

## 9. TRADITIONAL KNOWLEDGE IN SAMOA: AT RISK OF BEING LOST

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### ABSTRACT

This paper discusses the socio-cultural importance of Samoa's Traditional Knowledge (TK) and its vulnerability to commercial exploitation. It further discusses the inadequacies of Intellectual Property Laws in protecting Samoan TK, a precious resource that is an integral component of the Samoan cultural identity. Such inadequacies, if not redressed, could result in Samoan TK being lost over time. Distinctions between individuality and public domain (as related issues), and the need to formulate and legislate intellectual property laws are urgent considerations to be thoroughly deliberated and implemented.

**Key words:** *Traditional Knowledge (TK), legal protection, vulnerable, rich heritage, stolen, lost*

### 1. INTRODUCTION

One could say that Samoa is losing its Traditional Knowledge (TK) primarily because laws necessary to safeguard TK are non-existent or inadequate. Samoa has been a developing nation since gaining independence in 1962. Over the past 56 years, the importance of legally protecting Samoan TK from misuse has become a growing concern, alongside the concern of how to facilitate the use of Samoan TK through appropriate prior informed consent that allows for sharing in benefits from the commercial use of such knowledge.

While there is a general and common misconception that TK is part of the public domain, many feel that TK is not public property and therefore cannot be protected by intellectual property (IP) laws. The distinction and conflict between public domain and public property remains a debated issue. Irrespective of this distinction, it is important that TK be acknowledged as a specialised form of knowledge in order to be granted IP rights and be protected by IP laws, both of which would allow for its survival.

The importance of good governance, taking proper actions, and making appropriate decisions to combat the effects of losing Samoan TK cannot be over-emphasised. Indeed, good governance and having the heart and will to protect Samoan TK are inextricably linked. Samoa must do all in its powers to ensure the availability of proper laws and policies to provide some legal protection of its TK. The *sui-generis*<sup>1</sup> system provides a viable option as it at least makes available some form of legal protection, rather than no protection at all.

Without any modernized form of traditional legal protection, some of Samoa's cultural practices, cultural skills, language, cultural knowledge and expressions may be in danger of being lost. "When traditional knowledge is lost, this can have an enormous impact on the cultural identity and way of life in traditional communities."<sup>2</sup> The TK in making *Siapo*, one of Samoa's cultural art forms for example, is becoming a lost art.<sup>3</sup>

There are several cases where TK that was made public was then stolen or taken by others,<sup>4</sup> and several arguments exist as to how this issue should be addressed. One argument is that TK needs to be legally protected in order to make it less accessible to the public. Another argument is that TK should be less advertised and

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<sup>1</sup> Latin word meaning something unique of its own kind; describes a form of legal protection that exists outside typical legal protections. See 'sui generis' (Cornell Law School) [https://www.law.cornell.edu/wex/sui\\_generis](https://www.law.cornell.edu/wex/sui_generis) accessed 24 August 2017

<sup>2</sup> This concern of indigenous cultural practices, cultural skills, the language and cultural knowledge and expressions in danger of being lost was addressed by Veniana Qalo (Senior Trade Policy Specialist) at the Pacific Islands Forum Secretariat (PIFs) during

the Practical Workshop on Intellectual Property, Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources held in Apia, Samoa. 2015. [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_ipatk\\_apa\\_15/wipo\\_ipatk\\_apa\\_15\\_remarks\\_iplcs\\_day.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_ipatk_apa_15/wipo_ipatk_apa_15_remarks_iplcs_day.pdf) accessed 01 October 2018

<sup>3</sup> Siapo: (Tapa Cloth) 'The Traditional Fabric of the Samoa Islands.' For centuries, Siapo has been passed down from generation to generation. Unfortunately, it is becoming a lost art. Siapo is not only a decorative art; it is a symbol of Samoan culture used for clothing, burial shrouds, bed covers, ceremonial garments, and much more. <https://www.nps.gov/npsa/learn/education/siapo-the-traditional-fabric-of-the-samoan-islands.htm> accessed 01 October 2018

<sup>4</sup> Bob Makin, Sue Farran at USP: Ni-Vanuatu could easily lose the rights to their cultural capital' *Vanuatu Daily Post* (Port Vila, 22 August 2015. [https://www.dailypost.vu/.../sue-farran.../article\\_f2b408e5-77a9-5468-9441-5d95d1fd8cab.html](https://www.dailypost.vu/.../sue-farran.../article_f2b408e5-77a9-5468-9441-5d95d1fd8cab.html) accessed 24 August 2017

promoted. The crux of these arguments is that once TK is lost or stolen, everything else including the language, the skills, and many other aspects of traditional culture, become equally vulnerable and may entirely vanish along with TK. This is the unavoidable, consequential outcome from any loss or thievery of TK.

One major TK issue of today involves the language, songs, and dances that are cherished as a symbol of the Samoan cultural identity. Regarding song and dance specifically, Tuiatua Tupua Tamasese Efi<sup>5</sup> correctly points out: "When the living legacies of indigenous dance and song are no longer part of contemporary dance and song forms, the depths of our indigenous cultures are lost."<sup>6</sup>

To preserve the language, the Government of Samoa has taken the initiative to form the Samoan Language Commission with the purpose to maintain the language as a living language, and to standardise consistency in the usage and application of the Samoan language.<sup>7</sup>

This paper mainly focuses on the need and role of good governance, as well as the initiative by the Government and Parliament of Samoa to address the issue of legal protection of Samoan TK. This is also well in line with the context of on-going discussions at the World Intellectual Property Organisation (WIPO) and World Trade Organisation (WTO) (of which Samoa is a member) on negotiating terms surrounding possible creation of an international legal instrument to provide legal protection for TK from cultures around the world.

