

**PASS THE KAVA: IMPLICATIONS FOR
PATENT PROTECTIONS OVER
TRADITIONAL KNOWLEDGE IN SAMOA'S
NEW INTELLECTUAL PROPERTY ACT OF
2011**

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I.	INTRODUCTION	790
II.	BACKGROUND	794
	<i>A. Historical Influences on Samoa</i>	794
	<i>B. Traditional Knowledge Definitions</i>	797
III.	SAMOA'S PAST AND PRESENT IP FRAMEWORKS	801
	<i>A. Patents Act 1972</i>	801
	<i>B. Trends before the Intellectual Property Act 2011</i>	804
	<i>C. Intellectual Property Act 2011</i>	805
IV.	ANALYSIS.....	808
	<i>A. The Intellectual Property Act 2011 as Applied to Kava</i>	808
	<i>B. Future Implications of the Intellectual Property Act 2011</i>	816
V.	CONCLUSION	820

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I. INTRODUCTION

The *Fa'a Samoa*, or the Samoan way, is a cultural description of the central tenets to which the people of Samoa adhere.¹ It revolves around the *aiga* (family), the *matai* (chiefs), and the church.² This is evident in the emphasis on respect for one's "betters," namely older generations who hold high titles like *matai* or positions of integrity like pastors,³ or, for example, the United Nations Special Missions delegation that visited the island on May 26, 1959.⁴

The main issue at stake on this day was the establishment of the independent country of Samoa, releasing the island from a fifty-year trusteeship administered by New Zealand.⁵ As the United Nations Trusteeship Council was welcomed outside the *Fono*, or legislative house, the day began with the King's 'Ava Reception.⁶

Native to the South Pacific islands, kava—or 'ava as it is used primarily in Samoa—is a member of the pepper family that has been used in traditional ceremonies for centuries.⁷ In a very specific and complex process, both in preparation and presentation, the root of the kava plant is made into a drink that is passed around to the high-ranking participants of the 'ava

1. *Fa'a Samoa—The Samoan Way*, SAMOAN TOURISM AUTH., <http://www.samoa.travel/about/a10/Faa-Samoa---The-Samoan-Way> (last visited Mar. 6, 2014).

2. *Id.*

3. *Fa'a Samoa*, SAMOAN SENSATION, available in archived format at <https://web.archive.org/web/20130527121730/http://www.samoa.co.uk/faasamoaintro.html> (last visited Jan. 28, 2014).

4. See Jane Resture, *United Nations Special Mission to Western Samoa on Independent-Government*, JANE'S OCEANIA, http://www.janesoceania.com/samoa_independence/index.htm (last visited Jan. 28, 2014) (recounting the attendees and events of this specific day through a prose style similar to the oral traditions found in Samoa).

5. *Id.*

6. *Id.*

7. *Kava*, NAT'L CTR. FOR COMPLEMENTARY AND ALT. MED., <http://nccam.nih.gov/health/kava> (last visited Jan. 28, 2014); *The Kava Kava Root—Side Effects and Benefits*, FOODEDITORIALS.COM, http://www.streetdirectory.com/food_editorials/cooking/herbs_and_spices/the_kava_kava_root_side_effects_and_benefits.html (last visited Jan. 28, 2014).

ceremony.⁸ Because of its slightly intoxicating and sedative effects, kava is seen as a truth-bringer.⁹

Almost fifty years later, researchers in Scotland discovered another truth imparted to them through the kava plant.¹⁰ They found that certain kava derivatives had positive influences in inhibiting leukemia cell growth as well as other inflammatory diseases.¹¹ With such a finding, Samoa and the other South Pacific islands have potentially a gold mine's worth of kava¹² if they can discover a way to protect it legally under intellectual property laws. This may prove difficult, however, as most South Pacific nations customarily do not value western ideals of property rights and the written record of such rights.¹³

Yet, intellectual property (IP), while a relatively new field of law, has become an important topic in the growing world economy.¹⁴ The significance of IP protections on a country's legal and financial status has even islands in the middle of the Pacific

8. See Dorothee von Hoerschelmann, *The Religious Meaning of the Samoan Kava Ceremony*, 90 ANTHROPOS 193, 193–95 (1995) (Ger.), available at <http://www.jstor.org/stable/40463113> (describing in-depth the steps for kava preparation and ceremonial procedure in Samoa).

9. *Id.* at 193 (“In Samoa each form of a dream or trance is considered a condition that enables a person to recognize the truth easily.”); see also *Kava*, *supra* note 7 (describing how kava is a numbing agent and historically was used to help people fall asleep).

10. Florence Folmer et al., *Inhibition of TNFa-Induced Activation of Nuclear Factor κ B by Kava (Piper methysticum) Derivatives*, 71 BIOCHEMICAL PHARMACOLOGY 1206 (2006), available at <http://www.sciencedirect.com/science/article/pii/S0006295206000049>.

11. *Id.*

12. See Lindstrom Lamont, *Kava, Cash and Custom in Vanuatu*, 15.2 CULTURAL SURVIVAL Q. (Summer 1991), available at <http://www.culturalsurvival.org/ourpublications/csq/article/kava-cash-and-custom-vanuatu> (indicating the economic significance in Vanuatu, where “[t]he external kava market may soon strengthen”).

13. See SUSAN FARRAN & DONALD E. PATERSON, SOUTH PACIFIC PROPERTY LAW 217 (2004) (arguing in terms of land titles that “[u]nder the customary laws of island countries of the South Pacific there is no requirement that rights and interest in property should be recorded anywhere. Indeed, cultural values in these countries are against the recording of interest in property, first, because written records generally are not part of the traditions and cultures of these countries . . .”).

14. See David G. Post, *Some Thoughts on the Political Economy of Intellectual Property: A Brief Look at the International Copyright Relations of the United States*, TEMPLE UNIV. L. SCH. (Sept. 1998), available at http://www.temple.edu/lawschool/dpost/Chinapaper.html#N_2 (“[I]ntellectual property matters have moved to center stage in the world of international trade.”).

Ocean taking heed of the advances and benefits of IP laws.¹⁵ As these small, developing countries struggle to build their own economies and become feeders into the international trade market, adaptations in local IP laws help encourage their first steps into the flow of global commerce.

Nevertheless, globalization comes with a price. While IP protections can help developing nations economically compete with first world nations, they also asymmetrically can result in inequities such as biopiracy, especially in the field of traditional medicines.¹⁶ The conflicts between protecting traditional medicines, a subset of the field of “tradition-based intellectual activity referred to as traditional knowledge,”¹⁷ and updating national laws to reflect international IP norms are hot topics.¹⁸

Samoa is one such developing nation that has tried to take these conflicts and concerns into account with a revision of its older IP laws. In 2011, Samoa passed the Intellectual Property Act 2011,¹⁹ which came into effect October 1, 2012.²⁰ This new law replaces the previous existing Patent Act of 1972,²¹ which was created just a few years after the formation of Samoa as an

15. See generally *Project Description*, INTELLECTUAL PROP. PAC. ISLANDS, <http://www.ippacificislands.org/project.html> (last visited Apr. 2, 2014) (defining the purpose of a research project that seeks to grasp “the potential advantages and disadvantages of different models of intellectual property protection in the particular context of the Pacific island countries, to better inform the decisions that will need to be made concerning these issues in the next few years”).

16. Sumathi Subbiah, *Reaping What They Sow: The Basmati Rice Controversy and Strategies for Protecting Traditional Knowledge*, 27 B.C. INT'L & COMP. L. REV. 529, 530 (2004) (“The asymmetry in IP protection results in inequities and fuels developing nations’ and non-governmental organizations’ (NGOs) arguments against the globalization of certain IP rights.”).

17. *Id.* at 529.

18. See Deepa Varadarajan, *A Trade Secret Approach to Protecting Traditional Knowledge*, 36 YALE J. INT'L L. 371, 380 (2011) (“The controversial protection of plant varieties and bioengineered goods is particularly relevant to the emergence of traditional knowledge protection as a hot global topic.”).

19. Intellectual Property Act (Act No. 9, pt. II, § 4(3)(e)/2011) (Samoa).

20. Matt Adams, *Samoa Implements New Law*, PATENTBUFF (Aug. 30, 2012), <http://www.patentbuff.com/2012/08/samoa-implements-new-law.html>; *Samoa Accedes to the Paris Convention*, WORLD INTELLECTUAL PROP. REV. (July 15, 2013), <http://www.worldipreview.com/news/samoa-accedes-to-the-paris-convention>.

21. Patent Act 1972 (Act No. 22/1972) (Samoa).

independent country.²² Considered the cradle of Polynesian culture,²³ Samoa was the first Polynesian island in the South Pacific to regain its independence in the twentieth century.²⁴ Additionally, Samoa was the first amongst the Pacific Island nations to have written its own patent legislation.²⁵ It is fitting, then, to suggest that Samoa is a Polynesian leader in regards to encouraging patent legislation innovation and reform.

