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Selling Aloha: The Fight for Legal Protections Over Native Hawaiian Culture

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SELLING ALOHA: THE FIGHT FOR LEGAL PROTECTIONS OVER NATIVE HAWAIIAN CULTURE

ABSTRACT

In 2018, a Chicago-based restaurant attempted to enforce a registered trademark of "Aloha Poke" by sending cease-and-desist letters to small businesses with names containing some variation of the phrase. Most of those businesses were owned by Native Hawaiians, causing an uproar due to the terms "aloha" and "poke" having strong ties to traditional Hawaiian culture. Known as the *Aloha Poke* case, it brought attention to the fact that the United States currently has no definite legal framework to protect the cultural heritage of Native Hawaiians, much less their intangible cultural heritage.

This Note addresses the lack of federal recognition granted to Native Hawaiians and how that has resulted in a lack of protection over their culture, even in comparison to Native American culture. It will then analyze the current legal framework for protecting Indigenous cultural property, specifically intangible cultural heritage, both within the United States and globally. Informed by that analysis, this Note will present important components to include in a possible legal framework for protecting intangible cultural heritage for Native Hawaiians.

INTRODUCTION

What does it mean to "steal a culture"?

This question became the center of a 2018 controversy, when a non-Hawaiian Chicago restaurant chain owner trademarked the name "Aloha Poke" and tried to impose their ownership of the phrase over small businesses using some variation of the name.[1] Two prominent targets of the cease-and-desist letters were a downtown Honolulu restaurant and a Native Hawaiian-operated restaurant in Anchorage.[2] The battleground of the situation was the word "aloha," a word most used and known to greet and say goodbye to people.[3] In Hawaiian culture, however, the word "aloha" encompasses so much more—*love, compassion, kindness*—to the point where it is built into the Hawai'i Revised Statutes in the "Aloha Spirit" law.[4] The Aloha Spirit law states that everyone "must think and emote good feelings

1. *See* Audrey McAvoy, *Aloha Poke claim revives Hawaiian culture protections push*, ABC NEWS (Apr. 18, 2019, 8:15 PM), https://abcnews.go.com/US/wireStory/owns-aloha-hawaii-eyes-protections-native-culture-62475804 [https://perma.cc/NZA3-S6JS].

2. *See id.*

3. *See Aloha*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/aloha [https://perma.cc/SKD2-HT4Y] (last visited Jan. 27, 2023).

4. *See* McAvoy, *supra* note 1; HAW. REV. STAT. § 5-7.5 (2021).

to others," and it is a central component to the Hawaiian way of life.[5] This effort to steal or take ownership over the word "aloha" itself directly clashes with this way of life.

As such, the situation inevitably resulted in frustration and anger from Hawaiians, specifically Native Hawaiians who have grown up with the "Aloha spirit" not only embedded in their language but their daily life.[6] This *Aloha Poke* case saw the re-emergence of Hawaiian lawmakers considering a resolution to develop legal protections for Native Hawaiian cultural intellectual property.[7] Currently, there is no legal framework that works to protect distinctively Native Hawaiian cultural heritage or their intangible cultural heritage.

Part I of this Note addresses the lack of federal recognition granted to Native Hawaiians and how, as a consequence, there is next to no legal protection over their culture, at least not in a way that works to specifically protect Native Hawaiian culture. Contrast that with Native Americans—whose culture arguably also does not receive much legal protection—who can at least register trademarks connected to tribal names (i.e., the Navajo Nation). Parts II through VI analyze the current U.S. legal landscape and how it is unsuccessful when it comes to protecting Indigenous cultural property. Informed by those analyses, Parts VII through VIII look at more successful global frameworks for protecting intangible cultural heritage and use those as a foundation for determining the key components of a possible legal framework tailored specifically to protect Native Hawaiian culture.

I. THE IMPORTANCE OF FEDERAL RECOGNITION

"Federal recognition" describes "the government-to-government relationship between the federal government and American Indian governing bodies in the political relationship with the United States and those American Indian tribes 'recognized' by the United States."[8] Designating a Native American tribe as "recognized" occurs if "(1) Congress or the executive created a reservation for the group either by treaty, by statutorily expressed agreement, or by executive order or other valid administrative action; and (2) the United States has some continuing political relationship with the group," like using federal agencies to provide services.[9]

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5. *See* McAvoy, *supra* note 1; HAW. REV. STAT. § 5-7.5 (2021).
6. *See* McAvoy, *supra* note 1.
7. *Id.*
8. *See* Justin L. Pybas, *Native Hawaiians: The Issue of Federal Recognition*, 30 AM. INDIAN L. REV. 185, 186 (2005) (citing Le'a Malia Kanehe, *The Akaka Bill: The Native Hawaiians' Race for Federal Recognition*, 23 U. HAW. L. REV. 857, 861 (2001)).
9. *Id.*

A. Federal Recognition for Native Hawaiians

Today, Native Hawaiians have still not received federal recognition in the same way that Native Americans have.[10] There are federal statutes that include both Native Alaskans and Native Hawaiians within the category of "Native Americans," but in actuality, Native Hawaiians are not federally recognized while Alaska Natives are recognized to a degree.[11] This poses an issue because federal recognition determines the way in which the Supreme Court interprets statutes, legislation, or programs that are designed for the purpose of giving aid or giving preferential treatment to Native Hawaiians.[12]

Native Hawaiians and Native Americans bear certain historic similarities to one another. For example, the federal government signed treaties with both Native Americans and the Kingdom of Hawai'i and dispossessed both groups of their land and subverted their leaders.[13] Native Hawaiian people also inhabited the Hawaiian Islands for hundreds of years before any Westerner arrived there, and they had a thriving, isolated, and self-sufficient culture that depended on a sophisticated language and religion.[14] By the end of the eighteenth century through the nineteenth century, however, the presence of Westerners on the islands had quickly increased as the population of Native Hawaiians dramatically fell.[15] What followed was the Native Hawaiian economy, government system, and culture transforming into Western models.[16]

The main difference between the two groups, however, is that Native Americans remained in defined political organizations while Native Hawaiians did not, a fact that became crucial in a Supreme Court case that resulted in the implied rejection of federal recognition for Native Hawaiians.[17] If Native Hawaiians received federal recognition, the courts would use rational basis review when looking at programs and statutes granting preferential treatment to Native Hawaiians.[18] Under the rational basis standard of review, the

10. U.S. DEP'T OF THE INTERIOR, INDIAN AFFAIRS, FEDERALLY RECOGNIZED TRIBES, https://www.bia.gov/service/tribal-leaders-directory/federally-recognized-tribes [https://perma.cc/XJA3-U2U7] (last visited Jan. 27, 2023).

11. *See* Pybas, *supra* note 8, at 187.

12. *See id.* at 186.

13. *See id.* at 187.

14. *See id.* at 185.

15. *See id.*

16. *See* Pybas, *supra* note 8, at 185.

17. *See id.* at 187 (discussing how Morton v. Mancari, 417 U.S. 535 (1974), distinguished between tribal lines and racial lines).

18. *See id.* at 186.

legislation only must be "rationally or reasonably related to advancing a legitimate government interest."[19] Not only is the rational basis standard the lowest level of scrutiny applied to laws, it also allows the court to focus on political membership in a federally recognized tribe, rather than race.[20]

Without federal recognition, however, courts will regard any preferential program or statute to be based on a racial classification, therefore resulting in an equal protection issue.[21] Courts will review legislation under the strict scrutiny standard of review, which sets a higher bar and requires both a compelling state interest and narrow tailoring to achieve that interest.[22] Essentially, without political organization similar to that of Native Americans, Native Hawaiians are deprived of options outside of categorization by racial or ethnic lines, which results in an equal protection issue.

