

NATIVE HAWAIIAN CULTURAL TRADEMARK STUDY

FINDINGS & RECOMMENDATIONS

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**Conducted by Hale Ku'ai Study Group
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INTRODUCTION

The lifeblood of the Native Hawaiian people is our cultural arts, traditions, and expressions. From original settlement over a thousand years ago through the time of contact with Western explorers in the late 1700s, the culture of the people of Hawai'i evolved into a high, some say classical, culture. Hawaiians practiced sustainable land use and resource management through irrigated farming, land cultivation, fishpond building, and near-shore fishing conservation. Hawaiians established elaborate social orderings of *ali'i* chieftainship and commoner relations and ritual and healing practices that sustained a population numbering an estimated half million people at the time of Western contact. In the expressive cultural arts, we developed highly refined art forms including weaving, carving, tattooing, adornments, clothing, musical instruments, canoe making, weaponry, medicines and healing arts.

The cultural arts of Native Hawaiians practiced today are a vital and authentic expression of a dynamic culture. The practice of customary arts, such as *lei* making, *kapa* making, wood, bone and stone carving, musical instruments, body adornments, and ocean navigation in sailing canoes, is visible in daily practices, ceremonies, and sacred rites. Many native artists today are actively rediscovering and reviving ancient traditions. A new generation of native artists is engaged in revitalization of our culture through their artwork.

As is the case for many indigenous peoples throughout the world, Native Hawaiians have, at times, seemed to be in danger of losing these unique cultural practices through assimilation into the dominant Westernized society. Native Hawaiian cultural arts are being lost through limited access to raw materials, dilution by a flood of imitations in the marketplace, and stereotyped overuse or culturally inappropriate use in public environments. Native artists struggle to maintain authentic cultural practices and preserve the viability of supporting themselves as artists against the pressures of mass tourism and related commoditization of all things "Hawaiian" to the millions of visitors who come to Hawai'i every year. The once-famed "gathering place" Waikiki has become a concrete mile of shops and vendors selling nearly anything tourists will buy. Commoditized pricing dictates that goods

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be made (and sold) at the lowest possible cost. As a result, the vast bulk of products sold to tourists as “Hawaiian” are machine-made of synthetic materials or of low-cost foreign labor and materials.

Purchasers who cannot distinguish (or appreciate the difference) between a hand-made necklace of unique shells gathered from the shores of Ni'ihau having a value of thousands of dollars from one made of look-alike plastic molded shells strung together in a copycat style for \$50 will almost inevitably buy the \$50 imitation. This type of uninformed purchasing by visitors (and even local residents) repeated every day for practically every item of the cultural arts across the entire tourism industry results in the devaluing of authentic native artworks and the inability of native artisans making quality products to support ourselves through their art. Most require full-time non-art-related jobs to support themselves and subsidize their art and related cultural arts products.

Studies conducted at the international level of similar problems encountered by native peoples worldwide have identified the use of a cultural trademark as one measure that can be undertaken under existing intellectual property law regimes to protect native cultural arts against misappropriation and degradation. As part of its strategic goals to protect and promote Native Hawaiian cultural arts, the Office of Hawaiian Affairs (OHA), an agency of the State of Hawai'i, provided funding of \$74,300 for this Study to determine the extent to which Native Hawaiian artists would favor the implementation of a cultural trademark program in Hawai'i and under what circumstances.

HOW THE STUDY WAS CONDUCTED

This Study was conducted by the Hale Ku'ai Study Committee, co-chaired by Maile Andrade, Professor of Hawaiian Studies at UH, and Maile Meyer, co-founder of retail stores Native Books / Na Mea Hawai'i. Volunteer legal counsel for the Study were Leighton K. Chong, partner of the law firm of Godbey Griffiths Reiss & Chong, Honolulu, and Danielle Conway-Jones, Professor at UH Law School, and Of Counsel to the law firm of Alston Hunt Floyd & Ing, Honolulu. The Project Coordinator for the Study was Ho`oipo K. Pa, a Native Hawaiian attorney. The Fiscal Sponsor for the

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Study was PA'I Foundation, a qualified 501(c)(3) charitable non-profit organization, with Victoria Holt Takamine, Executive Director.

A listing of brief biographies for the Study participants is appended as Appendix I.

The Study was aided by a concurrent needs assessment survey of Native Hawaiian cultural artisans that was conducted by Vicky Holt Takamine, Executive Director of PA'I Foundation, under a grant from the Ford Foundation. The survey included about 30 questions on artisan demographics, artistic fields, and economic circumstances, and 20 questions on issues concerning the use of a cultural trademark in Hawai'i (see survey questions in Appendix II). Participants in the Study were urged also to respond to the survey, which was available online from the Study's website, www.hawaiiantrademarkstudy.org, as well in print form.

The Study took place over a 12-month period from November 2005 to October 2006. In the first part of the Study, four community meetings to explain what a cultural trademark is and how it might be used by Native Hawaiian artists were held in the four counties of the State, from January to May 2006. Feedback and comments were solicited from those who attended. Each meeting was videotaped for future record. Attendees of the Study's community meetings were urged to complete the needs assessment survey of PA'I Foundation with questions about a cultural trademark program in Hawai'i. Following this research (the artists survey and community meetings), the results were tabulated and assessed, and a State-wide public conference was held to present the findings of the Study and solicit feedback for the next phase of implementing a cultural trademark program in Hawai'i.

NATIVE ARTISTS COMMUNITY MEETINGS

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The Study conducted community meetings from January to May 2006 in each of the four counties of the State for purposes of information-gathering and consensus-building among native artists. The O`ahu County meeting was held on January 14, 2006, at UH Center for Hawaiian Studies, and attended by about 80 persons. The purpose, objectives, and timeline for the Study (see Appendix II) were presented by Maile Andrade, Leighton Chong, and Vicky Holt Takamine. The presentation also included visiting guest speaker Henry Townsend, Chairman of the Indian Arts & Crafts Board, who explained the history and current status of the Federal program under the Indian Arts & Crafts Act (IACA) to protect Native American arts and crafts from fakes by reserving exclusive use of "Indian Made" trademarks to Indian artisans.

The Kaua'i County meeting was conducted on February 22, 2006, at Aloha Center in Lihu'e, and attended by approximately 15 persons. Study speakers included Maile Andrade and Leighton Chong. Sabra Kauka was the Kaua'i liaison who helped organize the meeting, and the audience, though small, was made up of key persons from Kaua'i artisan groups.

The Maui County meeting was conducted on April 8, 2006, at Maui Culture & Arts Center in Kahului, and attended by about 12 persons. Study speakers included Maile Andrade and Leighton Chong. Hokulani Holt-Padilla was the Maui liaison for the meeting, and the audience was attended by key figures from Maui's native arts communities.

The Hawai`i County meeting was conducted on May 20, 2006, at Hawai'i Community College and connected to classroom sites in Kona and Kohala by videoconference, which included about 13 participants. Study speakers were Maile Andrade and Leighton Chong. Noe-Noe Wong Wilson was the Hawai`i Island liaison. Attendees were primarily independent artists of Hawai`i Island.

In the community meetings, Leighton Chong gave a Power Point presentation on "Use of Cultural Trademark to Protect Native Hawaiian Arts", which explained the background, basis, issues, and options for a Native Hawaiian cultural trademark program (printout appended in Appendix III).

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After the presentation, the meetings were opened to feedback and comments from the attendees, which were recorded and edited on CDs. The feedback and comments are summarized as follows:

1. Cultural Knowledge or Race: Most attendees stated the belief that a cultural trademark program should benefit artists of Native Hawaiian descent (*Kanaka Maoli*). Many attendees explained that the lineage of the artist is an important factor in knowing that the artist has been trained or taught within the true cultural environment of Hawai'i such that their work reflects "cultural truth". The lineage of transmission of cultural knowledge and traditions from recognized *kumu* (teachers), *kupuna* (elders), and master artists is considered the most important evidence of authenticity of the cultural expression in a work. The recognized *kumu*, *kupuna*, and master artists are generally of the elder generation(s) and are *Kanaka Maoli*, and most often the students they have taught are *Kanaka Maoli*.

Many respondents expressed the view that non-Hawaiian artists who were *hana'i* (adopted) or married into Hawaiian families and taught by master artists should be included in the same way, since they have been brought into the lineage of transmission of cultural knowledge. This is consistent with how Hawaiians historically have welcomed outsiders into their culture. A substantial portion of *Kanaka Maoli* artists are self-taught by emulating and absorbing the cultural knowledge and methods of master artists of Hawai'i, and believe that their work also reflects the lineage of transmission of cultural knowledge.

The acknowledgement of genealogy and lineage is a distinctive feature of how Native Hawaiians express their relationship to things Hawaiian. Generally, they do not think of the race or racial content (blood quantum) of a person as defining that person's standing in Native Hawaiian culture. It is the 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 in determining whether a person is considered a Native Hawaiian person and a part of Native Hawaiian culture.

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2. Need for Program: Most attendees expressed a strong desire to have a Native Hawaiian cultural trademark program. There was a wide range of views as to how such a program should function, what works should be certified, and what benefits would be realized.

A majority of artists currently producing works for sale in the marketplace expressed a strong desire to have a cultural trademark that would distinguish their work from imitations in the marketplace. However, they also recognized the difficulties of determining which artists would be licensed to use the trademark and the difficulties of enforcing a cultural trademark if outside vendors choose to use deceptive branding such as "Authentic Hawaiian-Style Product".