This Comment looks at Samoa's recent approach to protecting traditional knowledge under intellectual property rights, namely patents, through the lens of the island's ceremonial plant, kava. Part I traces some of the historical influences of colonialism, independence, and globalization on Samoa. Additionally, the definition of traditional knowledge is described in both a global and local context. Part II examines Samoa's past efforts at building a working model for IP protections, especially in regards to traditional knowledge. Then, relevant patent sections of the new Intellectual Property Act of 2011 are discussed and analyzed with respect to its significant departures from the old laws. Part III gives examples of existing kava patents and shows how kava can be included under the umbrella of traditional knowledge. Part III also illustrates how the Intellectual Property Act 2011 can be applied to future kava patents and promote Samoa's standing with its island neighbors and the IP world. In these ways, the new Act can help Samoa keep a good balance in its struggle for local

22. Central Intelligence Agency, *Samoa*, WORLD FACTBOOK (Feb. 26, 2014), <https://www.cia.gov/library/publications/the-world-factbook/geos/ws.html> (last visited Jan. 28, 2014).

23. The phrase "Cradle of Polynesia" was coined by Reverend John B. Stair in his 1897 book *Old Samoa: or Flotsam and Jetsam from the Pacific Ocean*. Obed Unasa, *Samoa Minoans From Ancient Crete: The Origin of Polynesia*, SCOOP (July 1, 2011, 5:20 PM), <http://www.scoop.co.nz/stories/WO1107/S00040/samoan-minoans-from-ancient-crete-the-origin-of-polynesia.htm> (expanding upon "the popular notion that Samoa is the Cradle of Polynesia.").

24. Central Intelligence Agency, *supra* note 22.

25. See Susan Farran, *Intellectual Property South Pacific Region*, UNIV. OF THE S. PAC. SCH. OF L., http://www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/pacific%20law/farran10.htm (last visited Jan. 28, 2014) (providing a list of the enactment dates of various Patent legislation in the South Pacific).

traditional knowledge protection while trying to increase its participation in the global intellectual property arena.

II. BACKGROUND

A. *Historical Influences on Samoa*

1. *Colonialism*

The history of the Samoa islands spans back about 3,000 years.²⁶ Ancient Samoans were prolific colonizers themselves;²⁷ however, the first Europeans credited with “discovery” were the Dutch explorer Jacob Roggeveen and the French explorer Louis Antoine de Bougainville.²⁸

Three main imperial nations had the biggest stakes in the Samoan islands: Germany, Great Britain, and the United States.²⁹ It was not until the Tripartite Convention in 1899, however, that a true imperialistic power was established over Samoa.³⁰ This Convention broke up the nine Samoan islands with the main Western Samoa islands of Savai'i and Upolu to Germany and the Eastern Samoa islands of Tutuila and Manu'a to the United States.³¹ Germany controlled Western Samoa until the onset of World War I.³² New Zealand then ruled over

26. See Roger C. Green & Helen M. Leach, *New Information for the Ferry Berth Site, Mulifanua, Western Samoa*, 98 J. OF THE POLYNESIAN SOC'Y 319, 326 (1989) (concluding that pottery shards found in the earliest known settlement site dated back 3,000 years).

27. Many archeological and oral histories point to Samoans settling the islands of Tokelau, Tonga, and even as far as New Zealand. *Story: Samoans*, TE ARA, <http://www.teara.govt.nz/en/samoans/1> (last visited Jan. 28, 2014).

28. *Samoa: History and Discovery*, POLYNESIAN CULTURAL CTR., http://www.polynesia.com/polynesian_culture/samoa/history-and-discovery.html (last visited Jan. 28, 2014). Antoine de Bougainville dubbed Samoa “the Navigator Islands” because of their canoeing and seafaring skills. *Id.*

29. See generally *A Brief History*, SAMOAN SENSATION, available in archived format at <https://web.archive.org/web/20130608051621/http://www.samoa.co.uk/history.html> (last visited Jan. 28, 2014) (chronicling noteworthy events and players in Samoa's history).

30. GEORGE H. RYDEN, *THE FOREIGN POLICY OF THE UNITED STATES IN RELATION TO SAMOA* 574 (1975).

31. *Story: Samoans*, *supra* note 27.

32. *Samoa: History and Discovery*, *supra* note 28. In the summer of 1914, Great

Western Samoa past World War I and World War II when the League of Nations issued a mandate for trusteeship until 1962.³³ Consequently, ties are close between the two countries, and many similarities exist between the two forms of government.³⁴

2. *Independence and Government Structure*

During New Zealand's trusteeship, growing discontentment³⁵ led to the creation of the Constitution of the Independent State of Western Samoa 1960, in which Western Samoa declared independence.³⁶ It was adopted at the Constitution Convention in 1960 and enacted in 1962.³⁷ While the Constitution does not have provisions for intellectual property, it does address rights regarding property in that "[n]o property shall be taken possession of compulsorily, and no right over or interest in any property shall be acquired compulsorily"³⁸

Despite being a parliamentary democracy,³⁹ Samoa was effectively under a constitutional monarchy until 2007 because

Britain informed New Zealand that taking over the Samoan capital city of Apia would be "a great and urgent Imperial service." *New Zealand Goes to War: First World War Overview*, N.Z. MINISTRY FOR CULTURE & HERITAGE, <http://www.nzhistory.net.nz/war/new-zealand-goes-to-war-first-world-war> (last updated Apr. 22, 2012). New Zealand's takeover of German Samoa was quick and met no resistance, especially given that New Zealand sent over one thousand men to conquer a German wireless station with only eighty guards. *Id.*

33. *Samoa History*, EMBASSY OF THE U.S. SAMOA, http://samoa.usembassy.gov/samoan_history.html (last visited Jan. 28, 2014).

34. See *Samoa: History and Discovery*, *supra* note 28 (noting that Samoa has a parliamentary style of government that reflects previous ties with New Zealand).

35. The rampant discontentment led to the formation of the Mau, which aided the transition for a free country. *Story: Samoans*, *supra* note 27. Despite being a nonviolent movement, nine Samoans died in a peaceful demonstration which may have spurred the move for independence. *Id.*

36. CONSTITUTION OF THE INDEPENDENT STATE OF SAMOA 1960, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=198468.

37. *Samoa: Constitution of the Independent State of Samoa 1960*, WORLD INTELLECTUAL PROP. ORG., <http://www.wipo.int/wipolex/en/details.jsp?id=7787> (last visited Jan. 28, 2014).

38. CONSTITUTION OF THE INDEPENDENT STATE OF SAMOA 1960, pt. II, art. 14, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=198468.

39. GOV'T OF SAMOA – OFFICIAL WEBSITE, <http://www.govt.ws> (last visited Jan. 28, 2014).

one man held the position of Head of State for 45 years.⁴⁰ Due to its strong British colonial influences, Samoa operates under the Westminster system, a system of government that it shares with other commonwealth countries like New Zealand, Australia, and Canada.⁴¹ However, Samoa's unicameral legislative body, the *Fono*, has been modified according to custom in that of the forty-nine members, forty-seven members have the chief title of *matai*.⁴² Another instance in which Samoan tradition is incorporated into the Constitution is found within the judiciary, where a separate court exists to deal with customary law in regards to land rights and *matai* titles.⁴³

3. *Current International Organizational Status*

In 1970, Samoa joined the Commonwealth of Nations,⁴⁴ a collection of fifty-four independent countries, which were all at some point ruled under the British Empire.⁴⁵ While membership in the Commonwealth provides seemingly lofty benefits, such as allowing "otherwise isolated and impoverished nations to network with powerful allies," it does not hold much clout realistically in terms of trade privileges or economic policy.⁴⁶ However, Samoa's memberships in similar regional

40. Paramount Chief Malietoa Tanumafili II held this position from 1962 to 2007. *Samoa Profile*, BBC NEWS (July 17, 2012), <http://www.bbc.co.uk/news/world-asia-15663597>; see also U.S. DEPT OF STATE, *Samoa* (Feb. 1, 2012), <http://www.state.gov/outofdate/bgn/samoa/196573.htm> (describing Samoa's government and history as far as the heads of states to date).

41. *Westminster System*, AUSTRALIANPOLITICS.COM, <http://australianpolitics.com/democracy-and-politics/key-terms/westminster-system> (last visited Jan. 28, 2014); U.S. DEPT OF STATE, *supra* note 40.

42. U.S. DEPT OF STATE, *supra* note 40.

43. *Id.*; GOV'T OF SAMOA – OFFICIAL WEBSITE, *supra* note 39.

44. *Samoa*, COMMONWEALTH, <http://thecommonwealth.org/our-member-countries/samoa> (last visited Jan. 16, 2014).

45. See *About the Commonwealth*, OFFICIAL WEBSITE OF THE BRITISH MONARCHY, <http://www.royal.gov.uk/MonarchAndCommonwealth/TheCommonwealth/TheCommonwealth.aspx> (last visited Jan. 28, 2014) (covering and viewing the Commonwealth system through the eyes of the British Monarchy).

46. Daniel Howden, *The Big Question: What is the Commonwealth's Role and is it Relevant to Global Politics?*, INDEP. (Nov. 26, 2009), <http://www.independent.co.uk/news/world/politics/the-big-question-what-is-the-commonwealths-role-and-is-it-relevant-to-global-politics-1827478.html>.

organizations like the Pacific Islands Forum, the Pacific Community, the Polynesian Leaders Group as well as more international bodies like the United Nations, the World Bank and, recently, the World Trade Organization⁴⁷ allude to its eagerness to enter the world stage.

