PROTECTING THE INDIGENOUS PAST WHILE SECURING THE DIGITAL FUTURE: THE FTAA AND THE PROTECTION OF EXPRESSIONS OF FOLKLORE

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Overview

The Free Trade Area of the Americas ("FTAA") Agreement encompasses many different areas of commerce and trade. Of all of these areas, the scope of intellectual property protection remains a crucial subject and widely contested area of debate.[1] With one year left to go before expected ratification, the text of this significant portion, Chapter XX, remains mostly bracketed and undecided.[2] Still, despite the doubts surrounding its scope, most of the chapter will certainly find its way into the Agreement itself because of the important issues involving changing technologies in international trade. The chapter's purpose: "To reduce distortions in trade in the Hemisphere and promote and ensure adequate and effective protection to intellectual property rights. Changes in technology must be considered,"[3] sets forth a challenging agenda. Reducing "distortions in trade" while maximizing intellectual property protection remains the focus for most developed economies. Because of this, some proposals outside the foreground of our digital age are in danger of being left behind and left out of any final draft altogether. Subsection B.2.d., the "[Protection of [Expressions of] Folklore]," is one such proposal.[4] This note explores this short subsection in the FTAA's intellectual property (IP) Chapter and the growing likelihood that it will not be incorporated into the scheduled upcoming Agreement. Specifically, because of

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[1] At the first draft of this paper, delegates again met to discuss this important chapter. January 28th through 30th, 2004, were the dates of the Third Issue Meeting with the Participation of Hemispheric Civil Society on Intellectual Property Rights, held in Santo Domingo, Dominican Republic.

[2] For the latest draft of the IP chapter and links to the entire Treaty at the time of this writing, visit the official webpage *at* http://www.ftaa-alca.org/ftaadraft03/chapterXX_e.asp.

[3] *Ministerial Declaration, Objective by Issue Area: Intellectual Property Rights,* Free Trade Area of the Americas, 4th meeting of Ministers of Trade, Annex 2, (March 19, 1998). Link *available at* http://www.ftaa-alca.org/ngroups/ngprop_e.asp.

[4] *See* the current FTAA draft, *supra* note 2. I include the brackets deliberately, as it is written in the current draft, to emphasize the real chance it may not make it further in the negotiation process.

the lack of an accepted definition of "expressions of folklore," because of the still nascent debate on what approach should be taken in protecting it once it is defined, and because of the vagueness of the third FTAA draft itself, the questions overwhelm the possible solutions and will likely table the issue for further debates outside the free trade realm.[5]

The FTAA's Chapter XX itself faces numerous challenges, but the most pressing ones concern the more publicized debates on globalization and modern economic integration or regulation. "The FTAA draft agreement's Chapter on Intellectual Property Rights reads like a 'wish list' for 'special interests' such as Microsoft, the MPAA, and the RIAA. Instead of promoting free trade and encouraging creativity, the proposed agreement threatens to chill speech and create monopolies for a few [United States'] corporations."[6] Some of the more chilling concerns opponents have regarding this "wish list" include proposals to have Internet domain name disputes decided by "a private unaccountable organization" and to expand copyright to include "data and facts."[7] Both of these concerns, however, are not absolutely contrary to American law. The United States ("US") already participates in ICANN, the International Corporation for Assigned Names and Numbers, which most likely will be the body overseeing the dispute resolution process for domain names for the FTAA.

Moreover, although the refusal to protect facts is a cornerstone of American copyright law,[8] the current push for a new, *sui generis*, form of protection for databases is not entirely remote. Lobbyists continue to ask for legislation similar to the European Union's 1996 Database Directive, and with the economic interests attached to this technology, some form of protection will likely take shape.[9] These more publicized economic interests have overshadowed the growing concerns among so-called "developing countries" to protect their indigenous knowledge, cultures, and heritage within the FTAA. Still, because the majority of the delegations to the FTAA are made up of these developing nations, these concerns have found a way to remain in the drafts of the

[5] Furthermore, some observers note that "[t]he U.S. has a very aggressive stance on issues such as government procurement, intellectual-property rights and market access, and is not willing to put on the table things that interest Brazil . . . ." Geraldo Samor & Scott Miller, *Latin America Warms Up to EU in Trade Talks*, WALL ST. J., April 15, 2004, A13.

[6] There are many writings opposing the FTAA available online. This quote is taken from one of the more colorful, the IP Justice website *at* http://www.ipjustice.org/FTAA. This site also contains the entire "wish list" IP Justice opposes regarding this Agreement.