Differences between fine art forms and traditional crafts were also discussed. Many artists felt that cultural crafts as practiced today reflect deep and artistic expressions of native culture even more than crafts made in pre-Contact times that were primarily for utilitarian purposes were to be valued in the same way as fine art forms. Increasingly shows of native crafts such as the "Life in the Pacific" exhibition at the Honolulu Academy of Arts, the "Kapa" and "Lei Hulu" shows at Bishop Museum, and the Maoli Arts Month exhibits at downtown art galleries in April 2006 are treating crafts as art. The consensus of artists was that the art versus crafts distinction was not valid where crafts are a form of cultural expression rather than production of tools for everyday usage.

Differences between contemporary art forms reflecting cultural content and traditional art forms performed in the traditional way were also discussed. Contemporary artists noted the difficulties of determining which contemporary works reflected sufficient cultural content to be licensed to use the trademark.

Artists of the older generations expressed the view that it was more important to have a cultural trademark program to identify true Hawaiian cultural knowledge to be transmitted to developing artists, to avoid the dilution and loss of knowledge. They also felt that a cultural trademark program would provide public recognition of master artists of Native Hawaiian cultural arts and include programs to promote teaching and mentoring by master artists of upcoming artists.

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3. Authenticity: Most attendees agreed that it was important to emphasize "authenticity" in cultural artworks and products to reinvigorate the vitality of Native Hawaiian culture. "Authenticity" of works made by native artists primarily refers to the lineage of cultural knowledge transmitted to the artist, and the artist's experience, capability, and faithfulness in representing such cultural knowledge in the artwork, which for the most part can be objectively assessed. However, as artists tend to be creative and independent-minded, most were leery about having a cultural arts board judge whether their work is sufficiently "authentic" to receive certification. Judgment by recognized *kumu*, *kupuna*, and master artists might be accepted as valid, but would still be problematic given the many different styles, sources, and ranges of art forms and varieties of content. Acceptance of judging of "authenticity" of works, even by recognized master artists, would be dependent on having clearly articulated and agreed-upon definitions of "authenticity" for judging criteria.

It was felt that it might promote initial acceptance and broaden outreach of a cultural trademark if master artists were recognized first by being granted use of the trademark in acknowledgement of the practice of their art forms at the highest levels. Because master artists are a select group, limiting the use of the trademark to master artists would limit the benefit of the program from a majority of artists. On the other hand, limiting the program only to recognized master artists would promote outside recognition of excellence in Native Hawaiian arts in the long term, which would ultimately benefit all artists by motivating them to pursue ever higher levels of excellence and by increasing the perception of value to outside purchasers and appreciators.

4. Quality: Artists generally agreed that works certified as high expressions of Native Hawaiian culture should be of "high quality". However, the term "quality" is viewed as being predominantly subjective, as it may refer to artistic quality, quality of expression, quality of materials, quality of craftsmanship, etc. Therefore, most artists seemed doubtful that judging criteria for "quality" could be clearly articulated and agreed upon, and that therefore judging the quality of works may be too subjective and at risk for divisiveness.

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5. Certifying Arts Organizations Instead of Artists: Most attendees did not feel comfortable with a cultural trademark program that would certify arts organizations that support native arts because they were not certain how such organizations might use the mark. Many felt uncertain whether native arts organizations would consistently adhere to the policies and standards for "authenticity" and/or "quality" set by a native cultural arts board. Many also felt that using the trademark to certify organizations would not provide any real help to artists selling their works or products in the marketplace. On the other hand, certifying native arts organizations could greatly extend the reach and diversity of the cultural trademark program, and strengthen its credibility to and acceptance by the larger public. It was also noted that certifying native arts or art support organizations can be undertaken as a later stage of implementing a cultural trademark program.

6. Use in Tourism: Most attendees expressed the view that the Hawaiian host culture identifies Hawai'i as a unique tourism destination and that Native Hawaiian culture benefits tourism industries without commensurate benefits flowing back to Native Hawaiian artists and cultural practitioners. Many felt that tourism inevitably results in the misappropriation and degradation of native culture. A few felt that it was inappropriate for native culture to be used at all to promote tourism. These concerns were also reflected in the study of public opinion on "The Impact of Tourism on Native Hawaiians" undertaken by the Native Hawaiian Hospitality Association (see NHHA Study discussed below)

7. State, Federal Support: Most attendees felt it would be better to have State and Federal support for implementing a cultural trademark program. However, many expressed concern that obtaining Federal support for a program benefiting primarily Native Hawaiian artists might take too much time and too many resources to obtain. It may also open the door to litigation against the program by those challenging it as unconstitutional or unlawful race discrimination. It was noted that the defeat of the Akaka Bill has shown how difficult it is to have national policymakers understand and act upon the unique circumstances of Native Hawaiians and diversity of perspectives on their political status and rights. It was also noted that many Native Hawaiians view the history of Federal treatment of Native American Indians as shameful and tragic and do not want the same for Native Hawaiians.

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Many felt that the State of Hawai'i should help Native Hawaiians to protect their culture, but that State involvement would introduce State control and politics into the program and might be counterproductive.

RESULTS OF SURVEY OF NATIVE ARTISTS

To date over 176 respondents have completed the artists needs assessment survey of PAHI Foundation containing questions regarding a cultural trademark program for Hawai'i (see Appendix III). This is a significant representation of the estimated 350 – 400 native artisans in Hawai'i engaged in active practice of their arts, and a significant percentage of the estimated 800 – 900 total native artists with substantial cultural knowledge (including those not in active cultural arts practices)¹. The survey results were summarized statistically and qualitatively in a PowerPoint presentation, entitled "Native Hawaiian Trademark Study Survey Results", prepared by Ka'ano'i Walk (see Appendix IV). These results are briefly outlined below.

Gender (Q3): 51% *kane* (men) and 49% *wahine* (women).

All ethnic categories (Q4) that applied: 93%, included Native Hawaiian; 7%, Pacific Islander; 16%, Japanese; 34%, Chinese; 40%, Caucasian; 3%, Korean; and about 21%, "Other". These responses indicate that most respondent artists identified their ethnicity as Native Hawaiian and at least one other race.

Age range (Q5): 0%, 20 and under; 7%, 20-30; 23%, age 30-40; 20%, 40-50; 34%, 50-60; 13%, 60-70, and 3%, 70 and over. The average age of respondent artists was about 50.

¹ Estimates provided by Maile Meyer in presentation to DBEDT Arts & Film Division, and Economic Momentum Commission to State Legislature, December 2005.

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All fields of cultural arts practices that apply (Q37): painting/drawing (39%), carving (35%), mixed media (33%), fiber arts (32%), graphics art/design (28%), sculpture (27%), photography/digital arts (26%), story-telling (26%), lei making (25%), weaving (21%), and other literary arts (20%). Lesser arts practices included: jewelry making (18%), printmaking (17%), *la`au lapa`au* or herbal healing (12%), ceramics (10%), *lomi lomi* or massage healing (10%), and playwriting (6%). Over half of the respondents (53%) checked "Other". A significant category of "Other" arts practice is *lua* or martial arts, for example. On average, the respondent artists are engaged in 3-4 different kinds of cultural arts practices.

When asked the affect that imitations have had on their ability to sell or promote their arts products at their true value (Q38): 27% respondents said "not at all or hardly at all", 14% said "substantial effect", 18% said "serious effect", 15% said "prevented from selling or promoting at true value", 16% said "none of the above", and 10% had no answer. The answers showed a wide range of views, but 57% said fakes and imitations have had a substantial effect or worse on their ability to sell or promote their arts products at true value.

When asked whether they thought a cultural certification trademark would help them sell or promote their arts products at true value (Q39), 3% said they "distrusted using a cultural trademark", 12% said they "preferred using their own name", 37% said "cultural trademark would help", 15% said "cultural trademark is a necessity", 23% said "none of the above" or "other answer", and 11% did not respond. The answers showed a wide range of views, but 52% said that using a cultural trademark would help or is a necessity to distinguish over fakes and imitations.

When asked whether a cultural certification trademark should only be used for cultural art works made by persons of Native Hawaiian ancestry (Q40), 7% said "yes, because only Native Hawaiians should make cultural art works", 26% said "yes, because only works made by Native Hawaiians would be authentic cultural art works", 14% said "no, because non-natives can also make acceptable cultural art works", 1% said "no, because not all works made by Native Hawaiians would

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be authentic or of good quality", 39% said "none of the above" or "other answer", and 12% did not respond. The answers to the requirement for Native Hawaiian ancestry showed a wide range of views.

When asked whether a cultural trademark should be used to designate 'authentic' cultural art works when certified by a board of Native Hawaiian *kumu* or master artists (Q41), 11% said "yes, because only Native Hawaiian master artists can judge 'authentic' cultural art works", 18% said "yes, because Native Hawaiian master artists can be trusted to certify 'authentic' cultural art works", 14% said "no, because what is 'authentic' is difficult to judge even by a Native Hawaiian board of master artists", 8% said "no, because I don't like the idea of anyone judging whether my work is authentic", 35% said "none of the above" or "other answer", and 14% did not respond. Most respondent artists seemed doubtful about a program in which the authenticity of their cultural art works would need to certified by a board of Native Hawaiian master artists to use the trademark.

When asked whether a cultural trademark should be used to designate 'high quality' cultural art works when certified by a board of Native Hawaiian *kumu* or master artists (Q42), 11% said "yes, because only Native Hawaiian master artists can judge 'quality' art works", 16% said "yes, because Native Hawaiian master artists can be trusted to certify 'quality' cultural art works", 20% said "no, because what is 'quality' work is a matter of personal opinion", 7% said "no, because I don't like the idea of anyone judging the quality of my work", 32% said "none of the above" or "other answer", and 14% did not respond. Again, most respondent artists seemed doubtful about a program in which the quality of their cultural art works would need to be judged by a board of Native Hawaiian master artists to use the trademark.