B. Traditional Knowledge Definitions

1. Global Definitions of Traditional Knowledge

Samoans do not know kava as *piper methysticum*. Rather, it is *ava*, an essential part of most traditional ceremonies honoring many different occasions, whether it be funerals, foreign visits, matai meetings or weddings.⁴⁸ Just because kava is used in abundance in Samoan traditional ceremonies does not immediately mean that it qualifies as traditional knowledge. Furthermore, while kava is traditionally used by grinding up the root and making it into a drink,⁴⁹ non-traditional uses of Kava exist. Since the late 1800s, herbal supplements have been made from kavalactones, a kava derivative.⁵⁰ Kavalactones make up 15% of the kava root.⁵¹ To date, more than nineteen different kavalactones have been isolated from kava, with six major and five minor types.⁵² The argument for kava as traditional knowledge must distinguish between use of the kava plant itself and kava derivatives like kavalactones. The first step, then, is to define traditional knowledge.

47. COMMONWEALTH, *supra* note 44; U.S. DEPT OF STATE, *U.S. Relations With Samoa*, <http://www.state.gov/r/pa/ei/bgn/1842.htm> (last visited Jan. 28, 2014).

48. *Kava*, *supra* note 7; see also Hoerschelmann, *supra* note 8 (naming the traditional Samoan titles in charge of serving the kava and to whom they serve).

49. Joji Malani, *Evaluation of the Effects of Kava on the Liver*, FIJI SCH. OF MED. 2 (Dec. 3, 2002), available at <http://www.spc.int/cis/documents/Kava%20article%20DrMalani.pdf>.

50. German and British shops had kava-based pills available towards the end of the 1800s. *Id.* at 3.

51. *Id.*

52. Two types of kavalactones have been shown to have a positive effect at treating ovarian cancer, leukemia, and bladder cancer. Rajesh Agarwal & Gagan Deep, *Kava, a Tonic for the Irrational Development of National Preventive Agents*, 1 CANCER PREVENTION RES. 409, 409–11 (2008), available at <http://cancerpreventionresearch.aacrjournals.org/content/1/6/409.full.pdf+html>.

The problem is, traditional knowledge lacks a clear meaning and covers a lot of information.⁵³ It is difficult to find a universally accepted definition.⁵⁴ In fact, some scholars reason “that traditional people and communities provide most of the world’s cultural diversity, it is probably inadvisable to define [traditional knowledge] except in fairly general terms.”⁵⁵ In a very broad sense, the World Intellectual Property Organization has defined traditional knowledge as “knowledge, innovations and practices of indigenous peoples and local communities.”⁵⁶ Some examples involve herbal remedies or plant-breeding techniques.⁵⁷

A distinction must be made between the common usage of the word “traditional” and its usage in “traditional knowledge” in this Note.⁵⁸ “Traditional” does not denote a type of knowledge in the sense that it is old or backward; rather, it references a mode of transmission of the knowledge and “the way in which it is acquired and used, which in turn is unique to each indigenous culture.”⁵⁹ Indeed, traditional knowledge can even be new, but it must have “a social meaning.”⁶⁰

A more appropriate and workable definition for traditional knowledge, with regards to the subject matter of this paper, comes from the International Council for Science (ICSU):

53. Varadarajan, *supra* note 18, at 373.

54. Subbiah, *supra* note 16, at 531.

55. TOBIAS KIENE, THE LEGAL PROTECTION OF TRADITIONAL KNOWLEDGE IN THE PHARMACEUTICAL FIELD: AN INTERCULTURAL PROBLEM ON THE INTERNATIONAL AGENDA 143 (Internationale Hochschulschriften 2011) (quoting Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 240 (2001)); see also Murray Lee Eiland, *Patenting Traditional Medicine*, 89 J. PAT. & TRADEMARK OFF. SOC’Y 45, 51 (2007) (stating that “[i]n practice, however, a precise definition [of traditional knowledge] may not be required”).

56. *The World Intellectual Property Organization Traditional Knowledge Documentation Toolkit*, WORLD INTELL. PROP. ORG. 6 (Nov. 1, 2012), http://www.wipo.int/export/sites/www/tk/en/documents/pdf/tk_toolkit.pdf.

57. Varadarajan, *supra* note 18, at 373.

58. KIENE, *supra* note 55, at 145.

59. *Id.* at 143 (citing Russel Barsh, *Indigenous Knowledge and Biodiversity*, in CULTURAL AND SPIRITUAL VALUES OF BIODIVERSITY 73, 74 (Darrell A. Posey ed., 1999)).

60. Russel Barsh, *Indigenous Knowledge and Biodiversity*, in CULTURAL AND SPIRITUAL VALUES OF BIODIVERSITY 73, 74 (Darrell A. Posey ed., 1999).

Traditional knowledge is a cumulative body of knowledge, know-how, practices and representations maintained and developed by peoples with extended histories of interaction with the natural environment. These sophisticated sets of understandings, interpretations and meanings are part and parcel of a cultural complex that encompasses language, naming and classification systems, resource use practices and ritual, spirituality and worldview.⁶¹

2. *Traditional Knowledge as Considered in Samoa*

To shed light in how traditional knowledge would be interpreted in Samoa, and thus, in the Intellectual Property Act 2011, the Samoan Law Reform Committee put together a report that also tried to define traditional knowledge in a locally meaningful context.⁶² While briefly giving acknowledgement to the Pacific Islands Forum Secretariat Model Law (PIFS Model Law) of 2002,⁶³ the Samoan Law Reform Committee decided on “a better description of traditional knowledge” by Stephen Hansen and Justin Van Fleet.⁶⁴ Traditional knowledge is described 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.”⁶⁵ This knowledge is used to sustain the community and

61. *Science, Traditional Knowledge and Sustainable Development*, 4 INT'L COUNCIL FOR SCI. & THE UNITED NATIONS EDUC., SCI. & CULTURAL ORG. 9 (2002); KIENE, *supra* note 55, at 145.

62. See generally *The Protection of Samoa's Traditional Knowledge and Expressions of Culture*, SAMOA L. REFORM COMM'N 6–9 (Aug. 2010), [http://www.samoalawreform.gov.ws/Portals/206/Publications/Issue%20Papers/Traditional%20Knowledge%20\(Final%20Version\).pdf](http://www.samoalawreform.gov.ws/Portals/206/Publications/Issue%20Papers/Traditional%20Knowledge%20(Final%20Version).pdf) [hereinafter SAMOA LAW REFORM] (providing a detailed analysis of the definitions of traditional knowledge to guide future legislation in the field of intellectual property for Samoa).

63. SECRETARIAT OF THE PAC. CMTY., PACIFIC REGIONAL FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE 3 (2002), available at <http://www.forumsec.org/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprssnssofCulture20021.pdf>.

64. SAMOA LAW REFORM, *supra* note 62, at 8.

65. *Id.*

its culture and to maintain the genetic resources necessary for its continual survival.”⁶⁶

By focusing on a “dynamic” and “tradition-based” definition, where traditional knowledge is seen as mirroring community traditions in the way “knowledge is preserved, created, and disseminated,”⁶⁷ the Samoan Law Reform Commission put emphasis on traditional knowledge as part of a collective, community enriched property system.⁶⁸ This working definition coincides well with the collective culture of Samoa and is not as broad as the generic working definition set out by the World Intellectual Property Organization.⁶⁹

However, the PIFS Model Law is also in accord with the emphasis on collectivism and community. The Model Law was written as a response to increasing concerns amongst Pacific Island countries of exploitation and commercialization of traditional knowledge.⁷⁰ It was the starting point for Pacific Island countries, such as Fiji and Papua New Guinea, who wished to enact legislation to protect traditional knowledge and expressions of culture.⁷¹ The Model Law reflects policy considerations to complement intellectual property rights and not undermine them.⁷² The definition under the PIFS Model Law holds that:

66. See *id.* (summarizing STEPHEN A. HANSEN & JUSTIN W. VANFLEET, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: A HANDBOOK ON ISSUES AND OPTIONS FOR TRADITIONAL KNOWLEDGE HOLDERS IN PROTECTING THEIR INTELLECTUAL PROPERTY, AND MAINTAINING BIOLOGICAL DIVERSITY 3 (2003), available at <http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/book-hansen-vanFleet.pdf>).

67. *Id.* at 8–9.

68. *Id.* at 9 (describing traditional knowledge as something created through the traditions of the community and belonging to the entire community).

69. *The World Intellectual Property Organization Traditional Knowledge Documentation Toolkit*, *supra* note 56, at 49.

70. PACIFIC REGIONAL FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE, *supra* note 63 (containing the model rule for the protection of traditional knowledge).

71. See SAMOA LAW REFORM, *supra* note 62, at 34 (stating the Model Law was produced as a result of a mandate to develop frameworks for traditional knowledge).