Consequently, Native Hawaiians have not received as much governmental assistance when it comes to regaining and restoring their culture, lands, and sovereign status.[23] Though, this has not been for want of trying or interest.[24] In 1893, President Grover Cleveland called Congress to restore the independence of the Kingdom of Hawai'i.[25] Almost 100 years following that, the U.S. Civil Rights Commission determined it necessary to federally recognize a Native Hawaiian governing entity in order to protect the civil rights of the Native Hawaiian people.[26] Since 1978, twenty-one groups have been successful in becoming federally recognized nations under the Bureau of Indian Affairs, Department of Interior, or through congressional action.[27] Yet, despite there being more than 550 federally recognized Native American nations and almost fifty federal statutes that consider Native Hawaiians to fall under the umbrella term of "Native Americans" alongside Native Americans and Alaska Natives, Native Hawaiians are the only group that has not been given federal recognition, severely limiting their paths to protect their culture.[28]

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19. *Id.*
20. *See* Le'a Malia Kanehe, *RECENT DEVELOPMENT: The Akaka Bill: The Native Hawaiians' Race for Federal Recognition*, 23 HAW. L. REV. 857, 893 (2001).
21. *See* Pybas, *supra* note 8, at 186.
22. *Id.* at 186–87.
23. *See* Kanehe, *supra* note 20, at 857.
24. *See id.* at 858.
25. *See id.*
26. *See id.*
27. *Id.* at 859.
28. *See* Kanehe, *supra* note 20, at 859–60.

B. Rice v. Cayetano *(2000)*

A landmark case in the relationship between Native Hawaiians and the United States was *Rice v. Cayetano*.[29] This case established the legal difference between Native Americans and Native Hawaiians.[30] In *Rice*, the Supreme Court reversed the Ninth Circuit decision that allowed the State of Hawai'i to restrict voting for Hawai'i's Office of Hawaiian Affairs (OHA) to indigenous Hawaiians.[31]

The OHA was created in the 1978 Hawaiian Constitutional Convention to manage land trusts for indigenous Hawaiians (Kānaka Maoli).[32] To ensure the OHA represented the people it was to protect, voting for OHA trustees was restricted to Native Hawaiians, defined as "persons who had at least one ancestor in Hawai'i in 1778."[33]

When brought to the Supreme Court, the question posed inquired as to whether OHA voting restrictions violated the Fifteenth Amendment's bar on race-based voting qualifications.[34] The Court's answer: yes.[35] The Court held that the voting restrictions implemented had used ancestry as a proxy for race, especially when looking at the stated purpose of OHA to "treat the early Hawaiians as a distinct people."[36] Further, the Court held that Kānaka Maoli were not entitled to similar treatment as federally recognized tribes, which would have provided OHA the status of a "separate quasi sovereign."[37] Instead, the Court considered OHA a state agency and therefore, racial restrictions on voting were not allowed.[38]

While there are a multitude of critiques towards Justice Kennedy's majority opinion in *Rice*, an important argument against it is that the Court's conclusion that ancestry acted as a substitution for race relies on U.S. understandings of race.[39] When it comes to Hawaiian genealogy, there is a very distinctive historical and cultural weight that does not necessarily hold the racial, genetic, or

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29. *See* Jeanette Wolfley, Rice v. Cayetano*: The Supreme Court Declines to Extend Federal Indian Law Principles to Native Hawaiians Sovereign Rights*, 3 ASIAN-PAC. L. & POL'Y J. 359, 359 (2002).

30. *See id.* at 360.

31. *See* Wolfley, *supra* note 29, at 361; Lisset M. Pino, *Colonizing History:* Rice v. Cayetano *and the Fight for Native Hawaiian Self-Determination*, 129 YALE L.J. 2574, 2577–78 (2020).

32. *See* Pino, *supra* note 31, at 2577.

33. *Id.*

34. *See id.* at 2577–78.

35. *See* Pino, *supra* note 31, at 2578; *see* Wolfley, *supra* note 29, at 361.

36. Pino, *supra* note 31, at 2578 (citing Rice v. Cayetano, 528 U.S. 495, 514–15 (2000)).

37. *Id.*

38. *See id.*

39. *See id.*

blooded meanings that it might in the mainland United States.[40] In addition, the opinion fails to provide the history of OHA, which could be argued to be the direct result of the Hawaiian land and sovereignty movements of the 1970s.[41] The holding essentially presents no awareness about the real circumstances of Native Hawaiians because the Court fails to discuss the extraordinary circumstances, the motives, and the historical backdrop that necessitated the creation of the non-Native, majority-sanctioned special election of trustees made to aid the disadvantaged Kānaka Maoli in the first place.[42] Strangely enough, the decision supposedly meant to prohibit discrimination by Native Hawaiians ended up clashing with the ideals behind the Fifteenth Amendment, mainly that the white majority should be prohibited from excluding racial minorities from participating in democratic government.[43]

While the Supreme Court chose not to address the body of federal Indian law that could be applied to Native Hawaiians, both Justice Stevens' and Ginsburg's dissent do present applicable principles of federal Indian law.[44] First, the dissent sets out to establish that Congress has repeatedly used its plenary power over the native inhabitants of the United States, implementing a duty for the national government to support native peoples with special "care and protection."[45] When Hawai'i adopted the Hawaii Statehood Admissions Act as a condition to its statehood, the Act set out 1.2 million acres of land to the State of Hawaii to be held in trust "for the betterment of the conditions of native Hawaiians."[46] Later in 1993, the existence and nature of the special relationship between Native Hawaiians and the U.S. Government was presented in detail when Congress adopted a Joint Resolution that included a formal "apology to Native Hawaiians . . . for the overthrow of the Kingdom of Hawaii," and that also stated that the 1.8 million acres of ceded lands had been acquired without the consent of or compensation to Native Hawaiians or their sovereign government.[47] However, even without relying on that apology, the well-established federal trust relationship with Native Hawaiians can be seen in the fact that over 150 laws today specifically include Native Hawaiians as part of the

40. *See id.* (quoting AMY L. BRANDZEL, AGAINST CITIZENSHIP 109 (2016)).
41. *See id.* at 2578–79.
42. *See* Wolfley, *supra* note 29, at 362.
43. *See id.*
44. *See id.*
45. Rice v. Cayetano, 528 U.S. 495, 530 (2000) (quoting United States v. Sandoval, 231 U.S. 28, 45 (1918)).
46. *Id.* at 532–33.
47. *Id.* at 533 (citing Joint Resolution, Pub. L. No. 103-150, 107 Stat. 1510).

class of Native Americans.[48] By doing this, Congress maintains that Native Hawaiians should be endowed the same rights and privileges afforded to Native Americans and Alaska Natives.[49]

The dissent then pushes back against the idea that Congress's trust-based power only deals with tribes and not individuals and therefore renders Native Hawaiians with no argument as there is no tribe or indigenous sovereign entity within the Kānaka Maoli.[50] Looking at the *Morton v. Mancari*[51] case as precedent, tribal membership cannot be the main component informing the Court's opinion, especially since the U.S. Government has not been limited in its dealing with Native peoples to laws having to do with tribes or tribal Indians alone.[52]

Lastly, the dissent approaches the Fifteenth Amendment equal protection analysis with more nuance than the majority does.[53] It states simply that there lies a difference between ancestry and race, contrasting with the majority's arbitrary equating of ancestry to race.[54] Tracing one's ancestry does not provide information about one's own or acknowledged race today, so while ancestry *can* act as a proxy for race, it does not always do so, and it certainly does not do so in the case of OHA's voting restrictions.[55]

This legal context surrounding the absence of federal recognition of Native Americans provides a backdrop against which we can examine the current legal framework to protect cultural heritage, specifically *intangible cultural heritage*.