When asked whether a cultural trademark should be used to designate Native Hawaiian cultural arts organizations rather than the works themselves (Q43), 6% said "yes, because it is more important to certify Native Hawaiian cultural arts organizations", 11% said "yes, because certifying Native Hawaiian cultural arts organizations will help more artists", 24% said "no, because certifying Native Hawaiian cultural arts organizations does not guarantee that the works are 'authentic' or of 'quality'", 7% said "no, because certifying Native Hawaiian cultural arts organizations will not necessarily help

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me sell or promote my work at its true value", 32% said "none of the above" or "other answer", and 14% did not respond. While this was a difficult question to pose, most respondent artists seemed to differ with using a cultural trademark to certify Native Hawaiian cultural arts organizations rather than the works themselves.

When asked whether they thought that protecting and promoting Native Hawaiian cultural arts is an important part of maintaining the uniqueness of the State of Hawai'i as a tourism destination (Q44), 30% of respondents said "yes, because Native Hawaiian culture is the only thing that makes Hawai'i unique", 7% said "yes, because promoting Native Hawaiian culture helps the State economically", 4% said "no, because Native Hawaiian culture is only one part of the melting pot of Hawai'i", 14% said "no, because Native Hawaiian culture should not be used to promote Hawai'i as a tourism destination", 35% said "none of the above" or "other answer", and 10% did not respond. In general, respondent artists seemed ambivalent about promoting Native Hawaiian cultural arts as an important part of the uniqueness of Hawai'i as a tourism destination.

When asked whether they thought that promoting Native Hawaiian cultural arts is an important function for the State and should receive State funding support (Q45), 37% of respondents said "yes, because the State should do more to help Native Hawaiians", 20% said "yes, because promoting Native Hawaiian culture helps the State economically", 2% said "no, because promoting Native Hawaiian culture should only be trusted to Native Hawaiians", 2% said "no, because State taxpayer funds should not be used to help a preferred racial group (Native Hawaiians)", 29% said "none of the above" or "other answer", and 10% did not respond. A majority of respondent artists thought that promoting Native Hawaiian cultural arts should receive State funding support.

When asked whether they thought that the benefits of U.S. cultural arts laws and grant programs should be extended to Native Hawaiian cultural arts (Q46), 34% of respondents said "yes, because the U.S. Government should help Native Hawaiians as they help Native Americans", 40% said "yes, because the U.S. Government should help promote Native Hawaiian cultural arts like other nationally appreciated arts", 5% said "no, because promoting Native Hawaiian culture should only be

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trusted to Native Hawaiians", 6% said "no, because they do not favor the conditions for obtaining Federal recognition for Native Hawaiians", 4% said "none of the above" (18% also gave other answers), and 10% did not respond. A majority of respondent artists thought that promoting Native Hawaiian cultural arts should receive U.S. support.

When asked to indicate which provisions are most important for a cultural certification trademark program in the State of Hawai'i to include, 57% of respondents said the cultural trademark should be used to designate cultural art works made by persons of Native Hawaiian ancestry, 41% said it should be used to designate cultural art works that are authentic or of high quality, 34% said it should be used to certify Native Hawaiian arts support organizations, 44% said it should receive State support, 46% said it should receive Federal support, 16% gave other answers, and 11% gave no answer. Therefore, the survey showed that respondent artists overall favored a cultural trademark program that benefits Native Hawaiian artists, designates the cultural lineage of the artists and their artworks, can also be used to certify Native Hawaiian arts support organizations, and receives State and Federal support only if helpful to the program.

CONFERENCE ON CULTURAL TRADEMARK STUDY

Following the community meetings and artists' survey, the Study Group conducted a Conference on July 29, 2006, to present the preliminary findings of the Study and results of the survey. The Conference was hosted by the Center for Excellence in Native Hawaiian Law, at the William S. Richardson School of Law, University of Hawai'i, and attended by about 105 registrants. The proceedings were videotaped for future record by Hans Peter Jensen, III and Olelo support crew.

In the morning session, opening remarks and introductions were made by Study Chair, Maile Meyer. A video of artists interviews commenting on the Study, produced by Kūnani Nihipali and Hans Peter Jensen, III (see Appendix V), was presented by Ho`oipo Pa, Study Coordinator. A statistical presentation and analysis of survey results to date was given by Ka`ano`i Walk, a UH law

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student retained by the Study. A mid-morning panel of Hokulani Holt-Padilla, Maui, Sabra Kauka, Kaua`i, and Leighton Chong summarized the community meetings with artists conducted by the Study. Hokulani Holt-Padilla expressed the view that a cultural trademark program should be used to identify native artworks that reflect "cultural truth". A video presentation by Mililani Trask (in absentia) discussed pros and cons of a Native Hawaiian cultural trademark program, and was followed by a question and answer period with audience participation.

Discussions of lessons learned in other cultural trademark programs to protect native arts were given by guest speakers Rebecca Tsosie, Executive Director of the Indian Law Program, Arizona State University. Professor Tsosie noted that the Native Hawaiian people are entitled to define themselves, their artforms, and their standards of "authenticity" as they desire, which is part of their right of self-determination as a native people. She noted that there is currently no U.S. domestic law that prevents a native people from exercising sovereignty over their cultural expression, and that international human rights law supports this right of sovereignty. However, making their plan of cultural protection enforceable against others may require working cooperatively with state and federal governments, but Professor Tsosie warned against over-reliance on the federal government, based on the problems Native Americans have had with dependence upon the U.S. legal framework.

Maui Solomon, a Moriori and Maori barrister, observed that enforcement of criminal penalties is always difficult, but that the presence of tough laws and monitoring of the marketplace may have a "stop light" effect of potential violators tending to observe the law to avoid prosecution. He also made the important observation that, for the Maori and potentially for Native Hawaiians too, a cultural trademark program is only an incremental step toward protecting native culture, yet it is an important step in building the "cultural capacity" of native people in the growing field of intellectual property rights.

Leighton Chong noted that "cultural capacity building" through a Native Hawaiian cultural arts board was the real benefit to be attained, beyond administering a cultural trademark program *per se*. Peter Apo expressed the view that the adoption of a cultural trademark program could have a "ripple

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effect" of empowering Native Hawaiians to develop the capability to exercise sovereignty over culture. The existence of a "quasi sovereign entity" acting on behalf of Native Hawaiians has been widely observed by legal commentators as a necessary condition for political and constitutional recognition of Native Hawaiians as a native (indigenous) people.

An afternoon panel of artists Bob Freitas, Imaikalani Kalahahele, Hiko Hanapi, Ipō Nihipali, Kawai Aona-Ueoka, and Noelle Kahanu discussed the artists' views of a Native Hawaiian cultural trademark program. A final panel of speakers including some of the earlier speakers and Peter Apo discussed next steps for dissemination of the Study results and planning for implementing a cultural trademark program in Hawai`i. Concluding remarks were delivered by Manulani Meyer, Professor of Education, University of Hawai`i at Hilo.

NHHA COMMUNITY MEETINGS: IMPACT OF TOURISM ON NATIVE HAWAIIANS

One of the most comprehensive attempts to gauge public opinion on "The Impact of Tourism on Native Hawaiians" was undertaken by the Native Hawaiian Hospitality Association (NHHA), with a major sponsorship from the Office of Hawaiian Affairs. A series of 17 community meetings were held at locations throughout the State from January to April 2006, attended by hundreds of people, primarily Native Hawaiians. The public comments were collated in a Summary Report prepared by the Council for Native Hawaiian Advancement Public Policy Center, and published by NHHA in May 2006. The community meetings were led by facilitators from the Council for Native Hawaiian Advancement, and discussions were organized around six (6) themes that emerged from previous discussions and focus groups:

1. Hawaiian Culture
2. Natural Resources, Environment & Infrastructure
3. Leadership
4. Tourism Marketing & Communications
5. Education & Workforce Development

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6. Business & Product Development

Major concerns were expressed over the misappropriation of Hawaiian culture and its misuse for entertainment value or commoditization. Possible solutions suggested included: a Native Hawaiian rating system that will alert the industry, visitors, and the local community about an establishment's implementation of Hawaiian culture; protecting Hawaiian culture through intellectual property rights; and ensuring that those who present cultural practices are rooted in traditional knowledge and have the proper foundation to engage in such practices.

Major concerns were expressed over self-described cultural practitioners who have not been trained with traditional knowledge holding themselves out as authentic practitioners. A possible solution suggested was enabling cultural masters to "govern" Native Hawaiian cultural practices according to stricter standards.

The problem of media and marketing materials inaccurately portraying Hawaiian culture was identified. Possible solutions included: ensuring that marketing materials represent Hawaiian arts and practices accurately and authentically; and educating visitors to appreciate authentic, quality cultural experiences.

Business & Product Development. Major concerns were expressed over non-Hawaiians misappropriating Hawaiian culture for profit and/or selling non-authentic products, leading to an undervaluing of native products and services. Possible solutions included: providing support to enable *kupuna* to share authentic Hawaiian culture with visitors; designating authentic Hawaiian-made products so that visitors can appreciate the work of native artists; identifying the work of native artists so that works by non-natives cannot be marketed as authentic works; certifying or licensing vendors as offering authentic Native Hawaiian products; and implementing a rating system for visitor industry establishments for presentation of authentic Hawaiian culture to visitors.

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The NHHA Summary Report shows that opinion widely held among Native Hawaiians reflected deep concerns over misappropriation, degradation, and commoditization of Hawaiian culture, specifically cultural products and practices, due to mass marketing of non-authentic products and practices by non-Hawaiian vendors or practitioners. The NHHA survey of opinions across the State indicates that there is community-wide support for the objectives of a cultural trademark program that would benefit Native Hawaiian artists by helping to distinguish their art works and products from fakes and imitations in the marketplace.