72. *Id.*; see also PACIFIC REGIONAL FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE, *supra* note 63, at 6 (stating that the Act does not apply to any preexisting rights before commencement, including

[T]raditional knowledge includes any knowledge that generally:

(a) is or has been created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes; and

(b) is or has been transmitted from generation to generation; and

(c) is regarded as pertaining to a particular traditional group, clan or community of people in [Enacting country]; and

(d) is collectively originated and held.⁷³

III. SAMOA'S PAST AND PRESENT IP FRAMEWORKS

A. *Patents Act 1972*

Combined with the *Trademarks Act 1972* and *Industrial Designs Act 1972*,⁷⁴ Samoa's Patent Act 1972 was one of only three pieces of legislation addressing IP for many years.⁷⁵ However, these acts were created about two decades before any real consideration was given to the idea of IP protections for traditional knowledge.⁷⁶ Called the "conventional legal frameworks" for IP in Samoa, these laws focused more on securing rights for individual private parties and not communities.⁷⁷ This is particularly surprising given the communal and community-focused nature of Samoan culture and customs.⁷⁸ Even more importantly, this singularity makes the lack of protection for traditional knowledge more apparent,

intellectual property rights).

73. PACIFIC REGIONAL FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE, *supra* note 63, at 7.

74. Trade Marks Act 1972 (Act No. 23/1972) (Samoa); Industrial Designs Act 1972 (Act No. 24/1972) (Samoa).

75. SAMOA LAW REFORM, *supra* note 62, at 5.

76. *Id.*

77. *See id.* at 12 (advancing this statement further to argue that "conventional frameworks are inappropriate for safeguarding local traditional knowledge and expressions of culture that are usually held by communities").

78. *See* Sean Morrison, *Foreign in a Domestic Sense: America Samoan and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 138 (stating one of the key aspects of the Samoan culture is communal ownership).

as most expressions of traditional knowledge in Samoa are through village communities and not just one person.⁷⁹

The Patent Act 1972 was “an act to make better provisions for the issue of letters patent for inventions[,]”⁸⁰ with “invention” defined as “any manner of new manufacture and any new method of application of known processes and the improvement or control of known processes.”⁸¹ The letters patent gave the inventor exclusive right to the invention for a period of sixteen years after the issue date.⁸² A patentable invention had to satisfy two requirements: it had to be new or unknown in the public domain before discovery of the invention or before the disclosure portion of the patent application, and it had to have “specific utility” such that it is useful.⁸³

Consequently, any person seeking patent protection for traditional knowledge only had to meet the above requirements.⁸⁴ This number is small and relatively uncomplicated compared to other countries’ patentability requirements, which usually include further restrictions such as patentable subject matter, nonobviousness, and enablement.⁸⁵ However, the main hurdle in the Patent Act 1972 was the “newness” requirement where the information is not known in the public domain before disclosure.⁸⁶ Because most traditional knowledge subject matter is usually known throughout a community and thus the public domain, it would have been difficult to argue for patent protection.⁸⁷

79. See SAMOA LAW REFORM, *supra* note 62, at 8–9 (describing traditional knowledge as dynamic and viewed as belonging to the entire community rather than a single individual).

80. Patents Act 1972 (Act No. 22/1972) (Samoa).

81. *Id.* pt. II.

82. *Id.* pt. IV, § 2.

83. *Id.* pt. V(a)–(d); SAMOA LAW REFORM, *supra* note 62, at 20.

84. Patent Act (Act No. 22, § 5(a), (b)/1972) (Samoa).

85. See, e.g., *Patent*, LEGAL INFO. INST. (Aug. 19, 2010, 5:21 PM), <http://www.law.cornell.edu/wex/patent> [hereinafter LEGAL INFO INST.] (summarizing the five requirements for patentability under the United States patent law system).

86. See SAMOA LAW REFORM, *supra* note 62, at 21 (listing the common limitations of the Patents Act of 1972, one of which is the full disclosure requirement that would disparage traditional owners from seeking patent protections).

87. *Id.*

Additionally, while the Act referred to an inventor as a single person with the language of “his or her,”⁸⁸ it remained ambiguous as to whether or not a group of people would be able to qualify as the plural “inventors.”⁸⁹ Since most traditional knowledge is a collective endeavor, and thus perhaps having many inventors, the specificity in the phrasing of the Act could have been a big problem.⁹⁰ Since 1997, only twenty patent applications have been filed with the Samoan Supreme Court and eighteen patents have been granted.⁹¹ Whether this number is low due to lack of interest or commercial viability or lack of acknowledgement for traditional knowledge is up to conjecture.

Perhaps as an effort to increase its relatively new world presence, Samoa’s verbage in the Patent Act 1972 was also very open to overseas countries. There were provisions in place under Section 9 for the granting of Samoa patents for patents existing in overseas countries, provided that the application was made within two years of the original issuance in the other country.⁹² Section 10 made the duration of the overseas patent concurrent with the origin countries’ expiration dates.⁹³ In view of its past (and at the time of enactment of the Patent Act 1972, very recent) history with New Zealand,⁹⁴ Samoa gave particular solicitude to New Zealand under Section 14.⁹⁵ Under this provision, New Zealand patent holders receive “absolute priority

88. See, e.g., Patent Act, § 4.

89. SAMOA LAW REFORM, *supra* note 62, at 21.

90. A good example given relates to the traditional knowledge of the production of the mamala for curing hepatitis. Instead of belonging to a specific member of a village, usually a traditional healer, the traditional knowledge would belong to the family of the healer. *Id.*

91. *Statistical Country Profiles: Samoa*, WORLD INTELL. PROP. ORG., http://www.wipo.int/ipstats/en/statistics/country_profile/countries/ws.html (last visited Jan. 14, 2014) [hereinafter *Statistical Country Profiles*]. Given the small amount of information publically available as to the content of these patents, there is no data that would point to how many of these patents have a basis in traditional knowledge. However, the statistical country profile information for Samoa’s patents show that in the fields of technology, a majority of the patents fall into the category of “others.” *Id.*

92. Patent Act (Act No. 22, § 9(1)/1972) (Samoa).

93. Patent Act, § 10(2).

94. See generally *Samoa: History and Discovery*, *supra* note 28.

95. Patent Act, § 14(1).

over all other applicants for patent rights” if they followed the registration requirements under Section 9.⁹⁶

Of note were the parallels between Samoa’s Patent Act 1972 and those of its surrounding island nations, especially that of Fiji.⁹⁷ In fact, certain sections in the beginning of Fiji’s Patent Act have almost the exact same phraseology and structure.⁹⁸ For the period of time in which Samoa’s Patent Act 1972 was in place, these similarities were important given that Fiji is a larger island nation with a longer history.⁹⁹ Thus, the Patent Act 1972 might have been primarily an emulation of its sister island countries. However, with the introduction of the new IP laws, it appears that Samoa is surpassing its larger neighbors, as far as IP law reform and adaptability to the world market.

B. Trends before the Intellectual Property Act 2011

While the 1972 Acts did not address traditional knowledge, the Village Fono Act 1990, in addition to the Copyright Act 1998, showed a trend towards recognizing local culture and customs as an intellectual property right.¹⁰⁰ The Copyright Act 1998 has a

96. *Id.*

97. See generally Farran, *supra* note 25 (examining most of the South Pacific Islands’ intellectual property laws and noting that there was little difference between the two countries’ patent laws).

98. Compare Patents Act (§ 4/1879) (Fiji) (“The right and privilege granted to inventors shall be conferred by letters patent under the seal of Fiji in the prescribed form whereby the inventor shall be entitled to the sole and exclusive privilege of using, selling or making his said invention in Fiji and of authorising others so to do for the term of fourteen years from the date of the letters patent.”), with Patent Act (§ 4/1972) (Samoa) (“The right and privilege granted to inventors shall be conferred by letters patent signed by the Registrar and sealed with the seal of the Supreme Court in the form contained in the First Schedule whereby the inventor shall be entitled to the sole and exclusive privilege of using, selling, or making his or her said invention in Samoa, and of authorising others to do so, for a term of 16 years from the date of issue of the letters patent.”).

99. Farran, *supra* note 25, at 19; see generally *About Fiji*, FIJI’S HIGH COMMISSION TO THE UNITED KINGDOM OF GREAT BRITAIN & N. IRELAND, http://www.fijihighcommission.org.uk/about_1.html (last visited Jan. 28, 2014) (giving a short synopsis of the history of Fiji, including hypothesizing the settlement of Fiji to date back more than three and a half thousand years ago as well as its colonization of Samoa and Tonga).

100. See Village Fono Act (Act No. 3, § 3(1)–(3)/1990) (Samoa); see also Copyright Act (Pt. IV, § 29/1998) (Samoa).

provision for the protection of expressions of folklore.¹⁰¹ More specifically, expressions of folklore are “a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means”¹⁰² Traditional knowledge holders could claim royalties if the traditional knowledge was performed and fixated on video.¹⁰³ These royalties were to go to “purposes of cultural development[,]”¹⁰⁴ although what that means exactly or how it was to be accomplished remains unclear, as no court cases have been heard on this part of the Act.¹⁰⁵

The Village Fono Act 1990 indirectly helps protect customs and cultures.¹⁰⁶ It does this through the recognition of the Village *Fonos*, or councils made up of *matais*, to make laws and enforce punishment “in accordance with the custom and usage of their villages”¹⁰⁷ Through the preservation of a tradition-based form of government, this Act also allows for the preservation of traditional knowledge through Samoa’s customary laws.

