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Lifting the Lid on "The Community": Who Has the Right to Control Access to Traditional Knowledge and Expressions of Culture?

Miranda Forsyth*

Abstract: This article explores some key considerations around determining who should have the right to control access to, and benefit from, traditional knowledge and intangible cultural heritage. It highlights the complexities involved in these considerations by examining in detail the different claims to control by different segments of the population in regard to two case studies: Samoan tattooing and the Vanuatu land dive. It uses insights from this analysis to problematize the assumptions about the use of concepts such as "community" in legislation designed to protection traditional knowledge and expressions of culture, and it also reflects on what effect such legislative developments may have on the cultural industries initiative and the implementation of the Convention on Intangible Cultural Heritage.

The global interest in protecting traditional knowledge and intangible cultural property has been increasingly manifest in the Pacific Islands region over the past decade.[1] It has led to three categories of current developments: the drafting of regional and national legislation to vest ownership and exclusive control of traditional knowledge in its customary owners, the promotion of cultural industries as a means of sustainable development for the region, and the implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage 2003 (ICH Convention) through the creation of inventories and registers of intangible cultural heritage. The stimulus for all of these has been multifaceted, combining concerns about ongoing misappropriation of traditional knowledge, decreasing transmission of traditional knowledge to future generations, dilution

*School of Regulation, Justice and Diplomacy, College of Asia and the Pacific, Australian National University. Email: Miranda.forsyth@anu.edu.au

and loss of culture as a result of the forces of globalization, and the hope that traditional knowledge may be a resource that can be tapped to provide economic opportunity for local communities. Moreover, all have been primarily initiated and driven at international, regional, and to a lesser degree, national levels, rather than being in response to grassroots activism, as has occurred in countries with indigenous minorities such as Australia and New Zealand.

These three categories of development are currently proceeding on the assumption that they are mutually compatible. For example, the UNESCO Program Specialist for Culture in Pacific Islands Region stated that "the two approaches—ICH safeguarding and IP protection of TK and TCEs through sui generis system—currently taken by the Pacific region are complementary."[2] This assumption also prevails in the international context: The head of the Traditional Creativity, Cultural Heritage and Cultural Expressions Section of the World Intellectual Property Organization (WIPO) has stated that the work of WIPO on the protection of traditional knowledge through a treaty and the safeguarding of intangible heritage are not "at odds" but are "two sides of the same coin."[3] This article seeks to test this assumption. It does so by analyzing two examples of traditional knowledge in the region and asking, with regard to each: Given the particular objectives of each development, who ideally should have the right to benefit from, use, and control access to traditional knowledge? If the answers to this question are different for each category of development, it would suggest that they are not mutually supportive, or at least neutral with regard to their effect on each other. Early recognition of any tensions that may exist between these different developments is crucial to prevent them from undermining each other in their respective implementation.

The first case study is situated in the Melanesian country of Vanuatu and concerns the practice of land diving (*nagol*); and the other is the practice of tattooing (*tatau*) from the Polynesian country of Samoa. Having two case studies from culturally distinct areas in the South Pacific allows us to gauge more accurately the extent to which the issues raised are shared throughout the region. These case studies are also used to explore in more detail the notion of "community" that forms an important, although differing, part of the regulation and policies of all three developments. Community or group ownership, voice, or control is increasingly seen to offer a solution to the problems involved in giving such rights to the state on the one hand[4] or to individuals on the other.[5] Kurin, for example, argues that the "community" is "a rising, alternative holder and centre of power to the state."[6] Community ownership is also seen to closely map customary notions of regulation of traditional knowledge that are understood as communal rather than individualistic.[7] Theoretically, therefore, community ownership or control of traditional knowledge is appealing; the problem is that implementing any laws based on such concepts is immensely complicated. To date, these complications have been largely glossed over both in the region and internationally, with policymakers and legislative drafters making assumptions about the

homogeneity and boundedness of local communities that overlook the complex realities of group dynamics.[8] The danger of proceeding along such a path is not simply that initiatives to protect traditional knowledge will fail to work in practice, but that attempts to implement them may foment local conflict and so threaten the existing social and regulatory structures in which much traditional knowledge is currently embedded.[9] These concerns are explored in this article by "lifting the lid" on the "the community" involved in each case study to demonstrate the range of competing views about the regulation of traditional knowledge, varied personal interests, power dynamics, and interconnections that can be involved in even very small and local groups of people. These case studies build upon the work of Noyes and Tauschek, who have demonstrated how, in the context of two European festivals, introduction of legal rules has led to changes in control over, and beneficiaries of, those festivals.[10] Tauschek argues that those who determine the rules "postulate that they are in possession of a hegemonic interpretation of a given cultural practice. Social conflicts may ensue."[11]

Although the analysis in this article is situated in the Pacific Islands region, it has relevance beyond this context in a number of ways. It seeks to challenge portrayals of relationships between indigenous communities and traditional culture that are based on idealized notions of custodianship and intragroup responsibility. Such portrayals are not uncommon in the literature on, and political statements around, traditional knowledge. For example, Juan Jintiach, Coordinator of Indigenous Organization of the Amazon Basin, commenting on the 18th session of the WIPO Intergovernmental Committee on Traditional Knowledge stated, "I think what [negotiating governments] might be afraid of is that indigenous peoples might act like them, [but] . . . I don't think indigenous peoples have ever indicated they would act like them."[12] This is perhaps a result of what Sunder refers to as "a problem in the context of postcolonial identity politics, where Third World countries find themselves in the discursive trap of defining a nation and its people in opposition to the West."[13] However, while potentially helpful for political purposes, setting up idealized notions of community cohesion tends to obscure issues of intracommunity disputes over ownership and control,[14] which can lead to serious problems with implementation of legislative achievements. As Noyes argues, "we will not correct the outdated paradigm of the modern individual by attaching to it the equally antiquated epicycle of the traditional community."[15]

The article also seeks to contribute to the growing literature on the benefits or disadvantages of the propertization of cultural property.[16] The two case studies illustrate that indigenous people are not immune from seeking to capitalize on control over traditional knowledge in order to commodify and profit from it, and that state laws and foreign purses can become very effective tools in manipulating claims by one individual against another. The detailed accounts of the local politics involved in each example demonstrate the potential for state or international interventions to wittingly or unwittingly strengthen the hands of some members

of the community vis-à-vis others, resulting in the exclusion of some who believe they too have traditional knowledge rights.[17,18]

The final contribution of this article is to show that traditional knowledge is currently not an unregulated field, once a broad view is adopted of regulation as "a social activity that includes persuasion, influence, voluntary compliance and self-regulation."[19] Any state initiative is therefore likely to be entering an area that is already the subject of regulation, possibly from a number of different sources, albeit of a nonstate or nonformal type. Moreover, in many cases these existing regulatory structures are under pressure from a range of factors, including loss of authority of traditional leaders, fragmented populations, and pressures from the cash economy, meaning that they are vulnerable to being undermined by the entrance of new sources of authority.[20]

PART 1: PACIFIC ISLANDS CONTEXT

This article focuses on two countries in the Pacific Islands region. The different countries in the region have considerable historical and cultural links that have been reinforced through trade networks, war and occupation, and, more recently, the development of regional bodies. With the exception of Tonga, each country was colonized by Europeans during the course of the nineteenth century, and all achieved independence or became self-governing between 1962 and 1994. Prior to colonization, each state was comprised of a number of different island groups, within which people tended to live in separate communities under the control of separate leaders and communities. Corrin Care et al. argue, "Although the indigenous inhabitants of each island group in the South Pacific were basically of the same racial category, there was no concept within each island group of a unified society, let alone a unified state."[21] Thus, unlike many other indigenous voices in international debates over traditional knowledge and intangible culture, Pacific Islanders do not comprise minority nations within a larger state, but live in autonomous nation-states that contain many different communities, each with its own culture and sense of identity. This presents opportunity in terms of diversity, but also challenges in balancing local claims to traditional knowledge with those of the broader community, especially given the constant movements of people over the past century as a result of plantation labor, missionization, overseas migration, and, recently, urban drift.

All the countries in the region are developing countries, although with differing economic positions, and all face challenges associated with dispersed populations, small size, and lack of infrastructure. Techera argues that "each state is currently confronting similar social, economic and environmental concerns including large and rapidly growing indigenous populations (following a period of outward migration), urbanization, limited land and financial resources, environmental fragility and the desire for economic development."[22] In part as a response to these

concerns, traditional knowledge is being promoted as an important potential developmental resource at national and regional levels.

