Dear Joint Standing Committee on Treaties,

I am writing to you to submit some comments towards the future ratification of the Australia-United States Free Trade Agreement, herein The US FTA, due to be scrutinized in the House of Representatives at this coming semester. I hope my comments will aid the Joint Standing Committee on Treaties to reach a fair judgment of what is best interest for Australia. This submission does not represent any legal advise or legal consultation, it is a work of research into the realm of law only.

Analysis of the AUS-USA Free Trade Agreement US FTA, Chapter 17 for further impacts on the Aboriginal Knowledge and future domestic legislation in Australia

In a brief overview, this submission will only consider the US FTA, Chapter 17, articles 17.1:General Provisions, (6) National Treatment,(7); 17.12:Transparency; 17.2:Trademarks, including geographical indications (1); 17.2(11); (12),(v),(B); 17.4:Obligations pertaining to Copyright, (4),(a),(b),(i),(ii); 17.4:(6),(a),(i) full transfer of ownership; 17.9: Patents(3); (5), (6); 17.10:Measures Related to Certain Regulated Products (1), (a), (1) and (2) and article 17.11: Enforcement of Intellectual Property Rights; . The article 17.10 is especially related to marketing and collect of subject-matter to be sent to the United States jurisdiction.

This is not an extensive report, but rather an array of highlights that should be considered before the US FTA ratification can take place between Australia and

United States. Other chapters from the US FTA will not be scrutinized, as it is not my intention to present a full and extensive study.

Yet, in my concise study I could draw some conclusions and expose some problems for IP law in Australia, especially for forthcoming legislation in the topic. In presenting my observations to Australian legislators for exercising a prudent look ahead, it does not follow that I am advocating against a free trade in a bilateral agreement. I am rather providing more argument for further discussion as well as awareness for legal consequences still to be unveiled. For me, a clear outcome would be a weak Copyright Amendment (Moral Rights for Indigenous Peoples) Bill 2004[i] and a massive commodification of aboriginal works in the near future. I do not concur that Australia and United States have the same scope and goals towards IPRights legislation for being State members of US FTA Treaty, as it is presented for public scrutinity.

Indisputably, implications in co-related areas as environment, land and water will apply with the US FTA ratification to the extend that divergent opinions concerning appropriate use of public land appears to be more frequent between aboriginal and non-aboriginals. The current submission of determinations of native title land shall be affected by US FTA as cultural rights will be closely related to the ownership of native titles, for instance, in the trademarks associated with geographical areas. Strong limitations may also apply to copyrights protection for aboriginal works in Australia and in the United States. The US FTA provides a favorable combination of

circumstances for impairing aboriginal ownership concerning cultural works by imposing the classical utilitarian approach largely appreciated in United States to the copyrights law in Australia.

Moreover, US FTA will also affect indirectly the land rights for indigenous peoples due to the inexistent communal copyrights unforeseen in the bilateral treaty. Further, in this study, we trace certification or label of origin with native title determination. The latter is affected by the non-existence of the former.

In the domestic context, Australian States will face a dilemma: either to legislate according to the previous promises to their electorate, including their indigenous voters or to replace old legislation – Native Title Amendment Act – with US FTA articles and obligations regardless of individual opinions. For aboriginal populations, it will certainly send a message of uncertainty for their rights as minority community.

Introduction

Facts

In regard to the free trade, no one can possibly argue that it is a burden for any State to enjoy free trade for its goods with new or important markets. Adam Smith has properly advocated for the freedom of the market, and until some time ago people believed that markets would behave just like that – free and adverse to control by regulations. Somehow the world became so sophisticated that policy-makers and regulations have different public strategies and interests. Then, the creation of multilateral organizations came into existence in order to put some certainty and order in the international commerce among States.

Undoubtedly, one of the reasons for having a main role in the economic stage for institutions such as The World Trade Organization, herein WTO, is in connection with outstanding implications of international commerce into State domestic budgets such as export and import of goods, licensing (especially with technology products), dumping proceedings, which can potentially increase or decrease the wealth of a country, so harmonization of rules is advised among member States. The major role that the WTO plays with member States evolved gradually for global trade and related matters to increase certainty in the trade relations, including private dispute resolution for member States within WTO auspices for issues arising out of these trade relations.

Later, in embodying services and technology in the international trade, a new organism called General Agreement on Trade in Services, herein GATS, was created at the Uruguay Round. At the same meeting a major set of obligations for Intellectual Property Rights among member States was agreed upon called Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, herein GATT/TRIPS.

Despite of so many initiatives among States, international trade has impacted adversely public interests such as food, environment, labor, public domain which once were exclusively jurisdiction of other United Nations organisms like FAO, UNEP, ILO or WIPO. Environment and moral rights such as copyrights once related to the private and public interests have been unfavorably undermined by multilateral trade agreements and particularly by bilateral treaties concerning trade.

To the surprise of minority stakeholders such as indigenous people, issues like Environment and Intellectual Property Rights often come into the trade agenda, and become part of worldly-wise contracts drafted by experienced negotiators from the Executive branch as a tool for a leverage in the bargain power for trade. Indisputably, less surprised are the stakeholders from corporations and policy makers, in opposition to the indigenous people directly affected in their traditional land. Unlikely most non-aboriginal citizens, aboriginal citizens celebrate the land and waters as their habitat. At the end of the day, there is a mismatch of interests for parties involved.

In the Evolution of Contracts to Agreements

Inside the private law, the theory of contracts has evolved through many changes towards allocation of risks since *Kruger v. Wilcocks and Others,* Hilary Vacation, 27 Geo. II, 12 March, 1754[ii]. Contracts have also evolved quite substantially and being more sophisticated it does require from contract players a more complex array of information and skills before any future commitments are arranged. The parties set goals to avoiding compulsory risks or uninvited future obligations. The main question is how to set an array of duties with a fair correspondence into obligations for both interested parties. That is a challenge for contractual attorneys daily in their business. It is also a dispute for legislators in carrying their legislative business, as well. It does certainly request more consideration and attention from the parties in a bilateral agreement, too.