C. Intellectual Property Act 2011

Although the Village Fono Act 1990 and the Copyright Act 1998 gave nods to traditional knowledge, the Intellectual Property Act 2011 distinctly addresses traditional knowledge in its Patent Section.¹⁰⁸ During the development stage of the Bill,

101. Copyright Act § 29; *see also* SAMOA LAW REFORM, *supra* note 62, at 12–19 (analyzing the components of the Copyright Act of 1998, as well as giving limitations and expanding on the protection of expressions of folklore).

102. Copyright Act § 2.

103. Copyright Act § 29, 30 (stating that any party that infringes on an expression of folklore that has been broadcast may be liable for damages).

104. Copyright Act pt. IV, § 29(5).

105. *See* SAMOA LAW REFORM, *supra* note 62, at 15 (stating that this specific provision of the Copyright Act of 1998 “has not been tested in local courts” up until the time of the commission report).

106. *See* Village Fono Act (Act No. 3, § 3/1990) (Samoa).

107. Village Fono Act, § 3(2).

108. Intellectual Property Act (Act No. 9, pt. II, § 7(3)(g)/2011) (Samoa).

stakeholders saw that one of the main focuses of the new changes was to protect traditional resources.¹⁰⁹

When the Bill was passed and came into effect in 2012,¹¹⁰ there were many changes that differed significantly from the Patents Act 1972.¹¹¹ Overall, the new Act mirrors those of the larger Paris Convention countries like the United States.¹¹² One directly affects traditional knowledge,¹¹³ while two others show a somewhat contradictory Samoan stance on foreign patents.¹¹⁴

For the new traditional knowledge requirement, each patent application has to now state whether or not the invention is based on knowledge available within any local or indigenous community, whether from Samoa or elsewhere.¹¹⁵ Future applicants might also be required to supply evidence of a right to use the knowledge or biological material to the Registrar.¹¹⁶

Also important are the new definitions of patentability in the new Intellectual Property Act 2011.¹¹⁷ Whereas the Patent Act 1972 had only two requirements, “newness” and specific utility,¹¹⁸ the Intellectual Property Act 2011 has three provisos: that the patentable invention be new, involve an inventive step, and that it be industrially applicable.¹¹⁹ This time, “newness” is defined as not being anticipated by prior art and “utility” has been replaced with “industrially applicable,” which means that

109. Matt Adams, *New IP Legislation for Samoa*, PATENTBUFF (July 8, 2011), <http://www.patentbuff.com/2011/07/new-ip-legislation-for-samoa.html> [hereinafter *New IP Legislation for Samoa*].

110. *Changes to Samoa's IP Laws*, CLARKEEY LAWYERS (Sept. 20, 2012), available in archived format at http://webcache.googleusercontent.com/search?q=cache:C-4zOIQNFUJ:clarkelawyers.net/wp-content/uploads/2013/05/Changes_to_Samoas_IP_Laws.pdf+&cd=2&hl=en&ct=clnk&gl=us.

111. *Id.*

112. *Compare* Intellectual Property Act (2011) (Samoa), with 35 U.S.C. §§ 100 et seq.

113. Intellectual Property Act (Act No. 9, pt. II, § 7(3)(g)–(h)/2011) (Samoa).

114. *See* Intellectual Property Act § 9 (requiring foreign patents to provide extra documentation to the registrar).

115. Intellectual Property Act (Act No. 9, pt. II, § 7(3)(g)–(h)/2011) (Samoa).

116. Intellectual Property Act pt. II, § 7(10).

117. Intellectual Property Act pt. II, § (5) (Samoa).

118. Patent Act (Act No. 22, § 5(a), (b)/1972) (Samoa); SAMOA LAW REFORM, *supra* note 62, at 20.

119. Intellectual Property Act pt. II, § 5(1)(a)–(c).

the invention “can be made or used in any kind of industry.”¹²⁰ More importantly, however, is the added “inventive step” condition, where in regards to relevant prior art, the invention is not “obvious to a person having ordinary skill in the art.”¹²¹ Thus, Samoa has added a “nonobviousness” requirement similar to those used in European nations.¹²²

Two other changes more circuitously address the affects of and effects of foreign markets on traditional knowledge in Samoa’s new IP law. The first is the removal of the ability to file patent or design re-registrations within the two-year limit of the Patent Act of 1972.¹²³ Despite sounding harsh and unfriendly, instead, Samoa has extended its previous New Zealand solicitude and priority status to any Paris Convention signatory.¹²⁴ This provision solidifies the original intent of having the Bill be more compliant with the Patent Cooperation Treaty, a prelude to actual accession.¹²⁵ It can also be an attempt to encourage more foreign filings of patents, given the slow rate of application in the past.¹²⁶ However, the priority filing requirements does reduce the two-year registration window to only twelve months.¹²⁷

Secondly, for all future foreign application examinations, the Registrar can ask for information on these and any other foreign applications, including objections raised against those applications.¹²⁸ At first glance, this appears to point to the

120. Intellectual Property Act (Act. No. 9, pt. II, § 5 (1)(a), (c)/2011) (Samoa).

121. Intellectual Property Act pt. II, § 5 (1)(b).

122. See *A Study on the Patent Law Standard of Non-obviousness: Chapter 4*, INDUS. CANADA, <http://www.ic.gc.ca/eic/site/ipdp-dppi.nsf/eng/ip00156.html> (last visited Feb. 1, 2014) (explaining the non-obviousness standard commonly found and used in European practice).

123. Adams, *supra* note 20.

124. *Samoa Accedes to the Paris Convention*, WIPR (Feb. 10, 2014, 6:32 PM), <http://www.worldipreview.com/news/samoa-accedes-to-the-paris-convention>.

125. Adams, *supra* note 20.

126. See generally *Statistical Country Profiles*, *supra* note 91 (recognizing in its data that only twenty patents have been filed in the past fifteen years).

127. Adams, *supra* note 20.

128. *Id.* at 1; Lynell T. Huria, *New IP Legislation in Samoa from 1 October 2012*, AJ PARK INTELL. PROP. (Sept. 7, 2012), <http://www.ajpark.com/media-centre/2012/09/new-ip-legislation-in-samoa-from-1-october-2012>.

trends for more local, insular protection and narrowing of very broad and friendly overseas legislation. However, as one firm predicts, these extra evidentiary requirements may be for the benefit of the Registrar in that this one appointed person may not be as adept at handling extremely technical patents.¹²⁹ Thus, any additional information or patent decisions from other countries would help the very small number of patent examiners at the Registration for Corporations and Intellectual Property (RCIP) Division.¹³⁰ Therefore, while both these new application amendments on the face look like restrictions, they actually illustrate Samoa's inclination to be more open to future international treaties and involvement, as well as dealing with practical concerns of effective administrative organization.

IV. ANALYSIS

A. *The Intellectual Property Act 2011 as Applied to Kava*

1. *World Kava and Kava Derivatives Patents*

A quick search of the European Patent Office's Patent database comes up with thirty-one different patents with kava in its title.¹³¹ They range from different methods of kava extraction¹³² to treatments for benzodiazepine addictions¹³³ and

129. *Changes to Samoa's IP Laws*, *supra* note 110.

130. *Id.*; see generally REGISTRATION OF COMPANIES AND INTELLECTUAL PROPERTY DIVISION (RCIP), MINISTRY OF COM., INDUS. & LABOUR, <http://www.mcil.gov.ws/rcip.html> (summary of the roles and duties of the RCIP).

131. European Patent Office Search for Patents with "Kava" in the Title, ESPACENET PATENT SEARCH, http://worldwide.espacenet.com/searchResults?page=0&compact=false&ST=advanced&TI=kava&locale=en_EP&DB=EPODOC (last visited Mar. 5, 2014).

132. Kava-kava extract, process for the production thereof and use thereof, European Patent No. US5296224 (A) (filed Mar. 22, 1994), *available at* http://worldwide.espacenet.com/publicationDetails/biblio?DB=EPODOC&II=1&ND=3&adjacent=true&locale=en_EP&FT=D&date=19940322&CC=US&NR=5296224A&KC=A; Kava extract, method of preparing the extract, and its use, European Patent No. WO9204036 (A1) (filed Mar. 19, 1992), *available at* http://worldwide.espacenet.com/publicationDetails/biblio?DB=EPODOC&II=2&ND=3&adjacent=true&locale=en_EP&FT=D&date=19920319&CC=WO&NR=9204036A1&KC=A1; Use of a Kava extract and of its constituents, European Patent No. EP0523591 (A2) (filed Jan. 20, 1993), *available at* http://worldwide.espacenet.com/publicationDetails/biblio?DB=EPODOC&II=3&ND=3&adjacent=true&locale=en_EP&FT=D&date=19930120&CC=EP&NR=0523591A2&

extrapyramidal motor disorders¹³⁴ to the patent for the kava extract that has the TNF α inhibitory effect.¹³⁵ In fact, the same company owns the patent for the TNF α production inhibitor made primarily of kavalactones in both the United States as well as within Japan.¹³⁶ As previously mentioned, if kava is found to be a possible cure for leukemia¹³⁷ and a viable medicine for a whole host of other diseases,¹³⁸ its potential market value could skyrocket in the coming years.¹³⁹ Ever since studies of the relationship between low occurrences of cancer and kava

KC=A2.