## 2. THE IMPORTANCE OF TRADITIONAL KNOWLEDGE TO SAMOA'S CULTURE AND TRADITION

Samoa is a country comprised of the western most group of Samoan Islands in the South Pacific.<sup>8</sup> Many of its

islands have reef-bordered beaches and rugged, rain-forested interiors with gorges and waterfalls. The islands include Upolu, home to most of Samoa's population, and Savai'i, one of the largest islands in the South Pacific. Some of the smaller islands include various small villages, while other smaller and uninhabited islands serve as wildlife sanctuaries.

Samoa is a nation proud of its culture and traditions that possesses a unique and rich heritage of TK and places a strong emphasis on upholding its culture and traditions. Samoan people readily acknowledge that TK is an essential component of daily life and is thus deeply rooted in what Samoans call *faa-Samoa* (the Samoan way of life). In interviews conducted by IP law students from the National University of Samoa, the general view and response from the public and stakeholders confirmed that TK is an important element of Samoan culture and traditions.<sup>9</sup> It is important to note that Samoan TK in relation to healing techniques, traditional medicines, agricultural practices, environmental knowledge and handicrafts are used and developed through the *faa-Samoa* and continue to be maintained and transmitted down through current day generations of Samoans.<sup>10</sup>

Samoa TK is often transmitted through specific cultural and traditional information exchange mechanisms. An individual custodian chooses a particular recipient in order to transmit TK on specific arts or disciplines such as: "master builder of traditional Samoan houses,<sup>11</sup> master canoe builder,<sup>12</sup> master tattooist,<sup>13</sup> traditional healer,<sup>14</sup> master weaver of mats and fine mats,<sup>15</sup> master traditional orator<sup>16</sup> and expert traditional fisherman or navigator."<sup>17</sup>

<sup>5</sup> Tuiatua Tupua Tamasese Efi was a Member of Parliament and Prime Minister of Samoa from 1976 – 1981 and a former Leader of Opposition. A former Member of the Council of Deputies and was Head of State of Samoa from 2007 – 2017.

<sup>6</sup> Tuiatua Tupua Tamasese Efi, 'CLUTTER IN INDIGENOUS KNOWLEDGE, RESEARCH AND HISTORY: A SAMOAN PERSPECTIVE.' [https://www.researchgate.net/publication/237620724\\_CLUTTER\\_IN\\_INDIGENOUS\\_KNOWLEDGE\\_RESEARCH\\_AND\\_HISTORY\\_A\\_SAMOAN\\_PERSPECTIVE](https://www.researchgate.net/publication/237620724_CLUTTER_IN_INDIGENOUS_KNOWLEDGE_RESEARCH_AND_HISTORY_A_SAMOAN_PERSPECTIVE) accessed 30 September 2018

<sup>7</sup> Samoa Language Commission officially launched. [www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=&p\\_isn=98695&p..01.05](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=98695&p..01.05) accessed 03 October 2018.

<sup>8</sup> Samoa has a population 195,843 according to the National Census 2016. Samoans are ethnically Polynesians and are also known as 'people under the sun.' Samoa Bureau of Statistics – Population and Demography [www.sbs.gov.ws/index.php/population-demography-and-vital-statistics](http://www.sbs.gov.ws/index.php/population-demography-and-vital-statistics) accessed 17 August 2017

<sup>9</sup> National University of Samoa. Report: 'HCL 352 Intellectual Property Law Class Research Project.' (2013)

<sup>10</sup> Samoa Law Reform Commission "Protection of Samoa's Traditional Knowledge Final Report." (2014)

<sup>11</sup> James Schollum, 'Samoan Architecture Design' Translation Tufuga Fau Fale [www.jameseschollum.com/samoan-architecture/](http://www.jameseschollum.com/samoan-architecture/) accessed 09 July 2017

<sup>12</sup> Monalisa Saveaalii Malietoa, 'O le Fale o le Fe'e' Tufuga Ta Va'a (The Journal of Samoan Studies, Vol 7, No 1 2017) National University of Samoa.

<sup>13</sup> 'Tufuga Ta Tatau: Master Tattooists - Culture Trip' <https://www.theculturetrip.com> accessed 09 July 2018

<sup>14</sup> 'Taulasea And Cultural Continuity In Samoa | Cultural Survival' <https://www.culturalsurvival.org> accessed 09 July 2018

<sup>15</sup> Tauiilili Pemerika, 'Anoafale O Le Gagana Ma Le Aganuu.' Translation of Master Weaver of fine mats. <https://books.google.com/books?isbn=1452088861> accessed 11 July 2018

<sup>16</sup> 'Samoan Matai, Translation of Master Traditional Orator' [www.pasefika.com/Culture/Article/13/sa/samoan-matai](http://www.pasefika.com/Culture/Article/13/sa/samoan-matai) accessed 14 July 2018

<sup>17</sup> 'Science of Pacific Island Peoples: Land use and agriculture.' Translation of traditional fisherman or navigator.

### 3. SAMOAN TRADITIONAL KNOWLEDGE OWNED BY COMMUNITY, NOT BY AN INDIVIDUAL

TK is traditionally passed down through generations, which means there is an element of time but does not mean that TK is ancient or stuck in time.<sup>18</sup> Instead, TK is constantly evolving and recreating within the community, reflecting the dynamic Samoan cultural and social identity. Another important characteristic when discussing modern-day protection of Samoan TK via IP laws is that the author(s) of TK is often unknown. This simply means that TK belongs to the community, but community-authorship may also create difficulties in attempting to provide protection via the traditional IP System.

It must also be noted that whenever there are discussions of applying copyright protection to TK, the issue of author identity in turn raises the issues of economic rights. In failing to identify the author, TK belongs to the community and this creates a mismatch with the existing IP regime.

