SAMOA

LAW REFORM COMMISSION

THE PROTECTION OF SAMOA'S TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE

Issues Paper IP 08/10

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Preface

The Attorney General referred the reference "Project" on the protection of Samoa's traditional knowledge and expressions of culture to the Law Reform Commission "Commission" in November 2008.

The project aims to examine existing intellectual property laws (*Copyright Act 1998*, *Patents Act 1972*, *Trademarks Act 1972* and *Industrial Designs Act 1972*) "conventional legal frameworks" and their appropriateness for protecting Samoa's traditional knowledge and expressions of culture.

The project will also look at approaches adopted by other jurisdictions to cater for the protection of their traditional knowledge and expressions of culture to help Samoa in determining a suitable approach to take.

The Commission will endeavor to formulate an articulated and reasoned legal policy for the protection of Samoa's traditional knowledge and expressions of culture at the completion of this project.

The Commission has employed for this Issues Paper, the form of questions and a closing date for responses 31 March 2011. This paper therefore discusses the issues and poses questions for consideration. The intention is to enable detailed and practical consideration of the issues.

We emphasize that we are not committed to the views indicated and any provisional conclusions should not be taken as precluding further consideration of the issues.

Given that many questions have been posed, the Commission will make its recommendations once it has received all submissions from stakeholders. The recommendations of the Commission will form the basis of its final report to Cabinet. The recommendations of the Commission will be independent of all stakeholders.

We emphasize however that the views expressed in this paper are those of the Commission and not necessarily those of the people who have helped us

Submissions or comments on this paper should be sent by 31 March 2011 to the Executive Director, Samoa Law Reform Commission, Private Bag 974 or by email to lawreform@ag.gov.ws.

We are grateful for the assistance of the following people who provided comments on earlier drafts of this paper: List

The content of the issues paper will be as follows:

1) IS THERE A NEED FOR CHANGE?

Intellectual property refers to a creation of the mind. It includes inventions, literary and artistic works, symbols, names, images, designs and inventive processes used in commerce. Intellectual property right laws operate to protect the right of creators to their creations.

The *Copyright Act 1998, Patents Act 1972, Trademarks Act 1972* and *Industrial Designs Act 1972* operate to protect the intellectual property rights of creators in Samoa. The enactment dates of these legislation "conventional legal frameworks" fall within the third quarter of the twentieth century, with the exception of the *Copyright Act*. This is approximately two decades before traditional knowledge and expressions of culture were considered to be valuable commodities and given formal international recognition. Therefore, it is without a doubt that these legislation were formulated and enacted without any policy consideration for the regulation and protection of traditional knowledge and expressions of culture.

The lack of relevant law reform in the past years is evident in the failure of conventional legal frameworks to provide adequate protection for Samoa's traditional knowledge and expressions of culture.

The complex nature of traditional knowledge and expressions of culture also render them incompatible with requirements under most of these conventional legal frameworks. This affects the extent to which they can be protected under these intellectual property legislation.

This project will discuss the reasons for this incompatibility and identify possible remedies to ensure that Samoa's traditional knowledge and expressions of culture are given adequate protection.

The paper will consider approaches adopted by other comparable jurisdictions such as the Pacific Islands Forum Secretariat Model (PIFS Model), African Union Model and China, for the protection of traditional knowledge and expressions of culture.

2) DEFINING TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE

The recognition of traditional knowledge stemmed from studies into the origins, behaviour and the development of humans in both primitive and modern societies[1]. This coincided with heightened environmental awareness, which resolved that traditional knowledge contributes to broader environmental assessment than conventional scientific knowledge[2]. It sparked an interest in the relationship between indigenous ways and the preservation of the environment.

The adoptions by international development organizations lead to worldwide appreciation and recognition of traditional knowledge. The United Nations was one of the first international development organizations that produced a report advocating the importance of traditional knowledge. These sentiments were prominently reflected in documents such as the 1992 *Convention on Biological Diversity*, *Agenda 21* and the *Rio Declaration*[3].

However, opponents argue that the integration of traditional knowledge into public policy is dangerous. The basis for this position is the fact that traditional knowledge has a

[1] http://network.nationalpost.com/np/blogs/fullcomment/archive/2009/02/06/book-excerpt-the-problem-with-traditional-knowledge.aspx (Accessed 2 Feb 2010)

[2] Peter J.Usher, "*Traditional ecological knowledge in environmental assessment and management", Arcti*c, 53(2) June, 2000 pp. 183-193.

[3] Frances Widdowson, Sir Wilfred Grenfell College, Memorial University & Albert Howard, Independent Researcher: Aboriginal *"Traditional Knowledge" and Canadian Public Policy: Ten Years of Listening to the Silence"* @ http://www.cpsa-acsp.ca/papers-2006/Widdowson-Howard.pdf (Accessed 2 Feb 2010).

spiritual component which would be difficult to prove through scientific reasoning. Thus, there is a risk that traditional knowledge can be used to justify any activity[4].

Traditional owners on the other hand are also reluctant to disclose their indigenous wisdom for fear of access and abuse by others who are not entitled to such knowledge. Owners may only divulge such valuable knowledge if there is an assurance that their rights and interests are protected.

The latter concern gave birth to the existing dilemma of what appropriate measures should be adopted to offer such protection. Certain matters need to be considered when determining suitable legal mechanisms to protect traditional knowledge. These include the need to seek prior informed consent of traditional owners; the fair and equal sharing of benefits derived from any transactions involving traditional knowledge and expressions of culture; protection of traditional knowledge and expressions of culture from abuse particularly in commercial transactions; and continual respect for customary law and practices[5].

2.1) What is traditional knowledge?

Attempts to define traditional knowledge have been numerous. One definition refers to it as the large body of knowledge and skills embedded in culture and unique to a given location or society[6]. Another definition states it as knowledge and values acquired through experience and observation from the land or from spiritual teachings, and handed down from one generation to another[7].

[4] Above n. 3.
[5] *Intellectual Property and Traditional Knowledge:* ***Booklet No. 2***, World Intellectual Property Organization Publication No. 920(E). p. 24.
[6] http://www.unesco.org/most/bpindi.htm (Accessed 12 March 2010).
[7] Above n.3.

The Pacific Islands Forum Secretariat Model Law (PIFS Model Law) defines traditional knowledge as knowledge generally created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes. It is capable of being transmitted from generation to generation and is regarded as pertaining to a particular traditional group, clan or community and is collectively originated and held[8].

However, a better description of traditional knowledge is given by Stephen Hansen and Justin Van Fleet in *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property, and Maintaining Biological Diversity*[9]. They describe traditional knowledge as the information that people in a given community, based on experience and adaptation to a local culture and environment, have developed over time, and continue to develop. This knowledge is used to sustain the community and its culture and to maintain the genetic resources necessary for its continual survival[10].

Traditional knowledge includes mental inventories of local biological resources, animal breeds, and local plant, crop and tree species. It may include such information as trees and plants that grow well together, and indicator plants, such as plants that show the soil salinity or that are known to flower at the beginning of the rains. It includes practices and technologies, such as seed treatment and storage methods and tools used for planting and harvesting[11].

Traditional knowledge also encompasses belief systems that play a fundamental role in a people's livelihood, maintaining their health, and protecting and replenishing the environment. Traditional knowledge is dynamic in nature and may include

[8] Model Law 2002 (PIFS) cl. 4.
[9] Hansen, Stephen et al, *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property, and Maintaining Biological Diversity*: (2003) p.3.
[10] Above n. 9.
[11] Above n. 9.

experimentation in the integration of new plant or tree species into existing farming systems or a traditional healer's tests of new plant medicines.

In Stephen Hansen and Justin Van Fleets' view, the term "traditional" used in describing this knowledge does not imply that this knowledge is old or untechnical in nature, but "tradition-based." It is "traditional" because it is created in a manner that reflects the traditions of the communities, therefore not relating to the nature of the knowledge itself, but to the way in which that knowledge is created, preserved and disseminated[12].

Furthermore, traditional knowledge is collective in nature hence it is often considered the property of the entire community and not belonging to any single individual within the community[13]. It is transmitted through specific cultural and traditional information exchange mechanisms, for example, maintained and transmitted orally through elders or specialists, such as *tufuga (traditional tattooist)* or *taulasea (fofo).*

Traditional knowledge also has been referred to as indigenous traditional knowledge,[14] cultural knowledge[15] or indigenous knowledge,[16] by a number of other authors. Therefore, traditional knowledge can take to mean cultural knowledge or indigenous knowledge.

