 27 (2015), at 18.

applicability. The concept of ownership is thus simply an efficient way of structuring and presenting legal norms.

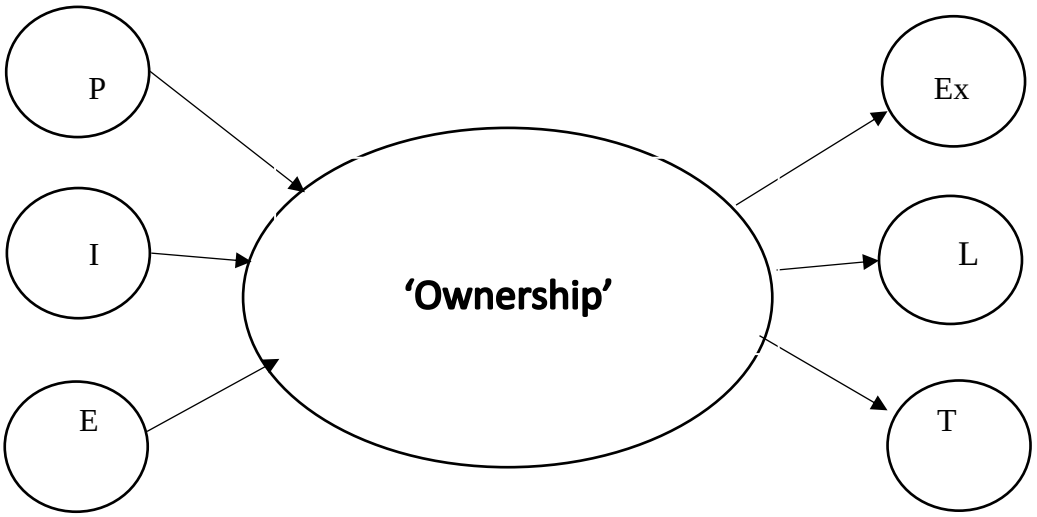


Fig. 2[133]

Alf Ross' theory of legal concepts represents the ultimate steps into the road which have led to the dephysicalization of the Western model of 'property', since it denies the existence of not just a physical, but even a *semantic* reference to the 'ownership' notion (and others legal concepts).

3.2.6.2. Karl Olivecrona

As Ross, Karl Olivecrona is an exponent of the psychological reductionism in legal theory. However, in both the first (1939) and second (1971) edition of his *Law as Fact*, Olivecrona explicitly argues that legal concepts, such as 'ownership', are not equivalent to 'physical' facts (besides stating that they have no semantic reference).

[133] P = 'purchase'; I = 'inheritance'; E = 'exchange'; Ex = 'right to exclude others'; L = 'right to limit the fruition of the good'; T = 'right to transfer the good'.

In the first edition of *Law as Fact,* Olivecrona significantly distinguishes the notion of 'property' from the notion of 'possession': more precisely, he states that - although property and possession are usually concurrent phenomena - the relation between 'property' and 'possession' is not a necessary one, and thus they should be conceived as two different notions.

> It is obvious […] that, according to current opinion, the right of ownership and the actual enjoyment of the possession are different things, though they are often both present at one time. By many jurists the actual possession has been defined as the counterpart in the real world of the right of property, which is represented as belongings to another context. They cannot always coincide, because the presence of the right is determined by the law. The right is acquired when such and such facts have taken place, e. g. a sale, the death of a relative etc. It is lost on account of corresponding facts, such as a new sale, a donation etc. The existence of a right is absolutely dependent on these facts, whose legal effects are determined by the law. The actual possession, the ability to use the thing, on the contrary, depends on a multitude of conditions which cannot be ascertained by reference to the law alone. The legal title is certainly of great importance in this respect too, since people habitually take care to abstain from interfering with the possession of the holder of a title. But the actual ability to use the object in question is not absolutely determined by the law.[134]

Similarly, in the second edition of *Law as Fact*:

> the right of ownership cannot be identified with any factual situation. The statement that A is the owner of this house tells me nothing about the actual relationship between A and the house. It does not say that A is living in the house, that he takes care of it, or draws an income from it. He need not have it in his power to make any decisions concerning the use of the house; the house may be so heavily mortgaged that the power of decision has passed to the creditors. The owner may, indeed, be ignorant of the existence of the house.[135]

[134] K. Olivecrona, *Law as Fact*, Copenhagen-London, Einar Munksgaard-Humphrey Milford, 1939, at 84-5.
[135] K. Olivecrona, *Law as Fact*, 2. ed., London, Stevens & Sons, 1971, at 194.

Olivecrona clearly affirms such irreducibility while speaking about the possibility to represent (graphically) the power connected to 'rights':

> It was said that the alleged power is non-existent – that we are unable to seize the power which the word is believed to signify. The alleged power is therefore an empty word, as was pointed above. Now it might be argued that patterns of conduct cannot be laid down by means of empty words. A picture of a situation and of a line of action cannot be expressed if there is not a definite meaning connected with the words. Therefore, it would seem that the analysis of the conception of a right must be wrong in some respect, since it is obvious that rules are effectively laid down by means of this conception. The answer to this objection is the following. The power which is labelled a right is really non-existent. It is an empty word. But the power is thought to be a power to do something. It refers to an imagined action. If this action is clearly conceived a rule is really laid down through the proclamation of the right. The pattern of conduct is contained in the idea of the action, or actions, which the possessor of the right is said to be entitled to perform.[136]

According to Olivecrona (as Ross), 'property' and 'rights' are 'empty' or 'hollow' concepts, and they do not refer to material realities. However, these expressions may refer to a 'power' - the power to do something - which can be represented in a picture, even if it is still not possible to represent as a picture what is called 'property'.

It should be highlighted here a (well-known) significant difference of Olivecrona's theory of legal concepts with respect to Ross'. It's true that words (and notions) such as 'property', 'ownership', and 'rights' are hollow, in the sense that they lack a semantic reference (and that they cannot be referred to material objects); however, they are still efficacious as means of social control because of how they are perceived in the 'common mind', with 'directive' or 'suggestive effect':

> Legal language is not a descriptive language. It is a directive, influential language serving as an instrument of social control. The 'hollow' words are like sign-posts with which people have been taught to associate ideas concerning their own

[136] K. Olivecrona, *Law as Fact*, 1st ed., at 94-5.

> behaviour and that of others […] the ascription of a right of property to a person is, so to speak, an echo of the rules concerning the right of property.[137]

3.3. From Property in Tangibles to Intellectual Property Rights

3.3.1. The Intellectual 'Object'

As briefly highlighted above (section 1.2), the modern intellectual property law originated from a purely Western 'legal transplant' occurred between 17th and 18th centuries, which extended the concept of 'real property' in land and tangible objects to 'intellectual creations'. Since many similarities seemed to be found between the need for protection of authors and inventors and that of common 'owners', rights in 'intellectual property' were justified by simply applying the already existing property theories.

Along with such 'transplant', defined statutory '*rights*' replaced the system of feudal *privileges* (section 1.2.1). As a consequence, 'the justification of any private property had to be detached from God's and the sovereign's will and grounded in the individual'.[138] As Alexander Peukert points out:

> [a]lthough this natural law theory, as well as the principles of first appropriation or possession, had been developed for the use of land, they proved to be a very good fit for inventions and creative products of the mind.[…] Nevertheless, this extension of the idea of private ownership was not an easy or quickly accomplished move. The

[137] K. Olivecrona, *Law as Fact*, 2. ed., at 3-4.

[138] A. Peukert, 'Intellectual Property: The Global Spread of a Legal Concept', at 116. The simple label of 'intellectual property' does not prove effective in the identification of what intellectual property is. Issues arise indeed both from the use of the term 'intellectual' (since it is usually taken to indicate that the patterns protected by the IP [Intellectual Property] doctrine have been produced by human mental activity), and the term 'property'. The alternative word - with respect to 'intellectual' - '*intangible*' is not less problematic: as seen (section 2.2.1.1), the insistence on 'intangibility' is drastically overboard in legal theory, since any 'legal' or 'institutional' object or interest can be seen as a 'valuable' intangible. On 'intellectual' see W. J. Gordon, 'Intellectual Property', at 618; on 'property' see (among others) R. Stallman, 'Did You Say "Intellectual Property"? It's a Seductive Mirage' (2004) (available at http://www.gnu.org/philosophy/not-ipr.xhtml). Against Stallman's arguments, see D. J. Halbert, *Resisting Intellectual Property*, London, Routledge, 2005, at 11. For a general overview over this topic, see A. George, *Constructing Intellectual Property*, at 37-40. However, the expression 'intellectual property' is still popular for several reasons, including its 'sexiness', and its ability to unite disparate legal doctrines. See M. Lemley, 'Property, Intellectual Property and Free Riding', at 1034.

> major obstacle for this transfer concerned the subject matter of this new type of ownership. What exactly is it that an author or inventor owns?[139]

Peukert further clarifies that 'in that respect, Roman law did not provide an answer'.[140] On the one side, Roman *dominium* (and *proprietas*) covered only *corporeal property*, defined by its tangible nature. On the other side, '*res incorporales*', which cannot be touched, was different from what we call now 'intangibles', since the former refers to 'rights' (and not to the object of property).[141] Thus 'before the transfer from real property to intellectual property could be accomplished, an object of ownership had to be constructed first'.

According to Peukert, the 'objectification' of intellectual property occurred during the second half of the 18th century, and resulted from both:

- the romantic aesthetics;
- shifts in cultural production. ,

The romantic movement in literature and art established the 'author' as the natural owner of the concrete work product.[142] However:

> [s]till this was not enough. Ownership in this work product would result only in exclusive rights in the manuscript and possibly in a prohibition of identical copies. But how was one to deal with alterations of a text? Did these modifications also encroach upon the copy-right? Since these adaptations were created by third parties, the original author could not claim ownership on the basis of her labor.[143]

[139] A. Peukert, 'Intellectual Property: The Global Spread of a Legal Concept', at 116-7.
[140] A. Peukert, 'Intellectual Property: The Global Spread of a Legal Concept', at 117.
[141] This point is made clear in G. Pugliese, 'Dalle '*res incorporales*' del diritto romano ai beni immateriali di alcuni sistemi giuridici odierni', *Rivista trimestrale di diritto di procedura civile*, 4 (1982), at 1173; and G. Turelli, ''*Res incorporales*' e beni immateriali: categorie affini, ma non congruenti', *Teoria e storia del diritto privato*, 5 (2012), at 1-17.
[142] See M. Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'', *Eighteenth-Century Studies*, 17, 4 (1984), at 425-448; and P. Jaszi, Peter 'Toward a Theory of Copyright: The Metamorphosis of "Authorship"', *Duke Law Journal* (1991), at 473-5.
[143] A. Peukert, 'Intellectual Property: The Global Spread of a Legal Concept', at 118.

In other words, in order to be protected, the artifact had to be recognized as possessing an 'existence and scope of protection of its own'. In Peukert's words:

> '[t]he work became a structurally integrated whole [work + object] that is only symbolically represented in books and scores and valued solely according to autonomous criteria of the fine arts'. The word »work« is a typical Kollektivsingular of the late 18th century describing both a process (working an invention, producing a creative work) and a result (the original work) on a high level of abstraction, allowing modern societies and capitalist markets to operate.[144]

3.3.2. Alexandra George's Metaphysical Approach

As a consequence of the 'romanitc' shift, intellectual property is subject to the same principles that apply to real property. Both grant the owner a transferable exclusive right to use the good and to exclude others from it, while any limitation of these rights requires justification.[145] However, 'intellectual property' remain an 'essentially contested concept', whose meaning remain more or less opaque.[146] In order to overcome the issue of identifying what 'intellectual property' means, Alexandra George proposed in 2012 a 'more sophisticated approach' to understand this notion 'as anything more than a collection of signifiers that are alienated from their signified and that therefore have little meaning outside the particular context in which they are used'.[147] George's proposal originated from an excerpt of Justice Story's decision in the case *Folsom v Marsh* (1841):

> [p]atents and copyrights approach, nearer to any other class of cases belonging to forensic discussions, to what may be called *the metaphysics of the law*, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.[148]

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[144] A. Peukert, 'Intellectual Property: The Global Spread of a Legal Concept', at 119-20.
[145] H. Demsetz, 'Toward a Theory of Property Rights', *The American Economic Review*, 57 (1967), at 347-359.
[146] For a discussion over the failure of common definitional systems in finding a definition of 'intellectual property' see A. George, *Constructing Intellectual Property*, at 113-147.
[147] A George, *Constructing Intellectual Property*, at 79.
[148] *Folsom v Marsh* (1841) at 342 (italics added). Quoted in A. George, *Constructing Intellectual Property*, at 86.

According to J. Story, the ‘evanescence’ of ‘intellectual property’ extends beyond distinctions within ‘patent’ and ‘copyright law’ to the very heart of what the subject matter of copyright and patent is, and it goes to the *metaphysics* of intellectual property law and the objects that it creates. Accordingly, George proposes that intellectual property doctrines share a number of core characteristics - dubbed *‘core criteria’* - that can be found in almost all cases of ‘intellectual property’. Such criteria would inhere to the essence of ‘intellectual property’, and fall into two categories:

1. *conceptual criteria*;
2. *rights*.

Together, the ‘objects’ and the ‘rights’shape the framework of intellectual property’s doctrines.

3.3.2.1. Conceptual Criteria

Intellectual property ‘conceptual criteria’ are four characteristics that identify what the ‘intellectual property objects’ - invoked by intellectual property doctrines - ultimately are. Intellectual property objects:

1. are *ideational objects*, where ‘idea’ refer to a specific kind of thought;
2. with respect to simple ideas, they have a *documented form* (*‘fixation’* requirement);
3. are *created* (*‘creatorship’* or *‘authorship’* requirement);
4. are *original*.

An ‘intellectual property object’ is thus *an ideational object that displays the required degree of originality, has an identifiable creator, and is presented in a documented*

form.[149] A characteristic that seems common to the standard forms of 'intellectual property' is the requirement that aspects of the ideational object be set in a *material* or *tangible - documented - form*. In other words, any 'idea' - in order to be protected by intellectual property law - have to be embodied in (or attached to) a *physical object* from which it can be copied or reproduced without recourse to the human brain or mind that originated the thought.[150] That is, for example, the 'expressed' form of the copyrightable material[151], the lodging of (written) 'claims' with a registry office prescribed by patent law, the graphical representation of trademark.

The person who puts elements of the ideational object into the documented form is usually thought of as the '*creator*' (or '*author*') of the intellectual property object.[152] Such figure reflects a particular 'Romantic' conception of creativity that developed from the conception of authorship pointed out in literary scholarship. As Lionel Bently argues:

> [t]he claim that the concept of authorship in literature is intimately related to that which operates in law is principally an historical claim that copyright law, romantic authorship and the overpowering significance of the author were 'born together.' That is, the link established in law between an author and a work, and the romantic conceptualisation of the work as the organic emanation from an *individual* author, emerged simultaneously at the end of the eighteenth century.[153]

The *individual* character of the author is focal to the 'intellectual property' conception of creatorship.[154] The reason for this is to be searched in the historical period in which

[149] As George specifies, this terminology is chosen for clarity and mostly resembles the specific lexicon of copyright. However, George's terms can be more or less easily 'translated' into the language of other intellectual property disciplines. For instance, it is the case of the verb 'created', which become with reference to patent 'invented'. However, some of the core criteria may change significantly, although maintaining a common basis. An example is the 'originality' required for literary and artistic works in copyright law, which does not necessarily entail 'novelty', but rather a certain degree of creativity and an independent creation. On the contrary, 'novelty' is one of the key requirement established by patent law for the protection of new invention.

[150] Drahos call it the 'corporealization' of abstract objects. See P. Drahos, *A Philosophy of Intellectual Property*, at 153.

[151] See the Article 2(2) of the *Berne Convention*.

[152] For a distinction between the 'creator' and the 'proprietor' see A. George, *Constructing Intellectual Property*, at 162.

[153] L. Bently, 'Copyright and the Death of the Author in Literature and Law', *Modern Law Review*, 57, 6 (1994), at 974 (italics added).

[154] According to Michel Foucault, the birth of the author during the Romantic period is 'the privileged moment of individualization in the history of ideas, knowledge, literature, philosophy, and the sciences'.

intellectual property laws firstly developed (17-18th centuries). At a time when society was starting to place a greater emphasis on imagination, individuality, and creativity - all encapsulated in the notion of the 'genius' - a law emerged that rewarded individual creative endeavor. Accordingly, copyright law emphasizing individualistic creatorship and originality was first identified as such during this era.[155]

The last of intellectual property 'conceptual criteria' is the requirement of originality. The common conception of 'original' is 'something that is new, not done before'. 'Originality' functions to distinguish 'newly created' intellectual property objects from 'existing' intellectual property objects, and originality conceptions operate in a similar manner in the various intellectual property doctrines.[156] In the seminal case *University of London Press Ltd. v University Tutorial Press Ltd* (1916) Justice Peterson stated that:

> [t]he word 'original' does not in this connection mean that the work must be the expression of original or inventive thought, and, in the case of 'literary work', with the expression of thought in print or writing. The originality which is required relates to the expression of thought.

The originality required by intellectual property law concerns thus *the way that the ideational object is expressed*. J. Peterson also stated that the law 'does not require that

See M. Foucault, 'What is an Author?', in *Aesthetics, Method and Epistemology* (ed. J. D. Faubion, trans. R. Hurley), vol. 2, New York, The New Press, 1998, at 205.

[155] See A George, *Constructing Intellectual Property*, at 167. While the history of the 'Romantic' author has been well documented and discussed in both literary and legal contexts, it is not without strong critics. The most powerful attack stems from Roland Barthes' 'The Death of the Author'. Barthes argues that a work results from many social influences and is thus layered with multiple meanings, including fragments of other texts, the pre-existing meanings of the language that is used, and other 'innumerable centres of culture', that constitute the text. See R. Barthes, 'The Death of the Author', in S. Heath (ed.), *Image-Music-Text*. New York: Hill & Wang, 1977, at 142-148. According to Lionel Bently, the effective critiques of literary authorship have not destabilized copyright's authorship concept, since the 'creator' figure is in intellectual property law essentially *functional*. In fact, it may act as a limitation on the subject matter protected by intellectual property law, a limitation on the threshold of protection (used to determine whether the 'originality' threshold is met), a limitation on the breadth of rights (by choosing to adopt a narrow view of creatorship rather than a broader one), and a limitation on the length of protection (particularly where, as in copyright law, the term of protection is related to the date of the author's death). See L. Bently, 'R. v the Author: From Death Penalty to Community Service', *Columbia Journal of Law and the Arts*, 32, 1 (2008), at 97-101. For the place of collaborative (or collective) authorship in the Romantic conception of the author see again A. George, Constructing Intellectual Property, at 174-206.

[156] Despite these guidelines, the nature of 'originality' in copyright law and other intellectual property doctrine tends to remain vague. What is an original work? The same problem can be found throughout intellectual property's classic doctrines. For a comprehensive overview of this issue, see A. George, Constructing Intellectual Property, at 210-34.

the expression must be in original or novel form, but that the work must not be copied from another work - that it should originate from the author'. Therefore, in order for a work to gain copyright protection, it must *originate from the author*. The ideas expressed within the work do not themselves have to be 'new', but the way in which they are presented to the audience does. Another case, *Ladbroke (Football) Ltd. v William Hill (Football) Ltd* (1964) concerned football betting coupons. One of the parties claimed that the other had infringed copyright on the design of the layout of the coupon, allegedly copying the fixture lists and adopting the same headings for the separate sections of the coupon. The appellants argued that the design of the coupon could not qualify as original. In response, the Court states (per Lord Reid) that the criteria for establishing originality are *skill, labour* and *judgement*. Interestingly, the criteria still bear *no* resemblance to the everyday understanding and use of 'original.'

3.3.2.2. Rights

Generally speaking, while the objects whose use is regulated by real property rights and other types of personal property rights are usually quite different in substance from those whose use is regulated by intellectual property rights, the rights themselves bear many resemblances. They stem from a *right to use* the object, to *authorize use* of the object, or to *exclude* others from using the property. Corollaries are *rights to earn income* from exploiting the intellectual property, as well as *rights to license or assign interests* in the intellectual property. However, the nature of intellectual property objects affects the application of the two typical dichotomizations of classic property law:

- the dichotomization between '*choses in action*' and '*choses in possession*';
- the dichotomization between rights '*in rem*' and rights '*in personam*'.

As is common knowledge, 'choses in action' relate to the objects of property that *depend on a proprietor's ability to take an action in a court rather than take physical possession of the object*. The intangible nature of intellectual property objects would seem

to put them clearly in this category.[157] However, J. E. Penner argues that, while they are similar to choses in action 'because they are abstract legal rights, with no direct connection to anything, tangible or intangible', intellectual property rights differ from typical choses in action because they do not involve claims to part of the property of others.[158]

The 'intangibility' of intellectual property objects also affects application of the second dichotomy, between rights '*in rem*' and rights '*in personam*'. As is known, 'rights *in rem*' are rights that a proprietor *can enforce against all members of society with respect to the object of property*. By contrast, 'rights in *personam*' are rights that *bind only certain individuals*, such as rights enforceable under the terms of a contract. Intellectual property rights tend to be classified as rights *in rem*.[159] However, a feature of rights *in rem* would normally be that of *excludability*: namely, the proprietor obtains rights to exclude others from doing certain things with respect to the property, and other people have an obligation or duty to abstain from interfering with the property. This principle may relate to property law generally, but it presents special challenges when applied to immaterial objects. As George explains:

> [w]hatever the reasons, it can be very difficult for a member of society to avoid trespassing on others' intellectual property when the boundaries are invisible and experts do not always agree where those boundaries lie […] In order to exclude, boundaries have to be established. As discussed earlier, there are certain difficulties associated with erecting conceptual fences around abstract objects of property rights. Even if these boundaries are established, society must be alerted to the status of the intellectual property-protected objects.[160]

Non-excludability - and non-rivalrousness - are characteristics typical of intellectual property objects, but they are not necessarily typical of other types of property.

George's 'core criteria' (including 'conceptual criteria' and 'rights') operate as mechanisms - and all together as a conceptual apparatus - to identify the 'intellectual

[157] See T. Murphy, S. Roberts, & T. Flessas, *Understanding Property Law*, London, Sweet & Maxwell, 2004, at 57.
[158] See J. E. Penner, *The Idea of Property in Law*, Oxford, Oxford University Press, 1997, at 119.
[159] See J. E. Penner, *The Idea of Property in Law*, Oxford, Oxford University Press, 1997, at 119.
[160] See A. George, *Constructing Intellectual Property*, at 243.

property objects'. The apparatus produces the 'propertization' of any idea that can be linked to a tangible object, by connecting it to a series of property rights. However, George's criteria seem to be *necessary*, but not necessarily *sufficient*, to identify what 'intellectual property' is. In fact, the core criteria of intellectual property may also be found in non-intellectual property doctrines: namely, doctrines that do not fall under the legal categorization of 'intellectual property law'.[161] About these doctrines, it could be argued that their structural similarities to intellectual property - their construction based on 'conceptual criteria' - should have led to their identification as 'intellectual property'. Conversely, there are also more recent expansions of the subject matter covered by intellectual property doctrines in which one of the core criteria seems to be missing from a modern intellectual property doctrine.[162]

Despite this caveat, as George explain, '[t]he core criteria are functional in nature'.[163] Even if the presence of the core criteria is not, in itself, determinative, it can be interpreted as a useful guideline as to the *likelihood* that a legal doctrine should be classified as intellectual property. The examination of the presence or lack of these criteria could thus be both a *method of better understanding the nature of 'intellectual property'* than is offered by the definitional technique, and *a way to emphasize the differences between the intellectual property field and other intellectual property-like doctrines*. Among the latter category, the complex of information and techniques in possession of Indigenous populations: the so-called Indigenous knowledge.

3.4. Concluding Remarks: Colonial Property

As seen, the anthropocentric division of the world into 'nature' and 'culture' formed the basis of the modern idea of 'property' in law. Also, the language of 'rights' developed during the evolution of the market economy through the industrial era in Britain and other Western countries, and is thus *specific to a particular social formation*. However, the Western 'property' archetype have been widely exported through colonial expansion.

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[161] An example proposed by George is the one of heraldry. See A. George, *Constructing Intellectual Property*, at 281-90.

[162] An example of this may be 'trading standards' or 'trade practices' law, which prohibits false and misleading commercial conduct and resembles trademark law, but whose heritage lies in the areas of consumer protection rather than intellectual property laws.

[163] A. George, *Constructing Intellectual Property*, at 141.

Evaluations of Indigenous - non-English - societies were articulated in terms of English laws and economies, particularly with regard to the use of land as a 'resource' or 'thing'. Locke's distinction between 'nature' and 'culture' have represented the greatest inspiration for colonizers since the "cultural development" of any given society was measured by its "sufficient removal" from the common state Nature placed it in.[164] Indigenous relations with land entailing - as will be discussed in the next chapter - 'people-place' relations, were translated into systems of property and measured against the standard of Western property law, as if those relations were culturally and geographically non-specific. As Graham notes, Indigenous normative systems surrounding land 'were not compared in terms of differentials but in terms of degree of attainment of a universal (English) standard'.[165] Therefore, Indigenous societies - at least in its dimension of 'property' - have been depicted as a 'primitive form' of English society.[166] According to Ian Keen:

> [i]t is rather extraordinary, then, that anthropologists use concepts whose meanings have been taken to be so problematic as if they were transparent instruments for translating concepts in other cultures.[167]

The Western model of 'property' entails a conceptual separation of the world into the categories 'nature' and 'culture', regarded as universally correct, legitimate and desirable, as the actual separation in the world of 'people' from 'place'. The language of 'rights' then ultimately removes 'place' from the property relation. Consequently, according to colonial ideologies, Indigenous societies *had no concepts of 'property'*.[168] Jurists provided legal justification for acquiring colonies by 'discovery' and 'settlement', and the doctrine of *terra nullius* was applied to areas such as Australia, deemed to be a settled colony. A key legal case was the 'Gove case' (*Milirrpum v Nabalco*, 1971, section 1.1),

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[164] J. Locke, *Two Treatises on Government*, quoted in P. Fitzpatrick, *The Mythology of Modern Law*, at 82.
[165] N. Graham, *Lawscape: Property, Environment, Law*, at 38.
[166] See I. Keen, 'The Language of 'Rights' in the Analysis of Aboriginal Property Relations'.
[167] I. Keen, 'The Language of Property: Analyses of Yolngu Relations to Country', at 102.
[168] See B. Buchan, 'Traffick of Empire: Trade, Treaty and Terra Nullius in Australia and North America, 1750–1800', *History Compass*, 5, 2 (2007) at 386–405. An exploration over how the Western model of 'property' has been exported and attached to the Indigenous Australian relation to land can be found in I. Keen, 'The Interpretation of Aboriginal 'Property' on the Australian Colonial Frontier', in I. Keen (ed.), *Indigenous Participation in Australian Economies: Historical and Anthropological Perspectives*, Canberra, Australian National University E Press, 2010, at 41-62.

in which J. Blackburn found both that the relation between a Yolngu group and its land was not a proprietary one, since it does not comply with Western 'property' standards. the language of 'rights' - along with a conception of 'property' as a 'person-person' relation - has dominated anthropological discussions of 'property' and of Indigenous conception of 'land'.

The borrowings of anthropological metalanguage from legal theory[169] may convey false representation of Indigenous realities. The source of this usage - the projection of Western categories on Indigenous societies in the field of anthropological researches - has been discussed as lying in the influence of the so-called *'jural paradigm'*.[170] Within Australian scholarship of anthropology, this expression has been linked to the structural-functionalist era, and more specifically to Alfred R. Radcliffe-Brown's main works on the social organization of Indigenous Australians.[171] An instance of Radcliffe-Brown's application of 'jural paradigm' to Aboriginal society is provided by his definition of Indigenous 'horde' as 'a small group of person […] possessing in common *proprietary rights* over the land and its products'.[172]

Although reinforced by the experience of colonial administration[173], the 'jural' approach appears to have been strongly influenced by Sir Henry Maine's legal

[169] For an analysis of the other way round (legal borrowings from anthropology) see P. Burke, *Law's Anthropology: From Ethnography to Expert Testimony in Native Title*, at 277-279.

[170] See C. Mantziaris, & D. Martin, *Native Title Corporations: A Legal and Anthropological Analysis*, Leichhardt (NSW), The Federation Press, 2000, at 33-34.

[171] See particularly A. R. Radcliffe Brown, *The Social Organization of Australian Tribes,* Melbourne, Macmillan, 1931; and the collection of papers *Structure and Function in Primitive Society: Essays and Addresses*, Glencoe (IL), The Free Press, 1952. As is known, the opportunity of using Western legal categories in the analysis of non-Western (precolonial African) societies was the object of a controversy between Paul Bohannan and Max Gluckman. In his analysis of Tiv (Nigeria) 'folk systems', Bohannan claims that he has tried not to explain them in terms of Anglo-American law simply because it 'would do violence to Tiv ideas'. See P. Bohannan, *Justice and Judgement among the Tiv*, London, Oxford University Press, 1957, at 5-6. Bohannan blames Gluckman for 'translating fundamentally Western ideas into Lozi instead of translating fundamentally Lozi ideas into English'. See P. Bohannan, 'Ethnography and Comparison in Legal Anthropology', in Laura Nader (ed.), *Law in Culture and Society*, Chicago, Aldine, 1969, at 411. Also, he suggests what he would do (and what he did for the Tiv): '[i]f I report an institution from the Tiv that is totally similar to another institution that is described by someone else, I must describe it in Tiv terms, so that other scholars can make up their minds whether it is like the Romans' (P. Bohannan, 'Ethnography and Comparison in Legal Anthropology', at 404). In contrast to Bohannan, Gluckman discusses law among the Lozi (Zambia) in terms of Lozi legal concepts as well as legal and normative ideas that constitute the concept. See M. Gluckman, *The Judicial Process among the Barotse of Northern Rodesia*, Manchester, Manchester University Press, 1955. Over the Bohannan-Gluckman controversy, see (among others) J. Wagona Makoba, 'On the Use and Application of Legal Concepts in the Study of Non-Western Societies', *International Journal of the Sociology of Law*, 29 (1992), at 202-210.