Since Samoan TK is considered (by most Samoans) collective property of the entire community and not that of any single individual, the entire community is considered holder and custodian of TK. This is true even within the context of transmitting TK from a single traditional healer, for example, to a single chosen recipient because the recipient is entrusted to hold, maintain and keep this traditional healer's knowledge for the benefit of the community. As further testament to community ownership, the knowledge often develops from the environment and utilises plants grown on lands belonging to the community.<sup>19</sup>

### 4. DEFINITION OF TRADITIONAL KNOWLEDGE

The Niue and Cook Islands previously enacted legislation providing definitions of Traditional Knowledge, namely Niue's Taoga Act of 2012<sup>20</sup> and Cook Island's Traditional Knowledge Act of 2013, the latter of which defines TK as the following:

"[TK is] knowledge (whether manifested in tangible or intangible form) that is or was intended by its creator to

be transmitted from generation to generation and originates from a traditional community; or was created, developed, acquired, or inspired for traditional purposes; and includes any way in which that knowledge appears or is manifested."<sup>21</sup>

The common characteristics of TK across various references at the international level and in regional model laws, which is captured by the Niue and Cook Islands legislations, are that TK:

- (i) consists in knowledge, know how, skills and practices, originated and held in common by indigenous people and traditional communities;
- (ii) passes from generation to generation without being codified; and
- (iii) constantly improves and adapts to the changing needs of these indigenous or traditional communities.<sup>22</sup>

To date, Samoa has no legislation that defines TK and there is no singularly accepted definition of TK at the international level. Although references to TK definitions are found across various international instruments and some regional model laws and pieces of legislation, none of these is accepted or expressly adopted by Samoa. With no universal definition, Samoa follows the World Intellectual Property Organisation (WIPO) definition below:

"Traditional knowledge is knowledge, know-how, skills, and practices that are developed, sustained, and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity."<sup>23</sup>

It must also be noted that different communities and different villages in Samoa have different understandings about what constitutes TK because TK can differ from one community to another, or from one village to another. This clearly demonstrates the need to develop a national definition that reflects the varied viewpoints of these communities.

- (a) is or has been created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative, or recreational purposes; and
- (b) is or has been transmitted from generation to generation; and
- (c) is regarded as pertaining to a particular group in Niue; and
- (d) is collectively originated and held."

<sup>21</sup> Traditional Knowledge Act 2013 (Cook Islands) s4 (1) (a) – (b)

<sup>22</sup> Samoa Law Reform Commission (n 5)

<sup>23</sup> 'Traditional Knowledge' (WIPO) <http://www.wipo.int/tk/en/tk> accessed 14 September 2017

<https://books.google.com/books?isbn=9820201055> accessed 14 July 2018

<sup>18</sup> Daphne Zografos-Johnsson, 'Current Work and Discussion in the WIPO Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (WIPO-WTO Colloquium for Teachers of Intellectual Property, Geneva, June 2017)

<sup>19</sup> Land of Samoa: 80% Customary land. 15% Freehold land. 05% Government land. 'Accessing land for public purposes in Samoa.' <https://www.radionz.co.nz/.../samoa-customary-lands-safe-says-law-reform-commission>. accessed 14 July 2018

<sup>20</sup> Taoga Niue Act 2012 (Niue) s2

TK "includes any knowledge that generally –

## 5. SAMOAN TRADITIONAL KNOWLEDGE CAN BE LOST

Because Samoan IP laws are silent in regards to TK, it is necessary to press the Samoan Government and Parliament to determine proper avenues by which to protect Samoan TK. The challenges and issues at hand are how Samoa may (as it must) provide effective legal protection of Samoan TK and thereby provide effective strategies to protect Samoan culture generally.

As mentioned, TK has no fixed definition but is often understood to cover knowledge and skills in medicine, agriculture or navigation, which are passed from generation to generation. This knowledge also forms cultural expressions such as dance, songs and artefacts.

One important question raised is to what extent does management and control of this knowledge remain in the hands of the individuals, groups or communities? If not in their control, then does it become something controlled by the State through its laws or because of its interest in developing industries that capitalise on commercialisation of TK—for example, through exploitation of the biodiversity of Samoa?

TK is part and parcel of the Samoan people's knowledge in the wider sense and would include Traditional Cultural Expressions (TCE). But for the purpose of protecting TK and TCE via IP rights, it is actually more sensible to distinguish the two given that TK has a more technical element that allows it to fall within patent rights while TCE are more easily linked to copyrights. It is therefore correct to say that for the purpose of protecting TK via IP laws, the distinction between TK and TCE is actually convenient to TK protection; but for most Samoan communities, this protection is artificial.

## 6. SAMOAN TRADITIONAL KNOWLEDGE APPLICATIONS

The below descriptions are classic examples of Samoan TK on the verge of being lost or stolen, and even more importantly, examples of the absence of economic benefit to the originators in idea and art derived from Samoan TK. IP law will continue to remain ineffective protection for Samoan TK by virtue of non-transparent legislations, regulations and policies that essentially put national protection and survival of TK in the hands of the Samoan people. It must also be noted that the lack of specific regulations governing intellectual property by the

proper authorities has multiple impacts on other vital and associated aspects of TK, which include loss of language, history and other sociocultural aspects indigenous to Samoan culture at both national and local-village levels.

### A. THE TRADITIONAL KNOWLEDGE OF THE MAMALA PLANT AS MEDICATION

In Samoa, for many generations traditional healers have treated viral infections through medicative use of the Mamala plant. In 1984, Paul Cox (an American Ethno Botanist) collected samples of Mamala trees for testing and interviewed Samoan traditional healers.<sup>24</sup> Cox tested the samples in the United States of America (United States) and test results showed that a compound known as 'Prostratin'—which can be extracted from Mamala tree bark—has potential for treatment of HIV-AIDS, hepatitis and certain forms of cancer.