II. THE INEFFECTIVENESS OF PROTECTING CULTURAL PROPERTY AND HERITAGE THROUGH WESTERN INTELLECTUAL PROPERTY LAW

A. Cultural Property and "Intangible Cultural Heritage"

Cultural property often indicates the "prehistorical and historical objects that significantly represent a group's cultural heritage," whether it is a tribe, localized population, a cultural or ethnic group, or a nation as a political entity.[56] In the legal context, scholars

48. *See id.*
49. *See id.* at 533–34.
50. *See id.* at 534.
51. *See* Morton v. Mancari, 417 U.S. 535 (1974) (upholding the Bureau of Indian Affairs' employment preference in favor of Indian applicants because it was "reasonably and directly related to a legitimate, nonracially based goal").
52. *See Rice*, 528 U.S. at 535.
53. *See id.* at 539.
54. *See id.*
55. *See id.*
56. Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected Through Current Intellectual Property Law?*, 7 J. HIGH TECH. L. 180, 183 (2007) (citing James D.

describe cultural property as "all of the tangible materials . . . [or] forms of culture produced . . . to adapt to and exercise control over their environment . . . the technological and other associated knowledge considered significant by the members of a culture."[57]

Within the context of the Western world, cultural property tended to be "politically centralized treasures,"[58] such as those collections of medieval European kings and emperors, and the loss of those treasures through armed conflict destroyed the sense of community tied to those objects.[59] In contrast, cultural property within Indigenous culture has a wider application, including all material and intangible knowledge that is important in the protection of spiritual, social, and artistic interests of a community.[60]

Understandably, concerns arise when cultural property cannot be protected. So often, a group's cultural property is a "community property," which can be utilized for various rituals and traditions integral to the identity of that group.[61] In 1994, Zia peoples insisted on reparations from New Mexico for the state's use of their Sun symbol.[62] They sought one million dollars for every year their Sun had been plastered on the state flag and letterhead, opposed to the idea that private businesses could profit off a cultural symbol so strongly tied to their community's religious practices.[63] While this was eventually addressed by the U.S. Patent and Trademark Office through public hearings, the question of whether the country's intellectual property laws sufficiently protect Native culture remained largely unanswered.[64]

B. The Struggle to Protect Cultural Property Through Western Intellectual Property Laws

When looking at the creation and implementation of current intellectual property laws on cultural property, there still exists a lack of understanding of Indigenous culture.[65] This was seen earlier in *Rice v. Cayetano*, where the Court's decision applied a Western

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Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL'Y REV. 255 (2001)).

57. *Id.*

58. *Id.*

59. *See id.*

60. *Id.* at 183–84.

61. *Id.* at 184.

62. *See* Kelley, *supra* note 56, at 185.

63. *See id.*

64. *See id.*

65. *See* Nina Mantilla, *The New Hawaiian Model: The Native Hawaiian Cultural Trademark Movement and the Quest for Intellectual Property Rights to Protect and Preserve Native Hawaiian Culture*, 3 INTELL. PROP. BRIEF 26, 31 (2012).

understanding of genealogy that did not align with how Native Hawaiians viewed ancestry.[66] With regard to cultural property, the United States' approach to intellectual property laws relies on economic incentive, in which protecting one's intellectual property allows for a limited monopoly that preserves their economic investment in that property.[67]

This conflicts with Native cultural property for numerous reasons:

1. Throughout the years, many peoples such as explorers, missionaries, anthropologists, and scientists have documented various aspects of indigenous culture, placing this knowledge into public domain for an already significant amount of time and thus barring the possibility of using patent laws.[68]
2. Throughout the years, many peoples such as explorers, missionaries, anthropologists, and scientists have documented various aspects of indigenous culture, placing this knowledge into public domain for an already significant amount of time and thus barring the possibility of using patent laws.[69] Certain practices may have already become part of the larger world, therefore disposing of its originality regardless of its significance to a specific community.[70]
3. Lastly, the Western concept of "owning" property—despite allowing for joint authors or owners—differs from the concept of communal ownership that often applies to Native cultural property.[71]

C. What Is "Intangible Cultural Heritage"?

This lack of protection becomes even more prominent when it comes to *intangible cultural heritage*. According to United Nations Educational, Scientific, and Cultural Organization (UNESCO), intangible cultural heritage comprises of traditions or living expressions passed down from ancestors to descendants, such as oral traditions, social practices, rituals, or the knowledge and practices required to produce traditional crafts.[72] Under the purview of UNESCO, the

66. *See* Pino, *supra* note 31, at 2578.
67. *See* Kelley, *supra* note 56, at 185–86.
68. *See id.* at 187–88.
69. *See id.*
70. *Id.* at 187.
71. *See id.* at 188.
72. *See What is Intangible Cultural Heritage?*, UNESCO, https://ich.unesco.org/en/what-is-intangible-heritage-00003 [https://perma.cc/ZDR3-VZST] (last visited Jan. 27, 2023).

Convention for the Safeguarding of the Intangible Cultural Heritage (ICH) was adopted in 2003, due to the need to emphasize a part of cultural heritage that is not as "tangible" as monuments, buildings, or natural sites but is equal in importance.[73]

With intangible cultural heritage, the importance lies in the wealth of knowledge and skills amassed from one generation to the next and not necessarily in the production of a particular result.[74] This constant recreation by communities and groups based on changes in their environment creates and strengthens their sense of identity and continuity,[75] and, in line with the goals of the ICH convention, it also promotes respect for cultural diversity.[76] It is important to note, however, that practices incompatible with fundamental human rights (e.g., female genital mutilation), however traditional they may be, are not protected under the ICH convention.[77]

Due to its very nature, defining how something can classify as intangible cultural heritage can be difficult.[78] The ICH Convention does present the idea that the concept of intangible cultural heritage has three fundamental components: (1) a practice—the objective component, (2) a community of people—the subjective or social component, and (3) a cultural environment—the spatial component.[79]

The practice can be manifested in various ways, such as through oral traditions and expressions; performing arts; social practices, rituals, and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship, and an element is not exclusive to a particular domain.[80] The community of people cannot include those who simply spectate or appraise the heritage, but the popularity of an element does not automatically preclude it from fitting within the category of intangible cultural heritage.[81] Within this community, the intangible cultural heritage must be voluntarily transferred from carriers to recipients because the constant recreation or reinterpretation of the heritage indicates its social and living character.[82] Unfortunately, the revitalization of some elements leads to a question of how much change can occur before it is no longer a part of the heritage.[83]

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73. *See* PIER LUIGI PETRILLO, THE LEGAL PROTECTION OF THE INTANGIBLE CULTURAL HERITAGE: A COMPARATIVE PERSPECTIVE 3 (Pier Luigi Petrillo ed., 2019).
74. *See* UNESCO, *supra* note 72.
75. *See* PETRILLO, *supra* note 73, at 6.
76. *See id.* at 5.
77. *See id.* at 4.
78. *See id.* at 4, 6.
79. *See id.* at 6.
80. *See id.*
81. *See* PETRILLO, *supra* note 73, at 8.
82. *See id.*
83. *See id.* at 9.