133. Treating withdrawal symptoms after addiction to alcohol or drugs, especially benzodiazepines, using kava extract, European Patent No. DE19847134 (A1) (filed Apr. 20, 2000), *available at* http://worldwide.espacenet.com/publicationDetails/biblio?DB=EPODOC&II=7&ND=3&adjacent=true&locale=en_EP&FT=D&date=20000420&CC=DE&NR=19847134A1&KC=A1.

134. Use of kava extract as medicament for treating extrapyramidal motor disorders such as neuroleptic-induced dyskinesia and Parkinson's disease, European Patent No. DE19858741 (A1) (filed June 21, 2000), *available at* http://worldwide.espacenet.com/publicationDetails/biblio?DB=EPODOC&II=8&ND=3&adjacent=true&locale=en_EP&FT=D&date=20000621&CC=DE&NR=19858741A1&KC=A1.

135. Kava Root Extract Having the TNF Production Inhibitory Effect, European Patent No. JP2001238638 (A) (filed Sept. 4, 2004), *available at* http://worldwide.espacenet.com/publicationDetails/biblio?DB=EPODOC&II=11&ND=3&adjacent=true&locale=en_EP&FT=D&date=20010904&CC=JP&NR=2001238638A&KC=A; Folmer et al., *supra* note 10, at 1206.

136. *Compare* TNF- α production inhibitor comprising kavalactone as an active ingredient, U.S. Patent No. 7,199,152 (issued Apr. 3, 2007) *available at* <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&p=1&u=%2Fmetahtml%2FFPTO%2Fsearch-bool.html&r=34&f=G&l=50&co1=AND&d=PTXT&s1=%22piper+methysticum%22&OS=%22piper+methysticum%22&RS=%22piper+methysticum%22>, with European Patent No. JP2001238638 (A), *supra* note 135.

137. While the Folmer research paper does not immediately link kavalactones as a cure for cancer, the results of the study were very promising and have sparked further research for the group. Folmer et al., *supra* note 10, at 1216–17.

138. See Jioji N. Tabudravu & Marcel Jaspars, *Anticancer Activities of Constituents of Kava (Piper methysticum)*, 23 S. PAC. J. OF NAT. SCI. 26 (2005) (other diseases in which kava has been historically used to treat include gonorrhoea, rheumatism, bronchitis, asthma, stomach aches and headaches).

139. See Christopher Frazier, *A Brief Look at Globalization through Kava*, UNIV. OF HAW. AT HILO, <http://hilo.hawaii.edu/academics/hohonu/documents/Vol04x07ABriefLookatGlobalizationthroughKava.pdf> (calling kava a “prospective money maker” due to its success in the global medicinal herbal market).

consumption came out in the early part of this century,¹⁴⁰ interest has grown in kava and its anti-cancer effects.¹⁴¹

While this research heralds good economic news for kava-growing countries like Samoa, it should be noted that there are two avenues for patenting kava: that of kava root itself and of kava extracts or derivatives, particularly kavalactones.¹⁴² Thus, there is an argument to be made for patenting either the root itself or its many derivatives under a traditional knowledge standpoint. The harder argument, however, would lay in the isolated kavalactones, since these are in a form not typically used in traditional Samoan ceremonies.¹⁴³

2. *Traditional Knowledge and Patent Protection for Kava*

Because there is such a range of problems in isolating a universal definition for traditional knowledge,¹⁴⁴ defining kava as a traditional knowledge comes with its own issues. However, by labeling kava and the Samoan's "knowledge" of its properties for sedation as well as its other medicinal benefits, kava could fit under the subset of traditional knowledge deemed "*ethnobotanical knowledge*," or the knowledge of plants by indigenous peoples.¹⁴⁵ This category should be disclaimed, though, for being more Western-research oriented as interpretations of indigenous knowledge about plants, and not descriptions by the indigenous people themselves.¹⁴⁶

140. Gregory G. Steiner, *The Correlation between Cancer Incidence and Kava Consumption*, 59 HAW. MEDIC. J. 420 (2000); Tabudravu & Jaspars, *supra* note 138, at 26.

141. See Tabudravu & Jaspars, *supra* note 138, at 26 (identifying Steiner's 2000 anti-cancer study as the basis for their research); Jessica Bruso, *Is Kava Kava Anti Cancer?*, LIVINGSTRONG (June 19, 2011), available in archived format at <https://web.archive.org/web/20120502180700/http://www.livestrong.com/article/474292-is-kava-kava-anti-cancer>.

142. See Tabudravu & Jaspars, *supra* note 138, at 26 (listing the kavalactones currently discovered under research and some of their common chemical qualities as well as major and minor constituents isolated from kava).

143. See Malani, *supra* note 49 at 1–2 (comparing the traditional versus the herbal kava extract usages).

144. Subbiah, *supra* note 16, at 531.

145. KIENE, *supra* note 55, at 144.

146. *Id.*

For the issue confronting the usage of kava extracts for future medicinal purposes, labeling kava as a traditional medicine also narrows the field of traditional knowledge down further. According to the World Health Organization, “[t]raditional medicine is the sum total of knowledge, skills and practices based on the theories, beliefs and experiences indigenous to different cultures that are used to maintain health, as well as to prevent, diagnose, improve or treat physical and mental illnesses.”¹⁴⁷ This is a tangible form of traditional knowledge because it is information about a plant that is used to treat disease.¹⁴⁸ A key divergence point is if the usage of kava as a “truth-bringer”¹⁴⁹ in Samoan ceremonies is to maintain health as described above or if its use is purely ritual.¹⁵⁰

While there are many proposed avenues of legal protection for traditional knowledge, the search for a proper vehicle has fixated on patents.¹⁵¹ This might seem strange, however, since patent protection is unavailable to any traditional knowledge form if it does not meet the newness standard.¹⁵² As stated previously, while traditional knowledge does not immediately mean being antiquated,¹⁵³ usually knowledge of this kind is not “new.”¹⁵⁴

Even if a type of traditional knowledge can overcome this novelty factor, there is still the problem of nonobviousness.¹⁵⁵

147. *World Health Organization Fact Sheet Number 134*, WORLD HEALTH ORG., available at <http://www.who.int/mediacentre/factsheets/fs134/en> (last visited Feb. 28, 2014).

148. See Eiland, *supra* note 55, at 48 (“For example, the information that a certain plant, prepared a certain way, is used to treat a particular disease is specific.”).

149. Hoerschelmann, *supra* note 8, at 193.

150. See generally Jacob Fitisemanu, *Samoa Social Drinking: Perpetuation and Adaptation of ‘Ava Ceremonies in Salt Lake County, Utah*, <http://content.lib.utah.edu/utils/getfile/collection/wc-ir/id/8/filename/image> (last visited Feb. 28, 2014) (supporting the idea that perhaps the kava ceremony is indeed more of a ritual in describing the procedural components of ‘ava ceremonies in Samoa).

151. Craig D. Jacoby & Charles Weiss, *Recognizing Property Rights in Traditional Biocultural Contribution*, 16 STAN. ENVTL. L.J. 74, 95 (1997).

152. *Id.*

153. Barsh, *supra* note 60.

154. Jacoby & Weiss, *supra* note 151, at 96.

155. See *id.* (noting that this pertains to the nonobviousness standard with regard to U.S. patent law requirements, and not necessarily the standard used in other PCT or

Under U.S. law, the test for nonobviousness is “whether the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious to a person having ordinary skill in the art at the time the invention was made.”¹⁵⁶ This differs from the European Patent Office test, in which a “problem-solution approach” is taken and three steps are used to determine obviousness.¹⁵⁷ Based on the similarities in wording of the Intellectual Property Act 2011 and Article 52 and Article 56 of the Convention on the Granting of European Patents,¹⁵⁸ it seems that the European approach will be more fitting for nonobviousness questions in Samoa. Thus, people seeking patents for traditional knowledge also have to overcome the test, such that with regards to relevant prior art, a person having ordinary skill in the art would not have found it obvious to have invented the patentable invention.¹⁵⁹

Generally, patent laws can act defensively or positively to protect traditional knowledge.¹⁶⁰ Defensive protections ensure that the customary traditional knowledge holders have the IP

European Union countries, like the United Kingdom).

156. LEGAL INFO INST., *supra* note 85; 35 U.S.C. § 103(a).

157. See *A Study on the Patent Law Standard of Non-obviousness*, *supra* note 122, at 1–2 (explaining that assessing the inventive step of European patents has three basic elements or stages: first, the most relevant prior art in the particular case must be identified; second, the objective problem has to be defined; and finally, the following question has to be answered: “Starting from the most relevant prior art, was it obvious to implement the differences identified in stage (1), in order to provide a solution to the objective problem (2)?”).