Cox lived for more than two decades in the Samoan village of Falealupo, amongst its villagers and traditional healers, ultimately becoming a respected figure in the village. His research in Samoa focused on the potential use of Samoan rainforest vegetation for traditional medicine and natural drugs to cure HIV-AIDS. Cox contributed enormously to the Falealupo community, and was duly bestowed the highest honour for a foreigner amongst villagers with the matai title *Nafanua*.<sup>25</sup>

Subsequent to his research and discoveries, the National Institute of Health (NIH) in the United States patented the process of extracting Prostratin from the bark of Mamala trees for use in treating HIV-AIDS, and Nafanua Paul Cox was listed among the inventors. Sadly, the Samoan healers who shared their TK about medical properties of the Mamala tree with the American ethno-botanist were neither listed among the inventors nor received any acknowledgement for their contributions. In 2001, the AIDS Research Alliance (ARA) entered into an agreement with the Government of Samoa to share any future royalties from medication developed through Prostratin extracted.<sup>26</sup> The agreement set out percentages of future royalties to be shared between the Samoan Government, the village of Falealupo, and the families of traditional healers who shared their TK with Cox.<sup>27</sup>

While this agreement appeared to benefit all three—the families of the traditional healers, the village and the

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<sup>24</sup> In his book, Paul Cox describes his research and adventures in Samoa, work that led to him being hailed by TIME magazine as a hero of medicine and awarded the Goldman Environmental Prize. Working closely with the native healers, Cox studied traditional rainforest remedies and is credited with finding natural drugs that can be used in treating AIDS. Paul Alan Cox, *Nafanua: Saving the Samoan Rain Forest*. (WH Freeman & Company, 1999)  
<https://www.goodreads.com/book/show/1328624.Nafanua>  
accessed 24 October 2017

<sup>25</sup> The Chiefs of Falealupo village – namely Solia and Foamea's chiefly identities, known as o Ma'opu-o-Nafanua. The name Nafanua is the Samoan war goddess whom Malietoa sought governance for him to lead Samoa. See Ole Tusi Faalupega o Samoa Atoa (Methodist Printing Press 1985) (compiled by the Tusi Faalupega Committee)

<sup>26</sup> 'The Falealupo Covenant and the Isolation of Anti-Viral Drug'  
<https://www.tandfonline.com/doi/pdf/10.1076/phbi.39.s1.33>.  
0001 accesses 03 October 2018

<sup>27</sup> Samoa Law Reform Commission (n 5)

Samoa government—the agreement in fact produced no financial benefit to any of the Samoan parties. This is partly because royalties are calculated based only on profit made from the commercialisation of any medicines resulting from the patent. Therefore, if the commercial returns of the patent do not outweigh the production and testing costs, then there unfortunately is no profit to share.<sup>28</sup> This is exactly what happened as a result of the agreement surrounding Prostratin, In addition to the traditional healers of Falealupo village not receiving inventor status for contributing TK, there was no profit to share amongst the Samoan healers, their families, the Falealupo village, or the Samoan government.

There was of course benefit sharing between Cox and the community: Cox initiated the preservation of 30,000 acres of rainforest and helped to fund a new school building for Falealupo village.<sup>29</sup> Nevertheless, the traditional healers of Falealupo village were not acknowledged for their contribution of TK.

By June 2008, Prostratin had not entered full-scale therapeutic clinical trials, and by 2014 the patent expired, which means that further inventions based on TK shared by Samoan healers are now available within the public domain. Anyone may now freely use the Samoan TK as outlined and disclosed in the patent application without consent from, commercial returns for, or recognition given to Samoa or the Samoan healers. Thus, the filing of the patent over Prostratin's medical properties long before its commercialisation may have ultimately deprived the Samoan Government and Samoan people of the ability to exploit TK (if they had so chosen) for the economic benefit of Samoa; this premature filing may have prevented owners or custodians of Samoan TK from capitalising on the healing properties of the Mamala tree bark.

The 2001 agreement between ARA and the Government of Samoa identified only some healers,<sup>30</sup> whereby it must therefore be subjected to protection as a trade secret. To date, Samoa does not have any law on trade secrets, which is another matter of interest in the protection of TK and a challenge to the Samoan Government in urgent matters of law reform.

## B. THE TRADITIONAL KNOWLEDGE OF SAMOAN TATTOOING (TATAU)

In 2013 the internationally well-known brand 'Nike' used a Samoan *Tatau* design on a line of tight-fitting, women's sportswear. This caused outrage in Samoan communities because Samoans traditionally use the design for men, not women. The specific design at issue here is a

distinctive part of Samoan culture traditionally only given to Samoan warriors or chiefs. Furthermore, only a select few have the knowledge and skills passed down from earlier generations necessary for *Tatau*.

Those against protecting the *Tatau* design at issue here argued that because tattoos (generally speaking) are in the public domain, the *Tatau* design was public property and therefore could not be protected by intellectual property law.

However, there is a misconception that TK regarding Samoan *Tatau* is part of the public domain. This is incorrect because *Tatau* is a specialised form of TK that has not been protected by intellectual property laws, which were not conceptualised to cover knowledge that belongs to communities and is transmitted orally. It boils down to the mere fact that Samoa does not have IP laws to provide legal protection for traditional *Tataus* and *Tatau* designs.

Of course, it is also a matter of disrespect to the Samoan people. Samoan outrage from the particular *Tatau* design at issue in this instance arose also because Nike converted the traditional design from one worn by men to one decorating tight-fitting, women's clothing.