All three of the initiatives outlined in this section have development as a stated common overarching goal. However, what is meant by development in these various initiatives is likely to differ quite significantly, although it has not been clearly articulated in any of them. At least two different viewpoints about what development means in the context of cultural industries have recently been identified.[23] The first is the prevailing neoliberal viewpoint that espouses the argument that by "drawing on the creative resources of human capital, nation states are focusing on what distinguishes them from each other in order to derive economic purchase in a global marketplace." The second viewpoint is described as a more holistic one, and "highlights the role culture plays in all aspects of life … Rather than being position as by-products of economic growth strategies, social cohesion and wellbeing are pursued in their own right." This latter view of development has been promoted nationally, regionally and internationally by Vanuatu MP Ralph Regenvanu, who argues that the traditional economy continues to be a crucial although undervalued resource in the region.[24] This viewpoint is also being supported by the Alternative Indicators of Well-Being for Melanesia Project based in the Vanuatu Office of Statistics, which aims to "focus on factors not currently captured by the Human Development Index or accounted for within the Millennium Development Goals—factors including free access to land and natural resources, community vitality, family relationships, and culture."[25] These two different viewpoints on development also reflect a fundamental "contestation over the orientation of 'law and development'" in the relevant literature.[26] Importantly, different visions of development are likely to lead to different emphases in any initiative concerning traditional knowledge: the former using it to generate more per-capita GDP (gross domestic product), and the latter for more cultural and local uses. Thus, as with *community*, *development* is another concept in this area that needs clarification.

PART 2: THREE TRADITIONAL KNOWLEDGE BASED DEVELOPMENTS

This section describes the three categories of developments based on traditional knowledge current in the region and elucidates their different objectives.[27] Only the national and regional legislation explicitly seek to create property rights in traditional knowledge and thus contain "a core negative right to exclude others from the imitative production of the intangible."[28] However, the implementation of the other two developments also involves the development of regulatory frameworks that will necessarily determine who has the right to benefit from, and control, traditional knowledge. They therefore involve questions of "symbolic ownership" as a form of possession that "establishes an authority over the use of a resource."[29]

(a) The Sui Generis Development

Sui generis development is the drafting of regional and national legislation to protect traditional knowledge (*sui generis* legislation). At a regional level, there are three relevant pieces of legislation: the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002) ("Regional Framework"), adopted by the Forum Trade Ministers in 2003; the Traditional Biological Knowledge, Innovations and Practices Model Law ("Model Law"), adopted by the Forum Trade Ministers in 2008; and the Melanesian Spearhead Group's draft Treaty on Traditional Knowledge 2011 ("Treaty") that has been approved by in principle by its members in April 2011, but not as yet signed by all of them. The Treaty will only apply to the Melanesian countries in the region.

At a national level, since 2010 seven countries in the region have started to draft legislation to protect traditional knowledge and expressions of culture under the Pacific Island Forum's Traditional Knowledge Implementation Action Plan (2009) ("Action Plan").[30] Samoa's Law Reform Commission is also currently working on developing Traditional Knowledge policy and legislation.[31] In addition, in Vanuatu, a section on indigenous knowledge already exists within the Copyright Act 2000, which legally came into force in 2011, although there are plans for a separate piece of legislation solely concerned with traditional knowledge. Although the Regional Framework has provided the starting point for the development of national legislation, countries in the region are taking quite different paths toward its development. Some, for example, Kiribati and Cook Islands, are working on developing a policy on traditional knowledge as a preliminary step; while others such as Fiji have developed legislation first. It is highly likely that the ultimate forms of these national laws will therefore be quite diverse (although both the Treaty and the Traditional Knowledge Action Plan refer to "uniform legislation"). However, in most cases they are likely to follow the general approach of the Regional Framework, the Treaty and the UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1985) of conferring upon owners of traditional knowledge the right to authorize others to exploit their traditional knowledge, and to prevent others from exploiting it without their free, prior informed and full consent.[32] This has been confirmed by a consultant working on the Kiribati Traditional Knowledge project, who remarked that the approach adopted "involves putting the interests of owners at the forefront, so they have the decision-making powers" and also by the Director i-Taukei Institute of Language and Culture in Fiji who stated that the draft Fijian legislation is based very significantly on the Regional Framework.[33] This approach is also clear in Section 41 of the Vanuatu Copyright Act and in the draft Palau legislation.[34]

The aims of the Regional Framework and the Treaty are broad. Both aim to prevent the misappropriation of traditional knowledge, and to facilitate the commercialization of traditional knowledge so that it will contribute to sustainable

development for the region.[35] The Treaty is also concerned with "protection, preservation, safeguarding and promotion" of traditional knowledge (Article 1.2). The question of whether all these (quite divergent) objectives can be successfully met under the proposed legislation is debatable.[36]

(b) The Cultural Industries Development

The development of cultural industries in the region is being shaped largely through the framework of the Structuring the Cultural Sector in the Pacific for Improved Human Development project funded by the European Union. It follows a series of high-level declarations about the importance of culture to development, such as the 2002 Declaration of Pacific Ministers of Culture that the promotion of sustainable and cultural industries is a priority,[37,38] This initiative conceptualizes culture as a means of generating economic growth for the region as a whole, for example, through the development of indigenous handicrafts and ethno-tourism.[39] For example, the Cook Islands draft National Policy on Traditional Knowledge 2011 states that "Traditional knowledge has become the backbone to our tourism industry, our primary source of income and foreign exchange." The stakeholders involved in this project are quite broad: Teaiwa and Mercer note that "the ultimate goal is for all stakeholders in culture—including the government, communities, individuals, artists, academics, traditional knowledge holders and leaders—to have ownership of, and thus ongoing investment in, 'a cultural sector.'"[40] The Cultural Industries development is currently taking the form of "cultural mapping" programs in a number of countries to determine what cultural resources actually exist. As with the *sui generis* development, a proprietary approach is also evident in this process, as Teaiwa and Mercer note that it is intended that through mapping "an understanding of culture as 'wealth' or an 'asset' or 'resource' becomes clear."[41]

(c) The Implementation of the ICH Convention

The third development is the implementation of the ICH Convention, which aims to "safeguard"[42] intangible cultural heritage for the benefit of humanity. To date it has been ratified by Vanuatu, Papua New Guinea, Tonga, and Fiji. The Convention largely sidesteps questions of its relationship with intellectual property rights[43] and issues about who controls the direction any safeguarding mechanisms may take, referring both to the state and to communities, groups and individuals. Kono argues that "despite heated debate during its drafting, the Convention lacks operational definitions, clear answers and workable solutions to identify the holder, owner or steward of intangible cultural heritage."[44] However, as seen in the case studies below, questions about who has the right to decide which particular safeguarding measures are put into place cannot be avoided when the Convention is being implemented. For example, the Convention requires states to make inventories of their intangible cultural heritage, and provides the opportunity to list

particular examples on the List of the Intangible Cultural Heritage of Humanity.[45] Bortolotto argues that such fixation of traditional practices in a new heritage status "presupposes and fosters a form of appropriation by a group."[46]

As we can see, the objectives of the three developments overlap to an extent, but have quite different emphases. For example, while the ICH Convention is predominantly about preservation, the cultural industries initiative is primarily concerned with commercialization, and the *sui generis* legislation with prevention of misappropriation and commercialization. While Sunder argues "commerce and culture are not necessarily at odds,"[47] there are clearly potential tensions between these different objectives, and these need to be acknowledged and worked through, rather than ignored as is currently the case. One important reason for doing so is that these issues will soon come to the fore in implementation when practical decisions need to be made about who has the right to decide, or to participate in deciding, inter alia whether traditional knowledge is disseminated, what restrictions are placed on it, for whose benefit is it used, and for what purposes. The next section draws on detailed ethnographic data concerning two examples of traditional knowledge to explore how such questions manifest themselves in practice and what conflicts can emerge when the potential for traditional knowledge to be commercially exploited arises. It will first detail the different claims of various members of the community over the particular practice, and then relate these back to the objectives of the three developments.

