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Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Co-modification of Culture

DANIELLE CONWAY-JONES*

I.
Our own people
say, "Hawaiian
at heart." Makes
me sick to hear
how easily
genealogy flows
away. Two thousand
years of wise
creation bestowed
for a smile
on resident non
natives.
"Form of survival,"
this thoughtless inclusion.
Taking in

* Associate Professor of Law and Director of the Hawai'i Procurement Institute, William S. Richardson School of Law, University of Hawai'i at Mānoa. At the outset, I must disclose that I am non-Hawaiian and am approaching this Article as a student learning about Kanaka Maoli. I was fortunate to be a participant in the planning of Ka 'Aha Pono '03: Native Hawaiian Intellectual Property Rights Conference. I wish to thank 'Ahahui O Hawai'i, Vicky Holt Takamine, Ilio'ulaokalani Coalition, and Papa Ola Lokahi for supporting my efforts to contribute this Article. I would like to thank Dean Aviam Soifer for his leadership and my research assistants for all of their diligence—thank you Okechukwu Dike, Matthew Eaton, Brandon Ito, Jason Woo, and Amanda Allen. Finally, I must recognize a young woman, R. Hōkūlei Lindsey, Esq., who masqueraded as my student but really served as my Alaka'i and hale aikāne. For all of her support, teaching, patience, research assistance, and friendship, I profess my respect and admiration.

foreigners and friends.
Dismissing history
with a servant's
grin.

II.

Hawaiian at heart:
nothing said
about loss
violence, death
by hundreds of thousands.
Hawaiian at heart:
a whole people
accustomed
to prostitution
selling identity
for nickels
and dimes
in the whorehouses
of tourism.

III.

Hawaiian at heart:
why no "Japanese
at heart?"
How about
"haole at heart?"
Ruling classes
living off
natives
first
land
then
women
now
hearts
cut out
by our own
familiar hand.

*Haunani-Kay Trask***

** Professor Haunani-Kay Trask supplies interpretive notes to her collection of poems. She explains: "[I]n contemporary Hawai'i, the phrase 'Hawaiian at heart' is used by Hawaiians and non-Hawaiians alike to identify non-Hawaiians thought to believe and practice Hawaiian cultural values like aloha 'āina – love of the land – and aloha – a familial love and caring."

INTRODUCTION

Information is the most precious form of commodity in the 21st century. Because information and its developmental infrastructure are so critical to the post-industrial Western society, protection of the rights of those who hold information becomes a central tenet of progress. Nowhere is protection of information more pronounced than in the field of intellectual property. In this age of information, intellectual property ownership shapes America's regional, domestic, and foreign policies. Western intellectual property laws dominate the global landscape.¹ The purpose of this Article is to present what I learned when everything I knew about Western intellectual property law came into contact with Native Hawaiian traditional knowledge. My observation is this: the domination of Western intellectual property law over western markets should not extend to the traditional knowledge and cultural heritage of Native Hawaiians. To be clear, this Article is not asserting that all intellectual property protection regimes are flawed; rather, this Article expresses a non-Hawaiian's observation that protection of Hawaiian traditional knowledge and cultural heritage has to emanate from a *sui generis* system originating with Native Hawaiians, not from Western intellectual property laws that promote the "commodification of culture," one of many remnants of colonization.²

Professor Trask continues with a more substantive explanation: "the tourist industry uses [this phrase] to lure visitors to Hawai'i and to congratulate those who return. The two groups who control Hawai'i's land and politics – the Japanese and the haole (white) – consciously use 'Hawaiian at heart' to describe their actions in the hopes of conveying some relationship to the land. In reality, the phrase is cultural theft." See HAUNANI-KAY TRASK, *LIGHT IN THE CREVICE NEVER SEEN* 64-66 (2004). I admit to engaging in "Hawaiian at Heart" at the beginning of the planning process of Ka 'Aha Pono '03 and have since learned that true and honest participation in a movement requires an open mind and an open heart to appreciate the lessons taught by the collective.

1. "Most intellectual property law models are based on Western, capitalist philosophy, and indeed appear to be developed with such a worldview in mind. The mere fact that works of intellectual creativity and innovation, so-called 'works of the mind,' are granted the status of protectable individual property itself represents a Western view." Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229, 246-47 (1998).

2. Colonization refers to the exercise of manifest destiny by large Western and European nations, like Great Britain, France, Germany, and the United States. Manifest destiny is described succinctly as the extension of a nation's domain by conquering hundreds of weaker nations. Hawai'i fell victim to American manifest destiny. Budnick explains:

To obtain cheap labor and natural resources for industrialization, European nations extended their domain by conquering hundreds of weaker nations from the late 1800's until the early years of the 1900's. In Africa, Asia, and in the Pacific region England added five million square miles of new territory with 88 million people, while France added more than three million square miles with 37 million people. . . . [American

As an initial matter, when academics speak of traditional knowledge or folklore of Indigenous Peoples, they speak of genetic resources, indigenous creations, indigenous practices, and possibly oral accounts of spiritual stories.³ Interestingly enough, whenever Western academics come together to discuss this topic, they usually find themselves speaking to each other without the benefit of attendance and participation of traditional healers, cultural practitioners, and elders.⁴ Even more interesting is the heavy emphasis by many academics on the significance of trade and trade related aspects of traditional knowledge and folklore.⁵ Typically, the conversations engaged in by

manifest destiny inspired the Mexican-American War and the illegal overthrow of the Hawaiian government and the later annexation of Hawai'i.]

England, France, and Germany built empires from smaller and weaker Pacific islands, which they colonized and controlled militarily, economically, and culturally. The missionaries usually came first, followed by soldiers, merchants, planters, and other settlers. . . .

As a result of these colonizing intrusions, hundreds of thousands of Pacific Islanders died from the white man's diseases, alcohol, and genocide. . . . In the competitive desire for world trade and the political conquest of new territory, every imperialistic nation would protect its own interests.

See RICH BUDNICK, *STOLEN KINGDOM: AN AMERICAN CONSPIRACY* 42-43 (1992).

3. Definitions of "folklore" and "traditional knowledge" abound. For illustrative but by no means exhaustive lists, see STEPHEN A. HANSEN & JUSTIN W. VANFLEET, *AMERICAN ASSOCIATION FOR THE ADVANCEMENT SCIENCE, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: A HANDBOOK ON ISSUES AND OPTIONS FOR TRADITIONAL KNOWLEDGE HOLDERS IN PROTECTING THEIR INTELLECTUAL PROPERTY AND MAINTAINING BIOLOGICAL DIVERSITY* 3 (2003); *infra* note 4; Daniel J. Gervais, *Spiritual But Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, 11 CARDOZO J. INT'L & COMP. L. 467 (2003).

4. Application of a Western intellectual property regime converts traditional knowledge and cultural heritage into a commodity even though a culture itself does not engage in commercial transfer of information. See Robert K. Paterson & Dennis S. Karjala, *Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous People*, 11 CARDOZO J. INT'L & COMP. L. 663, 664 (2003) (discussing commodification of intangible cultural property).