III. INTELLECTUAL PROPERTY RIGHTS V. INTANGIBLE CULTURAL HERITAGE

The main way intellectual property rights have been developed and conveyed runs counter to the characteristics of intangible cultural heritage as well as the needs of the communities producing such heritage, especially indigenous communities.[84] Bestowing intellectual property rights to a singular person or entity can be inappropriate for cultural traditions and practices that may be expressed collectively and that are considered as belonging to an entire community.[85] Additionally, the time limits of the rights licensed to a person clashes with the permanence of heritage that often reveals deep social or religious origins, which are not meant to become available to the public after a certain period.[86] Lastly, the legal costs associated with acquiring a patent serve as an obstacle to traditional holders of the heritage, putting them at a disadvantage against those who have the means to pay those costs.[87]

Intellectual property laws are deeply rooted in Western notions of protecting individual rights and individuals' financial interests.[88] They emphasize the products instead of focusing on the practices and processes that created the products.[89] This has resulted in a large-scale replication of indigenous designs, motifs, symbols, and artworks—often without the knowledge of or permission from indigenous artists and communities—for the purpose of commercial gain.[90] On top of duplication, commercialization results in the modification of traditional practices and products to make them more marketable and appealing to potential consumers—i.e., tourists.[91] Consequently, the integrity of these products has become a chief concern for indigenous artists and communities.[92]

However, the biggest point of contention is how the conferral of ownership rights to a third party deprives the artists and communities of their "past history and present identity."[93] Granting patents might prevent indigenous communities from making the same goods they have made for generations.[94] In the case of giving patents for

84. *See id.* at 13.
85. *See id.* at 14.
86. *Id.*
87. PETRILLO, *supra* note 73, at 14.
88. *See id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. PETRILLO, *supra* note 73, at 14.
94. *Id.*

traditional medicines, developing countries are concerned because there is no consensus on whether a patent applicant is obligated to disclose the source of genetic or natural ingredients of their invention.[95] In 1997, a patent granted two years earlier in the United States for the wound-healing properties of turmeric was revoked because the natural element had been used for centuries in traditional healing practices in India.[96] Implementing an obligation to disclose an applicant's sources could be greatly helpful with avoiding "bio-piracy" when "patenting pharmaceuticals, cosmetics or other products."[97]

In the growing awareness of this intellectual property rights issue, several countries have independently adopted some method of protection for traditional knowledge and cultural expression.[98] Different remedies such as collective trademarks or certain clauses in contracts have been used.[99] However, there is no uniform scheme at the international level to address the problem, prompting the need to look at individual countries' legislation instead in order to develop a suitable framework for the United States and Native Hawaiian culture.[100]

IV. CULTURAL APPROPRIATION OF INDIGENOUS HERITAGE

Cultural appropriation is defined by the Oxford English Dictionary as "the unacknowledged or inappropriate adoption of the practices, customs, or aesthetics of one social or ethnic group by members of another (typically dominant) community or society."[101] This transpires when members of a dominant and/or governing culture misuse the culture of a historically oppressed or colonized group "without proper referencing, understanding, respect or consultation" with that group.[102]

A. Navajo Nation v. Urban Outfitters *(2021)*

The Navajo Nation, as one of the largest organized Native American tribes, began registering trademarks associated to the Navajo

95. *Id.*

96. *Id.* at 14 n.34; K.S. Jayaraman, *US patent office withdraws patent on Indian herb*, 389 NATURE 6, 6 (1997).

97. PETRILLO, *supra* note 73, at 14–15.

98. *Id.* at 15.

99. *Id.*

100. *Id.*

101. Noelani Arista, *Aloha Not For Sale: Cultural In-appropriation*, KA WAI OLA (Sept. 1, 2018), https://kawaiola.news/cover/aloha-not-for-sale-cultural-in-appropriation [https://perma.cc/FBR7-7JR6].

102. *Id.*

name in 1943.[103] In February 2012, the Navajo Nation sued the clothing company Urban Outfitters, its subsidiaries Free People and Anthropologie, and the companies' websites—collectively, UO—because UO infringed its trademarks by using the name "Navajo" for its sale of goods ranging from jewelry to underwear to flasks.[104] For example, UO entities sold a "Vintage Handmade Navajo Necklace," "Navajo Hipster Panty," and "Navajo Print Fabric Wrapped Flask."[105] The complaint alleged the UO entities committed trademark infringement and trademark dilution by blurring and tarnishment and violated the Indian Arts and Crafts Act, which prohibits the sale of goods falsely labeled as produced by Native Americans.[106]

In its suit, the Navajo Nation argued that UO used the word "Navajo" in direct competition with the Navajo Nation's own sale of goods in a manner that deceived and confused customers, claiming that the goods were "designed to convey to consumers a false association or affiliation with the Navajo Nation, and to unfairly trade off of the fame, reputation, and goodwill of the Navajo Nation's trademarks."[107] UO countered that the use of "Navajo" was merely descriptive, not to identify a source but a particular style of the goods.[108]

A federal court in New Mexico denied UO's motion to dismiss the suit and found that the Navajo Nation sufficiently alleged that UO used the word "Navajo" as a trademark in a way that could result in consumer confusion.[109] Following the district court's ruling, both parties agreed to mediation but that was unsuccessful.[110] Three years later, in 2016, the Navajo Nation was finally able to settle the trademark suit against UO, though terms of the settlement remain undisclosed.[111] However, Navajo leaders released a statement that both parties signed a "supply and license agreement" and even planned to collaborate on authentic Navajo jewelry in future years.[112]

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103. Olivia J. Greer, *Using Intellectual Property Laws to Protect Indigenous Cultural Property*, 22 N.Y. STATE BAR ASS'N 27, 28 (2013).
104. *Id.* at 28.
105. *Id.*
106. *Id.* at 29.
107. *Id.*
108. *Id.*
109. Greer, *supra* note 103, at 29.
110. *Id.*
111. David Schwartz, *Navajo Nation settles trademark suit against Urban Outfitters*, REUTERS (Nov. 18, 2016, 6:15 PM), https://www.reuters.com/article/us-navajo-urbanoutfitters/navajo-nation-settles-trademark-suit-against-urban-outfitters-idUSKBN13D2QA [https://perma.cc/ZG6D-EYJF].
112. *Id.*

B. Disney's Lilo & Stitch

A particularly prominent use/misuse of Native Hawaiian culture was in Disney's original film, *Lilo & Stitch*, released in 2002.[113] Set in Hawai'i, the story focuses on a Hawaiian girl named Lilo and an alien she thinks to be a dog and names Stitch.[114] Native Hawaiians discovered the film incorporated two mele inoa, both of which honor King Kalākaua and Queen Lili'uokalani, both celebrated for their strong national and ethnic identity as well as their roles in the Hawaiian counterrevolution.[115]

Mele inoa are sacred name chants that use a person's name as a way of honoring them, and the two *mele inoa* that appeared in *Lilo & Stitch* are viewed as a source of Hawaiian pride.[116] Not only were the two *mele inoa* merged together into a single song, but they were also renamed for the main character Lilo and Disney then copyrighted the song for the movie's soundtrack.[117]

A movie once highly anticipated by Kānaka Maoli, who believed they knew what to expect—"romanticized notions of caring, forgiving natives with strange beliefs and quirky habits"—instead presented a misappropriation of something sacred to the community.[118] A *kumu hula* (hula teacher) and then President of 'Īlio'ulaokalani Coalition,[119] Victoria Holt-Takamine responded to the film's use of the *mele inoa*, stating: "Disney's Hawaiian consultant has no right to sell our collective intellectual properties and traditional knowledge. These two mele belong to us as a people and cannot be sold without our consent."[120]

This blatant misuse of the *mele inoa*, combined with other attacks on Kanaka Maoli traditional knowledge[121] culminated in Native Hawaiians assembling at the Ka 'Aha Pono '03: Native Hawaiian

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113. Mantilla, *supra* note 65, at 26.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. R. Hōkūlei Lindsey, *Responsibility with Accountability: The Birth of a Strategy to Protect Kanaka Maoli Traditional Knowledge*, 48 HOWARD L.J. 763, 766 (2005).
119. The 'Īlio'ulaokalani Coalition was an organization consisting of native Hawaiian cultural practitioners who aimed to protect and preserve the traditional way of life and ancestral rights of Hawaiians. *See id.* at 766 n.22.
120. Hōkūlei Lindsey, *supra* note 118, at 766–67.
121. *See id.* at 767 (discussing the University of Hawai'i Pacific Biomedical Research Center's proposal of the Hawaiian Genome Project and the licensing of the Hawaiian genome for health reasons. While the Kānaka Maoli do face certain health issues due to their bottleneck population, they also consider protecting the knowledge of their genealogy and worldview to be of utmost importance).

