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# Use of Native American Tribal Names as Marks

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## Cover Page Footnote

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# USE OF NATIVE AMERICAN TRIBAL NAMES AS MARKS

Brian Zark*

"Consultation is a critical ingredient of a sound and productive Federal-tribal relationship." President Barack Obama, November 5, 2009[1]

## I. INTRODUCTION

When the formation of Apache, Black Hawks, and Chinook Helicopters flew over the Superbowl in 2014, Native Americans felt pride in their hearts.[2] When Nick Corso and Bill Murray on ESPN's College Gameday threw an Eagle Staff before a Florida State Football game, a symbol to honor Native American veterans, Native American veterans thought this action to be inappropriate or even offensive.[3] When Urban Outfitters unveiled their new products entitled "Navajo hipster brief" and "Navajo fabric wrapped whiskey flask", Native Americans were angered and outraged.[4]

All the examples above have the use of a Native American tribal name as a mark in common. American Indian tribes have an interest in protecting their names for two important reasons: tribes do not want their names used for purposes they do not agree with, and tribes want to protect their products in the marketplace.[5] This paper will (1) show the current extent of protection available to Native American tribal names[6] and some challenges those protections face; (2) discuss how those protections were utilized in one case; and (3) show how minor adjustments in current laws could make a huge difference in the protection of Native American tribal rights.

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[1] Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation, *available at* http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president (last visited April 21, 2014).

[2] Thom Patterson, *Super Bowl flyover: Secrets of Split-Second Timing*, CNN, Feb. 1, 2014, http://www.cnn.com/2014/01/31/travel/super-bowl-flyover-preps (last visited March 21, 2014).

[3] Josh Sanchez, *Native American group unhappy with Lee Corson for portraying Seminole on College GameDay*, SI.com, March 10, 2014, http://fansided.com/2013/10/21/native-american-group-unhappy-lee-corson-portraying-seminole-college-gameday/#!y4gEm (last visited March 10, 2014).

[4] Bill Donovan, *Company Removes 'Navajo' from Website*, NAVAJO TIME, March 10, 2014, *available at* http://www.navajotimes.com/news/2011/1011/102411panties.php#.UxxHDPldWSo (last visited March 21, 2014).

[5] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §20.02[6][c], at 1312 (Nell Jessup Newton et al. eds., 2012).

[6] Todd Dickinson, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, *Report on the Official Insignia of Native American Tribes,* Sept. 30, 1999, 46, *available* at http://www.uspto.gov/web/offices/com/sol/notices/insgstdy.pdf.

## II. INDIAN ARTS AND CRAFTS ACT

### *A. History of the Indian Arts and Crafts Act*

The Indian Arts and Crafts Act (IACA) was enacted in 1935 and was later amended in 1990, 2000, and 2010.[7] When IACA was first enacted, it created the Indian Arts and Crafts Board (the Board).[8] The original IACA made it a misdemeanor to willfully misrepresent goods that were not made by Native Americans[9] as Indian produced.[10] For fifty years the United States government did not prosecute a single case under the 1935 IACA.[11]

In the 1970s, there was an increase in goods that misrepresented themselves as American Indian products because of the "fashion craze for American Indian style" during that time period.[12] Although change was needed earlier, it finally took place in 1989, when Congressman Kyl introduced amendments to IACA. Congressman Kyl, who had a large Navajo constituency, and Congressman Campbell, a Native American jewelry maker, worked together to produce IACA of 1990.[13] IACA of 1990 was amended to include civil penalties and to increase the criminal misdemeanor to a felony.[14]

In 2000, Congress again amended IACA to allow Indian arts and crafts organizations and Indians to file civil suits on their own.[15] In 2010, Congress made amendments to include increased penalties and allow all federal law enforcement the ability to investigate potential violations.[16]

### *B. The Indian Arts and Crafts Board and Indian Arts and Crafts Act*

The stated purpose of the Board is "to promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship."[17] Additionally, the Board was established for the "implementation and enforcement of the Indian Arts and Crafts Act of 1990, a truth-in-advertising law that provides criminal and civil penalties for marketing products as 'Indian-made' when such products are not

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[7] Anu K. Mittal, *Indian Arts and Crafts: Size of Market and Extent of Misrepresentation are Unknown 1-2* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-432, (2011).
[8] *Id.* at 1.
[9] Indians are citizens of the United States, 8 U.S.C. §1401(b), citizens of the state wherein they reside, U.S. Const. amend. XIV, and many are citizens of Indian tribes, Cohen's Handbook of Federal Indian Law §14.01[1], at 922 (Nell Jessup Newton et al. eds., 2012).
[10] *Id.* at 2.
[11] GAIL K. SHEFFIELD, THE ARBITRARY INDIAN: THE INDIAN ARTS AND CRAFT ACT OF 1990 (1997).
[12] *Id.* at 24.
[13] *Id.*
[14] *Id.* at 11.
[15] Mittal, *supra* note 7, at 2.
[16] *Id.* at 2-3.
[17] 25 U.S.C. § 305a.