INTERNATIONAL BASIS FOR USE OF CULTURAL (CERTIFICATION) TRADEMARK

Due to international concern for protection of surviving expressions of native cultures, traditional cultural expression (acronym "TCE" or "TKE") has been studied at the highest levels by the World Intellectual Property Organization (WIPO) under mandate from the World Convention on Biodiversity of 1992 that was signed by 187 countries including the United States. WIPO is a specialized agency of the United Nations dedicated to developing a balanced and accessible international intellectual property (IP) system that rewards creativity, stimulates innovation and contributes to economic development worldwide while safeguarding the public interest. It studies and recommends international treaty regimes to Member States to promote the protection of IP worldwide through cooperation among states and in collaboration with international organizations.

To specifically address the issues of traditional cultural expressions of indigenous peoples, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the WIPO General Assembly in October 2000 as an international forum for debate and dialogue concerning the interplay between intellectual property (IP), and traditional knowledge, genetic resources, and traditional cultural expressions (folklore). Member States of WIPO participate as members of the Intergovernmental Committee (IGC). Intergovernmental organizations and international and regional non-governmental organizations (NGOs) accredited to WIPO as observers also participate. In addition, ad hoc observers are also able to

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participate in the sessions after having receiving accreditation by the IGC. WIPO has also enabled participation of indigenous and local communities to enhance the work of IGC, beginning with a series of consultations with indigenous and local communities in over 60 locations around the world, and culminating in a comprehensive report on the needs and expectations of traditional knowledge ("TK") holders that still guides WIPO's work. The IGC has specially accredited over 130 observers to participate in its work, the majority representing indigenous and local communities and other TK holders.

Each IGC session begins with a panel session, chaired by an indigenous or local community representative, when representatives from diverse communities explain to the Committee their experiences and concerns regarding TCEs, TK and related native resources. In April 2006, WIPO/IGC held its Ninth Session of Members in Geneva to adopt its currently revised working drafts on TCEs and TK, and to further examine the interplay between the international dimension and national legal systems, and the appropriate relationship with other international instruments and processes. The IGC's work has shown that appropriate protection of TK and TCEs, in accordance with the wishes and interests of their traditional custodians, is a central area for IP law, both in current practice and in policy-making and norm-building. There is broad agreement on the need for appropriate protection of TK and TCEs, including empowerment of traditional holders to make effective use of legal tools, although there is as yet no agreed common position on the formal legal status of the outcome of the IGC process.

The WIPO/IGC 2006 Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore² is a mature draft document of policy objectives and core principles for the protection of TCE/EoFs. Formulated on the basis of extensive discussions within the IGC over eight past sessions, the experience of more than 70 countries and an inter-sessional commentary process, the draft provisions outline possible policy and legal space for protection against misappropriation and misuse of native cultural expressions and help define the legal measures for this

² WIPO/IGC Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore, April 2006, available at http://wipo.int/tk/en/consultations/draft_provisions/pdf/draft-provisions-booklet-tce.pdf.

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protection. Concentrating on the substance and content of protection, they are neutral as to legal status or format and thus can be used as bases for national or regional laws, and international outcomes such as declarations or resolutions, recommendations, model provisions, treaties or other form of international instruments. Even in their various draft forms, these texts have already been used by a number of countries, several regions, and other international organizations as a benchmark for legislation and international policy in this area.

Underlying the IGC's approach to studying the protection of traditional cultural expressions, the Committee has stated:

"[The] protection of TCEs/EoF should not be undertaken for its own sake, as an end in itself, but as a tool for achieving the goals and aspirations of relevant peoples and communities and for promoting national, regional and international policy objectives."³

"This means, in particular, that the protection of TCEs/EoF should recognize and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection measures, address both cultural and economic aspects of development, prevent insulting, derogatory and offensive acts in particular, promote cooperation among communities and not engender competition or conflicts between them, and enable full and effective participation by these communities in the development and implementation of protection systems."⁴

The WIPO/IGC Draft sets forth specific substantive principles to assist with defining the legal essence of protection. Article 1 defines the Subject Matter of Protection, as follows:

"ARTICLE 1:

SUBJECT MATTER OF PROTECTION

(a) "Traditional cultural expressions" or "expressions of folklore" are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof: (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols; (ii) musical expressions, such as songs and instrumental music; (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and (iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery,

³ WIPO/IGC, 2006 Draft, Objectives, p. 11.

⁴ WIPO/IGC, 2006 Draft, General Guiding Principles, page 13.

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terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;

*which are: (aa) the products of creative intellectual activity, including individual and communal creativity; (bb) characteristic of a community's cultural and social identity and cultural heritage; and (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community."*⁵

The recommended Article 1 draws upon the WIPO-UNESCO Model Provisions for National Laws for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 (the Model Provisions, 1982) and the Pacific Islands Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 (the Pacific Model, 2002), as well as existing national copyright laws which provide *sui generis* protection for TCEs/EoF.

TCEs/EoF can be both tangible and intangible and have both tangible and intangible components ("mixed expressions"). Paragraph (a) also makes it clear that oral (non-fixed) expressions would also be protectable, responding to the often oral nature of traditional cultural expression. The suggested provision defines protectable TCEs/EoF as "intellectual creations" and therefore can be considered "intellectual property", including both individual and communal creativity. The provision also requires that the works have some linkage with a community's cultural and social identity and cultural heritage that is "characteristic" of a communal identity and heritage. The term "characteristic" is intended to convey notions of "authenticity" or that the protected expressions are "genuine", "pertain to" or an "attribute of" a particular people or community. Both "community consensus" and "authenticity" are implicit in the requirement that the expressions, or elements of them, must be "characteristic": expressions which become generally recognized as characteristic are, as a rule, authentic expressions, recognized as such by the tacit consensus of the community concerned.

The notion "heritage" is used to denote materials, intangible or tangible, that have been passed down from generation to generation, capturing the inter-generational quality of TCEs/EoF; an expression must be "characteristic" of such heritage to be protected. It is generally considered by

⁵ WIPO/IGC, 2006 Draft, Article 1.

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experts that materials which have been maintained and passed between three, or perhaps two, generations form part of “heritage”. Expressions that may characterize more recently established communities or identities would not be covered.

The WIPO/IGC 2006 Draft also recognized that many expressions of folklore are handed down from generation to generation, orally or by imitation. Over time, individual composers, singers and other creators and performers might call these expressions to mind and re-use, re-arrange and re-contextualize them in a new way. There is, therefore, a dynamic interplay between collective and individual creativity, in which an infinite number of variations of TCEs/EoF may be produced, both communally and individually. The individual, therefore, plays a central role in the development and re-creation of traditional cultural expression, and, therefore, the description of subject matter to be protected under Article I includes expressions made by individuals.

In order to determine what is or what is not a TCE or EoF, it is therefore not directly relevant whether the expression was made collectively or by an individual. Even a contemporary creative expression made by an individual (such as, for example, a film or video or a contemporary interpretation of pre-existing dances and other performances) can be protected as a TCE/EoF, provided it is characteristic of a community’s cultural and social identity and heritage and was made by the individual having the right or responsibility to do so in accordance with the customary law and practices of that community. In so far as the *beneficiaries of protection* are concerned, however, the primary focus of these draft provisions is on communal beneficiaries rather than on individuals. Communities are made up of individuals, and thus communal control and regulation of TCEs/EoF ultimately benefits the individuals who make up the relevant communities.

The overall thrust of the WIPO/IGC 2006 Draft is to recommend a framework for protection of traditional cultural expression of indigenous peoples that is consistent with international treaties and protocols and existing regimes of intellectual property protection. It recognized that some, if not many, of the needs and concerns of indigenous peoples and traditional and other cultural communities and their members may be met by solutions existing already within current IP systems, including

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through appropriate extensions or adaptations of those systems. In particular, Article 10 of the 2006 WIPO/IGC Draft recognized the use of existing trademark law as follows:

"ARTICLE 10:

RELATIONSHIP WITH INTELLECTUAL PROPERTY PROTECTION AND OTHER FORMS OF PROTECTION, PRESERVATION AND PROMOTION

...

(e) traditional signs, symbols and other marks can be registered as trademarks;

(f) traditional geographical names and appellations of origin can be registered as geographical indications; and

(g) the distinctiveness and reputation associated with traditional goods and services can be protected against "passing off" under unfair competition laws and/or the use of certification and collective trade marks.⁶ (underlining added)

The studies of the WIPO/IGC Committee and the Draft Provisions for the Protection of Traditional Cultural Expressions have been frequently cited in discussions of the adoption of cultural certification trademark programs to protect native arts in other regions of the world, including the Maori, Australian Aborigines, Alaskan Natives, Montenegro Indians (Mexico), and Panama Native Artists.

Regional efforts to protect traditional cultural expressions of indigenous cultures include the work of the Secretariat of the Pacific Community (founded as the South Pacific Commission in 1947) representing the 22 Pacific island nations of Melanesia, Polynesia and Micronesia, and the 4 founding countries of Australia, New Zealand, France and the United States. In 2002 the SPC released its Pacific Model for a *sui generis* law for protecting TKE of the Pacific island nations, and its Proposed Guidelines for implementing the Pacific Model in national legislation in October 2006 (see <http://www.spc.int/culture>). A "sui generis" law is intended to treat native cultural expressions as a form of communal cultural property as to which others must observe certain prohibitions against infringement. Commentators for a sui generis law point out how Western IP law based on individual rights is not fully capable of protecting native cultural expressions based on communal cultural

⁶ WIPO/IGC, 2006 Draft, Commentary to Article 10: Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion.