[172] See A. R. Radcliffe-Brown, *The Social Organization of Australian Tribes*, at 4 (italics added).

[173] Australia colonialism largely influenced the development of anthropology as an academic discipline. At the beginning of twentieth-century, the Australian Government and colonial administrators were not indeed

evolutionary account of human societies.[174] In drawing his famous inference that 'the movement of progressive society has hitherto been a movement from Status to Contract'[175], Maine attempted to compare the structure of the 'primitive' societies of his time with that of ancient western civilizations, such as ancient Rome. The reception of Maine's methodology by later ethnographers resulted often in an analysis of indigenous societies which employed concepts and language originally developed to describe the legal systems of ancient Romans or Western societies in general.

The next chapter will then discuss why (and how) this transplant changes in fundamental way Indigenous view of 'land'.

convinced of the usefulness of university training in anthropology and were reluctant to consider the endowment of a chair. However, three events contributed to a radically subvert this attitude. At first, in 1906, a few years after the proclamation of The Commonwealth of Australia (1901), Great Britain granted to the new-born government the administration of Papua (former 'British New Guinea'). Later, in 1921, The Commonwealth of Australia acquired the Northern Territory from Southern Australia. Finally, from 1914 Australia have governed the former German colony of New Guinea. The sudden responsibility for many different groups of natives within Australian territories, along with the necessity to balance the economic use of native labor and a scientific study of native cultures before they were either lost or so transformed as to be unrecognizable, led to the establishment of a Chair of Anthropology at the University of Sydney in 1926 and to the appointment of Alfred Reginald Radcliffe-Brown as its first holder. See more broadly on this issue G. Gray, *A Cautious Silence: The Politics of Australian Anthropology*, Canberra, Aboriginal Studies Press, 2007, at 8, 31; and C. Antons, '*Foster v Mountford*: Cultural Confidentiality in a Changing Australia', in A. T. Kenyon, M. Richardson, & S. Ricketson (eds.), *Landmarks in Australian Intellectual Property Law*, Melbourne, Cambridge University Press, 2009, at 112.

[174] See C. Mantziaris, & D. Martin, *Native Title Corporations: A Legal and Anthropological Analysis*, at 34. On Maine's influence and reception among later anthropologists and legal theorists see J. Stone, *Social Dimensions of Law and Justice*, Maitlad, Sydney, 1966, 133-141.

[175] H. S. Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*, London, John Murray, 1861, at 178.

Part 2

Territorial Cosmos

4. ‘To Be in Place’: Yolngu ‘Territorial Cosmos’

> You are the land, and the land is you. There’s no difference.[1]
>
> So it comes to us that we are part of the land and the land is part of us. It cannot be one or the other. It cannot be separated by anything or anybody.[2]

4.1. Introduction

Chapter 2 addressed the Western archetype of ‘property’, especially in its relation to land, drawing from Nicole Graham *Lawscape*’s analysis. It concluded that such notion - the notion of ‘property’ - implies both:

1. an *ontological separation* between ‘people’ and ‘place’, as ‘subject’ and ‘object’;
2. the *irrelevance of ‘place’*, a specific area of land carrying along *physical* particularities.

As seen, implicit to the Western notion of ‘property’ is also an idea of ‘*commodification*’ and ‘*alienability*’ of land.

The present Chapter presents an alternative model with respect to the standard Western ‘bundle of rights’ archetype: the Yolngu ‘*territorial cosmos*’. As will be discussed, the

[1] Paddy Roe, Nyikina man (Western Australia). Quoted in J. Sinatra & P. Murphy, *Listen to the People Listen to the Land*. Carlton South: Melbourne University Press, 1999, at 19.
[2] G. Yunupingu, *Our Land is our Life*, St Lucia, Queensland University Press, 1997, at 2-3.

metaphor of ‘cosmos’ refers to an ‘extended’ dimension of ‘land’, as an ‘*interconnected network of meanings*’. Yolngu model of ‘territorial cosmos’, contrarily to the Western archetype of ‘property’, entails:

1. an *identification of ‘people’ and ‘place’*;
2. the *centrality of ‘place’*.

The *section 4.2* identifies several key notions in Yolngu social and ‘religious’ life. It particularly investigates the relation between Yolngu ‘law’, ‘Country’, and ‘sacred’ ancestors.

The *section 4.3* presents the concept of ‘territorial cosmos’, as an ‘extended dimension’ of Yolngu ‘land’ carrying cosmological connections to several aspects of Yolngu life. A double way of conceptualizing Yolngu ‘territorial cosmos’ will be eventually discussed, both as:

- a ‘*space*’ - an ‘object’ of property rights (in Nancy M. Williams’ account);
- and a ‘*place*’ - as a ‘subject’ *identifying* the people who inhabits the Country (in Fiona Magowan’s account).

The present chapter provides for the essential tools in order to discuss the specific theme of this research: namely, the relation between Indigenous intangibles and intellectual property law

4.2. Yolngu Key Notions

4.2.1. Defining ‘Yolngu’

'*Yolngu*' means 'person' in the nine related languages of North-East Arnhem land (even if some speakers stated that their word for 'person' was simply '*yol*').[3] After the establishment of contacts between Yolngu and white people, the word '*Yolngu*' have acquired the specific meaning of 'Indigenous person', and is frequently used by natives as contraposed to '*balanda*' (a corruption from Dutch 'Hollander'), meaning 'white people'.[4]

To speak about 'Yolngu society' or 'Yolngu culture' implies seemingly an assumption of cultural uniformity about this people which is not undisputed.[5] In fact, Yolngu social practices have known a 'mosaic distribution of variant forms' across Arnhem Land.[6] Moreover, groups clustered under the 'Yolngu' label fought at times among themselves and occasionally formed alliances with groups outside the region, often involving intermarriage with those groups.[7] Nevertheless, anthropologists have consistently treated Yolngu system of social and religious organization as a more or less uniform whole that differs from neighboring systems. The unifying factor between different 'Yolngu' groups have been identified with the '*Yolngu matha*' (literally: 'Yolngu tongue'), a cover term for a bunch of related 'dialect groups'[8] spoken in three major coastal settlement of north-east Arnhem land - Milingimbi, Galiwin'ku (Echo Island) and Yirkkala. A classic account of Yolngu society refers indeed the word 'Yolngu' to 'a group of intermarrying clans

[3] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, Oxford, Clarendon Press, 1984, at 4.

[4] See N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 64. The people of Australia's coastal north had considerable contact with people from the islands to north, the Malay Archipelago, where the Dutch began to trade in earnest during the 16th century, and eventually became quite established. '*Belanda*' was the word meaning 'Dutchman' in Malay and in other languages of that region. In the 1600s the Dutch explored northern Australia extensively. Starting from 1788, the British began to found permanent colonies in Australia, and exploration of the interior was carried out by various intrepid folks, including the Prussian-born Ludwig Leichhardt, who informed that the word that the Indigenous Australian in Arnhem Land used to mean 'white person' was '*balanda*'. See F. W. L. Leichhardt, *Journal of an Overland Expedition in Australia: From Moreton Bay to Port Essington, a Distance of Upwards of 3000 Miles, during the Years 1844-1845*, London, T. & W. Boone, 1847, at 523; quoted in P. Mühlhäusler, 'Post-contact Aboriginal Languages in the Northern Territory', in S. A. Wurm, P. Mühlhäusler & D. T. Tryon (eds.), *Atlas of Languages of Intercultural Communication in the Pacific, Asia, and the Americas*, Berlin-New York, Mouton de Gruyter, at 124.

[5] Ian Keen criticizes the use of Bourdieu's conception of '*habitus*' as a useful interpretive tool in order to describe Yolngu society, inasmuch it implies 'relative homogeneity' as a result of 'identical objective conditions of existence transcending individual intentions'. See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 8. On the notion of '*habitus*' see P. Bourdieu, *Esquisse d'une théorie de la pratique*, Genève, Librairie Droz, 1972, at 185.

[6] I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 4.

[7] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 40.

[8] B. Schebeck, *Dialect and Social Groupings in North East Arnhem Land*, Canberra, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 1968.

whose members speak a dialect of one of a number of closely related languages'.[9] More specifically, Yolngu people have been identified as forming a 'linguistic enclave'[10] and speaking suffixing languages of the Pama-Nyungan language family, while Yolngu's neighbors to the south and the west speak prefixing languages of the non-Pama-Nyungan language family.[11]

Throughout this work, both Yolngu social organization and language will play a fundamental role in framing and understanding Indigenous relations to land and intangibles. The following paragraphs will thus briefly highlight the main traits of Yolngu social constructs.

4.2.2. Social Identity

4.2.2.1. Moieties

Yolngu conceive their society as partitioned in two moieties, called respectively '*Dhuwa*' and '*Yirritja*'. The two moieties have been defined as 'exogamous patrilineal groups', since individuals belong to the moiety of their father and have to marry a person of their mother's moiety.[12] As stated by Warner, 'there is nothing in the whole universe […] that has not a place in one of the two categories'.[13] As a general principle of Yolngu social organization, the two moieties are independent from one another.

The division of Yolngu community in moieties influences many aspects of Yolngu life. Examples of the importance of moieties as a mean of social classification can be gathered from an analysis of the relationship between the two moieties towards land and

[9] H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 40.
[10] I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 22.
[11] The Pama–Nyungan languages are the most widespread family of Indigenous Australian languages, originally identified by Kenneth L. Hale's list of 57 words. See K. L. Hale, 'Review of J. G. Breen, *The Mayi Languages of the Queensland Gulf Country*', *Anthropological Linguistics*, 24, 3 (1982), at 372-376. The name 'Pama–Nyungan' is derived from the names of the two most widely separated groups, the 'Pama' languages of the north-east and the 'Nyungan' languages of the south-west. The words '*pama*' and '*nyunga*' mean 'person' in the two languages. Other Indigenous Australian language families are occasionally referred to, by exclusion, as 'non-Pama–Nyungan' languages.
[12] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 43; and I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 67.
[13] W. L. Warner, *A Black Civilization: A Social Study of an Australian Tribe*, at 30; quoted in H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 44.

sacra (‘*madayin*’). Dhuwa and Yirritja have indeed been defined as two separated ‘landowning units’ (or ‘landowning groups’). According to Howard Morphy:

> should a landowning group become extinct, the ownership of the land is transferred to another group of the same moiety. To the Yolngu, neither land nor clan should change moiety.[14]

Moreover, the independence of moieties is strongly emphasized with reference to the system of totemic classification associated with Yolngu ‘religious’ beliefs.[15] In fact, although being significant also to members of the opposite moiety, each ancestral being (‘*wangarr*’) belonging to Yolngu cosmology is referred to almost exclusively to one of the moieties only.[16]

4.2.2.2. ‘*Mala*’ and ‘*Ba:purru*’: Strings of Connectedness

In Yolngu view, the moiety organization (as an ordering system) has the priority over other methods of classification.[17] Nevertheless, Yolngu construction of social identity does not exclude the existence of a concurrent ‘segmentary’ organization. Yolngu refer to these social entities as ‘*mala*’ and ‘*ba:purru*’[18], two expressions which are just partially equivalent:

[14] H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 43.
[15] The use of ‘religion’ as a label isolating a specific domain of Yolngu social organization has been questioned. ‘Religion’ is used here in the sense described by Ian Keen, in order to denote the ‘categories, beliefs, and practices’ which referred to or invoked sacred ancestors or related beings. Such categories, however, penetrate all aspects of Yolngu life. See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 3.
[16] However, H. Morphy highlights the existence of ‘temporal sequences’ in Yolngu cosmology which transcend the moiety division. For example, the expression ‘*Wuyal time*’, which refers to a Dhuwa moiety ancestral figure, can be used also to locate events in the ‘mythology’ of Yirritja moiety. See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 45.
[17] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 43.
[18] Yolngu languages are written using special characters. The present work makes use of Yolngu orthography, with the exception of the word ‘*Yolŋu*’, written in its English equivalent ‘Yolngu’.

- '*Mala*' entails 'a sense of aggregation, perhaps perceived as the *spatial proximity* of a plurality of elements separated to some degree from others'.[19] However, this notion of 'physical aggregation' has been frequently used by Yolngu *metaphorically*, to denote the existence of a 'group' of persons connected in some way, whether grouped together in space or not. In fact, '*mala*' is mostly used in connection with a proper name (e. g. '*Gupapuyngu mala*')[20] in order to indicate a collectivity of people sharing the same '*ba:purru*' identity;
- According to Schebeck, '*ba:purru*' have derived etymologically from the word '*ba:pa*', 'father' (or 'father's brother'), and the suffix '-*wurru*', 'through'.[21] While '*mala*' denotes a collectivity of individuals with common attributes (or a cluster of individuals in space), '*ba:purru*' entails a more complex relation between the group, sacred ancestors, places, and elements of the sacred ceremonies.[22] Therefore, according to this conceptual distinction, a '*ba:purru*' may identify one of the common features which distinguish one '*mala*' from another.[23]

Ethnographers have applied to Indigenous social constructions ('*mala*' and '*ba:purru*') a vast range of names, including 'clan', 'sib', and 'phratry', and classified such entities as subgroups clustered in sets of higher order of inclusiveness.[24] However, the semantics of

[19] I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 64 (italics added). Similarly, see H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 46.
[20] As noted by H. Morphy, '*mala*' is a pluralizer, since (used as a suffix) it converts a singular noun into a plural. See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 46.
[21] See B. Schebeck, *Dialect and Social Groupings in North East Arnhem Land*, at 42. However, people in Milingimbi (see W. L. Warner, *A Black Civilization: A Social Study of an Australian Tribe*, at 30) and Yirkkala (see N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 70) denied this etymological connection. See also I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 64.
[22] See also I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 64. See also N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 66 (quoting her informer Daymbalipu).
[23] On the contrast between Yolngu conceptions of '*mala*' and '*ba:purru*' see N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 66 .
[24] A comprehensive account of ethnographers' names for Yolngu social entities (and the relationship between such names) can be found in I. Keen 'Metaphor and the Metalanguage: "Groups" in Northeast Arnhem Land', *American Ethnologist*, 22, 3 (1995), at 507. A specific criticism of the 'sib' classification is discussed in W. Shapiro, *Miwuyt Marriage: The Cultural Anthropology of Affinity in Northeast Arnhem Land*, Philadelphia, Institute for the Study of Human Issues, 1981, at 22.

'clan' (and akin) does not seem to fit the semantics of '*mala*' and '*ba:purru*'.[25] As Keen points out:

> [t]he identity and boundaries of groups were often ambiguous, that people disagreed about their 'internal' structure, including who was the leader, and that groups did not sort into a taxonomic hierarchy of different types of groups at different levels of inclusiveness implied by concepts such as 'clan' and 'phratry'. Rather than being constituted by enclosure within boundaries, Yolngu groups and groups relations, like places, extended outward from foci […] Yolngu groups were not like the corporations in Roman or English law or corporate groups of anthropological theory, but 'kinds' of people with ancestry and attributes that both linked them to, and differentiated them to, others.[26]

Keen refers to such 'extended' social entities, alternative to enclosing 'sets' and identified by Indigenous terms '*mala*' and '*ba:purru*', as 'strings of connectedness' (or 'strings of groups').[27] Yolngu 'strings' entail two different sorts of 'connection'. Groups can indeed be:

- '*dha:manapanmirri*' ('conjoint', 'joined together'). This relation reflects a close *kinship link* between persons who can combine to perform a ceremony;
- '*wanggany*' ('one', 'united'). People sharing 'one sacred object' ('*madayin wanggany*') and 'one ceremony' ('*bunggul wanggany*') form another kind of 'string' are in fact commonly named 'one group' ('*ba:purru wanggany*' or '*mala wanggany*').[28] Generally speaking, the existence of a shared name of a common *wangarr* ancestor indicates the existence of the 'one group'

[25] As is commonly known, 'clan' have been adopted into Gaelic from Latin and intended originally to denote Scottish kin groups. According to Keen, 'clan' have contributed to give to the Indigenous Australian social structure its exotic, primitive character. See I. Keen 'Metaphor and the Metalanguage: "Groups" in Northeast Arnhem Land', at 502.
[26] I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 64. On the same issue see also H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 47.
[27] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 73.
[28] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 73.

relationship.[29] Nevertheless, many of these names are shared by more than one group, reflecting the frequent *exchange* of ritual elements.

In conclusion, the relationship between groups and 'sacra' (objects, stories, songs, and ceremonies) seems to represent one of the fundamental criteria to classify Yolngu social entities. Such 'connection', entailing a complex set of obligations for the member of each group, has been described as a form of 'ownership' or 'property' (section 5.2.1.2).[30]

4.2.3. Language

4.2.3.1. The Yolngu '*Matha*'

A study of Yolngu society aimed to highlight 'property' notions unavoidably involves a brief excursus in the domain of linguistics. A third concept (after '*mala*' and '*ba:purru*') has indeed to be presented: the notion of '*matha*', defining both Yolngu 'language' and a fundamental aspect of Yolngu social organization and 'identity'. It is thought that over 250 Indigenous Australian language groups were spoken at the time of European settlement in 1788. Most of these languages would have had several 'dialects', so that the total number of named varieties would have run to many hundreds.[31] Eventually, European contact has had a profound impact on native languages. In fact, soon after the arrival of the first colonists, Indigenous Australian languages began to decline.[32] Today,

[29] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 73. Each group can be connected to several such strings, which cut across each other. Consistently, a group can possess a set of 'alternative names', which connect it to different strings.
[30] See N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 65; and H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 48.
[31] See M. Walsh, 'Languages and Their Status in Aboriginal Australia', in M. Walsh & C. Yallop (eds.), *Language and Culture in Aboriginal Australia*, Canberra, Aboriginal Studies Press, 1993, at 1. Dixon quantifies those dialects in 'around 700'. See R. M. W. Dixon, 'Languages in the Cairns Rain Forest Region', in S. A. Wurm & D. C. Laycock (eds.), *Pacific Linguistic Studies in Honour of Arthur Capell*, Canberra, Linguistic Circle of Canberra, at 652. However, according to Frances Morphy is actually difficult to apply to Yolngu tongue the usual linguistic criteria demarcating 'language' and 'dialects'. See F. Morphy, 'Djapu, a Yolngu Dialect', in R. M. W. Dixon & B. J. Blake (eds.), *Handbook of Australian Languages*, 3rd vol, Amsterdam, John Benjamins, 1983, at 1-12.
[32] For a reflection over the causes for the decline of native Australian languages see M. Walsh, 'Languages and Their Status in Aboriginal Australia', at 2.

fewer than 150 of those languages are still spoken.[33] Among them, the '*Yolngu matha*', spoken in the North-East Arnhem Land.

'*Matha*' is the Yolngu generic term for 'a way of speaking' (literally 'tongue').[34] The expression '*Yolngu matha*' identifies a group of related languages, which Schebeck[35] classifies into nine categories, or 'dialect groups', depending upon the form adopted for the demonstrative pronoun 'this-here':

- *dhuwala*;
- *dhuwal*;
- *dha'yi*;
- *nhangu*;
- *dhangu*;
- *djangu*;
- *dhiyakuy (ritharrngu)*;
- *djinang*;
- *djinba*.[36]

Each group contains a certain number of 'dialects', named by Yolngu people also '*matha*'.[37] The degree of difference between such ways of speaking is very diverse, from

[33] See A. Dalby, *Dictionary of Languages: The Definitive Reference to more than 400 Languages*, London, A& C Black, 2006, at 43.
[34] Keen points out the existence of synonyms for '*matha*', such as '*ya:n*'. See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 75. H. Morphy refers that in late 1980s '*dhaaruk*' has been preferred by Yolngu to '*matha*', due to the death of a man with a similar-sounding name. See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 46.
[35] See B. Schebeck, *Dialect and Social Groupings in North East Arnhem Land*, at 8.
[36] According to Schebeck, this is just one of the ways in which the Yolngu themselves classify their dialects. See B. Schebeck, *Dialect and Social Groupings in North East Arnhem Land*, at 8. Zorc reorganizes Schebeck's classification into four groups: the first including *dhuwala*, *dhuwal* and *dha'yi*; the second, the third and the fourth respectively corresponding to *dhiyakuy* (*ritharrngu*), *dhangu*, and *nhangu*. *Djangu*, *djinang*, and *djinba* are not considered by Zorc's classification. See R. D. P. Zorc, 'Functor Analysis: A Method of Quantifying Function Words for Comparing and Classifying Languages', in W. Wölk & P. L. Garvin (eds.), *Fifth LACUS Forum, 1978*, Columbia, Hornbeam Press, at 510-521. F. Morphy suggests to name such linguistic unities simply as 'groups' (and not 'dialect groups'). See F. Morphy, 'Djapu, a Yolngu Dialect', at 3. Keen refers that *dhuwala*, *dhuwal* and *djangu* are moiety-specific tongues (respectively: Dhuwa, Yirritja, and Yirritja), whereas all other categories include groups of both moieties. See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 76.
[37] See N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 61. For a survey of Yolngu 'dialects' see R. M. W. Dixon, *Australian Languages: Their Nature and Development*, Cambridge, Cambridge University Press, 2004, at xxxvi.

no discernible differences, through differences in a few lexical items, to major syntactical variation.[38]

Anthropologists and linguists have often reported that each *mala* or *ba:purru* owns its specific way of speaking. Each *matha* would thus be conceived by Yolngu as an *identity marker*, expressing also territorial affiliation.[39] According to Keen, this ideology seems not to be universal, since: 'some groups did not claim to possess a distinct tongue but said that they spoke a tongue in common with one or more other groups'.[40] Therefore, the use of language names as a social marker would not constitute a predominant way of social classification.

4.2.3.2. Semantic Levels

Quite interestingly, in his studies over Yolngu 'dialects' in north-east Arnhem Land, Schebeck notes that the semantics of *Yolngu matha* terms and expressions may occur 'at different levels'.[41] According to Schebeck, this fact demonstrates how Yolngu statements that appear contradictory to non-Indigenous people are in fact not contradictory because 'they are concerned with different level of reference'.[42] Such linguistic peculiarity results focal to the ways in which Yolngu people spread and exchange their knowledge, mostly 'religious' or sacred.

In his influential *Knowledge and Secrecy in an Aboriginal Religion* (1994), Ian Keen postulates a general structure in the control of Yolngu religious knowledge, resting in the *ambiguity* of the meaning of 'enacted forms': language, songs, dances, and designs.[43] A powerful instance of the ambiguous forms which guard religious knowledge in Yolngu

[38] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 76.
[39] See among others N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 61-4; and Williams (1986: 61-64) and H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 44.
[40] I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 77.
[41] See B. Schebeck, *Dialect and Social Groupings in North East Arnhem Land*, at 63.
[42] Quoted in N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 6.
[43] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 21.

society can be found in the language of '*manikay*' and '*bi̲l̲ma*' songs.[44] This language consists of 'cryptic phrases and clauses, and included lists of proper names and special song-words […] and archaism'.[45] An example is provided by a key phrase in a song about Little Red Flying Fox, one of Yolngu 'sacred' ancestors, belonging to 'Cloudy Waters' group's cycle of songs and stories.[46] The song describes animals as hanging in the trees, and describe the trees as 'game-possessing' ('*warrakanmirr*'), 'noisy' ('*rirrakaymirr*'), and 'fluffy/feathered' ('*gu̲li̲ku̲l̲imirr*').[47] According to Keen, these expressions connotes many 'complexes of meaning': in fact, besides their common significance, such phrases have meaning relating to sacred dances and objects, while 'other associations would be available to anyone who was familiar with the songs and related ceremonies, creating cross-cutting webs of significance'.[48] As will be discussed (section 4.3.1), a specific set of *polysemous* - in the sense described - terms and concepts named '*l̲ikan*' will be key instruments in order to understand the fundamental difference between Yolngu relations to land and intangibles, and Western 'property' notion.

4.2.3.3. 'Inside' v 'Outside'

An important interpretive tool to deal with Keen's thesis over the ambiguity of Yolngu languages and the multi-level semantics of Yolngu names is a conceptual dichotomy surrounding Yolngu system of 'religious' knowledge. Such dichotomy opposes two Yolngu notions, namely:

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[44] '*Manikay*' is a Yolngu expression denoting generally a 'song', or more specifically a 'song accompanied by clapsticks and digeridoo'. '*Bi̲l̲ma*' refers to a category of songs played only by means of clapsticks and not digeridoo (as is known, 'didgeridoo', considered to be an onomatopoeic word of Western invention, refers to a wind instrument developed by Indigenous Australians). It can also refer simply to 'clapsticks' or 'tapsticks'.

[45] I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 239.

[46] 'Cloudy Waters' refers to a set of creation stories, reproduced also in paintings, ceremonies and songs. These narratives concern two sisters and their brother (*Djang'kawu*), the major ancestors of the Dhuwa moiety, which came to Arnhem Land from the east, across the sea. According to the myth, they created the first human beings and organized them into groups, allocated land and provided fresh water by plunging their digging sticks into the ground. As a typical feature of Indigenous Australian stories, the Djang'kawu actions resulted in, or centered on, permanent *topographical features*, many of them being equivalent to sacred objects. A full account of Djang'kawu's story can be found in I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 50.

[47] English translations of the Yolngu expressions are provided in I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 39.

[48] I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 239.

- ‘inside’ (‘*djinawa*’ or ‘*djinaga*’);
- ‘outside’ (‘*warrangul*’).

The distinction between ‘inside’ and ‘outside’ - firstly discussed in H. Morphy’s *Ancestral Connections* (1991) - surrounds the interpretation of Yolngu words, songs, paintings, and dances, but pervades more generally every aspect of Yolngu culture. H. Morphy notes how ‘Yolngu languages tend to have a number of words for each object’[49]: while one or some of such words have an ‘everyday sense’, and are used in public, other words referring to the same thing are used in a *ritual context* with different meanings. The first kind of words are ‘outside’ words, if compared to the second ones, which are ‘inside’ words. An example[50] highlights the existence of (at least) two Yolngu words referring to ‘snake’: ‘*mikararn*’, an ‘outside’ word, and ‘*mundukul*’, its ‘inside’ equivalent. More specifically, ‘*mundukul*’ is used in order to identify the ‘snake’ with an ‘ancestral being’, as ‘the creator of thunder and lightning’.[51] Similarly, Keen speaks about ‘assigning an inside meaning’ to actions described in a song, when they involve the use of an object like a plant.[52] ‘Plants’ can be both everyday ‘physical’ objects, and ‘sacred’ objects. Accordingly, song concerning plants may describe one of the ‘sacred ancestors’, say, digging up a root, applying to this action the meaning (‘*mayali*’) of ‘put a sacred object into the ground’.