[7] *Id.*

[8] Feist Publications, Inc. v. Rural Telephone Service, Co., 499 U.S. 340 (1991).

[9] *See* Charles R. McManis' *Intellectual Property and Unfair Competition in Cyberspace*, for an overview and discussion of the protection of facts and database producers in America *at* http://www.kafil.or.kr/old_kafil/seminar/t-2001.PDF (last visited March 27, 2004). Given that the purpose of the EU Database Directive, according to McManis, is "to favor European database producers at the expense of their customers and non-EU competitors" coupled with the fact that the U.S. currently "dominates the database market," some U.S. legislative response is plausible despite any current Congressional stalemate. *See also* Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 Fla. L. Rev. 135 (Jan. 2004).

Agreement.[10] The US certainly has not turned a blind eye to these concerns, but when it comes to cultural heritage and traditional expressions of a people, it is quite difficult to place them within the context of US intellectual property laws.[11] One of the obvious difficulties comes in defining what exactly is being protected. As far as "folklore" is concerned, there still remains no wholly agreed upon definition, and because of this, the "Expressions of Folklore" provision has a significant hurdle to overcome if it is to be part of a final drafting. Because of this, defining "Folklore" is a very appropriate place to begin this inquiry.

The Problems of Defining "Folklore"

Although indigenous expressions, heritage, and knowledge have different and sometimes interchangeable names in the legal community, for purposes of this paper and to remain in line with the third FTAA draft, "Folklore" is kept distinct from "Traditional Knowledge."[12] Moreover, the focus of this note includes the intangible forms, such as oral traditions, or folkloric expressions that fall outside the traditional notions of arts and crafts. The American Heritage Dictionary defines "folklore" as the "traditional beliefs, myths, tales, and practices of a people, transmitted orally."[13] The World Intellectual Property Organization ("WIPO") has defined "expressions of folklore" as "characteristic elements of traditional artistic heritage developed and maintained by a community."[14] It also encompasses the individuals who reflect "the traditional artistic expectations of such a community" either through verbal, musical, visual, and active physical expressions such as dance.[15] However, this is not an exclusive definition. As

[10] *Supra* note 2. One interesting example of these concerns is the placement of the rights protected in the Copyright subsection. Currently, "Moral Rights" is assigned to Article 3 under that section. "Economic Rights" make up Article 4. Not surprisingly as quoted in an endnote of the text, "One delegation indicated that they [sic] prefer to place the provisions on moral rights after the provisions on economic rights." As to the identity of this country, it's anyone's guess.

[11] The Department of State handles cultural property and policy and has seen an increase in utilizing legislation such as the Convention on Cultural Property Implementation Act and National Stolen Property Act. *See* Molly Torsen, *Cultural Property Protection: International and U.S. Current Affairs*, for an interesting look at developments in this field. *Available at* http://cyber.law.harvard.edu/bold/devel03/torsentk.html (last visited January 25, 2004).

[12] For traditional knowledge and other forms of indigenous and cultural rights, an excellent starting point is found in the "Traditional Knowledge, Intellectual Property, and Indigenous Culture" Symposium issue of the Cardozo Journal of International and Comparative Law at 11 Cardozo J. Int'l & Comp. L. 239 (Summer 2003). *See also* Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 Am. Univ. L. Rev. 769 (1999); Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPs Game*, 88 Minn. L. Rev. 249 (Dec. 2003); Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 Colum. J. Asian L. 73 (Fall 2003).

[13] Definition from the American Heritage Dictionary online edition *available at* http://www.bartleby.com/61/72/F0227200.html.

[14] *See* Rory J. Radding, *Interfaces Between Intellectual Property and Traditional Knowledge and Folklore: A U.S. Perspective*, *at* http://articles.corporate.findlaw.com/articles/file/00310/008753#_ednref3 (quoting WIPO's study, *WIPO/GRTKF/STUDY/1*).

[15] *Id.*

WIPO notes, "there are many definitions of TK [traditional knowledge] and folklore," and "it may not be possible (or necessary) to develop an all-purpose term."[16] Opponents disagree, and emphasize that a clear definition is likely necessary before protection can be granted. During the 2001 request for comment period to the FTAA text, the International Intellectual Property Alliance ("IIPA") noted "that the inclusion of provisions on folklore in a regional trade agreement is premature."[17] It went on to state the simple reality facing proponents today: "There is no international consensus on how to address this issue."[18]

