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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

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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2. See R. Hokule'i 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).

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.5 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. 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. 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. 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. 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 trademarks.

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 impostors 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, PAOA KALANI DECLARATION 2 (Oct. 3-5, 2003), http://kaaapono.com/ Pa o kalaniDeclaration05.pdf [hereinafter PAOA KALANI DECLARATION] (asserting that the creative cultural expressions of Native Hawaiians are misappropriated and commercialized in violation of their rights as cultural owners).

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

14. See WORLD INTELLIGENT 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/th/en/wipo_grrkfc_17/wipo_grrkfc_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 P AOA KALANI 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, INDEPENDENT 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).


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.24

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 suggest a connection with persons, living or dead institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.26 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).
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).
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).
similarly to the Lanham Act’s disparaging mark cause of action, the burden still rests on Native Americans to protect their TCEs. 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. Although many claims have been filed, none have progressed past a motion to dismiss. However, this may change with the filing of a recent claim in *Native American Arts, Inc. v. Contract Specialties, Inc.* 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. The court denied the defendant’s motion to dismiss, and the final outcome of NAA’s claim, as based on the merits, is pending.

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 produce 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).


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).

42. Alaska Stat. § 45.65.010(a) (West 2010).


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).


47. See id. at 356-66 (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 (selling how the success of the quilts in museum exhibitions sparked spin-off projects based on the quilts including music, documentary films, and books).
homewares. 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. 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.

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.

1. Recent Case Law

Currently, Hawaiian state law does not offer much protection to Native Hawaiians. In fact, recent case law suggests the opposite. In *Reece v. Island Treasures Art Gallery, Inc.*, a non-native photographer brought a copyright infringement case against a Native Hawaiian artist. Reece was a professional photographer who had taken a famous photograph entitled “Makanani,” which was an image of a hula dancer kneeling on a beach in a traditional pose. 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. 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. 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 people, the places, stories, and names given to all those things[].” The court failed to recognize that

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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).
54. See Reece, 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 6346621 (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 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


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.

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).


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=releaseview&crid=717cd9fe-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).


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/expressions.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),
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. 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. 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. The SPC Guidelines and SPC Framework are tailored for small island countries and territories with relatively homogenous traditional cultures.

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). The Panama model stands out from other sui generis models because it focuses exclusively on protection of TCEs that are capable of commercial use.

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. The Toi Iho program uses trademarks to certify artwork that is of high quality and expresses traditional Māori culture. 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.

### 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. Because they share numerous goals with other indigenous groups fighting for intellectual property rights, Native Hawaiians should borrow from these other models.

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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).


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


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. 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.

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.

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. The SPC Framework creates a new set of “traditional cultural rights,” giving traditional owners control over the uses of traditional knowledge or expressions of culture. 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. 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. 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.

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. It aims to offer protection of TCEs that are capable of commercial use by implementing a system to register, promote, and market the rights. This distinct emphasis on the ability of the TCEs to be capable of commercial use differentiates the Panama model from other models. 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 available for commercial use.

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 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).
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. 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. However, the Panama model lacks flexibility in ownership of the rights by only allowing for collective ownership, ruling out protection for individual artists. 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. 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.

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. 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. 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. Rather, it is the state trademark program from Alaska which offers the best example of indigenous intellectual property rights protection to Native Hawaii. 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. 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. Additionally, the Lanham Act provides no answer to the issue of communal ownership. 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.

92. See Decl. of Mapuana De Silva at ¶¶ 18, 19 Reece v. Island Treasures Art Gallery, Inc., 468 F. Supp. 2d 1197 (D. Hawai‘i 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).


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

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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).


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).


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).

**THE NEW HAWAIIAN MODEL**

*Football, Inc.*, the defendant Native Americans lost on cross-motions for summary judgment for two reasons. First, the court questioned whether the aggregate number of Native Americans would find the Washington Redskins’ trademarks offensive or disparaging. 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. 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.

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. 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. 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. The court’s emphasis 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 the timing of a claim).

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 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 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’ self-determination.134 The rules of The toi iho program name the Te Wāka 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

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.toiho.com/Apply/Rules/tabid/273/Default.aspx [hereinafter Māori Made Rules] (describing the fundamentals of The toi iho program). But see Toi Ito (Nov. 14, 2011), http://toihiro.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.toiho.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).
The toi iho program allows the Māori the right to self-determination because the Māori set the standards of quality. The toi iho program also allows for great flexibility through the use of several trademarks to protect all varieties of indigenous cultural expressions. 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. 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. 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. 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.

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. 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. 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. The program is self-funded with application fees to offset costs, which addresses the difficulty of gaining sufficient government funding. 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. 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.

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 arts forms).

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.GOVT.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).


147. See Māori Reclain 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 price and cultural identity).


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).


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 Discussion, Keomailani Hanapi Foundation, http://www.kfhawaiianartarts.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 trademark.\(^{167}\)

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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 though 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).
The New Hawaiian Model

trademark.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{177} However, the New Hawaiian solution does not provide answers to every example of cultural misappropriation; it would not stop Disney from copyrighting mele 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.\textsuperscript{178} Although a cultural trademark program is only an incremental step toward protecting native culture, it is an important step nonetheless.\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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.).

\textsuperscript{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).

\textsuperscript{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").

\textsuperscript{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).

\textsuperscript{172} See Mäori 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 Mäori artforms").

\textsuperscript{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).

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

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

\textsuperscript{176} See Mäori Made Rules, supra note 129, at 4 (requiring artist to demonstrate continual artistry upon submitting renewal application).

\textsuperscript{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).

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

\textsuperscript{179} See id. at 17 (referring to the statement of Maui Solomon, a Mäori 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. 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”).