Besides being used to categorize things, the paradigm opposing ‘inside’ and ‘outside’ is used by Yolngu as a ‘logical schema’ applied to many situations, as to formulate an argument or to attempt to grasp the essential structure of something.[53] A ‘secular’ example[54] concerns the long-lasting discussion in 1980s between *balanda* (‘white people’) governments and Yolngu people over the construction of a road linking the towns of Nhulunbuy and Darwin in north-east Arnhem Land. On several occasions, delegations of politicians and planners visited Yirkkala putting forward reasons why the

[49] H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 78.
[50] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 79.
[51] According to H. Morphy both ‘*mikararn*’ and ‘*mundukul*’ have as their more precise English referent ‘death adder’. See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 79.
[52] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 239.
[53] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 80.
[54] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 81.

road should be built, many of them implying benefits for Yolngu themselves. Despite this, Yolngu have continued to reject *balanda* proposals and projects, explaining that while they knew the 'outside' reasons for building the road - the reason why *balanda* thought the road would have been good for Yolngu - they would persist in denying their permission due to the 'inside' story - the fact that the road would mainly serve *balanda* own interest. As H. Morphy states:

> the concepts of inside and outside are used frequently in such situations as a way of dealing with requests from *balanda* and as an attempt to model the issues involved.[55]

An analysis of the 'inside-outside' dichotomy reveals three main characteristics of such conceptual construction. It is in fact:

1. a *relative* relation: a term or interpretation is 'inside' only until a further one has been told to be 'more inside', at the same time remaining 'inside' relative to less restricted terms or interpretations;
2. a *variable* relation: many contingencies (as the death of a person) may influence the recycling of Yolngu vocabulary[56], with 'outside' words becoming restricted and 'inside' ones becoming public;
3. although being interpreted as opposed poles of meaning, 'inside' and 'outside' may identify a *continuum* of knowledge: more specifically, 'inside' words and forms are always linked in a continuous *chain* which associates them with outside forms.[57]

The third and final trait of the 'inside-outside' relationship - its connotation as a 'continuum', more than as a strict 'dichotomy' - deserves to be scrutinized. Its significance can probably be better understood with reference to Yolngu artworks than words and linguistic expressions. Yolngu 'religious' practice acknowledges the existence

[55] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 81.
[56] On the death of an individual, Yolngu people (as many other Indigenous Australians), cease to use words that sound like the name of the dead person, by means of substituting it with a synonym, or a loanword from a neighboring language. The length of the period in which the word cannot be used depends on a number of factors. See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 46.
[57] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 78-80.

of a 'most restricted' category of sacred objects: the holy '*rangga*', namely wooden objects revealed only to adult males during certain kind of ceremonies (section 1.1). Despite this, many variants of those objects may occur in semi-restricted or public contexts. An example adduced by H. Morphy[58] regards the so-called 'messengers', miniature versions of *rangga* which elaborate on different aspects of the meanings encoded into the original object, and are used mainly to announce a ritual associated with *rangga*. They represent, in a way, 'outside versions of inside things'. As a consequence, due to the existence of such 'chains' linking 'inside' and 'outside' versions of the same object, it is very hard to distinguish sharply between a 'sacred' and 'profane' dimension of Yolngu 'religious' practice.[59]

4.2.4. The 'Sacred'

4.2.4.1. '*Wangarr*'

The importance of linking Indigenous Australian cosmologies[60] to economic institutions have been constantly stressed out, since the former seem relevant in order to understand how the latter are organized, including the relations between 'people', 'place', and 'intangibles'.[61]

The notion of '*wangarr*' is a fundamental component of Yolngu 'religious' life, often mistranslated (according to a widespread tendency) as 'dreaming' or 'dreamtime' (section 1.3). William L. Warner defines '*wangarr*' - in its variant '*wongar*' - as 'a general name applied to the totemic spirits', and constructs it as a time-category, 'the time of *Wongar*'. Warner associates such notion to the 'mythological' period of '*Bamun*', 'long ago',

[58] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 80.
[59] The same thesis is advanced by Stanner for the Murinbata. See W. E: H. Stanner, 'Reflections on Durkheim and Aboriginal Religion', in M. Freedman (ed.), *Social Organisation: Essays Presented to Raymond Firth*, Chicago-New York, Aldine-Class, 1967, at 217-240.
[60] The term 'cosmologies' stands here for Indigenous 'metaphysics', including 'ontologies', 'cosmogonies', and 'cosmologies'.
[61] See P. Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 13; and I. Keen, *Aboriginal Economy and Society: Australia at the Threshold of Colonisation*, Melbourn, Oxford University Press, 2004, at 210.

contrasting with '*dhiyangu-bala*', the 'present', 'now'.[62] Similarly, H. Morphy and N. M. Williams refers '*wangarr*' to a 'distant time in the past'. However, quite significantly, both authors identify the 'past' as flowing into the 'present' by means of the signs and spirit traces that endure.[63] Ian Keen specifically criticizes the application of the dichotomy '(distant) past-present' to the notion of '*wangarr*', since Yolngu people do not seem to possess the equivalent of an abstract category of 'time'. According to Keen, '*wangarr*' refers instead to 'sacred ancestors', a class of extra-ordinary beings[64] which shaped and featured the land over the course of their ancestral travels:

> *Wangarr* ancestors existed and were active long ago; their traces and powers remained, and people explained some of the *wangarr* were still alive and active beneath the waters and earth. This does not mean that Yolngu believed that past time continued in parallel with the present.[65]

Keen's interpretation of '*wangarr*' seems consistent with a view of Indigenous Australian cosmologies as centered on '*place*' (and not centered on '*time*'). As anticipated in section 1.3.1, innumerable stories ('*dhawu*') pertaining to Yolngu cultural landscape recount identity and actions of *wangarr* ancestors, often identified by names and attributes of non-human species or entities (such as 'Red Fox', or 'Rainbow Snake'). According to such stories, the *wangarr* ancestors 'travelled, foraged, camped, defecated, or menstruated, copulated, fought other beings'.[66] Land and waters are full of signs of those activities, and of transformed substance of *wangarr* into rocks, creeks, hills, trees, waterholes, body of ochre, and so on. Over the course of their travel, ancestral beings created the topography of *specific* areas of land, ad their activity serve as partial 'physical

[62] See W. L. Warner, *A Black Civilization: A Social Study of an Australian Tribe*, at 568; and I. Keen I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 42.
[63] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 17; and N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 28.
[64] Keen identifies *wangarr* ancestors with just *one* category of Yolngu 'spirit-beings', along with '*ngurrunanggal*', human beings coevals of *wangarr*, and '*mokuy*', literally 'ghost of the dead' (also denoting a 'corpse' and contrasted with '*birrimbir*', the 'soul' that returned to the waters after the death). See I. Keen, *One Country, One Song: An Economy of Religious Knowledge among the Yolngu of North-East Arnhem Land*, Canberra, Australian National University, Department of Anthropology, unpublished PhD Thesis. However, Keen notes that 'this kind of typology falls into difficulties', especially concerning the demarcation of '*wangarr*' and '*mokuy*'. See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 46.
[65] I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 43.
[66] I. Keen, 'Yolngu Religious Property', at 278.

record' of the events described in Yolngu cosmologies. The focal element in Indigenous Australian cosmologies is the *diversity* and *particularity* of each piece of land with respect to others: in fact, *different groups of ancestors shaped different places disseminated over the Australian continent*. Therefore, ancestral beings may be understood as '*local forces*' acting within a *specific place*. Subsequently, Indigenous Australian cosmologies can be defined as '*locally specific*', as key interpretive tool to understand the characteristics of a specific area.

While 'place' seem to be a focal element, 'time' is almost irrelevant within Yolngu cosmology, and the 'time' dimension of 'sacred' events can be better identified as a 'place-time continuum'. Adolphus P. Elkin notes that this dimension should be imagined not as a horizontal line, on which things happen from time to time, but a 'vertical line in which the past underlies and is within the present'.[67] Similarly, Françoise Dussart specifies - with reference to the Walpiri (Northern Territory) culture - the meaning of 'dreamtime' (equivalent to Yolngu '*wangarr*') as 'Ancestral present', to convey the idea of a simultaneity of past and present.[68]

4.2.4.2. '*Madayin*'

Along with '*wangarr*', the notion of '*madayin*' results fundamental in order to grasp the structure of Yolngu cosmology. Looking for an exact equivalent of '*madayin*' in English is not an easy task to accomplish. Ethnographers have attributed to '*madayin*' two main referents, denoted by two English words:

- *'sacra'*;

[67] A. P. Elkin, 'Elements of Australian Aboriginal Philosophy', *Oceania*, 40, 2 (1969), 85-98. As noted by Patrick Glenn, the linear, contingent, or historical notion of time is clearly predominant in the Western world. Indigenous societies accept instead 'time' as 'an envelope, an environment, which simply surrounds us as we live'. See P. Glenn, Legal *Traditions of the World: Sustainable Diversity in Law*, at 79. Others approaches surrounding the 'time' dimension of Indigenous Australian cosmology are to be found in T. Swain, *A Place for Strangers: Towards a History of Australian Aboriginal Being*, Cambridge, Cambridge University Press, 1996, at 14-22.

[68] See Dussart, F., *The Politics of Ritual in an Aboriginal Settlement*, Washington-London, Smithsonian Institution Press, 2000, at 17-8.

- *'sacred law'*.[69]

According to Keen, '*ma<u>d</u>ayin*' defines 'anything connected with *wangarr* ancestors' and identifies 'the kind of quasi-entities frequently referred to as 'totems' by anthropologists'.[70] Additionally, Keen translates '*ma<u>d</u>ayin*' as 'sacra'.[71] Therefore, '*wangarr*' would define the content of, or the topic addressed by, '*ma<u>d</u>ayin*' objects. H. Morphy identifies a different meaning of '*ma<u>d</u>ayin*' (in its variant '*mardayin*') with respect to 'sacra'[72]: he states indeed that when asked to provide an English translation of this word, Yolngu tend to equate '*ma<u>d</u>ayin*' with 'history law', 'sacred law'[73], or just 'law'. Thus '*ma<u>d</u>ayin*' would point not directly to 'sacra', but rather to a '*normative system*', which 'centers around the songs, dances, paintings, and sacred objects which relate to the actions of the *wangarr* (ancestral) beings in creating the land and the order of the world'.[74] In any case, the dividing line between the two meanings of '*ma<u>d</u>ayin*' - as 'sacra' and 'sacred law' - seems a pale one. In fact, also H. Morphy adds that '*ma<u>d</u>ayin*' 'consists of sets of songs, dances, paintings, sacred objects, and ritual incantations associated with ancestral beings'.[75] Conversely, Keen hints at the meaning of '*ma<u>d</u>ayin*' as 'law' when he defines it as 'the explicit norms governing social life'.[76]

In attempting to harmonize its different English referents - 'sacra' and 'law' - H. Morphy refers '*ma<u>d</u>ayin*' 'to the actions of ancestral beings in creating the land and in instituting the practices of Yolngu life'.[77] According to this account, '*ma<u>d</u>ayin*' identifies *simultaneously* 'sacra' and 'law': Yolngu songs, dances, paintings, and sacred objects are 'connected' - in a sense that will be specified throughout this chapter - with *wangarr* ancestors' conducts, among which the *delivery of laws* to men is included. In fact, what

[69] On this duality see also D. Kelly, 'Foundational Sources and Purposes of Authority in Madayin', *Victoria University Law and Justice Journal*, 4, 1 (2014), at 33.
[70] I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 132-3.
[71] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 2.
[72] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 49.
[73] See also H. Morphy 'From Dull to Brilliant: The Aesthetics of Spiritual Power among the Yolngu', in H. Morphy & M. Perkins (eds.), *The Anthropology of Art: A Reader*, Oxford, Blackwell, at 305-6.
[74] H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 49.
[75] H. Morphy 'From Dull to Brilliant: The Aesthetics of Spiritual Power among the Yolngu', at 306.
[76] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 137.
[77] H. Morphy 'From Dull to Brilliant: The Aesthetics of Spiritual Power among the Yolngu', at 306.

Morphy is suggesting is that although *wangarr* ancestors' predicaments can be framed as absolute pronouncements in in terms of what people should do, they can also be in a way 'implicit' in paintings, songs and stories. Roland M. and Christine H. Berndt specify that not all events connected with sacred ancestors are presented as a model for human beings to imitate in its entirety: in fact, some of the *ma̲da̲yin* objects depict or concern adultery, incest, raping, or stealing. However:

> [w]hether they represent the good or the bad example, the mythical figures are said to have laid down precepts or made suggestions of which people are expected to take notice today. They defined the broad roles to be played by both men and women in such matters as sacred ritual, economic affairs, marriage, child-bearing, death. They warned that if people behaved in such and such a way, certain consequences would surely follow: that various tabus and avoidances had to be observed, that various relatives should not be intimate with one another. They set patterns of behavior for members of the particular social and cultural group in which their power is acknowledged.[78]

The fact that *wangarr* ancestors are regarded as sacred beings both lend 'an aura of sanctity to their precepts' and 'gives them a right to dictate in this way'.[79] In a sense, despite being 'law-makers', ancestors are also above the law, not bound by the rules which restrict ordinary human conduct.

What can be argued is that, generally speaking, '*ma̲da̲yin*' identifies portions of 'religious' (as connected with *wangarr* ancestors) life of Yolngu people, as well as Yolngu 'sacred' law, reified in durable 'objects'.[80] The next paragraph provides a more detailed reflection over Indigenous Australian (and specifically Yolngu) 'law' and 'legal system', and its interaction with the sacred.

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[78] R. M. Berndt, & C. H. Berndt, *The World of the First Australians. Aboriginal Traditional Life: Past and Present*, 5th ed., Canberra, Aboriginal Studies Press, 1999, at 337.
[79] See R. M. Berndt, & C. H. Berndt, *The World of the First Australians. Aboriginal Traditional Life: Past and Present*, at 337.
[80] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 132; see also J. Bern, 'Ideology and Domination: Toward a Reconstruction of Australian Aboriginal Social Formation', *Oceania*, 50, 2 (1979), at 118-132.

4.2.5. The 'Law'

4.2.5.1. Three Referents

Is there something like a Yolngu 'law'?

As many Indigenous Australian languages, Yolngu *matha* do not contain simple equivalents to the English term.[81] At least three terms have been presented – mostly by Yolngu themselves - as referring to 'law':

1. '*rom*';
2. '*nga:rra*';
3. as seen (section 4.2.4.2), '*ma<u>d</u>ayin*'.

However, all the three terms seem to denote much more encompassing concepts than simply 'law' in its Western significance.

'Rom'

Yolngu people often translate '*rom*' into English as 'law' or 'culture'.[82] However, Keen informs 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'.[83] Quite interestingly, F. Morphy (who translates '*rom*' as 'laws and customs'[84]) also notes that Yolngu representatives in official land

[81] See P. Sutton, 'The Robustness of Aboriginal Land Tenure Systems: Underlying and Proximate Customary Titles', *Oceania*, 67, 1 (1996), at 8-9; and I. Keen, *Aboriginal Economy and Society: Australia at the Threshold of Colonisation*, at 212.
[82] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 137.
[83] I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 2; and 312.
[84] See F. Morphy, 'Enacting Sovereignty in a Colonized Space: The Yolngu of Blue Mud Bay Meet the Native Title Process', in D. Fay & D. James (eds.), *The Rights and Wrongs of Land Restitution: 'Restoring What Was Ours'*, Abingdon (UK), Routledge, Taylor & Francis, 2008, at 104.

claims have used '*rom*' as a *counterpart* of the English 'law'. Here is a pertinent judicial transcript from the '*Blue Mud Bay*' case[85]:

> Counsel for the Appelants (CA): … you mentioned your law, or 'our law' I think you said. Well, what do you mean by that? What do you mean by your 'law'?
>
> X (witness): My law.
>
> CA: Yes.
>
> X: Well, what's that 'law' mean?
>
> CA: That's right.
>
> X: What in your –
>
> CA: That's the question I'm asking you.
>
> X: I'm asking too: what is 'the law' means?
>
> CA: Well, you -
>
> X: In *balanda* way, what youse [*sic*] call it?
>
> CA: You - you said, 'Under our law, we line the turtle shells up', as I understood you.
>
> X: Okay, exactly -
>
> CA: That's part of your law. What did you -
>
> X: Well, exactly what I'm talking now. When I'm using *balanda* English, well, you should know better than me, you know, because I'm - I'm talking in Yolngu way too

[85] *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008).

> you know? My - my tongues are turning around, like, Yolngu way I'm talking, and if I'm using your English now, you should understand this is new to me … my really language is Yolngu language … And I cannot - you know, when you talk to me, you know - what is Yolngu story, what this 'law' means, you know, well, I just pick up the English, 'law'. My *nga:rraku rom,* my *nga:rraku rom* is different. I call it *rom*.
>
> CA: And what does that word mean?
>
> X: Well, I'm telling you it - the law been there forever. It was given from our ancestors to our grandfathers to our father to me. This is what I call *rom* and law. I'm just putting that English into my - in my way of using of - using or thinking, you know, law. You call it law; I call it *rom*.[86]

F. Morphy refers to such 'judicial' use of the notion of '*rom*' by Yolngu representatives as an 'insistence on incommensurability' between Western and Indigenous legal traditions.[87] This 'dialectic' function of '*rom*' aims in fact to disclose the fundamental principles of governance generated by Yolngu 'law', to be considered as the 'foundation' of Yolngu existence and identity, along with the notion of '*gurrutu*'.[88] As F. Morphy points out:

> [t]he foundation of the Yolngu social system and system of governance is *gurrutu* - the complex networks of kinship that link individuals and groups to each other. Underlying *gurrutu,* and anchoring the human groups that are linked by *gurrutu* to their land and sea estates, is *rom*.[89]

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[86] *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust*, T (transcript) 126.41 - 127.39; T127.45 - 128.05. Quoted in F. Morphy, 'Enacting Sovereignty in a Colonized Space: The Yolngu of Blue Mud Bay Meet the Native Title Process', at 115-6; and B. R. Smith, & F. Morphy, 'The Social Effects of Native Title: Recognition, Translation, Coexistence', in B. R. Smith & F. Morphy (eds.), *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Canberra, Australian National University E Press, 2007, at 23-4.

[87] F. Morphy, 'Enacting Sovereignty in a Colonized Space: The Yolngu of Blue Mud Bay Meet the Native Title Process', at 116.

[88] See F. Morphy, 'Whose Governance, for Whose Good? The Laynhapuy Homelands Association and the Neo-Assimilationist Turn in Indigenous Policy', in J. Hunt, D. Smith, & W. Sanders (eds.), *Contested Governance: Culture, Power and Institutions in Indigenous Australia*, Canberra, Australian National University E Press, 2008, at 117See F. Morphy, 'Enacting Sovereignty in a Colonized Space: The Yolngu of Blue Mud Bay Meet the Native Title Process', at 109.

[89] See F. Morphy, 'Enacting Sovereignty in a Colonized Space: The Yolngu of Blue Mud Bay Meet the Native Title Process', at 109.

The term '*gurrutu*' has been translated by Yolngu representatives in Courts as 'permission'. However, as F. Morphy notes:

> there is […] no English equivalent of the word *gurrutu*, and no Yolngu matha equivalent of the English word 'permission.'. For an English speaker to understand what *gurrutu* means, it is necessary for them to be familiar with the operation of the Yolngu kinship system, and for a Yolngu person to understand what 'permission' means (in the context of native title) it necessary for them to be familiar with Anglo-Australian meaning of property.[90]

'Madayin'

As said (section 3.2.4.2), '*madayin*' have been translated by Yolngu speaker as 'history law', 'sacred law', or just 'law'. An Aboriginal Resource and Development Services 1996 paper describes more specifically '*madayin*' as 'the complete system' of 'customary and religious law' for the Yolngu people of Arnhem Land, encompassing the 'general law', the 'objects and documents that record the law', 'oral law', songs, ceremonies and 'institutions' associated with the law and the sacred places associated with the law.[91] '*Madayin*' is used as here an all-including description of the Yolngu normative system of law and religion.[92]

One issue with a definition of '*madayin*' as 'law' is to it from '*rom*' is yet to be traced. According to several commentators, '*madayin*' and '*rom*' are synonyms. For instance, Gondarra and Trudgen introduce their essay 'by explaining the Yolngu system of Law (*Rom*) that is called the *Madayin*'.[93] Others use '*rom*' as generic descriptor of a 'set of norms or practices' somehow connected with supernatural forces or entities. Keen

[90] F. Morphy, 'Enacting Sovereignty in a Colonized Space: The Yolngu of Blue Mud Bay Meet the Native Title Process', at 116.
[91] See Aboriginal Resource and Development Services, *The Madayin*, Information Paper No. 7, 1996 (available at http://caid.ca/YolnguInfo7.pdf), at 1. See also D. Kelly, 'Foundational Sources and Purposes of Authority in Madayin', at 34.
[92] See D. Kelly, 'Foundational Sources and Purposes of Authority in Madayin', at 33.
[93] See D. Gondarra, & R. Trudgen, 'Madayin Law System: The Assent Law of the Yolŋu of Arnhem Land'. Speech delivered at the *Law and Justice within Indigenous Communities Conference*, Melbourne, 22 February 2011 (available at http://blog.whywarriors.com.au/2012/madayin-law-system-yolngu-of-arnhem-land/).

proposes such use of '*rom*' when he states that 'one man contrasted *rom* from the ancestors with *yolngu rom*, 'people's *rom*', by which he meant sorcery'.[94] To equate '*rom*' with a sense of 'supernatural (religious) normativity' implies that '*ma<u>d</u>ayin*' designates *one species* of '*rom*': namely, the *rom* left by *wangarr* ancestors. On the contrary, some commentators have identified '*rom*' as *a part* of '*ma<u>d</u>ayin*':

> The *Ma<u>d</u>ayin* includes: all the peoples law (*rom*), the instruments and objects that encode and symbolize the law (*Ma<u>d</u>ayin girri*), oral dictates, names and song cycles and the holy, restricted places (*dhuyu <u>n</u>unggat wänga*) that are used in the maintenance, education, and development of law.[95]

'Nga:rra'

The last of the three terms used by Yolngu to refer to their 'law' is '*nga:rra*'. In fact, this word have been identified with the 'central term for the customary law of the Yolngu Aboriginal people of Arnhem Land'.[96] '*Nga:rra*' designates more precisely *the most important of Yolngu revelatory rites*[97], whose main purpose is to disclose secret dances and sacred objects to young men.[98] However, Yolngu ascribe to such ceremony also a combined *legislative* and *judicial* function.[99] According to Gaymarani, the *nga:rra* can be described as the 'Indigenous justice assembly of law', where Yolngu 'customary law' is 'declared'.[100] *Nga:rra* ceremony serves indeed the main purposes of educating Yolngu about 'law', punishing wrongdoers, resolving disputes and conducting trade. The ultimate aim of the *nga:rra* is to accomplish a 'state of people living in peace with each other and

[94] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 137.
[95] Aboriginal Resource and Development Services, *The Ma<u>d</u>ayin*, at 1.
[96] G. P. Gaymarani, 'An Introduction to the Nga:rra Law of Arnhem Land', *Northern Territory Law Journal*, 1 (2011), at 286. See also J. G. Gaykamangu, 'Nga:rra Law: Aboriginal Customary Law for Arnhem Land', *Northern Territory Law Journal*, 2 (2012), at 236.
[97] See R. M. Berndt, *Djanggawul: An Aboriginal Religious Cult of North-Eastern Arnhem Land*, London, Routledge & Keegan Paul, 1952, at 14.
[98] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 137. For a full account of the Nga:rra ceremony see See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 143-4. Significantly, Keen calls this rite '*Ma<u>d</u>ayin* ceremony'.
[99] See D. Kelly, 'Foundational Sources and Purposes of Authority in Madayin', at 35.
[100] See G. P. Gaymarani, 'An Introduction to the Nga:rra Law of Arnhem Land', at 283.

their environment'[101], called '*magaya*', 'when everything is still and tranquil'.[102] Such state of peace has been considered as 'foundational' to the 'Yolngu legal and governmental system'.[103]

4.2.5.2. Western Conceptualizations of Indigenous Australian 'Law'

The close relationship between - or the 'mixed' nature of - Indigenous Australians' normative structures and cosmologies has mostly prevented the conceptualization of local Indigenous regimes as a Western 'jurisprudential' type of law. Along this line of thought, three major reports (solicited by Australian law reform bodies) looked into issues of 'Aboriginal customary law':

1. the Australian Law Reform Commission (ALRC) *Recognition of Aboriginal Customary Laws Report* (ALRC Report No. 31) (1986);
2. the Northern Territory Law Reform Committee (NTLRC) *Report on Aboriginal Customary Law* (2003);
3. the Law Reform Commission of Western Australia's (LRCWA) *Aboriginal Customary Laws* (Report No. 94) (2006).

The ALRC Report

The ALRC *Recognition of Aboriginal Customary Laws Report* stated that 'Aboriginal customary law' is an 'highly ambiguous' term. In attempting to give a definition of such expression, the ALRC observed:

[101] See G. P. Gaymarani, 'An Introduction to the Nga:rra Law of Arnhem Land', at 286.
[102] Aboriginal Resource and Development Services, *The Ma<u>d</u>ayin*, at 33.
[103] Aboriginal Resource and Development Services, *Magayamirr: A Foundational Principle of the Yolngu Legal and Governmental Systems*, Information Paper No. 2, 1993, at 7.

> [t]he classification of this body of rules, values and traditions as 'law' has, however, caused divisions of opinion, especially for lawyers in the positivist tradition of jurisprudence, and for anthropologists adopting definitions of 'law' from that tradition. The difficulty is greater because most systems of indigenous customary laws include customs or principles which may appear to observers to be more like rules of etiquette or religious beliefs, as well as other more obviously 'legal' rules and procedures.[104]

The ALRC also draws upon comments by Eggleston[105], to make the point that:

> [l]aw and religion were intimately bound up in Aboriginal society […] and any attempt to identify certain segments of Aboriginal life as 'legal' involves the imposition of alien categories of thought on the tribal society. Some modern Aborigines have made comparisons between their law and the Australian legal system on the basis of common notions of rules and sanctions for their breach but they have also interpreted the word 'law' to mean 'way of life' and 'religion'.[106]

The report concluded that 'narrow legalistic definitions of Aboriginal customary laws will misrepresent the reality'.[107]

The NTLRC Report

The Northern Territory Law Reform Committee's *Report on Aboriginal Customary Law* sought to clarify the meaning of 'customary law':

> [u]nder the general [Australian] law, the term 'customary law' is a contradiction. 'Custom' and 'law' are regarded as two distinct concepts and never the twain shall

[104] Aboriginal Law Reform Commission *Recognition of Aboriginal Customary Laws* (ALRC Report 31), 1986, at 100.
[105] See E. Eggleston, *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria*, Canberra, Australian National University Press, 1976, at 278.
[106] Aboriginal Law Reform Commission (1986). *Recognition of Aboriginal Customary Laws* (ALRC Report 31), at 100.
[107] Aboriginal Law Reform Commission (1986). *Recognition of Aboriginal Customary Laws* (ALRC Report 31), at 101.

> meet unless and until 'custom' is converted into a law by statute; in which case it ceases to be 'custom'... [s]uch a distinction is unknown to Aboriginal society. Aboriginal members of the Committee and many others who have expressed their views, have emphasized Aboriginal tradition as an indivisible body of rules laid down over thousands of years and governing all aspects of life, with specific sanctions if disobeyed. The expression 'customary law' is therefore correct, as containing both concepts in the one expression.[108]

The LRCWA Report

The third and final noteworthy report into Indigenous 'customary law' is the LRCWA *Aboriginal Customary Laws*, which determined that:

> Aboriginal customary law embraces many of the features typically associated with the western conception of law in that it is a defined system of rules for the regulation of human behaviour which has developed over many years from a foundation of moral norms and which attracts specific sanctions for noncompliance.[109]

However, quoting once more Eggleston, the report states that the 'legal' character of Indigenous 'customary law' does not negate its 'religious' character.[110] Consequently, attempts at separating aspects of Indigenous Australians' life into discreet categories of 'legal' and 'religious' will impose 'alien categories of thought' upon the Indigenous Australian society. The LRCWA concluded that:

> [t]he term 'customary law' cannot be precisely or legalistically defined. Instead, the Commission favoured an understanding of the term that encompassed the holistic nature of Aboriginal customary law which the Aboriginal people of Western Australia shared with the Commission.[111]

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[108] Northern Territory Law Reform Committee, *Report on Aboriginal Customary Law*, 2003, at 11.
[109] Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Report No. 94), 2006, at 64.
[110] E. Eggleston, *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria*, at 278.
[111] Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Report No. 94), 2006, at 64.

Conclusions

All three law reform bodies observed that Indigenous Australian 'customary law' is a system that regulates Indigenous life in a 'holistic' way. The same inextricability of 'legal' and 'religious' dimension was noted by Justice Blackburn in the 1971 'Gove Land' case (section 1.1), involving Yolngu representatives. According to Blackburn:

> the fundamental truth about the aboriginal relationship to the land is that whatever else it is, it is a religious relationship.[112]

However, Blackburn also stated that:

> if ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.[113]

Therefore, as noted by Kelly, a sharp dichotomy between 'law' and 'religion' in Indigenous context will only be a false one.[114]

4.2.5.3. The Nature of Yolngu 'Law'

In the first part of his *Legal Traditions of the World*, Patrick Glenn describes the 'chthonic' (equivalent to 'Indigenous') 'legal tradition'.[115] Glenn's model is consistent with Yolngu idea of 'law' in at least five aspects. Law is:

1. essentially *oral*;

[112] *Milirrpum v Nabalco Pty Ltd*, at 167.
[113] *Milirrpum v Nabalco Pty Ltd*, at 267.
[114] D. Kelly, 'The Legal and Religious Nature of Aboriginal Customary Law: Focus on Madayin', *University of Notre Dame Australia Law Review*, 16, 1, at 60.
[115] According to Glenn, it is correct to talk about legal 'traditions' since they exist as 'large amounts of detailed and communicable information'. See P. Glenn, 'Are Legal Traditions Commensurable?', at 140.

2. managed by a *council of elders*;
3. based on the *natural world*;
4. interwoven with *'religious' beliefs*;
5. a *flexible* system.

Orality is one of the essential character of 'chthonic' (including Yolngu) normative systems: chthonic 'law' *rejects formality* in its expression. Indigenous norms are preserved through the informal - although often highly disciplined - means of speech and memory. Even if an 'oral' tradition of norms 'is not overly preoccupied with voluminous detail, that which human memory really cannot master'[116], this does not actually exclude the transmission of detailed information, but only that amount *manageable by human means of recall*. According to Glenn, at least two reasons - 'related not only to form, but to substance'[117] - justify the choice of an unwritten system of law:

- if no one is allowed to write down law, then no one can enjoy the privileged role of scribe, and no one can write commentaries that themselves become law. So, the orality of law *preserves the egalitarian character of chthonic societies with reference to the expression of 'law'*. This 'law' appears thus vested in a 'repository' in which all share and in which all participate;[118]
- the orality and the 'communal' nature of 'law' *allow important information to be learned by all, and all become able to assist in the process, to various degree*. Unwritten law would thus be more widely known and profoundly rooted than formal, written law.[119]

[116] P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 63.
[117] P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 64-5.
[118] On the view of chthonic law as a 'repertoire' (as opposed to a system) see P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 65; and T. W. Bennett, *Customary Law in South Africa*, Lansdowne, Juta and Co., 2004, at 2. For the egalitarian character of chthonic societies see U. Wesel, *Frühformen des Rechts in vorstaatlichen Gesellschaften: Umrisse einer Frühgeschichte des Rechts bei Sammlern und Jägern und akephalen Ackerbauern und Hirten*, Frankfurt, Suhrkamp, 1985, at 81-4.
[119] See P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, at 65.