made by Indians, as defined by the Act."[18] The Board promotes the economic welfare of Indian tribes and Indian individuals by providing business advice, providing information on IACA, helping with fundraising, and promoting Native American artists.[19] The board accomplishes these tasks by having information about IACA on their website, and going to Native American events such as art fairs and powwows.[20] In 2013, the Board was scheduled to be at twenty-one events throughout the country from Anchorage, Alaska to Washington D.C.[21]

The Board is not an enforcement agency, but still helps in the enforcement of IACA.[22] The Board helps enforce IACA by having a website to receive complaints over the Internet, a mailing address to receive mail in complaints, and a telephone number to receive violation reports.[23] Once the Board determines a violation may have occurred, it either sends a letter to the party accused of violating IACA stating there is a potential violation, or refers the matter to the authorities.[24]

The stated purpose of the Indian Arts and Crafts Act of 1990 was "to protect Indian artists from unfair competition from counterfeits."[25] Under IACA, it is unlawful if a person "offers or displays for sale or sells a good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or [tribal] organization, resident within the United States."[26] Brian Lewis, an attorney who used IACA in a case against Urban Outfitters, stated "[i]t was non-Indian corporations' profiting from posing their products as having been made by Native Americans that led to the enactment of the (law) in the first place."[27]

### *C. Example of a Significant Industry that IACA Helps Protect*

IACA is designed to help the Native American artists by not allowing goods that are not authentic into the marketplace, and by ensuring the consumer is not receiving imitation work. IACA provides protection, for example, to a Native American Navajo rug maker, by banning the sale of imitation Navajo rugs.[28] A Navajo rug maker starts

[18] Indian Arts and Craft Board Mission, U.S. DEPARTMENT OF THE INTERIOR, *available at* http://www.iacb.doi.gov/mission.html (last visited March 11, 2014).
[19] *Id.*
[20] Indian Arts and Crafts Upcoming Events, U.S. DEPARTMENT OF THE INTERIOR, *available at* http://www.iacb.doi.gov/upcoming_events.html (last visited March 11, 2014).
[21] *Id.*
[22] Mittal, *supra* note 7, at 7.
[23] Violations of the Indian Arts and Crafts Act, U.S. DEPARTMENT OF THE INTERIOR, *available at* http://www.iacb.doi.gov/file.html (last visited March 11, 2014).
[24] Mittal, *supra* note 7, at 14.
[25] H.R. REP. NO. 101-400 (II), at 6391 (1990).
[26] 25 U.S.C. 305e (b).
[27] Alysa Landry, *Deadline Looming for Settlement in Urban Outfitter Case,* NAVAJO TIMES, May 30, 2013, *available* at http://www.navajotimes.com/news/2013/0513/053013urb.php#.Ux2z7PldWSo (last visited March 11, 2014).
[28] E-mail from DeLyssa Bega, member of a family of excellent Navajo rug makers, to author (Feb. 28, 2014, 16:10 EST) (on file with author).

training as early as the age of four and continues the art tirelessly for sixty years perfecting her craft. A loving mother or grandmother generally trains the young child and directs the young child in the Navajo Rug Making craft. This direction is needed because making a Navajo Rug involves complicated procedures and the designs in the rugs have significant meaning. Each geometric shape, for example has certain meaning. A Navajo Rug imitator would likely not know the significance of the geometric shapes that are contained within the rugs.

The time required to make a good quality Navajo rug depends on many factors including the size of the rug, the intricate designs included in the rug, and other responsibilities a rug maker may have in her personal life. The price for a Navajo rug also depends on multiple factors, including the size and detail of the rug, and where the rug is sold. The rug making and other crafts need to be protected so that the tradition of passing on crafts to younger generations can continue.

### *D. Extent of Protection Provided by the Indian Arts and Crafts Act*

The Board has a budget of 1.2 million dollars, a staff of ten individuals,[29] and is the main point of contact for violation complaints for IACA.[30] As discussed above, one can make a complaint either through an online form, calling the Board, or by writing. From fiscal year 2006 to fiscal year 2010, the Board received 649 complaints.[31] Of these complaints, the Board sent 102 educational letters, 188 warning letters and referred 117 of these complaints to law enforcement agencies.[32] Figures from prior years can be found in the U.S. Government Accountability Office Report, but current data is not accessible. Keeping this information private hinders progress in determining the amount of misrepresentation of Native American arts and crafts in the industry.

