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The New Hawaiian Model: The Native Hawaiian Cultural Trademark Movement and the Quest for Intellectual Property Rights to Protect and Preserve Native Hawaiian Culture

Keywords

trademark, traditional knowledge

The New Hawaiian Model: The Native Hawaiian Cultural Trademark Movement and the Quest for Intellectual Property Rights to Protect and Preserve Native Hawaiian Culture

by Nina Mantilla*

I. INTRODUCTION

In 2002, Disney released the animated movie *Lilo & Stitch*, which told the story of an orphaned Hawaiian girl and a marooned alien she mistakes for a dog. Native Hawaiians were disturbed to find that the movie contained two mele inoa, traditionally used to honor King Kalākaua and Queen Lili'uokalani, two rulers in the 19th century known for their strong national and ethnic identity and role in the Hawaiian counterrevolution.¹ Mele inoa are sacred name chants that utilize a person's name to honor them. These two mele inoa, traditionally viewed as a source of Native Hawaiian pride, were performed as a single song and renamed for the orphaned character, Lilo.² Disney subsequently copyrighted the song for the movie's soundtrack.³ The inaccurate and culturally insensitive presentation of these mele inoa in the movie misappropriated traditional Native Hawaiian culture and, along with growing incidences of bioprospecting, sparked Native Hawaiians to come together at the Ka 'Aha Pono '03: Native Hawaiian Intellectual Property Rights Conference to address the growing problem of misappropriation of traditional knowledge and culture.⁴

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1. See Amy K. Stillman, *History Reinterpreted in Song: The Case of the Hawaiian Counterrevolution*, 23 HAWAIIAN J. OF HIST. 1, 13 (1989) <http://evols.library.manoa.hawaii.edu/bitstream/10524/346/2/JL23007.pdf> (translating to mean name chants).

2. See R. Hōkūlei Lindsey, *Responsibility with Accountability: the Birth of a Strategy to Protect Kanaka Maoli Traditional Knowledge*, 48 HOW. L.J. 763, 766 (2005) (quoting a notable Hula instructor stating that Disney "has no right to sell our collective intellectual properties and traditional knowledge."); Stillman, *supra* note 1, at 13 (describing and defining the types of traditional chants).

3. See U.S. Copyright No. PA0001101452 (registered July 2, 2002) (listing the title of the copyright as "He mele no Lilo," and the owner as Walt Disney Music Company).

4. See Lindsey, *supra* note 2, at 766-69 (describing bioprospecting as the process by which large corporations gain exclusive rights to scientific discoveries appropriated from traditional knowledge holders, listing examples to include the transformation of the Hawaiian Genome Project into an issue of intellectual property rights, rather than the original focus on social responsibility, and the patenting of traditional knowledge by mainland biotech companies).

This Article argues that a new solution is needed to address the specific needs of Native Hawaiians, and it can be created by borrowing elements from other successful cultural trademark programs. Part II examines the development of the Native Hawaiian Intellectual Property Rights movement and also examines the current legal barriers to indigenous intellectual property protection.⁵ Part III argues that the common goals of self-determination in intellectual property rights between the Native Hawaiian and other indigenous peoples globally allow Native Hawaiians to borrow elements of other existing intellectual property models to find a solution to the Native Hawaiian context.⁶ Part III also proposes a new model of protection, the New Hawaiian model, that combines elements of the New Zealand model and the Alaska model to create a solution for protecting indigenous forms of artistic expression that is uniquely tailored to the Native Hawaiian context.⁷ This Comment concludes that this New Hawaiian model provides a customized solution for protection of traditional cultural expressions for Native Hawaiians, but acknowledges that the model is an incremental step in what should be a larger movement in Hawaii to protect and preserve all aspects of Native Hawaiian culture.

II. BACKGROUND

A. The Native Hawaiian Cultural Trademark Movement

The use of the mele inoa in Disney's *Lilo & Stitch* was not the first time Native Hawaiians dealt with misappropriation of their native culture. Other examples of misappropriation included the Dodge Kahuna, a cartoonish concept car that crossed a minivan with a surf buggy.⁸ In Hawaiian, a kahuna is a

5. See *infra* Part II (outlining the current legal context in Hawaii and the current status of indigenous intellectual property rights in the United States and globally).

6. See discussion *infra* Part III (analyzing current models from which Native Hawaiians can, and should, borrow from).

7. See *infra* Part III (describing how this new model incorporates elements that will work for the specific needs of the Native Hawaiian context).

8. See *Dodge Kahuna Concept Car (2003)*, CAR BODY

person who participates in religious ceremonies; Native Hawaiians found the use of the word in that way offensive.⁹ A recent study conducted by the Hawaii Tourism Authority found that a majority of Native Hawaiians felt the tourism industry in Hawaii is inauthentic and distorts their traditional culture.¹⁰

Commercial misappropriation of Native Hawaiian culture affects the ability of Native Hawaiian artists to make a living from their crafts.¹¹ The combination of cultural misappropriation and unfair competition in the marketplace is what Native Hawaiians have sought to protect themselves against through adoption of the Paoakalani Declaration at the Ka 'Aha Pono '03 Conference.¹²

The Ka 'Aha Pono '03 Conference took place in 2003, and brought together Native Hawaiian artists, elders, individuals experienced in spiritual and ceremonial practice, and individuals skilled in traditional healing and plant knowledge, among many others.¹³ After Disney's misappropriation of traditional name chants and other incidences of cultural misappropriation, Native Hawaiians began preliminary work towards a solution that would provide legal protection for their traditional cultural expressions (TCEs) and traditional knowledge by first asserting their rights over Hawaiian TCEs and

traditional knowledge.¹⁴ The Ka 'Aha Pono '03 Conference produced the Paoakalani Declaration as its final product.¹⁵ The Paoakalani Declaration asserted the self-determination rights of Native Hawaiians over their TCEs and advocated the creation of a sui generis system that would empower Native Hawaiians to have complete control over TCEs.¹⁶ The Hawaiian State Legislature adopted the Paoakalani Declaration, and then funded a study to determine the best legal solution to the problem.¹⁷

The Native Hawaiian Cultural Trademark Study (Study) was sponsored by the Office of Hawaiian Affairs (OHA).¹⁸ The Study found that the majority of Native Hawaiian artists surveyed favored the use of a cultural trademark program¹⁹ to protect against misappropriation and to provide public recognition of Native Hawaiian cultural arts.²⁰

DESIGN (May 29, 2007), <http://www.carbodydesign.com/archive/2007/05/29-2003-dodge-kahuna-concept/> (advertising the car as embodying "California coastal culture," rather than acknowledging the Hawaiian origin of the name).

9. See John Book, *Name for the new model of Dodge car is offensive to Hawaiians and the Hawaiian culture*, <http://www.petitiononline.com/Kahuna04/> (last visited Nov. 14, 2010); see also *Definition of kahuna*, <http://www.websters-online-dictionary.org/definitions/kahuna> (last visited Jan. 3, 2011) (stating that there are more than forty types of kahunas, including healing professions, and other cultural practitioners).

10. See Herbert A. Sample, *Native Hawaiians say tourism industry distorts their culture*, (Feb. 15, 2010, 5:00pm), http://www.usatoday.com/travel/destinations/2010-02-15-hawaii-tourism-survey_N.htm (noting that sixty percent of the Native Hawaiians surveyed disagreed that the tourism industry "helps to preserve Native Hawaiian language and culture").

11. See Heidi Chang, *Native Hawaiians seek cultural trademark for art*, PACIFIC BUSINESS NEWS (Nov. 14, 2004, 12:00am HST), <http://www.bizjournals.com/pacific/stories/2005/11/14/story4.html> (explaining that imitators flood the market with cheaper fake versions of authentic Native Hawaiian crafts, such as native drums and leis).

12. See KA 'AHA PONO '03: NATIVE HAWAIIAN INTELLECTUAL PROPERTY RIGHTS CONFERENCE, PAOAKALANI DECLARATION 2 (OCT. 3-5, 2003), <http://kaahapono.com/PaoakalaniDeclaration05.pdf> [hereinafter PAOAKALANI DECLARATION] (asserting that the creative cultural expressions of Native Hawaiians are misappropriated and commercialized in violation of their rights as cultural owners).

13. See PAOAKALANI DECLARATION, *supra* note 12, at 1 (including non-Hawaiians experienced in indigenous intellectual property protection).

14. See WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) INTERGOVERNMENTAL COMMITTEE, REVISED DRAFT PROVISIONS FOR THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE 1, 3 (2010), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_4.pdf (borrowing the term "traditional cultural expressions," or "TCEs" from the WIPO Draft Provisions, designed to be all encompassing, and include any form of traditional cultural expression, tangible or intangible).

15. See PAOAKALANI DECLARATION, *supra* note 12, at 2 (incorporating the statements of previously-produced unifying statements, such as the Mataatua Declaration and the Kari-Oca Declaration).

16. See *id.* at 3 (defining self-determination to include the right to freely determine political status and freely pursue economic, social, and cultural developments and stating that because traditional knowledge is dynamic, it cannot be adequately protected by rigid western intellectual property laws).

17. See S. CON. RES. RECOGNIZING NATIVE HAWAIIANS AS TRADITIONAL, INDIGENOUS KNOWLEDGE HOLDERS AND RECOGNIZING THEIR COLLECTIVE INTELLECTUAL PROPERTY RIGHTS, S. Con. Res. 167, 22nd Leg. (Haw. 2004), available at http://www.capitol.hawaii.gov/session2004/bills/SCR167_.htm (recognizing that the western intellectual property system does not address the protection of indigenous peoples' rights to their collective traditional knowledge); Committee Minutes, Office of Hawaiian Affairs Comm. on Beneficiary Advocacy and Empowerment (Mar. 17, 2004) (on file with author) (offering financial funding to support the OHA commission to address the bioprospecting and intellectual property rights of Native Hawaiians).