Clearly, the multilateral and bilateral treaties, conventions or agreements are not an alien legal construction for contracts theory, but rather multilateral or bilateral treaties mirror the contracts in a large correspondence for citizens obliged to fulfill their duties before the International Law. Therefore, whichever the outcome is negotiated in a contractual relationship, the result will abide parties for the duration of the contract. In a treaty perspective, for as long as the States are into the agreement, citizens will be affected by it.

US FTA Analysis

Having said that, the US FTA, chapter 17 may arise concerns for Australian legislators. I have been examining the draft of the Australia-United States Free Trade Agreement, herein US FTA, signed by the Australia and United States and due to ratification after discussions in the House of Representatives and the Senate scrutiny. I did find some interesting points detailed below to address to the Joint Standing Committee on Treaties on the Free Trade Agreement between Australia and the United States of America.

Most of the copyright duties to be fulfilled in the future of US FTA will impair directly the upcoming legislation of communal copyrights for Aboriginal People – the Copyright Amendment (Indigenous Communal Moral Rights) Bill 2004 due to be voted next Autumn sittings. If the Copyright Amendment (Indigenous Communal Moral Rights) Bill 2004 aims to bring for aboriginal people cultural rights regarding copyrights for communal works such as paintings, drawings, sculptures, oral narratives recognizing them as communal owners, that cannot be achieved with the US FTA as it does harmonize sole ownership in opposition to communal ownership.

Consequently, at the cost of importing legislation into Australian territory, there exists a strong possibility that the delicate balance between aboriginal and non-aboriginal citizens rights will be struck down in Australia allowing the bundle of

rights once granted to indigenous communities to be in disarray. If there is any doubt on this matter, let allow me some highlights from US FTA.

The first major concern has arisen from article 17.1 (6)[iii]. The article 17.1.(6) bestows the equal protection to American and Australian citizens, which is imperative to be party in a fair US FTA as well as it is a principle set by the Agreement on Trade Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods, herein GATT/TRIPS, Part 1, article 3 as well as for the Paris Convention for the Protection of Industrial Property, article 2.

Before the GATT/TRIPS principle, a common rule was the mutually and reciprocally advantageous arrangements among member States (GATT, preamble, in 1947), later converted to treatment no less favorable than to its own services according to GATS, article XVII, to finally include nationals of State members of the GATT-TRIPS Uruguay Round Agreement, Part 1, article 3. In a first look, that evolution is attractive for member States as fair trade implies equality in treatment for citizens from both countries. If nationals have the same array of rights, with the same scope and goals, it makes legislation easier to achieve a fair treatment for States and interests involved.

In the case of Australian intellectual property law, copyright law has been developing a limited but constructive rules adapted to have moral rights entrenched for citizens. On the other hand, it is well known that moral rights doctrine prevented once the

United States to sign and ratify the Berne Convention[iv], and when the ratification came, the American legislation imposed considerable legal restraints applied for moral rights to be part of the 1976 Copyright Act. In ratifying the US FTA as it is presented in the draft, embodying national treatment for Americans and Australians broad limitations to the moral rights do apply for Australian citizens, especially for aboriginal citizens in the domestic law.

BRIEF CONSTITUTIONAL REVIEW

First of all, the US FTA does incorporate a lessen moral rights and a definitive burial of communal rights for aboriginal people, as American copyright law does not have provisions for extensive understanding of moral rights, especially communal rights for Native American Indians as a minority group. The Native American Indians have their own customary law and sovereignty recognized by Treaties, however, customary law is not incorporated into common law jurisprudence neither in the legal statutes[v]. Therefore, federal legislation does not provide any special consideration – moral rights for tribes – and for legal issues arisen from Native American Indian dealings. Rather, the US legislation and above al the United States Constitution bestow equality among citizens and the incentive for inventions for the public welfare. As a result of it, the copyright law makes no distinction among Americans. It could be no different as copyrights are embodied in the United States Constitution[vi]. It must prevail the equality among citizens, therefore the Framers did not bestow any discriminatory rights in the American Magna Carta bedrock.

Having said that, the observation that immediately arises for me is regarding the recent Australian History that has been challenging the predominant legal view of *res nullius* theory since 1992. In Australia, the Commonwealth of Australia Constitution Act, the equivalent of United States Constitution in Australia unites the Crown, the States and their people, for bestowing rights and obligations[vii]. However, it does not express any equality among subjects in their Preamble but rather permits States to legislate for its people provided that it does not confront with the Commonwealth of Australia Constitution Act[viii]. It does certainly leave enough interpretation to bestow rights to aboriginal comunities as minority people related to the IPRights, especially copyrights.

Further, the Commonwealth of Australia Constitution Act assigns the power to the Parliament to make legislation in diverse matters including copyrights, patents and designs as well as other variegated topics such as quarantine[ix]. It does follow that the IPRights are not vested into more importance than other rights for the Parliament to legislate. The utilitarian view of IPRights is rather comprised in the Commonwealth of Australia Constitution Act as any other matter. It is not distinctive and part of national policy empowering *Congress to define the scope of the substantive right* as in the United States Constitution, article I, section 8, clause 8 declares *to Promote the Progress of Science and useful Arts.*

INTELLECTUAL PROPERTY RIGHTS IN AUSTRALIA AND UNITED STATES

How the US FTA will accommodate such demands for IPRights from first inhabitants of Australia? Or better, will the US FTA allow the domestic legislation to circumvent aboriginal people claims for special IPRights protection by compromising the forthcoming legislation of moral rights? There must be the case as one can seldom see the future legislation – Copyrights Amendment (Moral Rights for Indigenous Peoples) Bill 2004 to survive with any communal rights if the US FTA is ratified by Australia. Once an advantage to be minority in Australia, it can be a burden at the end of the day.