Since the Board is not an enforcement agency, it refers the complaints to government enforcement agencies. The Board refers these complaints to the Federal Bureau of Investigation, Interior's Bureau of Indian Affairs, National Park Services, and state attorney generals.[33] Currently, any federal law enforcement organization can investigate an IACA violation.[34]

### *E. Challenges to the Indian Arts and Crafts Act and Indian Arts and Crafts Board*

IACA and the Board face many challenges in the effort to deter imitation artwork. Some of these challenges include the size of the Board's budget, the unknown size of the Indian Arts and Crafts market, and determining who IACA protects. As mentioned above, the Board has a budget of $1.2 million dollars a year. This budget covers the

[29] Mittal, *supra* note 7, at 5.
[30] *Id.* at 6.
[31] *Id.* at 14, 33.
[32] *Id.* at 14, 15.
[33] Mittal, *supra* note 7.
[34] *Id.* at 8.

staffing of three museums, in addition to handling IACA complaints.[35] The Board has a reimbursable support agreement for one full time investigator at the National Park Services Investigative Services,[36] but needs eight to ten investigators dedicated to investigating potential IACA violations.[37] Even though all federal law enforcement agencies have the power to investigate IACA violations[38], violations often receive low priority.[39]

If the Board and law enforcement agencies knew the size of the Indian arts and crafts industry and the amount of misrepresentation that is occurring, IACA violations might receive higher priority by law enforcement agencies. The size of the market and the extent of misrepresentation, however, are unknown.[40] A 1985 Department of Commerce study[41] put the market size between $400-800 million, with 10-20% of the goods being misrepresentative, but this study is outdated and unreliable.[42] Even though a more accurate study would be complex, costly, and might not have accurate results[43], a redesigned and revised study could determine the extent of misrepresentations of Indian arts and crafts taking place. More accurate data can be used to overcome the challenge of IACA being a low priority for federal prosecutors.[44]

Another challenge facing IACA is the debate to determine who may market their work as Indian made. IACA is not concerned with the quality of the product but with the origin of the art or craft.[45] IACA requires that "[a]ll products must be marketed truthfully regarding the Indian heritage and tribal affiliation of the producers, so as to not mislead the consumer. It is illegal to market an art or craft item using the name of a tribe if a member, or certified Indian artisan, of that tribe did not actually create the art or craft item."[46] This requirement ensures that one be either a member of a tribe or certified Indian artisan to market arts or crafts with the use of a tribe's name. To be a certified Indian artisan, "[t]he individual must be of Indian lineage of one or more members of such Indian tribe; and (2) the certification must be documented in writing by the governing body of an Indian tribe or by a certifying body delegated this function by the governing body of the Indian tribe."[47] In both situations one must have lineage to a tribe, and that is where controversy arises.

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[35] Mittal, *supra* note 7, at 5.
[36] *Id.* at 7.
[37] *Id.* at 21.
[38] *Id.* at 3.
[39] *Id.* at 21.
[40] *Id.* at 9.
[41] *Study of Problems and Possible Remedies Concerning Imported Native American-Style Jewelry and Handicraft,* DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, (Washington, D.C. 1985).
[42] Mittal, *supra* note 7, at 9.
[43] *Id.* at 12.
[44] *Id*. at 21.
[45] Suzan Harjo, 2nd Annual Cherry Blossom Symposium – Traditional Knowledge: IP and Federal Policy Panel 1, (March 21, 2014), *available* at http://www.pijip.org/events/cb2014/ (time period of the video is 2:01).
[46] The Indian Arts and Crafts Act of 1990, INDIAN ARTS AND CRAFT BOARD, *available at* http://www.iacb.doi.gov/act.html (last visited March 21, 2014).
[47] 25 C.F.R. § 309.25.

A federally recognized tribe is a tribe that is recognized by statute, administrative process, treaty or other intercourse with the United States.[48] The United States officially acknowledges a federally recognized tribe's government.[49] Congress has the power to terminate this federal recognition[50] as long as Congress's action is both clear and specific.[51] Tribal governments have the right to tax, establish laws, and determine citizenship.[52] Tribes have the authority to determine their own membership.[53] Tribal membership requirements are usually found in the individual tribe's constitution, articles of incorporation, or ordnances.[54] These requirements are usually a certain amount tribal blood quantum or lineal descendency to a tribal citizen.[55]

A tribe can also revoke tribal membership.[56] Tribal disenrollment is a very controversial topic.[57] Through disenrollment, the Chukchansi tribe in California went from approximately 1,800 people to 900 people. This mass disenrollment happened over a ten-year span, after the opening of a casino.[58] The disenrollment highly favored the remaining tribe members, as the profits from the casino per member rose.

