Scene 1: The opening of Disney’s 2002 animation feature *Lilo & Stitch* features a song in Hawaiian: *He Mele No Lilo*. Although composed by Mark Keali’I Ho’omalu, and sung by the all-Hawaiian Kamehameha Schools Children’s Chorus, it sparked controversy among Hawaiian cultural activists as it rewrote two *mele inoa*, sacred name chants honoring King Kalakaua and Queen Lili’uokalani, now re-dedicated to a cartoon character. As Hawaiian was not a written language, name and genealogical chants were central to native identity. Further disturbing the native practitioners, Disney copyrighted the song in what was seen as yet another appropriation of an Indigenous cultural form to Western commerce (Mantilla, 2011).

Maori activist Tina Ngata (2016) defines a continuing “colonial subversion of storytelling” in Disney’s animated Polynesian origins tale *Moana*, and finds cold comfort, at best, in Disney’s decision to withdraw its promotional Halloween costume for the character Maui in the face of multiple Polynesian protests of it as a disrespectful “skin suit.”

Scene 2: Actor Rob Schneider, playing a Hawaiian character named Ula in *50 First Dates* (2004), speaks in a Spanish-inflected pidgin accent never heard in the islands, and in a painful parody of island culture, covers himself with banana and ti leaves to perform a hula never seen there. Although declarations of Indigenous Rights decry an denigration of native cultures, the film, one Hawai’i reviewer wrote, “demonstrates that Hollywood is more than willing to resort to familiar perceptions of the Islands as places of lush natural beauty, populated (sparsely) by large, lazy people who sing, dance, play and eat but, oddly, don’t work very much” (Tsai, 2004).

Scene 3: *Aloha* Director Cameron Crowe offered “a heart-felt apology to all who felt” the role of actress Emma Stone as a one-quarter Hawaiian and one-quarter Chinese Air Force Fighter Pilot “was an odd or misguided casting choice” (Variety, 2005). This apology followed sharp criticism over the title of the film, “Aloha,” as a further cultural
(mis)appropriation and perversion of the meaning of a Indigenous Hawaiian expression to meet a Western tourist and commercial definition. The criticism was particularly acute as the film’s main characters and location were military related, and it was the U.S. military who backed the overthrow of the last monarch, Queen Liliʻuokalani, the composer of the treasured song *Aloha ʻOe*.

Joining the critical chorus was Hawaiʻi Film Commissioner Donne Dawson who said the filmmaker’s should have sought permission as cultural protocol to use the complexly rich expression as a title:

> I think people are overemphasizing the word permission. It is simply out of courtesy and respect for the native people of this land to seek advice and counsel. They come to Hawaiʻi and they want to tell stories that pertain to us and I don’t think there’s anything wrong with making sure that they have as much information as possible to do the best possible job they can. … So if you are getting permission to use a location, what is so different about getting permission to represent a people or an aspect of their culture? (Donnelly, 2015).

Along with ancestral lands, Indigenous Intellectual Property has been appropriated by colonizing dominant cultures and in most cases placed in "public domain," such as the *mele inoa*, allowing it to be commodified at the expense of, and at a loss to, the original authors. While filmmakers would go through extensive negotiations and payments for the rights to a piece of Western music as simple as *Happy Birthday*, they can freely pluck the Chamorro wedding song *Nobia Kahulu* without a single thought toward clearance or royalty. Because such songs, chants, dances, myths and legends were not in “fixed form,” had no definitive single or group authorship, and were of indeterminate age, they were relegated to common ownership: What was yours is now ours.

Western law abrades Indigenous customs with the same force felt in the conflict of values between individualist v collectivist cultures. Maori filmmaker, author and philosopher Barry Barclay (2005) suggests in “Mana Tuturu” that had a film crew documented Captain James Cook’s 1769 landing on Aotearoa and his officers’ freely walking into and poking around implements, clothing, and spiritual icons in private homes, it would be seen by Westerners as an important historic recording of discovery. However, Maori viewers would see such home
invasions as evidence of unconscionable breaking and entering along with multiple other violations of tribal law and customs.