5. For example, academic treatment of Indigenous Peoples' intellectual property rights often turns to methods by which to apply the Western regime to traditional knowledge, even by authors who acknowledge the incompatibility of the two worldviews and the dangers of attempting to mix them. See Gervais, *supra* note 3 ("Traditional knowledge and intellectual property seem irreconcilable, and this has prompted several authors to ask for *sui generis* protection. . . . [W]e will not address the wisdom or feasibility of *sui generis* protection, but look at the current legal framework and possible adaptation thereof to the needs of sacred traditional knowledge holders."); see also HANSEN & VANFLEET, *supra* note 3, at 4 (outlining the precise application of the major aspects of the Western intellectual property regime and providing worksheets for Indigenous Peoples to use in order to form a strategic plan for protecting traditional knowledge, even though the authors recognize that Western "regimes have focused on protecting and promoting the economic exploitation of inventions with the rationale that this promotes innovation and research. . . . [Western intellectual property law] is based on notions of individual property ownership, a concept that is often alien and can be detrimental to many local and indigenous communities."); Lauren [sic] Guttenplan Grant, *The Protection of Traditional or Indigenous Knowledge*, SE61 ALI-ABA 15 (2000) (identifying that the Western intellectual "paradigm is considered by many to be inadequate to protect many forms of traditional knowledge because property rights created by this system are used as a way of managing commercial transactions and not designed to protect cultural expressions," and answering her framing question "How can

these groups of Western individuals or organizations focus on one of several goals: defining folklore or traditional knowledge from a Western perspective; providing model protections for traditional knowledge from a Western perspective, presumably under existing intellectual property regimes; protecting traditional knowledge or folklore collections owned by Western art museums and other dealers in antiquities; balancing the economic and research needs of multinational corporations and their governments with the asserted rights of Indigenous Peoples in their traditional knowledge; and protecting traditional knowledge in the face of widespread and continued efforts at globalization.

These efforts may seem necessary to the education of those in control of the Western intellectual property regime when considering how Western policies of intellectual property ownership impact Indigenous Peoples, but in observing the protocol and practices of Native Hawaiians, these efforts are irrelevant to Native Hawaiian responsibility to protect and perpetuate traditional knowledge and cultural heritage. In fact, the more time and effort spent on analyzing methods to converge Western intellectual property regimes with Indigenous Peoples' traditional knowledge just brings more attention to the issue that any attempt at convergence creates a breeding ground for the commodification of culture and, thus, magnifies the reality that Western intellectual property laws promote economic and cultural oppression.⁶ From an observer's perspective, to do justice to the issues and concerns facing Native Hawaiians and the world's Indigenous Peoples in the information age, it is imperative that the rhetoric and discourse for protecting and safeguarding traditional knowledge be cast in terms of the Native Hawaiian and Indigenous Peoples' worldviews, not from the Western perspective, which idolizes trade, individualism, and radical free markets.

traditional or indigenous knowledge be protected?" through copyright law, moral rights, trademark law, unfair competition law, consumer protection laws, federal statutes protecting tangible property, patent law and model statutes; her analysis of possible *sui generis* protection is relegated to the "other forms of protection" section at the end of her analysis); Long, *supra* note 1, at 279 (not surprisingly, advocating the dominant Western intellectual property regime because "despite the potential for misuse in supporting the commodification and de-culturalization of native and indigenous culture, properly crafted and enforced intellectual property laws may not only meet the protection demands of foreign investors but can actually shield a country's cultural heritage against the leveling forces of globalizing de-culturalization.").

6. See R. Hōkūlei Lindsey, *Reclaiming Hawai'i: Toward the Protection of Native Hawaiian Cultural and Intellectual Property*, UCLA INDIGENOUS PEOPLES' J.L. CULTURE & RESISTANCE 110 (2004).

The purpose of this Article is to promote a Hawaiian-centric view of the protection of traditional knowledge and cultural heritage. This Article supports the proposition that the Hawaiian worldview and narrative are essential to responding to questions regarding the governance, use, and protection of traditional knowledge and cultural heritage.

Part I explores the meaning of traditional knowledge and cultural heritage according to the Native Hawaiian narrative. This part also supports the proposition that Native Hawaiian traditional knowledge and cultural heritage practices facilitate the protection of Hawaiian land through the assertion of self-determination. Part II describes the Native Hawaiian relationship to Hawaiian land and the significance that the relationship has to Native Hawaiian protection of traditional knowledge and cultural heritage. Part III describes the significance of political status and self-determination to the safeguarding of Native Hawaiian traditional knowledge and cultural heritage.

Part IV describes the harms exacted on Native Hawaiians as a result of the commodification of culture, specifically, harms to health, the environment, and sustainability. The Conclusion extends the discussion from the previous sections to explore the conflicts between the Native Hawaiian responsibility to protect traditional knowledge and cultural heritage, and the radical free market forces that promote global capitalism and free trade in the commodification of Indigenous Peoples' culture while simultaneously restricting the same market forces from operating on the Western intellectual property owned and controlled by captains of industry. This Part will explain the corporate hypocrisy caused by the commodification of Hawaiian culture by private sector corporations, while these same corporations erect strong Western intellectual property protections to prevent all others from misappropriating corporate claims to ownership of intellectual property. Finally, this Article ends with an observation that non-Hawaiians must be made to respect the worldviews of Native Hawaiians and Indigenous Peoples in their fight to repel misappropriations of their traditional knowledge and cultural heritage in accordance with Native Hawaiian and Indigenous Peoples' protocols.

I. DESCRIBING TRADITIONAL KNOWLEDGE
ACCORDING TO THE NATIVE
HAWAIIAN NARRATIVE

It is either obvious or lost on the reader why this piece does not begin with a definition of intellectual property; instead the observations in this Article will attempt to approach each topic with a critical look at issues from the Native Hawaiian or Indigenous Peoples' narrative.⁷ Attempts at defining traditional knowledge necessarily raise artificial and sometimes erroneous barriers around the practice of traditional knowledge. In some instances, definitions by their very nature can limit traditional knowledge and cultural heritage to a list of categories. For example, Stephen Hansen and Justin W. VanFleet offer a general definition of traditional knowledge. They state that traditional knowledge includes

mental inventories of local biological resources, animal breeds, and local plant, crop and tree species, . . . practices and technologies, such as seed treatment and storage methods and tools used for planting and harvesting, . . . belief systems that play a fundamental role in a people's livelihood, health maintenance, and environmental protection and replenishment.⁸

In many respects, Hansen and VanFleet present a comprehensive definition of traditional knowledge, which provides insight into the contributions that Indigenous Peoples have made and will continue to make to their communities as well as to the larger global society. In another respect, however, categorical definitions result in limitations

7. "[E]very culture has certain metaphors that are understood only within that culture." LILIKALA KAME'ELEIHIWA, *NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI?* 4 (1992). Professor Kame'eleihiwa masterfully explains, by interpreting Greg Dening's *Islands and Beaches*, which explores critical distinctions between "metaphor" and "model," the following:

Metaphors are those things, those phrases, those customs, a kind of language . . . that only members of a particular group understand. [Thus,] if an outsider comes to modern Hawai'i and tries to write a history of these islands, but doesn't know all the metaphors, then that outsider will write what he or she thinks might have happened - according to his or her understanding. Such a history would be based on a model of outside, non-Native metaphors, and might include an entirely inaccurate description of [the Native history]. . . . [A]ny historian must be careful not to assume that his or her model, which is based on the metaphors of the historian's culture, is the same as the people being written about.

Id. at 5.

8. HANSEN & VANFLEET, *supra* note 3, at 33. The authors explain that traditional does not imply that knowledge is old or non-technical in nature, but traditionally based. Traditional is used here to explain that the knowledge was created in a manner that reflects the traditions of communities and the ways in which these communities create, preserve, and disseminate knowledge.

and static perspectives about the power and purpose of traditional knowledge. From observing discussions about the practice of traditional knowledge from the Hawaiian narrative, definitions are reduced to levels of insignificance and should be replaced with the Hawaiian worldview that the practice and protection of traditional knowledge are an assertion of self-determination.