With an understanding of how a federally recognized tribe is defined and the authority granted to a federally recognized tribe, the IACA lineage requirement is understood more clearly. A problem arises because there are Native American artists who are unable to obtain certification. Some barriers to a Native American artist receiving certification include, "belonging to terminated tribes, having been adopted, or being of descent that does not meet the particular tribe's enrollment criteria."[59] If one is not an enrolled member of the tribe and depends on certification, that person is at the mercy of the tribe concerning certification.[60] The famous artist Willard Stone, who was

[48] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §3.02[3], at 134 (Nell Jessup Newton et al. eds., 2012).
[49] National Congress of American Indians, *An Introduction to Indian Nations in the United States,* 4, *available at* http://www.ncai.org/about-tribes/Indians_101.pdf (last visited April 21, 2014).
[50] Menominee Tribe of Indians v. United States, 391 U.S. 404, 408, 416 (1968) (assuming congressional authority to terminate the federal-tribal trust relationship).
[51] Cohen's Handbook of Federal Indian Law §3.02[8][a], at 164 (Nell Jessup Newton et al. eds., 2012).
[52] National Congress of American Indians, *An Introduction to Indian Nations in the United States*, 9, http://www.ncai.org/about-tribes/Indians_101.pdf (last visited April 21, 2014).
[53] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) ("[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."), available at http://supreme.justia.com/cases/federal/us/436/49/case.html#F32.
[54] Tribal Enrollment Process, U.S. DEPARTMENT OF THE INTERIOR, *available at* http://www.doi.gov/tribes/enrollment.cfm (last visited April 21, 2014).
[55] National Congress of American Indians, *An Introduction to Indian Nations in the United States*, 4, *available at* http://www.ncai.org/about-tribes/Indians_101.pdf (last visited April 21, 2014)
[56] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §3.03[3], at 175 (Nell Jessup Newton et al. eds, 2012).
[57] Siobhan Taylor, Part 2: Update on Tribal Membership/Disenrollment Issues at Grand Ronde — Tribe Statement, *available at* http://turtletalk.wordpress.com/2013/11/27/part-2-update-on-tribal-membershipdisenrollment-issues-at-grand-ronde-tribe-statement/ (last visited April 21, 2014). (Confederated Tribes of Grand Ronde's statement on disenrollment).
[58] *This American Life: Tribes*, CHICAGO PUBLIC RADIO, (March 29, 2013), http://www.thisamericanlife.org/radio-archives/episode/491/transcript.
[59] Sheffield, *supra* note 11, at 114-15.
[60] *Id.* at 129.

not an enrolled Cherokee, provides an example of the problem of certification.[61] Stone was never certified before he died,[62] but his family and other Cherokee believe that he should be posthumously certified.[63]

The opposing side believes that tribal affiliation should be required. Senator Campbell, a driving force behind IACA and an artist himself stated, "[i]f he cares so little about his heritage that he never has anything to do with the tribe from which he claims to have been descended except to use it as a marketing ploy, or if the only way he can get his work sold is by advertising that he is Indian, then he should not be validated."[64] Senator Campbell's view is one that should be respected because he has firsthand knowledge of the Indian arts and crafts industry since he is a Native American jewelry maker.[65]

## III. TRADEMARK LAW

### *A. A Brief History of Trademark Law and a Modern Day Example*

Trademarks are "generally a word, phrase, symbol, or design, or a combination thereof, that identifies and distinguishes the source of the goods of one party from those of others."[66] A service mark identifies services, is the same as a trademark, and is often referred to as such.[67]

Early civilizations such as the Greeks, Romans, and Egyptians used trademarks.[68] Egyptian law required bricks to have the names of both the owner of the brickyard and the slave that made the brick imprinted on the brick so that defective bricks could be traced back and fixed. In the 1300's, armorers required guilds to mark their products because if anything went wrong with the weapons or armor of the fighting man "his widow or next of kin wanted to find the varlet who was responsible."[69]

Over time, certain marks became synonymous with good workmanship.[70] Others were able to recognize the mark and associate the mark with good products. The mark

[61] Willard Stone Museum, STONE FAMILY HISTORY, *available at* http://www.willardstonemuseum.com/history.htm (last visited March 21, 2014).
[62] Sheffield, *supra* note 11, at 104-05.
[63] *Id.* at 105.
[64] HERMAN J. VIOLA, BEN NIGHTHORSE CAMPBELL: AN AMERICAN WARRIOR, 191, (1st ed. 1993).
[65] *Id.* at 171.
[66] United States Patent and Trademark Office, PROTECTING YOUR TRADEMARK: ENHANCING YOUR RIGHTS THROUGH FEDERAL REGISTRATION, 1, 1 (2012), *available at* http://www.uspto.gov/trademarks/basics/BasicFacts.pdf.
[67] *Id.*
[68] Edward S. Rogers, *The Lanham Act and the Social Function of Trademarks*, 14 LAW. & CONTEMP. PROBS. 173, 173 (1949), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2402&context=lcp.
[69] *Id.*
[70] *Id.* at 174.

that was associated with good workmanship therefore had goodwill with others and increased value.[71]

Different countries, including the United States, eventually enacted trademark statutes. Generally, the purposes of trademark statutes are "to protect the public so it may be confident that, in purchasing a product bearing a particular trademark which it favorably knows, it will get the product which it asks for and wants to get" and to protect the investment of the owner of a trademark who "has spent energy, time, and money in presenting the public the product ...from its misappropriation by pirates and cheats."[72] Trademark law therefore protects both the purchasing public and the trademark owner.