158. Compare Intellectual Property Act (Act No. 9, pt. II, § 5(1)/2011) (Samoa) (“An invention is patentable if: (a) it is new; and (b) involves an inventive step; and (c) is industrially applicable) and Intellectual Property Act (Act No. 9, pt. II, § 5(5)/2011) (Samoa) (“An invention is considered as involving an inventive step if . . . it would not have been obvious to a person having ordinary skill in the art.”), with Convention on the Grant of European Patents, 1973, art. 52, available at <http://www.epo.org/law-practice/legal-texts/html/epc/2010/e/ar52.html> (discussing that European patents shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step) and Convention on the Grant of European Patents art. 56 (“An invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art . . .”).

159. *A Study on the Patent Law Standard of Non-obviousness*, *supra* note 122, at 2–3.

160. *Traditional Knowledge*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/tk/> (last visited Feb. 28, 2014).

rights over the traditional knowledge and not some other party.¹⁶¹ Positive protection is “the creation of positive rights in traditional knowledge that empower traditional knowledge holders to protect and promote their traditional knowledge.”¹⁶² Some examples of defensive protections are the International Patent Classification system and the Patent Cooperation Treaty minimum documentation requirement.¹⁶³ This can be the tactic that the new provision in the Intellectual Property Act is after, since collecting this information is akin to developing a traditional knowledge database that will help defeat claims with evidence of prior art.¹⁶⁴ Some countries use *sui generis* legislation to accomplish positive protectionism,¹⁶⁵ but Samoa has no *sui generis* legislation.¹⁶⁶

On an international scale, most patent law conventions do not push for patent protections for traditional knowledge outside of those delineated in existing national patent laws.¹⁶⁷ Indeed, even the Paris Convention for the Protection of Industrial Property, with which Samoa’s Intellectual Property Act tries to comply, does not compel or encourage nations to extend patent rights to traditional knowledge contributions.¹⁶⁸ However, in Samoa’s situation, there *is* an explicit provision to help protect traditional knowledge.¹⁶⁹

3. Other Issues: First Use and Biopiracy

Alongside the issues already mentioned, the patenting of kava and kavalactones also comes with other discrete and disparate concerns. Preeminent amongst these are issues surrounding first use and biopiracy. Since kava has a strong connection to traditional knowledge use in Samoa,¹⁷⁰ patent

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Traditional Knowledge*, WORLD INTELL. PROP. ORG., *supra* note 160.

167. Jacoby & Weiss, *supra* note 151, at 97.

168. *Id.*

169. Intellectual Property Act (Act No. 9, pt. II, § 9/2011) (Samoa).

170. See Te’o Tuvale, *An Account of Samoan History up to 1918*, VICTORIA U. OF

applications for it may be denied because they use indigenous plants as a basis for their invention.¹⁷¹ However, potential patent inventors have a strong argument for patentability with regards to first use and novelty. The researchers involved with the TNF α inhibitors can argue that their method for using kava extractions and its applicability to leukemia was not the same as the traditional use of kava in Samoa.¹⁷² Following this argument is whether a method claim could survive with regards to kavalactones. Indeed, there are already international patents that have recognized these kava derivatives and the methods for producing them,¹⁷³ making it hard for Samoa to not recognize them, should these patentees ever want to file for a patent. This also makes a first use argument moot if inventors can point to prior established patents recognizing their inventions.

Traditional knowledge proponents could counter by saying that kava derivatives are excluded by the Intellectual Property Act 2011 because they are a “mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance.”¹⁷⁴ Thus, the real debate hinges on whether the kavalactones are new inventions, or whether they cannot be distinguished from the “known substance” aka the kava plant. The link between kava and a potential kava patent is only apparent if the invention is of the very same use as the kava plant used in the Samoan community.¹⁷⁵ Sometimes, when “isolated molecules and

WELLINGTON, <http://nzetc.victoria.ac.nz/tm/scholarly/tei-TuvAcco-t1-body1-d16.html> (last visited Jan. 18, 2014) (stating that “no constitutive gathering, no important undertaking, no valediction, no consequential ceremony, no momentous event whether pleasurable or otherwise, no trial by oath, is complete and worthy the name without the kava ceremony”).

171. See generally Intellectual Property Act (Act. No. 9, pt. II, § 4(3)(e)/2011) (Samoa) (excluding plants and animals from patentability).

172. Cf. Tuvale, *supra* note 170 (indicating that preparing kava involves many steps but does not involve the mechanical research and equipment that are used for kava extraction in the Fromer study).

173. U.S. Patent No. 7,199,152, *supra* note 136; European Patent No. JP2001238638 (A), *supra* note 135.

174. Intellectual Property Act pt. II, § 4(3)(h).

175. See Emanuela Arezzo, *Struggling Around the “Natural” Divide: The Protection*

compounds” reveal properties past those “identified by indigenous communities, or the properties already known by indigenous communities are studied for new purposes . . .,” the link is blurred and locals are hard-pressed to find out about biopiracy.¹⁷⁶

Biopiracy, or the misappropriation of traditional knowledge, is garnering a lot of international attention.¹⁷⁷ Since allegations of biopiracy have been growing in developing countries,¹⁷⁸ Samoa, as well as other kava-growing Pacific Island nations, has a strong interest in describing the use of kava derivatives in foreign patents as a misappropriation of traditional knowledge, especially as people have already claimed some medicinal properties of kava in foreign countries as a result of the spreading of the original traditional knowledge via early colonization and exportation.¹⁷⁹ This taking of information and genetic resources from lesser-developed nations has been criticized under different umbrellas: anti-globalization, lax international intellectual property enforcement and unbalanced trade, and economic relations.¹⁸⁰ While the Intellectual Property Act 2011’s changes in regard to traditional knowledge and patents can be seen either as positive or defensive protectionism,¹⁸¹ it really has no teeth until it has consequences for those seeking to misappropriate the uses of Samoa’s wealth of traditional knowledge.

of Tangible and Intangible Indigenous Property, 25 CARDOZO ARTS & ENT. L.J. 367, 379 (2007) (“Only when the innovation consists of the very same use of the plant that is known in the indigenous community is the link between the biological resource and the patent apparent.”).

176. *Id.*

177. Subbiah, *supra* note 16, at 537.

178. *See id.* at 538 (citing Meetal Jain, Note, *Global Trade and the New Millennium: Defining the Scope of Intellectual Property Protection of Plant Genetic Resources and Traditional Knowledge in India*, 22 HASTINGS INT’L & COMP. L. REV. 777, 815–16 (1999)) (referring to genetic plant biopiracy).

179. *See Frazier, supra* note 139 (describing the spread of kava cultivation across the major Polynesian countries and its rise in global popularity due to its medicinal properties).

180. Subbiah, *supra* note 16, at 539–40.

181. *See Varadarajan, supra* note 18, at 385 (considering the Intellectual Property Act of 2011 to be a defensive protectionism because it makes “otherwise secret or inaccessible knowledge public”).

With the rise of “first-world style intellectual property rights” on the international level, and appreciation of traditional and indigenous peoples’ IP rights, traditional knowledge has become a globally important issue.¹⁸² However, there is a growing sense of anger within some developing nations over the taking of traditionally used plants and the conversion of these plants or plant derivatives into a commercially viable technology, often without compensation for the traditional people or culture from whence the existence of the plant originally came.¹⁸³ Lesser-developed countries also complain of increased pressures to adopt IP laws of developed nations, particularly those of the West.¹⁸⁴ The catch-22, though, is that most Western intellectual property laws do not provide IP protections for traditional knowledge.¹⁸⁵ Thus, if these small nations like Samoa want to raise their economic futures to match those of developed nations, then they face a cyclical and oppressive loop that ignores protections for their traditional knowledge.

B. Future Implications of the Intellectual Property Act 2011

Accordingly, there are both legal and economic ramifications to the traditional knowledge requirements of the Intellectual Property Act 2011. The result depends on how Samoa is willing to interpret these changes with respect to its priorities. If Samoa wants to become more of a global market player, then its focus should be an open door, welcoming policy with the disclosure requirements of the Act as well as the registration requirements. Because trade in cultural relics and resources flow from less-developed countries to intellectual property-rich developed nations,¹⁸⁶ and not vice versa, Samoa will need to redirect the flow in its favor. Thus, Samoans should choose to see the disclosure requirement as simply adding to their traditional knowledge database, and not see it as a tool to crack

182. *Id.* at 379.

183. Jacoby & Weiss, *supra* note 151, at 76.

184. *Id.* at 77.

185. *Id.*

186. Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 447 (2008).

down on possible bio-pirates. In this way, the Intellectual Property Act provides positive legal support to its economic aspirations.

If Samoa decides to pursue the disclosure requirement as a form of defensive protection, it faces a double-edged sword.¹⁸⁷ It can either help Samoa's economy by introducing financially stronger investor nations to the island's natural resources, or it can aid in the exploitation of further traditional knowledge "secrets" and the unauthorized use thereof.¹⁸⁸ By taking a tighter stance on the interpretation of the Intellectual Property Act 2011, insofar as seeing it as a restriction on developed nations' usage of its traditional biological and cultural resources, Samoa risks losing an opportunity for kava to be a cash cow.¹⁸⁹ Given its small size, and recent economic woes and concerns,¹⁹⁰ Samoa needs to take every chance it can get for more financial interest on the island.