18. See NATIVE HAWAIIAN CULTURAL TRADEMARK STUDY, FINAL REPORT 1, 3 (January 2007) <http://hawaiiantrademarkstudy.org/Media/TrademarkStudyReport.pdf> [hereinafter STUDY] (including collaboration on the final study from legal professionals, master artists, and academics).

19. See *id.* (defining a cultural trademark program as one that uses a designator or symbol, on certain products to certify their authenticity).

20. See *id.* at 3, 9 (determining further that a cultural trademark would distinguish authentic Native Hawaiian arts from imitations in the marketplace).

B. The Legal Context of Indigenous Intellectual Property Rights in the United States

Intellectual property law protects copyrights, patents, and trademark. Trademark is most relevant to the Native Hawaiian context because the Study, and therefore Native Hawaiians themselves, concluded that the most effective solution for protecting and preserving Native Hawaiian TCEs is through the use of a cultural trademark.²¹

1. Federal Statutes

The following subsections will outline current United States federal and state law applicable to indigenous intellectual property rights, noting potential areas in the law that might provide protection to Native Hawaiian TCEs.

a. *The Lanham Act and Native American Tribal Insignia Database*

The Lanham Act is the federal trademark statute.²² The purpose behind the Lanham Act is to protect goods and services used in trade, and to prevent consumer deception in the marketplace.²³ The Lanham Act limits registration to marks that are to be used in commerce.²⁴ Registration is not allowed under § 1052(a) for trademarks “which may disparage or falsely suggest a connection with persons, living or dead institutions, beliefs, or national symbols, or bring them into contempt, or disrepute[.]”²⁵ This section seems to offer potential protection to indigenous peoples against cultural misappropriation and provides for the creation of the National American Tribal Insignia Database.²⁶

The Native American Tribal Insignia Database is a collection of insignia that the United States Patent and Trademark Office (USPTO) refers to when determining if new trademark applications attempt to trademark the symbol of a federally or state recognized Native American tribe.²⁷ However, the USPTO specifically

notes that registering an insignia does not provide any affirmative legal rights akin to those of registering a trademark; rather, the purpose of registering an insignia is merely to prevent others from registering a trademark.²⁸

b. *Lanham Act Litigation*

As demonstrated by *Pro-Football, Inc. v. Harjo*, the burden to bring action under § 1052(a) of the Lanham Act rests on Native Americans.²⁹ In *Pro-Football, Inc.*, Native Americans brought a claim under § 1052(a) to cancel six trademarks of the Washington Redskins team, alleging that the marks “may disparage” Native Americans or “bring them into contempt, or disrepute.”³⁰ On cross-motions for summary judgment to review the decision of the Trademark Trial and Appeal Board (TTAB), the court ruled in favor of the defendants, Pro-Football.³¹ The holding requires Native Americans to actively monitor forthcoming trademark applications for any offensive marks, and additionally to bring a claim in a timely fashion against the offensive trademark.³²

c. *Indian Arts and Crafts Act*

In addition to the Lanham Act, the Indian Arts and Crafts Act (IACA), enacted in 1935, is a second potential way indigenous peoples can protect TCEs.³³ The IACA authorizes a federally-recognized Indian tribe to bring an action against a person who “directly or indirectly, offers or displays for sale or sells a good . . . in a manner that falsely suggests it is Indian produced[.]”³⁴ Although the IACA has specific criteria for protection, the IACA does not have the same effect as intellectual property rights and only confers upon Native Americans a cause of action against those who

21. *See id.* at 3 (finding that the majority of Native Hawaiian artists surveyed over the course of a 12-month period favored the use of a cultural trademark program).

22. 15 U.S.C. §§ 1051 et seq. (2006).

23. *See* J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:2 (4th ed.) (expounding on the two goals behind any trademark statute).

24. *See* § 1051(a)(2) (stating that applications must include the date on which the applicant first used the mark in commerce).

25. § 1052(a).

26. *See id.* (suggesting a connection with particular institutions that is false, deceptive, or disparaging is a valid reason for rejection of a trademark application).

27. *See Native American Tribal Insignia Database—FAQs*, USPTO, <http://www.uspto.gov/trademarks/law/tribal/index.jsp>, (last visited July 31, 2010, 1:14 PM) (explaining how federally recognized tribes can submit an insignia to the database and the effect of that submission).

28. *See id.* (noting further that the USPTO does not inquire into the validity of a tribe’s insignia, and accepts the insignia as authentic so long as a federally recognized tribe submits it).

29. *See Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 123 (D.D.C. 2003) (stating that registrant has presumption that trademark is valid and burden shifts to contestant).

30. *See id.* at 99 (bringing evidence of expert testimony and survey results alleging that the term “redskin” was a derogatory, offensive reference to Native Americans).

31. *See id.* at 144 (focusing on the issues of evidence and timing of the claim rather than the appropriateness of Native American imagery used in team names).

32. *See id.* at 145 (stating that a delayed claim makes it difficult for a fact-finder to determine if trademarks are disparaging).

33. *See* 25 U.S.C. § 305a (2010) (declaring the function of the Act is to “promote the economic welfare of the Indian tribes . . . through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship”).

34. *See id.* § 305e(a)(4)(b)-(d) (defining which parties may bring a cause of action).

falsely suggest Native Americans made their products.³⁵ Similarly to the Lanham Act's disparaging mark cause of action, the burden still rests on Native Americans to protect their TCEs.³⁶

In 2000, Senate Report 452 stated that the IACA had not yet had a successful prosecution, and although a decade has passed since that statement, House Report 397, published in 2010, reported the same conclusion.³⁷ Although many claims have been filed, none have progressed past a motion to dismiss.³⁸ However, this may change with the filing of a recent claim in *Native American Arts, Inc. v. Contract Specialties, Inc.*³⁹ Plaintiff Native American Arts, Inc. alleged that defendant Contract Specialties, Inc. violated IACA by selling goods in a manner that falsely suggested these products are authentic Indian-made goods.⁴⁰ The court denied the defendant's motion to dismiss, and the final outcome of NAA's claim, as based on the merits, is pending.⁴¹



35. See *id.* (requiring that the product must be Indian-made, produced after 1935, and the producer of the Indian product must be a resident in the United States and including only civil causes of action); Protection of Products of Indian Art and Craftsmanship, 68 Fed. Reg. 35,164, 35,169 (June 12, 2003) (to be codified at 25 C.F.R. pt. 309) (defining "made by an Indian" as "that an Indian has provided the artistic or craft work labor necessary to implement an artistic design through a substantial transformation of materials to product the art or craft work").

36. See § 305e(d) (requiring either the Attorney General, an Indian tribe, an Indian, or an Indian arts and crafts organizations to bring a claim).

37. See S. REP. NO. 106-452, at 3 (2000); see also H.R. REP. NO. 111-397, at 3 (2010) (expanding the IACA criminal actions and sanctions in response to the lack of current successful claims).

38. See H.R. REP. NO. 111-397, at 2 (estimating that although "very few cases relating to the sale of counterfeit Indian goods are investigated each year[,] almost seventy-five percent of the merchandise sold as authentic is not).

39. See *Native Am. Arts, Inc. v. Contract Specialties, Inc.*, 754 F. Supp. 2d 368, at 369 (D.R.I. 2010) (noting this is the first IACA case in the First District, and one of the few to survive a motion to dismiss).

40. See *id.* at 368 (commenting that NAA has filed between ninety and 120 claims since Congress amended the IACA in 2000, allowing Indian arts and crafts organizations to bring claims).

41. See *id.* at 373 (ruling that IACA did not violate the first amendment because IACA does not restrict artistic work, rather it regulates the way such art is marketed and that IACA passes rational basis review).

2. State Trademark Law and Alternative Solutions

The Alaska Silver Hand Program is a state trademark law⁴² which uses identification seals to certify authentic Alaskan Native Art.⁴³ The Alaska Silver Hand Program is only available to Native Alaskans who are part of a federally or state recognized village or tribe, and living within the state of Alaska.⁴⁴ The program issues a two-year permit for the use of the identification seal, and the permit can be renewed indefinitely.⁴⁵

An alternative model for intellectual property protection at the local level is the example of the Gee's Bend Quilters of Gee's Bend, Alabama.⁴⁶ The Quilters

of Gee's Bend found a solution for protecting their TCEs through a relationship with the Tinwood Alliance, an Atlanta-based non-profit organization dedicated to promoting vernacular art.⁴⁷ Tinwood Alliance contracted with the Gee's Bend Quilters for the intellectual property rights to all their quilts made prior to 1984, and then began displaying the quilts in museums across the country.⁴⁸ A licensing program controls the rights to the quilts and has led to the use of the Gee's Bend aesthetic in all kinds of

42. ALASKA STAT. § 45.65.010(a) (West 2010).

43. See tit. 3, § 58.020(a)-(b); see also ALASKA STATE COUNCIL ON THE ARTS, *Time Line Silver Hand Permit Program and Related Events*, <http://www.eed.state.ak.us/aksca/pdf/SilverHandProgramHistory.pdf> (Jan. 28, 2010) [hereinafter *Time Line Silver Hand*] (tracking the history of the program, beginning around 1972, with the first uses of the Silver Hand trademark).