The Choctaw Nation of Oklahoma's "Choctaw Defense" provides a modern day example. Choctaw Defense is a defense company that is wholly owned by the Choctaw Nation of Oklahoma.[73] Choctaw Defense has a registered trademark at the United States Patent and Trademark Office (PTO). Some of the products that Choctaw Defense makes include shipping and storage containers, all-terrain trailers, and pollution control equipment.[74] The Choctaw Defense manufacturing facilities are ISO 9001:2000 compliant, which is a high quality assurance standard.[75] These standards ensure that Choctaw Defense produces high quality parts so its products maintain the reputation of good workmanship, and the company is not associated with "varlets." The mark can be seen in Figure 1.


Figure 1: Choctaw Defense Trademark[76]

### *B. Tribal Insignia Protection*

Congress ordered the PTO to conduct a study on Native American insignias after the Zia tribe had to face legal battles to protect their sun symbol. The legal battle began in 1992 when the Zia Pueblo attempted to block the Coulston International Corporation,

[71] I*d.*
[72] *Id.* at 181.
[73] *About Us,* CHOCTAW DEFENSE, *available at* http://www.choctawdefense.com/aboutus.htm (last visited March 21, 2014).
[74] *Products,* CHOCTAW DEFENSE, *available at* http://www.choctawdefense.com/products.htm (last visited March 21, 2014).
[75] C*apabilities*, CHOCTAW DEFENSE, *available at* http://www.choctawdefense.com/capabilities.htm (last visited March 21, 2014).
[76] Found using the PTO's Trademark Electronic Search System (TESS). The serial number of the trademark is 86148263. The TESS website can be found at: http://www.uspto.gov/trademarks/.

a chemical testing company, from using the Zia's sun symbol.[77] After three years of legal fighting, Coulston ended up withdrawing its application for a trademark.[78] This was only a small victory because the amount of resources the Zia people had spent to protect their insignia.[79]

In 1998, the Zia engaged in another legal battle for the use of their sun symbol when American Frontier Motorcycle Tours submitted an application for a trademark that included the Zia Pueblo's sun symbol.[80] This time, the Zia had the support of New Mexico's Senator Jeff Bingham,[81] and American Frontier Motorcycle Tours withdrew their trademark application. After supporting the Zia in the American Frontier Motorcycle Tours litigation, Senator Bingham additionally helped pass a law requiring the commissioner of the PTO to study the official insignias of Native American tribes.[82]

In response to this law, the PTO conducted a seven month study in which it received comments from the public.[83] These comments varied widely. Daimler Chrysler, for example, wanted the official insignia definition to be defined narrowly so as not to include Native American tribal names.[84] Daimler Chrysler went on to state that, "we believe that any new protection for Native American tribe insignia should include a grandfather provision for any third party use that exists at the time of enforcement."[85]

The Zia expressed a different view, and commented that, "[o]fficial insignia should be defined as any insignia used by a tribe signifying its identity and/or insignia identified by the governing body of the tribe as an official symbol."[86] The Pueblo also stated that the amended law should be retroactive and remove Native American symbols from companies. The Zia Pueblo claimed that, "[n]o business interest should justify the retention of federal registrations in official Native American symbols which Congress decides should not be registrable."[87] By enacting a retroactive law, current trademark owners who use Native American tribal names would not be able to retain their trademark.

In deciding the matter, the PTO took the position that it "does not believe that any statutory changes are necessary to provide adequate protection for the official insignia

[77] Stephanie B. Turner, *The Case of the Zia: Looking Beyond Trademark Law to Protect Sacred Symbols*, 11 CHI.-KENT J. INTELL. PROP. 116, 128 (2012).
[78] *Id.* at 129.
[79] *Id.*
[80] *Id.* at 131.
[81] *Id.*
[82] *Id.* at 132-33.
[83] Dickinson, *supra* note 6, at 1.
[84] Letter from Donna L. Berry, Staff Attorney for Chrysler, to Eleanor K. Meltzer, Attorney-Advisor for the U.S. Patent and Trademark Office, 2 (April 29, 1999), *available at* http://www.uspto.gov/web/offices/com/hearings/natinsig/comments/chrysler.pdf.
[85] *Id.* at 3.
[86] Letter from Amadeo Shije, Governor, to Eleanor K. Meltzer, Attorney-Advisor for the U.S. Patent and Trademark Office, 4 (April 26, 1999), *available at* http://www.uspto.gov/web/offices/com/hearings/natinsig/comments/zia.pdf.
[87] *Id.*

of Native American tribes."[88] The PTO's proposed definition of an insignia for Native American tribes is, "Official Insignia of Native American tribes means the flag or coat of arms or other emblem or device of any federally or State recognized Native American tribe, as adopted by tribal resolution and notified to the U.S. Patent and Trademark Office."[89] Examples of official insignia that are included in the database can be seen below in figure 2.