This lack of consensus is not attributable to a lack of effort. WIPO's definition comes from its *Model Laws*, drafted in 1982, which followed the broad and ambitious *Tunis Model Law on Copyright* of 1976; coincidentally the same year Congress completed its draft of our current Copyright Act. The *Tunis* definition of folklore encompassed "all literary, artistic, and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage."[19] Subsequent attempts to define and protect folklore have been less ambitious, yet the attempted definitions remain broad.[20] Problems may come from the nature of the word itself and exactly what any law would be trying to protect. The most recent attempt at defining this term, the *South Pacific Model Laws* of 2002, equates folklore with "cultural expression."[21] This term does not do much to narrow any of the definitions above but rather reinforces the many questions regarding the protection of this broadly defined form of expression. Unfortunately, the third draft of the FTAA agreement also leaves the term undefined.[22] Can such a wide range of knowledge even be protected, and if so, how? From the early debates of the 1970s to now, there are two basic views on how to answer these questions: (1) implement protection for "folklore" through existing IP laws, or (2) *sui generis* protection.

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[16] *Id.* The term, "traditional knowledge," has come to be focused narrowly on the knowledge of indigenous people regarding medicinal and usually patentable subject matter. However this term, like defining "expressions of folklore" lacks any true consensus.

[17] Michael N. Schlesinger, *IIPA Comments on the FTAA IPR Negotiating Text*, August 22, 2001, *available at* http://www.iipa.com/rbi/2001_Aug22_FTAA.pdf (last visited March 13, 2004).

[18] *Id.*

[19] *See* WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Comparative Summary of Sui Generis Legislation for the Protection of Traditional Cultural Expressions*, Annex April 28, 2003, *available at* http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_inf_3.pdf.

[20] *Id.* After the *Model Laws / Provisions* were released, debate waned, but a resurgence of interest into this topic has seen new proposals, most recently the *Bangui Agreeement* of 1999, *Panama Law No. 20* of 2000, and the *South Pacific Model Laws for National Laws* in 2002.

[21] *Id.*

[22] *Supra* note 2.

Finding a Home for the "Expressions of Folklore" within Existing IP Laws

Congress has the Constitutional power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[23] This is the cornerstone of American IP law, for which all American IP students are familiar. The logic goes that by protecting authors' writings for a set period of time, Congress promotes others to introduce their own works, thus enriching and adding to the pool of knowledge the public can then dip into. In other words, American intellectual property laws do not solely exist to protect economic interests. Yet, the general consensus that has developed places this economic concern squarely as the pinnacle goal of American negotiators.[24] If so, "expressions of folklore," like other "moral rights" may play only a bit part in the final draft of the FTAA agreement, if any at all. Moreover, the problems of "fitting" folklore into US laws are readily apparent without any in-depth discussion of copyright and trademarks.[25]

Not only is folklore itself difficult to define, but the "author" of folklore is equally elusive. American copyright laws can protect anonymous works, but only for "limited times."[26] The biggest dilemma obviously is that folklore, as a deeply imbedded core set of beliefs and expressions, has long since fallen into the public domain. Trademark protection also presents significant problems. "Trademark law is limited by its commercial basis and focus."[27] While symbols and other marks signaling a particular group or tribe can be protected as a "collective" mark,[28] these marks will only remain protected if they remain a "source indicator" for the indigenous tribe. Once the mark fails to do this, any trademark protection is lost.[29] For example, a Native American tribe would be protected with respect to "goods or services to which it affixes the tribal name and currently sells in commerce. This protection could be analogized to the protection given the marks used by guild associations in Europe."[30] However,

[23] U.S. Const. art. I, § 8, cl. 8. *available at* http://www.law.cornell.edu/constitution/constitution.articlei.html#section8.

[24] *Supra* note 6. The IP Justice website points out in great detail the dubious economic concerns of the U.S. FTAA negotiators.

[25] As this paper does not focus on "traditional knowledge," the problems with patents are not discussed. However, the same problems would exist with patents because it derives from the same "Copyright Clause" of the Constitution. Moreover, the "limited times" for patents is much shorter.

[26] *Supra* note 23.

[27] Stephen D. Osborne, *Protecting Tribal Stories: The Perils of Propertization*, 28 Am. Indian L. Rev. 203, 226 (2003/2004).

[28] 15 U.S.C. § 1054 (2003).

[29] Moreover, simply using a mark does not satisfy the requirements for federal protection. One must also show that one "actually used the designation at issue *as a trademark*." Rock & Roll Hall of Fame v. Gentile Prods., 134 F.3d 749, 753 (6th Cir. 1998) (emphasis in original).