In a humorous take on the theme, Don Featherstone’s 1986 Australian Broadcast Company mockumentary depicts a uniformed and armed troop of Aborigines landing and planting their flag at a riverside picnic of a white Australian group that they subsequently herd into reservations and ghettos and colonize. “What is the name of this place?” the officer in charge asks in a slow enunciation. “Bar-b-que area,” the white “native” responds. “Babakieuera!” the leader declares. “I like it.” The “documentary” is hosted by an aboriginal woman reporter who confesses, “I’ve always been fascinated with white people. The evidence of their culture is all around us. Their art (points to graffiti on a rock), their industry (points to an abandoned car by the riverside), and their way of life (a mound of trash).” The satirical film reversal of racial stereotypes was so effective it was used in police officer tolerance training.

Culture is not so easily codified. While contemporary law, led by the First Amendment, grants “the right to do,” filmmakers still need to consider what is the right thing to do, and what is the right way to do it. Media makers in Hawai‘i and on Guam are contemplating how to educate and encourage cultural knowledge and acknowledgement of cultural and creative practices as an integral, and perhaps contractual, part of the production process for offshore companies. Hawaiian Media Makers are exploring the development of a “Brown Book,” similar to the Maori guide for image-makers, and “Pathways and Protocols,” a handbook to filming among Aboriginal and Torres Strait Islander people of Australia.

**Legal Frameworks**

Numerous legal reviews have explored the issues surrounding the protection of Indigenous Intellectual (and other) Property Rights. Cultural preservation and activist groups have pointed to United Nations declarations, national laws, treaties, and agreements that define rights and relationships between and among Indigenous Peoples, tribal and government agencies. Some relationships have matured and produced model cooperation. Others have stalled, leaving issues unresolved and tempers simmering. Still others are nascent, searching
for both models to follow and original courses to set, navigating traditional cultural expressions between the rocks of legal systems and the hard landings of capitalism and commerce.

Aotearoa’s Barry Barclay (2005) admits “there are no such specific Indigenous intellectual property rights in the man-made world of copyrightable items…Nevertheless, copyright is a powerful instrument, an intellectual treasure in its own right” (94). Conway-Jones (2005) finds Western copyright laws and regimes not only fail Indigenous cultures, they “promote ‘commodification of the culture, one of the many remnants of colonization,” (739) and “economic and cultural oppression” (741).

The expression of traditional knowledge is dynamic and cannot be fixed in time, place or form and therefore, cannot be relegated to western structures or regulated by western property laws…(Indigenous) knowledge is not regarded as property subject to individual ownership (745)….Western intellectual property laws are instruments of commodification that draw traditional knowledge and cultural heritage into the capitalist model to exercise dominion, control, and subsequent public distribution over knowledge that indigenous peoples never intended to be dominated and distributed by such a regime (752).

The absorption of indigenous cultures, such as Hawaiian, Samoan, and Chamorro, has created a “catch-22” Conway-Jones describes as “either forced to commodify their collective culture and thereby perhaps misappropriate its position in the Indigenous community or renounce commodification, thus allowing other non-indigenous peoples to appropriate indigenous cultural traditions” (760).

That “catch-22” played out in a Hawai‘i court barely a year later. Mantilla (2011) notes, “Currently Hawaiian state law does not offer much protection to Native Hawaiians. In fact, recent case law suggests the opposite,” in reference to a case that upheld the copyright of a non-Hawaiian photographer to a depiction of a traditional hula pose. A native Hawaiian artist used the pose in a stained glass creation. The ruling was based on technical comparisons of the two figures in the two images, but in saying that hula in itself could not be copyrighted, placed it in the public domain, out of any control of its representation by traditional cultural practitioners of this traditional cultural practice.
The case spurred anger among some Native Hawaiians, who accused (the photographer) of trying to copyright a well-known hula pose. They also said the suit was part of a wide scale effort to trademark pieces of Hawaiian cultures. “The issue is not one painting. The issue is not one sculpture. The issue is who is he to own that pose?” said Wayne Panoke, executive director of the ‘Iliouaokalani Coalition. “As far as I’m concerned, he’ll never own it” (Vorsino, 2007).