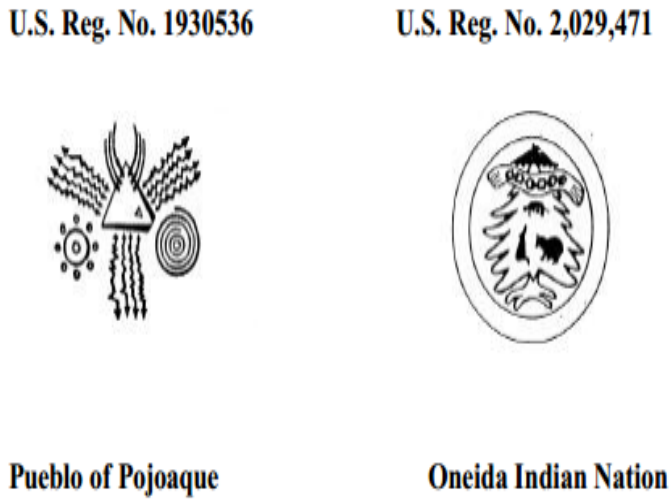


Figure 2: Examples of Native American Tribes' Insignia[90]

The PTO recommended in the study that, "[a]n accurate and comprehensive database containing the official insignia of all state and federally recognized Native American tribes should be created" and the PTO should maintain this database.[91] The PTO subsequently created a database of Native American Tribal Insignia, and the database is a resource for PTO examining attorneys to use when they receive an application for a mark.[92] The examining attorney can then use the database to compare the application for a mark with the official insignias in the database to determine if the applicant's mark impermissibly suggests a connection to a Native American tribe. If the examining attorney does determine the applicant's mark suggests such a connection, the attorney can disallow the registration to the applicant's mark.[93] Currently, of 565 federally recognized tribes, there are only forty-one registered Native American insignias.[94] While

[88] Dickinson, *supra* note 6, at 44.
[89] *Id.* at 24.
[90] *Id.* at 29.
[91] *Id.* at 47.
[92] Native American Tribal Insignia Database, *available at* http://www.uspto.gov/trademarks/law/tribal/. Instruction on how to access the database can be found under question two and three.
[93] Native American Tribal Insignia Database, available at http://www.uspto.gov/trademarks/law/tribal/. The answer to question eight states, "[t]he database is used as an aid in the examination of applications for trademark registration."
[94] Trademark Electronic Search System (TESS), *available at* http://tmsearch.uspto.gov/bin/gate.exe?f=tess&state=4809:x5nnka.1.1 (last visited March 8, 2014).

the database is a good resource for tribes to protect their insignias, the percentage of tribal insignias that are registered is extremely low.

### *C. Current Attempts to Retroactively Remove a Trademark*

The PTO did not recommend a retroactive law that would affect current trademark holders whose trademark was associated with a Native American tribe. This is the type of law for which the Pueblo of Zia fought. There is, however, a movement to remove current Native American trademarks that are offensive and derogatory. This movement has been in the news as a result of the R*dskins trademark.[95] The attempt to cancel this trademark[96] was unsuccessful because "the doctrine of laches barred the plaintiffs from bringing their claim."[97] Recently, however, the PTO had trademark registration of the R*dskin name and logo removed,[98] though the team is currently challenging this ruling.[99] Michael Honda, however, a Congressman from the region where the 2016 Superbowl will be played, introduced a bill that would bar the nickname "R*dskin" from being trademarked presently or in the future.[100]

In part because of this new legislation, public perception is changing. If an individual attempted to register the R*dskins trademark today, it would likely be turned denied. Since 1992, at least eleven attempts to register a new trademark with the word R*dskins have been denied.[101] One refusal letter from the PTO read, "[r]egistration is refused because the applied-for mark REDSKINS HOG RINDS consists of or includes matter which may disparage or bring into contempt or disrepute persons, institutions, beliefs, or national symbols."[102]

Public perception has increased the pressure to remove the trademark. President Obama even expressed his personal view, stating that, "[i]f I were the owner of the team and I knew that the name of my team, even if they've had a storied history, was offending a sizable group of people, I'd think about changing it."[103]