Copyrights – in the domestic and international law for Australia and United States

It is well-known that in the United States does prevail the most utilitarian approach of copyright law in place, although it has been changing quite substantially lately. Nonetheless, it has never been a classical approach that grants moral rights *per se,* but rather values the utilitarian view of copyrights law. In spite of having ratified the Berne Convention, including article 6 bis, it does not follow that moral rights is substantially identically in aim of the Berne Convention within United States

territory.

In the 1976 Copyright Act, the applicability of section 106A, sub-section (a), rights of Attribution and Integrity, which is Title 17, from the United States Code, detailed the limited situations applicable to the relevant moral rights section for visual arts, which sort of works will be granted the copyright protection, the effective date to start the copyright protection and does also state in its wording that the rule is *ex tunc* or non- applicable to works of visual arts before the date of the enactment of the 1976 Copyright Act. That makes works fixed previously from the effective date to be potentially lacking moral rights protection[x].

Regarding the transfer and ownership of copyrighted work, sections 201, (d), 202 of the 1976 Copyright Act allows third parties apart from blood or marriage connection to receive ownership and to share it separately[xi].

Still, in the case of limited moral rights protection, if this is also applicable for Australian jurisdiction, a substantial array of interests in fixed work will be scrutinized for copyright protection availability under the US FTA, and eventually the destiny of moral rights for fixed works will follow the limitations of the 1976 Copyright Act. It does seem rather unlikely to put the argument in so harsh perspective, however, having in mind that most of the aboriginal expression is not yet fixed and will be subject to the new copyright protection within the US FTA, we should have restrictions to the application of moral rights in Australian legislation, as

well.

That consequence is not attractive to aboriginal people already aspiring and making commitments to a new piece of legislation that would convey a positive message for their IPRights creation. In analogy to the past, the US FTA creates another opportunity to strip down indigenous potential rights to come into existence. At the same token, the theory of *res nullius* enabled the British Empire and Australia to avoid recognition of any rights for the first in-habitants, the forthcoming treaty might be curtailing them, as well. It is indeed a high price to pay for a free trade, I must say.

One must also remember that due to the utilitarian view, the copyright law and jurisprudence in the United States is towards and heavily influenced by mechanisms of free entrepreneurship, which makes American corporation law one of the most advanced in the developed world. Fully developed corporation law is the main reason why copyrights can be assigned within American jurisdiction first to corporations and it does rely on the principle of rewarding the creator regardless whichever material form. If the creator is a non-human entity that is not a barrier for the American copyright law[xii].

In the Australian copyright law, for instance, there is a non-exemption hypothesis in article 32, 4 of the Copyright Act 1968 for having copyrights first assigned to corporations, as it is a *qualified person* eligible for copyrights grant. Therefore, the Australian copyright law does not provide that legal circumstances, nonetheless, the

US FTA will demand the same treatment for nationals, which does certainly include the US corporations as nationals.

In Australia, the classical copyright approach has been encroached with distinctive portion of moral rights, as I illustrated above. Despite of not having any provision of inherited copyrights, Australian copyright law still has protection for moral rights, for instance, as the protection of the work as an extension of author's personality. Before the Copyrights Amendment (Moral Rights) 2000[xiii], the right of attribution of authorship was fully incorporated for human beings. After the Copyright Amendment 2000, moral rights are clearly still assigned for human beings, not for corporations. That is a non-typical circumstance originated in Australian copyright law – the protection for author's rights arisen from the materialized expression in a common law jurisdiction. It does certainly leave room for disenfranchised people, as the aboriginal people to advocate for their IPRights, as an extension of their personality and controling their materialized expression.

Still in the US FTA, the nationality reciprocity is another issue up to be negotiated – what would be the implications of section 84 (b) from Copyright Act 1968 in regard to the same 17.1.(6)?[xiv] One must know that this section claims that the first owner of a copyright must be a natural person, unless it is a work for hire. It does not follow the same argument for United States copyright law as the copyright ownership is silent concerning this topic. Rather, when are works for hire, the employer, which most of the time is a corporation, is the copyright-owner. Yet, in regarding this

interference and apparent detail of ownership it does nevertheless demand further investigation from Australian legislators.

In assigning as first copyrights-owner a corporation, we can have a hardship and a shift towards utilitarian view in copyright law in Australia. Having said that, it is fact that quite many aboriginal communities which live below the poverty line in the Australian territory shall be subject to a commodification of their works. It does not necessarily follow that they will have the best price to sell off products, but rather a leverage in the first negotiation. After US FTA ratification, it will be quite feasible to have corporations approaching these communities to purchase never compiled works for first assignment of copyrights. In having the nationality safely secured by the terms of the US FTA, corporations will be able to be first copyright-owners overriding the non-exemption rule from Copyright Act 1968, article 32, (4).

As first copyrights-owners the bargain power will shift gradually to establish a cultural expressions monopoly for companies for a duration period *of after 95 years from the year of first publication of a work, or a period of 120 years from the year of its creation, whichever expires first.*[xv] The most impressive observation from this change of circumstances is allowing misappropriation of Australian culture in derivative works, for instance, in displaying works at the Internet, in opposition to the public interest[xvi]. Also, the change of circumstances has to be noted for advances in technology as cultural works can be shared at the Internet reaching an expressive part of globe's population. In becoming private interest it is rather improbable whether

culture shall be accessible for education and creation purposes for the public at large[xvii].