44. See § 45.65.010(a) (stating that only those who meet these requirements may affix the identification seal to original Alaska Native art or handicrafts).

45. See tit. 3, § 58.020(d) (placing no explicit limit on the number of times a permit may be renewed).

46. See generally Victoria F. Phillips, *Commodification, Intellectual Property and the Quilters of Gee's Bend*, 15 AM. U. J. GENDER SOC. POL'Y & L. 359 (2007) (arguing that the story of the Gee's Bend quilters can contribute to current debates regarding commodification and intellectual property laws).

47. See *id.* at 365-66 (recounting that the partnership was spearheaded by the owner of Tinwood Alliance, William Arnett, after he was fascinated by the quilts from a photo in a book).

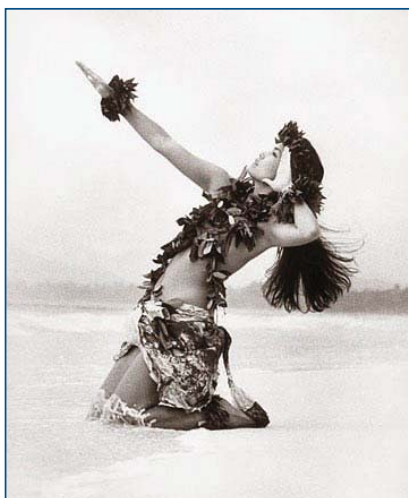
48. See *id.* at 366 (telling how the success of the quilts in museum exhibitions sparked spin-off projects based on the quilts including music, documentary films, and books).

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homewares.⁴⁹ With the help of Tinwood Alliance, the Quilters of Gee's Bend have formed a collective that is owned, operated and run by the Gee's Bend women.⁵⁰ In addition to helping the Quilters form a collective to produce the quilts, Tinwood Alliance pays a royalty to the community of Gee's Bend on all licensed uses for the quilts made before 1984.⁵¹

C. The Legal Context in Hawaii

The following subsections outline the current legal context of Hawaiian state law with respect to Indigenous intellectual property rights, as well as attempts by Hawaiians to change federal law with respect to such rights.



Photograph entitled "Makanani" by Kim Taylor Reece, showing a traditional hula pose.

1. Recent Case Law

Currently, Hawaiian state law does not offer much protection to Native Hawaiians. In fact, recent case law suggests the opposite.⁵² In *Reece v. Island Treasures Art Gallery, Inc.*, a non-native photographer brought a copyright infringement case against a Native Hawaiian artist.⁵³ Reece was a professional photographer who

49. *See id.* at 367 (listing products based on the quilts, and approved through licenses, including bedding, pillows, and pet-proof rugs).

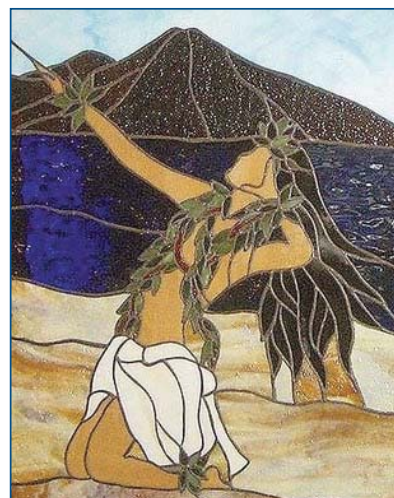
50. *See id.* at 368 (noting that the Gee's Bend collective serves as the only source of the quilts currently made by the women).

51. *See id.* at 366 (explaining that Tinwood Ventures purchased the rights to all quilts made prior to 1984).

52. *See* *Reece v. Island Treasures Art Gallery, Inc.* 468 F. Supp. 2d 1197 (D.Haw. 2006) (ruling on narrow issues of copyright infringement rather than addressing misappropriation of a Native Hawaiian cultural art).

53. *See id.*; Danielle M. Conway, *Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples' Rights, Identity, and Resources*, 15 TEX. WESLEYAN

had taken a famous photograph entitled "Makanani," which was an image of a hula dancer kneeling on a beach in a traditional pose.⁵⁴ Reece first published the image in 1988 as a poster and then broadened the image's distribution, including use on greeting cards and as picture frame inserts in Wal-Mart and Kmart stores.⁵⁵ Reece brought a copyright action against the native artist who created the allegedly infringing stained glass artwork "Nohe" as well as the art gallery displaying the work.⁵⁶ The sacred nature of hula in Native Hawaiian culture is best demonstrated by the expert testimony presented at trial, in which Mapuana De Silva stated, "[h]ula is not just the images, the motions, and the feet. It is the whole culture – the



*Stained-glass portrait in dispute in *Reece v. Island Treasures Art Gallery*. Created by Marylee Leialoha Colucci.*

people, the places, stories, and names given to all those things[.]”⁵⁷ The court failed to recognize that the

L. REV. 207, 245 (2009) (proposing that the Native Hawaiian context demonstrates that legal pluralism is needed to protect traditional culture).

54. *See id.*, 468 F. Supp. 2d at 1200 (depicting a hula dancer performing the hula kahiko tradition, an ancient style of hula in which all the movements are standard).

55. *See id.* at 1200, 1204 (citing the widespread visibility of the photograph as evidence that the defendant had reasonable opportunity to view it, an important factor in determining copyright infringement).

56. *See id.* at 1200 (describing the work as a stained glass depiction, containing over 200 pieces of glass, including a far greater variety in color than Reece's sepia tone photograph).

57. *See* Decl. of Mapuana De Silva at ¶¶ 15, 20, 27, *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197 (D.Hawai'i 2006) (No. 06CV00489), 2007 WL 6344621 (remarking that not only is it impossible to have a hula "pose" because of the fluid nature of hula movements, but that it is repugnant to suggest that an individual can claim ownership over a hula movement).

cultural art of hula belongs to Native Hawaiians or recognize that no other judicial remedies are available to Native Hawaiians to protect their cultural art; rather, the court ruled on the narrow issue of protectable elements within the photograph.⁵⁸

2. Proposed Legislation: The Akaka Bill

The low-level of protection currently available to Native Hawaiians for TCEs is largely because Native Hawaiians do not qualify for federal tribal recognition, and therefore do not have access to the same programs that Native Americans do.⁵⁹ Daniel K. Akaka, United States Senator for Hawaii, introduced the Native Hawaiian Government Reorganization Act in 2009, often referred to as the Akaka bill, which never made it out of the Senate in the last congressional session.⁶⁰ The Act would have allowed Native Hawaiians the same federally-recognized tribal status as Native Americans.⁶¹ Despite wide support, the bill faced opposition in the Senate.⁶² The Akaka bill was reintroduced on March 30, 2011, as was a companion bill in the House of Representatives.⁶³ This session of Congress has been

58. See *Reece*, 468 F. Supp. 2d at 1207 (ruling that protectable elements of the photograph included lighting, camera angle, and perspective, and that when these elements are isolated it is clear that the “Nohe” stained glass artwork did not infringe on Reece’s copyright); see also Conway, *supra* note 53, at 245 (pointing out that the court “could have provided a more meaningful analysis of the copyright infringement dispute launched by a non-Native Hawaiian copyright holder against a Native Hawaiian artist who herself was raised and trained in the cultural art of hula, a traditional dance that . . . communicates the identity of Native Hawaiians.”).

59. See STUDY, *supra* note 18, at 33 (noting that federal law requires a native group to be “continuously organized and governed under a quasi-sovereign entity” in order to be recognized as a tribal entity).

60. See Native Hawaiian Government Reorganization Act, H.R. 2314, S. 1011, 111th Cong. (2010) (placing the bill on the Senate calendar for this session); see also *Daniel Kahikina Akaka, U.S. Senator of Hawaii: Native Hawaiian Federal Recognition*, <http://akaka.senate.gov/issue-native-hawaiian-federal-recognition.cfm> [hereinafter *Akaka, 111th Congressional Session*] (last visited Jan. 25, 2011) (detailing the purpose, content, and status of the bill).

61. See *Akaka, 111th Congressional Session*, *supra* note 60 (correcting false accusations by assuring that the bill would not allow Native Hawaiians to secede from the United States, allow private lands to be taken, or authorize gaming in Hawaii).

62. See *Akaka Speaks on Senate Floor, Reaffirming his Commitment to the Native Hawaiian Government Reorganization Act*, <http://akaka.senate.gov/pressreleases.cfm?method=releases.view&cid=717cdf0e-c354-4019-a1d4-d223c7f5e747> (Dec. 22, 2010) (stating that the bill is supported by Indigenous leaders and communities across the United States, including American Indians, Native Alaskans, and the American Bar Association, which has written a statement affirming the Constitutional basis for the bill).

63. *Daniel Kahikina Akaka, U.S. Senator of Hawaii: Native Hawaiian Federal Recognition*, <http://akaka.senate.gov/issue-native-hawaiian-federal-recognition.cfm> [hereinafter *Akaka, 112th Congressional Session*] (last visited Oct. 16, 2011).

more favorable to the bill and on April 7, 2011, the Akaka bill was ordered to be reported out of the Senate Committee on Indian Affairs, favorably and without amendment; however, the Senate must still vote on the bill.⁶⁴

D. The Current Legal Context of Indigenous Intellectual Property Rights Globally

There is a wide array of international models for establishing indigenous intellectual property rights. However, when considering the Native Hawaiian context, it is best to draw upon sui generis models.⁶⁵ Models that attempt to protect TCEs within existing intellectual property regimes are inappropriate for several reasons.⁶⁶ Existing intellectual property protection, particularly trademark law, is designed to protect the sign or symbol as it interacts with the marketplace.⁶⁷ This presents two problems for indigenous expressions. First, protecting a sign or symbol does not address that often with TCEs, the underlying knowledge or cultural values are in need of protection.⁶⁸ Second, traditional cultural expressions are either forced into the category of signs and symbols used in commerce, or faced with non-protection.⁶⁹ For the foregoing reasons, the following sui generis models provide the best answers to borrow or learn from for the Native Hawaiian context.