Although the Hawai‘i State Legislature adopted a 2004 resolution recognizing Native Hawaiian collective ownership of traditional knowledge, expressions and art forms and the inadequacy of “the current western intellectual property regime … (which) often facilitates the theft, misuse and misappropriation of indigenous knowledge by researchers, authors, scientists … universities, and others,” and included a requirement that any use of such cultural material, for example in a film, “must be reviewed for accuracy and appropriateness,” it has no force of law. Similar conditions on the use of indigenous intellectual property have been legally sanctioned within Native American tribes, but Native Hawaiians do not share any tribal status or sovereign relationship within U.S. law.

Hawai‘i, Guam, and the Commonwealth of the Northern Marianas, the home of Chamorro culture, also fall under the First Amendment constitutional umbrella that repels any restriction on any representation of any cultural group by filmmakers or other storytellers. The “multitude of voices” philosophy embraces inaccuracy and inauthenticity as closely as it does truth and wisdom.

Barclay (2005) was instrumental in establishing the rights of Maori tribes and other community groups to the future use of their images used in films deposited in the national film archive, the mana tuturu clause in the repository agreement. Barclay states it is the expiration of copyrights that worries him more than the copyright itself: “‘Out of copyright’ hangs like a death sentence over the Indigenous image” (109). Once expired, the images become public domain, open to any use. The western view of copyright holds that the value of images decreases over time and therefore the need for protection recedes. In Maori culture, he explains, images of elders and their lives increase vastly in value with the passage of time:

…With a pakeha (western) film, the film’s principal period of glory is at the beginning of its life, at its premieres, during its main run, perhaps during a second run. After that … the gradient of vitality tracks downwards…a benign half-life in the
reserve stocks of the national memory…But with Maori work…the gradient tracks upwards….The early life of the image-document might be rather modest, but the document increases in vigour and relevance as each decade goes by (102).

Conway-Jones calls for the need to develop a Native Hawaiian intellectual property law *sui generis* – unique and from the perspectives of cultural tradition (2005), or to indigenize western copyright law through a philosophy of legal pluralism (2009): “The western approach to globalization is keen to recognize culture as an object rather than as a living, evolving organ to be shielded from exploitation” (208).

To date there has been no answer to the call.

**Cultural Responses**

A coalition of Native Hawaiian groups gathered in 2003 to discuss protection of traditional knowledge and property rights in the face of advanced genetic testing of native plants and of Native Hawaiians themselves. The concerns broadened into protection of artistic expressions and oral traditions. The result was the Paoakalani Declaration, which set forth a definition of traditional knowledge and art forms as well as a statement of rights to create laws and protocols to protect them, and insist that any use of them be made “in full consultation with Kanaka Maoli (Native Hawaiians)” (7). The declaration was the basis of a state legislative resolution a year later and like the resolution, expressed a spirit of cultural protection, but without any power to enforce. The declaration has been cited in subsequent controversies over genetic modification of crops, and biological research. Despite its potential as a basis for rational criticism, it has not come up, in recent discussions of film misrepresentations of Hawaiian culture, from the revival of the CBS series “Hawai‘i 5-O” to Crowe’s critically ill-received “Aloha.”

The Paoakalani Declaration is given some additional weight by the United Nations Declaration on the Rights of Indigenous Peoples (2007), in which Article 31 states:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora,
oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions (11).

The United States, Canada, Australia, and New Zealand, four counties with the largest resident indigenous populations, balked at signing the declaration, although they endorsed it in varying degrees as an expression of worthy ideals.