[30] Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 Am. Indian L. Rev. 111, 129 (1995/1996).

this does not give the tribe "exclusive use" of any of its marks,[31] and others can use them as long as there is no likelihood of confusion—as seen most publicly through the continuing "Indian Mascot" controversy.[32] Moreover, §1052 of the Lanham Act may prevent registration of "matter which may disparage" or bring into "disrepute" certain names, but again, this does not prevent unregistered use of tribal names by others.[33] The goal of trademark law is to keep the consumer free from confusion, and this goal does not align with indigenous goals to prevent uses of tribal symbols, names, and marks that an indigenous group finds offensive. Moreover, trademark laws will only protect marks that "signal" the people from where the marks came. They will not extend to the songs, stories, and expressions that carry these peoples' traditional cultural expressions.

Still, the Group of Latin American and Caribbean States ("GRULAC") has noted that "[m]any of the protection claims, needs and expectations expressed by the holders of genetic resources and traditional knowledge (including folklore) c[an] be entirely or partly addressed by means of the systems and provisions currently available in the intellectual property field."[34] This may be somewhat true for other countries that make room for this type of protection, specifically Latin American countries who align themselves with a more "*droit moral*" or moral rights approach to IP law, but in terms of American law, this is a difficult sell. At best, copyright protection can only extend to new expressions that utilize folklore already in the public domain. Indeed, the *Tunis Model Laws* make this distinction, protecting new expressions that are "'works derived from national folklore' as original copyright works," while folklore itself, which has long fallen into the public domain and is described as "works of national folklore," receives a special (*sui generis*) type of copyright protection "because they are unprotected by copyright."[35] This split approach seems contrary to the overall goal of garnering a single effective form of protection for all respective traditional cultural expressions, however, and leaves a possibility, questionably at least, whether some new expressions can ever move from current "limited times" IP protection to perpetual cultural protection. This may be the case with *droit moral*, where "the moral right is conceived as perpetual, inalienable, and imprescriptible. In theory, therefore, even today in France, an outrageous stage or film version of [Moliere's] *Le Medecin Malgre Lui* could be challenged and

[31] *Id.*

[32] *See generally* Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 Cardozo J. Int'l & Comp. L. 393 (Summer 2003).

[33] 15 U.S.C. § 1052 (2003). *But see* Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96 (D.D.C. 2003) (holding there was insufficient evidence to show that Washington "Redskins" was disparaging and that the suit was barred by laches).

[34] *Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options,* Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 6th Sess., at 28, *WIPO/GRTKF/IC/6/3*, December 1, 2003.

[35] *Id.* at 12.

subjected to the full range of sanctions for violation of the moral right."[36] Such is not the case with US law, however. As mentioned above, "limited times" protection serves to allow authors to build from a healthy and free pool of public knowledge.[37] Essentially, because of these reasons, no federal IP law proves an easy fit for the problems above. This leaves existing state laws, if any, as a possible fit for this form of expression.[38] Because of the difficulties in fitting "expressions of folklore" into existing IP laws, the *sui generis* approach is the system that carries the most weight, sense, and momentum.

A Sui Generis Approach

Congress tackled the problem of protecting folklore before, specifically in terms of Native Americans. There, it chose to separate folklore from existing intellectual property laws and dealt with it in a more traditional cultural property sense. In 1976, Congress implemented The *American Folklife Preservation Act* ("AFPA").[39] The AFPA extends and intends to cover more than solely Native Americans, however.[40] The Act defines "American folklife" as meaning the traditional expressive culture shared within the various groups in the US.[41] This definition is not so different from the latest working world definition of folklore or "traditional cultural expression" found in the *South Pacific Model Laws* of 2002, discussed above. Because of this, it seems a difficult task for negotiators to convince the US into a draft of the FTAA that recognizes expressions of folklore as IP rights. Indeed, to convince the US into agreement on this issue would most likely require acknowledgment of efforts the US has already made in this realm and an effort to fit protection of folklore into non-IP existing US laws, such as incorporation of language in the American Folklife Preservation Act or other similar US laws.[42]

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[36] 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01 (2002).

[37] *But see* Maureen Ryan, *Copy Fight: Two Veterans of the Internet Wars Debate the Raging Battle over Who Should Control Our Entertainment*, CHI. TRIB., March 28, 2004, sec. 7 pg. 1, at 5. In this interview, Stanford Professor and leading scholar on IP matters, Lawrence Lessig, puts the reality of the term "limited times" succinctly: "[C]reators have been able to build upon the culture around them and that came before them. All of Disney's great work is built upon stuff that was in the public domain. But what we've done under the law is eliminate the possibility of the public domain. Copyrights don't expire anymore. The average copyright term when Disney produced his work was 30 years. The average term now is 100 years."