### *D. Trademark Protection: False Connection*

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[95] Amada Blackhorse, *Why the R*dsk*ns Need to Change,* March 8, 2013, HUFFINGTON POST, *available at* http://www.huffingtonpost.com/amanda-blackhorse/washington-nfl-name-change_b_2838630.html.
[96] Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96 (2003).
[97] Alicia Jessop, *Inside The Legal Fight To Change The Washington Redskins' Name,* FORBES, Oct. 15, 2013, *available at* http://www.forbes.com/sites/aliciajessop/2013/10/15/a-look-at-the-legal-fight-to-change-the-washington-redskins-name/.
[98] Ian Shapira, *California congressman wants to bar federal trademark protection for 'Redskins'* Feb. 4, 2015, Washington Post, *available at* http://www.washingtonpost.com/news/local/wp/2015/02/04/california-congressman-wants-to-bar-federal-trademark-protection-for-redskins/.
[99] *Id.*
[100] *Id.*
[101] Theresa Vargas, *From Pork Rinds to Cheerleaders, the Trademark Office Rejects the Word 'Redskins'*, THE WASHINGTON POST, Jan. 28, 2014, *available at* http://www.washingtonpost.com/blogs/local/wp/2014/01/28/from-pork-rinds-to-cheerleaders-the-trademark-office-rejects-the-word-redskins/.
[102] *Id.*
[103] Jessop, *supra* note 97.

Along with protection provided by tribal insignia, a tribe's name also has protection from marks that falsely suggest a connection to an Indian tribe. This protection can be found in 15 U.S.C. § 1052 (a), which states:

> No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it
> (a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or **falsely suggest a connection** with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 3501(9) of Title 19) enters into force with respect to the United States.

This statute effectively provides the Patent and Trademark office the ability to refuse registration of a trademark that falsely suggests a connection to a Native American tribe.[104]

### *E. PTO Examining Attorney*

In order to ensure the PTO does not issue trademarks that give a false impression of being connected to an Indian tribe, the Office has assigned an attorney to review "all trademark applications containing tribal names, recognizable likenesses of Native Americans, symbols perceived as being Native American in origin, and any other application which the PTO believes suggests an association with Native Americans in origin, and any other application which the PTO believes suggests an association with Native Americans."[105]

These examining attorneys have to walk a fine line. For example, an examining attorney rejected a trademark application from Wagner Gourmet Foods, Inc., a North Carolina company,[106] for cocktail mixes because of the "likely false association with the Pueblo of Zia and possible disparagement of the tribe."[107] Figure three shows the rejected trademark from Wagner Gourmet Foods.

[104] Dickinson, *supra* note 6, at 34.
[105] *Id*. at 14.
[106] *Trademark Status & Document Retrieval*, Patent Trademark Office, *available at* http://tsdr.uspto.gov/#caseNumber=75-447770+&caseType=SERIAL_NO&searchType=statusSearch.
[107] Dickinson, *supra* note 6, at 14.


Figure 3: Rejected Trademark Application 75-447770 from Wagner Gourmet Foods[108]
Figure 4, below, shows the Zia's flag, which the tribe adopted in 1995.


Figure 4: Flag of the Pueblo of Zia[109]

### *F. Challenges that Trademark Law Faces*

Native American tribes face several challenges with trademark law including, the cost of bringing trademark challenges, the possible ignorance of the attorney examining marks that may have tribal connection, and litigating against existing trademark holders.

[108] *Trademark Status & Document Retrieval,* PATENT TRADEMARK OFFICE, *available at http*://tsdr.uspto.gov/#caseNumber=75-447770+&caseType=SERIAL_NO&searchType=statusSearch (last visited May 19, 2015).
[109] Flags of the World, *Zia Pueblo Keres Nation - New Mexico (U.S.), available at*, http://www.crwflags.com/fotw/flags/xa-zia.html#flag (last visited May 4, 2015).

Possibly the biggest challenge is financial. Many Native American tribes are without the financial resources to have trademark attorneys "institute opposition or cancellation proceedings in the PTO, to police unauthorized use of common-law trademarks, and to take advantage of legal options."[110] Even if a tribe does have the resources, tribal members may feel the time and resources spent were a waste, as was the case with the Zia tribe after it's batter with Coulston International Co.[111]

A second potential challenge faced by tribes attempting to protect their names is that examining attorneys may not be aware that a symbol they are examining is connected to Indian culture.[112] Even though the PTO has one dedicated attorney who is to have expertise and familiarity in Indian marks review all potentially connected marks, this task may be difficult due to the large number (566) of federally recognized tribes.[113]

A third potential difficulty faced by tribes, is existing trademark owners who have tribal names as marks of their goods. Non-tribal trademark owners argue that taking away their trademarks would "constitute a taking, and could shake business confidence in the U.S. trademark system."[114]

### *G. Positive Changes Occurring at the Patent and Trademark Office*

Even though Native American tribes encounter difficulty protecting their names with trademark law, the law offers some benefits to protect of Native American tribal names. The largest protection is the attorney review by someone who is familiar with all marks that might be considered connected to an Indian tribe. This examining attorney would likely deny any trademark application that falsely suggests a connection to an Indian tribe, such as the one seen above from Wagner Gourmet Foods.