The Hawaiian Media Makers Conference in 2014 wrestled with the charge of the Paoakalani Declaration to develop strategies to protect cultural expression and representation in film against a western backdrop of copyright and First Amendment law. The only resolution was a commitment to continue the effort, but along the way voices representing multiple Pacific cultures were heard in spirited discussions of what constitutes a Pacific Story, a Native Film, and whether greater protection was needed for indigenous film, or for indigenous culture represented in non-indigenous films.

The Hawaiian Media Makers are particularly sensitive to the latter, as the film industry is sufficiently developed in the Islands to attract several major outside productions a year, and to produce numerous local films, albeit mostly shorts. Guam, on the other hand, has no developed infrastructure or regularly agencies for film production, although Japanese, Korean, and other production companies regularly film commercials or tropics-set episodes of television series there. It’s a sort of professional “guerilla filmmaking” environment without regulation or oversight. Chamorro filmmaking brothers Kel and Don Muna began the Guam International Film Festival in 2011 to encourage the production of local films by providing a prestige venue, and showcase the Island to Asian and Pacific professional filmmakers as a shooting site, while building a “film culture” among islanders beyond the standard multi-plex fare. They would like to build the film industry infrastructure, but also have a healthy wariness for the potential of co-option and cultural misrepresentation, which has marked the short history of made-in-Guam features by outsiders.
Cultural Models & Protocols

The 2005 Australian western *The Proposition* begins with an apology:

Members of the Aboriginal and Torres Strait Islander communities are advised that this film contains images which may be offensive to indigenous people. It includes historical photographs of people now deceased.

The Australian edition of the DVD includes a short, *Managing Cultural Heritage of a Major Feature Film Shoot*, introducing Pearl Eatts, the Indigenous Coordinator for the film. Eatts explains her role on the set as consulting with director John Hillcoat, as well as the producer, location manager, and others on both historical and contemporary relations between Outback settlers and Aboriginals, oversees the impact of shooting on the local environment, and perhaps most importantly, advising on the often hidden history of many of the film’s location. In one instance she explains that in the settlers’ viewpoint, one particular cliffside site is a picnic spot. To Aborigines, however, it is both a sacred site of ceremonial worship, and the site where black Aborigines were massacred by white Australians who force-marched them over the edge onto the rocks below. Although it would be a picturesque scene for western viewers, it would be offensive to the Indigenous Aborigines if used in the film. “It’s a big country,” Eatts says. “There’s a lot of other places to film.” Hillcoat and the film company agreed. They moved on (Hillcoat, 2005).

Cultural consultancy is among the most popular recommendations for filmmakers to pursue when they are seeking Indigenous locales, stories, characters, and cultural representations. In Queensland it is written into the 2003 Aboriginal Cultural Heritage Act.

All persons undertaking land use activities in Queensland, have a duty of care to take all reasonable and practicable measures to ensure they do not harm Aboriginal cultural heritage. The legislation requires direct negotiation between traditional owners and land users to address cultural heritage matters (“Managing Cultural Heritage,” 2005).

Director Rolf de Heer, following his 2002 film *The Tracker*, worked with the film’s co-star David Gulpilil, perhaps best known Aboriginal actor (*Walkabout, Rabbit-Proof Fence*) to develop a film to be co-written, co-produced, and co-directed with the Yolngu people of Ramingining, inspired by the mid-1930s photos of anthropologist Donald Thompson of the
Yolngu now-lost practice of goose egg hunting in bark canoes. The making of Ten Canoes is captured in the documentary The Balanda and the Bark Canoes (de Heer and Reynolds, 2006) where we learn that rather than cultural appropriation of aboriginal traditional knowledge, the film provided the Yolngu the opportunity to “reappropriate” forgotten knowledge through relearning the artistry and craft of canoe building. The documentary reveals that all was not brightness and multicultural epiphanies on the shoot. Intra-tribal as well as inter-cultural tempers often ran short, and communication often ran aground. The end result was rewarding for both sides, and presented the audience with a rich and textured glimpse into a culture that was accurate, and authentic.