Questions:	1. *What is your definition of traditional knowledge?* 2. *What are examples of traditional knowledge found in your village?*

[12] *Elements Of A Sui Generis System For The Protection Of Traditional Knowledge*, World Intellectual Property Organization, Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore, 3rd Sess., 2002, WIPO/GRTKF/IC/3/8.

[13] Above n. 12.

[14] Erin MacKay the Director of the Indigenous Art and the Law project at the Indigenous Law Centre, University of New South Wales and Legal Officer at the Australian Law Reform Commission in, *Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in protection and alternative approach (2009) UNSW Law Journal Volume 32(1)*.

[15] Above n. 14.

[16] Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27(3) *University of New South Wales Law Journal* 585.

	3. *Do you think all sorts of traditional knowledge should be protected?* 4. *Who should traditional knowledge be protected from?* 5. *Who does traditional knowledge belong to?* 6. *Are all traditional knowledge linked to customary land?*

2.2) <u>What are expressions of culture?</u>

The PIFS Model Law gives a clear meaning of expressions of culture. Expressions of culture is defined as any way in which traditional knowledge appears or is manifested, irrespective of content, quality or purpose and whether tangible or intangible.

The PIFS Model Law also gives an inclusive list of examples of expressions of culture. The list includes names, stories, chants, riddles, histories and songs in oral narratives, woodwork, metalware, painting, jewellery, weaving, needlework, shell work, rugs, costumes and textiles, music, dances, theatre, literature, ceremonies, ritual performances and cultural practices, the delineated forms, parts and details of designs and visual compositions and architectural forms[17].

The *Copyright Act 1998* also gives expressions of folklore a similar definition. A comparable list identical to the list above is also provided under the Act as examples of expressions of folklore. A detailed discussion of the definition of expressions of folklore will be done in the relevant section which discusses the *Copyright Act*.

A number of authors have referred to expressions of culture as either cultural property[18], traditional cultural expressions or indigenous property[19]. Therefore, expressions of

[17] *Model Law 2002* (PIFS) cl.4.
[18] Susy Frankel a Professor of Law, Victoria University of New Zealand in *Trademarks and Traditional Knowledge and Cultural Intellectual Property*.
[19] Above n. 14.

culture can take to mean cultural property, expressions of folklore, traditional cultural expressions or indigenous property.

Questions:	*7. What is your definition of expressions of culture?* *8. What are examples of expressions of culture found in your village?* *9. Do you think all sorts of expressions of culture should be protected?* *10. Who should expressions of culture be protected from?* *11. Who do expressions of culture belong to?* *12. Are all expressions of culture linked to land?*

3) CONVENTIONAL LEGAL FRAMEWORKS

The *Copyright Act 1998, Patents Act 1972, Trademarks Act 1972* and *Industrial Designs Act 1972* protect the rights of intellectual property owners in Samoa. These conventional frameworks fulfill the public policy objective of consumer protection by preventing the public from being misled as to the origin or quality of a product or service. For example, trademark law operates to prevent customers from buying products of inferior quality.

These conventional frameworks also offer periodic protections over new creations and inventions. The given protection aims to give creators monopoly over their creations and encourage them to make new creations and inventions. It also gives them confidence to publicise and commercialise their works without fear that potential competitors or imitators would benefit from their labour.

But, no country favours giving the creator of an idea, an eternal property in his or her creation against imitators[20]. The implications of such a privilege on economies would be great. Instead, they would rather set limited forms of protection fashioned to safeguard against unauthorized exploitation by others[21]. Once this period of protection lapses, the

[20] Professor Cornish (1981) *Intellectual Property: Patents, Copyright, trade Marks and allied Rights*: London.
[21] Above n. 20.

public can freely access and use the ideas, concepts and designs that formed the basis for these formerly protected creations and inventions. The rationale for this is to promote innovation and creativity in society and facilitate the productions of newly improved creations and inventions.

The protections that are offered under conventional frameworks all focus on private individuals rather than communities or groups, except in the case of the *Copyright Act*. Hence, these conventional frameworks are inappropriate for safeguarding local traditional knowledge and expressions of culture that are usually held by communities.

In addition, the strict conditions for protection specified under these conventional frameworks are also incompatible with the unique nature of traditional knowledge and expressions of culture.

3.1) Copyright protection

The *Copyright Act 1998* protects original intellectual creations in the literary and artistic domain. A work is protected under copyright law by the sole fact of its creation, irrespective of its form of expression, content, quality and purpose[22]. Therefore, a creation or original work does not need to be registered in order for it to be protected.

In defining works that can be protected the Act gives an inclusive definition. The definition includes writings, oral works, works created for stage productions, expressions of folklore, audiovisual works, architectural work, works of fine art, photographic works, works of applied art, illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography architecture or science[23].

[22] *Copyright Act* s. 3(2).
[23] *Copyright Act* s. 3(1).

The Act also offers protection over derivative works from earlier protected works. These include translations, adaptations, arrangements and other transformations or modifications of an earlier work or collections of works[24].

In establishing such protection, the Act recognises economic and moral rights of creators in their creations. Economic rights are exclusive rights which operate to exclude the whole world and give holders the right to authorise the usage of their creations by others[25]. Economic rights are alienable. They can be alienated either temporarily (licence) or permanently[26]. Moral rights on the other hand are based on a European-imported idea of inalienable artistic merit that exists within a creation, apart from its economic value[27]. The Act recognises three moral rights: the right of acknowledgement, the right against false acknowledgement and the author's right to have his or her work treated with integrity and not in any kind of offensive manner[28].

Any person found to have infringed the economic or moral rights of an owner may be liable for damages or a fine not exceeding WST25,000.00 or in the case of re-offenders a maximum penalty of WST50,000.00; under civil law and criminal sanctions provided under the Act.

A number of exceptions are available under the Act where protected works may be used without the authority of the owner such as, in the cases of private reproduction for personal purposes,[29] quotation,[30] educational purposes,[31] for storing and preservation in libraries and archives,[32] public information[33] and display[34].

[24] *Copyright Act* s. 4(1).
[25] *Copyright Act* s. 6.
[26] *Copyright Act* s. 19.
[27] See, generally, Maree Sainsbury, *Moral Rights and their Application in Australia* (2003) cited in Erin MacKay, Above n. 14.
[28] Copyright Act s. 7.
[29] *Copyright Act* s. 8.
[30] *Copyright Act* s. 9.
[31] *Copyright Act* s. 10.
[32] *Copyright Act* s. 11.
[33] *Copyright Act* s. 12.
[34] *Copyright Act* s. 15.

The Act also contains an incorporation provision[35] which operates to give legislative force to international treaties in respect of copyright and related rights that Samoa is a party. However, the provision is specific that in the case of a conflict between the provisions of the Act and that of a treaty, the provisions of the Act prevails. Samoa has only ratified the *Berne Convention*[36]. The *Berne Convention* provides an international framework for protection of author's rights. *(A discussion of this convention is outside the scope of this paper.)*

Lastly, the Act specifies the duration of protection periods which are given to various categories of authors. A single author's economic and moral rights are protected during the life of the author and for seventy five (75) years after his or her death[37]. In a joint authorship, their economic and moral rights are protected during the life of the last surviving author and for seventy five (75) years after his or her death[38]. In the case of a collective work (other than applied art or audio visual work) economic and moral rights are protected for seventy five (75) years starting from the date when it was made[39]. In relation to a work published anonymously, the economic and moral rights are protected for seventy five (75) years beginning from the date which the work was first published[40]. The economic and moral rights in an applied art (e.g. a cup decorated with designs) are protected for twenty five (25) years commencing from the date when the work was made[41].

3.1.1) Protection of expressions of folklore:

The protection of expressions of folklore is also specifically addressed under the Act. The definition given to expressions of folklore is, a group and tradition-based creation of groups or individuals reflecting the expectations of the community as an adequate

[35] *Copyright Act* s. 33.
[36] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 July 1886, 943 UNTS 178, art 6*bis* (entered into force in Samoa in July 21, 2006).
[37] *Copyright Act* s. 16(1).
[38] *Copyright Act* s. 16(2).
[39] *Copyright Act* s. 16(3).
[40] *Copyright Act* s. 16(4).
[41] *Copyright Act* s. 16(5).

expressions of its cultural and social identity, standards and values as transmitted orally by imitation or by other means[42]. This provision has not been tested in the local courts. However, it seems to mean that for a creation to be accepted as an expression of folklore, it initially must be a creation based on traditions of an identified group of people or community. Secondly, the relevant community must accept such creation as an adequate expression of its values, standards, social identity and culture.