64. *Id.*

65. See generally *Legislative Texts on the Protection of Traditional Cultural Expressions*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) (Jan. 3, 2011), <http://www.wipo.int/tk/en/laws/folklore.html> (defining sui generis as “special laws and measures which specifically address the protection of traditional cultural expressions/expressions of folklore” as opposed to working protection into existing laws).

66. See Danielle Conway-Jones, *Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Commodification of Culture* 48 How. L.J. 737, 739 (2005) (asserting that Native Hawaiians will not benefit from intellectual property laws that promote the commodification of culture).

67. See Susy Frankel, *Trademarks and traditional knowledge and cultural intellectual property*, in *TRADEMARK LAW AND THEORY* 433, 445 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008) (pointing out the TRIPS Agreement requires that trademarks must be “capable of distinguishing the goods or services of one undertaking from those other undertakings[.]” and further noting other inherent goals of trademark law include enhancing competition and reducing consumer search costs).

68. See *id.* at 445 (arguing that it is only an inadvertent side-effect of the symbol protection that the underlying cultural values are protected from misrepresentation by third parties).

69. See *id.* (additionally noting that the use of a trademark in commerce must often be maintained or the trademark owner will lose the registration for non-use of the symbol).

THE NEW HAWAIIAN MODEL

1. *The SPC Framework and Guidelines*

The Secretariat of the Pacific Community (SPC) published Guidelines (SPC Guidelines) and a Framework (SPC Framework) in 2002 to assist Pacific Island countries and territories seeking to establish legal protection for TCEs.⁷⁰ The SPC Guidelines provide a step-by-step guide for any group seeking intellectual property protection by posing both policy and legal questions for consideration.⁷¹ The SPC Framework provides a model law for protection of traditional knowledge and expressions of culture that countries can adopt or from which they can borrow when creating their own protection regime.⁷² The SPC Guidelines and SPC Framework are tailored for small island countries and territories with relatively homogenous traditional cultures.⁷³

2. *The Panama Model*

Another example of a sui generis law from which Native Hawaiians can borrow is Panama Law No. 20, enacted in 2000, and corresponding Executive Decree No. 12, enacted in 2001 (Panama model).⁷⁴ The Panama model stands out from other sui generis models because it focuses exclusively on protection of TCEs that are capable of commercial use.⁷⁵

70. See REGIONAL FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE, SECRETARIAT OF THE PACIFIC COMMUNITY Background Page (2002), http://www.wipo.int/export/sites/www/tk/en/laws/pdf/spc_framework.pdf [hereinafter SPC FRAMEWORK] (collaborating to create the framework with the United Nations Educational, Scientific and Cultural Organization (UNESCO), Forum Pacific Island member countries and territories, and the Council of Pacific Arts).

71. See GUIDELINES FOR DEVELOPING NATIONAL LEGISLATION FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE BASED ON THE PACIFIC MODEL LAW 2002, SECRETARIAT OF THE PACIFIC COMMUNITY 14 (2006), <http://www.wipo.int/wipolex/en/details.jsp?id=6712> [hereinafter SPC GUIDELINES] (listing questions to consider including: what the subject matter of protection should be, who the beneficiaries of such protection are, how should rights be formalized and managed, and what processes should be used for dispute resolution).

72. See SPC FRAMEWORK, *supra* note 70, at background page (recognizing that the model law is merely a starting point from which countries should customize elements in accordance with their own experiences, and further, that the model law is meant to provide only national protection).

73. See *id.* (explicitly stating that the SPC Framework and Guidelines were developed to assist Pacific Island countries and territories).

74. See Act No. 20, *Gaceta Oficial*, June 26, 2000, <http://www.wipo.int/wipolex/en/details.jsp?id=3400> (naming the act the Special System for the Collective Intellectual Property Rights of Indigenous Peoples); Executive Decree No. 12, Ministry of Trade and Industries, Mar. 20, 2001, <http://www.wipo.int/wipolex/en/details.jsp?id=3397> (regulating Act No. 20 of Jun. 26, 2000).

75. See Act No. 20 at art. 1 (planning to protect TCEs suitable for commercial use via a registration system designed to

3. *The New Zealand Toi Iho Program*

The toi iho cultural trademark program of New Zealand has become a model for many other countries seeking indigenous intellectual property protection.⁷⁶ The toi iho program uses trademarks to certify artwork that is of high quality and expresses traditional Māori culture.⁷⁷ The program has the support of well-known Māori master artists, and their public support of the program, as well as their knowledge of Māori art, is crucial in setting The toi iho program's high standards of quality.⁷⁸

III. ANALYSIS

Ideas from existing models for protecting indigenous intellectual property rights should be borrowed in a way that creates a tailor-made solution that addresses the unique needs of Native Hawaiians. The demands of Native Hawaiians for self-determination in intellectual property rights are similar to those echoed throughout the world by other indigenous peoples.⁷⁹ Because they share numerous goals with other indigenous groups fighting for intellectual property rights, Native Hawaiians should borrow from these other models.⁸⁰

promote and market the TCEs); see also COMPARATIVE TABLE ON SUI GENERIS LAWS ON TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE, WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) 3 (Jan. 3, 2011), http://www.wipo.int/export/sites/www/tk/en/laws/pdf/suigeneris_folklore.pdf [hereinafter WIPO COMPARATIVE TABLE].

76. See STUDY, *supra* note 18, at 30 (describing the Māori Toi Iho program as the best model for a Native Hawaiian cultural trademark program).

77. See *Te Puia—Treasuring Māori Arts and Crafts*, NEWZEALAND.COM (last visited Oct. 30, 2011), http://www.newzealand.com/travel/media/features/maori-culture/maori-culture_te-puia-maori-arts-crafts_feature.cfm (establishing that the trademark is used to “promote and sell authentic, quality Māori arts and crafts” as well as to “authenticate exhibitions and performances of Māori arts”).

78. See STUDY, *supra* note 18, at 28-29 (arguing that participation of these master artists was crucial to obtain national and Māori “buy-in” for the program).

79. See PAOKALANI DECLARATION, *supra* note 12, at 2 (supporting the statements made in the Kari-Oca Declaration, Indigenous Peoples' Earth Charter, and Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, among others).

80. See STUDY, *supra* note 18, at 26-33 (analyzing existing solutions to determine which are most relevant to the Native Hawaiian context); see also MATAATUA DECLARATION ON CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES, FIRST INTERNATIONAL CONFERENCE ON THE CULTURAL & INTELLECTUAL PROPERTY REGIMES OF INDIGENOUS PEOPLES 2 (June 12-18, 1993), available at http://www.wipo.int/tk/en/databases/creative_heritage/indigenous/link0002.html (stating that indigenous peoples of the world have a “commonality of experiences relating to the exploitation of their cultural and intellectual property” and the right to self-determination and exclusive ownership of their TCEs).

In addition to sharing goals with indigenous peoples internationally, Native Hawaiians also share goals with Native Americans in the United States, and should borrow from the intellectual property protection given to Native Americans.⁸¹ Native Hawaiians and Native Americans share the identical goal of safeguarding their culture and communities through preserving and protecting their TCEs, and therefore Native Hawaiians can gain much by borrowing from the current solutions proposed for the Native American context.⁸²

There is no one-size-fits-all solution to protecting indigenous intellectual property rights. However, the shared goals of self-determination and protection of traditional culture necessitates that Native Hawaiians borrow from existing models, both within and outside of the United States, to create a new model that works specifically for the Hawaiian context.

A. Current International Solutions Do Not Address the Specific Needs of the Native Hawaiian Context

Examining current sui generis models that other countries have enacted provides strategies and ideas that Native Hawaiians should apply to their situation. However, as demonstrated by the following subsections, none of the current international solutions should be applied without some modifications to the Native Hawaiian context.⁸³

1. *The SPC Framework Will Only Work in Smaller, Non-Diverse Populations Where a Coherent Cultural Community Exists*

The SPC Framework allows for flexibility in legal ownership by providing for individual or communal ownership of TCEs, and looks to the group or clan's customary law and practices to determine who is entrusted with these ownership rights.⁸⁴ The SPC Framework creates a new set of "traditional cultural rights," giving traditional owners control over the uses

81. See S. REP. NO. 106-452, at *2 (2000) (describing the TCEs of Native Americans as "an extension of their heart and soul," expressing a spiritual, intangible nature to these TCEs, echoing the way Native Hawaiians describe their TCEs).

82. See *id.* at *1-2 (reporting that of the more than \$1 billion in revenue for Indian-made goods, \$400-500 million of the demand is being met by inauthentic and imitation products, demonstrating the detrimental financial effects of inauthentic goods).

83. See generally *Legislative Texts on the Protection of Traditional Cultural Expressions (TCEs)*, *supra* note 65 (listing a full and comparative list of sui generis laws).