In connection to the corporate influence, public interests such as aboriginal works have certainly a significant chance to be commodified and reserved to a wealthy public able to possess a culture monopoly. It is a tendency observed in United States since the advent of the Internet and other technologies. Those concerns of Internet privatization have been lately a major preoccupation for American IPRights scholars. Thus, to better illustrate what is worrying American legal scholars lately is the balance of monopolies such as from giant corporations in opposition to the free flow of expression and information to the public domain of ideas that hardly survives in the American IPRights those days. Clearly, US FTA provides fertile field for nurturing more monopoly than public interests striking down the balance for a reasonable term for copyrights monopoly. In response to the privatization, one can argue that copyrighted work can eventually be shared with the public eye. It has always been a possibility that the purchaser later donates the copyrighted work for a museum or an institution of education, but it is not a guarantee and is not enforceable.

One must bear in mind that the public domain is the threshold for enhancing future innovations for global society. If the information becomes increasing private, stretching the duration of terms for copyright protection it does follow that the public interest is becoming less important than the monopoly for copyrights and patents, which is not attractive for the marketplace of ideas. The private appearance of

IPRights has been gradually curtailing the people's right to spread information and education over the Internet. The privatization therefore enables the socio-economic gap to expand consistently between educated and illiterate people in a matter of years. The best test to illustrate the public interest relinquishment is the Sono Bono case[xviii] and the Eldred versus Ashcroft case[xix] still under intense debate in the legal arena in the United States.

The 1998 Sono Bono legislation mirrors the 1976 Copyright Act, however, with a slight difference of granting extension to created works, acting as a retrospective statute. Consequently, the release of copyrighted works for the public domain did not come into existence. The Eldred case originally initiated against Attorney-General Reno has been decided in 2002, under Attorney-General Ashcroft included interesting oral arguments. The duration of copyrights for retrospective works - ex tunc – has been intensively criticized in thiss case due to the chilling effect on First Amendment rights and Copyright Clause protection. In the oral arguments, one has a slight idea from the readings that the Supreme Court scrutinized deeply the bargain power for creators and for the public inscribed into the Copyright Clause illustrating the concerns of public domain disappearance. The test was divided between Framers intention and the repetitive enactment of legislation to extend copyright protection for content-owners.

In regard to the indigenous peoples, public domain is particularly important as it is not desirable to have indigenous works dissipated into the public domain. As I have

stated before, indigenous works are attached to their creators as a question of holistic approach. Unquestionably, this issue does not come into play if there is no copyrights available for aboriginal communities in the first place. Conversely, if there is a possibility for further extensions of copyright for indefinitive time according to the findings in the Eldred case, it may become a policy in Australia that aboriginal people can pledge for further extensions of their copyrighted work[xx]. In this particular case, US FTA would bring indefinite copyright protection, which is unexpected good news for aboriginal people. Conversely, aboriginal comunities would be subject to trade policies, particularly in the US FTA context, instead of having certainty of their IPRights in the domestic legislation.

Therefore, the price of the exclusion for indigenous people (utilitarian view) is connected to the price of self-determination deterioration (moral rights disappearance). It does also follow that the US FTA Treaty is a high price to be paid after the Reconciliation period. In the long run, it will produce a disarray of this delicate balance gradually attained by non-aboriginal and aboriginal communities. Again, it might be essential to further inquiry the US FTA ratification consequences for Australians citizens and the trade-offs for aboriginal communities before any obligation abide the parties.

For aboriginal citizens, which by force of customary law, do not incorporate the idea of reward or better economical value for cultural works, but rather a claim to be owners of their own creation, US FTA will enforce the commodification of art.

In being Australians citizens, aborigines will expect the upcoming legislation Copyright Amendment (Moral Rights) 2004 to come into existence for no moral rights. It would be particularly difficult to enforce moral rights as communal rights due to the US FTA 17.1.6. obligations, due to the abided rules that subject member States to further penalties under the WTO dispute resolution panel.

In exploring moral rights in this adverse context, and having in mind the ratification of US FTA as future certainty – how communal rights will be implanted in Australia jurisdiction or how to enable them to come into existence after the US FTA is ratified? The communal rights recognition for IPRights is not a new demand from aboriginal communities as we pointed out earlier in this submission. Additionally, it has a long History of political-jurisprudential conflicts since the Mabo case (1992)[xxi] to make it possible for aborigenes to enjoy land rights plus celebrate their culture. The adjustment of Australian domestic legislation to the US FTA obligations does not appear to occur.

Additionally, the US FTA will demand from any aboriginal work to be registered compulsorily, so the subject-matter will enjoy legal protection within the US FTA, according to its article 17.1, (12)[xxii]. It will also require from Australian Copyright Office to register peremptorily every aboriginal work within two years after ratification is reached to accommodate the US FTA binding articles. It is well-known that copyright protection is independently achieved within Australian borders,

declining apparently a compulsory registration. Similarly, it does demonstrate that Australian Copyright Office shall be subject to the same rules of US Copyright Office. Conversely, it will apply to Australians the rule of imperative registration of copyrighted work as in United States in order to enable equal treatment between parties.

Furthermore, the additional compulsory registration will demand an extra cost for human resources as more staff members skilled in the art and information for IPRights holders benefit might be employed, particularly, extensively awareness for aboriginal people regarding their copyrights in the international stage. Accordingly, it does also inflict a surplus cost for tax-payers, which might be not fully aware of the benefit-cost relationship of the US FTA. In employing more permanent staff, the Australian Government must allocate budget to pay staff wages plus tailored made information for aboriginal citizens.

Australian Jurisprudence and related legislation

No one could disregard the importance of the landmark case Mabo versus Queensland (number 2) in 1992. Since Mabo, Australia has shifted the understanding of minority and race by striking down the *res nullius* theory, so widespread in the International Law as well as incorporating the existence of native title for aboriginal people. Indeed, Australian indigenous law did attract the attention of many legal scholars around the globe, especially after the Bulun Bulun case[xxiii] for an original

moral rights copyright law merged into trustship theory. The subsequent legislation to come – Copyrights Amendment (Moral Rights for Indigenous People) Bill 2004 – aiming to accommodate Intellectual Property Rights for indigenous communities is certainly a novelty in the international statutes.