Indigenous Peoples regard their very existence as linked or related to other life-systems,⁹ yet this relatedness is not considered alienable. Lindsey explains that

because self-determination is about a peoples controlling their own destiny, essential to the exercise of the right to self-determination is the "right [of Indigenous Peoples] . . . to control, develop, and protect [their] sciences, technologies, and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, and visual and performing art."¹⁰

Native Hawaiians have organized their responses to the application of principles of Western intellectual property concepts and norms to what is customarily considered their traditional knowledge and cultural heritage.¹¹ Specifically, in the *Palapala Kūlike O Ka 'Aha Pono Paoakalani Declaration*,¹² the Indigenous Peoples of Hawai'i have asserted that "Kanaka Maoli [Native Hawaiians] have the right to self-determination and, by virtue of that right, Kanaka Maoli freely determine their political status and freely pursue economic, social, and cultural development, which includes determining the appropriate use of their traditional knowledge, cultural expressions and art-forms, and natural and biological resources."¹³ The *Declaration* continues with the following expression:

9. DEBRA HARRY ET AL., INDIGENOUS PEOPLES COUNCIL ON BIOCOLONIALISM, INDIGENOUS PEOPLES, GENES, AND GENETICS: WHAT INDIGENOUS PEOPLE SHOULD KNOW ABOUT BIOCOLONIALISM 21 (Indigenous Peoples Council on Biocolonialism ed., 2000), available at <http://www.ipcb.org/publications/primers/htmls/ipgg.html>.

10. See Lindsey, *supra* note 6, at 114 (citing U.N. Doc. E/CN.4/Sub.2/1994/56 (1994); *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/56 art. 3 (1994) [hereinafter 1994 Report]).

11. See Lindsey, *supra* note 6, at 114 (explaining that long before the Paoakalani Declaration, Kanaka Maoli have organized to protect their culture from exploitation and misappropriation).

12. See *Paoakalani Declaration*, Ka 'Aha Pono '03: Native Hawaiian Intellectual Property Rights Conference, Waikiki, Hawai'i, Oct. 2003, app. A (reprinted in Appendix A of R. Hōkūlei Lindsay, *Responsibility with Accountability: The Birth of a Strategy to Protect Kanaka Maoli Traditional Knowledge*, 48 How. L.J. 763 (2005), at <http://www.ilio.org/Ilionline/ahapon04/Paoakalani%Declaration.pdf> [hereinafter *Paoakalani Declaration*]).

13. See *id.* at 2.

Safeguarding Hawaiian Traditional Knowledge

Our culture is living and evolves over time with the Kanaka Maoli peoples. The embodiment of Kanaka Maoli identity manifests in both traditional and contemporary artforms and cultural expressions. Authenticity, quality, and cultural integrity of Kanaka Maoli cultural expressions and artforms are, therefore, maintained through Kanaka Maoli genealogy.

Kanaka Maoli traditional knowledge encompasses our cultural information, knowledge, uses, practices, expressions and artforms unique to our way of life maintained and established across Ka Pae 'Āina Hawai'i since time immemorial. This traditional knowledge is based upon millennia of observation, habitation, and expression and is a communal right held by the lāhui and in some instances by ohana and traditional institutions and communities. The expression of traditional knowledge is dynamic and cannot be fixed in time, place or form and therefore, cannot be relegated to western structures or regulated by western intellectual property laws. We retain rights to our traditional knowledge consistent with our Kanaka Maoli worldview, including but not limited to ownership, control, and access. We also retain the right to protect our traditional knowledge from misuses and exploitation by individuals or entities who act in derogation of and inconsistent with our worldview, customs, traditions, and laws. . . .¹⁴

Implicit in the genealogically based descriptions of traditional knowledge and cultural heritage, Native Hawaiians explain that knowledge is not regarded as property subject to individual ownership.¹⁵ Instead, Native Hawaiians view traditional knowledge and cul-

14. *See id.* at 4-5.

15. Western property rights inure to individuals on a private basis, and for some objects or uses, to individuals as members of the public. Public goods are goods that are available to all using members of the public to the same degree even if those members of the public are not responsible for the maintenance of the good. One result of the Western public good is expressed through the "tragedy of the commons." That concept explains why, in a utility-maximizing society where individual use of a good is based on rational decision-making, eventually the entire value of a parcel of property will be appropriated and used. In general, information is a public good subject to minimal profit to the producer of the information and maximum benefit to any user of it. In a Western property regime, then, restrictions on use of information protect the economic interests of the information to the detriment of users. Indigenous Peoples, though, do not have societal goals of protecting any economic interest of a producer of traditional knowledge or cultural heritage. In fact, an inherent element of traditional knowledge is that there is no one producer (most traditional knowledge arises as a multi-generational process). Thus, the Western rationale for protecting intellectual property as a common good fails when applied to traditional knowledge. For a discussion of the public goods problem in intellectual property, see Paterson & Karjala, *supra* note 4, at 647.

tural heritage as "deeply personal and spiritual," a resource not subject to exploitation and misappropriation.¹⁶

II. OBSERVATIONS OF HAWAIIAN LAND RELATIONSHIPS AND THE SHAPING OF THE PROTECTION FOR TRADITIONAL KNOWLEDGE AND CULTURAL HERITAGE

In most societies, the ways in which peoples identify with land shape and determine how they will relate to other resources within their respective communities. In this respect, Native Hawaiians share a common perspective with others.¹⁷ The similarities cease when the discussion turns to the substance of the relationships that Native Hawaiians have with the land ('Āina).¹⁸ Therefore, the extrapolation of the characteristics of this relationship will establish how Native Hawaiians view their resources like traditional knowledge and cultural heritage.

From an outsider's view, the traditional relationships that Hawaiians have with the rich land and soils of modern Hawai'i persist today in spite of the intrusion of the Western system of alienation. In stark contrast to the individual and private ownership that defines Western notions of landholding,¹⁹ Hawaiians perceive and relate to land as an elder sibling, a resource that should receive care, protection, and respect from the collective.²⁰ *The Paoakalani Declaration*

16. "In our nearly 2000-year history, Hawaiians have regarded knowledge not as public property but as deeply personal and spiritual understanding. . . . In our culture, knowledge is never sold or traded, it is shared. This custom allows non-Natives to profit from our knowledge as we have found it difficult even in modern times to be suspicious and selfish with what we know."

Jon Osorio, *Protecting Our Thoughts*, Speech Delivered at Voices of the Earth Conference (Nov. 10, 1993), available at www.hawaii.edu/chs/osorio.html [hereinafter Osorio, Speech].

17. "In Hawai'i, as in other parts of the world, control of the 'Āina has long been recognized as the basis of sovereignty[; however,] [c]ontrol of 'Āina is not the same as ownership of 'Āina, in the Western capitalist sense." KAME'ELEIHIWA, *supra* note 7, at 51.

18. MARY KAWENA PUKUI & SAMUEL H. ELBERT, *HAWAIIAN DICTIONARY* 11 (rev. & enlarged ed. 1986).

19. Western property ownership confers three basic rights: to possess and enjoy, to alienate, and to destroy. Those rights assume private, individual ownership, and the result of such ownership notions is a view of land and personal property as subject to private, individual control. The Western property model does not accommodate the concept of a reciprocal relationship with the land or other property or a concept of communal ownership of goods and resources.

20. Professor Kame'eiehiwa teaches

[T]hroughout Polynesia, it is the reciprocal duty of the elder siblings to hānai (feed) the younger ones, as well as to love and ho'omalu (protect) them. The relationship is thereby further defined: it is the 'Āina, the kalo, and the Ali'i Nui who are to feed, clothe, and shelter their younger brothers and sisters, the Hawaiian people. So long as younger Hawaiians love, serve, and honor their elders, the elders will continue to do

documents an oral history of the relationship that Hawaiians maintain with the land. The *Declaration* states:

According to the Kumulipo, a genealogical chant of creation, Pō gave birth to the world. From this female potency was born Kumulipo and Po'ele. And from these two, the rest of the world unfolded in genealogical order. That genealogy teaches us the land is the elder sibling and the people are the younger sibling meant to care for each other in a reciprocal, interdependent relationship. Humanity is reminded of his place with the order of genealogical descent. The foundational principle of the Kumulipo is that all facets of the world are related by birth. And thus, the Hawaiian concept of the world descends from one ancestral genealogy. . . .