The real problem is that Nike did not request Samoa's consent in using the design, nor did Nike offer monetary benefits for Samoa. Had Nike realised that this Samoan art and TK on *Tatau* designs were (and are) culturally important to Samoans, legal minds likely would have counselled Nike to obtain consent and the outcome might have been different. Less respectfully but different still, Nike even could have proceeded with selling products of Samoan *Tatau* design without first obtaining consent as the design or artwork was not legally protected. In the end, Nike withdrew the offensive range of sportswear on the basis of good faith and also apologised to those who viewed the design as insensitive to any specific culture.<sup>31</sup>

Most important to note, the Samoans outraged against Nike's product were more keen on preserving the TK on Samoan *Tatau* traditions than obtaining any settlement resulting in monetary benefit.

## C. THE TRADITIONAL KNOWLEDGE OF GENDER SPECIFIC SAMOAN TATTOOS (PE'A AND MALU)

Scholars have widely researched the TK and art of Samoan *Tatau*. Most scholarly, medical, and artistic studies examine Samoan tattooing with great emphasis

<sup>28</sup> Samoa Law Reform Commission (n 5)

<sup>29</sup> Samoa's Access and Benefit Sharing Success Story: Local ... <https://www.google.com/search?hl=en-WS&source=hp&biw=&bih=&q=Falealupo+benefits+from+paul+cox&gbv=2> accessed 02 October 2018

<sup>30</sup> Above n 27

<sup>31</sup> 'Nike Stops Production of Tattoo Tights.' <https://says.com/my/lifestyle/nike-halts-production-on-samoan-tattoo-inspired-tights> 11 accessed 04 October 2018



on the male tattoo (*pe'a*)<sup>32</sup> while the female tattoo (*malu*) is seldom explored.<sup>33</sup> Traditionally, the *malu* was reserved for the individual(s) in Samoan communities recognized as *taupou*.<sup>34</sup> Today, such reservation no longer exists.

Nowadays, it is more likely that any girl, lady or woman, whether Samoan, part-Samoan, or non-Samoan can be tattooed with a *malu* as long as she can afford the costs and withstand the pain. Perceptions on the issue of commercialisation of the *malu* are deeply debated and vigorously contested on social media and online discussion forums by Samoans both locally and abroad.

## 7. LAWS FOR LEGAL PROTECTION OF SAMOAN TRADITIONAL KNOWLEDGE

The only available laws within the Samoan legal framework that provide some sort of limited protection for TK are the Constitution of Samoa of 1960 and the Village Fono Act of 1990. Neither the Constitution nor the Village Fono Act directly addresses TK issues and concerns. Although they do not directly provide legal protection for TK, the two pieces of legislation do recognise Customary Law, which is crucial to protection of Samoan culture and tradition more generally. As previously emphasized, Samoan TK is an essential component of culture, tradition, and daily living for Samoan people.

IP Laws that explicitly provide some sort of protection for TK include the Copyright Act of 1998 (*Copyright Act*) and the Intellectual Property Act of 2011 (*Intellectual Property Act*).

### A. THE CONSTITUTION OF SAMOA OF 1960

Under the Constitution<sup>35</sup> of Samoa, *Matai* titles<sup>36</sup> and customary land may be held in accordance with custom and usage and within the law relating to custom and

usage.<sup>37</sup> The Constitution also establishes a Land and Titles Court, which has jurisdiction to adjudicate disputes pertaining to *Matai* titles and customary land.<sup>38</sup> Custom and usage is referred to as part of the laws of Samoa if the custom and usage have acquired force of law under an Act of Parliament or by way of a Court judgment. This reference appears to give customary law legal recognition, and could be viewed as an integration of customary law into the Constitution. The Parliament of Samoa has passed laws that take into account Samoa's customary laws.

### B. THE VILLAGE FONON ACT OF 1990

Among other functions, the Village Fono Act<sup>39</sup> validates and recognises the roles and functions of the Village Fono in accordance with the custom and usage of Samoan villages; confirms and grants certain other functions; and provides for incidental matters.<sup>40</sup> A Village Fono is empowered under the Act to develop and use village land for social and economic purposes of the village. These rules can extend over or have impact on the use of TK according to custom and usage of the village because TK is often developed as a result of biological resources from the environment, and TK is generally viewed as collectively owned and being maintained and kept for the benefit of the community.<sup>41</sup>

It is evident that the powers of the Village Fono under the Act are limited to within the particular village of discussion and cannot extend to other villages. Therefore, any protection of Samoan TK through the Village Fono Act, using customs and usages of the villages, is strictly limited to the village level only and specifically to each individual village.<sup>42</sup>

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<sup>32</sup> Samoan young men tattoo. 'Samoan Art in the Tatau (Tattoo)'

<https://www.nps.gov/npsa/learn/education/classrooms/samoan-n-art-in-the-tatau.htm> accessed 24 September 2017

<sup>33</sup> *ibid*, Samoan young ladies tattoo.

<sup>34</sup> Taupou – daughter of high chief. Taupou | Definition of Taupou by Merriam-Webster. <https://www.merriam-webster.com/dictionary/taupou> accessed 24 September 2017

<sup>35</sup> Constitution of Samoa 1960

<sup>36</sup> *Ibid* art 100

<sup>37</sup> *Ibid* art 101

<sup>38</sup> *Ibid* art 103

<sup>39</sup> Village Fono Act 1990

<sup>40</sup> Village Fono may be conceptualized as "Village Council." (5) Village Fono Act 1990.

**Powers of Village Fono relating to hygiene and economic development:** (1) A Village Fono shall in respect to its village have the powers set out in subsection (2) even if the powers may not in a particular village form part of its custom and usage.

