CULTURAL IP VS. COMMERCIAL IP

By J. Janewa Osei-Tutu

Who, if anyone, should control the use of the Hawaiian greeting "aloha"? This seemingly simple question can generate a lot of controversy. Claims of cultural appropriation are not new. Cultural appropriation in fashion, film, and the food industry continues to generate controversy and in some instances force change.

This article will discuss cultural appropriation as it relates to intellectual property (IP) to contrast the ways trademark law protects commercial identities as compared to cultural identities. In the domestic example, Aloha Poke, there are no IP laws to protect the cultural aspects of the IP that are claimed. In the international example, Ghanaian kente cloth, there are relevant laws in place in another country.

Aloha Poke restaurant and Native Hawaiians. In 2018, it was reported that a Chicago restaurant sought to enforce its trademark for the phrase "Aloha Poke" and sent cease-and-desist letters to various businesses, including one in downtown Honolulu, Hawaii. The trademark for "Aloha Poke" was registered by the Aloha Poke Company in 2017. The word "poke" was disclaimed. The attempts to prevent others from using the word "aloha" generated some negative public reaction. This is because the word "aloha" is a Hawaiian greeting that can be used to say "hello" or "goodbye." Hawaiian poke is a traditional dish of raw fish that has been cut into chunks.

> MUCH CULTURAL IP IS NOT PROTECTABLE UNDER CLASSIC IP LAW.

Someone started a petition on behalf of the Kanaka Maoli peoples of Hawaii to have the Aloha Poke company in Chicago remove both words from its name. The trademarking of the word "aloha" was perceived as an appropriation of Native Hawaiian culture. People were offended that a private company in Chicago was claiming Hawaiian words and seeking to prevent others, including Native Hawaiians, from using the word "aloha" as part of their business names or branding. The Native Hawaiians had not, it seems, claimed an individual exclusive right to use the greeting as a trademark. There may be a number of reasons for this, but one important aspect is the recognition of the term as a *cultural* symbol rather than as a commercial symbol.

The trademark may not be legally problematic insofar as it serves as a source identifier for the Chicago business, but it raises issues regarding cultural IP. In response to Aloha Poke, the Hawaiian legislature passed a resolution that created a task force to look into the protection of Native Hawaiian cultural IP, traditional knowledge, and genetic resources.

Ghanaian kente in the *Black Panther* movie. Turning to a situation with international implications, it was reported that the Ghanaian government had taken issue with the unauthorized use of Ghana's traditional kente cloth in the Marvel Studios film *Black Panther*.

The *Black Panther* movie beautifully showcased African traditional wear from a number of countries. For example, the lead character, T'Challa, wore a kente stole in the film. Kente designs are quite popular and often seen as a symbol of black pride. It is not unusual, therefore, to see kente cloth incorporated into North American fashion items or as part of the graduation attire at some historically black colleges and universities in the United States.

The difficulty, however, is that, like the Japanese kimono, kente cloth is part of Ghana's traditional cultural wear. Ghanaians typically wear kente for special occasions. Moreover, kente is protected as folklore under Ghanaian law as part of Ghana's cultural heritage. The folklore is held in trust by the president of Ghana for the people of Ghana. Personal use of folklore is permissible without the need to

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seek permission, but one needs permission from the National Folklore Board to use kente for commercial purposes. Given the territorial nature of IP law, this law would apply to the use of folklore in Ghana, but it is not clear how it would prevent the unauthorized use of kente in an American film in the United States. The primary international IP agreements, such as the Berne Convention, the Paris Convention, and the TRIPS Agreement, do not require the United States to recognize and protect folklore or cultural IP.

Cultural or commercial? As the aloha and kente examples illustrate, conflicts can arise when cultural words or symbols are appropriated by private actors for commercial purposes.

Trademark law protects commercial symbols but not words or symbols that are primarily cultural in nature. Section 45 of the Lanham Act defines a trademark as a "word, name, symbol, or device . . . used by a person, or . . . which a person has a bona fide intention to use in commerce." A cultural word or symbol that is *not* used in commerce is not protectable as a trademark under U.S. or international law. Certainly, trademark law can be used to protect cultural words or symbols when those words or symbols are used in commerce to distinguish the goods or services of one entity from those of another. However, cultural symbols that are not used in commerce will not be protected as trademarks.

Copyright can protect some traditional cultural works, as can geographical indications. Geographical indications, for example, have a cultural component because they identify a good as coming from a particular region or territory where there is some quality, reputation, or other characteristic of the good that can be attributed to its geographic origin. But much cultural IP is composed of intergenerational literary and artistic works, or words and symbols that are not protectable under classic IP law. This includes works that may have been protectable by copyright but have now fallen into the public domain, or distinctive symbols that have cultural significance but are not protected as trademarks or geographical indications because they are not used in commerce as indicators of source.

Legal and nonlegal solutions. One option is to create some form of international protection for cultural IP. The World Intellectual Property Organization has been engaged in discussions related to this topic for several years. Arguably, the law should protect intangible cultural goods that have elements of what is protectable under current IP law. This could include cultural goods that would be protected as trademarks or geographical indications if used in commerce, or that would have been protectable under copyright law at one point in time. The literary or artistic works, words, or symbols in question should be protected if they are recognizable as symbols or representations of a particular culture, even if they are not used in a commercial sense.

Second, cultural IP from other countries should be recognized if it is protected by that country's domestic law. If an artistic work or cultural symbol is protected by domestic IP law as part of the cultural heritage of a nation, it should, like other IP, be protectable across borders. This protection could also be limited to cultural words or symbols that could be protected as trademarks if used in commerce as indicators of source or by copyright if the term of protection had not expired. However, the trademark use in commerce would not be required, nor would the copyright temporal limitation apply.

Finally, businesses can do their due diligence before using words or symbols from another cultural group. This voluntary approach is the most likely short-term solution because the international legal solutions proposed above, while preferable, are not a realistic short-term option. ■

ABA SECTION OF INTELLECTUAL PROPERTY LAW

This article is an abridged and edited version of one that originally appeared on page 18 of *Landslide*®, March/April 2020 (12:4).
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