One must also remember that in the whole south hemisphere, we have only two developed countries with common law heritage legislation for indigenous peoples interests, particularly, Intellectual Property Rights lately: Australia and New Zealand. So far, we are interested in the Australia contribution to the debate.

After Mabo, some cases came into light for a test in the High Court of Australia as well as new legislation – commonwealth and state law - were enacted to protect the new owners of native title rights. Before Mabo, aborigines would be subject to Australian domestic policy regarding land. After Mabo, aboriginal people could proudly stand up and demand some participation in the legislative business that would affect their connection to the land and the preservation of their culture. The Wik case[xxiv] gave an opportunity to organize aboriginal communities in official organizations for claiming native title determinations and gave another step to clarify to non-aboriginal people that aborigines should be invited to negotiate before the commercialization of their land. It took some discussions in the political arena, some of them could be easily remembered as emotional for most Australians, notwithstanding that, it has unfolded a time for reconciliation between non-aboriginal and aboriginal people.

These cases open avenues for the Native Title Amendment Act (1993)[xxv] and further Amendment to this Act, which supplied native title protection to aboriginal communities with a claim land determination to be subject to examination at the Federal Courts or a step further at the High Court of Australia. The goal sought by claim land determination is to be registered at the National Native Title Register to offer certainty on ownership for aboriginal communities. After ownership title, aboriginal communities have been able to re-organize themselves for preserving their traditional culture, including materializing their expression.

Some native title determinations are still under way to be proceeded by courts[xxvi] and could be affected directly by US FTA ratification that requires two years to have appropriated legislation for IPRights in Australia. At first, it seems quite unlikely that land rights for aborigines could be affected by US FTA and even indirectly influenced any copyrights rights for aborigines, although that is such the case.

In regard to communal rights or any copyrights for indigenous populations to be determined and granted the trademark of geographical origin, which is called geographical indication for trademarks experts[xxvii], is crucial to single one community from another for markets purposes. For accomplishing an identity for indigenous works a label of certification is another proof of authenticity and origin, which is the connection with the traditional land, at last.

In the case of label certification, for instance, where the geographic area does matter for being protected at US FTA level, the determination of native title is vital for ascertaining the products originated in the region. It links the indigenous community with their land and culture. One can certainly connect with the land, if they have a land title, which guarantees ownership and certainty in the realm of personal property. In selling or distributing their artistic works, aboriginal people can be recognized by their region, by their piece of land. However, native title determination claims are still on their course to be resolved at courts and it is pacific among stakeholders that years will pass until all native title determinations will be scrutinized. That factual situation conflicts directly with article 17.2(1), article 17.2(11) and 17.2(12),(v),(B)[xxviii] from US FTA. Then, trademarks that depend on geographical designation shall pose an issue before US FTA, as some may be depending upon future native title determinations.

The article 17.2:1 defines the requirements for eligibility into Trademarks, including geographical indications, particularly, footnote 17.5 defines what a geographical indication is for the purposes of US FTA[xxix]. For much of my dismay, it includes the previous connection with the land, which is attached to the native title claims still in course.

In article 17:2:(12),(v),(B), there is an implicit requirement to have a previous record of aboriginal works to achieve legal protection under the US FTA and to better guarantee fixed works before the native title determination is decided by courts.

Conversely, aborigenes might have a difficult task to establish a connection to the geographical origin of their products and their traditional land in the absence of native title determination. A good illustration for trademarks of geographical origin is the region of Champagne in France that produces the champagne beverage. If you are not a local living in that region for a duration of time described in the French law, you are not permitted to explore the famous liquid. At the international treaty level, that is the understanding for having a trademark of geographical origin, which is a consequence of the importance of the market and the consumer's good faith in acquiring a product from a particular region in the globe. As a result of this, aboriginal communities shall be impaired to explore their association with their traditional land and link their product with it.

PATENTS

In the Australian patent law, some changes in the current legislation shall be made within two years. In article 17.9 (3) and (5)[xxx], a major shift towards private interests is relevant to illustrate in detail.

Further, in article 17.9 (6) and 17.10,(1), (a), 17.10 and (2)[xxxi] the theory of trade secrets shall have a space in the Australian legislation, however, lacking the jurisprudence and substantial reflexion in advantages and disadvantages to have trade secrets in Australian IPRights as it was the case for United States. In the context of the bilateral agreement and trade secrets, pharmaceutical and biotechnology companies will have a support from the bilateral treaty to enable the transport of

patentable subject-matter for marketing purposes and demonstration of use overseas avoiding direct control of the invention. The article 17.9 and 17.10 enable misappropriation of patent-subject matter[xxxii]. It is indeed a very unsafe and not desirable hypothesis for missing the novelty requirement for further patent grant.

The viability of useful subject-matter overseas requires more security and control over the number of people and circumstances surrounding the invention for future patentee preservation of patents rights, which translates as reasonable precaution for preventing disclosure. How are we to control and manage people and transportation, if we are in another jurisdiction? Cases of misappropriation of trade secrets in United States are not rare as any search for this specific jurisprudence in legal databases can illustrate to us.

In Australia, there is no trade secrets law in place and neither jurisprudence to guide Australian legislator, but rather confidential information theory. In a case of Australian misappropriation of patentable subject-matter, courts would be faced with new legislation and a new treaty or delegate to the court entitled to know the matter to decide. A classic question comes to my mind: which court will be the chosen one – the court where the misappropriation occurred overseas, by my first example, or the trade secret holder country of birth? The results of a court decision can be rather distinguished in Australia and United States jurisdiction.