Intellectual Property Rights Conference.[122] The purpose of the conference was to address the increasing concerns of misappropriation of Native Hawaiian traditional knowledge and culture.[123] Over fifteen years later, the same concerns have resurfaced.

C. The Aloha Poke *Case and the "Aloha Not for Sale" Campaign*

While there is no shortage of incidences of misappropriation of Hawaiian culture, a particular occurrence in 2018 led to a resurgence of the fight against cultural appropriation.[124] On July 27, 2018, a poke establishment located in Anchorage, Alaska, owned by Tasha Kahele, a Native Hawaiian, announced on its Facebook page that it was changing its name from "Aloha Poke Stop" to "Lei's Poke Stop."[125] This decision came as a response to a cease and desist letter Kahele received from the attorney representing Aloha Poke Company, a Chicago-based restaurant chain.[126] Aloha Poke Company, after registering the trademark for "Aloha Poke," had sent out cease and desist letters to businesses around the country with "aloha" in their name.[127]

Aloha Poke Company argued that using the word "aloha" in association with food products and service constituted infringement of their federally registered trademarks.[128] After Kahele's Facebook post, Native Hawaiian activist Kalamaoka'aina Niheu picked up the story and produced a Facebook video recounting the story, which quickly went viral.[129] As could be expected, the situation induced negative responses, especially among Native Hawaiians.[130]

Many accused Aloha Poke Company of trying to "own" the word "aloha" and engaging in cultural appropriation, resulting in the creation of the "Aloha not for sale" campaign.[131] Petitions circled the masses demanding that Aloha Poke Company take "aloha" out of its own name, and protests occurred at the company's locations in Chicago and other mainland locations.[132] In addition, the company's social media accounts were flooded with negative comments attacking

122. Mantilla, *supra* note 65, at 26.
123. *Id.*
124. Arista, *supra* note 101.
125. Brett R. Tobin, *Raw Emotions and Fishy Judgment: Aloha Poke Company and the Cost Benefit Analysis of Cease and Desist Letters in the Social Media Age*, 23 HAW. BUS. J. 4, 4 (Feb. 2019).
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. Arista, *supra* note 101; Tobin, *supra* note 125, at 4.
131. Tobin, *supra* note 125, at 4.
132. *Id.*

the company for its actions—their so-called effort to "own" "aloha"—as well as for the authenticity of the poke served there.[133]

As a response to the increasing outrage, Aloha Poke Company founder and former CEO Zach Friedlander further incensed the masses by taking to Facebook and labeling the situation a "witch hunt" and "false news."[134] As expected, the company drew negative reactions from its attempt to characterize the situation as a misunderstanding, even going so far as to misrepresent the contents of their cease and desist letters by claiming there was "zero truth to the assertion that we have attempted to tell Hawaiian-owned businesses and Hawaiian natives that they cannot use the word aloha or the word Poke. This simply has not happened, nor will it happen."[135] The truth quickly came to light when Jeff Samson, co-owner of Aloha Poke Shop in Honolulu, posted a copy of their letter he received from Aloha Poke Company.[136] The letter demanded that his company's "use of 'Aloha' and 'Aloha Poke' must cease immediately," obviously running counter to the claims Friedlander made.[137]

Not only was the *Aloha Poke* case a great example of a public relations nightmare, but the response it elicited from the public also reinvigorated interest in the way intellectual property and culture intersect.[138] The use of "aloha" in business names dates back to around the 1880s "Hale Aloha," a clothing store in Honolulu owned by Goo Kim.[139] The store was advertised in the Hawaiian language newspaper, and customers were encouraged to come and "nana pono e ike pono i ke au nui a me ke au iki (to come and carefully peruse [the merchandise] see for themselves both the great and small currents). . . ."[140]

The *Aloha Poke* case, almost 132 years after Hale Aloha's advertisement in the *nūpepa* (newspaper), brought attention to how "Aloha" as a branding concept has become common and arguably overused in the marketplace.[141] The "Aloha not for sale" campaign came as a response to Aloha Poke Co.'s claim to owning—at least for trademark purposes—the words "Aloha" and "Aloha Poke."[142] In her Facebook Live video, Dr. Kalamaoka'āina Niheu raised important questions about the exploitation of "aloha," especially through commercialization.[143]

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. Tobin, *supra* note 125, at 6.
138. *Id.*
139. Arista, *supra* note 101.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*

In this call to action, a combination of Native Hawaiian organizations from Chicago, Hawai'i, and Alaska coordinated several protests against Aloha Poke Company.[144] Led by Lanialoha Lee of the Aloha Center Chicago, a cultural center in Chicago focused on the "preservation and perpetuation of Native Hawaiian and South Pacific Arts," the protests garnered international consideration of the occurrence of cultural appropriation of Hawaiian words and cultural practices—here, a misappropriation of Hawaiian customary ways of preparing food and feeding people.[145]

By allegedly trying to take "ownership over the word aloha," Aloha Poke Company's actions clearly sullied the nature of what "aloha" has come to mean: kindness and affection given freely and unconditionally.[146] At a protest in Chicago, Kumu Hula Vicky Holt Takamine spoke about how Aloha Poke's actions conflicted with Hawaiian customs of proper behavior:

> We've never put a limit on how you could use our words, we want to share those things with the community around us . . . when you appropriate my cultural practice, when you appropriate our language, and then put a trademark and restrictions on the use of it, for other future generations of Native Hawaiians, that is hewa.[147]

V. THE CURRENT LEGAL CONTEXT OF INDIGENOUS INTELLECTUAL PROPERTY RIGHTS IN THE UNITED STATES

In the United States, there are federal and state laws that can be applied to indigenous intellectual property rights.[148] By outlining the current applicable laws, the weaknesses and strengths of these protections can be identified and can better inform the development of a potential legal framework in the United States to protect Native Hawaiian culture.

A. The Lanham Act[149]

Also known as the Trademark Act of 1946, the Lanham Act is the federal trademark statute.[150] Its purpose to protect goods and

144. *Id.*
145. Arista, *supra* note 101.
146. *Id.*
147. *Id.*
148. Mantilla, *supra* note 65, at 28.
149. Lanham Act, 15 U.S.C. §§ 1051–1141n.
150. Mantilla, *supra* note 65, at 28; U.S. PATENT & TRADEMARK OFFICE, TRADEMARK RULES AND STATUTES (2013), https://www.uspto.gov/sites/default/files/trademarks/law/Trademark_Statutes.pdf [https://perma.cc/BQ5J-X8K3].

services by preventing consumer confusion in the marketplace.[151] It provides for a national system of trademark registration through two basic requirements: (1) "'Use in Commerce' Requirement" and (2) "'Distinctive' Requirement."[152]

The "Use in Commerce" requirement ensures that a trademark is used in trade or that there is a "bona fide intention" to use it in trade.[153] If the mark is not already in use at the time of the application of trademark registration, the applicant must provide, in writing, a good faith intent to use the mark in commerce at a future date.[154] Under the Act's registration procedures, the exclusive trademark rights are awarded to the first applicant to use it in commerce.[155]