A broad list of examples of how folklore can be expressed is also incorporated in the definition given. It includes tales, poetry, riddles, songs and instrumental music, dances, plays, art, drawings, paintings, carvings, sculptures, pottery, terra-cotta, mosaic, woodwork, metal wares, jewellery, handicrafts, costumes and indigenous textiles.

The protection offered safeguards against reproduction, communication to the public by performance, broadcasting, distribution by cable or other means and adaptation, translation and other transformations made either for commercial purposes or outside their traditional or customary context[43].

In addition to customary exception and general exceptions in Part I, the Act also allows the use of expressions of folklore by a person exclusively for his/her personal purposes; short excerpts for reporting current events; and solely for face to face teaching or scientific research[44].

Anyone who wishes to use an expression of folklore for commercial purposes or in a manner outside its traditional or cultural context has to seek permission from the competent authority determined by the Minister of Justice. It is a requirement that the community or place from where the expression of folklore was derived from be specifically indicated every time it is published or communicated to the public.

[42] *Copyright Act* s. 2.
[43] *Copyright Act* s. 29(1).
[44] *Copyright Act* s. 29(2).

Any person who uses an expression of folklore for commercial purposes or in a way that does not fall under any of the exceptions is liable to the competent authority for damages, injunctions or any other remedies that the court would deem fit in each claim[45].

All monies collected from expressions of folklore for fees, damages and compensation are to be used for the development of culture[46]. The Act does not give any guidance on how such monies are to be used for the development of culture.

3.1.2) Limitations

Copyright law only protects tangible manifestations of the mind. When an idea is captured or fixed in a physical form that an owner can exert possession over, it will be protected. For example, a song can be given protection if the notes or words are reduced to writing or recorded. Therefore, copyright protection would only be applicable to expressions of culture. Traditional knowledge can only be protected when they become embodied as an expression of culture.

Furthermore, not all expressions of culture can be protected under copyright law. It is, only those that can fit under the definition of literary or artistic domain or expressions of folklore. The definition of expression of folklore is wide enough to cover most expressions of culture except few that can be addressed under patent law.

In addition, an expression of culture will have to be an original work before it can be protected. In the judgment of the Honourable Chief Justice Sapolu in *Fauolo v Gray*,[47] a case that was decided just before the enactment of the current Act, he takes the view that an original work can be a first creation or a derivative of that first creation. Therefore, in claiming copyright protection over an expression of culture, the alleged creator will have

[45] *Copyright Act* s. 30.
[46] *Copyright Act* s. 29(5).
[47] [1997] WSSC 1; CP 364 1995 (5 August 1997).

to provide sufficient evidence that he or she was either the first creator or the creator of a derivative work.

It is important to note that the protection of a derivative creation may be dependent on the consent of the first creator, whether it was granted or not. Furthermore, it may be difficult to prove originality for some expressions of Samoan culture in cases where they would seem identical to existing ones. For example, the designs on many of *upeti* (printing boards) sold by hawkers around town all seem identical. However, in the case that such works cannot be protected as first creations they might qualify as derivative creations.

In relation to the extent of application of the Act, the Court of Appeal in *Galumalemana v. Timani Samau & Sons Truck Services Ltd*,[48] provided a good discussion on the subject. The Court in its findings found that the Act operates to protect original creations from 19 December 1972. The *Copyright Act 1913* (New Zealand) was the relevant law in Samoa prior to that. *(A discussion of the NZ Act is outside the scope of this paper.)* Therefore, protection under the Act is only limited to eligible expressions of culture created after 19 December 1972.

Problems would also arise when determining who has original ownership of economic rights in an expression of culture. In *Fauolo v. Gray*,[49] Chief Justice Sapolu when commenting on *Ladbrooke (Football) Ltd v. William Hill (Football) Ltd*.,[50] asserted that leadership and the act of making a request are not susceptible to copyright law because there is no copyright in a suggestion. He takes the view that a person must make material contributions to a creation before his or her rights to such a creation are recognised under copyright law. In light of such a discussion, an elder in a village who advises a group of women on *siapo* making would not have a right in the *siapo*. The elder must provide material contributions such as the pounding of the mulberry bark or drawing designs on the mulberry paper before it can be said that he or she has a moral or economic right in the *siapo*.

[48] [2006] WSCA 6 (26 April 2006).
[49] [1997] WSSC 1; CP 364 1995 (5 August 1997).
[50] [1964] All ER 465.

Even if expressions of culture are given copyright protection, such protection is only for a limited time before it can be freely accessed by the public. It is highly likely that traditional owners of eligible works want the protection of their rights to continue endlessly. After all, it is an embodiment of their cultural and social identity, standards and values.

As mentioned earlier, the provisions regarding the protection of expressions of folklore are applicable to expressions of culture. These provisions have not been tested in the local courts to date hence their scope is unclear. However, it appears that the Act vests original economic rights in expressions of folklore in the competent authority referred to and not the relevant creators of expressions of folklore. This competent authority is yet to be determined. Moreover, it is unclear who has control over monies collected from transactions involving expressions of folklore. There is also no mention of the original creators getting a fair share from the use of their creations. In the absence of an express provision, there is no guarantee that traditional owners will get a fair share from any financial benefit obtained from their creations.

Furthermore, the Act does not require the seeking of prior and informed consent of the original creators and the members of a community or group whose cultural and social identity, standards and values are fixed in the expression of folklore in question, before authority is given to a commercial or non-customary user. The consent of the competent authority is the only requirement. It is possible that the competent authority would seek the prior and informed consent of the original creators before authorisation is given to potential users but in the absence of express provisions in the Act there is a great possibility that such prior and informed consent would not be sought particularly in cases where disputes would arise.

Lastly, an aggrieved copyright owner will have to bring a claim before a court against an infringer of his or her copyright before he or she can be compensated. The process is lengthy and costly hence it is unlikely that traditional owners will take out civil claims

unless it is worthwhile and they are confident of success. Trivial infringements however, can be addressed under the criminal sanctions.

It is also important to note the concerns of the International Bureau of WIPO regarding the inappropriateness of copyright law for protecting expressions of folklore.[51] In their view, even though relevant amendments have been made to the *Berne Convention* in 1967 to introduce copyright protection for folklore at the international level, it seemed that copyright law was not the right and certainly not the only means for protecting expressions of folklore. This is because copyright was author centric but in the case of folklore, an author - at least in the way in which the notion of "author" is conceived in the field of copyright - is absent. Because the existing system of copyright protection was not adequate for the protection of folklore, the Bureau recommended a new legal framework as a solution.

Questions:	*13. How can the Copyright Act be improved to make it more suitable for the regulation and protection of traditional knowledge and expressions of culture?* *14. Should exclusive rights in an expression of folklore/expression of culture be vested in a competent authority determined by the Minister of Justice or the creator?* *15. Who should benefit from monies earned from transactions in relation to trade in expressions of folklore?*

3.2) Patents Protection

The *Patents Act 1972* confers an inventor with exclusive rights in his or her invention. An invention is defined in the Act as any manner of new manufacture; any new method of

[51] *The Protection of Expressions of Folklore: The Attempt at International Level* at http://itt.nissat.tripod.com/itt9903/folklore.htm (Accessed 10 June 2010)

application of known processes or the improvement or control of known processes[52]. The exclusive right in an invention is conferred by a letters patent[53]. A letters patent provides an inventor with a temporary legal monopoly over the using, selling, or making his or her said invention in Samoa, and of authorising others to do so, for a term of sixteen (16) years from the date of issue of the letters patent[54]. The rights and privileges created by a letters patent are alienable[55].

When the period of protection lapses the protected invention goes into the public domain and is freely accessible by the public.

An invention is patentable under the Act if it satisfies certain requirements. Firstly, the invention must be new. That is, it was never known to the public domain before the invention was discovered or before the invention was disclosed during the patent application process. Secondly, the invention must have a specific utility. That is, it must be useful.