The new Act, in trying to acknowledge traditional knowledge as an important factor for intellectual property rights, may also revive interest in Samoa's biological and cultural resources. Kava itself is on the decline, especially with recent diaspora and breakdowns in traditional practices.¹⁹¹ However, if its

187. Varadarajan, *supra* note 18, at 385.

188. *Id.*

189. See Lamont, *supra* note 12 (describing kava's competing roles as a cultural symbol and an economic resource).

190. Lanuola T. Tupufia, *Samoa's Economic Woes Discussed at IMF Conference*, SAMOA OBSERVER (Mar. 27, 2012), <http://pidp.eastwestcenter.org/pireport/2012/Mar./03-29-07.htm>. Samoa's financial status has been affected severely by both the global economic downturn as well as by the earthquake and tsunami that hit the island on September 29, 2009. See Bruce Jaffe, *Surprises from the Deadly September 29, 2009, Samoa Tsunami*, U.S. GEOLOGICAL SURV. (Dec. 2009), <http://soundwaves.usgs.gov/2009/12> (describing the severity of the 2009 tsunami).

191. See Tuvala, *supra* note 170 ("The breaking down, or abolition, or weakening power of the Samoan ritual and customs as a result of contact with Europeans has materially lessened the solemnity of the ceremony as it is witnessed today . . ."); Deborah C. Gough, *Mobility, Tradition and Adaptation: Samoa's Comparative Advantage in the Global Market Place*, 4 GRADUATE J. ASIA-PAC. STUD. 31, 35 (2006), available at <http://www.arts.auckland.ac.nz/webdav/site/arts/shared/Departments/asian-studies/gjaps/docs-vol4/Gough-vol4no1.pdf> ("In 1966, eight percent of Samoans were living overseas, by the mid 1970s the percentage was sixteen and by 1980 a third of Samoans were living in the diaspora in over thirty different nations. Today some 200,000 Samoan-born Samoans, equal the population in Samoa, live abroad.").

popularity grows internationally as a source for medicinal treatment, it may gain back parallel popularity amongst Samoans as a source of livelihood.

Because Samoa has changed the Intellectual Property Act 2011 to reflect a more Western-centric view of IP laws, now Samoa's IP regime does not follow the same pattern as its Pacific Island neighbors, particularly that of Fiji on which its original patent laws were based.¹⁹² This has huge implications on inter-island relations and is especially significant as Pacific Island culture is seen as a culture of mobility.¹⁹³ Instead of viewing these IP reforms as a way to leave other smaller Pacific nations behind, Samoa can use the new Act as a way to bring other islands nations under a similar banner, moving them collectively to a more promising economic and legal future.¹⁹⁴ By sharing this legal framework with other similarly situated island nations like Fiji and Tonga, as well as being the figurehead for following the PIFS Model Law for reconciling modern IP laws with traditional cultural practices,¹⁹⁵ Samoa can develop its relationship with its island peers while at the same time maintaining its status as a leader.

192. See generally Farran, *supra* note 25 (noting the similarities between the two patent laws).

193. See generally Gough, *supra* note 191, at 32–33 (rationalizing how Samoans exemplify a culture of mobility).

194. But see Miranda Forsyth, *Intellectual Property Laws in the South Pacific: Friend or Foe?*, 7 J. S. PAC. L. 1, 1, 8–9 (2003) (arguing that “it is both ideologically and practically impossible for western-style intellectual property systems to meet the current needs for [traditional knowledge] protection” and that this method does not encourage economic growth; instead, *sui generis* legislation is offered as a better model for traditional knowledge protection.).

195. Samoa seems to have taken into account some recommendations of the PIFS Model Law, which has a provision that users of traditional knowledge give “sufficient acknowledgement of the traditional owners by mentioning them and/or the geographical place from which the traditional knowledge or expressions of culture originated.” PAC. REG’L FRAMEWORK FOR THE PROT. OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE pt. 2, § 7(5) (Secretariat of the Pac. Cmty., Pac. Islands Forum Secretariat & UNESCO Pac. Reg’l Office 2002), available at <http://www.forumsec.org/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprsnsofCulture20021.pdf>. A semblance of this is present in Samoa’s Intellectual Property Act 2011, where potential patentees must disclose the indigenous source and geographical location of any traditional knowledge used. Intellectual Property Act pt. II, § 7(3)(g)–(h).

Samoa's membership, as far as the intellectual property realm, in the World Intellectual Property Organization (WIPO)¹⁹⁶ and in the Berne Convention for the Protection of Literary and Artistic Works¹⁹⁷ also shows how the country has made strides to maximize its international appeal with larger, more established treaty nations. Interestingly enough, Samoa did not adopt the Patent Cooperation Treaty or sign the Paris Convention for the Protection of Industrial Property until just recently.¹⁹⁸ However, there were strong proponents pushing for accession of the Patent Cooperation Treaty as a way to advance Samoa's position in the intellectual property world.¹⁹⁹ Indeed, given the emphasis and research put into reforming the Intellectual Property Act 2011,²⁰⁰ by not acceding these treaties, the Act would have been rendered moot and efforts wasted. Nevertheless, stakeholders and experts have already pointed out that the Act was definitively an effort to be compliant with WIPO legislation and the Patent Cooperation Treaty.²⁰¹

196. *Information by Country: Samoa*, WORLD INTELL. PROP. ORG., http://www.wipo.int/members/en/details.jsp?country_id=187&country_code=WS (last visited Jan. 13, 2014).

197. *See Berne Notification No. 250: Berne Convention for the Protection of Literary and Artistic Works, Accession by the Independent State of Samoa*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_250.html (last visited Jan. 20, 2014).

198. *See PCT Newsletter July 2013*, WORLD INTELL. PROP. ORG., available at http://www.wipo.int/edocs/pctndocs/en/2013/pct_news_2013_7.pdf (announcing Samoa's accession of the Paris Convention on June 21, 2013, and its enforcement beginning September 21, 2013); *see generally* Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1583; 828 U.N.T.S. 303.

199. *See* Margaret Fruean & Osana Liki, Intellectual Property Rights: Opportunities and Challenges in the Pacific Region in Using the IP System for Economic Growth and Business Competitiveness, Presentation at the World Intellectual Property Organization Sub-regional Workshop on Effective Use of IP System for Economic Growth & Business Competitiveness (Dec. 1–3, 2010), available at http://www.wipo.int/edocs/mdocs/aspac/en/wipo_ip_nan_10/wipo_ip_nan_10_ref_t10_4.pdf (recommending accession to the Paris Convention of the WIPO as well as proposing modern legislation to keep up with global developments); SAMOA LAW REFORM, *supra* note 62, at 45 (encouraging the protection of traditional knowledge and expressions of culture on national and international levels).

200. *See generally id.* at 2.

201. *New IP Legislation for Samoa*, *supra* note 109.

V. CONCLUSION

Samoa's comparative advantage is that it can "engage successfully in the world economy in unique ways while retaining faithful links to traditional practices."²⁰² The first step has been through the Intellectual Property Act 2011, but future steps remain at the discretion of how the Samoan government will interpret and use the Act to help develop the country economically and culturally, especially in providing legal protections for traditional knowledge.

By delving into Samoa's colonial history in general as well as its legislative history with respect to intellectual property rights, it is clear that this island nation is making strides to move onto the world stage, yet also balancing that initiative with its cultural practices and traditional knowledge. The reforms Samoa has made with its patent laws shows that it is not only taking heed of global economic concerns, but local ones as well. Applied properly and construed favorably, the revisions in the Intellectual Property Act 2011 can help Samoa build a legal regime to further a better economy and respect for the practices that make them unique amongst the Polynesian nations.

Kava in its traditional use has not been patented, nor will its chances of it being patented ever increase.²⁰³ Despite this, kava derivatives and its popularity in the medical research field²⁰⁴ show that there are avenues in which Samoa can capitalize on its local resources if it can develop a robust legal system to support it. Overall, kava presents a model argument for how to move forward with the island's natural resources

202. Gough, *supra* note 191, at 37.

203. See Philippe Cullet et al., *Intellectual Property Rights, Plant Genetic Resources and Traditional Knowledge*, in *RIGHTS TO PLANT GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE: BASIC ISSUES AND PERSPECTIVES* 112, 137 (Susette Biber-Klemm & Thomas Cottier eds., 2006) (explaining that kava is not patentable under 2006 South Pacific intellectual property laws, yet also allowing that some kava patents had been granted to companies for exploratory purposes).

204. See Frazier, *supra* note 139 (describing kava's rise in the Pacific and in European markets due to its medicinal properties); Tabudravu & Jaspars, *supra* note 138 (recognizing the prolific amounts of research already done and to be done on kavalactones).

2014]

PASS THE KAVA

821

under a stronger and more globally-focused intellectual property regime, with the suggestion that the Act will indeed open up the island to more foreign investment. Either looking forward or looking back, kava may be the “truth-bringer” when it comes to the future of Samoa’s Intellectual Property Act 2011.