In the international arena, the Convention of Biological Diversity[xxxiii] signed and

ratified by Australia can be invoked to safeguard indigenous peoples rights, however, it must be open scrutinized by Australian legislators how the Convention of Biological Diversity will operate for aboriginal people as United States has not ratified this particular treaty. Therefore, the US FTA will impose obligations for Australia, but the counterpart will not be obliged by CBD as Australia is.

Similarly, article 17.11, (2) General Obligations for enforcement of Intellectual Property Rights in a common language to the member States for the US FTA, it seems quite interesting such a declaration defined in a bilateral treaty for Australia and United States, as those countries share the same language background, unless article 17.11,(2) was refering to especifically to the aboriginal language. Either one can argue that this declaration is regarding aboriginal customary law in Australia – which involves the aboriginal communities and organizations – or it does convey a message of harmonization of courts between the States involved. Yet, the whole article seems to propose the harmonization of legal procedures for courts. However, it is quite puzzling to read *national language* in the US FTA[xxxiv] context.

CONCLUSIONS

Either the solution shall rest on better drafting the US FTA for these articles 17.1:General Provisions, (6); National Treatment,(7); 17.12:Transparency;

17.2:Trademarks, including geographical indications (1); 17.2(11); (12),(v),(B); 17.4:Obligations pertaining to Copyright, (4),(a),(b),(i),(ii); 17.4:(6),(a),(i) full transfer of ownership; 17.9: Patents(3); (5), (6); 17.10:Measures Related to Certain Regulated Products (1), (a), (1) and (2) and article 17.11: Enforcement of Intellectual Property Rights for enabling a new forthcoming legislation regarding Copyright Amendment (Moral Rights for Indigenous Peoples) Bill 2004 for indigenous communities to be enforceable among Australian States and further to be protected under the US FTA.

If a re-drafting of articles is not an option available in the negotiation process, another solution shall be to present reservations or declarations to the US FTA, particularly to the articles illustrated in this submission. This outcome may not be attractive to neither of the parties involved in the US FTA. However, it might be an option to be negotiated and pursued for enhancing aboriginal peoples future IPRights protection.

Researcher Ana Penteado (on private capacity)

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[i] *The Copyright Act (Moral Rights for Indigenous Peoples) Bill 2004* has been released as an exposure draft for a limited number of interested organizations and Australian citizens. Nonetheless, I should be citing this piece of legislation, regardless of being not published and I have not researched the content of this Bill before. I am assuming that this Copyright Amendment will come into existence to challenge the status quo of the legislation in place in Australia. Otherwise, there would be no interest to propose an Amendment to the Copyright legislation in place, particularly, to the Copyright Act 1968. In searching the Copyright Law Branch of the Attorney-General's Department, published at the February issue 2004, a reader can be informed that: "The Attorney-General's Department is continuing to work on amendments to the Copyright Act which will give effect to "Indigenous communal moral rights". The proposed amendments were incorporated into an Exposure Draft Bill that was developed late last year in consultation with the Department of Communications, Information Technology and the Arts and the Department of Immigration, Multicultural and Indigenous Affairs. The proposed amendments have been listed for possible introduction in the Autumn Sittings of the Commonwealth Parliament. *The Exposure Draft was released on a limited basis to identified interests. Responses are currently being examined and where considered necessary changes will be incorporated into the legislation for introduction".* In <http:/www.law.goc.au/www/enewscopyrightHome.nsf/>.

[ii] *Kruger v. Wilcocks and Others, Hilary Vacation, 27 Geo. II, 12 March, 1754*, the case was reported in the English Reports as *Kruger v Wilcocks, 1754*, 96 ER 905. Also, I cited in *Comparing Law: Factoring legal frame in Brazil and United States,* (unpublished) produced for the late Professor Stefan Riesenfeld for my LL.M. Candidature at University of California at Berkeley, Boalt Hall in 1996. The court drew the rights and obligations of a factor due to the absence of law to guide the court regarding the risks imposed on factors.

[iii] This article states the national treatment to citizens from both countries. It is apparently a ratification of the principles declared at GATT/TRIPS, which is originated from the national treatment principle from the original *GATT – The General Agreement on Tariffs and Trade* from 1947, see <http://www.wto.org/english/docs_e/legal_e/legal_e.htm> and <http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm>. One can always argue that was a principle imported directly from the *Paris Convention* (1886), article 2, though. See, <http://www.wipo.int/clea/docs/en/wo/wo020en.htm#P193_31984>.Notwithstanding that, GATT/TRIPS expands to citizens the protection once bestowed to the States only. It is a major impact today when one thinks that the Internet is used by individuals around the world, regardless the legal boundaries involved. If web related issues shall come into a separate treaty, however, I have a strong opinion that The World Trade Organization will be the depositary of any Internet Treaty that would come in the future, as the Internet is considered a trade convenience. Neither WIPO, nor United Nations would be the depositary, which impact negatively on public interests aspects.

[iv] *The Berne Convention for the Protection of Literary and Artistic Works* (1886),completed in 1896, revised (1908, 1928,1948,1967,1971 and amended in 1979. See, <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>. According to the WIPO Archive, The United States of America became party to the Berne Convention on March 1, 1989, apparently not exercising the faculty of reserving some articles from Berne Convention, or using the article 30 for Reservations from Berne Convention. Nevertheless article 6bis applies in a very special fashion in the Copyright Act of 1976, article 106A, (e), (2). The Berne Convention applies *in totum* for Australia, which signed on April 14, 1928 and ratified on March 1, 1978.

[v] See, The Avalon Project: *The Treaty of Greenville of 1795*, articles 6 and 7. This project is funded by Yale University, New Haven.<www.yale.edu/lawweb/avalon/greenvil.htm >.