3.2.1) Limitations

Patent protection can be given only to traditional knowledge that satisfy the requirements of the Act. This means that a traditional knowledge must first qualify to be an invention. Secondly, such traditional knowledge must be new. Thirdly, the traditional knowledge concerned must be useful. The stringent requirements, limit the types and number of traditional knowledge that can be protected under patent law. However, keen traditional owners can still hope to take advantage of the costly and lengthy patent registration process. That is, they can still apply for registration and may be successful if a member of the public does not object and the Attorney General approves their applications.

[52] *Patent Act* 1972 s. 2.
[53] *Patent Act* 1972 s. 4.
[54] *Patent Act* 1972 s. 4(2).
[55] *Patent Act* 1972 s. 12.

The inclusive definition given to 'inventor' under the Act is wide enough to embrace traditional owners. However, the Act is silent on whether an inventor can be a group of people. In the absence of any clear guidance in case law, it is unclear whether the provisions of the Act are wide enough to cover collectively owned traditional knowledge based inventions. An express recognition of collective ownership would be suitable for traditional societies, given that most traditional knowledge are owned collectively. For example, the traditional knowledge related to the production of the *mamala* concoction that is used by Epenesa Mauigoa of Falealupo to treat hepatitis, is likely to belong to her family rather than her alone.

However, nothing would stop a group of traditional owners from appointing a single representative to obtain a patent on their behalf. The group can also incorporate themselves into a company and take out a patent on a particular traditional knowledge.

The requirement for full disclosure of an invention when applying for patent registration is another limiting factor. If an application fails, any traditional knowledge related to an invention in a failed application is now in the public domain and cannot be retracted. In the absence of clear statutory guidelines, traditional owners would hesitate to seek protection under the patent law.

There is also the issue regarding the finite period of patent protection which would be given to a patented invention. Any traditional knowledge linked to a patented invention would be in the public domain after sixteen (16) years. It is highly likely that traditional owners would approve of their traditional knowledge being freely accessible by others who are not members of their group. The whole process maybe counter productive given the short period of protection after which time the traditional knowledge is available to the public.

The Act also does not provide any guidance as to legal recourses that would be available to a disgruntled traditional owner whose patent has been infringed. However, as evident in *China Construction Realty Ltd v. China International Club Ltd.*,[56] the owner of a patent can rely on civil remedies to protect any infringement of their patent. But, given the cost involved in bringing such a claim before a court, a traditional owner would only do so if it is worthwhile. Therefore, it would have been helpful if criminal sanctions were available under the Act. That would mean any patent owner who cannot afford to bring a civil claim against a rich company that has infringed his or her patent can rely on the police or prosecutors protecting his or her interests.

Question:	*16. How can the Patents Act be improved to make it more suitable for the regulation and protection of traditional knowledge and expressions of culture?*

3.3) <u>Trademarks protection</u>

A trade mark is a mark used in the course of trade to indicate a connection between a natural or legal person and certain goods[57]. A mark can be words, phrases, symbols, designs or a combination of these. The *Trademarks Act 1972* confers the owner of a trade mark with exclusive rights to the use of such trade mark in connection with the goods in respect of which it was registered[58]. This means they can assign or transmit their marks for a consideration[59].

The prime purpose of trade marks was concisely expressed by the Supreme Court of the United States in *Hanover Star Milling Co. v Metcalf*.[60]. It is to identify the origin or ownership of the goods to which it is affixed. It is a marketing short-cut which persuades

[56] [2007] WSSC 52 (3 July 2007).
[57] *Trademarks Act 1972* s. 2.
[58] *Trademarks Act 1972* ss. 2 and 15.
[59] *Trademarks Act 1972* s. 15.
[60] (1916) 240 US 403, 412.

customers to select what they want or what they had been led to believe they want[61]. It protects customers from buying inferior products. On the other hand, it also works to protect a proprietor from others who may wish to benefit from the success of his or her products.

A mark is registrable as a trade mark if it satisfies certain requirements[62]. It must be registered in respect of particular goods or classes of goods as classified in the First Schedule to the Act. The mark to be registered must also be distinctive. Being distinct means the mark does not resemble any other existing word, phrase, symbol or design associated with a similar product.

An interested person must apply in writing to the Registrar of Trademarks (Registrar of the Supreme Court) to register a trade mark[63]. If the application is successful, he or she will be issued with a certificate of registration as proof of registration[64]. The successful applicant can enforce his or her exclusive rights against infringers of such a trade mark. This protection upon registration is for a period of fourteen (14) years and it may be extended through re-registration[65].

3.3.1) Limitations

When registering a traditional knowledge as a trade mark, it must satisfy the statutory requirements before it can be registered. Firstly, it must qualify as a registrable mark. That means a traditional knowledge needs to be transformed into a word, phrase, symbol, design or a combination of these before they can become a registrable mark. Hence, a traditional knowledge has to be transformed into an expression of culture that satisfies requirements of the Act before it can become registrable. This would operate to exclude a traditional knowledge that is incapable of being transformed into an expression of culture, as well as an expression of culture that cannot be fashioned into one of the prescribed forms.

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[61] *Mishawaka Rubber and Woollen Mfg Co v SS Kresge Co* (1942) 316 US 203, 205.
[62] *Trademarks Act 1972* s. 5.
[63] *Trademarks Act 1972* s. 6.
[64] *Trademarks Act 1972* s. 9.
[65] *Trademarks Act 1972* s. 13.

Secondly, the expression of culture must be distinctive. That is, such expression of culture must not resemble any existing trade mark. The prohibition of the use of geographical names, matai titles and surnames by the Act also means that the names of villages or family names cannot be registered.

The last condition requires the expression of culture to be registered in respect of goods or classes of goods classified in the First Schedule to the Act. The list includes chemical products, building materials, machinery and electrical appliances, foodstuff, scientific apparatus, metal products, tools, utensils, vehicles and spare parts, textiles, leather products, wooden products, agricultural products, groceries, alcohol and tobacco.

Once registered, the expression of culture is protected as a trade mark and must be used in connection with the goods in which it was registered. If it is used outside the prescriptions of the Act without legitimate justifications, it will be removed from the trade mark register. This goes to prove that monopoly guaranteed under a trade mark is in a proprietor's trade and not in the trade mark.

However, Justice Laddie in *Wagamama Ltd v City Centre Restaurants Plc and Another*.,[66] commented that the scope of such a monopoly can be broadened to include the trademark itself. He claimed that such a monopoly could be likened to a quasi-copyright in the mark, but unlike copyright, there would be no fixed duration for the right and it would be a true monopoly effective against copyist and non-copyist alike[67]. If such an extension would mean that proprietors would have the sole right to deal with their trade marks even to the extent of restraining conduct that is injurious to them, then it is highly likely that such a modification would suit traditional owners. On the other hand,

[66] [1995] FSR 713.
[67] [1995] FSR 713.

such a reform would inflate the trade mark register to the extent that it will be difficult to maintain.

Traditional owners who are interested in selling their expressions of culture can also register a trade mark in respect of their products. This was a strategy used by the *Seri* people of Mexico when facing competition from mass production. They registered a trade mark to protect authentic ironwood products that are produced through their traditional methods[68].

The list of goods under the First Schedule to the Act may need to be extended to capture a wider range of expressions of culture if found to be restrictive. This latter approach will create a competitive advantage over similar products that are alike but are not traditional knowledge-based. It also helps to certify the authenticity of their products. But, this would only suit traditional owners who are keen to market their expressions of culture. It also does not protect against imitators and pirates reproducing such expressions of culture for commercial purposes.

Therefore, given the function of a trade mark and the limited forms of expressions of culture that can be protected under it, it is doubtful whether trade mark law can single-handedly provide the much needed regulation and protection of traditional knowledge and expressions of culture.

Question:	*17. How can the Trademarks Act be improved to make it more suitable for the regulation and protection of traditional knowledge and expressions of culture?*

[68] *Intellectual Property and Traditional Knowledge:* ***Booklet No. 2***, World Intellectual Property Organization Publication No. 920(E). p. 19.

3.4) Industrial Designs Protection

Industrial design is the skill of creating and developing concepts and specifications that optimize the function, value and appearance of products and systems for the common benefit of both user and manufacturer. It is a combination of applied art and applied science, whereby the aesthetics and usability of mass-produced products may be improved for marketability and production[69].