We emphasize that the Kanaka Maoli is governed by the cultural principles of pono, mālama 'āina, and kuleana. Within this worldview, the Earth and her myriad life forms (biological diversity) are kinolau, the earthly body forms of the Akua. Every life form possesses living energy that sustains each other creating a familial, interdependent, reciprocal relationship between the Akua, the 'āina, and the kanaka in fine balance and harmony. . . .

As Kanaka Maoli, we maintain our inalienable rights to, jurisdiction over, and management of our 'āina mai uka a i kai, mai kahi pae a kahi pae and assert our kuleana for future generations. We maintain our inherent right of self-determination, despite the oppression of colonization and illegal occupation of our land base since January 17, 1893 when our sovereign Kingdom of Hawai'i was overthrown by the military force of the United States.²¹

The *Declaration* provides the framework for a foundational understanding of the relationship that Hawaiians have with the land and other traditional and cultural resources.

The history of land development and transfer prior to and following first contact with Westerners offers insightful views about the Hawaiian conception of the world. Prior to first contact, Hawaiians maintained a healthy spiritual belief and practice premised upon land being considered a living entity.²² Hawaiians did not conceive of this relationship as alienable because there was no reference in Hawaiian

the same for them, as well as to provide for all their physical needs. Clearly, by this equation, it is the duty of Hawaiians to Mālama 'Aina, and, as a result of this proper behavior, the 'Aina will mālama Hawaiians. In Hawaiian, this perfect harmony is known as pono

KAME'ELEIHIWA, *supra* note 7, at 25.

21. See *Paoakalani Declaration*, *supra* note 12, app. A.

22. See *id.*

culture to the land belonging to a person.²³ The land, like an elder sibling, cared for the Hawaiian people so long as the Hawaiian people cared for it.²⁴ With respect for the land and its resources, Hawaiians developed a conservation system that achieved environmental and biological sustainability.²⁵

The kinship to the land has been compromised following first contact.²⁶ Westerners introduced the concept of land ownership²⁷ from governments, which sought control over the Hawaiian islands for strategic naval and commercial purposes ranging from refueling and resupplying military forces, to individuals, who sought the rich lands and soils for harvesting and planting, and selling indigenous mineral resources, rubber, fibers, fertilizers, sugar, coffee, cocoa, vanilla, bananas, and fruits.²⁸

In 1840, King Kamehameha III, seeking to straddle his nation's independence between warring Western empires, promulgated the first constitution, which introduced land ownership across the islands.²⁹ This 1840 constitution paved the way for the Māhele of 1848, the legal mechanism that would authorize the monarchy to divide lands between the king, the government, the Ali'i (chiefs),³⁰ and the

23. *See id.*

24. *See id.* For an interactive discussion on land use issues, visit <http://www.brown.edu/Departments/AmCiv/Studentprojects/GISP10/week8/week8.htm> [hereinafter Interactive Discussion], where various authors discuss the land tenure system in Hawai'i. The content of the web page states:

Native Hawaiians believed that land belonged to no one. It was a living entity that could provide for the people, if the people took care of it. The ruling chief divided the land amongst his allies. They were to manage the land, by farming and fishing. The land tenure system was feudal in nature, but the people were not tied to the land. The commoners could go from one land division to another without problem. The Hawaiians were concerned with resources, and so they took only what they needed to survive. The kapu system enforced this rule along with a variety of other conservation rules.

25. One example helps to illustrate Hawaiian conservation techniques and land relationships. According to traditional conservation practices, Hawaiian custom dictated that "fish could not be captured during their breeding seasons, and young fry were released. The Hawaiians created a vast system of fishponds in which they allowed the young fry to grow before they were eaten. This allowed the islands to have a plentiful supply of fish, one of the most important parts of their diet." *See* Interactive Discussion, *supra* note 24.

26. *See generally* KAME'ELEIHIWA, *supra* note 7.

27. "[Missionary William Richards] taught the Ali'i Nui that in the Western world (i.e., in 'enlightened nations'), it was the buying and selling of 'Aina, and the profit made from such sales, that brought one wealth. . . . The argument was that if only Hawaiian people would become capitalists, they too could share in foreign wealth and thereby gain equality with 'civilized' Western nations." *Id.* at 177.

28. BUDNICK, *supra* note 2, at 42.

29. *See* R-M. KEAHI ALLEN ET AL., ONIPA'A: FIVE DAYS IN THE HISTORY OF THE HAWAIIAN NATION 5 (1994).

30. PUKUI & ELBERT, *supra* note 18, at 20.

people.³¹ Unfortunately, the authority to shift lands from the monarchs to various constituents meant that the parcels of land more often than not went to pay for newly acquired debts imposed by foreigners.

With the Māhele of 1848,³² King Kamehameha had hoped to give his people land to call their own. While the Māhele provided for land ownership for the makaʻāinana (people that attend the land)³³ or kanaka (people)³⁴ to cultivate crops, like taro,³⁵ most Hawaiians of the time could not embrace Western approaches to individual property ownership,³⁶ including the assessment of taxes and the obligation to pay such taxes, which in reality were beyond affordability.³⁷

Unsurprisingly, the institution of individual property ownership and commensurate tax obligations quickly spelled the demise of the Western legal recognition of Hawaiians' connection to the land. So shortly thereafter, Westerners bought all of the lands dispersed to makaʻāinana and began developing sugar plantations and designing plans to protect their own individual interests in the islands.³⁸

Without exception, Native Hawaiians continue to be displaced from their land. With Western attempts to exclude Native Hawaiians from their land and commensurate attempts to diminish Native Ha-

31. "The 1848 Māhele was the legal mechanism by which the model of private ownership of 'Aina replaced that of the traditional Hawaiian system of sharing control and use of 'Aina." Lilikalā Kameʻeleihiwa, *Native Land and Foreign Desires: Pehea Lā E Pono Ai?* 137 (1992).

32. See *id.* at 208.

The Māhele redistributed three million acres (3/4 of all lands), and sought to replace the traditional feudal type system with a fee simple land tenure system. While the division was thought of with good intentions, the actual distribution was unequal and eventually exploited. The Māhele sent 1,600,000 acres to the other chiefs, 1,500,000 acres were set aside for public lands to be used by the government, 1,000,000 acres were reserved as crown lands for the royal family, and only 30,000 acres were given to the rest of the Hawaiian commoners.

See <http://www.brown.edu/Departments/AmCiv/Studentprojects/GISP10/week8/week8.htm>.

33. PUKUI & ELBERT, *supra* note 18, at 224.

34. *Id.* at 127.

35. "In Hawai'i, taro has been the staple from earliest times to the present, and here its culture developed greatly, including more than 300 forms. All parts of the plant are eaten, its starchy root principally as poi, and its leaves as lū'au. . . . Specifically, kalo is the name of the first taro growing from the planted stalk. *Id.* at 123.

36. Native Hawaiians did not take advantage of the land awards in great numbers. "The claiming of 'āina was a very foreign idea, generally outside the common Hawaiian's reality. In Hawaiian thinking, emphasis was on the proper use of 'āina, not on its ownership. In Western terms it would be akin to filing documents for the right to use the air we all breathe." KAME'ELEIHIWA, *supra* note 7, at 296.