PART 3: CASE STUDIES

(a) Tatau: Samoan Traditional Tattooing

I use the Samoan practice of *tatau* as a case study because it is well documented and is referenced in all three developments outlined above. It is also the subject of a number of (conflicting) calls for regulation. Historically, it takes two forms: a male *pe'a* that is comprised of "areas of dense shading and fine parallel line-work, interspersed with a wide range of motifs and geometric patterns"[48] that covers the area from the waist to the knee; and a female *malu* that is less elaborate and appears between the knees and the top of the thighs. The *tatau* is performed by tattooing specialists known as a *tufuga*, and in the nineteenth century and to a great extent up to the present, these *tufuga* are associated with two main *'aiga* (extended family) in Samoa: the *'aiga* Sa Tulou'ena and the *'aiga* Sa Su'a. Mallon states "the organization of these families is comparable to artisan guilds in other societies. Tattooing 'families' shared continuity over time as a group and were organized in a hierarchical master craftsman-apprentice fashion, each with particular rules, standards and distinctive trademarks."[49] The tattooing combs traditionally used by the *tufuga* were made from boar's tusks and the ink was made from candlenut soot mixed with water. Historically, *tatau* was performed as a rite of pas-

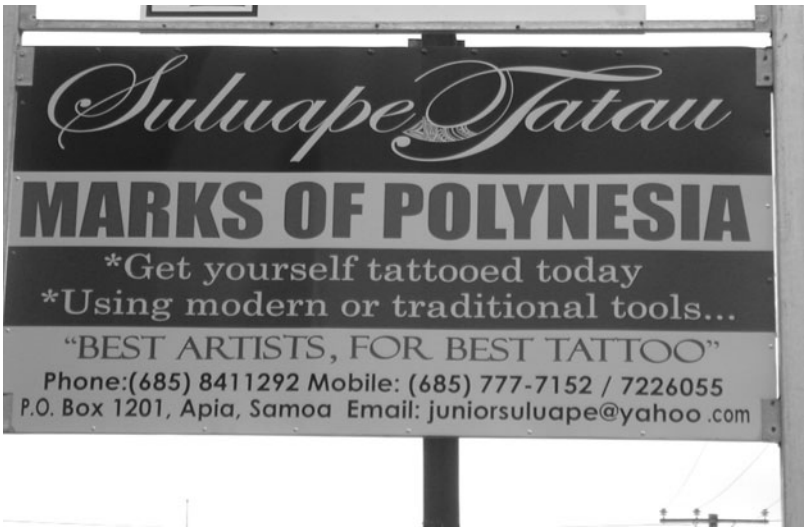

Figure 1. Sign for *tatau* services, Apia, Samoa. (Photograph by the author.)

sage to adulthood and would take place over a number of days, often accompanied by feasts and celebrations.[50] The *tufuga* were paid both during the process and at its completion with customary objects of high value such as prized fine mats and food. The missionaries who came to Samoa in the 1830s tried to suppress the

Figure 2. Back *tatau* in progress, Apia, Samoa. (Photograph by the author.)

practice and it went underground until the 1870s when the Catholic church began to tolerate tattooing.[51] Elsewhere in the Pacific (e.g., Tonga, Tahiti, and the Marquesas) the traditional practice of tattooing was completely lost and was revived only recently through the assistance of Samoan *tufuga* in the 1980s.[52]

Local and international interest in *tatau* has grown from the early 1960s until today. The practice has changed over this period, sometimes controversially. *Tatau* is increasingly being worn as a statement of Samoan heritage and identity, particularly among those in migrant Samoan communities,[53] rather than as a ritual entrance to manhood, and is also now being regularly performed on non-Samoans. Some non-Samoan tattoo artists have been given a Samoan title, which carries with it the right to tattoo others using Samoan tools,[54] and some have interpreted this right to include performing a *pe'a*.[55] Traditional *pe'a* designs are currently being performed on women, and traditional *malu* designs are being performed on men and on *fafafine* (the "third sex" in Samoa).[56] Also, *pe'a* and *malu* designs are being done on nontraditional body parts such as the top of the arm and ankles and wrists. In some contexts, *tatau* is now being performed using modern tattoo needles and modern ink. Western and other Polynesian (such as Maori) designs[57] are being incorporated into the *tatau* design, although this seems to have been occurring since at least the 1930s.[58] Finally, cash is increasingly being used to pay for *tatau*, either exclusively or together with customary objects of value (a full *pe'a* today costs on average AUD 3000, but prices vary widely).

Interviews from my recent fieldwork reveal much division in opinion concerning these different developments.[59] In general, there is a great deal of concern among non-*tufuga* concerning the new directions *tatau* is taking. This is often expressed in the context of disquiet over the loss of Samoan identity in the face of changes wrought by modernization and greater interaction with the western world. For example, a member of the Samoan Law Reform Commission working on an enquiry into traditional knowledge stated that people have expressed concerns about *tatau* being performed on foreigners and male designs on women and vice versa, saying "it is destroying the culture, it is not right."[60] A Facebook page called "Stop idiots from getting a Tatau or Malu" argues "We also want to stop people who are trying to acquire these traditional tattoos without proper cultural etiquette/knowledge of Tatau/Malu and their sacred significance. . . . As Samoans we are all co-owners of that intellectual cultural property. And we don't want our treasured jewel being dragged through the mud anymore."[61]

In contrast, the *tufuga* in general have a very open-minded attitude toward these new developments, and take the view that they—as traditional practitioners—have to move with the times. However, there are significant disagreements between them about how far to take this, particularly in regard to the bestowal of *tufuga* titles on non-Samoans.[62] Mallon argues that "some Samoan *tufuga* who claim authority over the arts of *tatau* are seeking to share it with the wider world. They are active agents in its dissemination and dispersal."[63] We see this in the example of the Suluape family (of the *'aiga* Sa Su'a), which is behind the market-

ing of the "Suluape Black Tattoo Pigment" by the international INTENZE brand of tattoo ink.[64] A member of this family also initiated an annual international *tatau* festival in 2006 that claims to celebrate both "Samoan culture and importance of *tatau* in the Samoan heritage" and also "how *tatau* has … transcended geographical boundaries to connect the international tattooing community."[65] *Tufuga* also regularly attend international tattooing festivals and travel around the world to perform *tatau* on international clients. Another member of the Suluape family has, for example, participated in the University of Auckland's Heritage Artists in Residence program, where he plans to create a full *tatau* on one of the students in a series of workshops "designed to maintain heritage arts and make them more accessible to Pacific communities and the wider public."[66]

There are at least three distinct sets of claims over *tatau*. The first is that of the *tufuga* from the two main families associated with the *tufuga ta tatau* title. These two families trace their "gift" back to a mythical story in which the twin goddesses *Taema* and *Tilafaiga* came to Samoa from Fiji and gave a basket of *tatau* combs and instructions on how to use them to their ancestors.[67] There is disagreement between the two families over which family's representative was given the combs first of all.[68] Members of these two families argue that they alone have rights over the practice of *tatau* because of their historical connections. Va'a reports that one *tufuga*, currently resident in New Zealand, argues that the goddesses gave the trade to the *Faleula* (Two Houses) "for their exclusive use; it was not given to the people of Samoa at large. Therefore, the *tufuga* of the *Faleula* have the exclusive right to tattoo in the traditional manner anyone they so wish, including foreigners."[69] It is unclear to what extent the *tufuga* have sought to enforce their rights over the exclusive practice of *tatau* to date.[70] According to Mallon, there were three tattooing parlors in the capital, Apia, in 2008, although only one was connected to the two main tattooing families.[71] One *tufuga* reported that there is no law the *tufuga* can use to stop people practicing, but they use heavy persuasion to get tattoo artists to do an apprenticeship with them and then give them the family title, thus incorporating them into the family. As this has numerous advantages for the apprentice as well, it appears to have worked to some extent, at least within Samoa.[72] Another *tufuga*, however, sees unauthorized *tatau* as a problem and stated, "I want to stop people from practicing without the permission of the two families."

Some *tufuga* also claim ownership over the designs used in the *tatau*. One stated "I want to copyright these two families' designs."[73] The use of word "copyright" is illustrative of the ways in which state-sponsored notions of property rights over intangible works have permeated every-day discourse. However, as Gaillot argues, "Due to its mode of transmission, it is nowadays neither possible to identify precedence nor to allocate ownership of certain tattoo motifs and designs to a given family. In recent years, this situation has created some conflict between *tufuga*. The present context can be defined as a sort of status quo."[74] Another *tufuga* raised concerns over the use of *tatau* designs on imported cloth and on the Samoan currency and said that this should not occur without their

permission. One *tufuga* also indicated that he wished to limit the creation of new designs, arguing "I feel that in the next ten years the art form will change. People will create new designs and that will damage the skeleton of the tattoo from the start."[75] However, another well-respected *tufuga* living in New Zealand has freely admitted that he occasionally invents new designs and motifs,[76] demonstrating that there are inconsistent views among the *tufuga* about the future direction *tatau* should take.