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property. Commentators against a sui generis law point out how difficult it is to define communal cultural property clearly so that we can know when any particular cultural expression falls within its protections and when the works of others infringe. For a large, diverse country like the U.S., it appears to be extremely difficult to define a new class of protected traditional cultural property under law, and there are enormous conflicts with preemption under existing U.S. copyright laws and with fair use and free speech rights. The Pacific Model Legislation may work best with smaller Pacific Island nations that arise from a single, coherent cultural community that has remained relatively intact and forms a vital part of their existing sovereign government, such as Samoa, Aotearoa, and Tonga, but may have difficulties working in diverse nations or territories that have been under colonial or democratic rule and where the cultural community has not remained relatively intact.

EXAMPLE OF MAORI "TOI IHO" CULTURAL TRADEMARK

One of the most successful examples of a cultural (certification) trademark program has been the Maori "Toi Iho" program in New Zealand. Initial legislation was enacted to undertake a process of consultation with the Maori artists and tribal communities for consensus building beginning in Year 2000, funded with about \$NZ 2 million. The Toi Iho cultural trademark program was implemented through legislation enacted in 2002, and is administered through the Arts Council of New Zealand in consultation with its parallel Maori arts agency, the Te Waka Toi Cultural Arts Board. In a short time, the Toi Iho program has become successful in establishing the Toi Iho Logo as a symbol of excellence in Maori cultural arts. Once the Toi Iho cultural trademark program becomes self-sustaining, the implementing legislation requires the Arts Council to transfer administration to the Te Waka Toi Cultural Arts Board.

The Toi Iho cultural trademark program is based on certifying authentic, quality works of Maori artists for designation under the Toi Iho trademark, under the following salient provisions:

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- A. The Toi Iho™ "Maori Made" mark is a registered trade mark of authenticity and quality used to promote and sell authentic, quality Maori arts and crafts, owned by a legislatively authorized agency (Creative New Zealand) on behalf of the native Maori cultural arts community. It can also be used to authenticate exhibitions and performances of Maori arts. The mark guarantees that designated works are made by persons of Maori descent and are of quality.
- B. Individual artists may apply and groups of artists working together to create single works may apply to use the certification mark. In doing so they must verify their Maori descent. Licensed users may use the mark to promote and market their works
- C. The Toi Iho Program also has a "Mainly Maori" mark for groups including artists of Maori descent, and a "Maori Co-Production" mark for use by Maori artists to create works in collaboration with others who may be non-Maori artists or business entities to produce, present or perform works across artforms.
- D. Retailers and gallery owners may apply to become users of the Toi Iho™ licensed trademark if they stock the works of at least six Maori artists who are licensed users. Licensed users will benefit from marketing and promotion of the trademark which will identify them as retailers of Toi Iho™ products.
- E. An applicant to use the mark must provide examples of quality works they have recently produced in both physical and other forms. A panel of Maori cultural art specialists will assess the quality of the works. Persons not of Maori descent who apply jointly with a Maori applicant to use the Toi Iho™ "Mainly Maori" mark or the "Maori Co-Production" mark must also provide artistic or business profiles as applicable and references and examples of quality works they have recently produced.
- F. Only persons who are licensed to use the marks are legally entitled to do so in accordance with the Rules. No other persons may use or copy Toi Iho™. If they do so, they can be prosecuted for trademark infringement under the Trade Marks Act and/or copyright infringement under the Copyright Act.
- G. The Toi Iho™ trademark will not prevent imitation Maori art and craft products being produced and sold. However, it is hoped that over time the existence of the Toi Iho™ trademark identifying authentic, quality Maori artworks will maintain the markets for authentic products and help deter the production and sale of imitation products.
- H. The Maori Toi Iho program is initially implemented by an agency of the New Zealand Government and is to be turned over to a native Maori cultural arts certification board for further administration once fully implemented.

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The Hale Ku'ai Study Group was fortunate to be visited by members of the Maori's Te Waka Toi Cultural Arts Board in January 2006. A meeting was held at UH Center for Hawaiian Studies with Board Chair Elizabeth Ellis and Board Member Sandy Ashley who provided an update on the implementation of the Toi Iho program. The following operational details of the program were provided.

The Arts Council of New Zealand has a Board with 7 members, 2 of them Maori. The Te Waka Toi Cultural Arts Board has 5 members, all Maori. The National Arts Council staff numbers 67 in total, including 8 who serve Te Waka Toi. The National Arts Council is funded with an administrative budget of about NZ \$8 million, and Te Waka Toi with about \$700,000. New Zealand has a population of just under 4 million persons, of which about 16% are Maori. The Arts Council dispenses about NZ \$28 million annually in grants for New Zealand-wide arts programs, currently funding about 340 programs out of over 1000 applications. Te Waka Toi dispenses grants of about NZ \$2.2 million annually for Maori arts programs, currently funding about 31 programs out of 100 applications. Maori artists can apply to either Te Waka Toi or to the New Zealand-wide Arts Council. Having its own funds to dispense for Maori arts programs has given Te Waka Toi a leading position in defining and guiding Maori arts programs.

The Toi Iho trademark is a distinctive logo design that is presented in 3 different colors to signify a work of a certified Maori artist, a collaboration work involving a certified Maori artist, or a licensed retailer of artworks of at least 6 certified Maori artists. The Arts Council and Maori Board decided early on that the Toi Iho trademark should signify high quality works, not just that they were made by native Maori, otherwise the significance of the mark could become quickly diluted or rendered undistinguished by mediocre works. The Te Waka Toi Board approached a core group of recognized Maori arts masters in order to set the level of quality for certifying Maori artworks at the highest levels. The Maori arts masters were well recognized and did not need the Toi Iho trademark to promote their works, but they supported the Toi Iho program in order to strengthen Maori arts. Their participation was crucial for the Arts Council to obtain national and Maori "buy-in" for the Toi Iho

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program. In a few years time, the Toi Iho trademark has achieved a high degree of recognition for excellence among the public, vendors, art dealers and arts publications.

Even though the Toi Iho program is intended to benefit artists of Maori ancestry, it is not exclusively based on the racial status of Maori artists. Works by non-Maori artists working in collaboration or in a group effort with Maori artists can also be certified. Any arts business, Maori or non-Maori owned, can be certified as a licensed vendor if they carry the works of at least 6 certified artists or arts groups. Because Maoris are generally cognizant of their own ancestry and sometimes even identify themselves with their tribal communities or villages rather than under a pan-Maori rubric, the Toi Iho program does not employ or even need the potentially divisive system of registering persons as being of Maori descent or blood quantum. Instead, the Toi Iho program focuses on recognizing works that are authentic to Maori cultural expression and of high quality, which is far more consistent and effective for achieving the goal of distinguishing authentic Maori artworks of excellence from fakes and imitations in the marketplace.

By contrast, even though the cultural trademark program of the Aboriginal Arts Council in Australia served as a model for the New Zealand program initially, it focused more on Aboriginal ethnicity rather than quality. Any distinctiveness in the Aboriginal trademark quickly became diffused when it was applied widely to any works claimed to be made by natives even if they were of mediocre or poor quality. The Australian Government has since withdrawn funding support for that program.

There are now 170 Maori artists on the Toi Iho register, most of them recognized masters. The master artists volunteer their time to act as art assessors. The Te Waka Toi art assessors are usually 5 persons drawn from the core group of masters having experience with that artform. They evaluate the artwork itself, not the artist's "story" or "proposal", so as to avoid any influences from politics, favoritism, or social welfare pressures. The status of these recognized masters is key to having their artistic judgments accepted by the artists.

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While it has focused on high-quality works, the Te Waka Toi Board recognizes that there is a need in the broader tourism market for arts products at tourist or gift-buying prices. However, it is not inclined to broaden the artwork inventory by certifying more Maori artists whose work is mediocre. Instead, the Board is considering certifying the licensing of Maori art works for mass production. The Board is considering adopting a trademark for licensing separate from the Toi Iho trademark. Maori artists are now also becoming interested in adopting tribal trademarks to create further distinctiveness for artworks characteristic of the different Maori tribes.

As noted by Maui Solomon, who has worked with Te Waka Toi, in his presentation at the Study's July Conference, developing the Toi Iho cultural trademark program was an incremental but important first step in "cultural capacity building" and has been successful because Maori have been involved in every stage of the development and implementation of the program from its conception, designing the brand and determining how it would be administered. Another important aspect of the Toi Iho brand was that it would eventually be administered by a Maori owned body separate from the Crown or state. In addition to the Maori Made Mark, the Te Waka Toi Board has undertaken other Maori arts related programs including administering arts grants, furthering native arts development, arts education, and cultural knowledge transmission. The ongoing NZ \$2 million annual budget the Te Waka Toi Board administers for arts grants is used to develop new generations of Maori artists whose work may not yet be ready to be certified at the Toi Iho level of excellence. Te Waka Toi is also starting a new project in which they will link promising artists with masters in their art field or tribal form, for transmitting the cultural knowledge of the master artists and further developing the work of younger artists. The Te Waka Toi Board has also worked with the South Pacific Council, which recently completed a long-awaited study of "Pacific Regional Guidelines for Model Legislation" to protect collectively-owned traditional knowledge and cultural expression of native peoples in the Pacific region. This work has been well received at WIPO, and is under consideration for legislation in Fiji, Samoa, Palau, and Papua New Guinea.

The Maori Toi Iho cultural trademark program thus serves as an important, and perhaps best, model for a Native Hawaiian cultural trademark program. A key and important aspect of the Toi Iho

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Mark is that registered users must demonstrate that they have Maori ancestry that is part of the process for registering to use the mark. Signatures from tribal elders are required to verify an applicants *whakapapa* or genealogical connection to one or more tribes. However, where art work is produced by Maori artists in co-production or collaboration with artists of non-Maori descent, an application can be made for a co-production mark. In this way, the Maori Made mark recognizes that it is the *matauranga* (traditional knowledge/stories/wisdom) behind the artwork that can often add the real ‘mark of authenticity’ to a artwork and that the rightful *kaitiaki* or guardians of this knowledge are the native peoples themselves.