84. See SPC FRAMEWORK, *supra* note 70, at 4 (noting further that "the customary use of traditional knowledge or expressions of culture does not give rise to civil or criminal liability").

of traditional knowledge or expressions of culture.⁸⁵ It offers an incredibly high level of legal protection for TCEs by creating rights that last indefinitely and by requiring prior informed consent from the traditional owners before third-party use is permitted.⁸⁶ Unfortunately, the SPC Framework is only able to offer such high levels of protection in exchange for relatively little flexibility as to the type of community to which the rights can apply.⁸⁷ Therefore, it is likely to work only in the smaller island nations for which it was initially developed, where traditional owners are more easily identified and a more coherent cultural community exists.⁸⁸

2. *The Panama Model's Market-Driven Focus and Restriction to Communal Ownership Does Not Provide Enough Flexibility for The Native Hawaiian Context*

The Panama model provides another example of sui generis protection that could be useful to Native Hawaiians.⁸⁹ It aims to offer protection of TCEs that are capable of commercial use by implementing a system to register, promote, and market the rights.⁹⁰ This distinct emphasis on the ability of the TCEs to be capable of commercial use differentiates the Panama model from other models.⁹¹ However, the market-focused nature of the Panama model does not provide protection to those TCEs which are not meant, or which the artists do not want, to be

85. See *id.* at 5 (defining traditional cultural rights as exclusive control over publishing, reproducing, performing or displaying, recording, photographing, or translating any traditional knowledge or expressions of culture).

86. See *id.* at 6-8 (explaining that a prospective user must either get prior and informed consent from traditional owner or ask the Cultural Authority, which utilizes a public application process in which traditional owners are given an opportunity to object to third-party use).

87. See SPC GUIDELINES, *supra* note 71, at 1-2 (acknowledging that the Guidelines are based on the needs of Pacific Island communities, and that other countries may have different ideological standpoints and cultural assumptions).

88. See STUDY, *supra* note 18, at 26 (arguing that the more intact a cultural community has remained, the more likely the SPC Framework will work, unlike communities that have become diverse through colonization and democratic rule such as Hawaii).

89. See Act 20, GACETA OFICIAL (Jun. 26, 2000), available at <http://www.wipo.int/wipolex/en/details.jsp?id=3400>; Executive Decree No. 12, Ministry of Trade and Industries (Mar. 20, 2001), available at <http://www.wipo.int/wipolex/en/details.jsp?id=3397>.

90. See Act 20 at art. 1 (stating that this registration and promotion system aims to guarantee social justice for indigenous cultures).

91. See WIPO COMPARATIVE TABLE, *supra* note 75, at 5-7 (listing the additional requirements of the Panama model: must be based upon tradition, must fit within the classification system established by Article 3 of the Decree, and must be "collective").

used in commerce, as is often the case among Native Hawaiians.⁹² The Panama model confers rights similar to other models: the right of exclusion, the right to use in commercialization and reproduction, and the right to prevent third-party usage.⁹³ However, the Panama model lacks flexibility in ownership of the rights by only allowing for collective ownership, ruling out protection for individual artists.⁹⁴ Allowing only for communal ownership does not provide the flexibility that individual artists seeking protection for their TCEs need, as is the case in Hawaii.⁹⁵ The Panama model, in which the collective indigenous community functions as if it were a single owner, does not offer protection to smaller collectives of artists or individual artists.⁹⁶

B. Current National Solutions Fail to Offer Ideas to Native Hawaiians

The potential legal solutions present seemingly promising solutions to Native Hawaiians in their pursuit of TCE protection. Unfortunately, none of these federal programs are available to Native Hawaiians because Native Hawaiians do not qualify as a federally recognized tribe.⁹⁷ Native Hawaiians are not listed under the 564 tribal entities that are federally recognized and eligible to receive funding and services from the Bureau of Indian Affairs.⁹⁸ The Akaka bill seeks to address this inequality; however, even if the Akaka bill passes, none of the federally-funded options provide workable solutions for the Native

Hawaiian context.⁹⁹ Rather, it is the state trademark program from Alaska which offers the best example of indigenous intellectual property rights protection to Native Hawaii.¹⁰⁰ United States federal law, including the Lanham Act, the Native American Insignia Database, and the IACA, will not work for the Native Hawaiian context.

1. Current Federal Statutes and Programs Place Too Much of a Burden on the Indigenous Population to Protect Traditional Cultural Expressions

The following subsections identify the shortcomings in current federal statutes and programs for protecting TCEs, concluding that current United States federal law places too high a burden on Indigenous populations to protect their own TCEs.

a. The Lanham Act is Inadequate Because Its Commercial Focus Does Not Address the Specific Needs of Native Hawaiians

The Lanham Act requires that a trademark be used in commerce to qualify for registration.¹⁰¹ Emphasizing only commercial use of a trademark does not address the Native Hawaiian's desire to have a specifically cultural trademark, with a dual focus of protecting TCEs in commerce and also preserving traditional Native Hawaiian culture.¹⁰² Additionally, the Lanham Act provides no answer to the issue of communal ownership.¹⁰³ Further, the Act places a heavy burden on Native Americans to defend their TCEs, which is demonstrated by the real-world operation of both the Native American Tribal Insignia Database and section 1052(a), the disparaging mark section, of the Lanham Act.¹⁰⁴

92. See Decl. of Mapuana De Silva at ¶¶ 18, 19 *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197 (D.Hawaii 2006) (No. 06CV00489), 2007 WL 6344621 (remarking that hula is not meant to be recorded or photographed for teaching purposes, that hula is meant to be passed down orally).

93. See *Act 20* at arts. 2, 15, 20 (explaining that the authority to grant third-party usage rests exclusively with the indigenous peoples).

94. See Executive Decree No. 12 at arts. 5-6 (making no mention of the potential for individual as well as communal ownership).

95. See *STUDY, supra* note 18, at 12-16 (surveying individual artists about their intellectual property needs).

96. See *Act 20* at art. 16 (explaining that general congresses, or traditional authorities, of a community are treated as the owner of the rights and the congress creates rules as a single unit regarding regulation of the rights).

97. See *STUDY, supra* note 18, at 33 (explaining that, unlike other states, which can recognize state tribes, Hawaii does not have state tribal recognition powers, because it is not within the continental United States).

98. See *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 75 Fed. Reg. 60,810 (Oct. 1, 2010), available at <http://www.bia.gov/idc/groups/xraca/documents/text/idc011463.pdf> (listing a separate section that includes native entities within the state of Alaska eligible to receive services from the U.S. Bureau of Indian Affairs).

99. See *STUDY, supra* note 18, at 17 (pointing out the problems that Native American have had with over-reliance on federal government programs).

100. See *ALASKA ADMIN. CODE* tit. 3, § 58.020 (2010) (outlining the basic components of the Alaska Silver Hand program under state trademark law).

101. See 15 U.S.C § 1051(a)(2) (2010) (requiring the applicant include the date of first use of the mark in commerce and the goods in connection with which the mark is used, in addition to a drawing of the mark).

102. See *STUDY, supra* note 18, at 9 (expressing that a cultural trademark program would provide public recognition of master Native Hawaiian artists and therefore preserve cultural traditions by encouraging teaching and mentoring of new generations of Native Hawaiian artists).

103. See § 1051(a) (referring only to applicants in terms of a singular "person" or "owner" of the trademark).

104. See *Native American Tribal Insignia Database—FAQs, supra* note 27 (requiring that Native Americans arrange to have their insignia submitted to the database).

i. The Native American Tribal Insignia Database is Insufficient Because the Database Confers No Legal Rights Akin to Intellectual Property Rights

The Native American Tribal Insignia Database is a passive stance to protection of indigenous culture on the part of the federal government. First, the Native American Tribal Insignia Database places the burden for protection on Native Americans by requiring Native Americans to register their tribal insignia with the government.¹⁰⁵ Second and more importantly, the Database confers no legal rights to the registration of an insignia.¹⁰⁶ It explicitly states that registration does not provide any positive legal rights, such as the right to bring an infringement claim or to exclusive use of the insignia, as would be the rights under a trademark registration.¹⁰⁷

ii. The IACA is Inadequate to Address the Needs of Native Hawaiians Because it Only Creates a False Attribution Cause of Action that Native Hawaiians Do Not Qualify to Use

The IACA is not applicable to Native Hawaiians, but would also not be a good source from which to borrow concepts for protecting TCEs because the IACA only addresses inauthentic marketing of goods claiming to be Indian-made. It attempts to address a hole in the Lanham Act for Native Americans' ability to protect their TCEs by offering a cause of action for false attribution.¹⁰⁸ However, the right to bring a false attribution claim only gives a cause of action against people who falsely attribute their work to a source, and does not grant separate affirmative rights to the TCE in question.¹⁰⁹ In contrast, intellectual property law offers the right to exclusive use and the right to bring a claim for infringement, which the

IACA does not.¹¹⁰ The IACA does not stop a third party from copying the design of a Native American and then selling it, so long as it is not labeled in any way that would indicate that it is "Indian-made."¹¹¹ In addition to not addressing the limited rights the IACA confers on Native Americans, it also does not address the main concern of Senate Report 452: mass-productions of Indian-imitation products undercutting the legitimate, authentic Indian-made market.¹¹² The IACA is only a regulation on the labeling of products, an issue often brought up in the IACA suits.¹¹³ The complete absence of any successful prosecutions under IACA demonstrates that the legislation has been an unsuccessful solution for Native Americans, and therefore not a solution from which Native Hawaiians should borrow.¹¹⁴ The recent case of *Native American Arts, Inc. v. Contract Specialties, Inc.*, may offer some new potential for Native Americans implementing the IACA to protect their TCEs, but the limited rights and singular cause of action available under the IACA will not meet the needs of Native Hawaiians.¹¹⁵

b. The Lanham Act Litigation Demonstrates That the Indigenous Populations Have Not Been Able to Use the Disparaging Mark Cause of Action as a Means to Protect Traditional Cultural Expressions

Although the text of section 1052(a) of the Lanham Act seems to offer promise to indigenous peoples, the way courts have applied the section as seen in *Pro-Football, Inc.*, operates as a kind of passive aid on the part of the federal government.¹¹⁶ In *Pro-*

105. See *id.* (listing the following requirements to registration: a written request, depiction of the insignia at or near the center of 8.5x11 paper, the name and address of the tribe for correspondence purposes, a copy of the tribal resolution adopting the depiction as the official insignia, and a signed statement by an official with authority to bind the tribe).