The second ownership claim comes from the state. It promotes *tatau* as a national marker of its culture and heritage through its tourism office, at international sporting events and in other international forums. For example, a traditional *tatau* demonstration was declared to be the highlight of Samoa's National Day at the Shanghai World Expo in 2010.[77] *Tatau* designs are also incorporated on Samoan banknotes. All governments in the region struggle with forging a national identity from a composite of essentially stateless societies that, especially in Melanesia, are often in conflict with each other. The idea of "national culture" is thus oftentimes a fraught one, and involves creatively drawing upon and transforming specifically local or place-based cultures.[78] Leach argues that "the process of creating nation states and cultural groups whose basis for cohesion is in identity and tradition, makes the elements which embody that identity and tradition, morally, and not just circumstantially, attached to them as entities."[79] It is therefore not surprising that Samoa seeks to elevate and appropriate an art form that has proved to be much admired by outsiders and can be unambiguously identified with its geographical state.

The third claim to ownership is made by the general public, both in Samoa and in migrant communities overseas. For example, Mallon argues that "there is a deep sense of ownership [in the community] over *tatau* and in particular the *pe'a*."[80] Elsewhere he observes "Samoan critics argue that contemporary tufuga do not own Samoan tattooing—it is owned by the Samoan people."[81] This is also demonstrated by statements by high-ranking chiefs,[82] heated exchanges in social media sites (see above and below), and the increasing numbers of Samoans who are being tattooed in Samoa and across the Samoan diaspora.[83] Mallon states "In an international context the distinctiveness of the *tatau* makes it valuable as a marker of ethnic and cultural identity. The more people feel they are becoming the same as others, the more they want to hold on to what makes them distinctive."[84] As noted above, many community members are concerned about the new directions in which the *tufuga* are taking *tatau* and accuse them of doing it for commercial reasons. For example, a Samoan academic commented "People are also using tattooing as a way of making money. . . . We have to look at a way to protect it within the context of the Samoan people."[85] In the context of performing *tatau* on non-Samoans, Mallon observes "In the minds of many Samoans, it is as though members of the 'aiga Sa Su'a were breaking from some kind of long-held essentialist tradition and code of practice,"[86] although he demonstrates that historically the tattooing of non-Samoans is well established.

Thus *tatau* is a practice over which there are multiple, often conflicting, claims and aspirations: There is the desire to preserve and limit the practice to its premodern form to reinforce a Samoan sense of identity and cultural pride; there is the desire to exploit it for commercial gain (through marketing opportunities such as the ink, *tatau* festivals, and performing *tatau*); and there is the desire to use it to market the state and to distinguish it as a tourist destination. Interestingly, all the advocates for these different perspectives are calling for the introduction of legal rules to limit the practice to accord with their particular view of what *tatau* should stand for. In doing so, they are drawing on new discourses, such as those surrounding traditional knowledge, copyright, and intangible cultural heritage.

Having lifted the lid on the complex reality of competing visions of control over *tatau*, we now turn to the exercise of imagining how the three developments could each be applied in such a context.

(i) The Sui Generis Development

All the regional *sui generis* legislation, and most likely the national legislation currently being developed, would vest proprietary rights over all aspects of *tatau* to the knowledge holders/owners in perpetuity. A preliminary question therefore is how to decide who the members of this group are, especially given the lack of geographical boundaries for the practice.[87] The Regional Framework (Article 4) defines a traditional owner as being "the group, clan, or community of people in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community." As we saw in the preceding lid-lifting exercise, the potential claimants include the *tufuga* within the two main families, all members of these families (complicated by the fact that membership is not strictly hereditary), or a number of other families who have raised claims to practice *tatau* as well. During my fieldwork there were consistent references to a possible unnamed "third" family, and Mallon states that today "the claims of the Sa Su'a are contested by some leading matai (village chiefs) and by some within the tattooing families themselves. There are at least three other families in Samoa with claims to prominent roles and influence in tattooing."[88] In addition, there is the question of what rights Samoan *tufuga* living overseas have over the practice, and how these should be balanced with those who are still resident in Samoa.

Assuming that satisfactory determinations of ownership could be made,[89] the result of *sui generis* legislation would be to allow the owners to determine who is allowed to practice *tatau* and, arguably, who can use *tatau* motifs.[90] Although this would facilitate implementation of the owners' vision of protection of *tatau* (assuming this could be agreed upon), it would not necessarily benefit the state or any broader development strategy as desired by the cultural industries initiative. There is no rational basis or customary norm on which to ground an assumption

that knowledge holders will necessarily act in ways that benefit the population as a whole, especially given the fragmented nature of many Pacific Island countries. For example, Kaplan argues, "Ethnic Fijians in their relations to land and water are highly creative in using shareholder models to disenfranchise other citizens."[91] The model of land in the region suggests a likelihood of boundaries being drawn in ever-decreasing circles as attempts are made to lessen the number of people with whom the resource "pie" must be shared.[92]

Such legislation may also have a negative impact on the current dynamic development of *tatau*. As all the legislation treats the knowledge holders as a single group, each time anyone (even one of the knowledge holders) wanted to use *tatau* for a noncustomary purpose, they would need to get the consent of all the other knowledge holders. The pace of change of the practice would therefore be determined by the most conservative of the knowledge holders, whereas in the past as we have seen it has often been forced by a particular individual running with an initiative.

(ii) The Cultural Industries Development

The cultural industries development is concerned with creating opportunities for a broad spectrum of the population to exploit traditional knowledge for commercial gain. For example, Teaiwa and Mercer argue that creation of cultural industries is about "encouraging participation in creation by traditionally excluded groups."[93] It will therefore require a pool of traditional knowledge from which the general public can draw inspiration, just as creative industries elsewhere require a rich public domain.[94] The UNCTAD Creative Economy Report (2010) states that "traditional cultural expressions and other elements of intangible cultural heritage is . . . a mainspring of creativity as they are in a permanent cumulative process of adaptation and re-creation."[95] Noyes also relevantly observes that communities "do not create their culture *sui generis* from their unique soil: they select and combine forms in general circulation according to their possibilities and with a competitive eye on the creations of their neighbors."[96]

An optimal regulatory framework for cultural industries should therefore ensure widespread access to traditional knowledge by all community members, rather than allowing aspects of it to be cordoned off in perpetuity by certain segments of the population as would be done in the *sui generis* legislation. The current nonproprietary attitude toward traditional knowledge has to date fostered a number of cultural revitalization schemes, such as the Women in Business fine mat project based in Samoa.[97] This initiative is based on the willingness of a handful of old weavers of fine mats to teach their craft to a group of women. Today it provides an income for many village weavers. However, according to oral history, the mat originally came from a single village in American Samoa, and so potentially the program could be at risk if a proprietary rights approach were adopted and that village decided to exercise its right to block access. Brown has similarly argued "efforts to regulate 'traditional' ex-

pressive culture are bound to have a chilling effect on fair use and artistic expression, especially given the constantly changing, entirely negotiable content of heritage."[98,99]

One of the main problems for the cultural industries initiative with the adoption of the *sui generis* initiative is that it has a potential to transform the way that local people think about their traditional knowledge. This is because, as Merry argues, "law is not simply a set of rules exercising coercive power, but a system of thought by which certain forms of relations come to seem natural and taken for granted."[100] There is thus a clear danger than once the idea of a "traditional knowledge owner" takes hold across the Pacific, many initiatives such as the cultural industries initiative and also climate change adaptation programs and so on will meet with far less willingness to share access to traditional knowledge for the common good. For example, such a transformation has occurred in Vanuatu in the past 30 years as a result of the Constitution recognizing customary "land owners." McDonnell argues:

> The idea that this landownership is based in custom creates a legal nomenclature that at once looks like offering a model of recognition for the "other" indigenous identity, while at the same time destabilising the foundation of this identity, reconfiguring indigenous relationships to land by asserting that land must be "owned."[101]

Finally, as the cultural industries initiative must translate into economic success *and* social unity,[102] circumventing potential sites of conflict should also be part of its regulatory requirements. This provides another reason to suggest that the interests of the cultural industries development are at odds with the *sui generis* development, as it is hard to see how conflicts over ownership can be avoided once the potential for economic exploitation is imagined or realized and ownership rights are being enshrine in state law.