[vi] See, *The United States Constitution,* Article 1, section 8, clause 8: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries". See, <http://www.house.gov/Constitution/Constitution.html>.

[vii] See, *The Commonwealth of Australia Constitutional Act 1900* the Preamble of the Constitution gives the drawing of the Commonwealth, which reminds me of the social contract theory envisionated by Jean-Jacques Rousseau. Copyrights, Patents of Inventions, designs and Trademarks are listed as attributions for the Australian Parliament to legislate, according to Chapter I – The Parliament, Part V- Powers of the Parliament, 51, XVIII. See, <http://www.aph.gov.au/Senate/general/Constitution/chapter1.htm>.

[viii] See, ibidem, Chapter V, The States, Section 109 "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extend of the inconsistency, be invalid. If you make a link with Powers of the Parliament, Chapter I - The Powers of the Parliament, XXVI, aboriginal people could be subject to special legislation at the Parliament due to their special circumstance. Therefore, the race does not make them equal and the Australian law permits to be deferred for them a special status before the law for their future existence.

[ix] See, ibidem, quarantine, Chapter I, section 51, IX has a higher hierarchy as it comes before than copyrights and related IPRights, Chapter I, section 51, XVIII.

[x] See, *Copyright Act of 1976* as Amended, 17 U.S.C.A., sections 101-810;1001-1010. Article 106A Rights of certain authors to attribution and integrity, (e) Transfer and Waiver (2), which is subject to applicability and effect of Section 610, (b), published L. n. 101-650, Title VI, section 610, 104. Basically section 610 does impose limits for applicability of moral rights. See, *Selected Statutes and International Agreements on Unfair Competition, Trademarks, Copyright and Patent*, 1996 Edition, on page 135, from Paul Goldstein, Edmund W.Kitch and Harvey S.Perlman, in 1996 at The Foundation Press, Inc.at Westbury, New York.

[xi] See, *Copyright Act of 1968*, section 32, (1); (a); (2), (d), (e) and 4, which defines the requirement for being a qualified person for Copyright Law in Australia. In the Copyright Act 1976, third parties are not mentioned towards their qualifications, or being necessarily Americans citizens. Then, transfer of copyrights in Australia apparently is more restricted, except for joint-works according to section 82. See, <http://www.scaleplus.law.gov.au/html/pasteact/0/244/top.htm>

[xii] See, *Copyright Act of 1976* as Amended, 17 U.S.C.A., section 101, Definitions, of "copyright owner" and "transfer of copyright ownership", both definitions do not limit for any qualified persons to be copyrighted owner and to transfer the copyright right. See, also, at the same legislation section 201, 202 and section 203, 204, 205 for obligatory recording of copyright ownership at the Copyright Office. See, reference above, pages are 123, 188 and 189.

[xiii] *The Copyright Amendment (Moral Rights) Act 2000*, originally introduced in June 1997 as part of the Copyright Amendment Bill 1997 information gathered from <http://www.dcita.gov.au/Article/0,,0_1-2_12-3_460-4_15599,00.html>.

[xiv] See, *Copyright Act of 1968*, section 84, for qualified person, other than a body corporate that has to be an Australian corporation, which apparently for me means that it must not be a foreign corporation. For US FTA, on 17.1.6.

declares the national treatment for both nationals. One concludes that American corporations are exempted to incorporate their assets in Australia soil due to 17.1.6 principle. See, <http://www.dfat.gov.au/trade/negotiations/us_fta/text/17_IP.pdf>.

[xv] That is a direct quote from Title 17, Copyrights, Chapter 3. Duration of Copyright: Works created on or after January 1, 1978., Section 302, (e) from U.S.C.S. According to LEXIS NEXIS and approved last March 19, 2004.

[xvi] This utilitarian approach for privatization of the Internet has been in the international agenda for drafting a separate Treaty for webcasters, as webcasters are nothing more than Internet users. This information of including a separate Treaty for the Internet was shared at the conference called *"Current Issues in Broadcasting Law"* by speaker Chris Creswell, from the Attorney-General's Department, one of the major negotiators for Australian Government for Intellectual Property Rights in the WIPO. See, also for more information on this event, organized by The Intellectual Property Research Institute of Australia – IPRIA - one of the centers of The University of Melbourne, Law School at the website <http://www.law.unimelb.edu.au/cmcl>.

[xvii] Interesting to cite **Eric Eldred, et Al., Petitioners v. John D. Ashcroft, Attorney General, 01-618, 537 U.S. 186 (2003)** in 2002 U.S. TRANS LEXIS 47,* Brief Amici Curiae – Oral Arguments. The oral arguments in the proceedings were supported by Eldred's counsel senior attorney, Stanford Law Professor Mr. Lawrence Lessig, transcribed by Alderson Reporting Company, Inc., which I will quote on page 6: "(...)MR.LESSIG: Justice, that's right. If only we had the Framer's copyright before us, because of course, again remember, the exclusive right the Framers spoke of was the right to print and publish. It didn't include the derivative rights, it didn't include the display rights, and it certainly –QUESTION: Right. It has expanded very much, and they also envisioned a very sshort term, and I can [*17} find a lot of fault with what Congress did here ---MR.LESSIG: That's right.QUESTION: --- because it does take a lot of things out of public domain that one would think that someone in Congress would want to think hard about."(...). Now, compare with General Olson's testimony, for the same oral arguments, which I will quote from page 12: " (...)QUESTION: With the exception [*34} of a limitation which illustrates the distinction between forever on the one hand and a definite number on the other, is there any limitation in the clause? Does the promotion, does the preambular recitation of promotion as such place limit on it?GENERAL OLSON: I submit, Justice Souter, that there's no per se limitation, that if there is, as Justice Scalia suggested, for --- if it is true that Congress, having specified 14 years or 28 years, decides that doesn't work very well because of the economies of other countries, the parade of constraints on artists in other countries, the reasons that we want things to be preserved or distributed, it should be 2 more years, or 5 years later –QUESTION: Yes, but that argument would apply to new copyrights, but to extension of already existing copyrights your argument doesn't apply." The exchange of thoughts in the proceedings by parties makes one wonder how the duration of copyrights will apply for international bilateral treaties, as the Petitioners failed to convince the Supreme Court and lost the case.