[38] This also is unlikely because IP issues are normally federal questions, and the only differences between state and federal IP protection exist primarily with the previously mentioned "moral rights" issue, rights of publicity, and trade secrets. Yet, with U.S. compliance to the Berne Convention, the addition of the Visual Artists Rights Act of 1990, and the Federal Economic Espionage Act of 1996, these differences continue to shrink.

[39] 20 U.S.C. §§ 2101-2107 (2003).

[40] *Id.*

[41] 20 U.S.C. § 2102 (2003).

[42] *See* Lucy M. Moran, Note, *Intellectual Property Law Protection for Traditional and Sacred "Folklife Expressions" – Will Remedies Become Available to Cultural Authors and Communities?,* 6 U. Balt. Intell. Prop. L.J. 99, 106-116 (Spring 1998) (discussing possible solutions in protecting

A *sui generis* approach, however, would force parties to step back and redefine the classification of expressions of folklore in general. Professor Rosemary J. Coombe essentially equates protection of cultural expressions and property, not as further legislation of intellectual property rights, but rather legislation of human rights.[43] This characterization may help in deciphering the importance South American countries place in this issue, but at the same time, it increases the likelihood US negotiators will dismiss the provision in an agreement on free trade. Yet, the goals of the FTAA do not solely encompass free trade but also encourage mutual growth and development.[44] Keepers of folklore and traditional knowledge, whoever they may be, generally do not want to prevent expressions of folklore by others completely. Instead, they merely want to gain entrance "into the intellectual property system and to establish, where appropriate, benefit-sharing arrangements consonant with notions of communal, as opposed to individual or private, property."[45] Most of these "benefit-sharing" arrangements occur, if at all, in the traditional knowledge arena. One example occurred in 1991 when the pharmaceutical giant Merck "paid over one million dollars to INBIO, Costa Rica's national institute for biodiversity, to gain access to the country's genetic resources."[46] If a drug developed from Merck's research, there would be a sharing of profits, but it left open "how the indigenous people who help in the selection of plants will be remunerated."[47] In context of folklore, however and to put it bluntly, the view is that the "bastardized commercialization of native and indigenous cultures results in a loss of the cultural and religious significance of traditional culture in the public memory."[48] Certain sacred symbols and beliefs used by outsiders by being incorporated into stories and artwork, the depiction of these images and beliefs outside the ceremonial or oral context in which they were intended to be applied, arguably show the misappropriation of "intangible assets," which now "serve as the primary remaining means of identifying and uniting [native tribes] themselves as a community."[49] Current US intellectual property laws do not

American folklife and general cultural expressions through the American Folklife Preservation Act and The Native American Graves Protection and Repatriation Act).

[43] ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW (Duke University Press, Durham NC, 1998). Chapter Five of this work, "The Properties of Culture and the Politics of Possessing Identity," specifically looks at protecting traditional cultural expression and property, although this theme runs through the entire book.

[44] *Supra* note 3.

[45] Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12 Fordham Intell. Prop. Media & Ent. L.J. 929, 972 (Spring 2002).

[46] Cécile Guérin, *Out of the Forest and into the Bottle*, *at* http://www.unesco.org/courier/2000_05/uk/doss24.htm.

[47] *Id.*

[48] Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 Colum. J. L. & Arts, 277, 294 (Winter 2004).

[49] Amina Para Matlon, *Safeguarding Native American Sacred Art by Partnering Tribal Law and Equity: An Exploratory Case Study Applying the Bulun Bulun Equity to Navajo Sandpainting*, 27

protect these "intangible assets," certainly not copyright law, which by statute requires a "fixed," "tangible medium of expression."[50]

Proposed *sui generis* approaches are not being pulled from thin air but rather from central principles of American jurisprudence, including unjust enrichment, misappropriation, and contracts, as will be discussed more fully below.[51] Additionally, "the trademark concept of geographic appellations of origin, a perpetual right, that can be controlled by the source country" has been proposed as a possible *sui generis* solution.[52] Other possibilities include the previously discussed *moral rights*,[53] a concept slowly creeping into US law, initially through state action but now through the Visual Artists Rights Act;[54] *domaine public payant*, an unlikely alternative that creates essentially a fee-based system for using cultural heritage, a clearance system so to speak; and *authentication marks*, a concept that incorporates attribution and is an approach closest to the one included in the current FTAA draft.[55] These last three possibilities are mentioned only to show the wide range of possible avenues a *sui generis* system might take. However, an accepted new systematic approach in a free trade agreement would most likely have to fit an existing US alternative, not in its IP laws but rather its cultural property principles, folklife protection, or general principles of unjust enrichment to be ultimately accepted.