A 'legal' tradition which is oral in character does not usually lend itself to complex institutions.[120] The main feature of Yolngu 'institutional' organization is the existence of a *council of elders*, namely individual people who, by their assimilation of tradition over a long period of time, often speak with greater authority. The authority of older men derives particularly from their *access to supernatural powers*, as well as from their *control of secret religious knowledge*, to which men are gradually admitted. This system has been referred to as 'gerontocracy'.[121]

As seen above (section 4.2.5.2), Yolngu 'law' seems inextricably interwoven with 'religious' beliefs, and infused with it. Norms are indeed believed to have been *laid down* from *wangarr* ancestors and 'law' is thus seen as a '*received*' tradition, which the older people hand down to youngsters. The derivation of 'law' from ancestors is the key notion to understand the link between Yolngu normative structure and land. Due to inexistence of a 'past' dimension in Yolngu perception of time, *wangarr* beings, who acted as legislators, *still exist in the feature of landscape and still produce and enact norms*. For this reason, in a way that will be specified throughout this chapter, the land is directly *'connected'* with the 'law', and one of the 'basic precepts' that governs Indigenous Australians' social life is that 'the Land is the Law'.[122]

A consequence of the land being the current home of *wangarr* ancestor is the *sacredness* attributed to the natural world. As stated by Glenn, in chthonic cultures (as Yolngu society):

> [i]f the natural world is divine, it is not something to be chopped down, dug up, extracted and burned, or dumped upon […] So chthonic law is environmentally friendly, in a way in which most ecological debate in the west do not fully reflect […] You don't simply have to repair damage to the environment; you and your kind

[120] On the existence of exceptions in a varied landscape, see P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, at 65.

[121] See (referring in general to chthonic cultures) E. Goldsmith, *The Way: An Ecological World View*, at 109. Relative to Yolngu, see I. Keen, 'Yolngu Religious Property', at 278. Keen states that Yolngu regime seem close to Max Weber's ideal type of 'gerontocratic traditional authority'.

[122] See M. Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews', *Australian Humanities Review*, 45 (2008), at 181. This assumption may raise a question about the nature of Indigenous Australian law as a *'spatial' entity*. The issue is examined in a recent paper by Giuseppe Lorini and Olimpia Loddo, questioning the existence of (generally) law in space. However, while the authors conclude that law is a *spatial entity*, they maintain that it is not a *material entity*. See broadly on this topic G. Lorini & O. Loddo, 'Il luogo delle norme. Un'indagine sulle dimensioni spaziali delle norme giuridiche', *Sociologia del diritto*, 1 (2017), at 77-102.

> have to live entire lives which accord as much respect to natural things as to yourself.[123]

Therefore, the natural world can be identified both as:

- the *source* of Yolngu 'law', since *wangarr* ancestors living within it originally delivered norms to mankind; and as
- the focal *object* of regulation of Yolngu 'law'

The peculiar nature of Yolngu 'law' - as an instance of 'chthonic' 'legal' tradition - have raised several doubts on the capability of a Western jurisprudential typology of 'law' to fit particularly well into Indigenous Australian normative structures. What have been asked is whether the notion of 'legal pluralism' addressed in the Indigenous Australian discourse should be intended as not just *the co-existence of multiple legal systems* on the same territory, but *a plurality in the very nature of law*.[124]

Peter Drahos argues that the incompatibility between Western and Indigenous conceptions of 'law' rests on the fact that Indigenous normative structures 'appears to describe forces that can be harnessed by individuals to help bring about physical consequences in the world'.[125] The 'forces' recalled by Drahos are sacred ancestors, which remains in some way active in the world. Indigenous norms may thus be identified with a 'system of binding guidance bequeathed to people by ancestors to help them to make correct selections when confronted by problems and troubles'.[126] This kind of 'law' seems thus 'more akin to a causal system of connections and consequences that individuals must understand if they are to survive and prosper'.[127]

Two conclusions may be derived from Drahos' interpretation of the 'law' of Indigenous Australians. On the one side, due to its strong connection with the physical (natural) world, in order to understand the structure of Indigenous 'legal' system:

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[123] See P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, at 65.
[124] See K. Anker, *Cultural Diversity and Law: Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights*, at 7.
[125] Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 19.
[126] Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 19.
[127] Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 19.

> it becomes more important to find indigenous people who know this system and less important to be engaged in the positivistic enterprise of codifying knowledge about customary practice.[128]

As a matter of fact, the main risk implied by a similar 'codification' attempt would be to transform and 'fix' Indigenous 'law' into static rules. As noted by Mantziaris & Martin[129], while anthropological observation has generally ascribed to Indigenous 'law and custom' a systematic quality, this view contrasts to the '*epistemic openness*' through which Indigenous Australians gives expression to their normative relationship towards country and sacra from their lived experience. 'Epistemic openness' refers here to the Indigenous Australians' preparedness to interpret new meanings (including *normative* meanings) in the landscape.[130] On the other side, the connection between normative structure and cosmology equates Indigenous regimes not with a purely 'legal' tradition, but rather with 'an ancestral system of which law in a variety of senses is a part'.[131] Indigenous vision of 'law' as created or 'left' by ancestral beings and forces *prevent to conceive norms as products of human acts, or as results of a political process*. Therefore, 'law' appears not just as a system of rules, norms and sanctions through which the society is ordered, but as 'the very foundation of reality'.[132] In fact, the legal dimension of Indigenous Australian societies encompasses such domains as the relationship between people, and between people and their tangible and intangible resources, as well as the metaphysical and moral underpinnings of those relations.[133]

4.3. Territorial Cosmos: People, Places, Sacred Objects

[128] Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 19.
[129] See C. Mantziaris, & D. Martin, *Native Title Corporations: A Legal and Anthropological Analysis*, at 35.
[130] See F. Merlan, 'Fighting over Country: Four Commonplaces', in D. E. Smith & J. D. Finlayson (eds.), *Fighting over Country: Anthropological Perspectives*, Centre for Aboriginal Economic Policy Research (Australian National University), Research Monograph No. 12, Canberra, Instant Colour Press, at 11. For a definition of 'customary law' as 'elastic' or 'flexible' see A. D. Badaiki, *Development of Customary Law*, Lagos, Tiken Publishers, 1997, at 14.
[131] This assertion leads Drahos to deny the appropriateness of labelling Indigenous Australian normative structures as 'customary law', preferring instead the nomenclature of 'ancestral system' (or 'ancestral law'). See Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 20.
[132] C. Mantziaris, & D. Martin, *Native Title Corporations: A Legal and Anthropological Analysis*, at 35.
[133] See also F. Myers, F., *Pintupi Country, Pintupi Self: Sentiment, Place, and Politics among Western Desert Aborigines*, Washington, Smithsonian Institute Press, 1986, at 47-51.

4.3.1. The '*Likan*' Concepts

Section 1.1 briefly recalled the events which introduced the judicial discussion of the 'Gove case'. As seen, that survey focused mostly on the evidences exhibited by Yolngu to demonstrate the existence of an Indigenous 'property right' in the area of Yirkkala: namely, the holy *rangga* - ancestral designs usually kept hidden. The question asked in the concluding remarks to the section was:

> *Is there any foundation in Yolngu worldview and cultural practice, which justifies the analogy between Yolngu intangibles - the holy rangga, or Yolngu sacred designs - and Yolngu land?*

The purpose of the present section is to find an answer - at least a preliminary one - to this question.

In his ethnographic studies on the transmission of knowledge in Yolngu society, Keen identifies a class of '*polysemous names*' which denotes '*related concepts*' in the Yolngu language.[134] This group of words - and the corresponding notions - is called in Yolngu *matha* '*likan*', 'joint', 'connection' (literally 'elbow')[135] and includes at least six terms:

1. '*wa:nga*', 'land', 'Country';
2. '*wangarr*', 'ancestors';
3. '*rangga*', the most 'sacred' *madayin* 'objects';
4. '*ngaraka*', 'ancestors' bones';
5. '*nga:rra*', 'sacred ceremony' in which *rangga* are revealed (but, as seen, also 'law');
6. '*djunggayi*' (or '*djunggayarr*'), the 'caretaker' of *madayin* ceremonies.

Also, the list includes:

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[134] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 102.

[135] More meanings of '*likan*' are listed in H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 189.

7. the suffix '-*watangu*' that refers to the 'holder' (or 'caretaker') of land and *ma<u>d</u>ayin* objects;
8. the verb '*ngayathama*', 'to hold', 'to look after' land and *ma<u>d</u>ayin* objects.

Quite significantly, the last two concepts - 'caretaker' and 'to look after' - denote *normative* actions and qualifications, that can be traced back to Yolngu rom. The group of *<u>l</u>ikan* names and concepts seems thus to provide a 'link' between aspects of the 'sacred' dimension of Yolngu worldview (*wangarr*), land (*wa:nga*), intangibles (*rangga*), people (*djunggayi*). A new question should be asked at this point:

What does it mean that <u>l</u>ikan *concepts are related to each other?*

In order to find an answer, the notion of 'connection' in Yolngu sacred life provided by H. Morphy seems to be a key one. H. Morphy proposes an investigation over the nature of the 'correlation' (or 'connection') between *<u>l</u>ikan* concepts, particularly concerning Yolngu conception of sacred design decorating holy *ma<u>d</u>ayin* objects ('*likanbuy miny'tji*', 'design related to *<u>l</u>ikan*') which usually depict *wangarr* ancestors and the creation of the land:

> [i]n talking about the meanings of paintings, one of the most frequent words Narritjin [Yolngu artist and Morphy's informant] used was 'connection': 'this design is connected with the spider', rather than 'means' or 'represents' the spider. Connection here is consistent with the idea that designs and their meanings arise out of ancestral action rather than simply represent it. The use of 'representation' would suggest *a gap between signifier and signified that is not consistent with Yolngu ontology*.[136]

According to H. Morphy, holy *rangga* and other *ma<u>d</u>ayin* designs are not mere *representations* of *wangarr* actions and Yolngu land, but they are rather *another dimension* of ancestors' conducts and Country.[137]

[136] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 189 (italics added).
[137] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 292.

4.3.2. The ‘Territorial Cosmos’

4.3.2.1. An ‘Interconnected Network of Meanings’

Morphy’s theory on the ‘link’ between *l̲ikan* concepts enlightens - at least partially - the relation between the different aspects of Yolngu social life. ‘Land’, ‘ancestors’, ‘*mad̲ayin* objects’ (including ‘*rangga*’), ‘people’, and the various nuances of ‘caretaking duties’ towards segments of Yolngu culture identify *different traits of the same entity*, rather that *different entities*. This ‘entity’, expressed in the correlation between *l̲ikan* concepts, has been known since longtime by Australian ethnography scholarship, and variously named. Among others:

- ‘*territorial cosmos*’[138];
- ‘*totemic polygon*’[139];
- ‘*totemic geography*’.[140]

All of the names refer to an ‘interconnected network of meaning’[141] which combines the ‘physical’ nature of land and sacred designs, the ‘spiritual’ dimension of wangarr ancestors, and the normative structure of Yolngu ‘way of being’ (fig. 3).

[138] See Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 13.
[139] See C. B. Graber, ‘Can Modern Law Safeguard Archaic Cultural Expression? Observation from a Legal Sociology Perspective’, in C. Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, Den Haag, Kluwer Law International, at 163.
[140] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land*, at 105.
[141] See H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 189.

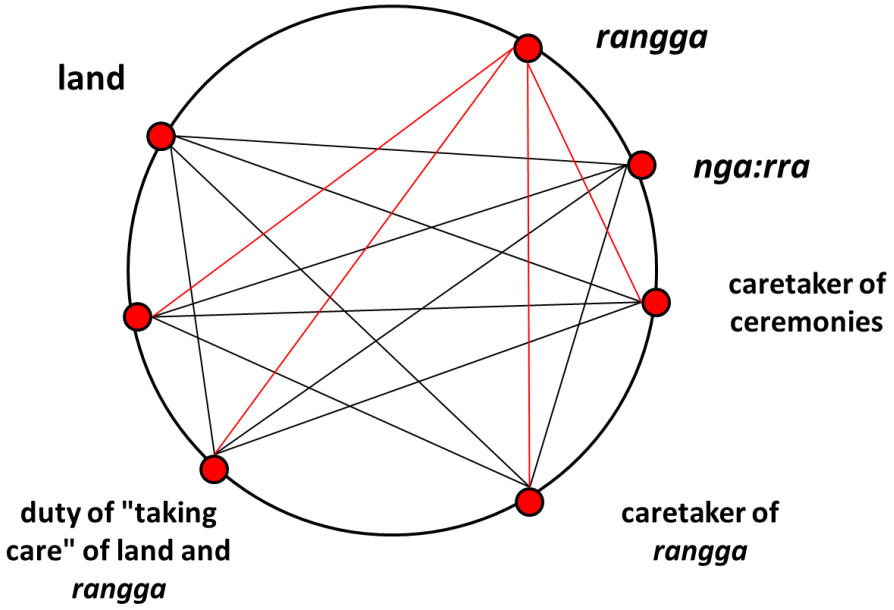

Fig. 3

Throughout this work the first of the aforementioned nomenclatures - 'territorial cosmos' – will be used, since it suggests *the centrality of land* within the complex networks of meaning which articulates Yolngu relation to Country.

According to Peter Drahos, international treaties concerning Indigenous land rights do not acknowledge the existence of such complex dimension, treating land as a 'resource' detached from other aspects of Indigenous social life. However, as Drahos points out, two international precepts get closer to this idea:

- Article 13 of the 1989 *International Labour Organization (ILO) Convention Concerning Indigenous and Tribal Populations* (No. 169), states that '[t]he use of the term 'lands' in Articles 15 and 16 shall include *the concept of territories*, which covers *the total environment* of the areas which the peoples concerned occupy or otherwise use'. The expression 'the concept of territories' seems to refer to a more complex dimension of land with respect to the sole 'commodity'.
- Article 25 of the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (61/295) states that 'Indigenous peoples have the right to maintain and

> strengthen *their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands*, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard'.[142]

4.3.2.2. 'Spiritual' *v* 'Physical'

The *wangarr* stories - the stories that recount the actions and travels of the *wangarr* ancestors - appear to be recalling events of the past, in which the ancestral beings created present day topography and landscape. However, when *wangarr* ancestors died, they did not leave the Country they created, but they became part of it and - crucially - they *remain* part of it.[143] According to Yolngu cosmology, the landscape's features and topographical signatures are not just physical 'traces' of the dead ancestors, but also *places where they remain active*. Still today, ancestors can manifest themselves *physically* in the landscape, for example through an unusual weather phenomenon or the appearance of an animal.

As seen (section 4.2.4.1), Yolngu cosmology does not follow a model of 'time' implying a conception of 'past' and 'present'. On the contrary, it seems to entail a cosmological commitment to the claim that *wangarr* ancestors are simultaneously part of a distant 'yesterday' and of 'today'.[144] In fact, linear models do not work for Yolngu cosmology.

Besides the absence of a 'time' dimension, or the fundamental incompatibility of Yolngu 'sacred' era with respect to the Western archetype of 'time', there exist another factor which make the analysis of Yolngu cosmology by means of Western categories extremely complex. Yolngu cosmology suggests in fact that *wangarr* ancestors have a certain degree of *materiality*.[145] In other words ancestors remain a watchful presence in the Countries they have shaped. As Drahos writes:

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[142] See Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 78.
[143] See Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 37.
[144] With reference to the generality of Indigenous Australians' conception of 'time', Stanner coined the expression 'everywhen'. See W. E. H. Stanner, 'The Dreaming', in William Edwards (ed.), *Traditional Aboriginal Society*, London, Macmillan, 1990, at.226.
[145] See Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 38; and I. Keen, *Aboriginal Economy and Society: Australia at the Threshold of Colonization*, at 211.

> Aboriginal cosmologies are perhaps closer to some version of physicalism than we realize. The world spiritual, frequently used to describe the relationship that indigenous people have with their land, probably misses in significant ways what indigenous people believe about ancestors and the land.[146]

Accordingly, the land - as the central element in the 'territorial cosmos' setting - is primarily a *physical* entity, a 'place'. The physical nature of a specific piece of land - of a 'place' - is thus focal to Yolngu cosmology. It is at the same time:

- the result of the actions of the *wangarr* ancestors;
- their *current* physical manifestation.

The physicality of land - the conception of 'land' as a 'place', rather than as a 'space' - is thus more than a foundation in the 'real' world of Yolngu cosmology: it shapes and articulates the complex bundle of cosmological connections, which constitutes the 'territorial cosmos'. Significantly then, Yolngu view about land *does not operate with an oppositional logic 'physical-cosmological'* (or 'material-immaterial'), but it rather develops *a continuum between the two poles*, unifying the 'physical' and the 'cosmological' dimension of land in a unique notion ('territorial cosmos').

The mixed nature of 'territorial cosmos' - as a *cosmological network of connections based on and made possible by the 'physical' Country* - suggests to refine the definition of 'place' put forward in Graham's *Lawscape*. It seems quite clear that Yolngu do not care about 'space' - 'abstract' and 'dephysicalized' conceptualization of 'land' - but rather about 'place'. However, the physicality, the particularism of each 'place' *does not matter in itself, but rather in virtue of the cosmological connections it carries along*. As seen, Yolngu cosmologies are indeed 'locally specific', and *wangarr* ancestor are 'local forces' (section 4.2.4.1): '*locality*' is at the foundation of Yolngu 'sacred' beliefs, since it determines the characteristics of each cosmology. Thus, the cosmological dimension of 'land' does not diminish the fundamental role of the 'physical', which remains a central notion in Yolngu ontology. Nevertheless, the notion of 'territorial cosmos' implies *an*

[146] Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 38.

'extended' meaning of 'place' - with respect to the definition of 'place' as a 'physical' location - rooted in the cosmological nature of its connection with other aspects of Yolngu sacred and social life.

Based on Graham's diversification of 'space' and 'place', Chapter 2 of the present work tried to answer the question:

> *Can the particularism and diversity of (physical) places be conceived within the rigid archetype of Western (real) property law?*

The answer was a negative one: 'places' as 'physical locations' are irrelevant to Western 'property'. The present section introduced though a new definition of 'place', not just as a physical (and specific) piece of land, but also as *a cosmological entity*. A new issue comes at the attention at this point:

> *Since 'physical' places are irrelevant to property law, what happens to the cosmological connections based on physical topographies?*

Or:

> *Can the current archetype of Western 'property' conceive Yolngu 'territorial cosmos' as a 'continuum' of the physical and the cosmological?*

4.3.2.3. Territorial Cosmos and 'Property'

The question whether the concept of 'property' can be applied to relations constituted in very different cultures has been anticipated above (section 1.4). In Hann's term:

> [t]he most basic element in the anthropologist's approach to property (and to other key concepts) is to question whether the understanding that has emerged in Western intellectual traditions can provide an adequate base for understanding the whole of humanity. The English term 'property', in technical, legal and academic as well as

> in 'folk' understandings, is closely tied to the history of enclosures and the emergence of capitalism. How, then, can the patterns of access and use characteristic of precapitalist land tenure be described in terms of property relations?[147]

For the most part, anthropologists have construed the concept in terms of 'rights', 'obligations', and 'interests'. A well-known 'translation' of Yolngu relation to Country into the language of 'property' and 'rights' is N. Williams' 1987 account on Yolngu 'land tenure': *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*. According to Ian Keen, Williams 'had a good reason' for taking this approach, namely:

> to prepare the way for future legal recognition of Yolngu relations to land in light of the findings of Blackburn J. in the Gove case, in which he rejected Yolngu claims to proprietary rights over their lands.[148]

Nancy Williams: Yolngu 'Land Tenure'

Williams uses the term 'property' - and what she calls the Yolngu 'concept of property' - to explain Yolngu 'principles and rules' governing the 'tenure' of land. She uses quite deliberately concepts and definitions derived from common law to suggest *equivalences* between Yolngu relation to Country and ideas about landownership embodied in Anglo-European 'property' regimes. For instance, Williams writes of the 'jural order in the distribution of proprietary interests to land through time'[149] and deploys terminology drawn from British and Australian law to explicate what she calls Yolngu 'tenure'.

As other ethnographers investigating Indigenous Australian relations to land, Williams names the 'land-holdings' of a patrilineal group its 'estate'.[150] Although borrowing this term from the realm of property law, Williams specifies that in the Yolngu case 'estate'

[147] C. Hann, 'A New Double Movement? Anthropological Perspectives on Property in the Age of Neoliberalism', at 289.
[148] I. Keen, 'The Language of Property: Analyses of Yolngu Relations to Country', at 110.
[149] See N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 101.
[150] See among others W. E. H. Stanner, 'Aboriginal Territorial Organisation: Estate, Range, Domain and Regime', *Oceania*, 36, 1 (1965), at 1-26.

does not simply refer to a 'parcel of land' but consists of a 'cluster of two or more discrete areas'.[151] Quite importantly, according to Williams tenure on the part of an 'owning group' has *a religious rationale in the journeys of spirit beings*: Yolngu 'myths' attributes land to named groups 'establishing ownership under right of title', while 'subsidiary categories of ownership are implied in a myth'. [152] Williams describes also varieties of 'subsidiary rights' in land, due to kin or ancestral lineage. These relations are called '*to look after*' a place.[153] Williams concludes that:

> the Yolngu system of land tenure is characterised by groups which, in terms that common law can comprehend, are corporate with respect to their interests in land, and that those interests are proprietary.[154]

From this perspective, Williams investigates the failure of the Australian Courts - particularly of Justice Blackburn in the 'Gove case' - to find that Yolngu had 'proprietary interests'. In fact, Williams translates Yolngu tenure of land and waters in such a way as to provide a rethinking of that finding.

As Ian Keen points out, it is clear from Williams' account that land and waters are far from being conceived of as inanimate 'objects' in Yolngu discourse. According to Williams, the Country and its 'spirits' are indeed addressed when a visitor is introduced.[155] However, the 'living' dimension of land does not inhibit Williams from using the language of 'property' and 'rights', but she does provide a 'window' for her research into Yolngu concepts and words.

Williams writes that, although Yolngu *matha* do not contain verbs that can be translated as 'to have' or 'to own', they do include a large number of forms 'that allow Yolngu to express complex sets of rights and duties in all categories of property, and to

[151] See N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 78.
[152] See N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 79; 102.
[153] See N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 80.
[154] See N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 104.
[155] I. Keen, 'The Language of Property: Analyses of Yolngu Relations to Country', at 107.

express them as precisely as they wish'.[156] According to Williams, such forms are created mostly by means of *suffixes* that denote 'possession'. As Keen explains, Williams is referring presumably to the possessive suffix '*gu/ku/wu'*, as in '*ngarraku wa:nga*' ('my country/place/ camp'.[157] Also, the suffix '*-watangu*' is added to '*wa:nga*' ('place', 'land', 'Country') to denote what Williams calls the 'owner' of an 'estate'. It should be also recalled that both '*-watangu*' and '*wa:nga*' are included in the list of *l̲ikan* notions (section 4.3.1).

Quite interestingly, Williams translates Yolngu relation to Country not just as 'rights', but also in terms of '*responsibilities*' for land and waters, expressed in terms of 'looking after' (with its rough equivalent in Yolngu *matha* as '*dja:ga*').[158] For example, the most senior man of a 'landowning' group has 'responsibility' for the most sacred site on the 'estate' as a whole, while each parcel is the 'primary responsibility' of a mature man to 'look after'. Moreover, members of the landowning group 'hold in their hands' the associated ritual 'property'.[159] According to Keen, the verb rendered by Williams as 'to hold in one's hands' is '*ngatayama*' (another *l̲ikan* concept) or perhaps '*ga:ma*', 'to carry'.[160]

The use of the Western 'property' archetype - along with the language of 'rights' - to describe Yolngu relation to land produces three major problematic outcomes:

1. as seen in Chapter 3, 'property' makes 'place' *irrelevant*. However, the particularism of each piece of land, and the physical nature of the land represent central notions in Yolngu cosmology and normativity;
2. the language of 'rights' produces *'mediating'* concepts[161], which put 'abstract' entities between 'people' and 'place', conceptually partitioning 'subjects' from 'objects'. However, as will be discussed in the next section, Yolngu 'territorial cosmos' establishes a relation of *identity* between Country and people. The

[156] N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 102.
[157] See I. Keen, 'The Language of Property: Analyses of Yolngu Relations to Country', at 107.
[158] See N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 93.
[159] See N. M. Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, at 78.
[160] See I. Keen, 'The Language of Property: Analyses of Yolngu Relations to Country', at 109.
[161] I. Keen, 'The Language of Property: Analyses of Yolngu Relations to Country', at 107.

language of ‘rights’ seem to fail in describing such ‘identification’ of people with place;

3. the language of ‘property’ does not penetrate the entirety of the relation between Yolngu and Country, since it does not account for the *duties* and *responsibilities* of people (of ‘owners’) relative to place.

Alternative approaches in the description of the Yolngu-Country relation - with respect to the application of the ‘property’ archetype to Indigenous realities - should be investigated.

4.3.2.4. Territorial Cosmos and ‘Identity’

Several instances of ethnographic efforts can be found criticizing the use of the ‘property’ concept - along with language of ‘rights’ - to translate Indigenous relation with land. Among others:

- Rumsey and Redmond (in their *Report* for the Wanjina-Wunggurr-Wilinggin Native Title Claim) express reservations about the use of the ‘rights’ terminology to approach the Indigenous Australian way of conceiving ‘Country’;[162]
- Stasch uses the expressions *‘sense of belonging’*, besides ‘owner’ and ‘ownership’, to translate Korowai (West Papua) possession of land.[163]
- Myers criticizes the term ‘property’ as ‘ontologically inappropriate’ to describe some societies’ conception of ‘territory’;[164]

[162] See A. Rumsey, & A. Redmond, *Final Anthropological Report:* Wanjina-Wunggurr-Wilinggin *Native Title Claim* (prepared for the Federal Court). Derby (WA): Kimberley and Kamali Land Councils.
[163] R. Stasch, *Society of Others: Kinship and Mourning in a West Papuan Place*. Berkeley-Los Angeles: University of California Press, 2009, at 28.
[164] F. Myers, ‘Burning the Truck and Holding the Country’, in T. Ingold, D. Riches, & J. Woodburn (eds.), *Property, Power and Ideology in Hunting and Gathering Societies*. London: Berg, 1988, at 53. See also I. Keen, ‘The Language of Property: Analyses of Yolngu Relations to Country’, at 107.

- Peter Drahos argues that 'it is probably not helpful to think about this system [the Indigenous Australian knowledge system] too much in Hohfeldian terms'.[165]

Marilyn Strathern

As probably the most well-known example of this sort, Marilyn Strathern have questioned the applicability of the notion of 'property' to Hagen (Highlands of Papua New Guinea) people in her *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (1984).

According to Strathern, the notion of 'rights' is embedded in the Western notion of 'property', which entails a *radical disjunction* between 'people' and 'things'. Strathern suggests that there is a Western antithesis between treating someone as a 'person' and as an 'object': as 'subjects', people manipulate things, and can cast other people into the role of things 'insofar as they can hold rights in relation to these others'; the 'acting subject' is indeed recognizable by his or her 'rights'.[166] Strathern argues that, in Hagen, social relations are not necessarily bound up with a 'subject-object' dichotomy. Assets such as a 'clan estate' or material and immaterial 'valuables' represent an aspect of *intrinsic identity*, so that they cannot be disposed of or withdrawn from the exchange system without compromising that identity. People in Hagen exercise 'proprietorship' insofar as they have personal 'rights of disposal' over 'valuables and possessions'. These 'valuables' and 'possessions' *are not alienable in the same way as 'commodities' are,* for labor remains part of the person. Disposal is construed as *a loss to the producer for which the producer is compensated, rather than the labor being purchased*. When Hagen women are equated with 'wealth' and become 'gifts' in exchanges between men, they too are seen as an aspect of intrinsic clan identity and stand for aspects of the 'clan person'. Thus, when men exchange women between clans, according to Williams 'we may argue

[165] See Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge*, at 8.
[166] M. Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia*. Berkeley-Los Angeles: University of California Press, 1984, at 162.

that *it is part of themselves that men are exchanging*'[167] and in giving valuables the donor 'is giving himself'.[168]

Nancy Munn and Fiona Magowan

An interesting analysis specifically surrounding the discourse about Yolngu relations to Country - significantly outside the language of land as a 'thing', or object of property rights - is F. Magowan's 2001 construal of Yolngu conceptions of the ancestral significance of 'sea' and 'fresh water'.[169] The aim of Magowan's work is to re-evaluate the 'human-ancestor-land complex', while its foundation is Nancy Munn's 1970 account of transformations of 'subjects' into 'objects' in Warlpiri (Northern Territory) and Pitjantjatjara (Central Desert) ontologies.[170] Munn uses the terminology of 'subject' and 'object' to construe a cosmology that posits *intrinsic connections between 'persons' and 'things'*. According to Munn, Warlpiri and Pitjantjatjara people are embedded in a universe constituted in part by *objectifications* of ancestors in the form of their traces, which remains in the landscape and in the form of ancestral designs painted on bodies. However, an underlying pattern of ancestral transformation has a '*bi-directional structure*'.[171] It entails indeed both:

- '*objectification*' (especially of features of the landscape) through the agency of ancestors;
- and '*identification*' by the living subject with those 'objects'.