The "Distinctive" requirement necessitates that a mark is distinctive and can be used to identify and distinguish goods from one producer or source to another.[156] Trademarks are commonly divided into four categories of distinctiveness: arbitrary/fanciful, suggestive, descriptive, and generic.[157] A mark categorized as arbitrary/fanciful or suggestive is considered inherently distinctive and readily recognized by consumers.[158] Exclusive rights are determined by priority of use.[159] A descriptive mark is only protectable as a trademark *if* it obtained a secondary meaning among consumers.[160] Generic marks or terms are not eligible for trademark protection because they do not indicate a unique and distinct source.[161]

Under § 1052(a), registration for trademarks that "disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute" is prohibited.[162] This restriction appears to be the only portion of the act that potentially provides specific protection to indigenous peoples against cultural misappropriation.[163] It also provides the establishment of the Native American Tribal Insignia Database.[164]

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151. Mantilla, *supra* note 65, at 28.
152. *Lanham Act*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/lanham_act [https://perma.cc/XS44-5GKQ] (last visited Jan. 27, 2023).
153. Lanham Act, 15 U.S.C. § 1051(b).
154. *Id.* § 1051(b)(1).
155. *Id.* § 1051(d)(1).
156. *Id.* § 1052.
157. LEGAL INFO. INST., *supra* note 152.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *See, e.g.*, Mantilla, *supra* note 65, at 28; 15 U.S.C.A. § 1052(a).
163. *See* Mantilla, *supra* note 65, at 28.
164. *Id.*

B. Native American Tribal Insignia Database

"The Native American Tribal Insignia Database is a collection of insignia that the United States Patent and Trademark Office (USPTO)" maintains and uses as a reference when deciding "if new trademark applications attempt to trademark the symbol of a federally or state recognized Native American tribe."[165] It is one component of the larger database maintained by the USPTO, the Trademark Electronic Search System (TESS).[166] The USPTO acknowledges the long and cherished history of spiritual and cultural beliefs within Native American and Alaska Native tribes and claims their database aims to protect those cultural properties.[167]

The USPTO encourages Native American tribes to submit their official tribe insignias to the database, though they are not legally required to do so.[168] This allows the USPTO to consider their tribal insignia while reviewing trademark applications, and the USPTO can determine whether the trademark applicants suggest false connections to the tribal insignias.[169] The USPTO claims that this provides the benefit of protection for a tribe's intellectual property and culture heritage.[170] However, the USPTO also states that including the tribal insignia does not grant any rights to the tribe and it is not the legal equivalent of registering the tribal insignia as a trademark.[171] Registering the tribal insignia as a trademark is still limited to its use—or planned use—in commerce and will still require the trademark application, fee, and examination other trademarks undergo.[172]

C. Indian Arts and Crafts Act of 1935/1990

"In addition to the Lanham Act, the Indian Arts and Crafts Act (IACA)" was enacted in 1935 to "promote the development of Indian arts and crafts and to create a board" that will "promote the economic welfare of the Indian tribes."[173] The IACA authorizes *federally*

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165. *Id.*

166. *Native American tribal insignia*, U.S. PATENT AND TRADEMARK OFF., https://www.uspto.gov/trademarks/laws/native-american-tribal-insignia [https://perma.cc/Y7S6-RD8W] (last visited Jan. 27, 2023).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. U.S. PATENT AND TRADEMARK OFF., *supra* note 166.

173. Mantilla, *supra* note 65, at 28; *Indian Arts and Crafts Act of 1935*, U.S. DEP'T OF THE INTERIOR, INDIAN ARTS AND CRAFTS BOARD, https://www.doi.gov/iacb/indian-arts-and-crafts-act-1935 [https://perma.cc/5VLX-D9Z5] (last visited Jan. 27, 2023).

recognized Indian tribes to bring action against a person who: "offers or displays for sale or sells a good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States."[174] This authorization does not confer any other intellectual property rights.[175] Furthermore, Native Hawaiians may not even be able to bring action under this Act because it defines "Indian" and "Indian tribe" in a way that emphasizes state and federal recognition.[176]

While current federal statutes and programs may help protect cultural heritage and expressions, there remains two issues: (1) they place too great a burden on the indigenous population to protect their traditional cultural expression and heritage, and (2) they rely on a Western model of intellectual property rights that is founded in commercialization and profit.[177] Existing intellectual property law, especially trademark law, is designed to protect marks within its position in the marketplace, forcing traditional cultural expressions and heritage to be used in commerce or to be left without protection.[178]

VI. THE NATIVE HAWAIIAN CULTURAL TRADEMARK MOVEMENT

Unfortunately, the commercial misappropriation of Native Hawaiian culture is not an uncommon occurrence, especially in the State of Hawaii itself.[179] A survey conducted in February 2010 found that most Native Hawaiians found the tourism industry in Hawaii to be inauthentic and distorts their culture.[180] This kind of cultural misappropriation was what Native Hawaiians hoped to protect themselves from when they came together at the Ka 'Aha Pono '03 Conference in 2003.[181]

The Ka 'Aha Pono Conference "brought together Native Hawaiian artists, elders, individuals experienced in spiritual and ceremonial practice, and individuals skilled in traditional healing and plant

174. *Indian Arts and Crafts Act of 1990*, U.S. DEP'T OF THE INTERIOR, INDIAN ARTS AND CRAFTS BD., https://www.doi.gov/iacb/indian-arts-and-crafts-act-1990 [https://perma.cc/S5TT-N5VU] (last visited Jan. 27, 2023).

175. *See, e.g.*, Mantilla, *supra* note 65, at 28–29; U.S. DEP'T OF THE INTERIOR, *supra* note 174.

176. *See* U.S. DEP'T OF THE INTERIOR, *supra* note 174.

177. Mantilla, *supra* note 65, at 31.

178. *Id.*

179. *See* Herbert A. Sample, *Native Hawaiians discontented with tourism*, NORTHWEST ASIAN WEEKLY (Feb. 18, 2010), https://nwasianweekly.com/2010/02/native-hawaiians-discontented-with-tourism [https://perma.cc/QDS7-27GK].

180. *Id.*

181. Mantilla, *supra* note 65, at 27.

knowledge."[182] After Disney's own misuse of traditional chants and various other incidences of cultural misappropriation, Native Hawaiians wanted to find a way to legally protect their traditional cultural expressions (TCEs) and traditional knowledge.[183]

A. The Paoakalani Declaration

As a result, they developed the Paokalani Declaration, which asserted the rights of Native Hawaiians over their TCEs and pushed for the creation of a system that allowed Native Hawaiians to have complete control over TCEs.[184] "The Hawaiian State Legislature adopted the Paoakalani Declaration," deciding to "fund[] a study to determine the best legal solution to the problem."[185]

The Office of Hawaiian Affairs (OHA) sponsored the Native Hawaiian Cultural Trademark Study, which found that most Native Hawaiian artists surveyed preferred using a cultural trademark program.[186] This program would both protect against misappropriation and provide public recognition of Native Hawaiian cultural arts.[187]

B. The Proposed Akaka Bill aka "the Native Hawaiian Government Reorganization Act"[188]

In February of 2009, the Akaka Bill, originally proposed by U.S. Senator Daniel Akaka from Hawaii, was reintroduced in the House of Representatives.[189] A modified version of the bill was then reintroduced in May of 2009 after the other had not made it to committees.[190] The bill proposed a process for organizing and federally recognizing a native Hawaiian government like those of federally recognized Indian tribes.[191] Efforts to pass this proposal through Congress stretched back to 1999, and numerous versions have stalled or failed to receive sufficient votes to reach cloture.[192]

The stated purpose of the bill is (1) the "reorganization of the single Native Hawaiian governing entity" and (2) the establishment