37. As the land was divided by the Māhele, an award was subject to a "commutation fee" to the government in the form of a percentage of value or a government mortgage. *Id.* at 213.

38. TOM COFFMAN, *NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAII* 63 (1998).

waiian power, Native Hawaiians face an assault on their way of life, including their efforts to protect their traditional knowledge and cultural heritage. The history and the current state of theft of lands and power ensure that issues over land use, ownership, and customary practices will permeate the Native Hawaiian Rights movement. In reestablishing a nation, land is important because it forms the paradigms for political recognition and legal status.

Therefore, quite naturally, issues of political recognition and legal status directly impact how customs and laws will develop to protect not only tangible resources within a society, but also the intangible resources in a society. Thus, the protection of traditional knowledge and cultural heritage in accordance with a Hawaiian worldview, as opposed to a Western worldview, will turn on the decisions that result from the quest for political status, power and, above all, self-determination.

III. OBSERVATIONS OF THE SIGNIFICANCE OF POLITICAL STATUS TO THE SAFEGUARDING OF TRADITIONAL KNOWLEDGE AND CULTURAL HERITAGE

What foreign capitalists expect in a colonized society is that the foreign government acts to bring about the legitimacy of capitalists' interests in that colonized society. Thus, there is a "detached complicity" between the goals of capitalism and the violent, ill effects of colonization.³⁹ To begin the dismantling of colonialism and to address the degradation of cultural knowledge that colonialism causes, it is critical to recognize the political status of a colonized people so that the community can repair itself.

The United Nations Economic and Social Council Commission on Human Rights has recognized that "the protection of cultural and intellectual property is connected fundamentally with the realization of the territorial rights and self-determination of indigenous peoples."⁴⁰ This Article supports the proposition that Native Hawaiians, Indigenous Peoples, and other colonized peoples must be recognized politically if they are to re-teach, renew, and re-learn the tenets that comprise their cultural identity.

39. See FRANTZ FANON, *THE WRETCHED OF THE EARTH* 65 (1963).

40. *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 45th Sess., U.N. Doc. E/CN.4/Sub.2/1993/28 (1993) [hereinafter "1993 Report"].

As with many peoples and in many places around the globe, Hawaiians and Hawai'i⁴¹ have suffered from the ill effects of colonialism by foreign nations, including the United States. Because of Captain James Cook's accidental sighting of the islands in 1778, Hawai'i became a target for colonization and the focus of threats of political, social, and economic manipulation from the 1800s to the present.⁴² A significant portion of the Hawaiian identity is bound in the traditional knowledge and cultural heritage that is the subject of modern attempts at colonization.

Accordingly, the protection of traditional knowledge and cultural heritage of Native Hawaiians is not just a theoretical question of confronting misappropriation and abuse; it is a question of political status and recognition.⁴³ Inherent in the protection of traditional knowledge and cultural heritage is the protection of the land on which indigenous knowledge is practiced and perpetuated.

In Hawai'i, Native peoples and [their] lands have been exploited by Europeans, Americans, and recently Japanese. After the lands were divided and sold to foreign settlers, and after Hawaiians suffered enormous depopulation from introduced disease, [Hawaiian] beliefs and arts could also be appropriated by people with status and money.⁴⁴

41. Hawai'i was a sovereign Nation (and many insist that it still is) until the illegal overthrow of the Hawaiian government in 1898. This does not mean that Hawai'i had not been ravaged by colonialism before this time. Professor Haunani-Kay Trask cogently sets forth the history of the events in Hawai'i after first contact with Captain James Cook. Professor Trask writes:

My people have lived in the Hawaiian Islands since the time of Papa—Earth Mother—and Wākea—Sky Father. Like many other native people, we believed that the cosmos was a unity of familial relations. Our culture depended on careful relationship with land, our ancestor, who nurtured us in body and spirit.

For over one hundred generations, we tended the earth. Then, in 1778, white people arrived on our shores. They brought syphilis and tuberculosis, iron and capitalism. And they also brought violence, the violence of first contact, the violence of plague and death, the violence of dispossession.

By the arrival of the first missionaries in Hawai'i in 1820, more than half of the estimated one million Hawaiians present in 1778 were dead from foreign, epidemic diseases. Within another twenty years, the population had been halved again. Conversion to Christianity occurred in the chaos of physical and spiritual dismemberment.

In 1893, the American military invaded Hawai'i, overthrew our chiefly government, and put an all-white puppet government in its place. We were forcibly annexed to the United States in 1898. Hawai'i has been an occupied country ever since.

*Preface to TRASK, supra note **.*

42. See COFFMAN, *supra* note 38, at 23-27.

43. At the Ka 'Aha Pono Conference in October of 2003, Native Hawaiians gathered "and united to express [their] collective right of self-determination to perpetuate [their] culture under threat of theft and commercialization of the traditional knowledge of" the Hawaiian people. See *Conference Background to Paoakalani Declaration*, *supra* note 11, app. A.

44. Jon Osorio states "the commodification of the hula represents the most monstrous desecration of a once deeply spiritual art form whose composition and performance were dedicated

The abuse and misuse of Aloha is but one example.⁴⁵ To the capitalist tourist and entertainment industries,⁴⁶ the Hawaiian meaning of "Aloha" has been transformed from its traditional roots to a meaning that depicts Native women in grass skirts submitting to foreigners on one hand and chest thumping Native men or pygmy-like cartoon characters running aimlessly through the islands in search of adventure on the other. Westerners have been able to achieve these types of transformations in Hawaiian meaning by using Western intellectual property laws. Western intellectual property laws are instruments of commodification that draw traditional knowledge and cultural heritage into the capitalist model to exercise dominion, control, and subsequent public distribution over knowledge that indigenous peoples never intended to be dominated and distributed by such a regime.

To convert the traditional knowledge and cultural heritage of the Native Hawaiian people into definitions of patents, copyrights, trademarks, personality, and trade secrets is to ignore that traditional knowledge and cultural heritage that identify an indigenous people and makes a mockery of the Native Hawaiian struggle for freedom and self-determination. In other words, recognizing the Native Hawaiian struggle for self-determination, in fact, gives meaning and substance to traditional knowledge and cultural heritage. Without appreciating the central importance of the political status of Native Hawaiians and their struggle for self-determination, that which the West means to take and call intellectual property has absolutely no value. Even under the Western laws of intellectual property and competition, taking or stealing subject matter and clouding the origins of its source and then peddling the now tainted subject matter to an unsuspecting public consumer is considered unfair and deceptive. So, in fact, protecting the traditional knowledge and cultural heritage of Hawaiians by recognizing the political status of Hawaiians and af-

to Hawaiian Gods and Hawaiian chiefs." Another example that Professor Osorio illustrates is the appropriation of "Aloha," a deeply meaningful word in the Hawaiian culture that is defined as love, affection, compassion, mercy, sympathy, pity, kindness, sentiment, grace, or charity. Today, Aloha has been co-opted by the tourist industry as a marketing tool to identify the vacation destination of Hawai'i. Osorio, Speech, *supra* note 16.

45. Unchecked commercialization ravages communal and indigenous societies. See Long, *supra* note 1, at 244 (stating that "the traditions of the . . . Native Hawaiians . . . in the United States have become commercialized to such an extent that their cultural and religious significance has been virtually erased from public memory.").

46. See 1993 Report, *supra* note 40 (stating "[m]any countries feature indigenous peoples in advertising designed to attract tourists from overseas, without consulting with the peoples themselves or providing them with the legal or institutional means to control or reap benefit from increased tourist flows.").

firming their struggle for self-determination has the symbiotic benefits of maintaining cultural cohesion and the protection of the greater public welfare.