The definition given in the *Industrial Designs Act 1972* is:

> *" … any assemblage of lines or colours designed to give a special appearance to an industrial or artisanal product, and any plastic form, whether or not associated with colours, provided such assemblage or form can serve as a pattern for the manufacture of an industrial or artisanal product but does not include anything in the industrial design which serves solely for the obtaining of a technical result;"*[70]

A person who wishes to register an industrial design in Samoa has to apply to the Registrar of Designs. Any application should satisfy all the listed statutory requirements before being accepted for registration[71]. These requirements include: a written request for registration; name and address of applicant or an address for service in the case of a foreign applicants; a sample of the product which the design is incorporated or a graphic representation in colour; and indication of products for which the industrial design will be used[72]. Successful applicants will be registered and issued certificates of registration[73].

The effect of registration is such that it gives the registered owner exclusive right to the industrial design. That is, the right to restrain others from reproduction of the industrial design protected; offering any product incorporating the industrial design for sale or utilisation and holding such products for offering it for sale or utilisation[74].

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[69] http://www.absoluteastronomy.com/topics/Applied_art (Accessed 10 March 2010)
[70] *Industrial Designs Act 1972* s. 2.
[71] *Refer to relevant sections of the Industrial Designs Act 1972*.
[72] *Industrial Designs Act* 1972 s. 7.
[73] *Industrial Designs Act 1972* s. 11.
[74] *Industrial Designs Act 1972* ss. 16(1) (a) to 16(1) (c).

The rights conferred by the registration of an industrial design can be alienated temporarily through the granting of licences,[75] or permanently either through assignment or transmission through succession[76].

The protection offered through registration is only against acts done for industrial and commercial purposes[77]. The rights conferred do not extend to acts done to the product incorporating the protected industrial design after it has been sold only in the case of duplication or substantial copying of the protected design[78]. The duration of such protection under Industrial Designs Act is for a period of 5 years determined from the date of application and is renewable[79].

3.4.1) Limitations

Industrial design law can be used to protect expressions of culture that can be applied to products to increase their function, value and appearance. For example, traditional artworks, models, designs and fashions.

The scope of such protection is limited to designs that are new and have not been available to the public. This means that only new expressions of culture can be registered and protected under the Industrial Designs Act. The Act does not provide a clear definition of what it means by "new" and whether a special exception can be made in relation to expressions of culture.

The *Industrial Designs Act* establishes rights akin to economic and exclusive rights. This would seem adequate for owners of expressions of culture to engage in simple transactions. But economic rights would not be sufficient to protect their interests in the

[75] *Industrial Designs Act 1972* ss. 19 to 22.
[76] *Industrial Designs Act 1972* s. 17.
[77] *Industrial Designs Act 1972* s. 16(3).
[78] *Industrial Designs Act 1972* s. 16(4).
[79] *Industrial Designs Act 1972* ss. 14 and 15.

case of abuse and offensive use of such cultural expressions and/or related traditional knowledge by a third party.

The Act does not provide a mechanism by which an interested third party can obtain the consent of traditional owners for the use of an expression of culture and related traditional knowledge. Distribution of benefits acquired from any resulting transactions should also be regulated to ensure that they are distributed fairly amongst the right traditional owners.

Question:	*18. How can the Industrial Designs Act be improved to make it more suitable for the regulation and protection of traditional knowledge and expressions of culture?*

3.5) <u>Other applicable laws</u>

In addition to conventional legal frameworks, the protection of certain expressions of culture can be obtained from the *Samoan Antiquities Ordinance 1954*.

The *Ordinance* provides for the protection and preservation of Samoan antiquities. Antiquities are defined under the Ordinance as Samoan relics and articles manufactured with ancient Samoan tools and according to Samoa customs and methods[80]. It also includes all other articles or things of historic, anthropological, or scientific value or interest and relating to Samoa including Samoan fine mats, orators staffs, orators fly whisks, ceremonial headdress and other artefacts but does not include any botanical or mineral collections or specimens[81]. In the case of a dispute as to the scope of the

[80] *Samoa Antiquities Ordinance 1954*, s 2.
[81] *Samoa Antiquities Ordinance 1954*, s 2.

Ordinance, the Head of State has the final say as to what articles or things are within its scope[82].

The Ordinance operates to prevent unauthorised exportation of Samoan antiquities. It empowers officers of Customs to seize and detain any Samoan antiquities about to be removed illegally from Samoa[83]. The Head of State may authorise the export of any antiquities[84]. A Customs officer may authorise the export of fine mats[85].
The Head of State may make the granting of his/her authorisation conditional upon the making of copies of antiquities to be exported either through photography, cast or in any such manner as the Head of State directs[86]. These copies are the property of the Government of Samoa for the use of the people of Samoa[87].

3.5.1) Limitations

The Samoan Antiquities Ordinance is a potential measure that can be used to protect local expressions of culture. It can operate as a border protection measure, regulating the taking of expressions of culture out of Samoa.

However, the effectiveness of any protection provided under the Ordinance is hindered by the fact that it is only limited to expressions of culture that can fit under the definition of antiquities. That is, protection would only be given to expressions of culture manufactured with ancient Samoan tools and according to Samoan customs and methods. This would exclude expressions of culture created with new technology or a new method, which may be a more economical and faster way to reproduce such expressions of culture for the tourism market.

[82] *Samoa Antiquities Ordinance 1954*, s 9.
[83] *Samoa Antiquities Ordinance 1954*, s 5.
[84] *Samoa Antiquities Ordinance 1954*, ss. 6 and 7.
[85] *Samoa Antiquities Ordinance 1954*, s. 4.
[86] *Samoa Antiquities Ordinance 1954*, s. 8.
[87] *Samoa Antiquities Ordinance 1954*, s. 9.

Furthermore, protection can only be warranted to expressions of culture that are articles or things of historic, anthropological or scientific value and relating to Samoa. This can limit such protection to old and ancient articles leaving recently manufactured expressions of culture vulnerable to exploitation and abuse.

The Ordinance is also explicit that it does not protect botanical, mineral collections or specimens. This potentially means that the Ordinance cannot protect expressions of culture that deal with the use of herbs as in the case of traditional medicine or any other products made from local minerals.

In addition, the absence of proper guidelines to how the Head of State may exercise his or her discretion under the Ordinance particularly in relation to articles and things that can be covered under the Antiquities Ordinance during disputes allows for uncertainty as to its real scope.

Question:	*19. How should the Samoa Antiquities Ordinance be improved to make it more suitable for the regulation and protection of traditional knowledge and expressions of culture?*

3.6) A Case for Law Reform?

A brief analysis of the conventional legal frameworks reveals that they are not totally incompatible. These conventional frameworks can still be used to regulate and protect traditional knowledge and expressions of culture despite limitations. Identical frameworks have also been reformed and are successfully being utilised in other jurisdictions to regulate and protect traditional knowledge and expressions of culture. Therefore, the important concerns are, how efficient are these conventional legal frameworks in other jurisdictions and whether law reform would be the answer.

In the next part, this paper will look at reforms in China to improve the relevance of conventional legal frameworks to traditional knowledge and expressions of culture.

3.6.1) China

China has modified its Patent laws and relevant regulations to provide for the protection of its traditional medicine[88].

- *Patent Law of 2000*

The purpose of *Patent Law 2000* is to accelerate inventors' enthusiasm and stimulate innovation[89]. It is also aimed at providing an important and effective means of traditional medicine intellectual property protection. The scope of this protection covers product,[90] method[91] and the use[92] of medicine[93].

The conditions of protection of traditional knowledge under *Patent Law 2000* are novelty,[94] inventiveness,[95] and practical applicability[96]. A successful applicant is given a certificate of patent[97] upon registration[98]. This gives the holder exclusive rights to prevent third parties not having the right holders' consent from making, using, offering for sale, selling or importing the patented invention and to bringing litigation when infringement occurs.