(iii) The ICH Convention Development

The Convention aims to "safeguard intangible cultural heritage" and this is defined as, *inter alia*, "identification, documentation, research preservation, protection, promotion, enhancement and transmission." The Convention envisages that primary responsibility goes to the state, and it is the state that is held accountable for failure to implement appropriate measures.[103] The Convention prioritizes transmission and access to intangible cultural heritage for the population at large and provides that "the safeguarding of intangible cultural heritage is of general interest to humanity" (Article 19) although it recognizes the need to respect and work with communities, groups and individuals "that create, maintain and transmit such heritage" (Article 15). However, as Kono observes, "individual community ownership directly contradicts the ideal of universal ownership for the good of all humanity."[104] These tensions are illustrated by the different desires for access and control over *tatau* by the *tufuga*, the population at large and the state outlined above. A related consideration is the increasing advocacy of the importance of

culture for human diversity and as a human right,[105] neither of which can be guaranteed by giving control to a group of individuals. An optimal regulatory framework for the purposes of ICH Convention would therefore be one that balances the interests of the state, the national population, humanity in general, and those of the specific traditional knowledge holders.

If, by contrast, the *sui generis* approach is adopted, the owners of traditional knowledge (assuming they can be identified) will have the exclusive right to say what (if any) safeguarding measures are put in place. Moreover, if the ability to claim proprietary rights in traditional knowledge is realized through national legislation, the creation of inventories of intangible cultural heritage will no longer be seen as neutral endeavors, but are likely to be used as evidence of ownership. A useful parallel to the contemporary inventory problem is the detailed descriptive work of European ethnographers of Pacific Island societies in the nineteenth centuries. They too were prompted by the concern to record what they feared was a dying culture. These ethnographies are often used in the region today as primary evidence in land and title disputes, and what has been written is treated as a highly authoritative record. For example, an informant complained that the German ethnographer Kraemer recorded incorrect facts about his family 150 years ago, and that this has been a continuing problem for his family ever since. He observed, "People nowadays refer to these old books as bibles." Indeed, reflecting on the Fijian Cultural Mapping program, the Director of the Institute of Fijian Language and Culture noted that disputes by communities over ownership are an ongoing problem.[106]

The creation of inventories and databases, as well as being of questionable utility[107] may also raise issues regarding ownership of intellectual property rights associated with the material collected in those countries in the region that have Western-style intellectual property regimes. The owner of the copyright in any recordings of expressions of traditional culture will belong to the person making the recording, which is most likely to be the state and not the traditional knowledge holder. Consequently, once the recording is made the state has the ultimate power to decide what is done with the recording. Recording traditional knowledge in an inventory may also raise prior art issues for patent law, and may take away any protection that may have existed under trade secrets legislation. The end result may be that such inventories or databases may cause more uncertainty, rather than less, over rights to use traditional knowledge.

Further tensions may also be generated over future uses of traditional knowledge recorded in the inventory. For example, Fiji's cultural mapping initiative feeds into its Living Human Treasures program by identifying custodians of significant traditional knowledge and skills. Revival workshops are then held that "focus on the dissemination of this cultural heritage."[108] While it may well be that such custodians are happy for their knowledge to be disseminated, it is possible that they may not be, thus necessitating a balance between the rights of the community at large and the knowledge holder.

(b) Nagol: The Pentecost Land Diving Ceremony

The *nagol* land diving ceremony is used as a second case study because, like *tatau* in Samoa, it is a source of national pride and its contemporary practice is contested by a range of interest groups within Vanuatu. The *nagol* originates on Pentecost, one of the islands in Vanuatu, and is associated with the South of that island in particular. Today it is one of the country's major cultural attractions and so is an important source of tourist income both for South Pentecost and for Vanuatu as a whole. The *nagol* ritual involves building a high tower from which men jump with vines tied to their ankles, ideally at exactly the right length that the men neither crash to their death nor are jerked back violently into the tower. The origin of the *nagol* is that a woman was unhappy with her husband's treatment of her, and so she ran away from him into the forest. When she realized that he was chasing her, she climbed up into a banyan tree, but he climbed after her. She then climbed to the top of the tree and tied vines to her ankles. When her husband followed her and lunged at her, she jumped. Her husband followed, but as he had not tied his ankles with vines, he fell to his death while she survived. Today, however, it is only men who jump from the tower, in a ceremony that is a celebration of a particular form of masculinity.[109] The *nagol* is performed in April to June each year at the time of the yam harvest when the vines have the right amount of strength and spring to support the jumpers.

Like *tatau*, there have been many changes to the *nagol* over time, transforming it from an intensely local celebration to a tourist event taking place many times a year and attended by hundreds of spectators. On several occasions the *nagol* has been performed outside South Pentecost, its customary performance ground. In 1972 it was performed in February, outside its customary time, for the visit of Queen Elizabeth II, and this resulted in the tragic death of a young diver.[110] In the late 1960s a journalist for the *National Geographic*, Kal Muller, performed the jump, the first foreigner to do so.[111]

Such changes to the practice of *nagol* have occurred amid much community debate about the benefits and disadvantages of increased tourist presence since at least the 1970s, when the tourist companies in the capital started to exert pressure to regularize and expand the tourist market.[112] This debate escalated publicly early in 2011 when a radio report announced that the Council of Chiefs of South Pentecost had decided that there would be just four *nagol* ceremonies for tourists this year (as opposed to the 26 planned by the South Pentecost Tourism Council). In a letter to travel and tourist agents, the chairman of the council, Chief Telkon Watas, said the cuts were are an effort to preserve the traditional value of *nagol*, and he claimed that the numbers of dives planned were a "prostitution" of their tradition.[113] He also told the travel agents that the Council of Chiefs is the sole custom owner of *nagol*, and they have to respect its decision. Chief Watas was reported to say that any visitor who arrives on the island without the approval of his council will not be allowed to see the *nagol*.[114]

At first glance, this would appear to be an excellent example of "the community" exercising agency over its traditional knowledge. However, a different perspective is given by an anthropologist who has spent over a decade working in this community.

> Telkon Watas was the very individual who re-introduced the *gol* on Pentecost's more easily accessible West coast to attract tourists in the seventies. The massive inflation of *gol* performances is thus to a large extent his work, or at least an outcome of his initial initiative. He has always benefitted immensely—and often exclusively—from it, while the people actually doing the performance, have not—or not much. . . . A ban on commercial filming that was put in place by the Vanuatu Cultural Council in 2006, was to a large extent a reaction to Telkon Watas' long time mismanagement. He never obeyed this ban but rather did what he could to undermine it. Telkon Watas is a much feared man on Pentecost. . . . As far as I see it, this is yet another move by Telkon Watas, now a man in his seventies, to secure this "kastom as commodity" for himself and some of his sons. It has nothing to do with an interest in this outstanding and intricate performance itself. What would be much more (!) needed, and would make more sense, is transparency with regards to what happens with the enormous influx of money that the *gol* tourism generates.[115]

The president of the South Pentecost Tourism Association dismisses claims of ownership and control by Watas and argues that his claims have also been rejected by the chiefs and the community. He argues that it is the association that should control land diving and to maintain and protect some of the cultural values in it. Some of the challenges to its values that he identified are the desire of TV crews to film the preparation of the *nagol* tower, which is considered to be a technology belonging to the people of South Pentecost; the movement of the *nagol* to North Pentecost or even other islands; and the time of year it can be performed. He also said that there is a traditional festival that occurs every year where the *nagol* is performed just for the community without tourists to ensure the custom remains strong. According to him, neither the state nor the Vanuatu population at large have any rights over the *nagol*—it belongs solely to the people of South Pentecost and should be regulated by the South Pentecost Tourism Association.[116]

A third claim to control comes from a few individuals who claim to be the owners of the "copyright" of the *nagol*. At least one such claimant has tried to register his name as the owner with both the Vanuatu Cultural Centre and the Vanuatu Intellectual Property Office, although there is no legislation currently in place to facilitate this. According to the director of Tourism, the quest to find the "owner" of the *nagol* started in 2000, the year that the Copyright Act was passed by parliament (but not gazetted) and the discourse of intellectual property entered the public arena. This quest has recently been reinvigorated as a result of the gazetting and entry into force of this law in 2011, and also as a result of perceived unfairness in the distribution of benefits arising from the *nagol*. He argues that it will be impossible to trace the descendant of the original jumper, and also that there are no advantages to be gained by identifying a particular owner, pointing out that

the position of customary "owner" of land in Vanuatu has given rise to numerous problems. He suggests the *nagol* should be seen as belonging to South Pentecost as a whole, and strongly resists the notion of legislation introducing new rights such as the application of the concept of "copyright owner" to traditional knowledge.[117]

A final claim to rights over the *nagol* comes from the Vanuatu population as a whole, many of whom see it as a tradition belonging in some respects to the country as a whole, and to the state. As with *tatau*, it has been adopted as a state emblem of sorts. Tabani argues that it is "an emblem of the state's measures in favour of the promotion and protection of Melanesian values."[118] This is most clearly demonstrated by the widespread belief that the *nagol* has been misappropriated by those who set up commercial bungee jumps around the world. According to Soden the *nagol* is in fact the original inspiration for the bungee jump, as it was Muller's (the first foreigner to perform the jump) account of his own land diving that "would provide the detonator for the next blast in the chain reaction that would lead to the invention of bungee jumping."[119] This view led the Vanuatu prime minister in 1995 to issue a formal protest about the bungee jumping business' misappropriation of Vanuatu's cultural heritage and, according to Tabani, led to Vanuatu's desire to join the WTO.[120] No financial compensation was received, and indeed it is highly arguable whether there is enough of a connection between *nagol* and bungee to justify such a claim.