[167] M. Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia*. Berkeley-Los Angeles: University of California Press, 1984, at 167 (italics added).
[168] M. Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia*. Berkeley-Los Angeles: University of California Press, 1984, at 168. As noted by Keen, while suggesting that the language of 'rights' is bound up with inappropriate concepts of 'property', Strathern nonetheless mixes the language of 'property' and 'rights' - such as 'proprietorship' and 'rights of disposal' - with the language of 'inalienable possession' and 'intrinsic connection'. See I. Keen, 'The Language of Property: Analyses of Yolngu Relations to Country', at 107.
[169] See F. Magowan, 'Waves of Knowing: Polymorphism and Co-Substantive Essences in Yolngu Sea Cosmology', *The Australian Journal of Indigenous Education*, 29, 1 (2001), at 22-35.
[170] See N. Munn, 'The Transformation of Subjects into Objects in Walbiri and Pitjantjatjara Myth', in R. M. Berndt (ed.), *Australian Aboriginal Anthropology*, Nedlands, University of Western Australia Press, 1970, at 141–63.
[171] See N. Munn, 'The Transformation of Subjects into Objects in Walbiri and Pitjantjatjara Myth', at 156.

Munn takes such transformations and relations of identification to be the grounds of the Walpiri and Pitjantjatjara universal order.[172]

Drawing from Munn's research, Magowan emphasizes the dynamic 'kinetic' properties of landscape[173], and builds it into her account of Yolngu cosmology and relations to Country and ancestors. According to Magowan, ancestral powers 'inheres in both topography and oceanography through its own natural movements and the actions of others upon it'.[174] Each ancestral transformation 'has its own dynamic and interactive agency arising from particular movement forms in the landscape and seascape', which are constantly in motion.[175]

The 'dynamic' nature of landscape reflects in Yolngu artistic expressions. For example, in Yolngu song

> different configurations of co-substantive essences allow apparently static topographical features to acquire human qualities because they image ancestral movement patterns.[176]

Magowan refers to this process as *'polymorphism'*, literally meaning 'the ability of a figure to undergo metamorphosis into a new form or to appear simultaneously in multiple forms'. As D. B. Rose points out, relative to the 'human' nature of Country:

> [p]eople talk about country in the same way that they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for

[172] As Munn refers, these contrasting uses of the subject-object dichotomy come from Kantian philosophy, in which a 'subject' is a person capable of knowledge and an 'object' is something that is capable of being known. The object as appearance has to be distinguished from the object as it is in itself, beyond the possibility of knowledge. Objects are objects for subjects and are conditioned by subjects. But the self can also be the object of knowledge. A subject is also a moral entity who is responsible for actions carried out, as distinct from an object that is acted upon.

[173] See A. Redmond, 'Places that Move', in A. Rumsey and J. F. Weiner (eds.), *Emplaced Myth: Space, Narrative, and Knowledge in Aboriginal Australasia and Papua New Guinea*, Honolulu, University of Hawai'i Press, 2001, at 120–38.

[174] F. Magowan, 'Waves of Knowing: Polymorphism and Co-Substantive Essences in Yolngu Sea Cosmology', at 23.

[175] F. Magowan, 'Waves of Knowing: Polymorphism and Co-Substantive Essences in Yolngu Sea Cosmology', at 23.

[176] F. Magowan, 'Waves of Knowing: Polymorphism and Co-Substantive Essences in Yolngu Sea Cosmology', at 23.

> country, and long for country. People say that country knows, hears, smells, takes notice, takes care, is sorry or happy […] Country is a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life.[177]

Another key concept emerging from Magowan's account is '*simultaneity*'. In contrast with Stanner's account, according to which a man said that a person and their totem were '*like*' one another[178] - a relation called by Magowan of *'simulation'* - Yolngu would posit 'a closer ontological relationship between subjects and objects as one of 'simultaneity': a person will indeed say '*I am* the water' or '*I am* the tree' (and not 'I am *like* the water', 'I am *like* the tree').[179] Embedded in such statements are ideas about how Yolngu 'view themselves as *multiple, simultaneous entities* encompassing and encompassed by the landscape and seascape'.[180] Therefore, in Yolngu ideas of 'sea' cosmology 'humans, ancestors and waters are interlinked by a combination of the various shapes, forms, colours and sounds of water movements in, through and upon the land'.[181] Accordingly, people are perceived as 'ancestors' in ritual performance and song, which evoke 'movements of the ancestral past in the landscape and seascape'.[182]

Drawing on Bagshaw's use of the term *'consubstantiation'* to capture the relation between a group and its Country[183], Magowan discusses the 'gendered' identity of bodies of sea water and fresh water, each identified with a particular moiety (Dhuwa or Yirritja). Relations between waters provide images in song of conjugal union, insemination and conception. For example, a reference to Dhuwa moiety salt water 'provides an image of male waters covering the female freshwater as it runs into the sea, inseminating the

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[177] See D. Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness*, 7.
[178] See W. E. H. Stanner, *On Aboriginal Religion*, Oceania Monographs, 11, Sydney, University of Sydney, 1966, at 260-2.
[179] F. Magowan, 'Waves of Knowing: Polymorphism and Co-Substantive Essences in Yolngu Sea Cosmology', at 24. However, Keen notes that there is, however, no equivalent to the verb 'to be' in Yolngu languages. See I. Keen, 'The Language of Property: Analyses of Yolngu Relations to Country', at 113.
[180] F. Magowan, 'Waves of Knowing: Polymorphism and Co-Substantive Essences in Yolngu Sea Cosmology', at 24 (italics added).
[181] F. Magowan, 'Waves of Knowing: Polymorphism and Co-Substantive Essences in Yolngu Sea Cosmology', at 25.
[182] F. Magowan, 'Waves of Knowing: Polymorphism and Co-Substantive Essences in Yolngu Sea Cosmology', at 25.
[183] See G. Bagshaw, 'Gapu Dhulway, Gapu Maramba: Conceptualisation and Ownership of Saltwater among the Burarra and Yan-nhangu Peoples of Northeast Arnhem Land', in N. Peterson & B. Rigsby (eds.), *Customary Marine Tenure in Australia*, Sydney, University of Sydney, at 154-177.

singer's mother'.[184] Thus, waters are *'ancestral subjects'* with their own agency. Songs about water 'embody human agency in movements that express the consummation of marriage between people through the mingling and swirling of waves, depicting the conjoining of two individuals'.[185] The intermingling of fresh and salt water is termed '*ganma*', with connotations of sexual relations and the mixing of bodily fluids.[186] Patterns of movement connecting humans, ancestors and the sea enable body parts and ancestors to be seen as 'conterminous' with one another, although the relationship between their parts is multivalent. In songs, 'strings' of entities connected by aspects of shape and form can be 'imaged as simultaneously subsumed inside the other' as a song series progresses. As noted earlier, Magowan labels these relations and processes 'polymorphism', which is 'the process whereby an ancestor, human or part of the landscape or seascape is seen as being simultaneously held inside the other'.[187] Magowan thus coins terms to capture subtleties of Yolngu cosmological discourse (especially in song).

4.4. Concluding Remarks

The present Chapter enlightened an alternative model of the relation between 'people' and 'place', with respect to the Western 'property' archetype. The Yolngu 'territorial cosmos':

- represents a '*dynamic*' relation, in which people *are* (in) place. As Magowan points out, 'subject' and 'object' are not clearly distinguishable in Yolngu setting, since land is not a powerless 'thing', but rather a *'living entity' equipped with ancestral subjectivity*. As seen, modern property law excludes

[184] F. Magowan, 'Waves of Knowing: Polymorphism and Co-Substantive Essences in Yolngu Sea Cosmology', at 27.
[185] F. Magowan, 'Waves of Knowing: Polymorphism and Co-Substantive Essences in Yolngu Sea Cosmology', at 27.
[186] On the notion of '*ganma*', as a metaphor for the idea of two cultures 'working together' in a way in which each one is preserved and respected has a place see R. Marika, 'The 1998 Wentworth Lecture', *Australian Aboriginal Studies*, 1, 1 (1999), at 7.
[187] F. Magowan, 'Waves of Knowing: Polymorphism and Co-Substantive Essences in Yolngu Sea Cosmology', at 28.

this kind of relation, preferring the categories of 'people' and 'place' to be fixed as either 'natural' or 'cultural';

- does not seem based on 'rights', but rather on *connectivity*: more specifically, on 'cosmological connections' structured by the stories of *wangarr* ancestors;
- is a normative structure made in response to the particularity of places. In the territorial cosmos - as Graham writes - 'traditions are traditions because the reason for them is materially apparent'.[188] On the contrary, Western 'property' structure abstracts the physical condition of land into transcendental legal traditions.

The outline of Yolngu relation to place discussed in the present chapter represents the conceptual foundation for the next (and final) section. Chapter 4 will focus *on the function of Yolngu intangibles into the territorial cosmos*. Nearly all Indigenous Australian art can indeed be related to the landscape, while the majority of paintings and designs do represent explicitly the physical relationship between different features of the Country. However, Aboriginal paintings should be seen primarily as 'maps' of conceptual relationships that influence the way the land is seen and understood. When Aboriginal paintings do represent specific features of landscape, they show them in their cosmological - besides their physical - relationship to one another.

The main purpose of Chapter 4 will be to clarify the reasons why the application of intellectual property law to Indigenous Australian intangibles changes such objects in fundamental ways.

[188] N. Graham, *Lawscape: Property, Environment, Law*, at 201

5. Yolngu 'Intellectual Property': Knowledge in Place

> The environment is not something that is simply external to the object. Instead the environment enters the constitution of the entity: it is folded into and becomes part of the object in question.[1]

5.1. Introduction

Chapter 4 discussed how the simultaneously - and paradoxically - 'contextual and holistic' character'[2] of Yolngu relation to land contrasts greatly to the paradigm of non-Indigenous (Western) 'property' law to which 'place' is irrelevant. The present chapter interprets the fundamental clash between the Western 'property' archetype and the Indigenous way of conceiving 'place' as an *essential conceptual tool* to understand a seemingly different issue: the protection of the so-called Indigenous people's knowledge. This theme has been (and still is) highly discussed in the intellectual property circles worldwide.

As noted in the introductory remarks to this research (Chapter 1), dominant legal regimes have tried to reconcile the realm of Indigenous intangibles with conventional intellectual property rights. As seen (section 1.2), this need seems informed by the desire of Western legal regimes to encapsulate Indigenous knowledge - incorporated in cultural objects - into their - dominant - legal categories. However, Indigenous peoples do not reject such conceptualization at all, since for them would be advisable to benefit from their knowledge, while preserving its integrity and stemming the tide of its appropriation

[1] B. Sherman, 'Taxonomic Property', *Cambridge Law Journal*, 67, 3 (2008), at 565.
[2] See J. K. Weir, *Murray River Country: An Ecological Dialogue with Traditional Owners*, Canberra, Aboriginal Studies Press, 2009, at 11.

by external interests.[3] Apart from being integral to the Indigenous quest for self-determination, this need continues to rise because of the growing value of Indigenous knowledge in different areas of scientific, cultural, economic, and commercial endeavours. Nevertheless, there are several ways in which *conventional intellectual property rights are said to be a mismatch for Indigenous knowledge forms*. The debate over the so-called 'fitness' of standard intellectual property to Indigenous realities is an ongoing one, but a general consensus surrounds the idea that that conventional intellectual property *does not satisfy the peculiarity of Indigenous knowledge*. Central themes exposed and discussed in the literature supporting the thesis of the 'unfitness' of intellectual property rights to enclose Indigenous knowledge were presented in very simple terms (quoting Oguamanam) in section 1.2.2.2, after a brief excursus over the (problematic) notion of 'intellectual property' and its main characteristics.

The section 4.3 narrows the analysis to Yolngu society and discusses the nature of Yolngu 'knowledge'. While enlightening similarities and differences between Yolngu internal 'exchange' system of *madayin* objects and 'property' regimes, the present section qualifies madayin as an '*inalienable possession*' of Yolngu, drawing from Annette Weiner conceptual scheme. Section 4.3 also acknowledges the inextricable link between Yolngu knowledge and Yolngu land (Country). Yolngu knowledge will be indeed identified as a 'place-based' and 'local' knowledge, simultaneously *originated by* and *concerning* a specific place. The last part of section 4.3 shows how the conceptual link between 'knowledge' and 'place' has been reaffirmed by Yolngu representatives in the occasion of intellectual property claims centred on the misappropriation of Yolngu art.

Finally, section 4.4 identifies the 'interconnected' nature of knowledge and place as *the main element preventing the conceptualization of Yolngu intangible as 'intellectual property'*. In fact, since the concept of 'place' is discarded by Western 'property' law in favour of the more abstract notion of 'space', intellectual property regimes - or at least its current archetype - does not recognize Yolngu knowledge as a part of a wider territorial cosmos.

[3] For a detailed rationale for the protection of indigenous knowledge, see R. J. Coombe 'The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law', *St. Thomas Law Review*, 14 (2001), at 278-80.

5.2. The 'Propertization' of Indigenous Knowledge

5.2.1. Indigenous Knowledge as 'Property'

Ethnographic approaches to the relation between Indigenous people and sacred objects incorporating 'knowledge' may be classified as an example of what has been called *'jural' paradigm*, namely the projection of Western legal categories on non-Western societies (section 2.4.1). In fact, the Western 'property' archetype has been often focal to this process. Among others:

- Meggit and Hiatt describe an 'individual ownership' in ritual objects and songs.[4]
- March Suchman states that 'intellectual property rights actually pervade preliterate societies', even if '[t]hese rights do not wholly parallel their Western counterparts'.[5]
- R. M. and C. H. Berndt speak of the 'owner of a particular design of pattern' among Indigenous Australians.[6]
- According to Julius Lips, among Indigenous Australians '[p]lays and dances of neighborly tribes may be adopted, but they, too, are copyrighted and the privilege to perform them has to be paid for'.[7]

The next two sections (5.2.1.1 and 5.2.1.2) will highlight three examples of the 'jural' approach towards Indigenous relation to intangibles:

1. Robert Lowie's conception of 'incorporeal property';

[4] See M. J. Meggit, 'Gadjari among the Walbiri Aborigines of Central Australia', *Oceania*, 34, 3, at 299; and L. Hiatt, *Kinship and Conflict: A Study of an Aboriginal Community in northern Arnhem Land*, Canberra, Australian National University Press, 1965.
[5] M. Suchman, 'Invention and Ritual: Notes on the Interrelation of Magic and Intellectual Property in Preliterate Societies', *Columbia Law Review*, 89 (1989), at 1265.
[6] R. M. Berndt, & C. H. Berndt, *The World of the First Australians. Aboriginal Traditional Life: Past and Present*, at 114.
[7] J. Lips, *The Origin of Things: A Cultural History of Man*, London, Harrap & Co., 1947, at 317.

2. Howard Morphy's conception of 'ownership of *ma<u>d</u>ayin*' (specifically referred to Yolngu people).

As will be showed, Lowie and Morphy provide an analysis of Indigenous relations to intangibles by means of the Western language of 'property' and 'rights'. In conclusion, an alternative view of the relation between Yolngu and madayin will be presented, namely the one advanced in the classic W. Lloyd Warner's ethnography *A Black Civilization* (1937).

5.2.1.1. Robert Lowie's 'Incorporeal Property'

The most notable example of the 'jural' orientation towards intangibles is perhaps Robert H. Lowie's classic ethnological work *Primitive Society* (1921). In the chapter devoted to the theme of '*Property*', Lowie discusses many examples of what he called '*incorporeal property*', namely the 'ownership' by individual or groups of exclusive rights in dances, songs, tales, names, designs, charms, and special roles in ritual. According to Lowie, so-called 'primitive' societies have *well-developed concepts of 'copyright' and 'patent law'*:

> [o]n one of the Eastern Torres Strait Island, Professor Haddon discovered distinct ideas of proprietorship in local legends, for an informant never liked to tell a story connected with another locality. This type of experience has been shared by many investigators of the North American Indians. Additional examples of *copyright* are furnished by the Kai. Among them, as in the Andamans, a poet is the absolute owner of his composition. No one else may sing it without his consent, and usually he exacts a fee for granting it. Similarly, there is ownership of magical formulas, the instructor being entitled of compensation. Certain carvings too, must not be copied without special leave. Even personal names are in a sense a form of *patented property*, so that a young man adopting a name already held presents his elder namesake with a gift by way of conciliation.[8]

[8] R. H. Lowie, *Primitive Society*. New York: Boni and Liveright, 1920, at 236 (emphasis added). Lowie used the expression 'incorporeal property' also in two later books: *Introduction to Cultural Anthropology*

Lowie is not the first author stating the existence of Indigenous 'legal' rights in intangibles (his work is in fact an analysis of former essays). However, he first used the language of 'intellectual property' - by means of notion such as 'copyright' and 'patent' - in addressing this topic, and coined the expression 'incorporeal property' in the field of ethnology.[9] Lowie realized that this sort of 'rights' could be transferred within 'primitive' communities by means of sale, gift or inheritance, although the right to transfer incorporeal properties was not absolute: a holder cannot, for instance, transfer intangibles as a gift as the proper ritual and ceremonial protocols must be followed - including payment - for the transfer to take effect. There were also particular restrictions on who was able to purchase these rights, and the specific protocol varies between different classes of intangible property.[10] Lowie is quite clear in stating that these are *not transactions in the tangible objects accidentally associated with the 'intangible' one*, but rather 'the right to use this particular combination of objects together with the right to the associated songs and activities; but also with any coexistent duties and restrictions on conduct'.[11] Lowie criticizes contemporary anthropology both for failing to recognize the existence of immaterial 'properties' among 'primitives', and for supporting the false idea that 'primitive peoples' lack the necessary mental sophistication to abstract such a conception.

From a methodological standpoint, Lowie's insistence on intellectual property language appears to be mostly *instrumental* to a general criticism towards the 'primitive communism' doctrine. In his 1928 paper 'Incorporeal Property in Primitive Society', Lowie shifted the attention over intangibles only after three introductive pages devoted to discuss the inconsistence of theories which denied the individual character of property

(New York: Rinehart & Co., 1940), at 281-282; and *Social Organization* (New York, Rinehart & Co., 1948), at 235-243.

[9] Some anthropologists embraced Lowie's terminology: see for example the use of 'incorporeal property' in E. A. Hoebel, and K. N. Llewellyn, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, Norman, University of Oklahoma Press, 1941, at 237; and S. Cohen, 'Primitive Copyright', *American Bar Association Journal*, 55 (1969), at 1144-1148. However, in Lowie's later work 'Incorporeal Property in Primitive Society' (*Yale Law Journal*, 37, 5, 1928) which discussed again the issue of 'incorporeal property' among 'primitives", the author did not persevere in using the concept of 'copyright' and 'patent' to describe Indigenous realities (these words are indeed not mentioned), although he still interpreted the 'primitive' social context through the notion of 'ownership'. The language of 'copyright' and 'patent' appeared again eventually in *Introduction to Cultural Anthropology*, at 281.

[10] Robert H. Lowie, *Primitive Society*, at 239.

[11] Robert H. Lowie, *Primitive Society*, at 239.

rights among 'primitives'. The main topic of his work was indeed introduced as an 'undisputed proof' of the existence of individual ownership among primitives:

> the dogma of general primitive communism is, however, at once eliminated by the wide prevalence of individually owned forms of incorporeal property.[12]

According to Lowie, if 'primitive' societies were able to conceive such a polished conceptualization of intangibles as 'property', then *a fortiori* this would also have been true for tangible objects (including land).

Lowie's conception of 'primitive' proprietary rights in intangibles influenced many scholars of the day. However, it received also several criticisms. Among others, William Seagle's *The Quest for Law* (1941) explicitly denied the proprietary nature of Lowie's 'rights', by affirming that primitive law is 'hostile' to incorporeal property. According to Seagle, Lowie's examples would refer instead to cases of 'possession', since incorporeal goods identify a mere *extension* of the individual, rather than his 'properties'.[13] Edward A. Hoebel contrasts Seagle, and states that the issue of the 'property' in 'primitive' intangibles can be solved by the reference to Hohfeld's fundamental legal conceptions (section 1.4), and interprets several Lowie's examples by means of hohfeldian terminology.[14] A typical instance of Hoebel's approach surrounds the case of a Plain Indian (North America) that sought for a supernatural power through a 'vision'. While dreaming, he met a bear, who taught him four songs and the method to build a rawhide shield. The shield, if used after singing the four songs, was believed to grant the immunity

[12] Robert H. Lowie, 'Incorporeal Property in Primitive Society', at 553. The linkage between Lowie's criticism of primitive communism and his reflection over 'incorporeal property' is suggested by L. A. White, *The Evolution of Culture: The Development of Civilization to the Fall of Rome*, London-New York, Routledge, 2007, at 256-257. Other opponents to the primitive communism dogma subscribed Lowie's thesis: see (among others) A. Goldenweiser, *Early Civilization: An Introduction to Anthropology*, New York, Alfred A. Knopf, 1922, at 137; F. Boas, 'Anthropology' in E. R. A. Seligman, and Alvin S. Johnson (eds.), *Encyclopaedia of the Social Sciences*, vol. 2, London, Macmillan, 1930, at 83; R. Benedict, *Patterns of Culture*, New York, Houghton Mifflin, 1934, at 183; R. Bunzel, 'The Economic Organization of Primitive Peoples' in F. Boas (ed.), *General Anthropology*, Boston, D. C. Heath & Co., 1938, at 358; M. J. Herskovits, *Economic Anthropology: A Study in Comparative Economics*, New York, Alfred A. Knopf, 1952, at 316-317.

[13] See William Seagle, *The Quest for Law* (New York: Alfred A. Knopf, 1941), at 52. For a 'neutral' overview on the Lowie-Seagle debate, see Alfred I. Hallowell, 'The Nature and Function of Property as a Social Institution', *Journal of Legal and Political Sociology*, 1, 3 (1943), at 117-119.

[14] See Edward A. Hoebel, '*The Quest for Law*. William Seagle', *American Anthropologist*, 44, 1 (1942), at 141-143; and Edward A. Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics*, Cambridge (MA), Harvard University Press, 1954, at 60.

from enemies. The complex formed by the shield, the songs, and the connected supernatural power could be transferred as a gift or sold. According to Hoebel:

> [i]n Hohfeldian terms, all this meant simply that the owner of a vision complex could sing its songs and possess its distinctive paraphernalia, and others could not: this way his *demand-right* as against any other people. From the standpoint of other warriors in the tribe it meant that A could sing its songs and possess its distinctive paraphernalia, and B (any other person) could not: this was the duty of every B. But B's duty is not shown to give grounds for a legal claim on A's part in the event of violation; rather, B's duty existed with respect to the supernatural order and perhaps not with respect to the legal order.[15]

According to Hoebel, Hohfeld's constructions such as 'right' and 'duty' illuminate the 'property' nature of 'primitive' relationships centred on incorporeal goods.

5.2.1.2. Howard Morphy's 'Ownership of *Madayin*'

According to Howard Morphy's seminal work *Ancestral Connections* - which investigates specifically Yolngu people - '*madayin*' (in the sense of 'sacra') is 'owned by the members of one clan as a whole'.[16] The membership of a clan gives the 'ownership of *madayin*', which consists in '*an individual set of rights and obligations*'.[17] It seems thus necessary to distinguish Morphy's analysis of:

- (what Morphy calls) '*clan ownership*' of *madayin*; from
- the *differential rights* in *madayin* objects *within a clan*.

'Clan Ownership'

[15] E. A. Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics*, at 62.
[16] H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 49.
[17] H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 48.

Even if groups in which Yolngu society is partitioned own - *as wholes* - a unique '*ma<u>d</u>ayin* set', a single intangible can be owned jointly by two or more groups. So, single sacred objects (as a song, a design, a story) are 'rarely the property of a single clan'.[18] As a result:

> the members of each clan thus possess rights to a unique set of mardayin which overlaps to some extent with the sets of mardayin belonging to other clans of the same moiety.[19]

Quite significantly, Morphy insist on the point that 'rights in mardayin and rights in land are two sides of the same coin'. In fact:

> rights in land were given to the founding human ancestors of a clan by the wangarr ancestral beings, who journeyed across the respective areas of land and created features in them. The clan was also entrusted with the sacred law that derived from the actions of the wangarr and which formed the basis of ceremonial reenactments of ancestral events. Continued ownership of the land was conditional on the clan maintaining the sacred law of the land, performing the ceremonies, and passing on the paintings to succeeding generations.[20]

These sets of responsibilities - 'to look after' the *ma<u>d</u>ayin* - are requirements for the 'landowning' groups, or groups who 'owns' the land. Conversely:

> [u]se of the mardayin is also a statement about rights in land since the mardayin represents an ancestral charter to the land.[21]

'Differential Rights'

[18] H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 49.
[19] H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 49.
[20] H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 49.
[21] H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 49.

According to Morphy, there is a 'strongly asserted ideology' that all members of the 'clan' exercise joint rights in mardayin. However, some evidence shows that differential rights exists *among the member of the 'clan'*:

> [f]or example, certain members of the clan produce a bark painting predominantly associated with one mardayin or one part of the clan's territory, whereas other members produce predominantly another set.[22]

Therefore, it is acknowledged that a man 'has rights' in the *ma<u>d</u>ayin* of his own 'clan'. However, as Morphy notes, 'clan leaders' (the oldest member of the 'clan', the 'elders') control the way in which those rights are distributed 'and the majority of people exercise relatively few rights in paintings'.[23]

As can be easily noted, Morphy's language recalls, in a way, Lowie's lexicon of 'incorporeal property' since it makes large use of the 'property' terminology ('ownership', 'ownership rights'). This usage raises a question, that will orient the rest of the present chapter:

> *Does the Western construct of 'intellectual property' - along with its notions of 'property' and 'rights' - 'fit' into Indigenous conceptions of intangibles?*

Or, more generally:

> *Is the 'property' language an effective tool to penetrate Indigenous view of intangibles?*

5.2.1.3. William Lloyd Warner

W. Lloyd Warner, the first to carry out long-term fieldwork among Yolngu (in the late 1920s), is also perhaps the first of the major ethnographers to question the 'property'

[22] H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 50-1.
[23] H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 72.

analysis of Indigenous Australians' land. Quite significantly, Warner extends the concept of 'property' to include 'incorporeal property' such as *ritual*. In fact, Warner distinguished three 'types' of property:

1. items of technology;
2. land;
3. 'incorporeal property', such as names and totemic designs.[24]

According to Warner, Yolngu 'clans' are supposed to have an *'owning' relationship* to their areas of land, by derivation.[25] Items of technology are 'personally owned', although a number of fathers, sons and brothers who have cooperated in an enterprise such as building a boat 'have a feeling of collective ownership'.[26] Among elements of 'incorporeal property', the concept of which he saw as 'not very highly developed' were a man's name, 'which is his own', although others may share it, and totemic designs associated with clans and moieties 'it would be impossible for members of the other clans or moiety to use these designs or emblems unless given permission under special circumstances'.[27] Quite significantly, Warner states that totemic designs, like totems themselves and rituals, '*are not so much properties in an economic sense as integral parts of the structure of the clan*'; moreover, '[t]o a great extent this is also true of the land'. They belong to 'an economic category' *only in a secondary and derivative sense*, 'yet the effect of their being part of the clan and moiety configuration has many of the attributes of our concept of property'.[28]

Eventually, Warner qualifies the use of the expression 'property'. Land, its natural and physical feature and 'incorporeal property' *were less the 'property' of the clan and more an integral 'part' of it*.[29] According to Ian Keen, Warner's conceptual scheme reflects Yolngu distinctions 'rather more closely than does the property model'.[30]

[24] See W. L. Warner, *A Black Civilization: A Social Study of an Australian Tribe*, at 140.
[25] See W. L. Warner, *A Black Civilization: A Social Study of an Australian Tribe*, at 140.
[26] See W. L. Warner, *A Black Civilization: A Social Study of an Australian Tribe*, at 147.
[27] See W. L. Warner, *A Black Civilization: A Social Study of an Australian Tribe*, at 147.
[28] See W. L. Warner, *A Black Civilization: A Social Study of an Australian Tribe*, at 147.
[29] See W. L. Warner, *A Black Civilization: A Social Study of an Australian Tribe*, at 149.
[30] I. Keen, 'The Interpretation of Aboriginal 'Property' on the Australian Colonial Frontier', at 54.

Warner's account proves fundamental to the purposes of the present research, since it both:

- *associates* the Indigenous relation to land to the Indigenous associations to intangibles;
- *distinguish* such relations from the Western 'property' model.

5.3. Yolngu Knowledge and Land

5.3.1. *Madayin* and 'Property'

5.3.1.1. Similarities

According to Ian Keen[31], there do seem to be at least two elements in common between Yolngu rules about ritual elements - for the most part what has been identified above as '*madayin* objects', or 'sacra' (section 4.2.4.2) - and the Western archetype of 'ownership' (at the foundation of the notion of 'intellectual property'). Yolngu relations to intangibles, as the Western (legal) ones, do in fact:

1. imply 'a *very general power to exercise a greater degree of control of the object by an 'owner' than by others*';[32]
2. share many *linguistic usages* with the Western standard 'property' archetype, such as the use of *possessive case* - the suffix '-*watangu*' - and the idioms 'holding' or 'keeping' - '*ngayathama*' - and 'looking after' - '*djaga*'.