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[88] *Patent Law 2000* (of the People's Republic of China); *Regulations on the Protection of Varieties of Chinese Traditional Medicine* cited in WIPO/GRTKF/IC/5/INF/4.
[89] Above n. 88.
[90] Product is defined in the context of the *Patent Law 2000* (China) as a new pharmaceutical composition and preparation thereof, effective ingredient extracted/separated from traditional medicine, effective parts and preparation thereof, new preparation of changing the administration route, etc.
[91] Method is defined in the context of the *Patent Law 2000* (China) as a preparation method of the products mentioned above, new or improved technology of production, etc.
[92] Use is defined in the context of the *Patent Law 2000* (China) as the new indication of medicine, first medical use, the second use of the known medicine, etc.
[93] *Patent Law of 2000* (China)
[94] That is, determined in accordance to the principle of complete identity of technical solution.
[95] That is, determined by comparing the prominent substantive features and notable progress of new product/process with the existing technology.
[96] That is, the product having medical effect; methods can be carried out or exploited industrially; use can be realized industrially;
[97] *Patent Law 2000* (China) Art. 39.
[98] *Patent Law 2000* (China) Chapt. III.

The *Patent Law 2000* establishes a patent administration department under the State Council, which is responsible for patent work throughout the country. It receives and examines patent applications and grants patent rights for inventions-creations in accordance with law[99]. The patent administration departments hold administrative authority for patent affairs under governments of provinces, autonomous regions and municipalities directly under the Central Government and are responsible for the administrative work concerning patents in their respective administrative areas.
It is also the responsibility of these patent administration departments to maintain a Traditional Chinese Medicine (TCM) Patent Database required for the defensive protection of patents[100].

Protection under *Patent Law 2000* is limited to only 20 years counted from the date of filing the patent application.

- *Regulations on the Protection of Varieties of Chinese Traditional Medicine*

The purpose of *Regulations on the Protection of Varieties of Chinese Traditional Medicine* is to improve product quality, normalize the market, and wash out low quality medicine[101].

The protection provided under the relevant regulations is limited to Chinese traditional medicine that fulfils official criteria. They are, medicines produced only in China that do not qualify for patent protection and categorised within the officially recognised classes. It is important to note that these regulations do not provide for conventional requirements such as novelty but it is necessary for all traditional medicine to pass a quality inspection in order for any relevant protection to be granted.

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99 *Patent Law 2000* (China) Art. 3.
100 That is *Patent Law 2000* provides for the establishment and use of advanced search tools for patent and non-patent literature during substantive examination of Traditional Knowledge related patent applications.
101 Above n. 88.

Therefore, protection given under such regulations only gives holders the right to manufacture or produce traditional medicines on the basis that their methods are safe. Any manufacture by unauthorised producers will be dealt with by the Health Department of local governments. The period of protection under these regulations, vary from seven (7) to thirty (30) years.

Question:	*20. What is full protection of traditional knowledge and expressions of culture?*

4) A NEW LEGAL FRAMEWORK

New legal frameworks have been adopted by some jurisdictions. These new legal frameworks provide specifically for the protection of traditional knowledge and expressions of culture. They guarantee proper regulation and full protection to traditional knowledge and expressions of culture. They also embrace local customary laws and are fashioned to complement conventional frameworks. This move fits in well with the international call for the recognition of rights of indigenous peoples[102].

In the next part, this paper will look at legislative developments undertaken by the Pacific Islands Forum Secretariat and the African Union, which are aimed at providing appropriate legal frameworks to effectively regulate and protect the traditional knowledge and expressions of culture of their member countries.

[102] *See* United Nations Draft Declaration on the Right of Indigenous Peoples, Art. 29., *available at* http://www.ohchr.org/english/issues/indigenous/docs/declaration.doc.

4.1) Pacific Islands Forum Secretariat's Model Law

The mandate of the Pacific Island Forum Secretariat to develop frameworks for traditional knowledge protection arose at the Forum Trade Ministers Meeting in 1999[103]. A Model Law for the protection of traditional knowledge was produced as a result.

The PIFS Model Law establishes a new range of statutory rights for traditional owners of traditional knowledge and expressions of culture. It provides a basis for Pacific Island countries wishing to enact legislation for the protection of traditional knowledge and expressions of culture. Cook Islands, Fiji, Kiribati, Palau, Papua New Guinea and Vanuatu have adopted the PIFS Model Law.

The policy objective of the PIFS Model Law is to protect the rights of traditional owners in their traditional knowledge and expressions of culture and permit tradition-based creativity and innovation, including commercialisation thereof, subject to prior and informed consent and benefit sharing. It reflects the policy that it should complement and not undermine intellectual property rights.

The development of the model law was guided by responses to a range of questions posed by Pacific Islands Forum Secretariat adopted from reports by the World Intellectual Property Organisation (WIPO) [104]. These questions are listed below.

- *What is the policy objective of the protection?*
- *What is the subject matter?*
- *Who owns the rights?*
- *What are the rights?*
- *How are the rights administered and enforced?*

[103] Traditional Knowledge Implementation Action Plan at: http://www.forumsec.org.fj/resources/uploads/attachments/documents/Traditional%20Knowledge%20Action%20Plan%202009.pdf (Accessed 13 January 2010).

[104] *Elements of a sui generis system for the protection of traditional knowledge created by the World Intellectual Property Organisation for consideration* by the *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* at www.**wipo**.int/export/sites/www/tk/en/igc/ngo/scbd_igc6.pdf (Accessed 9 Feb 2010)

- *How are the rights lost or how do they expire?*

The model law create new rights in traditional knowledge and expressions of culture. The rights created fall into two categories: traditional cultural rights and moral rights. Traditional cultural rights grant traditional owners exclusive rights in respect of a range of uses of traditional knowledge and expressions of culture that are non-customary in nature, irrespective of whether they are for commercial or non-commercial purposes. This includes the use of traditional knowledge and cultural expressions for the making of new creations and innovations based thereon ('derivative works').

The moral rights created for traditional owners are the right of acknowledgment, the right against false acknowledgment and the right against derogatory treatment of traditional knowledge and expressions of culture. The existences of these rights do not depend upon registration or other formalities.

The model law establishes procedures whereby consent can be obtained for the non-customary use of traditional knowledge and cultural expressions, including the making of derivative works. The intellectual property rights in derivative works created, is vested in the creator. In other words, intellectual property rights are fully respected, and the model makes it clear that the rights it creates are in addition to and do not affect intellectual property rights. However, should a derivative work or traditional knowledge and cultural expressions be used for commercial purposes, the user must share benefits with traditional owners, provide acknowledgement of the source of the traditional knowledge or expressions of culture and respect the traditional owners' moral rights.

The model law also provides two avenues by which a prospective user of traditional knowledge or expressions of culture for non-customary purposes can seek the prior and informed consent of the traditional owners for the use of the traditional knowledge or expressions of culture. These avenues are through applying to a 'Cultural Authority', which has functions in relation to identifying traditional owners and acting as a liaison between prospective users and traditional owners or directly approaching traditional owners.

In both cases, the prior and informed consent of the traditional owners is to be evidenced through an 'authorised user agreement'. The Cultural Authority has an obligation to advice traditional owners about the terms and conditions of such user agreements and maintain a record of finalised authorised user agreements.

In terms of enforcement the model law proposes offences for contraventions of traditional cultural rights and moral rights. The first of the proposed offences is against the infringement of traditional rights of traditional owners[105]. Any person who makes a non-customary use of traditional knowledge or an expression of culture without the prior and informed consent of traditional owners would be liable upon conviction for a fine or imprisonment term or both fine and imprisonment term.

The second offence is against the infringement of traditional owners' moral rights[106]. Any person who does an act or omits to do an act that would lead to the infringement of the moral rights of traditional owners without their prior and informed consent to such act or omission would be liable upon conviction for a fine or imprisonment term or both fine and imprisonment term.

The third offence is against the non-customary use of sacred–secret traditional knowledge or any expression of culture[107]. Any person who uses sacred-secret traditional knowledge or any expression of culture other than in accordance with a customary use would be liable upon conviction for a fine or imprisonment term or both fine and imprisonment term.

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[105] *See Model Law (PIFS)* cl. 26. If a person makes non-customary use of a Traditional Knowledge and Expressions of Culture (whether or not such use is of a commercial nature) and the traditional owners have not given their prior and informed consent to that use, the person is guilty of an offence.

[106] *See Model Law (PIFS)* cl. 27. If a person does an act or omission in relation to a Traditional Knowledge and Expressions of Culture that is inconsistent with the moral rights of the traditional owners and the traditional owners have not given their prior informed consent to the act or omission, the person is guilty of an offence.

[107] *Model Law (PIFS)* cl. 28.