Thus lifting the lid on *nagol*, like *tatau*, highlights the difficulties of deciding who comprises "the community" in a particular context, who speaks for it, and what power dynamics are involved in questions of rights to control particular aspects of traditional knowledge. It also shows the importance of interrogating how benefits are internally shared, rather than assuming that community agency will necessarily result in all members of the community having the chance to benefit from a particular resource. This is an important point to emphasize as the subverting potential of local politics is often not appreciated by those advocating changes in intellectual property rules.

I turn now to an analysis of regulation of the *nagol* from the perspective of the three different initiatives. As with the *tatau* example, it is clear that these will not all dictate the same approach.

(i) The Sui Generis Development

Vanuatu's Copyright Act currently adopts a *sui generis* approach to traditional knowledge, although there is very little detail on how the regulatory scheme should operate. It provides that a person should not reproduce an expression of indigenous culture if he or she is not one of the custom owners, has not been sanctioned to do the act, and has not done the act in accordance with custom. There is no guidance provided about how to identify a particular custom owner, and the term is not defined in the act. Section 42(1), however, provides that if it is not possible to identify the custom owners, or if there is a dispute about ownership, the National Cultural Council or the National Council of Chiefs may institute pro-

ceedings as if it were the owner and any damages must be used for indigenous cultural development. If such an approach were applied to the *nagol*, it would mean that the custom owners, assuming there could be agreement over who they are—which seems unlikely from the discussion above—would have absolute control over any noncustomary use of the *nagol*. If there could not be agreement, control would be in the hands of the state, as has frequently occurred in the case of land, often with disastrous results.[121] In either case, decisions concerning the number of jumps, filming rights, location of the *nagol* and so forth would all be dependent upon the views of a few individuals. This clearly opens up new rent-seeking opportunities for these individuals, and the history of the management of revenue from the *nagol* to date demonstrates potential for considerable financial exploitation. There is no room in this model for the type of communal decision making and distributive sharing mechanisms advocated by the South Pentecost Tourism Authority and the Director of Tourism. If agreement could not be reached about who the owners are, then these decisions will be given to one of two national bodies, with no directions to act in the best interests of the people of South Pentecost. Seen in this context, the potential for such legislation to create a monopolistic model of traditional knowledge ownership is apparent.

(ii) The Cultural Industries Development

The cultural industries initiative seeks to maximize opportunities for the population as a whole to financially benefit from traditional knowledge. It would therefore favor an approach that would stretch the benefits from the *nagol* over as much of the population as possible. For example, this development might encourage the villagers that currently perform the *nagol* to tourists to teach adjacent villagers how to do it, so as to ensure that the financial benefits are shared more widely. This apparently occurred in 1972 after the unfortunate death of the diver who performed for Queen Elizabeth. The cultural industries development would not be served by a *sui generis* approach as this would almost inevitably lead to a concentration of the financial benefits in the hands of a few who can set the terms on which others can perform.

(iii) The ICH Development

The Convention obliges state parties to designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory. This may mean that the responsibility for the *nagol* is taken over by a state authority, which would prioritize its safeguarding over financial benefits accruing to individual owners. Indeed, this occurred in a way in 2006 when the Vanuatu Cultural Centre established a "moratorium" on the making of commercial films and audiovisual productions of the *nagol*. The intention was "to ensure that its cultural meaning is not lost, the customary knowledge associated with it continues to be transmitted to younger generations, the bush resources required to build the *nagol* towers are preserved and the significant cash revenues earned from

tourism and other commercial activities associated with the *nagol* are properly channeled into appropriate and sustainable development for the communities of the area."[122] This is a clear example of the clash of interests between "customary owners" and the state that may arise in relation to traditional knowledge when desires for preservation and commercialization are pulling in different directions. Creating proprietary rights in the owners would leave the state with very little recourse in such a situation, as the owners would have the exclusive right to decide whether, and on what terms, the traditional knowledge is exploited.

Vanuatu's greatest experiences with the Convention to date come from the inscribing of the traditional practice of creating sand drawings onto the Representative List of the Intangible Cultural Heritage of Humanity. Interestingly, the issue of ownership of particular sand drawings was avoided by the leaders of the sand drawing project by working with local cultural representatives to generate around 80 different sand drawings that could be considered to be "in the public domain" and could be used freely in festivals and in promotional materials and activities for tourists. This meant that the ownership of the countless other "secret" sand drawings was not an issue for the purposes of safeguarding activities. It is harder to see how such a balancing approach could apply to a single ritual such as the *nagol*, but it points toward the benefits of developing regulatory models that provide room to balance the interests of different segments of a community and the broader public interest.

CONCLUSION

This article has shown that although all three current developments based on traditional knowledge in the Pacific Islands region are proceeding on the assumption that they are mutually compatible, in fact, the objectives of each suggest very different answers about who should benefit from, and control the use of, traditional knowledge. In particular, there are potential tensions between the interests of the nation as a whole with various local groups closely identified with the particular manifestations of traditional knowledge, and also between those who want to commercialize traditional knowledge and those who want to preserve it. The two case studies have demonstrated that the implementation of these different developments in practice would result in different claims over traditional knowledge being promoted to the exclusion of others. They also point unavoidably to the conclusion that implementation of the *sui generis* legislation would severely hamper the implementation of the other two developments, as it would prioritize the interests of a narrow group of individuals over the broader national public interest. For example, *sui generis* legislation would pave the way for certain right-holders to refuse to allow either *tatau* or the *nagol* to be listed by the ICH Convention or to be developed as part of the cultural industries initiative, or to allow it only on condition of payment. While it may be possible in practice to resolve these differ-

ences, a first step toward doing so must be to recognize that the potentials for conflict *exist*, as new forms of state intervention lead to new decisions being made over rights to control and benefit from traditional knowledge. Interventions such as *sui generis* legislation and cultural mapping also lead to changes in attitudes toward traditional knowledge that will trickle through into other uses of it, customary and otherwise. In particular, the pervasive influence that the creation of new forms of proprietary rights can have on the ability to manage intangible cultural resources for broader developmental objectives cannot be underestimated. As Leach argues, "the problematic object-ownership language in the new policy guidelines and laws, including UN terms such as TCE, introduce visions of exclusive and transactable 'property' into cultural arenas and groups formerly more concerned with communicating knowledge and defining relationships from which material flowed."[123]

Such influence can be countered in part by explicit discussions about the competing visions concerning the "protection" of traditional knowledge, and identification of the different choices and trade-offs between different objectives that will need to be made. Some useful lessons can be learned from the development of western intellectual property laws which, in theory at least, are predicated on the need to balance the interests of creators of intellectual property with users. Such a balancing exercise in relation to traditional knowledge in the Pacific Islands could lead to the development of a regulatory framework for it based on a consideration of all potential users, and all possible objectives, and which would balance the interests of the broader community and the state with those of particular groups. It should be noted that such a strategy may not be appropriate for countries outside the region where indigenous communities are in the minority. In developing such a framework, serious consideration should be given to whether a range of regulatory strategies, such as recognition of customary laws, development of research permit schemes, introduction of authenticity branding schemes, controls on imported handicrafts and so on, could not be utilized to meet the desire to protect against misappropriation and help to promote commercialization, without the need to create a new property right. This "regulatory toolbox" option is outlined in greater detail elsewhere.[124]