The way the mark is administered avoids the divisiveness of judging the works of others by enlisting the participation of recognized master artists and setting high standards of excellence for works to be certified. It does not isolate itself within the Maori communities, but rather seeks support from and integration with the broader non-native public, arts vendors, arts purchasers, and visitors to appreciate the value of native arts. The Toi Iho cultural trademark appears to be acquiring the capability of distinguishing authentic Maori artworks to world audiences, thereby expanding its reach globally and promoting the development of export markets for native arts.

EXAMPLE OF INDIAN ARTS & CRAFTS ACT "INDIAN MADE" TRADEMARK

American Indian tribes also experienced a long period during which cultural arts were degraded by outside producers making imitation "Indian" products and selling them in markets catering to reservation visitors. The U.S. Congress first enacted the Indian Arts and Crafts Act in 1935, and it was reauthorized⁷ in 1990 with several significant changes to the original statute. IACA reserved to tribal members the exclusive use of designations of "Indian Made" and specific tribal trademarks for authentic products hand-made by Native Americans, providing for civil and criminal penalties of up to \$250,000 in fines and 5 years in prison for individuals and fines up to \$1,000,000 for businesses.

⁷ Public Law 101-644, 104 Stat. 4664, enacted November 29, 1990.

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Investigation of violators is conducted by the FBI and prosecutions are brought through the U.S. Department of Justice. The fines/sentences were increased for subsequent offenses in later amendments in 2000.

The departing Chair of the IACA Board, Henry Townsend, spoke at the O'ahu artists meeting in January 2006 conducted by the Study Group, and provided an update on the IACA program emphasizing its increased penalties. Professor Rebecca Tsosie, Executive Director of the Indian Legal Program in the College of Law at Arizona State University, spoke at the July 2006 State-wide Conference, offering a less optimistic view noting the lack of successful prosecutions under the IACA program. A large part of the difficulty of obtaining successful prosecutions under IACA is due to the high standard of proof of criminal intent required for criminal prosecutions and punitive fines. However, the existence of the IACA statute with severe penalties and jurisdiction for Federal investigation has had a "stop light" effect of forcing vendors of non-authentic products to brand their products with designators distanced from "Indian Made" or tribal trademarks. This has had the effect of better protecting the markets for authentic Indian-made products. Today, the Indian arts markets have been revitalized with artworks of ever increasing excellence into a billion dollar a year industry.

As an example, the Southwest Association on Indian Arts (SWAIA) Indian Market, which is held annually in Santa Fe, New Mexico, was originally created by non-Natives trying to help Natives. Today, there are both Native and non-Native board and staff members but only enrolled members of federally recognized tribes may participate in the Market. SWAIA verifies the enrolled status of any applicant artist and then the artist must go through a juried process to determine if the art meets the standards of authenticity and quality that SWAIA demands. If so, they are invited to participate in the show if they pay the requisite fees. Any qualified Indian artist may apply. Because the show takes place in the Southwest, Indians from the Southwest (e.g., Navajo, Hopi, Pueblo, Apache) tend to be more represented than those from other regions. However, the Market has become "intertribal" with Natives from other regions, such as Alaska, the Plains, Oklahoma, etc.

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Indian artists participating in Indian Market or other shows held around the U.S. may use an individual trademark, or authorized tribal mark. The trademark provisions of the IACA are unenforceable right now due to a conflict with the U.S. trademark laws under the Lanham Act. Therefore, while the statute in practical terms makes "Indian" the equivalent of a trademark, it is not a registered trademark under the Lanham statute. Different states protect Native arts through various local regulations and laws. The Alaska "Silver Hand" program, for example, is operated as a state-licensed trademark to protect Native Alaskan artists. Most of the other states adopt the IACA framework and have state laws to protect "Indian" art markets against fraudulent misrepresentation of others.

Under IACA, the term "Indian" is defined to mean a member of an Indian tribe or a person descended from the tribe and certified as an Indian artisan by an Indian tribe. The term "Indian tribe" is defined to mean "any Indian tribe, band, nation, Alaska Native village, or other organized group or community which is recognized ... by the United States ... or ... that has been formally recognized as an Indian tribe by a State legislature or by a State commission ... vested with State tribal recognition authority." Since IACA requires the status of Federal recognition as an Indian tribe, the protections of IACA are unlikely to be applicable or extendable to include Native Hawaiians.

Since Native Hawaiians have not been recognized as a native group "continuously organized and governed under a quasi-sovereign entity" as mandated under existing federal law, it is unlikely to be qualified for federal recognition as a Native American tribe. The State of Hawai'i does not have state tribal recognition authority because it is not "within the continental United States" as required under existing federal law. The Akaka Bill for instituting a prescribed process for Federal recognition of Native Hawaiians has so far failed to be approved in the Senate. Whether justified or not, the U.S. Commission on Civil Rights also issued a finding recently that Native Hawaiians today are primarily a racial or ethnic group and are not entitled to the special status of an indigenous people. In the recent public policy discussions over the Akaka Bill, divisions among Native Hawaiians remain visible on the desirability of Federal recognition.

LEGALITY OF A NATIVE CULTURAL TRADEMARK PROGRAM IN THE U.S.

Under U.S. trademark law, a distinctive trademark may be adopted and used by a person or entity to designate product or services sold or put into commerce, as long as it is not confusingly similar to a trademark previously used by another, a mere (generic) description of common things, deliberately misdescriptive, or immoral, deceptive, or scandalous matter, or matter which may disparage or falsely suggest a connection with persons, institutions, beliefs, or national symbols, or bring them into contempt or disrepute.⁸ A trademark may consist of a word, phrase, slogan, image, logo design, or any combination thereof.

The legal entity may be an association or organization of people that has a charter or structure to constitute itself and designate persons authorized to act on its behalf. A certification entity may adopt policies and standards for certifying goods or services under its trademark. Registration of the mark with the U.S. Trademark Office provides recognition of that entity's exclusive right to use the mark in the U.S. The legal entity may enforce its legal rights under U.S. federal trademark laws, as well as any parallel state trademark laws.

A trademark may certify products or services as endorsed, approved by, or associated with a particular group of people, even a racial or ethnic group. For example, service marks such as "NAACP", "Knights of Columbus", "Daughters of the American Revolution", or "Chinese Chamber of Commerce" are not illegal or unconstitutional even if the service organization has a membership that is limited to a particular race or ethnicity. Similarly, a Native Hawaiian cultural certification trademark is not illegal or unconstitutional even if it is used to certify cultural artworks made only by artists of Native Hawaiian ancestry. Where a Native Hawaiian cultural certification board licenses use of its cultural trademark by evaluating art works based on a number of entirely legitimate factors, such as the artist's lineage of transmitted cultural knowledge, the authenticity of materials or cultural expression in

⁸ U.S. Trademark Laws, 15 United States Code, Section 1052

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the work, the quality of the work, and the strength of its cultural content, any legal challenge based on racial discrimination would be most unlikely to succeed.

However, if the assistance, funding, or enforcement capabilities of state or federal governments is desired, then a cultural trademark program may need to design its provisions to ensure that it does not run afoul of U.S. and State constitutional requirements against racial discrimination and/or denial of due process and equal protection of the laws to other citizens who are not native. For example, a State-funded Native Hawaiian cultural arts board probably could not require only Native Hawaiian board members. Parallel legislation in the form of a State consumer-protection type of law for authenticity in Hawaiian artworks probably cannot require that only artworks made by Native Hawaiians are to be protected or certified.

As distinct from prevailing U.S. views of race, Native Hawaiians recognize a person's identity through the genealogy, kinship, and cultural lineage of the person, and thereby determine what cultural heritage resides in the person. This genealogical "narrative" or viewpoint in social interaction and relationship is a unique aspect of Native Hawaiian culture, and perhaps of native cultures in general. A cultural trademark program that would resonate with Native Hawaiians would therefore be one that honored this cultural viewpoint.

While State and U.S. constitutional implications need to be considered in developing programs to protect the cultural arts of Native Hawaiians, a supportive framework is already provided and recognized in international law in promoting indigenous self-determination under a human rights paradigm. Casting the issue of the legal viability of a cultural trademark program for the benefit of Native Hawaiians under a human rights model can provide a counterweight to inapposite analogies to racial classifications under U.S. anti-discrimination laws or to attempts to compare their political status to that of Native Americans for purposes of federal recognition.

In 1989, UNESCO adopted a protocol of "Recommendation on the Safeguarding of Traditional Culture and Folklore", which is intended to guide member countries in the preservation and protection

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of traditional knowledge and the cultural arts for the direct benefit of Indigenous Peoples and for the indirect benefit of all mankind on the theory that there is a collective benefit in protecting the diversity of indigenous cultures. The UNESCO protocol states:

Preservation is concerned with protection of folk traditions and those who are the transmitters, having regard to the fact that each people has a right to its own culture and that its adherence to that culture is often eroded by the impact of the industrialized culture purveyed by the mass media. Measures must be taken to guarantee the status of and economic support for folk traditions both in the communities, which produce them, and beyond.

Protection, in so far as folklore constitutes manifestations of intellectual creativity whether it be individual or collective, should be in a manner inspired by the protection provided for intellectual productions. Such protection of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, both within and outside the country, without prejudice to related legitimate interests.

