

**2023 HAWAI‘I ACCESS TO JUSTICE CONFERENCE
“BUILDING TRUST AND UNDERSTANDING ABOUT CIVIL ACCESS TO
JUSTICE”**

Friday, June 16, 2023

William S. Richardson School of Law, University of Hawai‘i

12:45 - 2:00 p.m.

**“20 Years After Paoakalani, Native Hawaiian Access to Justice.”
Makalika Naholowa‘a, Devin Kamealoha Forrest, Zachary Lum**

Since western contact, Hawai‘i and her native people (“Kānaka Maoli”) have experienced monumental changes. From changes in landscape and communities, to changes in customs and spirituality, Kānaka have adapted to the ever changing tides and rising waves of change. Important inflection points in Kānaka Maoli history through these changes include the shift to a more western legal system in Hawai‘i in 1840, and the subsequent evolution of that system from the monarchical period, through the illegal overthrow and republic era, and into statehood.

The legal outcome of these changes is a unique body of law reflecting this specific history, with dominant Western legal foundations incorporating elements of pre-Western and pre-US Hawaiian laws and culture, as well as contemporary Kānaka lead legal protections for traditional and customary lifeways and practices. Hawai‘i’s unique laws among states in the US on property and traditional and customary practices are good examples. While these laws have experienced extensive constitutional development, legislative development, and judicial review, not all areas are as mature and battle tested. Protection for Kānaka Maoli traditional knowledge, cultural property, and intellectual property (“Kānaka IP”) has had very little bandwidth spared in Hawai‘i’s legal community and legislative work. As a result, exploitation and abuse of Kānaka IP has been a serious problem impacting Kānaka Maoli economic justice, cultural integrity, and consumer protection for generations.

In response, an ‘Aha was held by Kānaka Maoli cultural practitioners and community leaders in October 2003. Those gathered grounded their efforts in the collective right of Kānaka to self-determination, Kānaka concepts of cultural property, and an urgent need to address the threat of theft and commercialization of these cultural assets. Not only did they recognize a need for this work to protect Kānaka, culture, and the ‘āina of Hawai‘i, but also to protect all people. The harm from Kānaka IP abuse could range from consumer deception and confusion to physical, emotional or spiritual damage due to the improper stewardship, transmission, and use of Kānaka IP. With these goals, they produced a historic document calling for change; The Paoakalani Declaration.

The Paoakalani Declaration articulated the breadth of Kānaka IP from a Kānaka cultural and historical perspective, including a cursory list of specific manifestations of Kānaka IP and related Kānaka property interests. However, unlike Western IP regimes, the Paoakalani Declaration did not seek private rights of exclusive control and use for authors, inventors, or commercial actors. The Declaration instead requires that Kānaka IP is stewarded in a culturally appropriate way to maintain both the tangible and intangible integrity of Kānaka Maoli culture. In part, this calls for *sui generis* protection within a Western legal regime and is similar to calls for indigenous traditional knowledge and cultural property protections by many other native people across the US and around the world.

Unfortunately, twenty years later, Kānaka IP abuses have continued unabated with scant enforceable law providing the protections called for in the Declaration. For example, the Hawaiian Language (“‘Ōlelo Hawai‘i”), an invaluable and fundamental component of Kānaka IP, enjoys almost no legal protection from abuse in Hawai‘i State and US law, and is essentially offered in pieces as privately owned IP assets to anyone willing to use it commercially and pay government registration fees. Indeed, there is at least one case that was decided by the Trademark Trial and Appeal Board that treated the language similar to “dead” languages. Though this was not a precedential decision, it signals that ‘Ōlelo Hawai‘i might not even enjoy some of the protections against non-distinctive protection that Western language do, and there’s questions about how the foreign language equivalence doctrine applies. With no protection, Hawaiian words have been disrespectfully appropriated, exploited, and abused in ways that result in a degradation of Native Hawaiian language and culture, while also giving products a veneer of cultural legitimacy luring unaware consumers and devalue the market for authentic cultural experiences and creative expression.

There’s been action in recent years posing cause for cautious optimism that progress is coming, though certainly slow and measured. Following numerous incidents of abuse in the last decade resulting in substantial Kānaka Maoli outcry, in Hawai‘i and on the continent, the Hawai‘i State Legislature passed resolutions in 2019 and 2023 that would create a working group to address the need to better protect Kānaka IP.¹ Additionally, in 2021, a large contingent of Kumu Hula ratified the Huamakāhikina Declaration on the Stewardship of Hula which outlined the basic precepts and methods of knowledge stewardship relating to hula. This was the first time since Paoakalani that a group of practitioners gathered to outline clear concrete rules and practices that have been done to maintain the integrity of their practice.

¹ House Concurrent Resolution 155 adopted in 2019 and Senate Concurrent Resolution 191 adopted in 2023 both called for the creation of a Native Hawaiian Intellectual Property working group.

Though promising, however, none of this is legally enforceable protection for Kānaka IP.

In the coming years, there is room for concurrent progress via numerous channels. There is room for Kānaka IP and other indigenous people's IP needs to be better recognized by international bodies, like the United Nations, and for member states like the US government to correspondingly implement laws that honor the cultural property rights for indigenous peoples articulated in the UN Declaration on the Rights of Indigenous People. There is room at the state level for efforts like the report to be prepared by the Native Hawaiian Intellectual Property Working Group being convened following this year's resolution, and for the legislature to seriously weigh and implement their recommendations. There is also room in our present judicial system for decisions grounded in existing law to better protect Kānaka IP. Finally, there is room for industry to commit to proactive efforts to avoid engaging in Kānaka IP abuse, and for individuals and organizations to support and resource Kānaka Maoli efforts to advocate for change and access services needed to use existing legal tools to protect Kānaka IP.