To encourage such intercultural cooperation across the filmmaking industry starting from the earliest stages of pre-production, Screen Australia (formerly the Australian Film Commission) published “Pathways & Protocols: A filmmaker’s guide to working with Indigenous people, culture and concepts.” Protocols, author Terri Janke (2009) notes, “are not in themselves legally binding, but over time they establish practices that can be relied on as industry standards” (10). Included in the protocols are statements that set the ownership and protection of Indigenous cultural and intellectual property rights with the Aborigines and Torres Strait Islanders, and that they have the right to:

- be recognized as the primary guardians and interpreters of their cultures
- authorize or refuse to authorize the commercial use of Indigenous cultural and intellectual property according to Indigenous customary laws
- maintain the secrecy of Indigenous knowledge and other cultural practices
- be given full and proper attribution for sharing their heritage
- control the recording of cultural customs and expressions, and the particular language which may be intrinsic to cultural identity, knowledge, skill and teaching of culture (11-12).

The book gives numerous examples of potential cultural representation and assists in the implementation of the protocols through extensive sets of checklists beginning with initial research, project and script development through editing and post-production. A sample checklist (24-25):
Checklist for initial research and project development

Preliminary
☐ Have you considered why you are making the film or program, why you are using Indigenous material, and the perspective you bring to it?
☐ Have you sought advice on the cultural issues that need to be addressed through consultation?

Consultation
☐ Has consultation with relevant Indigenous individuals and communities been initiated?

Representation
☐ How will your work affect the Indigenous group it is based on?
☐ Does it empower Indigenous people?
☐ Does it depict or expose confidential, personal and/or sensitive material?
☐ Does it reinforce negative stereotypes?
☐ Have you researched your characters?
☐ Is the use of language appropriate?

Cultural integrity
☐ Are you proposing to adapt or alter traditional knowledge, communally owned material or cultural heritage material in any way? If so, have you explained the adaptation you propose, given people time to comment, and obtained consent?
☐ Will the individual or community who is the subject of the work have an opportunity to see the work prior to public dissemination? Have their suggestions been incorporated?

Authenticity
☐ Have you established that any Indigenous cultural and intellectual property in your film is used in the correct cultural context?
☐ Have you established whether there are any restrictions on the material and the exact meaning of any words in the language if unsure?
☐ Do you use heritage material such as imagery, music and language with proper regard to gender, clan affiliations and cultural restrictions?

Sensitive or sacred material
☐ Is the material culturally sensitive? Is it secret or sacred? Is it a women’s or men’s area?
☐ Are there any themes that refer to sacred or secret material that may need consultation with Indigenous people?
☐ Are there contemporary sensitive issues involved?
☐ If so, how should it be handled? How do you plan to involve the relevant Indigenous specialist agencies in the development of the film project?
☐ Have you spoken to elders or other relevant Indigenous people from the relevant area to identify any sensitivities and sacred or religious issues that might prevent depiction of the image, story or event?

Although not as detailed in defining the points of potential cultural conflict as “Pathways and Protocols,” the “Brown Book” establishes a broad set of ground rules for intercultural interaction well before the scope of a film is introduced. As Maori director and screenwriter Himeona Grace explained, “You have to have twenty cups of tea with someone before you can trust them” (2014). The book strongly urges filmmakers to share images with the community from which they are captured:

We would urge production companies, especially when interviewing Māori elders and experts, to be sensitive to the fact that they are being gifted with sometimes ancient knowledge and traditions. Without trying to interfere with the intellectual property rights of producers, we suggest that production companies would be making a useful and powerful contribution to those communities if they made available the footage that they shot in those communities. Interviews with kaumātua and kuia (male and female elders), or shots of the landscape, which for Māori is the personification of their ancestors, are taonga (precious objects) for those communities. That is, maunga (mountains), whenua (land) and moana (sea) are named after ancestors or important events in tribal history, and are the physical representation of those people and events. Therefore, images and reproductions of these sites hold spiritual and cultural significance for those communities, and any footage taken of them becomes a part of the tribal repository of knowledge, mātauranga Māori (Henry and Wikaire, 2013, 46).