The principles that UNESCO has articulated plainly casts the issues of preservation and protection into overarching concerns for conserving a peoples' identity and self-determination. The principles in these documents do not unreasonably segregate transmitters of knowledge based upon race or even political status; rather, UNESCO's document embraces the contextual reality that it is the Indigenous Peoples who are entrusted to manage, preserve, and protect traditional knowledge and the cultural arts and, thus, any models of protection and preservation, for example based upon an intellectual property regime, must be constructed for the benefit of the holders or transmitters of the traditional knowledge and the cultural arts.

Similarly, the World Convention on Biodiversity in 1992, which has been signed by 197 countries including the U.S., mandates the protection of traditional knowledge and the cultural arts. Article 8(j) provides in pertinent part:

Each Contracting Party shall, as far as possible and as appropriate, [s]ubject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. . . .

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Again, references to holders of traditional knowledge are not made for purposes of separating Peoples by race; rather, the CBD reflects the truism that Indigenous traditional knowledge and the cultural arts fall within the purview of those living the Indigenous traditional lifestyle. Weaving the international human rights laws into the legal regime to support a cultural trademark program for Native Hawaiians is a fundamental normative concept that cannot be ignored when making decisions about managing precious resources and information that flow from Native Hawaiian traditional knowledge and the cultural arts.

STUDY FINDINGS

The Study confirms that Native Hawaiians widely favor adopting a cultural trademark to distinguish authentic native artworks and products from fakes and imitations in the marketplace. The Study's data, research and analysis support the following Findings below:

1. Cultural Knowledge: A Native Hawaiian cultural trademark should be consistent with international human rights norms protecting cultural knowledge. Cultural knowledge can include knowledge about lineage, as well as the requirements for certain art forms to be considered "Native Hawaiian Art." Therefore, the cultural trademark can be used to designate native artists, Native Hawaiian artworks and products, and/or native arts or arts support organizations that reflect Native Hawaiian cultural lineage. In addition, the cultural view of lineage could identify a person's genealogy, kinship, and source of cultural knowledge.

2. Need for Program: Native Hawaiian artists and members of the Native Hawaiian community at large have repeatedly expressed the need to protect against misappropriation and degradation of Native Hawaiian culture as one of our highest priorities, and we believe that the

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adoption and use of a cultural trademark is a useful, near-term measure that can be instituted for this purpose.

3. Authenticity: Native Hawaiian artists and the Native Hawaiian community at large widely favor having some kind of system to distinguish the cultural authenticity of artworks and products from fakes and imitations. "Authenticity" is an attribute that we can judge objectively based upon the common cultural knowledge and heritage that Native Hawaiians share. Native Hawaiian artists and the Native Hawaiian community at large have indicated that they would find acceptable the judgment of "authenticity" by a native arts board composed of recognized *kumu*, *kupuna*, and master artists based upon clear and agreed-upon definitions for "authenticity" as judging criteria.

4. Quality: Artists in general believe that works certified as authentic expressions of culture should be of "high quality". To make this happen, there will need to be objective standards differentiating authenticity from quality. For example, all Native Hawaiian art forms could be further evaluated for the quality of materials and workmanship.

5. What Is To Be Certified: Native Hawaiian artists favor a cultural trademark program that would operate in a positive way to protect and promote cultural arts without incurring divisiveness. Such a program could start by recognizing master artists in respective fields of Native Hawaiian cultural arts and might enlist support for the program through recognition awards or granting honorary use of the trademark. A cultural trademark could be used to designate the authenticity of Native Hawaiian art work or products in the marketplace in circumstances where the primary attribute that determines their value in the marketplace is authenticity, in contrast to creativity, marketability, presentation, and other usual sales indicia. A cultural trademark could also be used to certify native arts or arts support organizations where they have established policies consistent with supporting cultural authenticity in expression of Native Hawaiian culture.

6. Use in Tourism: Native Hawaiian artists widely favor the use of a cultural trademark to certify authenticity of native artworks and products in tourism markets, in order to counter exploitation

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by commercial vendors of fakes and imitations. At the same time, they favor combining a cultural protection system with an effort to educate, identify, and share authentic expressions of native culture with visitors.

7. State, Federal Support: Native Hawaiian artists favor obtaining State and U.S. support for a cultural trademark program, but only where it would not compromise the program with red tape, non-native control, and/or U.S. racial politics.

8. Legality: Under existing U.S. laws, a cultural certification trademark can be adopted by a certifying organization acting on behalf of Native Hawaiians to certify native artists, their artworks and products, and/or native arts or arts support organizations as reflecting cultural authenticity. While possible constitutional restrictions may limit access to State and U.S. assistance, funding, or enforcement of a cultural trademark program on behalf of Native Hawaiian artists, Native Hawaiians in general have no compelling need to surrender our cultural viewpoint based on the importance of a person's genealogy, kinship, and lineage within the cultural context in order to gain State or U.S. support for a cultural trademark program. Larger frameworks of international law on human rights and the protection of cultural diversity more broadly support the Native Hawaiian viewpoint of remaining true to their cultural heritage.

DISCUSSION OF STUDY FINDINGS

The results and Findings of the Study come as no surprise to the Study authors and participants, since we have long been aware of the strong and pervasive sentiments in the Native Hawaiian community of the need to protect our culture from misappropriation and degradation by outsiders, especially by reclaiming its intrinsic value through distinguishing its authentic expression in cultural artworks and products from fakes and imitations. We think that the diversity of views (and the repeated selection of "other" as a category for comments) as expressed in the Study, on the specific issues of what a cultural trademark is to represent and how it should be used, instead reflects an

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impatience in the Native Hawaiian community to get on with the business of implementing a cultural trademark program in Hawai'i.

A general consensus was also expressed in the Study on some of the key issues in instituting a Native Hawaiian cultural trademark program. These provide guidance for the next steps of sourcing a trademark image reflecting the aspirations of Native Hawaiians for protecting and promoting their cultural arts and developing well-considered guidelines for use of the trademark in the cultural trademark program. These next steps providing a start toward implementation would conclude with a transfer of administration of the cultural trademark program to a duly-constituted organization or agency, referred to as a "Native Hawaiian Cultural Arts Board". Such a Board would be empowered not only to carry on the work of the cultural trademark program, but also to undertake a broader set of appropriate measures for the protection and promotion of Native Hawaiian cultural arts, such as recognizing emerging artists, protecting heritage arts treasures, administering arts support grants for developing artists, promoting native arts education in schools, developing native arts markets, and perpetuating the transmission of cultural arts knowledge to younger generations of artists.

Native Hawaiians share many similarities with Maori in terms of historic migration and settlement as indigenous people, domination by colonialist forces, and loss of culture in the face of ongoing misappropriation, degradation and neglect. The Maori also have a similar cultural viewpoint as Native Hawaiians that it is important that the trademark designate the artist's connection to their cultural lineage. In Maori/Moriori terms, whakapa or genealogy is the basis upon which a Moriori/Maori identifies him or herself with his/her creation gods and all the stories and matauranga/knowledge associated with those creation beings (gods of sea, wind, gardens, love, forest etc) down to ones forefathers and down to oneself. This matauranga or traditional knowledge aspect combined with the quality of Maori artistic work is what distinguishes superior/authentic products in the market place. The Maori example in adopting and implementing their Toi Iho program, with the help of an enlightened New Zealand Government, provides a strong model for success that Native Hawaiians can emulate.

STUDY RECOMMENDATIONS

The Study confirms that the Native Hawaiian community wants to implement a cultural trademark program in Hawai'i as a useful, near-term measure for protecting and promoting Native Hawaiian cultural arts. Emulating the successful Maori Toi Iho cultural trademark program, initiating a Native Hawaiian cultural trademark program should start by convening a strong and well-informed native advocacy group (the "Steering Committee") to take the lead in sourcing a truly representative trademark image and developing initial guidelines for its use.

The Steering Committee should source a proposed trademark image reflecting the aspirations of Native Hawaiians for protecting and promoting their cultural arts. The trademark should embody the principles of *Kanaka Maoli* cultural essence, excellence in the cultural arts, perpetuation of Hawaiian heritage, and the interconnection of Native Hawaiian people. The trademark should be a newly created and visually distinctive design that does not interfere with the *mana* of any other marks or designators used in Native Hawaiian arts.

The Steering Committee should discuss and develop initial guidelines for a Native Hawaiian cultural trademark program so that a proposal can be presented to the broader community as a concrete, well-considered, and cohesive program. For example, guidelines should be discussed for the following types of issues:

1. Identification of initial types of cultural arts for use of trademark
2. Criteria for lineage of cultural knowledge qualifying for use of trademark
3. Criteria for authenticity of works qualifying for use of trademark
4. Criteria for quality of works qualifying for use of trademark
5. Criteria for cultural content qualifying for use of trademark
6. Sources, meanings and extrinsic functions of proposed trademark image
7. Proposed process for certifying artists for use of trademark
8. Proposed process for certifying arts organizations for use of trademark

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9. Proposed process for certifying vendors for use of trademark
10. Proposed terms for use of trademark in advertising, marketing, sales

The Steering Committee should present their work widely for discussion with Native Hawaiian artists and the larger Native Hawaiian community in order to obtain acceptance and broad-based support for the cultural trademark program. The Steering Committee should also enlist the support of key figures among master artists as a sign of the program's commitment to the highest levels of authentic expression of the cultural arts. With the program launched and supported widely by the Native Hawaiian community, the ad hoc Steering Committee should then effect a smooth transfer of administration of the cultural trademark program to a duly-constituted and empowered Native Hawaiian Cultural Arts Board.