(2) The powers referred to in subsection (1) are:

- (a) the power to make rules for the maintenance of hygiene in the village; and
- (b) the power to make rules governing the development and use of village land for the economic betterment of the village; and
- (c) the power to direct any person or persons to do any work required to be done pursuant to rules made in accordance with the powers granted or preserved by paragraphs (a) and (b).

(3) A person is guilty of village misconduct and may be punished by his or her Village Fono who fails to obey any rule or direction made or given under the powers granted or preserved by this section.

[http://www.paclii.org/ws/legis/consol\\_act/vfa1990128/](http://www.paclii.org/ws/legis/consol_act/vfa1990128/) accessed 28 September 2017

<sup>41</sup> Plants grown on customary land belonging to a traditional community.

<sup>42</sup> Samoa Law Reform Commission (n 5)

## 8. WHERE PROTECTION OF SAMOAN TRADITIONAL KNOWLEDGE MAY EXIST

The below sections discuss availability of and impediments to protection of Samoan TK under the Copyright Act as a work, and under the Intellectual Property Act as a patent, as a mark or collective mark, and as a design.

### A. PROTECTION UNDER THE SAMOA COPYRIGHT ACT OF 1998

It is generally understood that copyright law protects literary and artistic works that are an 'original intellectual creation.' This requirement is the primary impediment to copyright protection of TK in that TK is passed from generation to generation and is constantly improving for and adapting to the changing needs of TK-reliant communities.

According to scholars, a work is original if it involved some degree of intellectual effort and is not a mere copy of a previous work.<sup>43</sup> Works inspired by and/or based on pre-existing traditional creations may be sufficiently original to be protected under copyright law, but if the works are mere copies, then they are unlikely to comply with the originality requirement and thus would remain in the public domain. We are to be mindful that any work is considered to be in the public domain if there is no legal restriction for its use by the public.<sup>44</sup>

### B. PROTECTION FOR PATENTS UNDER THE INTELLECTUAL PROPERTY ACT OF 2011

The primary impediments to proper protection of Samoan TK under the Intellectual Property Act, especially the patent law section, are the strict requirements under section 5 of the Act, whereby an invention must be new, should involve an inventive step, and must be industrially applicable in order to be registerable.<sup>45</sup> Unfortunately, these requirements make patent protection appear incompatible with the protection of TK due to the nature of TK as a body of knowledge passed down from generation to generation. It is also not clear how to apply these strict requirements for claimed inventions that are TK themselves, or derived from TK, or developed within a TK system.<sup>46</sup>

#### (i) LIMITED PROTECTION PERIOD

Patent protection expires after 20 years (seven years for innovation patents)<sup>47</sup> from the filing date of the

application. After this period, any TK disclosed in the patent proceedings falls within the public domain. In the case of pharmaceutical products (recall Prostratin extracted from Mamala tree bark, for example) the effective period of protection may be even shorter because testing and subsequent commercial approval for human use may take several years (of the 20 or seven years). This aspect of patent protection is incompatible with the interests of traditional communities in protecting their designs in perpetuity.<sup>48</sup> It must be noted that the use of Prostratin extracted from Mamala tree bark was not a TK secret, but instead was (and is) knowledge shared amongst Falealupo community members, including villagers and traditional healers.<sup>49</sup>

### C. PROTECTION FOR MARKS AND COLLECTIVE MARKS UNDER THE INTELLECTUAL PROPERTY ACT OF 2011

Protection of marks does not directly protect TK, but does provide some indirect protection via protection of distinctive signs and symbols associated with TK. To be registered, the mark must be distinctive. The Intellectual Property Act suggests that marks can consist of a wide variety of signs, such as a letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound, scent or taste, or a combination thereof.<sup>50</sup>

A 'mark' under the Intellectual Property Act is defined as "any sign: (a) capable of being represented graphically; and (b) capable of distinguishing the goods or services of one person from those of another in the course of trade."<sup>51</sup>

A 'collective mark' is defined as "a sign capable of: (a) being represented graphically; and (b) distinguishing the origin or any other common characteristic, including the quality of goods or services of members of the collective association<sup>52</sup> that is the owner of the sign from those of persons who are not members of the association." Therefore, only members of the association are entitled to use the collective mark. Typical examples of this are logos on commercial products or advertising jingles that clearly define the services or product of one manufacturer from another.<sup>53</sup>

#### (i) LIMITED PROTECTION AND IN-DIRECT PROTECTION

A mark is protected for 10 years from the date of filing of the application. Such protection may be renewed for consecutive periods of 10 years upon the payment of

<sup>43</sup> Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works*, 1886-1986 (Kluwer, 1987) 228 - 234

<sup>44</sup> *ibid*

<sup>45</sup> Intellectual Property Act of Samoa 2011 (IP Act of Samoa) s 5.

<sup>46</sup> Samoa Law Reform Commission (n 5)

<sup>47</sup> IP Act of Samoa, s 29

<sup>48</sup> Samoa Law Reform Commission (n5)

<sup>49</sup> Paul Cox was a matai of Falealupo village.

<sup>50</sup> IP Act of Samoa, s 45 (1) S 45 (1)

<sup>51</sup> *ibid*

<sup>52</sup> *ibid*, A collective association means an incorporated body that has or is able to have members, and is constituted for the joint benefit of its members.

<sup>53</sup> Samoa Law Reform Commission (n 5)

renewal fees.<sup>54</sup> A registered mark or collective mark confers on an owner the exclusive rights to use of his or her mark in relation to any goods or services in respect of which the mark is registered.<sup>55</sup> Trademark protection can therefore cover only those aspects of Samoan TK that consist of a sign that can be presented graphically, such as traditional words and symbols, in trade.