The fourth offence deals with the importation[108] of articles that would infringe the traditional and moral rights of traditional owners and the exportation[109] of traditional knowledge and expressions of culture. The first arm of the offence captures people who import articles that relates to local traditional knowledge and expressions of culture knowing those imported articles would infringe the traditional and moral rights of traditional owners. Any person that would be convicted under this provision would be liable for a fine or imprisonment term or both fine and imprisonment term.

The second arm of the offence captures people who export traditional knowledge and expressions of culture for non-customary use without the prior and informed consent of traditional owners. Any person that would be convicted under this provision would be liable for a fine or imprisonment term or both fine and imprisonment term.

The model law also proposes an inclusive range of civil remedies available to traditional owners for the non-customary usage of their traditional knowledge and expressions of culture without their prior informed consent[110]. The remedies range from claims for damages for loss resulting from the unauthorized use of traditional knowledge or expression of culture, equitable orders such as injunction, order to account for profits and orders for the seizure of illegal objects to any order that the court considers appropriate in the circumstances[111].

The possible limitations of the PIFS Model are its failure to address the issue concerning the indivisibility of traditional knowledge and any of its various forms of manifestation from customary land. That is, when a dispute arises concerning the ownership of a traditional knowledge questions as to its origin will be asked and most certainly, it will have some linkage to *matai* titles and customary land. Any dispute pertaining to customary land and *matai* titles are to be determined by the Land and Titles Court.

[108] *Model Law (PIFS)* cl. 29(1).
[109] *Model Law (PIFS)* cl.29 (2).
[110] *Model Law (PIFS)* cl. 30.
[111] *Model Law (PIFS)* cl. 31.

The PIFS Model seems to encourage a hands-off approach when a dispute pertaining to traditional knowledge arises. It advises the relevant Cultural Authority to refer the matter to the persons concerned to be resolved[112]. It does offer some assistance by pointing at various mechanisms that can assist in resolving related disputes, such as mediation, alternative dispute resolution procedure and customary law and practice but it does not offer advice as to the customary land issue given that customary land tenure exists in most if not all of the members of the PIFS. On the other hand, perhaps this was left to be addressed by each respective member country.

Secondly, the scope of what is protected is problematic. The nature of the properties proposed to be protected under the PIFS Model Law is both tangible and intangible. There is the danger that when the focus is too wide then the strength and effectiveness of any protection to be offered can be limited. It might be better to address property rights in the intangible and tangible parts (expressions of culture) of traditional in separate pieces of legislation. This will make such legislation simple and easy to administer.

However, this is just a model and it can be tailored to suit the Samoan context.

Questions:	*21. What are some of advantages of the PIFS Model?* *22. What are some of disadvantages of the PIFS Model?*

4.2) <u>African Union Model</u>

The African Union[113] Model Legislation for the Protection of Rights of Local Communities, Farmers and Breeders and Regulation of Access to Biological Resources (2000) provides for the conservation, evaluation and sustainable use of biological resources,[114] knowledge,[115] and technologies in order to maintain and improve their

[112] *Model Law (PIFS)* cl. 18.

[113] Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe.

[114] "Biological resources" are defined to include "genetic resources, organisms or parts thereof, populations, or any other component of ecosystems, including ecosystems themselves, with actual or potential use or value for humanity."

diversity[116]. It specifically aims to provide recognition, protection and support for the inalienable rights of local communities over their knowledge and technologies. It establishes an appropriate system for access to community knowledge and technologies.

The model promotes mechanisms for fair and equitable sharing of benefits arising from the use of community knowledge and technologies. It ensures effective participation of concerned communities in deciding the distribution of benefits deriving from knowledge and technologies. It also provides mechanisms for implementation and enforcement of rights of local communities and conditions of access to biological resources, community knowledge and technologies[117].

The model law also regulates access,[118] use and exchange of traditional knowledge by those who are not members of any local community[119]. It provides for the establishment of National Competent Authorities, which receive applications from third parties and grant access to traditional knowledge. It also requires all applications to provide detailed descriptions of innovations, practices, knowledge or technologies associated with the biological resources and propose mechanisms for benefit sharing[120].

The law also recognizes the right of local communities to refuse access to their traditional knowledge where such access will be detrimental to the integrity of their natural or cultural heritage[121].

The model law is not specific about conditions of protection of traditional knowledge. It is left to National Competent Authorities to determine and set their own conditions[122]. National Competent Authorities are also expected to develop National Information

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115 "Community knowledge" is defined as "the accumulated knowledge that is vital for conservation and sustainable use of biological resources and/or which is of socio-economic value, and which has been developed over the years in indigenous/local communities."
116 *Model Law 2000 (African Union)*, Art.2 (1) (i-iii).
117 *Model Law 2000 (African Union)*, Part I.
118 *Model Law 2000 (African Union)*, Art. 2(2) (ii).
119 *Model Law 2000 (African Union)*, Art. 21(2).
120 *Model Law 2000 (African Union)*, Art.4. (1)(xi) and 4(1) (x).
121 *Model Law 2000 (African Union)*, Art.19.
122 *Model Law 2000 (African Union)*, Article 58 (iv).

Systems to document community innovations, practices, knowledge and technologies[123]. Local communities are also expected to establish their own databases on local knowledge and technologies[124].

Access to information deposited in National Information Systems and local databases are regulated by charters which set out the rights of the owners of the data.[125] It specifies that any access to such traditional knowledge is subject to the necessary prior informed consent of National Competent Authorities as well as concerned local communities[126]. Any access granted without consultation with the local communities is invalid and in violation of the prior informed consent requirement[127].

National Competent Authorities grant access to traditional knowledge through written agreements between local communities on the one hand and applicants on the other[128]. The guidelines for these agreements specify that they must contain statements by applicants/collectors that they agree not to apply any intellectual property rights over biological resources and over traditional knowledge without the prior informed consent of the providers[129]. They also require commitments by applicants/collectors to provide for the sharing of benefits[130].

The rights established under the model law are Community (Intellectual) Rights and Farmers' Rights. Community (Intellectual) Rights are the rights of communities over their innovations, practices, knowledge and technologies acquired through generations. It gives local communities the authority to use their innovations, practices, knowledge and technologies in the conservation and sustainable use of biological diversity and to benefit collectively from any such utilization[131]. This type of right is inalienable[132]. Farmers'

123 *Model Law 2000 (African Union),* Arts. 58 (vi), 64 (1) and 65(1).
124 *Model Law 2000 (African Union),* Art. 64 (2).
125 *Model Law 2000 (African Union),* Art. 64 (3).
126 *Model Law 2000 (African Union*), Arts. 3(1), 5(1) and 18)
127 *Model Law 2000 (African Union),* Art. 5 (3).
128 *Model Law 2000 (African Union),* Art. 7.
129 *Model Law 2000 (African Union),* Art. 8 (1) (v).
130 *Model Law 2000 (African Union),* Art. 8(1) (vi).
131 *Model Law 2000 (African Union),* Art. 16(iii)-(v).
132 *Model Law 2000 (African Union),* Art. 23(1).

Rights are the rights of farmers' over their traditional knowledge of plant and animal genetic resources[133].

The Model Law also recognises customary law and protocols[134]. It provides that customary laws and practices of local communities can assist in identifying, interpreting and ascertaining their local traditional knowledge[135]. Customary law also guides how local communities exercise their inalienable rights to access, use, exchange or share their biological resources[136]. The determination of rights available under customary law is done through consultations between National Competent Authorities and local communities[137].

Sanctions are expressly provided under the model law as well. It stipulates that each state must establish appropriate agencies with the power to ensure compliance with the provisions of the model law[138]. Sanctions and penalties include; written warnings, fines, automatic cancellation/revocation of the permission for access, confiscation of collected specimens and permanent bans from access to community knowledge and biological resources.

Violations are publicised and reported by the relevant National Competent Authority to the secretariats of international agreements. Intergovernmental co-operation is also necessary to ensure that any violations outside of national jurisdiction are prosecuted accordingly. The model also embraces recourse to courts after exhaustion of all administrative remedies[139].

Questions:	*23. What are some advantages of the African Union Model?* *24. What are some disadvantages of the African Union Model?*

[133] *Model Law 2000 (African Union),* Art. 26(1) (a).
[134] *Model Law 2000 (African Union),* Art. 17.
[135] *Model Law 2000 (African Union),* Art. 23(2).
[136] *Model Law 2000 (African Union*), Art. 21(1).
[137] *Model Law 2000 (African Union),* Art. 58(ii).
[138] *Model Law 2000 (African Union),* Art. 67.2.
[139] *Model Law 2000 (African Union),* Art. 68.