As seen (section 3.4), partial conceptual overlaps between western and Indigenous structures have led several anthropologists to use the lexicon of 'ownership' to describe Indigenous 'rights' in their ritual elements (and land). The sole 'classic' exception

[31] See I. Keen, 'Yolngu Religious Property', at 273-4.
[32] Italics added. According to Keen (at 272) the element of *control* is implied by all the dimensions ascribed to the notion of 'property' ('property' as 'possession', 'right to use and enjoy', 'right to exclude others from use and enjoyments', 'right to dispose').

concerning Yolngu - until more recent studies - has been Warner's account of Yolngu 'sacred property' (section 2.4.2.4), which hint at a distinction between Yolngu relation to land and intangibles from 'ownership'. As seen, according to Warner 'totemic designs', 'totems' themselves and rituals, 'are not so much properties in an economic sense as integral parts of the structure of the clan'. Moreover, '[t]o a great extent this is also true of the land'. They belong to 'an economic category' only in a secondary and derivative sense, 'yet the effect of their being part of the clan and moiety configuration has many of the attributes of our concept of property'.

Warner's account supports an investigation over the nature of Yolngu normative system surrounding the exchange of *ma<u>d</u>ayin* objects, and ritual elements in general.

5.3.1.2. The Peculiarities of *Ma<u>d</u>ayin* 'Exchange' System

'Property' Equivalents in Yolngu Matha

Quite crucially, Yolngu *matha* does not possess exact equivalents of the English words 'property', or 'property/ownership rights'. As Ian Keen notes, Yolngu maintain instead two ways of expressing the relations to land and *ma<u>d</u>ayin* objects.[33] This sort of relation is indeed expressed:

1. in terms of '*knowledgeability*': '*marnggi*', meaning 'knowledgeable', refers to the 'holder' of a piece of land or a *ma<u>d</u>ayin* object; others are '*dhunga*', 'ignorant', 'unable'. If one asks people for information about a ceremony in which they do not possess what a western observer would call 'rights', they are quite likely to say '*Yaka ngarra marnggi*', 'I am not knowledgeable'.[34]
2. in terms of '*caretaking duties*', through the term '*djaga*' (or its variant '*djaka*'), meaning 'to look after'.

[33] See I. Keen, 'Yolngu Religious Property', at 286.
[34] See I. Keen, 'Yolngu Religious Property', at 286.

Commodities v Gifts

Taking the absence of a 'property' - or 'rights' - terminology in Yolngu *matha* as the starting point of his analysis, Keen[35] postulates a fundamental distinction between Western 'property' systems - including 'intellectual property law' - and Yolngu relation to ritual elements and intangibles, as follows:

- 'property' regimes - as intellectual property law - are typically rooted in a conception of intellectual creation as *commodities* and exist in economic systems built on commodity exchange. 'Commodity exchange' is 'an exchange of *alienable* objects between people who are in a state of *reciprocal independence* which establishes a *quantitative relationship between the objects exchanged*'.[36] Most importantly, in a class-based economy a person has *alienable rights* over the things that he owns. Such classic IP discourse, along with its typical notions and features of '*alienability*' and '*commodification*', conflicts with the nature of Yolngu normative structures.
- despite being used in transactions (internal to Yolngu society) such as purchase, gift-exchange, formal bestowal or ceremonial exchanges, Yolngu artworks and ritual elements *cannot be conceived of in monetary terms*, and necessarily include interests that are inexplicable into market rhetoric. The primary function of exchange of ritual elements in Yolngu society is indeed to *create and shape social relationships* between people which transfer the objects, rather than an impersonal relation of price between the objects themselves (as in a commodity-based economy).

More specifically, Keen qualifies Yolngu normative and economic system surrounding land and *ma<u>d</u>ayin* as a '*gift economy*' or '*gift exchange system*', as opposed to a 'commodity economy'. The expression 'gift exchange' refers to an exchange of

[35] See I. Keen, Yolngu Religious Property, at 273.
[36] C. Gregory, *Gift and Commodities*. London: Academic Press, 1982, at 100 (italics added).

inalienable objects between people who are in a state of *reciprocal dependence* that establishes a *qualitative relationship between the transactors*.

Three Dichotomies

According to the conceptual distinction proposed by Keen, Yolngu sacred artworks results conceived in a fundamentally distinct way with respect to intellectual property objects. Such fundamental difference - the difference between a 'commodity exchange system' and Yolngu 'gift exchange system' - develops through three major dichotomies:

1. *alienability* v *inalienability* (of intangibles and rights over intangibles): in a 'gift economy', people *do not have alienable rights over things* and the objects are *anthropomorphized* or 'never completely separable from the men who exchange them'.[37] The personification of objects of exchange is a consequence of the inalienable relationship between the object and its producer.
2. *independence* v *interdependence* (of the transactors before the transaction takes place). As Keen notes, in Yolngu society '[e]ach adult is at the node of a nexus of exchange with every category of close relative and with some more distantly related exchange partners among whom gifts of foods or artifacts (*girri*) as well as services are exchanged';[38]
3. *quantitative relation of price* v *qualitative relation* (established between the transactors): in a gift economy, gifts create or reinforce relationship of *trust*, and potentially enlarge one's reputation. As Chris Gregory points out, in a gift exchange system the aim of the transactor is to acquire as many gift-debtors as possible, and not to maximize profit.[39]

*'*Ma<u>d</u>ayin*' as 'Inalienable Possessions'*

[37] C. Gregory, *Gift and Commodities*. London: Academic Press, 1982, at 18, 41. Gregory quotes here Marcel Mauss' conception of 'anthropomorphized' gift.
[38] See I. Keen, Yolngu Religious Property, at 275.
[39] See C. Gregory, *Gift and Commodities*. London: Academic Press, 1982, at 19.

The first of the three dichotomies presented above results particularly interesting for the purposes of the present research. It may be asked in fact:

What does it mean that something - a madayin object - is 'inalienable'?

American anthropologist Annette Weiner proposes an analysis of those goods that she names 'inalienable possession' in *Inalienable Possessions: The Paradox of Keeping-While-Giving* (1992).[40] As Weiner notes, a first conceptualization of 'inalienable property' was put forward by Sir Henry Maine's classic definition of 'immovable property':

> [t]he idea seems to have spontaneously suggested itself to a great number of early societies, to classify property into kinds. One kind or sort of property is placed on a lower footing of dignity than the others, but at the same time is relieved from the fetters which antiquity has imposed on them.[41]

By 'fetters', Maine refers to the complex rituals necessary to alienate 'immovable' properties, not required for movable goods.[42] Marcel Mauss eventually refers a similar dichotomy - with respect to Maine - in his well-known work *The Gift*:

> [a]mong the Kwakiutl and Tsimshian, the same distinction is made between the various kinds of property as made by the Romans, the Trobriand peoples, and the Samoans. For these there exist, on the one hand, *the objects of consumption and for common sharing* […] on the other hand, there are *the precious things belonging to the family* […] This latter type of object is passed on as solemnly as women hand over at marriage the 'privileges' to their son-in-law, and names and ranks to children

[40] A. Weiner, *Inalienable Possessions: The Paradox of Keeping-While-Giving*, Berkeley, University of California Press, 1992.
[41] H. S. Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*, at 264.
[42] See E. E. Ferry, 'Inalienable Commodities: The Production and Circulation of Silver and Patrimony in a Mexican Mining Cooperative', *Cultural Anthropology*, 17, 3, (2002), at 334.

> and sons-in-law. *It is incorrect to speak in their case of transfer. They are loans rather than sales or true abandonments*.[43]

Weiner defines what she means by 'inalienable possessions' by giving examples from a broad range of cultural settings. According to Weiner, the distinction between 'inalienable' and 'alienable' possessions is widespread and perhaps *universal*, and exists also in the European (Western) context. She states:

> [t]he conviction prevailed [in 'the Western world'] that possessions belonging irrevocably to a patriline or a clan were of higher value than those things that could be freely exchanged because they were not inheritable […] What makes an object inalienable is its exclusive and cumulative identity with a particular series of owners through time.[44]

Weiner's analysis relies on the Western tradition of 'inalienability' as a conceptual tool to understand 'non-Western' practices. She states that certain objects become inalienable only when they have acquired '*cosmological authentication*':

> [i]ts [of the object] history is authenticated by fictive or true genealogies, origin myths, sacred ancestors, and gods. In this way, inalienable possessions are transcendent treasures to be guarded against all the exigencies that might force their loss.[45]

Weiner refers the notion of 'cosmological authentication' to Indigenous Australian 'inalienable possessions'

> [a]s an ideology, The Dreaming is immaterial but in another sense, The Dreaming flourishes because it consists of material and verbal possessions - myths, names, songs, ceremonies, and sacred objects inherited from one generation to the next. In

[43] M. Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies*, New York, W. W. Norton, 1990, at 43 (italics added). The notion of 'inalienability' have been eventually appropriated by several theorists of 'property' in the 20th century. Among others (and most notably), M. Gluckman, *The Ideas in Barotse Jurisprudence*, New Haven, Yale University Press, 1965.
[44] A. Weiner, *Inalienable Possessions: The Paradox of Keeping-While-Giving*, Berkeley, University of California Press, 1992, at 32-3.
[45] A. Weiner, *Inalienable Possessions: The Paradox of Keeping-While-Giving*, at 33.

> this way, The Dreaming itself encompasses vast inalienable possessions that are authenticated by the very cosmology under which they are produced. These possessions created in and authenticated by The Dreaming circulate from one person or group to another in a limited way. The possibilities of transmission in the face of the canon for guardianship establish for ritual leaders a domain of authority that in certain situations leads to a formalized position of rank. [46]

Consistent with Weiner's notion of 'cosmological authentication' seems the Yolngu distinction between:

- ritual or 'sanctified' artefacts - '*ma<u>d</u>aynbuy*', whose exchange is restricted to men;
- 'ordinary' artefacts ('*wakinngu*').[47]

Men can consecrate an ordinary artefact - can make a '*wakinngu*' into a '*ma<u>d</u>aynbuy*' - by invoking the name of a *wangarr* ancestor, or by painting on the object a *ma<u>d</u>ayin* design. The main effect of such consecration is that it enables the holder of the artefact to have a greater degree of control over the ritual object. As Keen notes, '*ma<u>d</u>aynbuy*' given in exchange are *inalienably bound to the original transactor*, as token of the types instituted by the *wangarr* ancestors.[48]

As can be noted, a tension exists seemingly between the notion of 'inalienable possessions', as 'something that cannot be alienated from its owner', and the fact that such possessions are *nonetheless frequently drawn into 'exchange' networks* (as Yolngu 'gift exchange' system). Weiner refers to this contradiction as '*the paradox of keeping-while-giving*': inalienable possessions too can be exchanged, lost, or destroyed, undermining their owners' pretension.[49] As Weiner explains, inalienable possessions are given mostly as 'gifts' - and not definitely sold - *still retaining a tie to their owners*. This sort of gifts - different from those given in regular 'Western' birthday gift giving - can't

[46] A. Weiner, *Inalienable Possessions: The Paradox of Keeping-While-Giving*, at 101.
[47] See Thomson, D. F., *Economic Structure and the Ceremonial Exchange Cycle in Arnhem Land*. Melbourne: Macmillan, 1949. The term '*wakinngu*', also applied to wild dogs, means 'having nothing and belonging to no-one'. See I. S. McIntosh, The Birrinydji Legacy: Aborigines, Macassans and Mining in North-east Arnhem Land', *Aboriginal History*, 21 (1997), at 82.
[48] See I. Keen, 'Yolngu Religious Property', at 276.
[49] A. Weiner, *Inalienable Possessions: The Paradox of Keeping-While-Giving*, at 37.

be re-sold for money by the receiver because the value and the significance of the gift *cannot be alienated or disengaged* from its relationship to those whose inalienable possession it is. Weiner recalls, as perhaps the most well-known example of this 'paradox', the many Kula valuables of the Trobriand islanders. Those objects appear as *culturally imbued with a spiritual sense of the gift giver*.[50] As Weiner points out, when Kula's objects are transferred from one individual or group to another, the objects reserve *meaningful bonds* associated with the giver and his lineage. The shell bracelets and necklaces given in exchange each have their own histories, and are thus ranked on the basis of who they have been exchanged to.

With respect to Weiner's theory of 'inalienable possessions', Keen anticipated - by making use of the notion 'inalienable property' - the conception of the 'keeping-while-giving' paradox in Yolngu society. According to Keen, in fact:

> [in Yolngu society] in so far ritual elements are disposed of, these are, with few exceptions, gifts. But is important to distinguish here the gift […] of tokens and of types. It is one thing to give a song, or the right to make a sacred object, which is the gift of a type, or programme. Such a gift *does not extinguish the rights of the donor*, and so it follows that, far from alienating the object from the holder, the gift *creates a new relationship between donor and recipient*, or *reinforces an existing relationship* […] It is quite another thing to make a gift of an object which is the token of a type, such as a cassette tape of a song, a bark painting or a feather string. The gift or sale of bark paintings and other artefacts *do not extend rights to make or perform*.[51]

Madayin *and Land*

As Keen notes, Yolngu exchange system involving *madaynbuy* mantains the same structure as the system concerning *land*, and 'ritual elements are tied to land and waters,

[50] Kula (Kula exchange) is a ceremonial exchange system conducted in the Milne Bay Province of Papua New Guinea, made famous by Bronisław Malinowski's *Argonauts of the Western Pacific* (1922). Malinowski used the example of the Kula ring to argue for the universality of rational decision making, and for the cultural nature of the object of their effort.
[51] I. Keen, 'Yolngu Religious Property', at 291.

and are in general acquired in the same way as land'.[52] Both the exchanges of land and sacred objects share indeed three features, which do not seem to fit the structure of Western property law:

1. the basis for Yolngu relation to *ma<u>d</u>ayin* objects and land is believed to be a *causal connection* between *wangarr* ancestor, the ceremony-song-design-sacred object, or the land, and the member of a group. Such causal nexus, which entitles a holder to religious property, is the creation activity of a *wangarr* ancestor, and the chains of filiation that link the living with the *wangarr*. Representation of the *wangarr* in the form of mimetic dances, designs and sacred objects is not conceived of as a mere iconic sign of *wangarr*, but as having a causal relation to them, so imbued with their powers;
2. Yolngu 'control' over *ma<u>d</u>ayin* objects and portions of land is *shared* in principle, even where a person has rights on the strength of an individual relationship. *Ma<u>d</u>aynbuy* are distributed, in a sense, among *ba:purru*: different groups - or different land-holding units of the same group - may make different designs and hold different sacred objects. The relationship between a group and the complex land-sacra is denoted by the suffix '-*watangu*' (one of the *<u>l</u>ikan* concepts) that can be glossed as 'holder of'. Each member of the group is individually and severally '*wa:nga-watangu*'. In relation to the group's sacra, group's members are '*ma<u>d</u>ayin-watangu*'. According to Beluah Lowe's dictionary, '-*watangu*' denotes 'ownership' of land ('*wa:nga*').[53] As Keen notes, the sense of '-*watangu*' as 'holder of' is supported by linguistic evidences: the first syllable '-*wat*' (linked to the nominalizing suffix '-*ngu*') appears to be cognates of a group of words such as '*gatthun*' ('caught'), '*gatmarama*' ('catch'), or '*bat*' (an interjection associated with the verb '*ngayathama*', 'to hold').[54]
3. *ma<u>d</u>ayin* objects and land are *inalienable*, although different degree of control over them can be shared with people who did not previously have them. More precisely, Keen argues that land and *ma<u>d</u>ayin* objects are at the top of a scale

[52] See I. Keen, 'Yolngu Religious Property', at 277.
[53] See B. Lowe, *Yolngu-English Dictionary*. Winnellie: ARDS, 2004.
[54] See I. Keen, 'Yolngu Religious Property', at 280.

(or a 'continuum') of inalienability. The most 'alienable' objects are food and everyday objects, followed by publicly accessible rituals (*garma*) artefacts and some use-right in land; 'esoteric ritual artefacts'.[55]

Thus, there exists *a strong connection between land and ritual holdings*. As seen, this link is emphasized in Yolngu language, where terms for 'sacred object' ('*rangga*') and 'land' ('*wa:nga*') belong to a group of related names and concepts, known as '*l̲ikan*'. A sharp distinction between these concepts has no place in Yolngu ontology, where land and sacra identify two features of the same entity, rather that distinct and detached objects.

Yolngu knowledge systems that produce and manage 'sacred' knowledge incorporated in *ma<u>d</u>ayin* objects, reflects this inextricable bound between land and sacra.

5.3.2. Knowledge in Place

5.3.2.1. Yolngu Knowledge and *Ma<u>d</u>ayin*

Chapter 4 highlighted a conceptual connection between sacred images and Country in Yolngu cosmology. The last section (4.3.1.2) showed how land and *ma<u>d</u>aynbuy* are governed by the same regime of (in)alienability. Given the conceptual connection between 'land' and *ma<u>d</u>ayin* objects, the present section tries to answer a different question:

> *What are the pragmatic outcomes of the connection between land and sacred objects?*

A first and very general answer to this question is that Yolngu designs, songs, ceremonies and artefacts do not only *represent* land, but also *incorporate the knowledge of land*. The present section highlights several characteristics of Yolngu knowledge, and identifies it as a '*place-based*' knowledge, inscribed in a 'scheme of *cosmological connection*'.

[55] See I. Keen, 'Yolngu Religious Property', at 279.

5.3.2.2. Yolngu Knowledge as a 'Place-based' Knowledge[56]

Knowledge of Place

The relationship between Yolngu knowledge - reified in sacred images - and Country manifests itself in articulate ways. According to Howard Morphy, Yolngu designs are a kind of 'maps' of land, in the sense that the land itself is a *sign system* that is the result of the actions and transformations of the *wangarr* ancestors.[57] Yolngu sacred images commemorate the actions of the *wangarr* beings related to the landscape, at same time enabling people to maintain contact with the spiritual dimension of existence. As said, the '*wangarr*' cult differs from Western metaphysics, since it polarizes on *places* (section 3.4.2.1): Yolngu cosmology focuses indeed on explaining the origin of specific areas of land. In *wangarr* stories, 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 those facts. 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*. Accordingly, 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;
- a knowledge *about* the Country, since it reproduces and 'map' the land inhabited by the clan.

[56] For the use of the expressions 'place-based knowledge' and 'place-based innovation' see: P. Drahos, 'When Cosmology Meets Property: Indigenous Peoples' Innovation and Intellectual Property', *Prometheus*, 29 (2011), at 241.
[57] See H. Morphy, *Aboriginal Art*, London, Phaidon, 2008, at 36.

The 'Country', as said, is a *place*, a specific portion of Australian territory, where a landscape has been transformed by ancestors. Therefore, 'sacred knowledge', or the knowledge incorporated in the madayin objects and relative to land (*wa:nga*) and *wangarr*, can be defined as a 'place-based' knowledge.

The relation between knowledge and landscape is a dynamic one. Yolngu knowledge does not provide indeed a homogenous body of static information but notions that challenge the paradigmatic categories of landscapes. Yolngu knowledge of Country is not intuited, but *learned and experienced within specific places over long periods of time*. In fact, as Irene Watson points out, the knowledge of place '*comes through the living of it*'.[58] Also, this kind of knowledge is central to Yolngu law:

> [w]hat makes any law succeed is not whether it is somehow, inherently good or bad, right or wrong, but whether it meaningfully and practically describes, explains and prescribes activities in the context of local and dynamic material conditions. Where laws exceed their material contexts their authority flounders as the economies they facilitate collapse.[59]

The accumulation of knowledge of place is thus *as material as it is cultural*. Therefore, it is not because Indigenous land use practices are intrinsically 'more ecologically sound than those of non-Indigenous people'[60] that their knowledge is inherently different from the standard model of intellectual property objects, but rather because Indigenous knowledge is *about practices have specifically adapted over a long period of time to specific places*. Yolngu knowledge responds to a living and changing 'place' and their knowledge connects them with that place. Knowledge of place supports life not only in an important economic sense, it 'goes beyond food web dependencies to include stories, histories, feelings, shared responsibilities and respect'.[61]

Cosmological Connections

[58] I. Watson, 'Buried Alive', at 255 (italics added).
[59] N. Graham, *Lawscape: Property, Environment, Law*, at 199.
[60] N. Gill, 'The Ambiguities of Wilderness', in E. Stratford (ed.), *Australian Cultural Geographies*, Melbourne, Oxford University Press, 1999, at 63.
[61] See J. K. Weir, *Murray River Country: An Ecological Dialogue with Traditional Owners*, 2009, at 50.

This section takes advantage of Peter Drahos' alternative use of the word '*connectionism*'.[62] The standard meaning of 'connectionism' refers to an approach of cognitive science, which draws on the *interaction of units in the context of a specific - social - network*. However, the 'network' of Yolngu community stretches well beyond the conventional understanding of 'social network', since it includes not only human beings, but also *animals*, *plants*, the *ancestors* and - thus - the *land* itself.[63] In Yolngu society, the threads, which shape the connections between different units, results from a cosmological dimension, and are precisely the events told in *wangarr* stories.

Yolngu knowledge - the knowledge of sacred *wangarr* stories - operates to *create an intricate web of relations* as well as to *help individuals to orient into it*. This 'scheme of cosmological connection', characterized by the variety of the types of unity in the network and the *density* of connections[64], can hardly be grasped by outsiders.

A consequence of the 'mixed' nature of landscape, as both *physical environment* and *scheme of cosmological connections*, reflects in the sets of meaning attached by Yolngu to objects pertaining to Country. As noted by Drahos, '[i]n this connectionist world plants, animals, rocks, rivers and other things have *multidimensional natures*'.[65] Namely, within the Yolngu physical-cosmological continuum, objects may acquire *additional meanings* with respect to their ordinary ones. Two examples:

> [a] tree may have utilitarian functions such as providing shelter and being a source of medicine, but it may also be linked to a person by virtue of a kinship relation because it features in an ancestral story on that person' mother side leading that person to say 'this tree is my mother'. From this kinship connection there may flow a set of rights and obligations with respect to a tree species.[66]

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[62] See: P. Drahos, *Intellectual Property, Indigenous People, and Their Knowledge*, at 39-40.
[63] William Stanner speaks about a 'totemic association'. See: W. E. H., Stanner, 'Religion, Totemism and Symbolism', in M. Charlesworth, H. Morphy, D. Bell & K. Maddock (eds.), *Religion in Aboriginal Australia*, St Lucia:,University of Queensland Press, 1989, at 137-139.
[64] Accordingly, Indigenous knowledge has been defined also as '*relational*' and '*detailed*'. See: W. van Beek, & F. Jara, '"Granular Knowledge": Cultural Problems with Intellectual Property and Protection', in W. Grosheide, & J. F. Brinkhof (eds.), *Intellectual Property Law*, Antwerp-Oxford-New York, Intersentia, 2002, at 39.
[65] P. Drahos, *Intellectual Property, Indigenous People, and Their Knowledge*, at 42 (italics added).
[66] P. Drahos, *Intellectual Property, Indigenous People, and Their Knowledge*, at 42-3.

> In a world full of multi-level connections, the sighting of, say, a snake is not necessarily a random event. It may be, but the snake may also be judged on the basis of its physical feature to be a manifestation of the Rainbow Serpent.[67]

As seen (section 4.2.3.3), the multi-level structure of landscape is often emphasized by the *different terms* associated with the same object or phenomenon.

Observe and Transmit

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

1. knowledge is *acquired* through the observation of the Country;
2. knowledge is (or must be) *preserved* by the community;
3. knowledge is *transmitted* to the next generation.

As seen in the previous section, the *observation* of the land, by virtue of the scheme of cosmological connection, entails the ability to orient within at least *two epistemic levels*:

- a first epistemic level, concerning the *physical* world;
- a second epistemic level, concerning the *cosmological* world (the presence of sacred ancestors within the Country).

Therefore, to *'observe'* the Country requires a great degree of care and the ability to constantly shift between such different epistemic conceptions of reality. As stated, observation may also produce *practical* benefit: for the Yolngu living in direct contact with the nature[68], knowing the land, the animals, and the plants has a great importance

[67] P. Drahos, *Intellectual Property, Indigenous People, and Their Knowledge*, at 43.
[68] 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.

and directly affects their chance of survival.[69] The most effective way to acquire such a deep (and multi-level) knowledge of the Country is perhaps to observe it *directly*, to become *intimate* with it.

After the knowledge of the Country is acquired through observation, it must be *memorized* and *preserved*. Such knowledge is an extremely powerful instrument, which must be governed carefully.[70] Yolngu designate some of their members as persons in charge of keeping - or 'caring' for - such knowledge.[71] These peoples are included in a system of knowledge transmission, after a long period of apprenticeship devoted to enhancing their memory 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 Yolngu knowledge. More specifically, it may possibly qualify Yolngu knowledge as '*personal' knowledge*'.[72] By virtue of the aforementioned relationship of intimacy between people and Country, knowledge that can be inferred by observation can indeed hardly be generalized and codified, but it must be *directly* taught from someone who actually lived the experience of 'knowing' the Country.[73] Moreover, such 'traditional' transmission of knowledge - in the very specific sense of 'something that is handed down through generations' - allows to grasp the structure of the Yolngu knowledge system. Peter Drahos[74] suggests imagining Yolngu system as concentric circles made up of individuals. Those in the innermost circle are the *most knowledgeable peoples* (often referred as 'the elders'), which - as seen – maintain the higher degree of control over sacred knowledge. They have arrived in the inner circle after a life-long

[69] From this point of view, Indigenous knowledge, or a part of it, can be defined as 'practical knowledge'. See: W. van Beek, & F. Jara, '"Granular Knowledge": Cultural Problems with Intellectual Property and Protection', p.39.
[70] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion*, p.106.
[71] According to a classic ethnographic study by 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. See A. P. Elkin, *Aboriginal Men of High Degree*, St. Lucia, University of Queensland Press, 1977, at 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 Linne Kelly, *Knowledge and Power in Prehistoric Societies: Orality, Memory and the Transmission of Culture*, Cambridge: Cambridge University Press, 2015, at 133-135.
[72] See: W. van Beek, & F. Jara, '"Granular Knowledge": Cultural Problems with Intellectual Property and Protection', at 38-9. Susan Frankel and Peter Drahos speak of Indigenous knowledge as '*uncodified knowledge'*. See S. Frankel, & P. Drahos, 'Indigenous Peoples Innovation and Intellectual Property: The Issues', ch. 1.
[73] 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: Michael Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy*, London, Routledge, 1969, at 53.
[74] P. Drahos, *Intellectual Property, Indigenous People, and Their Knowledge*, at 8-9.

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

As can be noted, the concepts that dominate the use of knowledge in these contexts is not that of 'right' 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 the rights - access to knowledge is generally governed by *conditional permissions*, rather than what a lawyer would call a transfer of a legal title.[75]

5.3.3. Territorial Cosmos on Trial

5.3.3.1. The Link between *Maḏayin* and Country

The link between Yolngu sacred objects and land, scrutinized in the previous section, has represented the focal element of the specific and dynamic repertoire of *linguistic conducts* and *pragmatic strategies* implemented by Yolngu as stakeholders in the inter-ethnic negotiation process.[76] In the last two decades of 20th century, several copyright

[75] This peculiar feature of Indigenous knowledge systems became apparent over the course of the cultural interactions between Indigenous Australian worldviews and the Western 'ownership' conception. For instance, the Waitangi Tribunal report (New Zealand) *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, Terry (2003): Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions, op.cit., p.45.

[76] According to Carneiro da Cunha: '[i]n contrast to an endemic context in which logic operates on units or elements that are part of a social whole, in an inter-ethnic situation, it is societies as wholes themselves - ethnic groups - that are the units of the inter-ethnic structure. They are its constituent elements, and they

cases concerning misappropriations of Indigenous Australian artworks and ritual elements were discussed before Australian Courts. Yolngu people was particularly involved in such sustained judicial activity, and filed claims for copyright infringement eventually resulted in five independent lawsuits: *Yangarriny Wunungmurra v Peter Stripes* (1981), *Bulun Bulun v Nejlam* (1989), *Yumbulul v Reserve Bank of Australia* (1991), *Milpurrurru v Indofurn Carpets* (1994), and *Bulun Bulun v R & T Textiles* (1998).

Yolngu judicial discourse concerned mostly *the interaction between copyright law and the Indigenous normative regimes*. Such dialectic was a two-fold one:

- on the one side, Yolngu have *creatively reconsidered their conceptual schemes* in order to fit 'Western' property categories and benefit from the advantages that come from a State recognition of their 'copyright'. They tried to do so particularly insisting on the 'original' character of their sacred works.
- on the other side, Yolngu judicial discourse have emphasized *a large number of fundamental differences between Western 'property' archetype and the Indigenous normative tradition*, due to a risk of alienation from Yolngu cultural identity in case of an uncontested submission and commensuration to Western law.[77] Yolngu attempts to preserve their identity reveals the complex characterization of Indigenous claims over sacred intangible resources as statement about *self-determination* as well as assertions of entitlements.

This 'strategic' use of Yolngu culture has primarily focused on the connection between 'land' and 'sacra'. The next sections will briefly highlight those cases in which Yolngu have specifically insisted on the point of coincidence between rights over land and rights over sacred artwork and knowledge.