The eagerness of Western powers to employ Western intellectual property laws and to achieve capitalist goals is reason enough to insist that Native Hawaiians be recognized as a political entity. From an outsider's perspective, Native Hawaiians have political will, organization, and institutional norms and goals. The *Paoakalani Declaration* is proof of this will in the area of the protection of traditional knowledge and cultural heritage. It is true that not all Native Hawaiians think homogeneously on all issues. There may be some Native Hawaiians who would be proponents of, or at least be ambivalent to, a complete transformation of traditional knowledge and cultural heritage into the Western intellectual property regime. But this dichotomy of thought and expression is no different than in any other society.

Thus, upon observation, many Native Hawaiians, along with their supporters, oppose the absolute penetration of market forces that would convert Hawaiian traditional knowledge and cultural heritage into an information commodity that is privatized and distributed under a purely Western intellectual property regime.⁴⁷ Reformulating the issue of protection of traditional knowledge and cultural heritage as a question of self-determination further supports the need to recognize Native Hawaiians as a political entity and crystallizes the efforts to protect the Native Hawaiian identity, not just for the benefit of Native Hawaiians,⁴⁸ but also for the continued diversity of the global community.⁴⁹

47. See generally Anthony McCann, *Irish Traditional Music and Copyright Debate* (2003), at 47, <http://www.beyondthecommons.com/iff2003.html>.

48. The UNESCO Sub-Commission formulated concepts to help explain the priority and urgency attached to protecting Indigenous Peoples' spiritual and cultural life, arts, and scientific and medical knowledge. One of these concepts was expressed as follows:

The protection of culture and intellectual property is connected fundamentally with the realization of the territorial rights and self-determination of indigenous peoples. Traditional knowledge of values, autonomy of self-government, social organization, managing ecosystems, maintaining harmony among peoples and respecting the land is embedded in the arts, songs, poetry, and literature, which must be learned and renewed by each succeeding generation of indigenous children. These rich and varied expressions of the specific identity of each indigenous people provide the required information for maintaining, developing and, if necessary, restoring indigenous societies in all of their aspects.

See 1993 Report, *supra* note 40.

49. Recognizing the political status of Hawaiians and respecting their right to self-determination via the control of their own traditional knowledge and cultural heritage will not defeat the policy goals of sharing knowledge publicly with the global community. The Special Rapporteur underscored the following: "Greater protection of the indigenous peoples' control over their

IV. THE IMPACT OF CULTURAL COMMODIFICATION ON HEALTH, THE ENVIRONMENT, AND SUSTAINABILITY

The commodification of culture will, in every instance, destroy the consciousness of a people and yield deleterious results to Native Hawaiian health, environment, and sustainability.⁵⁰ The problems created by the commodification of culture are not limited to those created by the arts.⁵¹ By manipulating the traditional knowledge and cultural heritage of Native Hawaiians, captains of the information and intellectual property age are producing an environment of increased tension and sovereign consciousness. “A *laissez faire* environment of liberalized and expanding trade, investment, production and consumption is resulting in continuing land alienation and forcible displacement of indigenous peoples.”⁵² Moreover, lands that remain under the control of Indigenous Peoples are the areas that contain the majority of the biodiversity that remains in the world, a fact that is not lost on trade expansionists.⁵³ These lands are considered the “new gold in the rush to gain commercial [advantage] over biodiversity.”⁵⁴ Nowhere is this phenomenon truer than in the islands of Hawai‘i.

In Hawai‘i, land can be viewed as both temporally infinite with active volcanoes constantly producing new land,⁵⁵ yet practically fi-

own heritage will not . . . decrease the sharing of traditional cultural knowledge, arts, and sciences with other peoples. On the contrary, indigenous peoples’ willingness to share, teach, and interpret their heritage will increase.” *See id.*

50. Long, *supra* note 1, at 229 (identifying the connection between global commercial culture and a “deculturalization of traditional customs, rituals and folklore.”)

51. Indigenous heritage and culture include more than songs, visual art, and stories. The United Nations Draft Declaration on Indigenous Rights identifies cultural and intellectual property as including science, technology, genetic resources, biological resources, and oral traditions among others. *See* HANSEN & VANFLEET, *supra* note 3, at vii.

52. *See Report of the Commission on Sustainable Development*, U.N. Doc. E/CN.17/2002/PC.2/6/Add.3 (Jan. 28 – Feb. 8, 2002) [hereinafter *2002 Report*] (stating that the biggest challenge faced by indigenous peoples and communities in relation to sustainable development is to ensure territorial security; the legal recognition of our ownership and control over customary land and resources, an the sustainable utilization of our land and other renewable resources for our cultural, economic, and physical health and well-being).

53. *See* Harry et al., *supra* note 9.

54. *See id.*

55. *See* Marine Science, *Hawai‘i: Geology, Plate Tectonics/Hot Spots*, available at <http://www.biosbcc.net/ocean/marinesci/02ocean/hwgeo.htm>. A brief explanation of geology is necessary to understand the complexity of an island that has both infinite and finite characteristics. A description of volcanism and land creation follows:

Hawai‘i is geologically a unique place on Earth because it is caused by a ‘hot spot.’ A geologic ‘hot spot’ is an area in the middle of a crustal plate where volcanism occurs. It is easy to geologically explain the volcanism at plate spreading centers and subduction zones but not as easy to explain a ‘hot spot.’ The molten magma breaks through and produces undersea volcanoes. Some of these volcanoes build up to the surface of the

nite, as there is no significant change in the amount of lands that are usable for either traditional or industrial practices. Because land in Hawai'i, for all practical purposes, is finite, there is a strain placed on indigenous peoples in Hawai'i to bear activities by capitalists that are environmentally unsound and socially and culturally inappropriate.⁵⁶ These industrial practices render use of ancestral lands unfit for practicing traditional knowledge and cultural heritage.

An unyielding commitment to cultural commodification will ensure the continued degradation of non-renewable resources, biopiracy, the unfair and inequitable distribution of benefits arising from research and intellectual knowledge in the islands, and the lack of respect for traditional knowledge-holders.⁵⁷ The practice of commodifying culture does not recognize the range of rights held by Native Hawaiians.⁵⁸ These rights include gathering rights, access rights, resource management rights, and consultation rights. Ignoring these rights or unfairly limiting them by applying the principles and concepts of Western intellectual property laws will deplete the value of sustainable managed ecosystems. Dismissing the custom, spirit, and law contained within international treaties and the public trust responsibilities of the State of Hawai'i would, in the long run, damage both Native Hawaiians in the practice of their traditional knowledge and cultural heritage as well as industries in their commercial market practices.⁵⁹

To respond to the challenges presented by land development, bioprospecting, and industrialization, Native Hawaiians have analyzed the impact that Western intellectual property laws can and will have if

ocean and become islands. Over millions of years the plate may move across the 'hot spot' and the original volcano becomes extinct but a new volcano will begin to form in the area of the 'hot spot.' Magma turns to lava as molten rock comes to the surface. Molten rock is considered magma when it is under the Earth's crust, but when extruded from the crust (as in a volcanic eruption) it is called lava. The lava flows through cracks, vents and fissures, adding to Hawaii's land mass. New acreage is formed in Hawaii when the lava flows make it to the edge of the island. Often this new acreage is just a shelf, with ocean under the shelf so access to this new acreage is off-limits until it is cool and has been explored. If it is solid then it will be safe but if it is just a shelf then it may break at any time. When the lava flow hits the ocean where there was a cliff before, there may be a step-like feature showing where the old sea cliff was located.

56. See 2002 Report, *supra* note 52.

57. Lindsey explains that "[b]ioprospecting by pharmaceutical companies exploits the traditional and customary knowledge of indigenous peoples around the world, generating sales of more than \$130 billion annually, with little or no return to the indigenous communities that provided the knowledge." See Lindsey, *supra* note 6, at 112.