A registered collective mark may be used only as a mechanism to indirectly provide some protection of Samoan TK. A classic example could be if local producers of the Samoan *elei* were to unite in an association and register the collective mark “ELEI-SAMOA” or “SAMOAN TRADITIONAL ELEI” in order to assure tourists and local consumers about the authenticity and quality of the products. This would further assure that *elei* producers are Samoans, thereby affirming *elei* as a product of traditional Samoan methods of production, thereby indirectly recognizing the Samoan TK from which these methods derive. This indirect approach can create a competitive advantage over similar products that are alike but not marked with a sign indicating Samoan TK-based origin. At this stage, the protection would apply to the collective name used to identify the various designs as being traditionally Samoan. However, we are to be mindful that this approach and indirect protection can only come into effect if the local *elei* producers in Samoa first agree to form an association and then successfully register a collective mark.

#### **D. PROTECTION FOR DESIGNS UNDER THE INTELLECTUAL PROPERTY ACT OF 2011**

Under the Intellectual Property Act, ‘design’ is defined as any aspect of the shape, pattern or configuration of the whole or part of an object.<sup>56</sup> A ‘design right’ is a property right in an ‘original’ design that the creator automatically owns; if, that is, certain criteria are met.<sup>57</sup> It is important to note that a design is not original if it is commonplace in the relevant design field at the time of its creation.<sup>58</sup>

A design right can be vested in two or more people who jointly made or created the design, and can be assigned or transferred.<sup>59</sup> The owner of the design right has the exclusive right to reproduce the design, and to make, sell or import articles incorporating the design;<sup>60</sup> but the design right does not extend to articles that have been put on the market (anywhere in the world) by the owner or with the owner’s consent.<sup>61</sup>

It must further be noted that a design right may only apply to a design created by a Samoan national or by a person with permanent residence in Samoa, or to designs

created in Samoa.<sup>62</sup> A design can therefore only be registered if it is ‘new’ and has not been disclosed to the public in Samoa or elsewhere in the world before the application for registration.<sup>63</sup>

#### **(i) LIMITED PROTECTION FOR DESIGNS UNDER THE INTELLECTUAL PROPERTY ACT OF 2011**

The primary impediment to proper protection of TK as a design right under the Act is that it must be new. This requirement makes the protection of designs appear incompatible with the protection of TK as a body of knowledge that passes down from generation to generation.<sup>64</sup>

Furthermore, a design right expires after 15 years from the end of the calendar year in which the design was first recorded in a design document or in which an article was first made using the design.<sup>65</sup>

### **9. GENERAL VIEWS AND OBSERVATIONS**

Given the analysis mentioned herein of the existing legal framework of contemporary intellectual property laws in Samoa, namely the Copyright Act and the Intellectual Property Act, it is evident that such laws do not provide adequate legal protection of Samoan TK; and apparently, such laws do not meet the expectations of traditional communities insofar as the laws fail to provide adequate protection. The government of Samoa should thus resolve that Samoan TK need be protected by a *sui-generis* legislation specifically designed to provide adequate protection of TK, consistent with the expectation of traditional communities.

It must be noted that Samoan TK has intrinsic cultural and spiritual values for Samoan people. Samoan TK is important evidence of Samoa’s national, social, cultural, and historical identity, and is therefore vital for the sustenance and continued survival of traditional Samoan communities and the Samoan lifestyle; otherwise, there is likely to be a loss of Samoan TK, culture, and way of life. To avoid such an unrecoverable loss, the government of Samoa must take the initiative to reform and develop the laws of Samoa so as to ensure that the laws are modern, meet current needs of the community, and provide adequate legal protection for Samoan TK.

### **10. CONCLUSION**

All that has been discussed so far assumes the issues at hand are the present challenges faced by Samoa in providing effective legal protection and implementing effective strategies to protect its culture and traditions,

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<sup>54</sup> *ibid* s 60

<sup>55</sup> IP Act of Samoa, s 56

<sup>56</sup> *ibid*, s 31

<sup>57</sup> *ibid*, s 32

<sup>58</sup> *ibid*,

<sup>59</sup> *ibid*, s 38

<sup>60</sup> *ibid*, s 36

<sup>61</sup> *ibid*

<sup>62</sup> *ibid*, s 32

<sup>63</sup> *Ibid*, s 36

<sup>64</sup> Samoa Law Reform Commission (n 5).

<sup>65</sup> IP Act of Samoa, s 34



including TK. Hence, there is importance in highlighting the weaknesses, inefficiency and inadequate legal protection of current IP laws in protecting Samoan TK. Samoa must not let go of its historical culture and traditions. Samoa should be considerate of maintaining the values of TK because Samoan TK is incorporated into the everyday life of the Samoan people.

TK is one of the most vital organs and components of the Samoan way of life, an organ and component that must not be allowed to remain static. Samoa can only succeed in having proper legal protection for TK if political leaders are keen enough and have enough political will to initiate and introduce appropriate laws relevant to the social changes and applicable legislation necessary to protect TK. Unless Samoa fully commits, TK and Samoan culture are threatened and vulnerable to becoming forever lost.

## BIBLIOGRAPHY

### Books

*Black's Law Dictionary* (definition of Public Domain: No legal restriction for its use by the public)

Sam Ricketson, *'The Berne Convention for the Protection of Literary and Artistic Works.'* 1886-1986 (Kluwer 1987) 228 – 234

*Ole Tusi Faalupega o Samoa Atoa.* (Methodist Printing Press 1985) (compiled .by the Tusi Faalupega Committee)

### Journals

Monalisa Saveaalii Malietoa, *'O le Fale o le Fe'e'* Tufuga Ta Va'a (The Journal of Samoan Studies, Vol 7, No 1, 2017) National University of Samoa.