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. Mantilla, *supra* note 65, at 27.
188. *Id.* at 31.
189. *See* S. 2899, 106th Cong. (2000); H.R. 862, 111th Cong. (2009).
190. *See* Native Hawaiian Government Reorganization Act, H.R. 2314, 111th Cong. (2010).
191. Ryan William Nohea Garcia, *Who Is Hawaiian, What Begets Federal Recognition, and How Much Blood Matters*, 11 ASIAN-PAC. L. & POL'Y J. 85, 87–88 (2010).
192. *Id.* at 87 n.1.

of a government-to-government relationship between that formed Native Hawaiian government and the United States.[193] While the bill itself is not an organic, governing document, it states that U.S. policy provides for self-governance for Native Hawaiians.[194] The bill also reaffirms that Native Hawaiians have: "(A) an inherent right to autonomy in their internal affairs; (B) an inherent right of self-determination and self-governance; (C) the right to reorganize a Native Hawaiian government; and (D) the right to become economically self-sufficient. . . ."[195]

More importantly, it identifies native Hawaiians as a "distinctly native community," allowing Congress the authority to promote the welfare of the native Hawaiian people under the Indian Commerce, Treaty, Supremacy, and Property Clauses, and the War Powers.[196] Under these powers, Congress possesses the authority to enact legislation that improves the conditions of Native Hawaiians, and it has previously exercised this authority through the Hawaiian Homes Commission Act of 1920, the act that provided statehood for Hawai'i in 1959, and more than 150 other federal laws addressing the conditions of Native Hawaiians.[197]

After establishing Congress's authority to federally recognize Native Hawaiians in the same manner as it does Indian tribes, it provides a process for how to do so.[198] The bill proposes the establishment of an Office of Hawaiian Relations within the Office of the Secretary of the United States and a Native Hawaiian Interagency Coordinating Group.[199] The Office of Hawaiian Relations would oversee the operation and coordination of the special political and legal relationship between the Native Hawaiian governing entity and the United States.[200] Meanwhile, the Interagency Coordinating Group, made up of officials designated by the President from each federal agency whose actions could significantly or uniquely affect Native Hawaiian conditions, would coordinate federal programs and policies affecting Native Hawaiians and consult with the Native Hawaiian governing entity.[201]

However, much of the controversy lies within the process for establishing the Native Hawaiian governing entity because it limits eligibility to individuals who possess ethnic Hawaiian blood.[202] The

193. H.R. 2314 § 4(b).
194. Nohea Garcia, *supra* note 191, at 88.
195. H.R. 2314 §§ 4(a)(4)(A)–(D).
196. *Id.* §§ 2(1)–(2).
197. *Id.* §§ 4(a)(3)(A)(i)–(iii).
198. Nohea Garcia, *supra* note 191, at 88–89.
199. H.R. 2314 §§ 5(a), 6(a).
200. *Id.* § 5(b)(2).
201. *Id.* § 6(b), (d).
202. Nohea Garcia, *supra* note 191, at 89–90.

U.S. Commission on Civil Rights considered this requirement to be discriminatory "on the basis of race or national origin and further subdivide[s] the American people into discrete subgroups accorded varying degrees of privilege."[203] The finding that Congress has authority to federally recognize a Native Hawaiian governing entity also remains controversial as does whether the bill promotes sound public policy.[204] Public criticism focused more on the potential of the bill to transfer the lands previously ceded to the State of Hawaii by the United States to the native Hawaiian governing entity, as the revenue from those lands currently serves all of Hawai'i's citizens.[205] Among those who aim to obtain complete sovereignty from the United States, the bill is considered to be an impediment to that goal.[206]

VII. USING GLOBAL FRAMEWORKS TO DEVELOP AN EFFECTIVE METHOD FOR PROTECTING NATIVE HAWAIIAN CULTURAL HERITAGE

A. Global Frameworks in Comparison

While this Note heavily focuses on the United States' lack of protection over indigenous culture, specifically Native Hawaiian culture, developing a suitable legal framework for the United States and Native Hawaiian culture requires looking at legislation implemented by other countries. Analyzing what other countries have done because of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage will inform the development of a method of legal protection for Native Hawaiian intangible cultural property. Here, it may be helpful to look at countries with similar colonial histories—i.e., European colonists arriving and establishing communities in regions occupied by indigenous persons—because Hawai'i was a sovereign nation until the U.S. annexation (Brazil), as well as countries that also operate on common law (New Zealand).

B. The Legal Protection of the Intangible Cultural Heritage in Brazil

The nation of Brazil actively participated in drafting the Convention for the Safeguarding of the Intangible Cultural Heritage and there is even a UNESCO representative at the National Historical

203. *Id.* at 90.
204. *Id.*
205. *Id.* at 91–92.
206. *Id.* at 93.

and Artistic Heritage Institute (*Instituto do Patrimônio Histórico e Artístico Nacional*/*IPHAN*).[207] Within the IPHAN exists the Department of Intangible Heritage (DPI), the main governmental structure for the preservation of intangible cultural heritage.[208] Important to note here is that in 2000, the National Indian Foundation (FUNAI) established the registration of Indigenous Cultural Heritage, but this will not be examined here.[209] Directed to the ICH were a set of a policies that included: (1) "the legal instrument of the Registry," (2) "the research methodology developed in the National Inventory of Cultural References (*Inventário Nacional de Referencias Culturais*/*INRC*)," (3) the "National Program for Intangible Heritage (*Programa Nacional do Patrimônio Imaterial*/*PNPI*)," and (4) "safeguarding plans."[210]

The Registry is a legal instrument that acts as a method of social recognition of cultural property, like the Native American tribal insignia database in the United States.[211] However, it is starkly different in that instead of registering specific community symbols, it allows for the listing of "physical sites, building, and objects" along with "traditions, celebrations, rituals, and forms of expression, and the spaces where these practices develop."[212] Traditions can include knowledge and "ways of doing" that are embedded in the daily life of certain communities; meanwhile, forms of expression comprised of "literary, musical, scenic, and recreational manifestations."[213] Celebrations incorporate rituals and celebrations that denote a collective work experience, religiosity, entertainment, and other social practices; and places take account of "markets, fairs, sanctuaries, parks and other spaces where cultural collective practices concentrate and reproduce."[214]

The social groups that practice, create, and recreate a cultural expression submit registry proposals to IPHAN, which are then evaluated, and if considered to be reasonable, are forwarded for instruction.[215] The application kick-starts the preparation of a file—guided by a specific methodology developed by IPHAN—that contains the description of the cultural object along with related documentation.[216]

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207. PETRILLO, *supra* note 73, at 19.
208. *Id.* at 23.
209. *Id.*
210. *Id.* at 24.
211. *Id.*
212. *Id.*
213. PETRILLO, *supra* note 73, at 24.
214. *Id.* at 25.
215. *Id.*
216. *Id.*

Following the conclusion of the registration process, IPHAN then issues an opinion in the federal government's official daily and collects social responses to the issue for thirty days, which are then forwarded to the Cultural Heritage Advisory Council for deliberation.[217] Once approved, the cultural property is added to one of the Books of Registry, and the applicants are given a certificate that names the property, attaches an identification number, and denotes its approval by the Advisory Council.[218]