58. See Paoakalani Declaration, *supra* note 12, app. A.

59. Alexander Malahoff & Victoria Rectenwald, Study on Marine Biotechnology Policy in Hawai'i: Analysis of the Laws and Policies Related to Marine Bioprospecting and Harvesting 82 (draft on file with author).

Native Hawaiians are not consulted in the process of identifying existing and adopting new customary laws to govern the protection of traditional knowledge and cultural heritage. In specifically assessing the protections for traditional knowledge involving scientific research, Kanaka Maoli have communicated the following:

We have the right to free, prior and informed consent before research relating to our biological resources commences. Researchers, corporations, educational institutions, government, or others conducting such research must fully and entirely inform Kanaka Maoli regarding the purposes of their research and recognize our right to refuse to participate.

Biological samples are being transferred, traded, bought, and sold without the agreement or consent of our peoples, in violation of our inherent human rights.

Although biological and genetic samples have been transferred, sold, patented or licensed, Kanaka Maoli never relinquished our rights to our biological and genetic materials and, therefore, call for the rightful repatriation of such samples and due compensation.

Kanaka Maoli human genetic material is sacred and inalienable. Therefore, we support a moratorium on patenting, licensing, sale or transfer of our human genetic material.

We further support a moratorium on patenting, licensing, sale, or transfer of any of our plants, animals and other biological resources derived from the natural resources of our lands, submerged lands, waters, and oceans until indigenous communities have developed appropriate protection and conservation mechanisms.⁶⁰

As may be evident from the language of the *Paoakalani Declaration*, methods of protection are not spelled out in terms of individual ownership or resource exploitation for profit. According to the *Declaration*, Native Hawaiian custom regards the protection of the listed resources as the kuleana (responsibility) of the current Kanaka Maoli and demands that these resources be held in trust for future generations. Inherent in the customary laws of this First Peoples is the preservation of the lands, waters, traditional knowledge, and cultural heritage for the continued promotion of the culture through principles of justice, goodness, morality, and equity and the benefits that result from the application of these principles. These benefits do not directly inure to Hawaiians, but rather to the land, which nourishes and sustains Hawaiians.

60. See *Paoakalani Declaration*, *supra* note 12, app. A.

V. OBSERVING THE CONFLICT BETWEEN NATIVE HAWAIIAN RIGHTS AND FREE TRADE

The recognition of the political status and the right of self-determination of Native Hawaiians is urgent in light of the most recent era of globalization and the Internet.⁶¹ In no other era has the potential for the commodification of culture been so great. Free trade and radical free market ideology represent the ethos of Western captains of industry when applied to the resources of others, especially politically and economically weaker or developing countries. Notably, these captains of industry have been successful in persuading governments that the universality of intellectual property laws, through the Trade Related Aspects of Intellectual Property (TRIPs), is the appropriate means to stimulate trade domestically and globally. What was not made transparent in the push for the universality of intellectual property laws is the hypocrisy of strong intellectual property protection according to the Western narrative of intellectual property with no commensurate protection for other valued information, like traditional knowledge or cultural heritage, according to an Indigenous narrative.

The hypocrisy referenced above has myriad layers. Prior to TRIPs,⁶² the discourse of intellectual property was firmly rooted in the language of competitive, anti-monopoly practices.⁶³ During the era of strong antitrust laws and an American ideology that fostered

61. See Danielle Conway-Jones, *Mongolia, Law Convergence, and the Third Era of Globalization*, 3 WASH. U. GLOBAL STUD. L. REV. 63 (2004).

62. TRIPs is part of the multinational trade agreements that were made binding on members in the Final Act of the Uruguay Round. See SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 8 (2003). Professor Sell explains:

Adhering to the TRIPs Agreement is obligatory for all states that wish to join the World Trade Organization, and is part of the common institutional framework established under the WTO. The agreement covers all IP rights, patents, trademarks, copyrights, trade secrets, including relatively new rights such as semiconductor chip rights. It incorporates the Berne Convention for copyright norms, and adds additional copyright protection for computer software, databases, and sound recordings. . . . States are required to provide adequate and effective enforcement both internally and at the border. The agreement makes the WTO's dispute settlement mechanism available [and provides for trade sanctions].

See *id.* at 8-9.

63. See *id.* (noting that prior to World War II, the United States made policy commitments to free trade and the primacy of competition policy outside of the United States). Professor Sell explains:

The passage of the Sherman Anti-trust Act ushered in an era of anti-trust dominance, . . . suppressing the patent law, that was to last for seventy-five years. Throughout most of the twentieth century patents were considered to be monopolies rather than necessary incentives for innovations . . . market power was presumed, and [intellectual property] rights were subordinated to the dominant anti-trust policy.

complete competition, the United States viewed attempts to extend exclusive intellectual property protection as an affront to the right to compete in a market economy with few monopoly restrictions.⁶⁴ With the shift from an industrial economy to a service, electronic, and information economy, representatives of large corporations found themselves grasping for new market shares and extreme economic opportunities.⁶⁵

It is difficult to pinpoint exactly when these corporate representatives realized that their very economic survival depended on the birth of an entirely new industry, but what is clear is that intellectual property protection was considered one of the most viable short-term solutions to the new industry problem.⁶⁶ The solution derived from the economic circumstances leading independent private industry corporate actors to form collective lobbying groups for the purpose of persuading the United States government to take new approaches to the protection of intellectual property.⁶⁷ These new private collective organizations reinvented themselves into quasi-government actors and spokespeople during the negotiation of international treaties relating

64. See *id.* at 65.

65. Professor Sell's research explains that strong competition policy and weak intellectual property protection had "deleterious effects in [certain] sectors such as consumer electronics." As a result of the competitive harms visited on specific industries, many American businesses were unwilling to shoulder the financial risks of commercializing new technologies. See *id.* at 67.

66. See *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980) (stating that "the policy of free competition runs deep in our law [; however,] the policy of stimulating invention that underlies the entire patent system runs no less deep"). Professor Sell concludes that this case marks a point in time when "the Supreme Court placed the public policy of supporting patent rights on an equal footing with the public policy of supporting free competition, and 'effectively ended the era of anti-trust dominance over patent law in the eyes of the judiciary.'"

67. See SELL, *supra* note 62, at 1 (stating "TRIPs ushered in a full-blown, enforceable global intellectual property regime that reaches deep into the domestic regulatory environment of states. The central player in this drama was an even smaller group, the *ad hoc* US-based twelve member Intellectual Property Committee (IPC)."). Professor Sell's description of the IPC is critical to appreciating that concentrated private corporate interests significantly impacted the decisions of state actors for the sole benefit of corporate high protectionist intellectual property goals. Professor Sell describes the make up of the IPC:

Consisting of twelve chief executive officers (representing pharmaceutical, entertainment, and software industries), the Intellectual Property Committee [composed of Bristol-Myers; CBS; Dupont; General Electric; General Motors; Hewlett-Packard; IBM; Johnson & Johnson; Merck; Monsanto; and Pfizer] successfully developed international support for strengthening the global protection of intellectual property The IPC, joined by its counterparts in Europe and Japan, crafted a proposal based on industrialized countries' existing laws and presented it to the General Agreement on Tariffs and Trade (GATT) Secretariat in 1988 By 1994, . . . , the IPC achieved its goal in the Agreement on Trade-Related Aspects of Intellectual Property Rights of the Uruguay Round.