The article has also shown that providing for communal rights over traditional knowledge is likely to be very difficult to implement in practice. In both case studies we saw multiple groups who could claim to be the relevant "community" for the purposes of the *sui generis* legislation and the ICH Convention. For example, with regard to *tatau* even if "the community" is defined at its most narrow point as being the *tufuga*, this would still leave the boundaries of the group incredibly difficult to determine. With regard to the *nagol*, we saw that at least two groups have claimed rights over it in the name of "the community." Moreover, these subgroups present radically different views about how use of their traditional knowledge should be regulated. These insights suggest proceeding in this direction with caution, particularly bearing in mind Comaroff and Comaroff's warning that "it

is yet to be seen whether ethno-prise actually will increase the general prosperity, the commonweal of those who look to it for a panacea—or whether it will exacerbate, even re-invent, long-standing forms of extraction and inequality."[125] Further, any regulatory initiative based on recognizing communal rights, particularly ones that would enshrine new rights in formal laws, should at the very least contain workable mechanisms for determining entitlement to those rights, which is not presently the case. A number of options for doing so are set out by the author elsewhere.[126]

The two case studies also demonstrate that many manifestations of traditional knowledge are already intensely regulated, often through traditional mechanisms such as the *tufuga's* apprenticeships and the Pentecost Council of Chiefs, but sometimes also by newer institutions such as the South Pentecost Tourism Authority. Moreover, these nonstate institutions may be operating under considerable stress and may be more or less effective as a result. It is important for any new initiatives that seek to regulate traditional knowledge to be aware that they may be entering what is already a contested regulatory space, and that their presence may affect the balance of power that currently prevails. For example, in both case studies we saw key actors making reference to "copyright" as a potential way to strengthen their claims for control. We also saw that different individuals within affected communities have different abilities to make their voices heard and to access any new resources or rights that are being created. For example, well-connected men (such as Chief Watas) may be better able to communicate with state authorities or regional funding bodies than women. Consequently, any new initiative should proceed only on the basis of an understanding of local politics, obtained by lifting the lid on the community through ethnographic research, rather than making assumptions about group homogeneity, to avoid the risk of disenfranchising those who lack the power to speak for themselves. Thus, the complexities of local politics must be taken into account in all regulatory and developmental programs concerning traditional knowledge because, as Tamanaha reminds us, "[law] swims in the social sea with everything else."[127]

ENDNOTES

1. The terms traditional knowledge and cultural property are used broadly and interchangeably in this article to include all practices, representations, expressions, knowledge and skills that communities and groups recognize as part of their cultural heritage. See article 2 of the Convention for the Safeguarding of the Intangible Cultural Heritage 2003.
2. UNESCO, *Implementation of the 2003 UNESCO Convention in the Pacific*, 90.
3. Wendland, "Managing Intellectual Property Options," 95.
4. Leach, "Arts and Owners," 614.
5. Githaiga, "Intellectual Property Law"; Posey, "Commodification of the Sacred"; Samoa Law Reform Commission, *Protection of Samoa's Traditional Knowledge*.
6. Kurin, "Safeguarding Intangible Cultural Heritage," 15.
7. Gibson, "Intellectual Property Systems."
8. See, for example, Yu, "Cultural Relics, Intellectual Property, and Intangible Heritage," 458–459.

9. See Forsyth, "How Can Traditional Knowledge Best Be Regulated?" for a further elaboration on the potential dangers involved.

10. Noyes, "The Judgment of Solomon"; Tauschek, "Cultural Property as Strategy."

11. Tauschek, "Cultural Property as Strategy," 77.

12. New, "Indigenous Peoples Won't Be 'Wished Away' In Traditional Knowledge Treaty Talks." See also Carpenter at al., "In Defense of Property," 1084 and throughout.

13. Sunder, "Intellectual Property and Identity Politics," 92.

14. See Chanock, "Branding Identity and Copyrighting Culture," 179.

15. Noyes, "Hardscrabble Academies," 41; see also Noyes, "The Judgment of Solomon."

16. Brown, Who Owns Native Culture?, "Heritage Trouble: Recent Work", "Culture, Property, and Peoplehood";, Carpenter et al., "In Defense of Property.", and Comaroff and Comaroff, *Ethnicity, Inc*.

17. See Brown, "Culture, Property, and Peoplehood," 576.

18. For example, Cang, "Defining Intangible Cultural Heritage," 54, discusses the "local preservation groups" in Japan whose "prestige and power" have been unwittingly reinforced by the government's ICH program; Wendland, in "Managing Intellectual Property Options," p. 134, asks, "How do such projects transform social relationships, power dynamics, cultural development and exchanges within such communities?" in the context of reflecting upon a WIPO initiative to help a Masai community record its own ICH.

19. Braithwaite, "Ten Things You Need to Know About Regulation,"19.

20. See Chanock, "Branding Identity and Copyrighting Culture," 178; Tauschek, "Cultural Property as Strategy," 74.

21. Corrin Care et al., *Introduction to South Pacific Law*, 1.

22. Techera, "Legal Pluralism, Indigenous People and Small Island Developing States," 174.

23. Synexe Consulting Limited, *Valuing Culture in Oceania*, 24–26.

24. Regenvanu. Panel Session on "Indigenous and Local Communities' Concerns and Experiences in protecting their Traditional Knowledge and Cultural Expressions" and "The Traditional Economy as the Source of Resilience in Melanesia."

25. Vanuatu Statistics, *Alternative Indicators of Well-Being for Melanesia*, 2.

26. Tamanaha, The Primacy and the Failure of Law and Development," 9.

27. In addition to these three initiatives, there are numerous other programs involving traditional knowledge, including arts festivals, revitalization initiatives, cultural tourism, the teaching and study of cultural heritage at primary, secondary and tertiary levels, and the use of traditional knowledge in climate change adaptation programs. Many different foci are identifiable in these projects: some are concerned with ensuring traditional knowledge is used to create a rich cultural life and is passed down to succeeding generations, others are aimed at making an economic return from it, and yet others to document and record it, ensuring its preservation in the face of increased challenges to its transmission.

28. Drahos, "An Alternative Framework," 3.

29. Bortolotto, "The Giant Cola Cola in Gravina," 83.

30. These countries are: Fiji, Kiribati, Solomon Islands, Vanuatu, Cook Islands, Palau and Papua New Guinea.

31. Samoa Law Reform Commission, *Protection of Samoa's Traditional Knowledge*.

32. A broadly similar approach is being taken by WIPO's Intergovernmental Committee on Traditional Knowledge that is developing draft treaties on Traditional Cultural Expressions and Traditional Knowledge. The most recent drafts (July 2011) of these treaties are available in the appendices to document WO/GA/40/7 on the WIPO web site. A further discussion of the international developments in this area is beyond the scope of this article.

33. Interview with Setareki Tale, Director i-Taukei Institute of Language and Culture, 29 September 2011, Suva, Fiji.

34. A Bill for an Act to establish a *sui generis* system for the protection and promotion of Traditional Knowledge and Expressions of Culture for the people of the Republic of Palau (2005). Available at http://www.palauoek.net/senate/legislation/sb/sb_7-3.pdf. Details of other national legislation are currently not publicly available.

35. See articles 1 and 2 of the Treaty. The Regional Framework does not specify any objectives, but accompanying Guidelines (Secretariat of the Pacific Community 2006, 2.1) state the objectives are "to protect the rights of traditional owners in their [traditional knowledge] and provide them with the means to control the commercialisation of their [traditional knowledge] and ensure that such commercialisation is subject to their prior informed consent and the fair and equitable sharing of benefits arising from that utilisation with the traditional owners."

36. See also Forsyth, "The Traditional Knowledge Movement in the South Pacific."

37. George et al., *Situational Analysis of the Cultural Industries in the Pacific*.

38. It also follows an international trend in this area. For example, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005* focusses upon the integration of culture in sustainable development. Techera ("International Heritage Conservation," 49) argues: "The Convention suggests aiding the emergence of viable cultural industries, strengthening cultural activities and the production and distribution of cultural goods and services, facilitating wider access to global markets and networks, and encouraging appropriate collaborations between developed and developing countries in areas such as music and film." See also United Nations 2010.

39. See Teaiwa and Mercer, *Pacific Cultural Mapping*; Synexe Consulting Limited, *Valuing Culture in Oceania*, 27–28.

40. Teaiwa and Mercer, *Pacific Cultural Mapping*, 7.

41. Teaiwa and Mercer, *Pacific Cultural Mapping*, 9.

42. Safeguarding is defined (art 2.3) as meaning "measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and nonformal education, as well as the revitalization of the various aspects of such heritage."