The Hawaiian Media Makers conference looked to the “Brown Book” as a basis for establishing protocols for filming in Hawai‘i. The State Film Office, a sponsor of the conference, publishes an annual “Hawai‘i Production Index.” Primarily a source of information for rental and contracting technical support for films, the Production Index contains a limited section titled “Guidelines for Filming in Sensitive Locations.” It advises filmmakers to be aware of environmental as well as cultural concerns and encourages the use of cultural consultants, including the office itself:
The Hawai‘i Film Office will help productions understand and navigate the cultural and environmental sensitivities that make Hawai‘i such a special place. When choosing a location, it’s easy to get caught up in the beauty of the place or how perfectly it fits within the script. Producers and location managers should be aware though, that depending on the location, there may be cultural or environmental sensitivities to consider:

- Certain public lands are adjacent to communities who have concerns about using the area for filming.
- Some areas are nature preserves, wildlife sanctuaries or home to endangered marine life.
- Ancient burial sites are not uncommon, especially in undeveloped areas.
- Many forested areas shroud ancient lo‘i kalo (taro terraces), heiau (religious temple) or other archaeological sites (18-20).

**Images for the Future**

The quest for a set of Hawai‘i-based protocols for filmmaking aligned with the Paoakalani Declaration and not negated by U.S. copyright and constitutional law continues through the Hawaiian Media Makers group, Pacific Islanders in Communication, the state Film Office, University of Hawai‘i, and other stakeholders. Examining best practices developed in other Indigenous Pacific cultures, it will be a combination of educational and aspirational approaches. Budget-minded filmmakers will lean toward voluntary adoption of protocols when they not only understand their cultural importance, but also realize they can constitute an enhancement of story and production. The goal for Guam, with its nascent filmmaking culture and industry, are similar: How do you convert cultural protocols into a “value-added” to attract the global filmmaking community?

Since Hawai‘i, like other sought-after locations, offers economic incentives in the form of tax breaks for film production, it could write an acknowledgement of protocols and a requirement to retain a cultural consultant and/or to complete an extensive checklist into the tax credit agreement and the permitting process for location shooting on public and private lands.

The protocols themselves could be defined and explained in an expanded Production Index, as well as in a demonstration video (perhaps produced by student filmmakers) made available to production teams as they consider Island-based stories and locations. A class or
workshop outlining key cultural concerns and protocols could be offered on a regular basis through the university as a cooperative outreach program. Cooperating production companies could also be rewarded by being featured for their cultural sensitivity in future editions of the multi-media Production/Protocol Index, perhaps through a short behind-the-scenes documentary shot by student interns available for public as well as industry viewing.

The recognition of Indigenous cultural rights resonates with both the ethical and political principles of the right of self-determination, as well as a practical application of the Harm Principle and the Social Authority Principle – the right of society to protect itself from actions deleterious to its interests. This relates to both ownership of intellectual property, and some degree of control over how the culture is represented as a celebration not only of the culture itself, but also of the diversity of global cultures.

Absent access to the knowledge, or acquiescing in the misuse and misappropriation of that knowledge, Indigenous identities become hostage to external perceptions and influences that often relegate Indigenous Peoples to subordinate or nonexistent status as the fringes of the global community (Conway-Jones, 2009, 210).

While political sovereignty is argued in more rarified arenas, filmmakers have the power to recognize “rhetorical sovereignty: a people’s right to determine their own communicative needs and desires, to decide for themselves the goals, modes, style and languages of public discourse” (Siebert, 2006, 536).

Our storytelling traditions are complex, interconnected and inextricably linked to our political, spiritual, economic and environmental realities. Our storytelling is a part of a broader knowledge system that underpins our relationships to the world around us, and informs our value systems in relation to that environment (Ngata, 2016).

The Indigenous Peoples of the Pacific are inherent storytellers. When they intersect and interact with the film industry, it is the bringing together of tremendous story-telling cultures. Each has its own protocols and customary ways. They need not be defined by conflict to have a good story ending.
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