106. See *id.* (stating explicitly the database is merely a tool to aid the USPTO examiners in evaluating new trademark applications).

107. Compare *id.* (stating that registration with database does not confer any positive legal rights), with 15 U.S.C. § 1114 (2010) (listing the private causes of action available to an owner of a registered trademark against third-party infringement, as well as available remedies).

108. See 25 U.S.C. § 305e (2010) (explaining what parties may bring a cause of action, the availability and limits on damages, and what a party must establish to prevail in a cause of action).

109. See § 305e (granting no affirmative rights to contesting parties).

110. Compare 15 U.S.C. § 1114 (2010) (listing causes of action available to an owner of a registered trademark against third-party infringement), with § 305e(b) (allowing only an action to be brought against a person who sells a product and "falsely suggests it is Indian produced").

111. See § 305e(b) (listing no other available causes of actions).

112. See S. REP. NO. 106-452, at *2 (2000) (arguing that mass-production of imitation arts and crafts at a fraction of the cost has required traditional Indian artists to either reduce their prices and profit margin, or retire).

113. See *Native American Arts, Inc. v. Contract Specialties, Inc.*, 754 F. Supp. 2d 386, at 388 (D. Rhode Island 2010) (describing the IACA as a truth-in-advertising statute aimed at preventing counterfeit products).

114. See S. REP. NO. 106-452, at *3 (stating there has never been a successful civil or criminal suit under the IACA); see also H.R. REP. NO. 111-397, at 1 (2010) (describing that the continually low amount of cases actually investigated under IACA prompted Congress to implement amendments to the Act).

115. See *Native American Arts, Inc.*, 754 F. Supp. 2d, at 387 (denying defendant's motion to dismiss, allowing case to proceed forward on the merits).

116. See *Pro-Football, Inc. v. Harjo* 284 F. Supp. 2d 96, 99 (D.C. 2003) (avoiding the public policy implications of the case

Football, Inc., the defendant Native Americans lost on cross-motions for summary judgment for two reasons.¹¹⁷ First, the court questioned whether the aggregate number of Native Americans would find the Washington Redskins' trademarks offensive or disparaging.¹¹⁸ The court reasoned that although the term "redskins" is a derogatory term to refer to Native Americans, that mere use of the word by a professional football team in various trademarks does not mean that the trademarks are offensive.¹¹⁹ The court's logic separates the everyday use of a disparaging word from the use of the same disparaging word in a registered trademark, even though the latter would seem to be more offensive since registration is an implicit endorsement of the disparaging word by the federal government.¹²⁰

The second reason the Native Americans lost the motion for summary judgment was because of the doctrine of laches, the delayed bringing of a claim.¹²¹ The court incorrectly infers that because Native Americans did not bring a claim when the marks were first registered in the 1960s, Native Americans must not have been truly offended by the trademarks, ignoring that perhaps Native Americans lacked the legal and financial resources to bring such claims.¹²² This ruling suggests that even if a mark is deemed offensive or disparaging, a court will not order cancellation of the trademarks if the claim is brought several years after the mark is used in commerce.¹²³ The court's emphasis on

and focusing on the narrow issue of reviewing the TTAB's decision and the laches defense).

117. *See id.* at 145 (stating that although this is "undoubtedly a 'test case' that seeks to use federal trademark litigation to obtain social goals. . . . By waiting so long to exercise their rights, Defendants make it difficult for any fact-finder to affirmatively state that in 1967 the trademarks were disparaging.").

118. *See id.* at 121, 122 (pointing to the fact that the survey on which TTAB based its opinion used surveyed only twelve states and this could not be representative of the majority opinion of Native Americans).

119. *See id.* at 133 (deciding that the derogatory connotation of the word does not extend to the use of the term "redskins" in connection with Pro-Football's entertainment services).

120. *See id.* at 124 (explaining the meaning of the word "disparaging" takes the ordinary meaning, which is that the mark may "dishonor by comparison with what is inferior, slight, deprecate, degrade, or affect or injure by unjust comparison").

121. *See id.* at 140 (pointing out that plaintiffs had known about the Redskins trademarks for at least a decade each and had not brought a claim in a timely fashion); *see also id.* at 136 (stating that in trademark, a laches defense is used to argue that the plaintiff "fumbled away its trademark rights through inattention").

122. *See id.* at 140 (stating that the court's finding of laches correlates with the court's findings that the TTAB's decision did not meet evidentiary standards).

123. *See id.* at 139 (reasoning that it would be both inequitable and undermine the place of trademark in the free market economy to allow Pro-Football's trademarks to be subject to

timing of a claim requires Native Americans to monitor forthcoming applications to ensure that offensive or disparaging marks are not registered.¹²⁴ Overall, the burden the Lanham Act places on indigenous peoples to bring a claim is too high for such people to successfully pursue a claim.

c. *The Gee's Bend Solution is a Small-Scale Solution Entirely Dependent on Private Funding and Will Not Work for the Large and Diverse Native Hawaiian Population*

The Gee's Bend Quilters solution demonstrates how a tailor-made program for protection of TCEs, specific to the needs of the group involved, works well, although it is an inappropriate model for Native Hawaiians.¹²⁵ The success of the Gee's Bend solution is dependent on the fact that a private actor had both a genuine interest in promoting the quilters' cultural arts and the financial ability to do so.¹²⁶ The solution works in a very small-scale, close-knit community, and depends entirely on private funding.¹²⁷ This small-scale, privately-funded solution is not a realistic possibility for an entire population of native peoples, such as Native Hawaii, encompassing numerous art forms and numerous island communities.¹²⁸

Native Hawaiians should not borrow from the currently available national solutions because they are either not narrowly tailored enough to the address the needs of Native Hawaiians, or Native Hawaiians do not have legal access to the solutions.

attack at any point after registration).

124. *See id.* at 122 (demonstrating that the burden of proving that a mark is disparaging rests on the party seeking cancellation).

125. *See Phillips, supra* note 46, at 376 (noting how the partnership with Tinwood Alliance has allowed an ongoing dialogue of the needs of the quilters and their community).

126. *See id.* at 365-66 (describing the relationship between the well-connected art scholar, William Arnett, and the Gee's Bend Quilters as collaborative in nature, and based on Arnett's genuine desire to promote the quilts as forms of artistic expression, rather than exploit the quilts through cheap imitations).

127. *See id.* at 359, 370 (explaining how the profits of the Tinwood Ventures licensing activities are reinvested in the Gee's Bend Community, a remote bend on the Alabama River).

128. *See STUDY, supra* note 18, at 26 (describing the Native Hawaiian community as diverse and spread out over the islands of Hawaii, requiring a solution with more flexibility).

C. The Toi Iho Program in New Zealand and the Alaska Silver Hand Program Contain Elements that Best Address the Unique Needs of Native Hawaiians Seeking a Cultural Trademark Program

The following subsections identify workable elements from The toi iho program of New Zealand and the Alaska Silver Hand Program that would be beneficial to the Native Hawaiian context.

1. *The Toi Iho Program in New Zealand is the Best International Model for Native Hawaiians to Borrow From for Their Own Model*

Native Hawaiians should borrow heavily from New Zealand's toi iho program because The toi iho program allows for indigenous self-determination, flexible ownership options, and art standards based on quality of art rather than ethnicity of the artist.¹²⁹ The program sets itself apart from other models through its emphasis on a high-level quality of artwork.¹³⁰ The two goals articulated by the program are to "maintain the integrity of the Māori art culture" and "promote Māori art and artists nationally and internationally."¹³¹ The dual goals of the Māori program protect all forms of traditional cultural expression by protecting those forms of art that enter the marketplace, as well as preserving those forms of art that are not meant for commercial uses.¹³² The program is able to maintain its high standards of quality by requiring artists to register annually to continue to use The toi iho trademark.¹³³

There are three main reasons The toi iho program

129. See THE ARTS COUNCIL OF NEW ZEALAND TOI AOTEAROA, RULES GOVERNING THE USE BY ARTISTS OF THE TOI IHO MĀORI MADE MARK, 1 (Nov. 4, 2009), <http://www.toiio.com/Apply/Rules/tabid/273/Default.aspx> [hereinafter MĀORI MADE RULES] (describing the fundamentals of The toi iho program). But see TOI IHO (Nov. 14, 2011), <http://toiio.blogspot.com/> (The New Zealand government divested funding of the toi iho program in 2009 and the program is currently in a state of transition to a new, Māori-controlled entity: TIKI- Toi iho Kaitiaki Incorporated Trust. TIKI is currently rebuilding the database of Māori artists and expects to have an update website in the near future.).

130. See STUDY, *supra* note 18, at 29 (comparing The toi iho program to less successful models in which certification is based on ethnicity of the artist).

131. MĀORI MADE RULES, *supra* note 129, at 1 (administering these two goals will include the maintenance of a registry of artists currently using any toi iho marks); see also RULES GOVERNING THE USE BY ARTISTS OF THE TOI IHO MAINLY MĀORI MARK, THE ARTS COUNCIL OF NEW ZEALAND TOI AOTEAROA (Nov. 4, 2009), <http://www.toiio.com/Apply/Rules/tabid/273/Default.aspx>.