An initial step in establishing protection of folklore while incorporating general principles of common law can be seen through the so-called *Bulun Bulun equity.*[56] This Australian case involving Aboriginal art started as a straight-forward copyright issue. A tribal artist, John Bulun Bulun, discovered significant portions of his painting, *Magpie Geese and Water Lilies at the Waterhole*, were being reproduced and sold as t-shirts without his permission.[57] The painting incorporated "depiction of a site of great spiritual significance" to his tribe.[58] The cornerstone of this case came with respect to the holding regarding the Ganalbingu People, of which he belonged. The court held that

Colum. J. L. & Arts 211, 220 (Winter 2004).

[50] 17 U.S.C. §102 (2003).

[51] *See supra* note 45, at 973-976.

[52] Ralph Oman, *Folkloric Treasures: The Next Copyright Frontier?*, Association of Teachers and Researchers in Intellectual Property Annual Meeting pg. 7, August 24, 1998. The U.S. does acknowledge "geographic indications" as a protected IP right under Trademark law. *See* 15 U.S.C. § 1054 (2003).

[53] *Supra* note 36.

[54] Additionally, Subsection B.2.c, Article 16 of Chapter XX extends moral rights to "performers." If incorporated, this would broaden U.S. moral right protection, which is currently limited to visual or fine artists. *See supra* note 2.

[55] *Supra* note 2, Subsection B.2.d, Article 1.2.

[56] Bulun Bulun v. R & T Textiles Pty. Ltd., 41 I.P.R 513 (1998). *See also* Matlon, *supra* note 49, who provides an excellent and in-depth discussion of this famous Australian case.

[57] Matlon, *supra* note 49, at 222.

[58] *Id.*

Bulun Bulun owed a fiduciary duty to the traditional owners to guard against infringement of this sacred knowledge and that "if he did not, the custodians had an interest 'in personam' through which they might compel him to preserve the integrity of the community's culture and ritual knowledge."[59] The court recognized two things: (1) tribal customary law and (2) a fiduciary relationship.[60] The setbacks come in the facts that Bulun Bulun was a member of this tribe and had acquired permission from the tribe to use this sacred symbol. The court also stopped short and rejected declaring rights via "communal title, express trust, and [the tribe's] contract claims"[61] While these shortcomings are significant and the fact that most misuse of folklore would come from outsiders, the common law fiduciary duty concept is one avenue deserving of further exploration. Coupled with a growing, albeit slow, acceptance of moral rights by the US, perhaps a constructive trust idea is also a related possibility to consider. These are all questions too involved and complex for this short note.[62] However, the continual push to protect cultural expressions grows, and the US finds itself negotiating extensive economic pacts with countries that hold this issue key. So the inquiry becomes, does the US tackle this concern now in an agreement that supposedly places all the Americas on equal footing, or does it set it aside, further disparaging the proponents who find this type of protection central to their countries' development, discouraging any equal footing with regards to the importance of their cultures and protection of their citizens?

The Vagueness of FTAA Protection

Both existing IP laws and the *sui generis* systems above merely reflect the two main camps in determining how to go about incorporating protection for expressions of folklore. Subsection B.2.d itself does not necessarily endorse either.[63] Instead, it lists general goals and aspirations of its supporters:

> [Article 1. Protection of [Expressions of] Folklore]
>
> [1.1. Each Party shall ensure effective protection of all expressions of folklore and artistic expressions, of the traditional and folk culture.]
>
> [1.1. Each Party shall ensure effective protection of all expressions of folklore, particularly those forms that are the product of the traditional and folk culture of indigenous people and communities, Afro-American and local communities.]
>
> [1.1. Each Party shall protect traditional and popular culture manifested in any

[59] Kamal Puri, Seminar, *Is Traditional or Cultural Knowledge a Form of Intellectual Property?*, *available at* http://www.oiprc.ox.ac.uk/EJWP0100.pdf.

[60] *Id.*

[61] Matlon, *supra* note 49, at 225.

[62] As mentioned before, Matlon's article, *supra* note 49 but also Puri's overview, *supra* note 59, are excellent places to get a more developed analysis of this analysis.

[63] *Supra* note 2. However, the subsection itself stands alone after the Copyright subsection and before the Patents subsection. The substantive sections that precede the Protection of Expressions of Folklore are as follows: Subsection B.2.a covers Trademarks, B.2.b covers Geographic Indications, and B.2.c covers Copyright and Related Matters.