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derive meaning from it'. See M. Carneiro da Cunha, *"Culture" and Culture: Traditional Knowledge and Intellectual Rights*, at 70.

[77] See B. R. Smith, & F. Morphy, 'The Social Effects of Native Title: Recognition, Translation, Coexistence', at 54. The idea of two cultures 'working together' in a way in which each one is preserved and respected has a place in Yolngu philosophy and it is usually expressed, as seen, with the metaphor of '*ganma*'. This concept denotes primarily a place, namely 'an area within the mangroves where the fresh water coming in from the sea meets the stream of fresh water coming down from the land'. However, even if the two streams get mixed up, the swelling and the retreating of the tides can still be seen in the two separated bodies of water. See R. Marika, 'The 1998 Wentworth Lecture', at 7.

Yangarriny Wunungmurra v Peter Stripes (1981)[78]

In 1981, the Australian Gallery Directors Council set up the exhibition 'Aboriginal Australia', featuring several Indigenous Australian artworks. The exhibition catalogue reproduced an original bark painting by Yolngu artist Yangarriny Wunungmurra, called 'Long-necked Freshwater Tortoises by the Fish Trap at Ganaan' (fig. 5), and purchased in 1975 from one of the catalogue's authors. The picture reported in the catalogue was originally reproduced on fabric for retail sale by Peter Stripes Fabrics without authorization and, according to Wunungmurra, altered in some elements of the original design. In 1983, Yangarriny Wunungmurra - represented by the Aboriginal Artist Agency (AAA)[79] - took Peter Stripes Fabrics to the Federal Court for unauthorized use and modification of his painting.[80] The plaintiff claimed that his copyright in 'Long-necked Freshwater Tortoises by the Fish Trap at Ganaan' had been infringed from the defendant, and sought orders including delivery up of the infringing fabric, damages and an account of profit. The Court finally set an amount of 1.500$ damages, and the roll of fabric was delivered up and destroyed.

The strategy enacted by Wunungmurra (and the other plaintiffs involved in the lawsuit) have stressed out the *'halfway' dimension* - across two different conception of 'property' - of Yolngu artworks.

On the one side, Yolngu representatives presented the case as a violation of Wunungmurra's copyright, and particularly of the exclusive right of the owner of a copyrighted work to reproduce and modify such work. This choice raised many doubts over the possibility to apply IP concepts to Indigenous art, specifically relative to the requirement of '*original authorship*' inherent to copyright law. As Nina Stevenson - one of Yolngu lawyers engaged by the AAA - stated in her public account of the controversy:

[78] This case was the first ever involving infringement of an Indigenous Australian artist's copyright to go before an Australian Court, and it seems to have disappeared without trace from the annals of legal history. The material discussed and quoted here can be found in V. Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*, Sydney, National Indigenous Arts Advocacy Association and Macquarie University, 1996, at 15-16.

[79] The AAA, incorporated in 1976, was an agency appointed to administer IP rights for Indigenous Australian artists.

[80] *Copyright Act 1968*, § 31, 1(a).

> [a]lthough the arrangement of the elements and the expressions on the figures may vary between painters of the story, certain features […] will always be the same. The concept of original authorship is somewhat inappropriate in this context. Could it ever be asserted that an Aboriginal plaintiff was not the author of a painting because the painting was, in effect, a copy and was not totally original to him?[81]

Other significant questions arose relative to the issue of *damages*:

> [w]hat weight should be given to certain principles of Aboriginal law which make the act of infringement particularly distressing and insulting to Aboriginal people? […] In the case discussed above, the fabric designer had made some changes to these elements [the cross-hatching, the paneling, the way the figures are placed in painting]; changes in which in his opinion enhanced its aesthetic appeal, but which offended Aboriginal law.[82]

On the other side, Indigenous plaintiffs exposed reason why Peter Stripes' infringement resulted particularly *distressing* and *insulting* to Yolngu people. Gawirrin Gumana, one of the artists involved in the lawsuit, significantly stated that '[w]hen that man [Peter Stripes] does that it is like cutting off our skin'.[83] Accordingly, Wunungmurra explained to the Court the additional seriousness of the infringement, which extended well beyond a violation of the state copyright of the artist:

> This is our foundation. That painting comes from Barama. Barama is the first person for Yrritja people; he gave us our singing, dancing, our country and all our places. He taught us laws and one law he taught us is to behave ourselves – not to steal other people's paintings; we must first ask older people for their permission […] *Part of that painting belongs to the land*. If the same design or painting was used in a

[81] N. Stevenson, 'Casen Note: Infringement of Copyright in Aboriginal Artworks', *Aboriginal Law Bulletin* 17 (1986), at 3-10. Quoted in V. Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*, at 15.
[82] N. Stevenson, 'Casen Note: Infringement of Copyright in Aboriginal Artworks'.
[83] Affidavit of Gawirrin Gumana. Quoted in V. Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*, at 15.

> ceremonial ground, then it would only be for the eyes of initiated men. It is one of the most important things people could paint.[84]

Wunungmurra presented his painting as a ceremonial object, directly ascribable to one of Yrritja sacred ancestor, Barama. He underlined the 'sacredness' of the design, implying a profound statement of *tribal identity*. However, as can be noted, the artist used the verb 'to steal' in order to qualify Peter Stripes' conduct, implying a reference to a Yolngu 'property' right in the artwork.[85]

Bulun Bulun v Nejlam (1989)

This case, also known as the 'T-shirts case', represented the first major breakthrough to public consciousness of the copyright issue in Indigenous Australian art.[86] It involved John Bulun Bulun, a Yolngu well-known artist of the Ganulpuyngu language group, living in the small outstation of Maningrida. In 1987, Flash Screenprinters, a T-shirt manufacturer based in Queensland, reproduced Bulun Bulun's painting 'Magpie Geese and Waterlilies at the Waterhole' on a series of T-shirt without asking for permission. The original version of the painting (1980) was reproduced in a 1984 Jennifer Isaac's book, which is where Flash possibly saw the image (fig. 6 and 7). Eventually, Flash did not just call their copy of 'At the Waterhole', but even implied by the use of '©' symbol that they owned the copyright upon it. Many discussions relative to the opportunity for a judicial claim on copyright infringement - mostly centered on the requirement of the 'originality' of Indigenous paintings[87] - had preceded Bulun Bulun's Court action. In 1989, the Federal Department for Aboriginal Affairs provided the funds needed to prepare the case, and Bulun Bulun brought an action for infringement of copyright and breaches

[84] Affidavit of Yangarriny Wunungmurra (italics added). Quoted in V. Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies* Johnson, at 16.
[85] On the impact of the metaphor of 'theft' in the process of formation of the 'intellectual property' notion see W. St Clair, 'Metaphors of Intellectual Property', in R. Deazley, M. Kretschmer & Lionel Bently (eds.), *Privilege and Property: Essays on the History of Copyright*, Cambridge, OpenBook Publishers, 2010, at 375.
[86] See V. Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies* Johnson, at 17.
[87] See V. Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies* Johnson, at 17; and M. Hardie, 'What Wandjuk Wanted?', in M. Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*. Cheltenham-Northampton: Edward Elgar, 2015, at 162-5.

of the *Trade Practices Act* (1974). However, the case never actually went to trial: further researches led the plaintiffs to discover thirteen other artists whose paintings had been reproduced on Flash T-shirt and whose names were added to the list of plaintiffs in the case. The day before the scheduled court appearance, a meeting was held at Maningrida in which the parties agreed for a 150.000$ settlement figure and the withdrawal of all infringing shirts from sale.

Yolngu judicial statements revealed the *dual nature* of sacred paintings, caught across an *inter-cultural dimension*. Yolngu witnesses supported a qualification of their artworks as IP objects, particularly insisting on the '*distinctive*' nature of the painting style:

> [t]hese works are not copies of other works, but are all distinctive in their own ways […] His [of Bulun Bulun] painting style is distinctive in particular ways. He adopts a particularly distinctive approach to the depiction of magpie geese. I know of no other artist who pains these birds as the Applicant does.[88]

> The artistic work is an original work. I did not copy the designs in the work from any source […] I was taught to paint by my father, who is now deceased. He also taught my brothers. He taught us the style of painting which is traditional to our area, although each member of my family paints in a distinctive way.[89]

However, Yolngu did not deny the '*traditional*' (and not 'novel') and '*interconnected*' character of their paintings. Bulun Bulun, although presenting his paintings as an 'original works' in which he had a 'copyright'[90], stated indeed:

> [m]y particular responsibility as a ceremonial manager is to ensure that ceremonies and traditions are observed correctly, and my artwork is a significant part of this duty, as I am continuing the practice of showing designs of our clans dreaming.[91]

[88] Affidavit of Charles Godjuwa (Arts Adviser), March 1989.
[89] Affidavit of Robin Ngainjmira (artist), 1989.
[90] Affidavit of John Bulun Bulun (artist), 1989, p. 1.
[91] Affidavit of John Bulun Bulun, pp. 2-3.

In addition, Bulun Bulun stated that he was 'restricted by customs as regards the subject matter' with which he may deal in painting.[92]

The *close connection between sacred painting and land* was also recalled:

> [m]y work is very closely associated with *an affinity for the land*. This affinity is at the essence of my religious beliefs […] The impetus for the creation of works remain their importance in ceremony, and the creation of artworks is an important step in the preservation of important traditional customs.[93]

Such connection was underlined in other depositions, in which land is used as a *metaphor* to describe the theft of Yolngu art:

> [p]eople stealing our paintings is the same as invaders coming to our land without asking. It is the same as people stealing our land.[94]

Milpurrurru v Indofurn Carpets (1994)

In 1993, three Aboriginal artists - George Milpurrurru, Banduk Marika, and Tim Tjapangati - assisted by the Public Trustee for the Northern Territory - started an action before the Federal Court of Australia against Indofurn Ltd., a Perth based company. The artists alleged and subsequently proved that the respondent company had, since 1991, manufactured in Vietnam, imported into Australia, and sold woolen carpets which reproduced artworks (or substantial parts of artworks) of each of the artists without the permission of the owner of the copyright (fig. 5-6). They sought remedies under the *Copyright Act 1968* and the *Trade Practices Act* 1974.

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

[92] Affidavit of John Bulun Bulun, p. 3.
[93] Affidavit of John Bulun Bulun, 1989, p. 7.
[94] Affidavit of Peter Bandjurljurl Maningrida (artist), January 1989.

> [t]he reproduction of the image on carpet has caused me great distress because I believe it desecrates the story which is partly told by the imagery in the waterhole artwork.[95]
>
> I am very concerned that harm has been done to the spirit depicted in the story and I am most adamant that the reproduction of the artwork in this way be stopped as I believe it destroys respect for the art and culture in question.[96]

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

> *[m]y rights to use this image arise by virtue of my membership of the land-owning group. The right to use the image is one of the incidents arising out of land ownership* […] When the Djangkawu handed over this land to the Rirratjingu they did so on the condition that we continued to perform the ceremonies, produce the paintings and the ceremonial objects that commemorate their acts and journeys. *Yolngu guard their rights in paintings and the land equally*. Aboriginal art allows our relationship with the land to be encoded, and whether the production of artworks is for sale or ceremony, it is *an assertion of the rights that are held in the land*.[97]

Artists even denied any character of 'novelty' or 'originality' in their artwork:

> [b]ecause of my strongly traditional training, unlike some other Aboriginal Artists, I do not use any colors other than the ones which are traditional to us: black, white, red and yellow, which colors I make from ochres and crushed roots […] I paint only

[95] Affidavit of Banduk Marika (artist), § 4, 1994.
[96] Affidavit of Banduk Marika (artist), § 6, 1994.
[97] Affidavit of Banduk Marika (artist), 1994 (italics added). Quoted in T. Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, Geneva, World Intellectual Property Organization (WIPO), 2003, at 11. The *Djang'kawu* narrative concerns the travel of two sisters and their brother, the major ancestors of the Dhuwa moiety, which came to Arnhem Land from the east, across the sea. According to the myth, they created the first human beings and organized them into groups, allocated land and provided fresh water by plunging their digging sticks into the ground. As a typical feature of Indigenous Australian stories, the Djang'kawu actions resulted in, or centered on, permanent topographical features, many of them being equivalent to sacred objects. A full account of Djang'kawu's story can be found in I. Keen, *Knowledge and Secrecy in an Aboriginal Religion*, at 50.

> those shapes and creatures which our laws have required us to paint, depicting dreamtime events.[98]

Milpurrurru's affidavit provided for a clear instance of the collision between Western and Indigenous normativity surrounding artworks. On the one hand, the artist (one of the three leading plaintiffs in the lawsuit) stated that he 'owned' his paintings[99], and referred to himself as the 'creator' and the 'originator' of his works.[100] On the other hand, Milpurrurru underlined the 'special' nature of Yolngu artworks:

> [m]y paintings are my soul, my *warro*, and are not just bits of ochre and bark, even if I paint them for sale. Sometimes I sing the story of the painting while I am painting it. I think this is what makes our paintings special because they have us in them […] *They are like part of the land to me.* They keep us strong and our culture alive and meaningful.[101]

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

> [t]he reproduction of the painting on the carpets by the respondents is a grave insult to me. This was firstly because my rights as an artist to have my work respected and not copied without my permission have been infringed, and secondly because the infringement undermines and insults my position as the boss of the story and the country from which the story comes from. The painting and the land they come from are the foundations of our law, religion, and culture […] This applies to all Yolngu people and their *madayin* (sacred objects and ceremonial art) as we all observe our law and believe in it.[102]

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

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[98] Affidavit of Bruce Wangurra (artist), § 3-4, 1994.
[99] Affidavit of George Milpurrurru (artist), p. 2, 8.2.1994.
[100] Affidavit of George Milpurrurru (artist), p. 3, 8.2.1994.
[101] Affidavit of George Milpurrurru (artist), p. 3, 8.2.1994.
[102] Affidavit of George Milpurrurru (artist), p. 2-3, 7.5.1994.

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

Significantly, the dual conception of Yolngu art put forward by Indigenous witnesses and plaintiffs reflected somehow in the Court's decision, and the existence of Indigenous *sanctions* - internal to Yolngu community - proved crucial. In December 1994, Justice Von Doussa delivered indeed a landmark judgement referred to by lawyers as the 'Mabo decision of Aboriginal culture'.[103] The Federal Court awarded the artists damages of 188.000$ for infringement of the copyright in their artworks. However, Justice Von Doussa also awarded the artists the sum of 70.000$ for *additional damages* to reflect the *cultural hurt and harm* they had suffered as a result of the unauthorized reproduction. The Court particularly acknowledged that the unauthorized use of the artworks has (or it was likely to have) far reaching effect given the cultural environment in which they live.

Bulun Bulun v R & T Textiles (1998)

This case concerned John Bulun Bulun's work 'Magpie Geese and Waterlilies at the Waterhole', subject of an earlier action in *Bulun Bulun v Nejlam* (1989). In mid-90s Bulun Bulun's painting was altered and copied onto fabric (in Indonesia), imported into Australia and sold nationally by R & T Textiles (**fig. 9-10**). Bulun Bulun and George Milpurrurru (already a plaintiff in the 1994 lawsuit *Milpurrurru v Indofurn Carpets*) took an action against R & T Textiles in the Federal Court of Australia. The peculiar nature of Yolngu claims, aimed to enlighten the *collective nature* of the 'ownership' in Indigenous

[103] See V. Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*, at 39. As is known, the judicial decision *Mabo v Queensland (No 2)* (1992), also known as 'Mabo decision', was a landmark High Court of Australia decision recognizing Indigenous 'native title' for the first time.

sacred paintings, influenced the plaintiffs' dialectics. Although qualifying himself as the 'legal owner of the copyright subsisting in the artistic work', Bulun Bulun provided indeed a detailed description of Yolngu conception of 'rights' in sacred artworks:

> [m]y traditional Aboriginal ownership rights are handed down to me from my father, who is turn had them handed to him by his father.[104]

> Barnda, or Gumang (long neck tortoise) first emerged from Inside the earth at Djulibinyamurr and came out to walk across the earth from there […] Barnda gave to my ancestors the country and the ceremony and paintings associated with the country. My ancestors had a responsibility given to them by Barnda to perform the ceremony and to do the paintings which were granted to them. This is a part of the continuing responsibility of the traditional Aboriginal owners handed down from generation to generation […] The continuity of our traditions and ways including our traditional Aboriginal ownership depends upon us respecting and honouring the things entrusted to us by Barnda.[105]

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

> [m]y creator ancestor passed on to me the elements for the artworks I produce for sale and ceremony. Barnda not only creates the people and landscape, but our designs and artworks originate from the creative acts of Barnda […] The land and the legacy of Barnda go hand in hand. Land is given to Yolngu people along with responsibility for all of the *Madayin* (corpus of ritual knowledge) associated with the land. In fact for Yolngu, the ownership of land has with it the corresponding obligations to create and foster the artworks, designs, songs and other aspects of ritual and ceremony *that go with the land*.[106]

The link between artworks and land was once again underlined:

[104] Affidavit of John Bulun Bulun (artist), p. 3, 16.9.1997.
[105] Affidavit of John Bulun Bulun (artist), p. 4-5, 16.9.1997.
[106] Affidavit of John Bulun Bulun (artist), p. 6, 16.9.1997 (italics added).

> I am permitted by my law to create this artwork, but it is also my duty and responsibility to create such works, as part of my traditional Aboriginal land ownership obligation. *A painting such as this is not separate from my rights in my land. It is a part of my bundle of rights in the land and must be produced in accordance with Ganalbingu custom and law*. Interference with the painting or another aspect of the *Madayin* associated with Djulibinyamurr is tantamount to interference with the land itself as it is an essential part of the legacy of the land […][107]

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

> [i]t is the ultimate act of destruction under our law and custom - it upsets the whole religious, political and legal balance underpinning Yolngu society. It destroys the relationship and the maintenance of the trust established between the creator ancestor and their human descendants and also between traditional Aboriginal owners. This relationship controls all aspects of society and life, for example ownership of country, relations with other clans, marriage and ceremonial life and Its attributes. If the life source is damaged or interfered with In any way the power and stability derived from it and the power and stability which has continued from the time of creation is diminished and may collapse.[108]

> Unauthorized reproduction of 'at the Waterhole' threatens the whole system and ways that underpin the stability and continuance of Yolngu society. It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor. It interferes with our custom and ritual, and threaten our rights as traditional Aboriginal owners of the land and impedes in the carrying out of the obligations that go with this ownership and which require us to tell and remember the story of Barnda, as it has been passed down and respected over countless generations.[109]

[107] Affidavit of John Bulun Bulun (artist), p. 7, 16.9.1997 (italics added).
[108] Affidavit of John Bulun Bulun (artist), p. 5, 16.9.1997.
[109] Affidavit of John Bulun Bulun (artist), pp. 8-9, 16.9.1997.

R & T Textiles admitted copyright infringement of Bulun Bulun's artwork and consent orders were entered into. However, a second applicant, George Milpurrurru, continued in his own right, furthering an additional claim with respect to the infringement of Bulun Bulun's IP rights. More precisely, he stated that Yolngu 'traditional owners' had certain rights in the copyright in the artistic work, *separated from the individual rights* of Bulun Bulun:

> [t]he Second Applicant brings these proceedings in his own right and as a representative of the traditional Aboriginal owners. The Second Applicant is a senior member of the Ganalbingu people, and at all material times along with the other traditional Aboriginal owners had the right to permit and control the production and reproduction of the subject matter of the artistic work, and the artistic work itself, under the custom and law of the Ganalbingu people.[110]

> […] the Second Applicant and the people he represents, claim damages for the interference with the enjoyment of their traditional Aboriginal ownership of Ganalbingu country including the subject matter of the artistic work and the artistic work itself.[111]

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

> [s]ometimes Balanda (non Yolngu people) refer to *Djungayi* as meaning manager. Other times Balanda (non Yolngu people) refer to a *Djungayi* as a policemen. This is because amongst a *Djungayi*'s responsibilities is the obligation to ensure that the owners of certain land and *Madayin* associated with that land are dealt with in accordance to Yolngu custom, law and tradition, A *Djungayi* sometimes might have

[110] Consolidated and Amended State of Claim, pp. 7-8, 27.2.1997.
[111] Consolidated and Amended State of Claim, p. 2, 27.2.1997.

> to issue a warning to advice a traditional Aboriginal owner about the way certain land or the *Madayin* associated with that land is used. A *Djungayi* has an important role to play in maintaining the integrity of the land and *Madayin*.[112]
>
> Many of these people should be consulted if for example Bulun Bulun wants to do something physically at Djuliblnyamurr or with some aspect of the *Madayin* related to Djullbinyamurr. For example if he wants to introduce a further inside aspect of the Madayin into paintings for commercial sale he would discuss it with me […][113]

Conclusions

The analysis of Yolngu participation in 1990s copyright cases contributes to enlighten the nature of Yolngu normative system surrounding sacred artworks, particularly stressing out a 'gap' between Indigenous 'law' and intellectual property rights. Native artworks and technique have been indeed presented as *collectively shared* among Yolngu society, *inherited* by sacred ancestors and then handed down generation past generation, and - as a crucial feature - *inextricably linked* with rights in land. However, Yolngu judicial dialectics seemed not to have denied such gaps from the standard intellectual property discourse. On the contrary, although stating the 'original' nature of traditional artwork and the existence of Yolngu 'rights' in Indigenous artworks, Yolngu representatives insisted on this point. This judicial phenomenon, which has been called 'insistence on incommensurability', has been recently identified in F. Morphy's studies on Yolngu judicial conducts in native title cases. The same notion can be applied to Indigenous IP jurisprudence. B. R. Smith and F. Morphy depicts Yolngu people as finding themselves into a conundrum, between the risk of a loss of their cultural identity, and the advantage deriving from a state recognition of their rights.[114] The insistence over the impossibility to compare fundamentally different 'legal traditions' enacts a form of *resistance* against the 'enforced commensurability' imposed by state legal agents:

[112] Affidavit of Djardie Ashley, p. 2, 1997.
[113] Affidavit of Djardie Ashley, p. 4, 1997.
[114] See B. R. Smith, & F. Morphy, 'The Social Effects of Native Title: Recognition, Translation, Coexistence', at 54.

namely, a distortion of Yolngu culture and 'law' surrounding intangibles through an enforced translation of Yolngu concepts into the language of 'intellectual property'.

5.3.3.2. *Madayin* as Proof of Native Title

As is common knowledge, '*native title*' is a notion embedded in the Australian legal tradition which postulates the existence of a legal relation between the Indigenous Australian populations and the Australian territory. To the expression 'native title', first recalled from the High Court of Australia in the *Mabo* case, does not correspond a shared definition among legal scholars.[115] 'Native title' identifies conceptually an *intersection* between the Western category of 'real property law' and the Indigenous normative systems surrounding land.[116] The 'slippage' of the two normative structure - the Australian real property law and Indigenous norms - towards a reciprocal recognition appears however *asymmetrical*. Section 223(1) of *Native Title Act* (1993) states that the 'native title' is a bundle of 'rights' and 'interests', conferred to Indigenous Australians in a portion of the Australian land:

> [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.

Australian law acknowledges thus the existence of a specific segment of the Indigenous normative system which regulates the relations between people insisting on land. However, the notion of 'native title' translate Indigenous norms by means of legal conceptions typical of Western 'property law': namely, 'rights', 'interests', and the very notion of 'title'.[117] According to a part of Australian legal scholarship.[118], such

[115] See C. Mantziaris & D. Martin, *Native Title Corporations: A Legal and Anthropological Analysis*, at 12.
[116] For the identification of 'native title' with an 'intersection' between different legal traditions see *Fejo v Northern Territory* [1998] HCA 58, at 46; and *Yanner v Eaton* (1999) 201 CLR 351.
[117] See *Western Australia v Ward* (2002) 191 ALR 1, at 15. On the improper use of 'title' see *Mabo v Queensland (No. 2)*, at 177-8.
[118] Among others, see C. Mantziaris & D. Martin, *Native Title Corporations: A Legal and Anthropological Analysis*, at 32.

'translation' results in a *transformation* of Indigenous Australian 'land law' and ignores, through an imperfect analogy, a radical alterity between cultures.

The present section investigates one of the dimension of the incompatibility between Western and Indigenous Australian 'legal culture', particularly centred on Yolngu '*rom*'. As seen, Yolngu people have been depicted as finding themselves into a conundrum, between the risk of a loss of their cultural identity, and the advantage deriving from a state recognition of their rights. As F. Morphy states:

> [i]f they abandon *rom*, the *rom* will remain in the country, but Yolngu will no longer be Yolngu - they will just be 'Aborigines'. Yolngu identity is thus deeply bound to the fundamental underlying principles of governance generated by *rom*. It is, as they say, the 'foundation' of their existence and identity. Native title as a process seeks to impose commensurability between rom and law in order to make the former legible to the latter, and so potentially 'recognizable'.[119]

Yolngu response to the conundrum has known complex manifestation. One of this is the judicial act of *exhibiting 'sacred' artworks as evidences of land ownership*. This kind of 'evidence' is named here 'evidence-through-artefact'.[120] From a *pragmatic* standpoint, the evidence-through-artefact represents a new and untraditional evidence, an epiphany of the major flexibility granted from Australian judicial rules to Indigenous Australians plaintiffs with respect to the requirements of the traditional rule of evidence.[121] From a

[119] B. R. Smith & F. Morphy, F. 'Performing Law: The Yolngu of Blue Mud Bay Meet the Native Title Process', at 54.

[120] The first occurrence of the term (in italian) can be found in R. Mazzola, 'Atto probatorio *vs*. atto ostensivo: fra epistemologia ed antropologia giuridica', *Rivista Internazionale di Filosofia del Diritto* 91, 1 (2015), at 301-308. Anticipation of this concept in the context of Australian native title jurisprudence are G. P. Tuzi, 'Oltre la musica: il caso degli aborigeni australiani. Un esempio di applicazione del sapere etnomusicologico', *Historia Actual Online*, 23 (2011), at 106-117; G. Koch, *We Have the Song, So We Have the Land: Song and Ceremony as Proof of Ownership in Aboriginal and Torres Strait Islanders Land Claims*, Canberra, AIATSIS Research Publications, 2013; K. Anker, *Cultural Diversity and Law: Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights*, at 141-61. The same phenomenon has been studied with reference to North American realities: see, among others, M. Pomedli, 'Eighteenth-century Treaties: Amended Iroquois Condolence Rituals' *American Indian Quarterly*, 19 (1995), at 313-339; and W. C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior*, Toronto, University of Toronto Press, 2002, at 89-93.

[121] See C. Mantziaris & D. Martin, *Native Title Corporations: A Legal and Anthropological Analysis*, at 32; and G. Koch, *We Have the Song, So We Have the Land: Song and Ceremony as Proof of Ownership in Aboriginal and Torres Strait Islanders Land Claims*, at 8. For a recognition of Australian rule of evidence see http://www.naa.gov.au/records-management/strategic-information/standards/records-in-evidence/evidence-law-australia.aspx.

theoretical standpoint, the evidence-through-artefact stimulates a broader reflection on the nature of Yolngu 'law' and Yolngu artefacts.

The basic question asked here is:

What does the evidence-through-artefact prove?

The present section argues that *ma<u>d</u>ayin* objects used as 'evidence-through-artefacts' acquire two different meanings in the context of the native title claims and within the Yolngu setting, respectively.

'Evidence-through-artefacts' as 'Evidence'

In the introductory remarks to the present work, the judicial strategy adopted in the *Milirrpum* case - where Yolngu representatives showed holy *rangga* as evidence of their property in Yirkkala territory - was highlighted. That strategy, although not effective at that time, resulted successful in a long-time perspective: the introduction of the *<u>l</u>ikan* notion in the context of a formal common law trial produced in fact a noteworthy impact on the Australian culture.[122] Two statues broadened specifically the formal categories of the Australian rule of evidence in order to encompass the Indigenous evidence-through-artefacts:

- the *Aboriginal Land Rights (NT) Act 1976*, enacted after the recommendations formulated in the *First Report of the Aboriginal Land Rights Commisson* (1973) and applied only in the Northern Territory;
- the *Native Title Act 1993*, which ratified and extended to the totality of Australia the conclusions reached by High Court in the Mabo case.

The 'evidence-through-artefact', although not explicitly admitted by the *Aboriginal Land Right Act*, was acknowledged in the reports of several Aboriginal Land

[122] See R. Mohr, 'Shifting Ground: Context and Change in Two Australian Legal Systems', at 11; and H. Morphy, ''Now You Understand': An Analysis of the Way Yolngu Have Used Sacred Knowledge to Retain Their Autonomy', in N. Peterson, & M. Langton (eds.), *Aborigines, Land and Land Rights*, Canberra, Australian Institute of Aboriginal Studies, 1983.