Since the near-term objective is a Native Hawaiian cultural trademark to distinguish authentic native artworks and cultural products, the Steering Committee should focus on use of a cultural trademark in visual arts fields initially. The Steering Committee may be comprised of distinct sets of persons with expert knowledge to accomplish the distinct phases of the project:

- A. Accomplished native practitioners in the visual arts and persons expert in the knowledge of how a cultural trademark can best be applied should be convened on the Steering Committee to source a truly representative trademark image for protecting and promoting the cultural arts, and develop initial guidelines for a Native Hawaiian cultural trademark program.
- B. Knowledgeable Native Hawaiian leaders and public speakers should be convened on the Steering Committee to present the proposed trademark image and guidelines for the cultural trademark program widely to Native Hawaiian artists and the Native Hawaiian community throughout the State and beyond (by online access) for comment and feedback, and make any amendments that are necessary.
- C. Accomplished native practitioners in the visual arts should be convened on the Steering Committee to select recognized *kumu*, *kupuna*, and master artists in their respective cultural arts fields to be awarded honorary use of the trademark in a high-visibility public launch event.

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- D. Knowledgeable Native Hawaiian leaders should be convened on the Steering Committee to effect a smooth transfer the work of the Steering Committee to a duly constituted Native Hawaiian Cultural Arts Board.

CONCLUSION:

The experience with existing cultural trademark programs indicates that their success depends heavily on the wisdom of its proponents in designing a program for widespread public acceptance while navigating difficult public policy issues of racial identification, judging authenticity and/or quality of artworks, ensuring distinctiveness in the marketplace, gaining ongoing political support, maintaining access to public funding, achieving effective public education, and practicing enlightened and inclusive administrative control.

This Study has undertaken a broad-based research of the opinions of Native Hawaiian artists and community at large, legal research, artists interviews, community meetings in the four counties of the State, artists survey, and public conference to present and discuss the Study with Native Hawaiian artists and arts organizations, and the larger law, business, and governmental communities. The Study Findings show that Native Hawaiian artists generally favor the use of a cultural trademark program to protect against misappropriation and degradation of Native Hawaiian culture by distinguishing the cultural authenticity of artworks and products from fakes and imitations. The work of the Study is summarized visually in a video presentation of the Study accompanying this Study Report (see Appendix VI).

The Hale Ku'ai Study Group wishes to convey its most appreciative *mahalo* to the Office of Hawaiian Affairs of the State of Hawai'i for providing the funding for this Study, and to PA'I

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Foundation for acting as fiscal sponsor and enabling our concurrent use of its needs assessment survey of Native Hawaiian artists. Our deepest gratitude goes to our Study Coordinator Elizabeth Pa and all those who assisted us in carrying out the year-long work of the Study. We want to give special thanks to volunteers who provided expert services such as Kunani Nihipali, Peter Jensen, Ka'ano'i Walk, and Stephen Szabo (Digital Edge Hawaii), as well to our outside cultural experts Henry Townsend, Rebecca Tsosie, Elizabeth Ellis, Sandy Asher and Maui Solomon, our legal counsel Leighton Chong and Danielle Conway-Jones, and all of the speakers who shared their insights on a Native Hawaiian cultural trademark program at our community meetings and conference. Most of all, we wish to acknowledge the selfless commitment and zeal of all the Native Hawaiian artists, *kumu*, *kupuna*, and cultural leaders who have participated in the Study proceedings and our survey in support of the ultimate goal for which this Study was conducted. We sincerely hope that all the work that has been done and what is to come as a result of the Study will provide our Native Hawaiian people with the needed tools for protecting and promoting our cultural arts, and finally retaking sovereignty over our culture.

APPENDIX I

BIOGRAPHIES OF STUDY GROUP PARTICIPANTS:

MAILE ANDRADE, Study Co-Chair, is a native of Makaha, Oahu, and received her BA degree at University of Hawai'i at Hilo, and Masters of Fine Art degree in Ceramics/Fiber from the University of Hawai'i at Manoa. She is Assistant Professor at UH Center for Hawaiian Studies, and was formerly Assistant Professor in the UH Art Department. Prof. Andrade has received a variety of academic awards including UH-Hilo Chancellor's Achievement Scholarship, the A.E. Healy Art Scholarship, and the American Association of University Women--Hilo Scholarship. In 1989, she was selected by the Folk Arts Apprentice Program of the Hawai'i State Foundation on Culture and the Arts to serve as an apprentice with Master Weaver Elizabeth Lee. Her work has exhibited locally, nationally, and internationally at the Wailoa Center, Hilo, Hawai'i; the Volcano Art Center, Volcano, Hawai'i; as well as in Seattle, New York City, California, New Zealand, and Germany.

MAILE MEYER, Study Co-Chair, is the owner and founder of Native Books / Na Mea Hawaii at Ward Warehouse. Ms. Meyer, who is the third of seven children, grew up on the Windward side of Oahu and was a graduate of Punahou School. She obtained a master's degree in business administration in marketing and arts management from UCLA, and a bachelor of arts degree in design from Stanford University. She opened her first bookstore, Native Books in Kalihi 15 years ago, carrying books and publications on Native Hawaiian subjects and holding readings, performances and other events to feature native artists. She combined that business with native arts products when she opened Native Books / Na Mea Hawaii in 2003. She is also a Board member of Native Hawaiian Hospitality Association and frequent speaker in support of protecting Native Hawaiian culture and the arts.

LEIGHTON K. CHONG is an intellectual property and patent attorney employed for over 30 years in private law practice. He is a registered patent attorney with the U.S. Patent Office, and a licensed attorney in New York and Hawai'i. After entering law practice in 1974 in New York City, he became a founding partner of the intellectual property law firm of Ostrager Chong Flaherty & Broitman, PC, in 1988. After returning to Hawaii in 1996, he continued to practice in intellectual property law and is a partner with the firm of Godbey Griffiths Reiss & Chong. Currently, he is Co-Chair of the Programs Committee of the American Bar Association's Intellectual Property Law Section, Chair of the Intellectual Property & Technology Section of the Hawaii State Bar Association, and Co-Chair of the Hawaii Intellectual Property Licensing Conference which he founded in 2005 and continues to organize annually.

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DANIELLE CONWAY-JONES serves on the faculty of William S. Richardson School of Law, University of Hawai'i at Manoa, teaching Intellectual Property, Government Contract Law, and Internet Law and Policy, and is also Director of the Hawai'i Procurement Institute, a research center on Government procurement policies. She is a graduate of New York University, Stern School of Business, and Howard University School of Law, and also earned dual Master of Laws degrees in Environmental Law and Government Procurement Law from the George Washington University Law School. She served in the U.S. Army, and is currently a Major in the U.S. Army Reserve. Conway-Jones is also Of Counsel with the Honolulu law firm of Alston Hunt Floyd & Ing. She has presented at numerous international conferences on topics of Globalization, Government Contracts, Distance Education, Intellectual Property, E-Commerce, and Indigenous Peoples Rights in Traditional Knowledge, and has published widely on these subjects.

E. A. HO'OIPO K. PA, Project Coordinator for the Study, is the Executive Director of the Hale Ku'ai Cooperative, the artist/producer cooperative sponsoring this Study. She is an attorney in private practice in Hawai'i, and an activist for Native Hawaiian causes. She was the former executive director of the Native Hawaiian Advisory Council, a non-profit organization that engaged in numerous activities to protect and defend the rights and interests of Native Hawaiians. She chaired the Native American Rights Fund Board for two of her six year term on the board. She was one of the plaintiffs in a lawsuit against a planned merger of Bank of America and FleetBoston over the bank's failure to meet its community lending obligations for Hawaiian Homestead lands. She was the founding president of Hui Na`auao, composed of over forty native Hawaiian organizations formed to promote sovereignty and self-determination, and member of the Onipa`a Committee at the time of the 1993 centennial memorializing the 1893 "overthrow," aka "act of war," and, also a delegate to the Native Hawaiian Convention, elected by fellow Hawaiians in 1999 to propose models of sovereignty for vote by Native Hawaiians.

VICTORIA HOLT TAKAMINE is Executive Director of PA'I Foundation, the fiscal sponsor for the Study. She is founder and kumu hula (master teacher) of Pua Ali'i 'Ilima, a school of traditional Hawaiian dance, having graduated through 'ūniki from hula's legendary Maiki Aiu Lake. She received her BA and MA in Dance Ethnology from the University of Hawai'i, and is a lecturer at UH Mānoa and Leeward Community College. She has served as Hawaiian consultant and choreographer for numerous Hawaiian Style Theatre productions. Vicky is well respected throughout the Hawaiian community for her cultural expertise and advocacy work on behalf of Hawaiians, their cultural traditions, and the protection and preservation of the cultural and natural resources of Hawai'i. Of the numerous organizations she is involved in, she is co-founder and president of 'Īlio'ulaokalani, a coalition of traditional practitioners committed to protecting their Hawaiian customs and traditions, KAHEA: The Hawaiian Environmental Alliance, committed to protecting the natural and cultural environment of Hawai'i, and Papa Laua'e O Makana on Kaua'i Island.

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APPENDIX II

STUDY PRESENTATION: "Use of Cultural Trademark to Protect Native Hawaiian Arts"

APPENDIX III

SURVEY QUESTIONS TO NATIVE HAWAIIAN ARTISTS ON CULTURAL TRADEMARK:

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APPENDIX IV

POWERPOINT PRESENTATION, "Native Hawaiian Trademark Study Survey Results", prepared by
Ka`ano`i Walk

APPENDIX V

Native Hawaiian Cultural Trademark Conference & Archival Videos and Transcript,
including Interviews of Native Hawaiian Artists, produced by
Kūnani Nihipali, Ho 'oipo Kalaena 'auao Pa & Hans Peter Jensen, III

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APPENDIX VI

Video Presentation on A Native Hawaiian Cultural Trademark, produced by Stephen Szabo, Digital Edge Hawaii