> kind of folklore expression and production, as well as creations of popular art or craftwork.]
>
> [1.2. Each Party shall provide that any fixation, representation or publication, communication or use in any form of a literary, artistic, folk art or craft work, shall identify the community or ethnic group to which it belongs.][64]

This is the entire article, and it is readily apparent that there would have to be a great deal of leeway given to parties in determining how to protect expressions of folklore. No terms are defined and there is simply no guidance as to what "effective protection" might be. Because of the vagueness of this subsection, it is highly likely that when it comes time for a final draft, the parties will simply agree to look into this matter further, politically saving face but substantively brushing aside the above stated concerns. In that light, the use by others of traditional cultural expressions will essentially continue to go unchallenged, and even use with good intentions will raise concerns. Consider an example by Coombe of a Picasso painting: "When a primitive statue, produced in a collectivity for social reasons, makes its way into a Picasso painting, the statue itself may still embody the identity of the culture from which it sprang, but any reproduction of it is legally recognized as the embodiment of Picasso's authorial personality."[65] This is a common occurrence in the arts, as painters and artists often find uses for sources in the public domain. Still, the example raises legitimate concerns. "Royalties flow not to the statue's culture of origin but to the estate of the Western author, where the fruits of his or her original work are realized for fifty years after death.[66]

The FTAA supposedly will bridge economic gaps that exist between developing and developed countries. Certainly, there is one inherent gap in the example above; however, is there anything *per se* wrong with this? If put into context of the Expressions of Folklore subsection itself, Article 1.2 requires attribution to the group from which this expression was taken. Practically, it is difficult to see this happening. First, something in the public domain does not require attribution because it belongs to all. However, the growing concerns of "developing" nations really have fostered a push for "cultural nationalism."[67] This leads to an interesting question of whether there is only one public domain, or are there multiple cultural domains that come with rights to keep intruders, so to speak, out? This may seem a trivial question but it is one way to look at the concerns expressed by the proponents pushing for this type of protection. Second, the method of attribution itself is vague in the draft. Like everything else in the section, it leaves open completely how minutely or how broadly any attribution would have to be. Could it be as simple as including the indigenous tribe's name in the work, for example, in the title of the painting above? Or does

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[64] *Id.*

[65] Coombe, *supra* note 43, at 225.

[66] *Id.* U.S. protection extends for 70 years after death currently. *See generally* 17 U.S.C. §§ 302-305.

[67] Coombe, *supra* note 43, at 224.

it require a complete disclaimer?[68] Beyond concerns of attribution is the free use of a cultural icon for commercial gain. While the Picasso example above may not be a commercial enterprise, it certainly has economic repercussions.

A closer and recent example of freely using cultural icons and expressions signaled a victory for indigenous peoples, but reinforced the shortcomings of the lack of an international consensus on handling this issue. In 2001, popular toy maker Lego dipped into the legends of the Rapa Nui for a new game and product line entitled "Bionicle."[69] Of course, the legends of Easter Island and the Rapa Nui people are plentiful and fascinating. Admittedly, Lego "borrowed" names from Polynesian culture in building its story of six heroes fighting for peace on the mythical island of "Mata Nui."[70] Subsequently, the Polynesian Maori tribes of New Zealand challenged Lego's use, obtaining a small victory as Lego apologized and partially withdrew the game, pledging "to draw up a code of conduct to govern the way it uses folklore to spice up its toys."[71] However, the game is still available in the US and any challenges here would most likely have proved difficult. There are no "attributions" found on the game or the Lego site itself.[72] Geographic indicators might be available as one avenue to explore, yet the names have been changed so they do not falsely indicate any actual source or place, currently or historically. As far as trademarks are concerned, these are not likely to confuse and are not misleading as to its source. Copyright protection does not extend to names but only to the overall expressions or story, which Lego would hold because the myths have fallen into the public domain.[73] We are only slowly embracing droit moral, and US protection here is currently limited to visual artists. Given these possibilities, this partial victory of the Maori shows the need for more international consensus on this issue and likely "a code of conduct to govern" the way folklore is used. This is the main problem of the current draft of the FTAA. It seems to completely defer "effective protection" to each country itself. Because of the lack of consensus dealing with this problem, the US can much more easily dismiss this specific subsection as "premature" and overbroad.[74]

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[68] This last possibility has led to interesting scenarios. One Canadian discussion thread opposing the FTAA joked, "I'd love for the Pagans to sue Hallmark for not attributing the Easter bunny to them," *at* http://www.digital-copyright.ca/discuss/442.