Commissioner.[123] For example, the Commissioner Michael Maurice, in his *report* on Timber Creek *land claim* (1985), states:

> Expression of responsibility for the sites and the surrounding country were commonplace. Part of the exercising of responsibility is no doubt involved *in painting the designs, singing the songs, and performing the ceremonies for the country*.[124]

Analogously, Commissioner Peter Gray declares (in a recognition of his experience)

> The ability to have a particular design painted on your body, or to paint it on someone's else body, to sing a particular song, or to perform a particular dance, *is proof of entitlement to particular lands*.[125]

Moreover, according to *Aboriginal Land Right Act* judicial hearings are 'informal' ones, and thus they can accord a higher degree of flexibility with respect to the standard rule of evidence.[126]

Section 82(2) of *Native Title Act* regulates the application of the rule of evidence to native title claims, and admits the possibility to exhibit unconventional evidences:

> In conducting its proceedings, the Court *may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders*, but not so as to prejudice unduly any other party to the proceedings.[127]

The exhibition of evidences in native title claim, as regulated in *Native Title Act*, is ruled by *Federal Court Rules*, which explicitly affirm the right to show proofs

[123] *Aboriginal Land Rights Act*, V, 51-60.
[124] M. Maurice, M., *Timber Creek Land Claim: Report by the Aboriginal Land Commissioner, Mr. Justice Maurice, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory*, Canberra, Parliamentary Paper no. 398 (1985) at 85 (italics added).
[125] P. Gray, 'Aboriginal and Native Title Issue', *Australian Law Librarian*', 7 (1999), at 6 (italics added).
[126] See G. Koch, *We Have the Song, So We Have the Land: Song and Ceremony as Proof of Ownership in Aboriginal and Torres Strait Islanders Land Claims*, at 8.
[127] *Native Title Act 1993* (Cth), § 82 ("Federal Court's Way of Operating"), (2) (italics added).

> of a cultural or customary subject […] to be given by way of singing, dancing, storytelling or in any other way other than in the normal course of giving evidence.[128]

Australian rule of evidence admits thus the possibility of exhibit evidences-through-artworks in the context of a native title claim. But what does the evidences-through-artworks prove, in their conceptualization according to Australian law? Section 223(1) of *Native Title Act* establishes a double probative requirement at the foundation of Indigenous Australian claims over land. Such claims depend in fact from the proof of two fact:

> the rights and interests are *possessed* under the traditional laws acknowledged, and the traditional customs *observed*, by the Aboriginal peoples or Torres Strait Islanders.
>
> the Aboriginal peoples or Torres Strait Islanders, *by those laws and customs*, have a *connection* with the land or waters.[129]

What Indigenous plaintiffs must prove is both:

- the existence of a connection between the Indigenous community and the land;
- the relevance of this connection according to the '*traditional laws and customs*' of the community.

Australian case-law specified eventually the nature of these probative requirements, by structuring them into three distinct phases. Courts' interpretation hinges upon the expressions 'possessed' and 'observed'. The three facts that founds Indigenous Australian land claims are thus:

1. the existence of an Indigenous 'law' regulating the relation between people and land;

[128] *Federal Court Rules 2011*, Rule 34.122 (former Order 78, ii).
[129] *Native Title Act 1993*, 223(1)(a-b) (italics added).

2. the practice of that 'law' *as law* in the Indigenous community that started the action;
3. the practice of that 'law' continuously from a historical period prior to the landing of English colonists in 1788.[130]

These general principles, in the specific case of Yolngu, translate the necessity to prove both the existence of *rom* and *ma<u>d</u>ayin* (as the two Yolngu normative systems), and their 'legal' nature among Yolngu. The question is here:

> *How can evidences-through-artefact, in their conceptualization according to Australian law, demonstrate the existence of* rom *and* ma<u>d</u>ayin*, as enacted law among Yolngu?*

An answer to this question illuminates two different ways in which evidences-through-artefact influences the inferential reasoning of the judge:

1. evidences-through-artefact are evidence of the existence of *rom* and *ma<u>d</u>ayin* because they are the *physical manifestation* of those normative systems. As seen, *rangga* are 'connected' with Yolngu land and norms about land (expressing mostly caretaking duties and possession). Their exhibition, along with an explanation of their significance[131], demonstrates the existence of *rom* and *ma<u>d</u>ayin*, and their continuous practice among Yolngu. In other words, the judge can hardly deny that Yolngu law exists, because he directly *sees* it. Such first way of proving the existence of *rom* and *ma<u>d</u>ayin* implies the *integration of some elements of Yolngu cosmology* - the connection between the *<u>l</u>ikan* concepts - *among the principles of the interpretation of the proof* typically included in the Australian rule of evidence.
2. evidences-through-artefact are evidence of the existence of *rom* and *ma<u>d</u>ayin* since they are a *persuasive* evidence. As Kirsten Anker points out, '[f]or the

[130] See *Fejo v Northern Territory*, at 46; and *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606.
[131] See F. Morphy, 'Enacting Sovereignty in a Colonized Space: The Yolngu of Blue Mud Bay Meet the Native Title Process', at 121.

Court, evidence will be judged credible *if it gets with expectations of authentic culture (the 'feel' and the 'look')* and if the witnesses display 'genuine' knowledge in their testimony'.[132] Evidences-through-artefact support thus the inferential reasoning of the judge also on a *non-rational* and *aesthetic* level: they are *credible* evidences if they are perceived from the Court as '*authentic*' and '*traditional*'. Such second way of proving the existence of *rom* and *madayin* is apparently an expression of post-colonial dynamics: the communicative power of the evidences-through-artefact entails in fact a notion of 'authentic Indigenous culture' that is essentially *non-Indigenous*. The requirement of 'authenticity' reflects the Western idea of 'Indigenous culture', the way in which non-Indigenous have conceptualized the culture of the native. Such Western construct, a product of the diffusion on a large scale of Indigenous Australian art during 1970s[133], does not necessarily coincide with the actual conformation of Indigenous cultural landscape. Evidences-through-artefact result thus 'intercultural objects'.[134]

'Evidence-through-artefacts' as Enactment of Rom *and* Madayin

As seen, Australian law includes among the principle of the interpretation of the evidence - as stated by the rule of evidence - some elements of Yolngu cosmology: acknowledging specifically the connection between 'intangibles' and 'land' into the Yolngu conception of 'territorial cosmos'. However, a difference exists - between the Western conceptualization of 'evidences-through-artefact' according to Australian law and to Yolngu cosmology, respectively - relative to the *function* of evidences-through-artefact. Such diverse interpretation is illuminated by a conceptual distinction put forward by Frances Morphy over the course of her study of the *Blue Mud Bay* case (involving

[132] K. Anker, *Cultural Diversity and Law: Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights*, at 152.
[133] See K. Anker, *Cultural Diversity and Law: Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights*, at 152.
[134] See K. Anker, *Cultural Diversity and Law: Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights*, at 152.

Yolngu people).[135] F. Morphy distinguishes between two 'kinds of action' implemented by Yolngu representatives during the trial through the exhibition of evidences-through-artefact:

1. the *performance* of *rom*;
2. the *enactment* of *rom*.

The notion of '*performance*' of *rom* refers to performances of songs or ceremonies, or exhibition of artefacts, during a hearing. As seen, the *Native Title Act* admits such performance, aimed to support the inference of the judge about the existence of rom. The notion of '*enactment*' of *rom* refers to a statement about the *sovereignty* of *rom*, about *its nature of 'enacted law'* not just among Yolngu, but also in the wider Australian setting. The complex relation between 'performance' and 'enactment' of *rom* supports the culturally different interpretation of 'evidences-through-artefact' in the context of Indigenous land claims. According to Yolngu, *any performance of* rom *is also an enactment of* rom.[136] Once exhibited in a courtroom, *rom* is enacted - is made 'enacted law' - in Australia, and becomes concurrent to Australian 'official' law. This enactment is implemented through particularly complex performances:

> [i]n order to accommodate the performance inside the courtroom it was necessary to disrupt the spatial ordering of the native title court by moving aside the tables and chairs facing the judge's 'bench', where the judge sat […] the lawyers and other court officials were displaced to the periphery of the arena. The judge, significantly, was not; he sat at his 'bsench' throughout the performance, which ended with the ceremonial objects being laid against the bench, and the Yolngu leaving the court. The court space was reconstituted, the ceremonial objects were moved out of the courtroom, and the court then got down to its business. But for a moment, *it must have seemed to the non-Yolngu present, as it certainly did to the Yolngu, that rom had momentarily displaced Australian law in its own space*.[137]

[135] See F. Morphy, 'Enacting Sovereignty in a Colonized Space: The Yolngu of Blue Mud Bay Meet the Native Title Process', at 104.
[136] See I. Keen, *Knowledge and Secrecy in an Aboriginal Religion*, at 211.
[137] See F. Morphy, 'Enacting Sovereignty in a Colonized Space: The Yolngu of Blue Mud Bay Meet the Native Title Process', at 106 (italics added).

However, Australian law - although including the connection between 'sacred design' and 'land' among the principles for the interpretation of the evidence - *does not acknowledge the identity between performance and enactment of* rom. The performance of *rom* is in fact a mere 'evidence', aimed to *prove a fact*. *Rom* is thus 'matter of fact', and its existence must be proven to the Court.[138] *Rom* is not 'enacted law': the status of 'official' law as the sole source of law in Australia has been indeed constantly reaffirmed by the *native title jurisprudence*.[139]

To summarize:

- Australian law conceives 'evidences-through-artefacts' as *performances* of *rom*, aimed to prove the existence and the current practice of *rom* among Yolngu; in grado di dimostrare l'esistenza e la consistenza giuridica del "diritto" aborigeno;
- Yolngu conceive 'evidences-through-artefacts' not just as performances of *rom*, but also as means for its *enactment*.

5.4. Indigenous Intellectual Property: A Case of Mistranslation

4.4.1. Refining Questions

The present research originated from three questions (section 1.2):

- Why is Western intellectual property 'inherently unsuitable' to address Indigenous demands over the protection on their intangible and cultural resources?
- Why does the superimposition of intellectual property regimes to Indigenous systems produce an 'oversimplification of more complex practices and beliefs'?

[138] *Mabo v Queensland (No. 2)*, at 164.
[139] See for instance *Yarmirr v Northern Territory* [2001] HCA 56, at 115. On this issue see K. Anker, *Cultural Diversity and Law: Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights*, at 144.

- Why does the classic language of 'property-ownership' seem unable to take into account Indigenous ways of conceiving intangibles and their management?

Those questions all implied a reflection over the 'untranslatability' of the 'intellectual property' concept – or, about *whether the concept of 'intellectual property' is a useful one to apply outside from the context in which it was originally conceived*: namely, if it can be used efficiently in cross-cultural analysis involving Indigenous realities. Making use of William Twining's lexicon, the same issue can be reformulated as follows:

> *Does the notion of 'intellectual property' 'travel well' across culturally different normative orders and jurisdictions?*[140]

The aforementioned research questions clearly implied a negative answer. 'Intellectual property' does *not* travel well across different legal traditions: it is 'inherently unsuitable' to address Indigenous demands, it produces oversimplifications of Indigenous beliefs, and it is unable to address Indigenous practice even from a linguistic standpoint.

The purpose of the present research was thus to go further the assumption of the 'unfitness' of 'intellectual property' categories where applied to Indigenous views about intangibles. What the three questions have in common is indeed an interest for the *reasons* behind such intercultural 'gap':

> *Why is 'intellectual property' notion a potentially misleading instrument in the analysis of Indigenous relation surrounding intangibles?*

Section 4.2.2 and 4.2.3 combined pointed out that intellectual property and Indigenous 'intellectual creations' maintain several structural dissimilarities. While intellectual property objects - *more often than not* - are fixed in a tangible form, have an identifiable creator, and are original, Indigenous equivalents are on the contrary - usually - non-fixed or unrecorded, do not have a human author, and are not original (or 'new') according to Western standards. Nevertheless, acknowledging dissimilarities in the 'metaphysical' (in the sense developed in Alexandra George's analysis) structure of Western and Indigenous

[140] See W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, at 43.

intangibles does not tell much about what stands *behind* the fundamental gap between the two different traditions. In fact, it could be asked:

> *Why does Yolngu normative system regulating the production and management of intangibles not emphasize the originality, fixation, and authorship requirement?*

To note the differences between the two models could hardly explain *why* such differences exists. Different conceptions of 'authorship', diverse emphasis put on the 'originality' and the 'material fixation' of intangibles appear indeed as *epiphanies* - or the ultimate *results* - of the distinct rationale that founds the two normative systems.

The distinct foundation of intellectual property law and *ma<u>d</u>ayin* (as a 'normative system') has been partially explained in section 4.2.3 and 4.3.1.2. It concerns mostly the different *function* of intangible goods in Western and Indigenous societies respectively, and reflects on the 'structure' of the intangibles. As seen, intellectual property regimes conceive intellectual creation as *commodities* which exist in economic systems built on commodity exchange. The main focus of such system is thus to the *economic function* of intangibles - seen as valuable 'resources' - and to the impersonal relation of 'price' resulting from transactions. On the contrary, in the context of Indigenous societies - in this case: within Yolngu community - the main function of the intangibles 'exchange' system is to *shape social relations* and preserve knowledge. Intangibles are thus *not* alienable 'resources', but rather 'inalienable possessions', in the sense specified in section 4.3.1.2.

The present - final - section relies on this conclusion, and try to answer to a new question:

> *Why is the 'intellectual property' notion unable to translate the different rationale at the foundation of Indigenous knowledge systems?*

Or:

> *Why does the Western 'property' archetype not 'fit' normative system that, as the Yolngu regimes, do not conceive intangibles as 'commodities'?*

As explained in the introductive remarks (section 1.2), an answer to this question involves necessarily a reference to the *inextricable link between land (Country), people, and knowledge*.

The following paragraphs argue that the application of the notion of 'property' - of 'intellectual property' - to Indigenous knowledge system:

1. provokes a *partition of the territorial cosmos*;
2. through the notion of 'rights', it interposes an *imaginary and abstract 'object'* between a person and the intangible good.

The thesis advanced here is that both these phenomena *are caused by the irrelevance of 'place' to the Western 'property' archetype*.

4.4.2. The Partition of Yolngu Territorial Cosmos

Section 4.3.4.1 presented the *Bulun Bulun* case, concerning R&T Textiles' unauthorized reproduction of Johnny Bulun Bulun's artworks. As seen, Yolngu plaintiffs claimed the '*sameness*' of sacred designs and Country according to Indigenous cosmology.

The Court - per Justice Von Doussa - answered to the plaintiffs' claim stating 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 well characterized as 'skeletal'* and stands in the road of acceptance of the foreshadowed argument.[141]

Von Doussa relied here on J. Brennan's statement in the *Mabo* decision:

[141] *Bulun Bulun v R & T Textiles* (1998), at 256.

> 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*.[142]

Thus, according to Von Doussa:

- since *Australian law cannot acknowledge the existence of Indigenous rights that 'fracture a skeletal principle' of the legal system*;
- and since *the principle of separation between 'ownership of land' and 'ownership of artistic' works is a skeletal one in Australian law*;
- so, *Australian law cannot acknowledge 'designs' and 'land' as the same entity*.

A first question occurs at this point:

> *What kind of consequences provokes on the 'territorial cosmos' construction the Australian legal system insistence on the necessity to keep ownership claims over land and 'intellectual property' separated?*

The most notable consequence is that such division imposes a *conceptual partition* of the 'territorial cosmos' notion that in Yolngu ontology and cosmology reunites artistic expressions, the *wangarr* ancestors, the artists, and the Country. This partition can be graphically represented as in fig. 11.

[142] *Mabo and Others v Queensland (No. 2)* (1992), at 524.

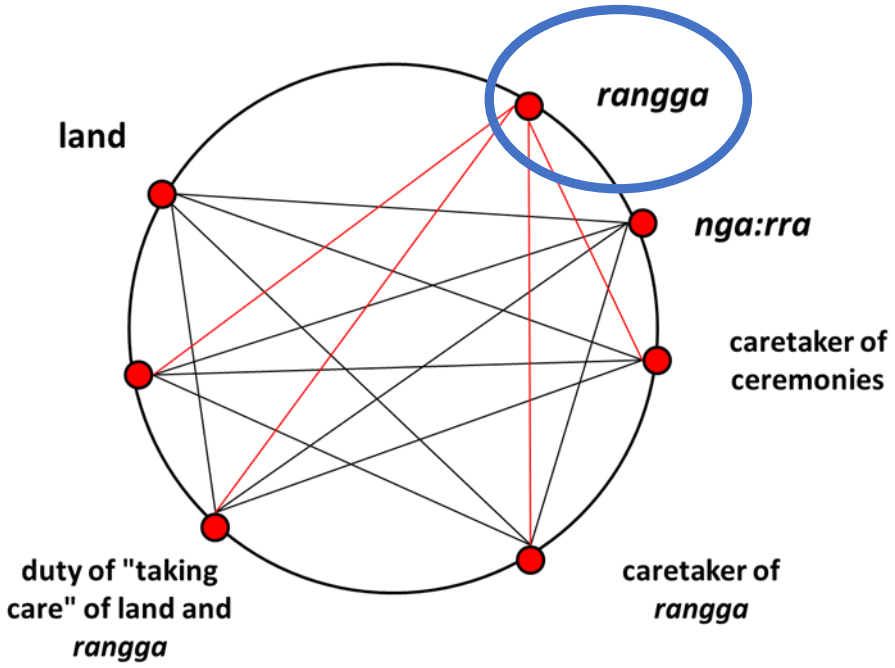

Fig. 11

The blue circle symbolizes the effect of the separation - operated by the Australian legal system - between the realms of 'land ownership' and 'intellectual property'. It *severs the cosmological connections which link the artistic work to land and other aspects of Yolngu territorial cosmos*. The skeletal division between the 'land ownership' and 'intellectual property', typical of Western legal systems, produces the *alienation of Yolngu art from Yolngu land*, making any reference to Country irrelevant.

A second question:

> *Why is Western 'property' law unable to conceive the relation of identity between Yolngu land and Yolngu artworks?*

The irrelevance of 'place' in the Western 'property' archetype seems to be the main reason preventing such acknowledgement.

Section 3.2.4.1 described *wangarr* ancestors - whose actions are at the foundation of Yolngu cosmology and the main object of Yolngu art - as *local forces*. As stated, the Yolngu 'territorial cosmos' is consequently a system of cosmological connections *existing in (and in virtue of the topography of) a specific (physical) place*. Therefore, the

same notion - 'territorial cosmos' - cannot be referred and linked to an 'abstract' space. To *exclude the particularism of 'places'* from the analysis of Yolngu normative systems surrounding intangibles means thus necessarily *to exclude Yolngu cosmology from the picture,* and consequently *to disregard the cosmological threads that relate 'intangibles' to 'land'*.

The physicality and particularism of Country - the conception of Country as a 'place' - are fundamental notions for the Yolngu conceptualization of Yolngu art. To acknowledge land as a 'place' allows in fact to *understand the inextricable bound between intangibles and Country*. On the contrary, given that 'place' is an irrelevant notion to Western 'property' archetype - as discussed in Chapter 1 - dominant property regimes fail to understand such connection and treat 'land' and 'artworks' as two distinct entities.

4.4.3. The 'Subject-Object' Relation

Section 3.3.2.5 presented Magowan's thesis on the relation between Yolngu and Country. As seen, the author points at the key notion of *'polymorphism'*, as 'the process whereby an ancestor, human or part of the landscape or seascape is seen as being simultaneously held inside the other'. The ability of *wangarr* ancestors to appear simultaneously in several forms produce two main outcomes:

1. the landscape - the 'place' - is not a lifeless and motionless entity, but rather a *dynamic* cosmos, expression of '*ancestral subjectivity*';
2. *wangarr* ancestors 'connect' people to the landscape: as Magowan explain, Yolngu believe in a *close ontological relationship between subjects (people) and objects (land)*, as one of '*simultaneity*': people *are* (in) the place.

The relevant question is here:

> *How does the language of 'property rights' relate to the 'consubstantial' connection between 'people', 'places' and 'intangibles', characteristic of Yolngu 'territorial cosmos'?*

At this point, it can be argued that:

- since *in Yolngu ontology and cosmology 'land' (or 'Country') and 'artworks' do not refer to different entities, but to a unique 'extended' dimension of the 'place'* (namely, the 'territorial cosmos');
- and *since Country identifies at the same time an ancestral subject (rather than an 'object') and the people who inhabits that piece of land*;
- so, *also Yolngu artworks* can be seen, according to Yolngu cosmological view, as '*ancestral subjects*' and as 'Yolngu' themselves.

The point that an 'ancestral subjectivity' dwells in Yolngu artworks - beside Yolngu Country - has been highlighted in legal and ethnographic research on Indigenous 'intellectual property'. As Anne Barrow explains:

> The ontological, epistemological and moral status of the Dreaming yields a concept of property which is, however, wholly devoid of the subject-object antinomy characteristic of Western legality. *Whereas the latter assumes the owning subject to be absolutely prior and distinct from the owned object*, and conceives of that object merely as material resources available for use and exploitation, *the former sees (ancestral) subjectivity - and therefore spiritual potency - as residing in objects* (country and sacred relics).[143]

As Keen notes, the 'ontological correlates' of a relation of property - 'subject and object' - vary in parallel to the 'consubstantial' relations between 'people', 'Country', and 'intangibles'.[144] Such relations, which render land and intangibles inalienable,

[143] A. Barron, 'No Other Law? Author-ity, Property and Aboriginal Art', in L. Bently, & S. Maniatis (eds.), *Intellectual Property and Ethics*. London: Sweet & Maxwell, 1998, at 48. See also H. Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, at 48-9. Alfred Gell's *Art and Agency* (1998) advances the thesis that the attribution of 'subjectivity' to art is also a typical feature of Western thought. According to Gell, to consider an object 'artistic' implies the attribution of a certain 'agency' to the object, a character usually attributed to human beings. See A. Gell, *Art and Agency: An Anthropological Theory*, Oxford, Clarendon Press, 1998, at 16.

[144] The attribution of 'subjectivity' to objects (as a phenomenon typical of non-Western society) is discussed in Hans Kelsen's *Society and Nature* (1943), in the chapter devoted to 'Primitive Consciousness': '[…] regards certain objects, especially those of daily use, as belonging to a certain individual because they are connected with him by the transference to them of the substance of their personality; for the personality of

becomes thus more akin 'to the relation of a person to a part of the body and/or to a kin relationship'.[145] Moreover:

> Used as a metalanguage, the language of rights obscures much of the language and culture of possession relations, and by imposing the alien concept of abstract rights *as mediating possessions,* it may well distort what it describes.[146]

The relation of 'identity' and 'consubstantiation' between 'people', 'place' and 'intangibles' is, in a way, *'interrupted' by the interposition of the 'rights' language*. The bundle of rights notion implicit in the 'intellectual property' construction distorts these relations through over-specification and rigidity, and removes 'people' - promoting them to the rank of 'subjects' - from the 'territorial cosmos' preventing their identification with a place.

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an individual, his specific "essence" is regarded as a transferable, radiating substance. Hence arises the peculiarity of primitive thinking which accept the part for the whole. A fingernail loosed from the body, a cut tuft of hair, a man's excrements, contain his personality' (H. Kelsen, *Society and Nature: A Sociological Enquiry*, Chicago: The University of Chicago Press, 1943, at 16).

[145] See I. Keen, 'The Language of Possession: Three Case Studies', at 210. Keen shows that Yolngu languages express this relation for possession of parts of the body as in '*ngarra wana*' ('my arm'), 'personal names, patrigroup identity, subsection identity, and occasionally, patrigroup country'. The possessive suffix denotes other kinds of possession including kin relations, as in '*ngarraku bathi*', 'my basket', and '*ngarraku nga:ndi'mirringu*', 'my mother'.

[146] I. Keen, 'The Language of 'Rights' in the Analysis of Aboriginal Property Relations'.

6. Concluding Remarks

> [A] culture dominated by ideas about property ownership can only imagine the absence of such ideas in specific ways.[147]

The starting point, from which the present research developed, was the fact that legal doctrine has insisted that Western intellectual property constructs - as they are - are not appropriate for the protection of Indigenous intangibles.

One of the main issues imposed by the translation of Indigenous relations into 'property' is that classical forms of intellectual property are still based on their fundamental preconceptions created through Western thought, such as the romantic 'author' as an individual, solitary and original creator.

Also, unlike Western societies, Indigenous peoples' social and 'cosmological' views have not, generally, been represented by large monuments or vast amounts of physical property.[148] Accordingly, Peter Drahos has argued that Indigenous peoples have predominantly chosen to invest resources into information that expresses itself in *services* and *processes*, rather than 'technological artefacts', making the application of property law inappropriate.[149]

The research question that guided this work since the beginning surrounded the reasons behind such 'incompatibilities' between Western intellectual property and Indigenous normative systems:

> *Where lies that fundamental diversity, which prevents the application of the Western 'property' ('intellectual property') archetype to Indigenous intangibles?*

[147] M. Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia*, at 18.
[148] See L. V. Prott & P. O'Keefe, ''Cultural Heritage' or 'Cultural Property'?', *International Journal of Cultural Property*, 1, 2 (1992), at 314.
[149] See P. Drahos, 'When Cosmology Meets Property: Indigenous People's Innovation and Intellectual Property, at 241-2.

In order to answer this question, the present work took into account the *close affinity between 'land' and 'intangibles'* in several Indigenous cultures. The basic assumption at the foundation of this research was in fact that 'a study over Indigenous social life and culture necessarily involves an analysis on Indigenous relation to *land'* (Chapter 1). In fact, most of the Indigenous populations around the world conceive land as a central element of their 'institutional' and 'cosmological' systems. This issue has been stressed out with reference to Indigenous Australians - more specifically: Yolngu people - conception of 'land', expressed by means of the Aboriginal English term 'Country'. This expression denotes a peculiar dimension of the land and its relations to people. As noted throughout this work (Chapter 3), the 'Country' is in fact:

1. a *living entity*, since 'sacred' ancestors are believed to be 'active' in it;
2. a *scheme of cosmological connections*, since stories about ancestors connects humans being with other elements of the 'cosmological' landscape;
3. '*consubstantiated*' with people, or '*another dimension*' of 'people'.

What's the place of intangibles in this picture? They are among the 'other elements' mentioned at point 2. Knowledge incorporated into sacred artworks is at the same time *originated from* the Country - as it can be traced to the acts of powerful ancestors in shaping the land - and *about* the Country, since it reproduces and 'map' the land inhabited by the clan. Most importantly, *as a part of 'territorial cosmos'*, intangibles (and knowledge) are not conceived as 'resources' – like in Western intellectual property regimes - but rather *as another dimension of 'land', and of 'people'* and are thus '*inalienable*' (Chapter 4).

The initial question - *Where lies that fundamental diversity, which prevents the application of the Western 'property' ('intellectual property') archetype to Indigenous intangibles?* - appeared thus connected to a different sort of issue:

> *Does intellectual property provide an adequate normative structure to deal with the 'interconnected' dimension of Indigenous intangible and Indigenous land?*

The major point to be considered is that, as pointed out (especially in section 3.3.2.2), the focal element which provides to Indigenous 'Country' its 'cosmological' resonance *is the diversity and particularism of each piece of land with respect to the others*. Yolngu cosmology - as many Indigenous Australian cosmologies - is, in other words, *locally specific*, or based in specific 'places' within the Australian landscape.

At this point, seemed necessary to generalize the question whether intellectual property law provides an adequate normative structure to deal with the 'interconnected' dimension of Indigenous intangible and Indigenous land:

> *Can the particularism and diversity of places at the core of Indigenous Australian cosmologies be conceived within the archetype of Western (real) property law?*

As showed in Chapter 2, the answer is a negative one. Western property law conceives land as an abstract '*space*', conceptually 'detached' from the people living upon it. This model can hardly conciliate with the notion of Country presented above, according to which land is a specific 'place' connected - in virtue of its cosmology - to people and intangibles. The 'Country' appears thus as a 'physical-cosmological' continuum, at the same time *contextual* - as based in a specific and physical landscape - and *holistic* - as implying connections to the sacred dimension of Yolngu life.

The problem with Western 'property' archetype approaching Indigenous realities - such as Yolngu normative system - is that, since the former - as it is - cannot conceptualize 'places' (considered as 'spaces'), it fails to conceives both the contextual and the holistic character of the latter. Or, better: Western 'property' does not conceives the holistic ('cosmological') nature of Yolngu *ma<u>d</u>ayin* - and thus, its cosmological connection to land - *because* it does not understand the contextual roots of the Indigenous normative system. The application of Western model of 'property law' to Yolngu 'territorial cosmos' provokes thus unavoidably a *partition* of Yolngu holistic construction, *both dividing 'intangibles' from 'place' and 'intangibles' from 'people'* (Chapter 4).

To summarize:

- Chapter 2 and 3 established that the current Western ‘property’ archetype conceptualizes ‘land’ as an abstract ‘space’, dephisicalized, fungible and ontologically partitioned from ‘people’;
- Chapter 4 showed that, according to Yolngu cosmology, land is a ‘territorial cosmos’: a living entity connected to people and intangibles in virtue of the story surrounding sacred ancestors. However, the ‘cosmological’ dimension of Country stays rooted in the physical landscape. The ‘Country’ appears thus as a ‘physical-cosmological’ continuum, at the same time *contextual* and *holistic*.
- Chapter 5 argued that the fundamental distinction between intellectual property objects - ‘intangibles’ as conceived in an intellectual property regime - and Yolngu intangibles regards the role of ‘land’ in the conceptualization of those objects. While *intellectual property law conceives intangibles as ‘resources’*, detached both from people and the environment in which they were originally created, *Yolngu normative system (madayin) conceptualizes intangibles as one of the dimension of the ‘territorial cosmos’*. So, intellectual property constructs and language distorts the Indigenous view in at least two regards: first, it separates ‘land’ from ‘intangibles’; second, it separates ‘intangibles’ from ‘people’. Both these partitions are unknown to Yolngu ontology and cosmology.

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