See *id.*

to trade and intellectual property.⁶⁸ Specifically, their actions and positions were particularly persuasive in securing the passage of the TRIPs Agreement along favorable terms consistent with the goals of certain private Western industries.⁶⁹ With the passage of the TRIPs agreement, member states legitimized the global proliferation of the principle of “cultural commodification,” to the delight of private industry but equally to the dismay of developing countries and, more saliently, Indigenous Peoples.⁷⁰

It is extremely difficult to try to discuss solutions to the misappropriation or commodification of culture and traditional knowledge without first unearthing the very reason why these issues present themselves. It is difficult to find anyone in the mainstream eager to confront the “how we got here” question.⁷¹ As with anything, the “how we got here” question raises an amalgam of complex issues

68. Formerly a forum for states whose roles were to negotiate for the benefit of the entire public welfare, the Uruguay Round was unusual in so far as this agenda of new [IP] issues was driven entirely by the private sector, particularly by activist elements of the United States business community. *See id.* at 7-8. In fact, the course of action by these private actors “was auspicious because the private sector had no official standing at GATT.” *See id.* at 50. Professor Sell explains:

TRIPs is a dramatic expansion of the rights of IP owners and a significant instance of the exercise of private power. The approach embodied in the TRIPs Agreement, extending property rights and requiring high levels of protection, represents a significant victory for US private sector activists from knowledge-based industries. In the TRIPs case, private actors worked together, exercised their authority and achieved a result that effectively narrows the options open to sovereign states and firms, and extends the opportunities of those firms that succeeded in gaining multilateral support for a tough global IP instrument. . . . Private actors pursued their [individual] interests through multiple channels and struck bargains with multiple actors: domestic interindustry counterparts, domestic governments, foreign governments, foreign private sector counterparts, domestic and foreign industry associations, and international organizations. They vigorously pursued their IP objectives at all possible levels and in multiple venues, successfully redefining intellectual property as a trade issue.

See id. at 7-8

69. For example, the GATT TRIPs Agreement explicitly states that intellectual property rights are private rights (preamble) and that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations” (Article 7). Note the use of and reliance on terminology from Western intellectual property regimes.

70. *See 2002 Report, supra* note 52 (stating “[t]he WTO TRIPs Agreement is an obstacle and threat to indigenous knowledge, through the harmonization of uniform intellectual property rights regimes, and allowing the patenting of life forms, for micro-organisms and non-biological and microbiological processes of production of plants and animals.”).

71. There is no one and no entity profiting from the TRIPs agreement willing to admit acts of prior piracy and misappropriation. Professor Sell keenly observes that “[t]he industrialized countries built much of their economic prowess by appropriating [dare say misappropriating] others’ intellectual property [or traditional knowledge and cultural heritage]; with TRIPs, this option is foreclosed for later industrializers. [TRIPs] codifies the increasing commodification of what was once the public domain.” *See id.* at 9.

about views on superiority, dominance, ideology, education, oppression, racism, opportunism and, above all, capitalism.⁷² But there can be no doubt that under the current global intellectual property regime indigenous peoples, specifically Native Hawaiians, are in a “catch-22 in that [they] are either forced to commodify their collective culture and thereby perhaps misappropriate its position in the Indigenous community or renounce commodification, thus allowing other non-indigenous peoples to appropriate indigenous cultural traditions.”⁷³

The analysis fails without a historical and contextual discussion of the conflicts between capitalism and trade on the one hand and domestic, centrist policies and ideologies on the other hand. It is also disconcerting that Indigenous Peoples are pitted against each other by Western regimes in their respective attempts to safeguard cultural treasures. For example, the United States continues to erect arguments premised on fine distinctions and, oftentimes, disingenuous rationales with respect to the question of recognizing the political status of Native Americans without recognizing the political status of Native Hawaiians. This dichotomy directly presents the issue that Native Hawaiians, as the Indigenous Peoples of Hawai‘i, have a legitimate claim to sovereign status as a recognized political entity, or some other equitable remedy that Native Hawaiians approve.

Along these lines, Native Hawaiians rejected the issue of Western intellectual property ownership and protection as defining their collective narrative. Native Hawaiians, by rejecting the application of Western intellectual property definitions and principles to their collective traditional knowledge and cultural heritage, and by asserting rights of self-determination and adherence to Hawaiian custom as opposed to Western trade laws, specifically the TRIPs agreement, are reclaiming once misappropriated cultural building blocks. Globalization necessarily seeks to homogenize all law, not just intellectual property law, and that law’s application. Issues surrounding sovereignty, political status, and self-determination are critical questions to consider, as they will necessarily determine bargaining power and positions, standing to negotiate, and the very ability to exercise Native Hawaiian governance.

72. Long, *supra* note 1, at 244 (stating “this transformation of indigenous culture into a de-cultured, marketable commodity may be facilitated and, potentially even accelerated, by the development and enforcement of the intellectual property laws required to attract foreign [and domestic] investors.”).

73. See Paterson & Karjala, *supra* note 4, at 634-35.

None of these political, economic, and social concerns are lost on multinational corporations, which seek in every instance the promotion of capitalism, profit, and power for private industry actors. In this era of privatization, the phenomena of placing democratic decisions in the hands of private entities acting in the capacity of de facto government policymakers will continue to diminish and degrade indigenous peoples' efforts to protect their traditional knowledge and cultural heritage from misappropriation, exploitation, and commodification.

Unfortunately, so many individuals taking part in the conversation from the Western intellectual property regime perspective view the questions of safeguarding culture from commodification as an interesting dilemma, something to be balanced between the rights to free trade in a globalizing world on the one hand and a desire to preserve and maintain a traditional culture on the other hand. Safeguarding Native Hawaiian culture from commodification is a matter of survival for Native Hawaiians and their land. By forcing the conversion of Native Hawaiian traditional knowledge and cultural heritage into the Western intellectual property regime, Western policymakers will subjugate a people and its culture to romantic fantasy.⁷⁴

Moreover, an entire society will be assimilated into a system that idolizes individual wealth, money, greed, and the power to subordinate entire cultures. Western intellectual property concepts and principles, as many authors have stated, do not just differ from the beliefs of Indigenous Peoples because of surface characteristics like communal land-holding versus individual ownership, or oral traditions as protectable versus fixed expression as protectable, or charting the need for perpetual protection versus limited protections; rather, Western intellectual property paradigms are diametrically opposed to Indigenous Peoples' protection paradigms governing the respect of traditional knowledge and cultural heritage because these living entities symbiotically and simultaneously guarantee the very existence and survival of the collective.

According to Native Hawaiian expression in the *Paoakalani Declaration*, the living entities of traditional knowledge and cultural heritage are the means by which a people sustain their environment, provide for the health of the biological organisms in their ecosystem,

74. See Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 179-184 (2000) (regarding how the mid-eighteenth century European notion of an "author" spawned modern copyright law).

and maintain a system of societal interdependence that is supported by justice, respect, care, and responsibility. There is no doubt that the Native Hawaiian society incorporated trade as a function of its existence, but unlike Westerners, trade and trade rhetoric are not the alpha and the omega of their society.

CONCLUSION

In the very sense of the word, I do not have the authority to draw conclusions about what I have presented about my observations of Native Hawaiian practices, protocols, or traditional knowledge. What I have heard Native Hawaiian teachers, elders, practitioners, and leaders express is a recursive need for consultation with the Native Hawaiian People when dealing in areas that will affect the Native Hawaiian in the protection of land, biodiversity, traditional knowledge, and cultural heritage. What I can suggest after thinking about the pressing issues of political status, self-determination, and sustainability is that Western views and application of Western doctrine are inconsistent with the worldviews of Native Hawaiians in the area of protection of traditional knowledge and cultural heritage. Thus, I end this Article, but not my ongoing education, with the observation that protection of Hawaiian traditional knowledge and cultural heritage has to emanate from a *sui generis* system originating with Native Hawaiians.