4.3) PIFS Model vs. African Union Model

A brief comparison of the two models reveal the PIFS Model to be more comprehensive than the African Union Model. That is, the scope of the former encompasses all traditional knowledge and expressions of culture created, acquired or inspired for traditional, economic, spiritual, narrative, decorative or recreational purposes. The scope of the latter is limited to traditional biological and agricultural knowledge and resources.

The two models both encourage the creation of new legal frameworks, but the rights proposed to be established are distinct. That is, the African Union Model establishes only exclusive rights which are alienable. The PIFS Model on the other hand creates traditional cultural rights and moral rights, which are inalienable.

Both models aim to conserve and ensure the sustainable development of traditional knowledge. They promise to protect the rights of the owners and guarantee fair and equitable benefit sharing amongst them. However, only the PIFS Model allows and promotes creativity and innovation. That is, it recognises rights in derivative works, which are intellectual creation or innovation that are based upon or derived from traditional knowledge.

Finally, both the models promise all forms of protection. That is, positive and defensive protection and encourage the regulation of access. Positive protection is the recognition of rights in traditional knowledge and expressions of culture and the recognition of the need to acquire prior informed consent of owners before the appropriation of their traditional knowledge and expressions of culture.

Defensive protection involves the publishing of a traditional knowledge as a defensive measure to block third parties from patenting it. However, the problem with this is that it makes it easier for third parties to use the knowledge against the wishes of traditional knowledge holders.

Access control is merely regulating access by third parties by providing conditions to the use of traditional knowledge upon acquiring prior informed consent of traditional knowledge owners.

Both models allow for customary exceptions. That is, the customary use of traditional knowledge and expressions of culture do not give rise to any criminal or civil liability[140].

Questions:	*25. Should Samoa adopt a new legal framework for the regulation and protection of traditional knowledge and expressions of culture?* *26. What are the advantages of adopting a new legal framework?* *27. What are the disadvantages of adopting a new legal framework?* *28. If you believe that a new legal framework is the best solution then what should be covered under the new legal framework?*

5) SUMMARY

In their current forms, conventional legal frameworks can only protect certain aspects of traditional knowledge and expressions of culture. Legislative change can improve their efficiency. However, it is evident in the case of China that even if these conventional frameworks undergo modifications, there is no guarantee that all aspects of traditional knowledge and expressions of culture will be sufficiently regulated and protected.

The requirements under the *Patent Law of 2000* still follow those of conventional frameworks. The regulation and protection of traditional medicine are specifically provided under regulations. This means that the regulation and protection given under such subsidiary legislation can easily be overruled by any legislation. It also places interests in traditional knowledge and expressions of culture in a special class that is inferior to patented property interests directly protected under *Patent Law of 2000.*

Even if these conventional legal frameworks operate simultaneously, parts of traditional knowledge and expressions of culture would still be left unprotected. The features of

[140] *Model Law (PIFS)*, cl. 8.

these conventional legal frameworks may not be suitable for the desires of traditional owners.

It is conceivable that any legislative change to conventional legal frameworks would not be extensive unless the related international intellectual property conventions undergo modifications first, as seen in the case of the amendments to the *Berne Convention* when incorporating the international protection of expressions of folklore.

Therefore, reviewing these conventional legal frameworks would only be for the purposes of enhancing their application to the appropriate aspects of traditional knowledge and expressions of culture only.

On the other hand, there has been high recommendation for the development of a new legal framework specifically aimed at regulating and protecting traditional knowledge and expressions of culture, in all the academic papers and special reports discussed in this paper. For example, the International Bureau of WIPO expressly stated that the protection of expressions of folklore does not sit well in copyright law and they recommended that such protection be provided under a new legal framework.

The feasibility of such a new framework is due mainly to the fact that it focuses on regulating and protecting traditional knowledge and expressions of culture. It proposes the recognition of inalienable rights in traditional knowledge and expressions of culture. This however has to be considered carefully as such a desire can hinder innovation and creativity in a society.

The consideration of the interests and welfare of traditional owners is also promoted in such a new framework. Traditional owners must have a say in the process of granting authority for the use of their traditional knowledge or expressions of culture for commercial purposes and any benefits obtained from related transactions must be distributed fairly. This must be given careful consideration as it can create onerous responsibilities on the Government and can hamper viable trade opportunities.

The new legal framework also encourages the use of customary laws and protocols. Given the perceivable relationship between traditional knowledge and customary land, customary law would best be used to determine disputes as to ownership of traditional knowledge and expressions of culture. Samoa already has a framework in place which is used to determine ownership of land and titles in the Samoan Land and Titles Court. This may mean that the jurisdiction of the Land and Titles Court would need to be extended to address such matters pertaining to traditional knowledge and expressions of culture.

Furthermore, there is the danger that such a comprehensive protection for traditional knowledge and expressions of culture under a new legal framework would place traditional knowledge and expressions of culture out of reach. This could limit innovation and creativity in a society and hinder any efforts to commercialise them. Hence, in such a situation, the selective protection of traditional knowledge and expressions of culture under the conventional legal frameworks would be preferable, to allow for the protection of specific areas of traditional knowledge and expressions of culture that require protection from abuse and exploitation by outsiders.

Irrespective of which path Samoa opts to take, the protection of the rights of Samoans in their traditional knowledge and expressions of culture is long overdue. This protection should be developed at both national and international levels. Proper regulation and protection would ensure that Samoan culture is preserved and valued. The right people would benefit from the commercial use of their traditional knowledge and expressions of culture. The Samoan economy would finally receive revenues it has been denied for many years due to the lack of proper regulation.

Any legislative change whether it be amending the conventional legal frameworks or the development of a new legal framework or both, should be carried out with reverence to Samoan customs and customary laws and if possible, complement existing frameworks.

6) SUMMARY OF QUESTIONS

1. *What is your definition of traditional knowledge?*
2. *What are examples of traditional knowledge found in your village?*
3. *Do you think all sorts of traditional knowledge should be protected?*
4. *Who should traditional knowledge be protected from?*
5. *Who does traditional knowledge belong to?*
6. *Are all traditional knowledge linked to customary land?*
7. *What is your definition of expressions of culture?*
8. *What are examples of expressions of culture found in your village?*
9. *Do you think all sorts of expressions of culture should be protected?*
10. *Who should expressions of culture be protected from?*
11. *Who do expressions of culture belong to?*
12. *Are all expressions of culture linked to land?*
13. *How should the Copyright Act be improved to make it more suitable for the regulation and protection of traditional knowledge and expressions of culture?*
14. *Should exclusive rights in an expression of folklore/expression of culture be vested in a competent authority determined by the Minister of Justice or the creator?*
15. *Who should benefit from monies earned from transactions relation to trade in expressions of folklore?*
16. *How should the Patents Act be improved to make it more suitable for the regulation and protection of traditional knowledge and expressions of culture?*
17. *How should the Trademarks Act be improved to make it more suitable for the regulation and protection of traditional knowledge and expressions of culture?*
18. *How should the Industrial Designs Act be improved to make it more suitable for the regulation and protection of traditional knowledge and expressions of culture?*
19. *How should the Samoa Antiquities Ordinance be improved to make it more suitable for the regulation and protection of traditional knowledge and expressions of culture?*
20. *What is full protection of traditional knowledge and expressions of culture?*
21. *What are some of advantages of the PIFS Model?*
22. *What are some of disadvantages of the PIFS Model?*

23. *What are some advantages of the African Union Model?*
24. *What are some disadvantages of the African Union Model?*
25. *Should Samoa adopt a new legal framework for the regulation and protection of traditional knowledge and expressions of culture?*
26. *What are the advantages of adopting a new legal framework?*
27. *What are the disadvantages of adopting a new legal framework?*
28. *If you believe that a new legal framework is the best solution then what should be covered under the new legal framework?*

7) CALL FOR RESPONSES

It is not necessary to respond to all questions. It is preferred that responses be in writing. Responses on this paper should be sent by^ to the Executive Director, Samoa Law Reform Commission, Private Bag 974 or by email to lawreform@ag.gov.ws.