[69] Andrew Osborn, *Maoris Win Lego Battle*, THE GUARDIAN, October 31, 2001, *available at* http://www.guardian.co.uk/print/0,3858,4288446-103681,00.html.

[70] *Id.*

[71] *Id.*

[72] The official Bionicle site is *available at* http:www.lego.com/eng/bionicle/default.asp.

[73] *What Does Copyright Protect?, at* http://www.copyright.gov/help/faq/faq-protect.html.

[74] *See* Schlesinger, *supra* note 15.

Conclusion: One Small Step Forward is Still One Step in the Right Direction

Despite its shortcomings and vagueness, the US should not merely set this tiny subsection aside. Though small, the subsection can be a significant step into building future international consensus. The Sixth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore meets in Geneva in March 2004. Among its scheduled discussions, the Committee plans to lay out "Practical Steps for Setting Overall Directions," including steps in establishing "how national systems would interact with each other to provide regional and international protection, through bilateral, regional or international legal frameworks."[75] The current FTAA draft, though vague, is rather simple as it essentially leaves open the scope of protection to each individual country and asks the US to do two things: "ensure effective protection of all expressions of folklore" and require attribution to the original cultural group when using its folklore. Both are difficult positions—the latter, because of our deep interest in maintaining the concept of one free public domain. The former, however, seems daunting but may be possible if the US is willing. The phrase "all expressions" seems a significant undertaking, but as discussed before, the US already sets aside protection of its own folklife. Recognition of the folklife of other nations would not require a complete overhaul of existing US laws. Moreover, the broad leeway in ensuring "effective protection" is free for the US to interpret. Still, as the sunset approaches in the debates and the time for ratification draws nearer,[76] the actions of the US in securing individual free-trade pacts do not encourage those who would support the current draft of the FTAA.[77] Moreover, another danger, especially for those in IP, is an agreement that is kept from the eyes of the public.[78] Still, the US has never expressed outright opposition to protection of expressions of folklore. At most, it emphasizes instead the growing concerns of the digital age. Yet, the other negotiating nations refuse to leave the issue of folklore and traditional knowledge behind. While traditional knowledge takes

[75] *WIPO/GRTKF/IC/6/3 supra* note 32, at 51.

[76] *Free-Trade Meeting Postponed for Third Time*, WALL ST. J., April 2, 2004, A7 (recognizing the current impasse negotiators face and noting "the 34 nations already have agreed to drop their goal for a more ambitious accord and focus on a so-called 'FTAA-lite'").

[77] Michael Schroeder, *U.S., Australia Reach Free-Trade Agreement*, WALL ST. J., February 9, 2004, A4 (noting that "U.S. trade officials said they planned to separately negotiate a trade agreement with 13 of the 34 nations taking part in the Free Trade Area of the Americas talks).

[78] *See* Medecins Sans Frontieres [Doctors Without Borders], *Open Letter Concerning Intellectual Property and Access to Medicines in the U.S.-Central American Free Trade Agreement ("CAFTA")*, (October 15, 2003) (regarding the lack of public disclosure for the recently signed CAFTA agreement. "The draft text of CAFTA has not been made public, so it is impossible to provide an informed analysis of the IP provisions proposed in the agreement. However, IP provisions in other bilateral free trade agreements [e.g. the U.S.-Singapore agreement] are clearly TRIPs-plus, and these are consistent with proposed provisions in the Free Trade Area of the Americas agreement), *at* http://www.cptech.org/ip/health/trade/cafta/mcf10152003.html.

up a bulkier part of Chapter XX of the current FTAA draft and has more consensus and economic weight to work with,[79] the subsection for the protection of folklore does need a lot of work. Most likely, its current form will not find its way into a final agreement. However, if countries can somehow negotiate and work the subsection itself into the final draft, no matter how limited, it will be a significant step towards recognizing this issue as an important one for the 21st century. As more countries join the global digital age, it is imperative that the US take a step back and find room for these countries' cultures and folklore, not in order to assure these peoples' IP rights, but in an effort to acknowledge their dignities, histories, and growing contributions to this digital age.

[79] *Supra* note 2. Subsection B.2.f covers Traditional Knowledge. *See also* Homere, *supra* note 46, at 292 (noting "Traditional knowledge has been used as a significant source of commercial research, as well as a starting point for product development in the areas of medicine and pharmaceuticals [e.g. herbal treatment, medicinal plants and botanical medicine], agriculture and horticulture [e.g. recipes, farming and fishing techniques], toiletries and cosmetics. It is estimated that seventy-four percent of the 119 plant-based compounds used in pharmaceutical medicine worldwide have used traditional knowledge as a starting point towards the development of the compounds").