132. See MĀORI MADE RULES, *supra* note 129, at 2 (protecting artwork in electronic form or other media, as well as performance art in either live, electronic form, or other media).

133. See *id.* at 1 (requiring that the artist(s) continue to create quality works of authentic Māori expression).

has achieved greater success than other models and should be used as a guide for the Native Hawaiian context. First, the program is based on the right of indigenous peoples' to self-determination.¹³⁴ The rules of The toi iho program name the Te Waka Toi as the guardians of the marks, and that this indigenous council will administer the rules of the program.¹³⁵ The implementation and administration of The toi iho program acknowledges that indigenous peoples often need government funding to get such a program started, but also that indigenous people have the right to run the program autonomously in accordance with their cultural traditions.¹³⁶

The second reason for the success of The toi iho program is the program's focus on the quality of artwork it certifies, rather than the ethnicity of the artist.¹³⁷ The focus on quality rather than ethnicity keeps the mark from becoming diluted through usage on common or low-quality products and prevents the "potentially divisive system of registering persons as being of Māori descent or blood quantum."¹³⁸

Finally, The toi iho program's flexibility addresses the modern reality that artists often collaborate and create art in collective form.¹³⁹ The toi iho program contains three different trademarks to ensure flexibility in ownership: Māori Made, Mainly Māori, and Māori Co-Production.¹⁴⁰ The variety of cultural trademarks available to artists acknowledges that Māori artists may collaborate with non-Māoris and still create works of authentic Māori expression, thereby allowing

134. See *id.* (stating that the indigenous peoples are the guardians of the trademarks and responsible for administration of the rules and the program).

135. See *id.*; see generally THE ARTS COUNCIL OF NEW ZEALAND TOI AOTEAROA Act 1994 No 19 §§ 13, 14(1)(e)-(i) (2009) http://www.legislation.govt.nz/act/public/1994/0019/latest/whole.html?search=ts_act_Education_resel (creating the Te Waka Toi and stating they are responsible for administering all aspects of funding and guidelines for Māori arts).

136. See STUDY, *supra* note 18, at 28 (describing the amount of funding given to Māori arts programs but also that Māoris are given leading positions in the arts programs).

137. See MĀORI MADE RULES, *supra* note 129, at 4 (requiring that the artwork be a work of high quality in addition to proving Māori descent of artist).

138. See STUDY, *supra* note 18, at 29 (arguing that programs based on ethnicity of the artist are unsuccessful because poor-quality works dilute the distinctiveness of a cultural trademark).

139. See *id.* at 31 (arguing that the success of The toi iho program is aided by the fact that it does not isolate itself within the Māori community, but enlists support from the broader non-native public including art vendors, purchasers, and non-native artists).

140. See *toi iho > About us*, *supra* note 77 (reserving Māori made for artists of proven Māori descent, Mainly Māori for use by a group of artists, most of whom are of Māori descent, and Māori Co-Production for use by collaborations between Māori and non-Māori artists).

performance art, and other group-oriented cultural arts, protection within the program.¹⁴¹

The *toi iho* program allows the Māori the right to self-determination because the Māori set the standards of quality.¹⁴² The *toi iho* program also allows for great flexibility through the use of several trademarks to protect all varieties of indigenous cultural expressions.¹⁴³ Finally, the program's focus on quality, rather than ethnicity, addresses the reality of diversity and fluidity in cultural heritage.

Given the popularity and success of the program, it came as a shock to many Māori when, in 2009, the New Zealand government cut funding for The *toi iho* program, stating that the program had not delivered the financial benefits to indigenous artists it had originally hoped for.¹⁴⁴ The New Zealand government stated that many Māori artists were receiving high recognition and sales for their artwork without the need of The *toi iho* trademark.¹⁴⁵ Despite the official statement by the New Zealand government that The *toi iho* program was not successful, Māori artists were outraged at the government's decision to cut funding and demanded the government transfer the program to Transition Toi Iho Foundation (TTIF), a group comprised of *toi iho* artists.¹⁴⁶ The overwhelming response from Māori after the government's announcement, and subsequent reclamation of the program, demonstrates that this program not only plays a critical role in the preservation and protection of indigenous art in New Zealand, but is also a source of cultural pride and

identity for the Māori.¹⁴⁷

2. *The Alaska Silver Hand Program is the Best Current National Solution and Contains Key Structural Elements to Borrow When Developing a Solution for the Native Hawaiian Context*

The Alaska Silver Hand Program is a state trademark law that issues renewable identification seals to Native Alaskan artists to verify that their works of art are authentic, original, and made in the state of Alaska, and is the most appropriate national model for Native Hawaiians to borrow from.¹⁴⁸ The benefit of utilizing a state trademark program is that garnering state support for such a program is easier than attempting to get federal support.¹⁴⁹ The Alaska model is structured well, but the ways in which these structural aspects have been implemented present some problems.

The structural aspects of the Alaska model that stand out include the way the program is funded, the use of a state arts council to administer the program, and the mandatory renewal process for use of the identification seals.¹⁵⁰ The program is self-funded with application fees to offset costs, which addresses the difficulty of gaining sufficient government funding.¹⁵¹ However, starting a brand new program, as would be the case in Hawaii, would require initial government funding before the program could self-fund through application fees.¹⁵² The use of a state arts council to administer the program provides implicit government support and keeps the use of the trademarks centralized and regulated.¹⁵³ The Alaska State Council on the

141. See MĀORI MADE RULES, *supra* note 129, at 2 (defining performance as any artistic presentation performed live, or reproduced in electronic form or other media).

142. See *id.* at 4 (granting and renewing of licenses to use the marks requires approval by a panel of persons with special knowledge of Māori artforms).

143. See *toi iho > About us*, *supra* note 77 (providing for four different trademarks to choose from, depending on the applicant).

144. See *Creative New Zealand statement on disinvestment in toi iho*, CREATIVENZ.GOV.T.NZ, <http://www.creativenz.govt.nz/en/news/creative-new-zealand-statement-on-toi-iho> (last visited Nov. 14, 2011) (stating that while the ideas behind The *toi iho* brand have remained important, the program has not met the goals of increasing sale of Māori art).

145. See *id.* (explaining that for many artists, "the quality of their work speaks for itself" and that artists have not needed the use of the trademark to the extent originally thought).

146. See *Māori Reclaim Toi Iho Trade Mark*, VOXY.CO.NZ (Dec. 15, 2009), <http://www.voxy.co.nz/national/maori-reclaim-toi-iho-trade-mark/5/33358> (reporting that outrage followed the announcement that New Zealand government planned to "disinvest" in The *toi iho* program); see also *Creative NZ agrees to transfer Māori Trademark – toi iho*, THE BIG IDEA – TE ARIA NUI (May 27, 2010), <http://www.thebigidea.co.nz/news/industry-news/2010/may/70176-creative-nz-agrees-to-transfer-maori-trademark-toi-iho> (describing the formalities of the transfer from the New Zealand government to the TTIF and expecting the transition to be complete by June 2010).

147. See *Māori Reclaim Toi Iho Trade Mark*, *supra* note 146 (disagreeing with the government's assessment that the program has been unsuccessful, reporting that artists feel that the program has been very successful and a source of pride and cultural identity).

148. See *Alaska State Council on the Arts Silver Hand Program & Permit Application*, ALASKA STATE COUNCIL ON THE ARTS (AKASCA), <http://www.eed.state.ak.us/aksca/Forms/individuals/SH.pdf> (last visited Jan. 25, 2011) (explaining the operation of the program and instructions for a permit).

149. See *STUDY*, *supra* note 18, at 11 (determining that trying to get federal support for a program to benefit Native Hawaiians would require too much time and too many resources).

150. See ALASKA ADMIN. CODE tit. 3, § 58.020(a)-(d) (2010) (stating the requirements for certification under the program).

151. See *Time Line Silver Hand*, *supra* note 43 (implementing a small twenty dollar fee for a two year permit to solve funding issues).

152. See *Panel Discussions*, KEOMAILANI HANAPI FOUNDATION, http://www.khfnativehawaiianarts.com/PDF/2004_Panel_Hawaiian_Art_Transcript.pdf (pointing out that government funding has allowed cultural trademark programs in other countries to get off the ground).

153. See *Alaska State Council on the Arts Silver Hand Program & Permit Application*, *supra* note 148 (providing all arts education, development, and services under one state agency ensures that there

Arts is the agency that runs the Silver Hand program and issues permits to use the identification seals, and the governor appoints members of this council.¹⁵⁴ However, there are no requirements that Native Alaskan artists sit on the council, and consequently, those issuing identification seals for native artwork are not necessarily knowledgeable about Native Alaskan art.¹⁵⁵ Additionally, although the mandatory renewal process seems to keep the use of identification seals current, the renewal period does not require artists to demonstrate that they are still making authentic works of art.¹⁵⁶ The permits are also based on membership in an Alaskan tribe rather than the quality of the work, which could lead to dilution of the Silver Hand trademark.¹⁵⁷

D. Combining Elements from Both the Alaska Model and the New Zealand Model Creates a Custom Solution to Address the Unique Needs of the Native Hawaiian Context

Native Hawaiians favor the use of a cultural trademark program in order to protect and promote the Native Hawaiian cultural arts, and the best solution will consider the unique needs of the Native Hawaiian context and create a tailor made cultural trademark program.¹⁵⁸ This article proposes a solution entitled the New Hawaiian model, which combines elements of both the Alaska model and the New Zealand model. Combining elements of these two successful programs will give Native Hawaiians a critical tool to use in protecting and preserving the Native Hawaiian cultural arts.¹⁵⁹ The New Hawaiian model is a state trademark

program which emphasizes self-determination for Native Hawaiians through the use of a Native Hawaiian arts council, focuses on quality of art over ethnicity to prevent dilution of the trademark, and allows flexibility in ownership and in trademark use.