[xviii] *The Sono Bono Copyright Term Extension Act* enacted on October 27, 1998, easily accessed from the search engine Google at the website <http://keytlaw.com/Copyrights/sonybono.htm>. For expecific information regarding the reprospective effect of Sono Bono Copyright Term Extension, see <http://www.en.wikipedia.org/wiki/Sonny_Bono_Copyright_Term_Extension_Act>, which one can easily infer that corporations have been preoccupied in losing their copyrights for the public domain, for instance, the celebrated cartoon character is one of the examples that this website is refering to.

[xix] See, footnote XVII above for a full reference of this case.

[xx] The argument for further extension regardless the term is a very powerful one, however, it has to be negotiated upfront that this oportunity exists for Australians, according to the national treatment principle. See, footnote XVII and XVIII.

[xxi] This is a reference for the landmark case in Australia jurisprudence **Eddie Mabo and Ors v The State of Queensland [n.2], (1992), HCA(Unreported, Mason, McHugh, Brennan, Deane, Gaudron, Dawson and Toohey JJ, 3 June, 1992).**

[xxii] See, *Australia United States Free Trade Agreement*, easily retrieved from Australian Government Department of Foreign Affairs and Trade< http://www.dfat.gov.au/trade/negotiations/us_fta/text/index.html>. In article 17.1(12) the transparency principle is presented along with the requirement for having a national language and written documents for the efficient sharing of information for both parties involved and its nationals.

[xxiii] See, **John Bulun Bulun v R & T Textiles Pty Ltd. (1998).**

[xxiv] See, **Wik Peoples v Queensland (1996).**

[xxv] See, *Native Title Act 1993* and *Native Title Amendment Act 1998*. In the context of other legislation, land rights for aboriginal people has been conceived for land rights workability in Australia, See, these legislation and others in the Guide to Mediation and Agreement Making in the <http://www.nntt.gov.au/metacard/files/Mediation_guide/contents.html> site of the National Native Title Tribunal.

[xxvi] See, the website of National Native Title Tribunal, in the Register of Native Title Claims (RNTC), one can research on thr Geographic Extent of Claimant Applications as per Register of Native Title Claims. To summarize, there exists 513 Claimant Applications filed prior to the *Amendment to the Native Title Act* (1998) waiting to go through the registration test and 509 Claimant Applications that are to be determined and be awarded the determination of native title as latest accurate data from March 31, 2004. <http://www.nntt.gov.au/publications/data/files/Claim_register.jpg>

[xxvii] See, *The Paris Convention*, on article 10, 1 and 2, especially 2. This article declares that the interested party can sue

the owner, merchant , producer, manfacturer that commercializes a good which is falsely attributed to a region or source. Australia and United States have ratified this portion of the Paris Convention without any reservation.

[xxviii] See, *the US FTA*, article 17.2:(1) declares that each party to the Treaty should provide the region and the marks for having the protection as geographical indications. The article 17.2.(11) declares that harmonization of the trademark system for contracting Parties are another goal for thr US FTA. For last, article 17.2.(12), (b), (v), (B) declares that if in any case the trademark (which can be an insignia, a simbol of a flag, a drawing from aboriginal people, for instance) has been used in good faith overseas, it can be refused by Patent Office of both countries. That makes me wonder if any sign from aboriginal origin has not been used abroad, which can perfectly the hypothesis to pursue harmonization for geographical indications with double caution.

[xxix] See, this particular footnote at US FTA to concur with me that geographical indication definition at the US FTA for aboriginal signs or insignias and related are not included, or at least one has to make an intellectual legal stretch for having them as well protected by US FTA.

[xxx] This article provides ground to accept all sort of organism and genetically modified organisms as well as the controversial human organisms, unless article 17.9.2 from US FTA would apply restrictively. The boundaries will be very limited to refuse a patent, according to article 17.9(2) related to exclusion for patentability. For my knowledge, Queensland has been the only State to have drafted and enacted legislation regarding this matter.

[xxxi] I have a concern towards having a patentable subject-matter being handled and displayed overseas or in a manner that diminish the effective control for the potential patent applicant over the patentable subject-matter. In a event of dissemination of information, either ilegal or in an innocent circumstance, I have a deeply concern how misappropriation will be examined by courts as trade secrets law is not applicable in Australian jurisdiction, which means in a US court an argument that not enough care to keep the trade secret or better the confidential information was not pursued by the potential patent applicant.

[xxxii] The marketing of a new pharmaceutical product and overseas demonstration is a cause for concern as third persons can disclose the trade secret of this particular invention.

[xxxiii] See, *the Convention of Biological Diversity*, particularly, article 8(j), which is related to preservation and maintenance of knowledge and conservation of biological diversity and benefit-sharing for traditonal knowledge custodians. Regarding the CBD enforcement, Australia has signed and ratified on June 05, 1992 and ratified on June 18, 1993. Conversely, The United States of America has signed on June 4, 1996 and not yet ratified it. In the website of United Nations Environment Programme -UNEP- Convention on Biological Diversity <http://www.biodiv.org/world/parties.asp> lastest update on March 30,2004.

[xxxiv] One can argue that national language excludes the words or signs applied to a trademark or a copyright if they are written in the aboriginal language. Out of this context, it is rather interesting to have this national language article within the US FTA content.