### Statutes:

Constitution of Samoa 1960.

Cook Islands Traditional Knowledge Act 2013.

Copyright Act of Samoa 1998

Intellectual Property Act of Samoa 2011

Taoga Act of Niue 2012.

Village Fono Act of Samoa 1990.

### Reports:

National University of Samoa, *'HCL 352 Intellectual Property Law Class Research Project'* (2013)

Samoa Law Reform Commission *"Protection of Samoa's Traditional Knowledge Final Report."* (2014)

Daphne Zografos Johnsson, *'Current Work and Discussion in the WIPO Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore'* (WIPO-WTO Colloquium for Teachers of Intellectual Property, Geneva, June 2017)

### Online Materials

Bob Makin, *'Sue Farran at USP: Ni-Vanuatu could easily lose the rights to their cultural capital'* *Vanuatu Daily Post* (Port Vila, 22 August 2015). [https://www.dailypost.vu/.../sue-farran.../article\\_f2b408e5-77a9-5468-9441-5d95d1fd8cab.html](https://www.dailypost.vu/.../sue-farran.../article_f2b408e5-77a9-5468-9441-5d95d1fd8cab.html) accessed 24 August 2017

Paul Alan Cox, *Nafanua: Saving the Samoan Rain Forest* (WH Freeman & Company 1999) <https://www.goodreads.com/book/show/1328624.Nafanua> accessed 24 October 2017

*'suigeneris'* (Cornell Law School) [https://www.law.cornell.edu/wex/sui\\_generis](https://www.law.cornell.edu/wex/sui_generis) accessed 24 August 2017

*'Traditional Knowledge'* (WIPO) <http://www.wipo.int/tk/en/tk> accessed 14 September 2017

James Schollum, *'Samoan Architecture Design'* [www.jamesschollum.com/samoan-architecture/](http://www.jamesschollum.com/samoan-architecture/) accessed 07 July 2018

Tufuga Ta Tatau: Master Tattooists - Culture Trip' <https://www.theculturetrip.com> accessed 09 July 2018

Taulasea And Cultural Continuity In Samoa | Cultural Survival' <https://www.culturalsurvival.org> accessed 09 July 2018

Tauiliili Pemerika, *'Anoafale O Le Gagana Ma Le Aganuu.'* Translation of Master Weaver of fine mats. <https://books.google.com/books?isbn=1452088861> accessed 11 July 2018

*'Samoan Matai, Translation of Master Traditional Orator'* [www.pasefika.com/Culture/Article/13/sa/samoan-matai](http://www.pasefika.com/Culture/Article/13/sa/samoan-matai) accessed 14 July 2018

Science of Pacific Island Peoples: Land use and agriculture.' *Translation of traditional fisherman or navigator.* <https://books.google.com/books?isbn=9820201055> accessed 14 July 2018

*'Accessing land for public purposes in Samoa.'* <https://www.radionz.co.nz/.../samoa-customary-lands-safe-says-law-reform-commission>. accessed 14 July 2018

Samoan young men tattoo. *'Samoan Art in the Tatau (Tattoo)'* <https://www.nps.gov/npsa/learn/education/classrooms/samoan-art-in-the-tatau.htm> accessed 24 September 2017

Taupou – daughter of high chief. Taupou | Definition of Taupou by Merriam-Webster. <https://www.merriam-webster.com/dictionary/taupou> accessed 24 September 2017

Powers of Village Fono relating to hygiene and economic development.

[http://www.paclii.org/ws/legis/consol\\_act/vfa1990128/](http://www.paclii.org/ws/legis/consol_act/vfa1990128/)  
accessed 28 September 2017

Samoa Language Commission officially launched.

[www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=&p\\_isn=98695&p...01.05](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=98695&p...01.05) accessed 03 October 2018.

Tuiatua Tupua Tamasese Efi, 'CLUTTER IN INDIGENOUS KNOWLEDGE, RESEARCH AND HISTORY: A SAMOAN PERSPECTIVE.' [https://www.researchgate.net/publication/237620724\\_CLUTTER\\_IN\\_INDIGENOUS\\_KNOWLEDGE\\_RESEARCH\\_AND\\_HISTORY\\_A\\_SAMOAN\\_PERSPECTIVE](https://www.researchgate.net/publication/237620724_CLUTTER_IN_INDIGENOUS_KNOWLEDGE_RESEARCH_AND_HISTORY_A_SAMOAN_PERSPECTIVE)  
accessed 30 September 2018

'The Falealupo Covenant and the Isolation of Anti-Viral Drug'

<https://www.tandfonline.com/doi/pdf/10.1076/phbi.39.s1.33.0001> accessed 03 October 2018

'Nike Stops Production of Tattoo Tights.'

<https://says.com/my/lifestyle/nike-halts-production-on-samoan-tattoo-inspired-tights>  
accessed 04 October 2018

Samoa's Access and Benefit Sharing Success Story: Local ... <https://www.google.com/search?hl=en-WS&source=hp&biw=&bih=&q=Falealupo+benefits+from+paul+cox&gbv=2> accessed 02 October 2018

Practical Workshop on Intellectual Property, Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources held in Apia, Samoa. 2015.

[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_ipk\\_apia\\_15/wipo\\_ipk\\_apia\\_15\\_remarks\\_ipkcs\\_day.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_ipk_apia_15/wipo_ipk_apia_15_remarks_ipkcs_day.pdf)  
accessed 01 October 2018

Siapo: (Tapa Cloth) 'The Traditional Fabric of the Samoa Islands.'

<https://www.nps.gov/npsa/learn/education/siapo-the-traditional-fabric-of-the-samoan-islands.htm>  
accessed 01 October 2018