43. See article 3 of the ICH Convention. See also Wendland, "Managing Intellectual Property Options," 133.

44. Kono, *Intangible Cultural Heritage and Intellectual Property*, 29.

45. Both the Vanuatu Sand Drawings and The Lakalaka, Dances and Sung Speeches of Tonga were inscribed on the list in in 2008. See http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011#results (accessed November 2011).

46. Bortolotto, "The Giant Cola Cola in Gravina," 90.

47. Sunder "Intellectual Property and Identity Politics: Playing with Fire," 112.

48. Mallon, "Samoan Tatau as Global Practice," 145.

49. Mallon, "Samoan Tatau as Global Practice," 147.

50. Mallon, "Samoan Tatau as Global Practice,"150.

51. Gaillot, *Tattooing in Samoa*, 10.

52. Utanga and Mangos 2006

53. Mallon, "Samoan Tatau as Global Practice," 153.

54. Mallon, "Samoan Tatau as Global Practice," 163.

55. Mallon, *Tatau*, 29.

56. See Farran, "Pacific Perspectives," 13–28.

57. Va'a, "Five Days with a Master Craftsman," 311.

58. Mallon, "Samoan Tatau as Global Practice," 151.

59. I spent three weeks in Samoa in April 2011 and conducted thirty seven interviews with a broad range of stakeholders including *tufuga*, officials in relevant government departments, customary leaders, and those involved in tourism and culture.

60. Interview with officer in the Samoan Law Reform Commission, April 2011, Samoa.

61. http://www.facebook.com/StopIdiotsFromGettingATatauOrMalu (accessed August 2011).

62. Mallon, "Samoan Tatau as Global Practice," 158.

63. Mallon, "Samoan Tatau as Global Practice," 167.

64. http://www.tattoosuperstore.com (accessed August 2011).

65. http://internation-samoan-tatau-festival.com (accessed August 2011).

66. http://www.arts.auckland.ac.nz/uoa/home/about/news/news/template (accessed August 2011).

67. Mallon, "Samoan Tatau as Global Practice," 148.

68. Va'a, "Five Days with a Master Craftsman," 302–303.
69. Va'a, "Five Days with a Master Craftsman," 311–312; see also Mallon, *Tatau*, 55.
70. See Gaillot, *Tattooing in Samoa*, 7.1.
71. Mallon, *Tatau*, 21.
72. See also Gaillot, *Tattooing in Samoa*, 7.
73. Interview with Master Tatau Artist, Sua Suluape Alaivaa Petelo Sulupae, 14 April 2011, Apia, Samoa.
74. Gaillot, *Tattooing in Samoa*, 7.3.
75. Interview with Master Tatau Artist.
76. Mallon, *Tatau*, 56.
77. Telefoni, "China is a Friend Indeed."
78. See Hirsch, "Looking Like a Culture," 227, 234.
79. Leach, "Owning Creativity: Cultural Property," 136.
80. Mallon, "Samoan Tatau as Global Practice," 149.
81. Mallon, *Tatau*, 30.
82. Mallon, *Tatau*, 30.
83. Va'a, "Five Days with a Master Craftsman," 297.
84. Mallon, *Tatau*, 30.
85. Similar sentiments are expressed on social networking sites, such as these comments posted on 31 March 2011 by "inkonmyas": "Do yourself and everyone else a favour, leave it 2 the REAL tufuga, youre just a money hungry little shit and if ever i see you around ill say it to your face and we'll take it from there, I hear story after story about you and all of them not good. I'm glad a Real Su'a put Samoa's mark on me and i have continued with my own family's tradition, Your work is crap, the end results are not even remotely close to what a pe'a should look like, i wish you nothing but shit money & a smack in the chops." http://finddragonflytattoos.com/articles/samoan-tatau-bill-puta-pea-journey-snippets-1/ (accessed August 2011).
86. Mallon, *Tatau*, 26.
87. Cf Noyes, "The Judgment of Solomon"; Tauschek, "Cultural Property as Strategy."
88. Mallon, *Tatau*, 16.
89. This is a major assumption and is discussed at length in Forsyth, "How Can Traditional Knowledge Best Be Regulated?"
90. As many designs and motifs, such as those in *tatau*, are common throughout the region and so ownership may be difficult to prove.
91. Kaplan, "Fijian water in Fiji and New York," 698.
92. See, for example, Filer, "The Bougainville Rebellion" and "Grass Roots and Deep Holes."
93. Teaiwa and Mercer, *Pacific Cultural Mapping*, 12.
94. Oseitutu, in "A Sui Generis Regime for Traditional Knowledge," 207, argues "Intellectual property law strives to maintain a balance between the public good of access and the free movement of information with the need to protect creators and innovators. It does so with a view to stimulating further creative activity. A predominantly creator-focused approach, which is the approach some traditional knowledge proponents tend to take, leads to an intangible rights regime that is tilted heavily in favour of the right holder."
95. UNCTAD Creative Economy Report 2010:181
96. Noyes, "The Judgment of Solomon," 37.
97. See http://www.womeninbusiness.ws/ (accessed August 2011).
98. Brown, "Heritage Trouble," 51.
99. See also Oseitutu, "A Sui Generis Regime for Traditional Knowledge," 187, 191.
100. Merry, "Legal Pluralism," 889.
101. McDonnell, "Masters Not Mistresses Of Modernity," 7.
102. Synexe Consulting Limited, *Valuing Culture in Oceania*, 24.
103. The state is also implicated in other aspects of control of the exercise of traditional knowledge, for example through issues of public health. This is relevant for tattooing where unclean instruments can cause serious illness and even death (see, e.g., McLean and D'Souza, "Life-Threatening

Cellulitis After Traditional Samoan Tattooing") and also for traditional healers. They argue "Balancing the fundamental right to perform a traditional cultural practice with the need for up-to-date infection control techniques and appropriate regard to health and safety requires care and is essential." (29).

104. Kono, *Intangible Cultural Heritage and Intellectual Property*, 33.

105. For a complete list of the relevant international agreements relevant to this area see Coombe ("Protecting Traditional Environmental Knowledge," 118–119). Shaheed (*Report of the Independent Expert in the Field of Cultural Rights*, 6) argues that "The right of access to and enjoyment of cultural heritage forms part of international human rights law, finding its legal basis, in particular, in the right to take part in cultural life, the right of members of minorities to enjoy their own culture, and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage." In addition, a 2011 General Assembly resolution on culture and development (A/RES/65/166) recognizes that culture is an essential component of human development, represents a source of identity, innovation and creativity for the individual and the community and is an important factor in the fight against poverty.

106. Qereqeretabua, "The Safeguarding of Intangible Cultural Heritage in Fiji," 4. See also UNESCO, *Implementation of the 2003 UNESCO Convention*, 73.

107. See Brown, "Heritage Trouble," 47–48; Noyes, "Hardscrabble Academies," 50.

108. Techera, "Safeguarding Cultural Heritage," 330.

109. Jolly, "Kastom as Commodity," 134.

110. Jolly, "Kastom as Commodity," 138.

111. Soden, *Falling: How Our Greatest Fear Became Our Greatest Thrill*, 4.

112. Jolly, "Kastom as Commodity," 138.

113. Bule, "Pentecost Chiefs to Halt Nangol Exploitation."

114. "Vanuatu Chiefs Limit Pentecost Land Dives," Radio New Zealand. Posted at 03:24 on 16 February 2011 UTC. http://www.rnzi.com/pages/news.php?op=read&id=58805 (accessed November 2011).

115. Post by Thorof Lipp on ASAONET Email Discussion List on 19 February 2011. See also Pigliasco and Lipp (2011) 392–394, 397–398.

116. Interview with the President of the South Pentecost Tourism Association, 30 July 2011, Vanuatu.

117. Interview with the Director of Tourism, 28 July 2011, Vanuatu.

118. Tabani, "The Carnival of Custom," 313.

119. Soden, *Falling: How Our Greatest Fear Became Our Greatest Thrill*, 5.

120. Tabani, "The Carnival of Custom," 317.

121. See Haccius, "The Interaction of Modern and Custom Land Tenure Systems in Vanuatu."

122. "Moratorium (Ban) on Commercial Filming of Nagol." Vanuatu Cultural Centre website. http://www.vanuatuculture.org/site-bm2/film-sound/20051122_pentecost_land_dive.shtml

123. Leach, "Arts and Owners," 611.

124. Forsyth, "How Can Traditional Knowledge Best Be Regulated?"

125. Comaroff and Comaroff, *Ethnicity, Inc.*, 142.

126. Forsyth, "How Can Traditional Knowledge Best Be Regulated?"

127. Tamanaha, "The Primacy and the Failure of Law and Development," 43.

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