In 2004, the *Samba de Roda* began undergoing this process of registration—albeit in an odd way—through a public announcement that the Brazilian government intended to nominate the *samba* for designation by UNESCO as a "Masterpiece of the Oral and Intangible Heritage of Humanity."[219] One reason for the interest in the *samba*'s bid was to more widely circulate Brazilian actions in favor of its ICH, and the popularity of *samba* as a highly valued component of Brazilian cultural identity resonated in this announcement.[220] Due to the *samba* being a generic name encompassing a mass of musical rhythms and dances, it became necessary to choose a specific mode of *samba* in the country: *Samba de Roda of the Recôncavo*.[221] As one of the forming strands of "urban *samba*," the *Samba de Roda* was seen as directly tied to the wide spread of the *samba* musical genre in the country.[222] The Registry's approval also came with the establishment of the Association of *Sambadores* and *Sambadeiras* (Asseba) who represented different regions in the country and would work not only to develop guidelines for safeguarding the knowledge but also to pass it on to new generations.[223]

An important component to note about this registry is its ability to ensure the continuity and capacity of a cultural element to be a living and evolving thing.[224] The dossiers compiled during the registration process provide a basis for how best to protect these cultural elements.[225] The Registry is also periodically re-evaluated and renewed every ten years to allow for changes in cultural manifestations.[226]

Meanwhile, the "National Intangible Heritage Program" (PNPI) is used to build "partnerships with government agencies, universities,

217. *Id.*
218. *Id.*
219. PETRILLO, *supra* note 73, at 28.
220. *Id.* at 29.
221. *Id.*
222. *Id.*
223. *Id.* at 31–32.
224. PETRILLO, *supra* note 73, at 26.
225. *Id.*
226. *Id.* at 25.

NGOs, private institutions, and funding agencies" for the funding and execution of safeguarding policies.[227] The Ministry of Culture utilizes these funds to directly invest in cultural projects through agreements or similar means like scholarships or cultural exchange programs.[228] One example is in 2002, when the Centre for Indigenous History of São Paulo's University presented extensive research in the area of indigenous peoples' ICH for the first cultural element's Registry.[229]

C. The Toi Iho Program in New Zealand

In New Zealand, the Toi Iho program provides for indigenous self-determination, flexible ownership options, and art standards based on quality of art instead of the artist's ethnicity.[230] The two goals of the program are to "'maintain the integrity of the Maöri art culture' and 'promote Maöri art and artists nationally and internationally.'"[231] These goals work to "protect all forms of traditional cultural expression" by guarding art forms that enter the marketplace, but also to safeguard art forms that may not be for commercial use.[232]

The program's basis on the right of indigenous peoples' to self-determination allow for an indigenous council to use government funding but autonomously govern the rules of the program.[233] It also permits flexibility in collaborating to create art, even in a collective form, so that Maöri artists may still work with non-Maöris to produce authentic works of Maöri expression.[234] Lastly, its focus on the quality of art that is certified prevents marks from becoming diluted through common use without having to register artists as of Maöri descent or blood quantum—which could potentially be a highly divisive constraint.[235]

These factors make the Toi Iho Program a good basis for protecting Native Hawaiian cultural heritage, especially tangible expressions of it. Further, it works to actually protect the people it was created for in a way that also recognizes their work, and by making use of an indigenous council, it leaves the decision-making to those who are part of the community.[236]

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227. *Id.* at 26.
228. *Id.*
229. *Id.* at 27.
230. Mantilla, *supra* note 65, at 37.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. Mantilla, *supra* note 65, at 38.

VIII. KEY ELEMENTS TO CONSIDER FOR A POSSIBLE CULTURAL TRADEMARK PROTECTION PROGRAM FOR NATIVE HAWAIIANS

With those global frameworks in mind, there are various ways in which the United States could impose legal protections for Native Hawaiian culture. It is important to keep in mind that Native Hawaiians do not necessarily operate in tribes, unlike Native Americans, so protecting Native Hawaiian culture could be more difficult in that there may be fewer rigid guidelines as to what it encompasses. For example, while "aloha" may be an inherent and distinguishable part of Hawaiian culture that should be protected, restricting the use of "poke"—despite its Native Hawaiian roots—could be too broad of a restriction.[237]

A. Cultural Trademark Protection

Tangible cultural property could be easier to protect than intangible cultural heritage because there is often a particular product that results. The difficulty lies in ensuring a collective ownership over a specific product or process in that its creation will not criminalize others but will provide a basis for a cause of action.[238] To protect tangible cultural property, it is helpful to look to the Toi Iho program in New Zealand in that it allows the indigenous community to take charge of the rules.[239]

Likewise, a council can be established that determines the rules of a certification program for Native Hawaiian traditional cultural expressions (TCEs).[240] This would allow Native Hawaiians to have the power to determine what should be considered a Native Hawaiian TCE.[241] Removal of outsiders from this decision ensures that those who have knowledge of the culture are the ones administering and implementing the program.[242] Not only does this support the indigenous right to self-determination, but it could also streamline the process because there will be little to no disruptions by people who know nothing of the culture.[243]

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237. *See What is poke and where did it come from?*, HAWAIIAN AIRLINES, https://www.hawaiianairlines.com/hawaii-stories/food-and-entertainment/origins-of-poke [https://perma.cc/5PKG-MPP4] (last visited Jan. 27, 2023).
238. *See* Mantilla, *supra* note 65, at 34.
239. *Id.* at 37.
240. *See* Mantilla, *supra* note 65, at 37.
241. *See id.*
242. *See id.*
243. *See id.*

The program will also allow for Native Hawaiians to work with non-Hawaiians, opening the culture to others who may not be of Kanaka Maoli blood but who will respectfully use the cultural expressions.[244] As such, it will not need to find a way to justify a registration system for people who are Kanaka Maoli descent.

B. Intangible Cultural Heritage of Native Hawaiians

Looking to the Brazilian model, the establishment of a registry is a good first step towards legal protection of intangible Native Hawaiian culture.[245] However, it needs to provide a basis for a cause of action unlike the submissions to the Native American tribal insignia database.[246] In this sense, it must allow for a sort of collective ownership of the cultural element, whether it be a phrase, an artistic form of expression, and traditional knowledge.[247]

Like that of the Toi Iho program, this registry will likely need to be headed by a Native Hawaiian council;[248] and similar to the Brazilian registry, it will involve the compilation of research and supporting documentation into a file so that it may be considered for approval by this council.[249] This methodological process of submitting an application and garnering public opinion will allow concerns to be addressed openly before the addition of a cultural element to a list that can be used in suit.[250]

Since the task of upending Western intellectual property rights to accommodate for indigenous culture is a daunting one, the most important outcome of a legal framework would be at least providing a cause of action for Native Hawaiians to bring suit against those who appropriate their culture. By allowing Native Hawaiians to create a registry of traditional knowledge practices, phrases, and artistic forms of expressions, they may at least be able to use financial incentive to protect their culture.[251]

CONCLUSION

While this proposed framework may be a step up from the current state of affairs in the area of cultural intellectual property rights,

244. *See id.*
245. *See infra* Section VII.B.
246. *See* U.S. PATENT AND TRADEMARK OFF., *supr*a note 166.
247. *See* Mantilla, *supra* note 65, at 34.
248. *See id.* at 37.
249. *See* PETRILLO, *supra* note 73, at 25.
250. *See id.*
251. *See id.* at 24.

it still cannot be accomplished without federal recognition of Native Hawaiians.[252] The creation of a Native Hawaiian council to oversee a traditional knowledge and historical sites registry will not occur—much less be federally funded—because the lack of federal recognition leaves it under strict scrutiny, and its "racial-based" classification of members will not pass.[253]

Nevertheless, it is important to start legally protecting Native Hawaiian culture to prevent further commodification. In addition, the creation of these registries can also ensure that these cultural practices are recorded and able to be maintained and passed on to new generations.[254] This preservation is equally important in ensuring that Native Hawaiian culture is not diluted to the point of unrecognizability.

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252. *See infra* Section I.A.

253. *See* Pybas, *supra* note 8, at 186–87.

254. *See* PETRILLO, *supra* note 73, at 31.

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