The New Hawaiian model would fit under Hawaiian state trademark law, much like the Alaska Silver Hand program.¹⁶⁰ As the Alaska model demonstrates, it is easier to initiate a cultural trademark program in the state legislature where the needs of local indigenous peoples are better understood and supported.¹⁶¹ Native Hawaiians understand how difficult it is to have federal legislators consider the unique circumstances of Native Hawaiians.¹⁶² The Office of Hawaiian Affairs already supports the plight of Native Hawaiian artists, and funding would be more readily available from the Hawaiian state government than the federal government.¹⁶³ Despite this initial government funding, the New Hawaiian model, like the New Zealand model, would be administered by an indigenous peoples' arts council after the initial phases of the program.¹⁶⁴ Native Hawaiian artists advocate limited government involvement in the administration and regulation of a cultural trademark program but also understand that government funding is a necessary tool to initiate the program.¹⁶⁵ Providing for administration and regulation of the program by a Native Hawaiian arts council would ensure that Native Hawaiians are assured the right of self-determination over the protection and preservation of traditional culture.¹⁶⁶

The New Hawaiian model borrows from both the Alaska model and the New Zealand model regarding the requirements for certification to use the cultural

is no confusion for artists and consumers).

154. See *AKASCA – Mission and History*, AKASCA, <http://www.eed.state.ak.us/aksca/about.htm> (last visited Jan. 25, 2011) (defining the council's missions to foster "the development of the arts for all Alaskans through education, partnerships, grants and services.").

155. See *AKASCA – Council Members*, AKASCA, <http://www.eed.state.ak.us/aksca/about3.htm> (last visited Jan. 25, 2011) (stating that the council is made up of eleven volunteer members all serving staggered three-year terms).

156. See ALASKA ADMIN. CODE tit. 3, § 58.020(d) (2010) (listing the only criteria for renewal as submission of a renewal application within thirty days of the end of the two-year permit period).

157. See tit. 3, § 58.020(c)(1)-(3) (requiring only that applicant is certified Alaskan Native and living in the state of Alaska); see also *STUDY*, *supra* note 17, at 29 (using the Australia model as an example of how programs based on ethnicity rather than quality will fail).

158. See *STUDY*, *supra* note 18, at 43 (confirming that the Native Hawaiian community favors implementation of a cultural trademark program in Hawaii).

159. See *id.* at 40 (arguing that the similar worldviews of Native Hawaiians and the Māori facilitates borrowing from the Māori example).

160. See ALASKA STAT. § 45.65.010(a) (2010) (protecting certain articles created or crafted in the state by Alaska Native persons, but does not preempt federal trademark law).

161. See *STUDY*, *supra* note 18, at 11 (arguing that the difficulty with getting support for the Akaka bill demonstrates that national support would be tough to get).

162. See *id.* at 11, 15 (citing that a majority of artists surveyed supported the idea of state funding of the cultural trademark program).

163. See *id.* at 5 (demonstrating state legislature support for the program supports through formal adoption of Paoakalani Declaration and funding of OHA study).

164. See *id.* at 40 (supporting transfer of administration of the cultural trademark program to an organization to be entitled the "Native Hawaiian Cultural Arts Board").

165. See *id.* at 11; see also *Panel Discussions*, *supra* note 152, at 11 (speaking about money, panelist Meleanna Meyer stated "it's a necessary tool to allow us to do what we want to do").

166. See *STUDY*, *supra* note 18, at 40 (arguing that a Native Hawaiian cultural arts council will be able to have powers far beyond implementation of the trademark program to include protecting heritage treasures, developing and recognizing emerging artists, promoting native arts education, and developing new markets).

trademark.¹⁶⁷ It would require artists to be residents of Hawaii to receive permission to use the trademark, similar to the residency requirements under the Alaska model.¹⁶⁸ Imitation products sold in the Hawaiian tourism industry have a profoundly detrimental effect on the authentic Native Hawaiian arts market, and requiring that those who use the cultural trademark be residents of Hawaii provides an extra layer of protection against imported fakes in the tourism market.¹⁶⁹ The Study stated that a cultural trademark program should identify native artworks that reflect a “cultural truth,” demonstrating that, for Native Hawaiians, it is more important for an artist to understand the Native Hawaiian cultural experience and traditional arts than prove pure blood quantum.¹⁷⁰ This emphasis on an artist’s understanding of cultural truth combined with the proven success of the New Zealand model demonstrates that certification should be based on works of quality, rather than ethnicity.¹⁷¹ Borrowing from the New Zealand model, the standards of quality should be determined by a set of well-known and well-respected master artists.¹⁷² Distinguishing works of art based on quality rather than the ethnicity of the artist is particularly important for any program implemented under United States law, where a program that discriminated based on ethnicity would likely be deemed unconstitutional.¹⁷³

The New Hawaiian model would borrow the flexibility of ownership of the New Zealand model and the periodic renewal requirements from the Alaska

model. It would employ several trademarks to allow artists to collaborate with non-Native artists.¹⁷⁴ The success of the New Zealand program has largely been because the program gives native artists the choice to collaborate with non-native artists and still create works of traditional cultural expression.¹⁷⁵ The New Hawaiian model borrows the two-year renewal requirement from the Alaska program, and would require artists to provide examples of quality works they have recently produced in order to qualify for re-certification.¹⁷⁶ Periodic renewal of the trademarks would ensure that artists are preserving the high-quality standards of the trademark and still producing works of authentic cultural expression to represent Native Hawaiian cultural arts.

IV. CONCLUSION

The New Hawaiian model is an important step in the preservation and protection of Native Hawaiian culture, and would give Native Hawaiian artists a way to distinguish their authentic works of art from cheaper imitations in marketplace while simultaneously elevating the status of Native Hawaiian cultural arts.¹⁷⁷ However, the New Hawaiian solution does not provide answers to every example of cultural misappropriation; it would not stop Disney from copyrighting mele inoa, and it would not prevent Dodge from misusing Hawaiian words in car names. However, given the conclusion in the Study, the New Hawaiian model presents a uniquely tailored solution that would align with the Native Hawaiian artists’ desire to implement a cultural trademark.¹⁷⁸ Although a cultural trademark program is only an incremental step toward protecting native culture, it is an important step nonetheless.¹⁷⁹ Furthermore, placing administration of the program in the hands of Native Hawaiians will give them the power and resources to expand into other areas

167. See generally STUDY, *supra* note 18, at 41 (stating that the trademark should be a newly created and visually distinctive design that embodies the cultural essence of Native Hawaiians).

168. See *Alaska State Council on the Arts Silver Hand Program & Permit Application*, *supra* note 148 (requiring proof of residency through current photo I.D.).

169. See STUDY, *supra* note 18, at 38-39 (suggesting the cultural trademark’s use in tourism industry will help weed out fakes and imitations while simultaneously emphasizing authentic expressions of native culture with tourists).

170. See *id.* at 8 (commenting on the perspective of Native Hawaiians that “they do not think of the race or racial content of a person as defining the person’s standing in Native Hawaiian culture. It is a matrix of genealogy, kinship to indigenous families, cultural lineage, and the source(s) of a person’s cultural knowledge rather than race that Native Hawaiian artists believe is important”).

171. See *id.* at 29 (arguing that focusing on quality rather than ethnicity is more consistent and effective for achieving the goal of distinguishing imitation artwork from authentic artwork).

172. See MĀORI MADE RULES, *supra* note 129, at 4 (establishing that the panel in charge of artistic standards will be made up of “persons who Creative New Zealand considers have specialist knowledge of Māori artforms”).

173. See STUDY, *supra* note 18, at 34-35 (pointing out that it is not illegal for a trademark to be associated with a particular ethnic or racial group but that in order to receive any government funding, there can be no racial discrimination).

174. See *toi iho > About us*, *supra* note 77 (listing the variety of marks available and the purpose behind each mark).

175. See *id.* (allowing retailers and gallery owners to use a mark to show that they are an official vendor of authentic art).

176. See MĀORI MADE RULES, *supra* note 129, at 4 (requiring artist to demonstrate continual artistry upon submitting renewal application).

177. See STUDY, *supra* note 18, at 29 (noting that The *toi iho* program has not only been able to distinguish authenticity in the marketplace but also establish a reputation for excellence in the arts).

178. See *id.* at 3 (concluding that a cultural trademark program would greatly benefit Native Hawaiian cultural arts).

179. See *id.* at 17 (referring to the statement of Maui Solomon, a Māori lawyer invited to the cultural trademark conference because of his involvement with The *toi iho* program, that a cultural trademark program is an important step in building the “cultural capacity” of indigenous peoples to demand and shape their intellectual property rights).

in need of solutions, such as native arts education and protection of traditional knowledge from bioprospecting.¹⁸⁰ The New Hawaiian solution is an incremental step in what should be a larger dialogue in Hawaii of creating customized solutions to protect indigenous intellectual property rights and preserve Native Hawaiian culture.

180. *See id.* at 17, 18 (describing a cultural trademark program as producing a “ripple effect” that would empower Native Hawaiians “to develop the capability to exercise sovereignty over culture”).