Tribal members also have an advantage in that, "[w]ith respect to federally recognized tribes and their members, statutory authority already exists for waiver of PTO fees charged in connection with obtaining Federal trademark registration for marks that identify Indian arts and crafts products."[115] Even though this does not pertain to all Indian products, a large number of Native Americans benefit because they work within the arts and crafts industry.

Another major benefit is created by the partnership between the PTO and the Native American Intellectual Property Enterprise Council (NAIPEC). The NAIPEC is a nonprofit organization that provides pro bono legal assistance to tribes, tribal

[110] Dickinson, *supra* note 6, at 29.
[111] *Id.* at 129.
[112] *Id.* at 125.
[113] Tribal Directory, US DEPT. OF INTERIOR: INDIAN AFFAIRS, *available at* http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm.
[114] Dickinson, *supra* note 6, at 43.
[115] *Id.* at 31.

businesses, and Native American inventors.[116] The founder of NAIPEC is a successful Native American inventor.[117] The partnership between the PTO and NAIPEC was created in a Memorandum of Understanding in which the two organizations would work "together to research and identify the IP education needs of specific Native American communities, and to provide that education in whatever way works best, our partnership will help provide Native American inventors the tools they need to expand their patent and trademark filings."[118] The PTO provided NAIPEC an office within the PTO so the Native American community voice can be heard concerning Intellectual Property policies.[119] This relationship between the PTO and NAIPEC is still going strong today,[120] and these changes have the trademark law moving in the right direction.

## IV. STATE LAW PROTECTION FOR NATIVE AMERICAN TRIBAL NAMES

In addition to IACA and federal trademark laws, state laws provide additional protections for tribal names. Currently, twelve states have enacted Indian arts and crafts laws.[121] Arizona and New Mexico are two such states. Under Arizona law, it is unlawful to "[s]ell or offer for sale any products represented to be authentic Indian arts and crafts unless the products are in fact authentic Indian arts and crafts."[122] A violation of this law results in a misdemeanor.[123] New Mexico has a similar law entitled the New Mexico Indian Arts and Crafts Sales Act, which states that, "[i]t is unlawful to barter, trade, sell or offer for sale or trade any article represented as produced by an Indian unless the article is produced, designed or created by the labor or workmanship of an Indian."[124] The New Mexico Attorney General and the Indian Arts and Crafts Board have worked closely together and have created a brochure titled, "Take Home a Treasure from Indian Country: Buy Authentic New Mexico Indian Arts and Crafts" to help the consumers and the artists of New Mexico.[125] The brochure was created to help solve a common problem, that consumers sometimes buy misrepresented products.[126] With this additional step, not only has New Mexico taken steps to prevent the selling of misrepresented, non-tribal arts and crafts with informational brochures, but New Mexico's assistant Attorney General, together with the Indian Arts and Crafts Board, has

[116] NAIPEC and Native Innovation, THE NATIVE AMERICAN INTELLECTUAL PROPERTY ENTERPRISE COUNCIL, *available at* http://nativeamericaninventors.org/operating-guidelines/.
[117] About Us, THE NATIVE AMERICAN INTELLECTUAL PROPERTY ENTERPRISE COUNCIL, *available at* http://nativeamericaninventors.org/about-us/.
[118] David Kappos, Under Secretary of Commerce for IP & Director of the USPTO, *Expanding Outreach to the Native American Community*, (Jan. 30, 2012), *available at* http://www.uspto.gov/news/speeches/2012/kappos_NAIPEC.jsp.
[119] *Id.*
[120] E-mail from David Petite, Founder of NAIPEC (March 9, 2014, 11:39 EST) (on file with author).
[121] Mittal, *supra* note 7, at 3.
[122] ARIZ. REV. STAT. 44-1231.0, *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/44/01231-01.htm&Title=44&DocType=ARS.
[123] ARIZ. REV. STAT. 44-1231.05.
[124] NMSA 1978 §30-33-1.
[125] *U.S. Department of the Interior and New Mexico Office of the Attorney General Promote Authentic Indian Arts and Crafts,* PAST IACB NEWS, *available at* http://www.iacb.doi.gov/past_news.html (last visited March 20, 2014).
[126] *Id*.

conducted sting operations on stores that sold misrepresented items.[127] This duel strategy is an excellent example of states attempting to protect tribal rights and heritages.

## V. FUNDAMENTAL SIMILARITIES BETWEEN IACA AND TRADEMARK LAWS

Trademark laws and IACA are fundamentally similar both in what, and whom, they seek to protect. Trademark laws are designed to protect the purchasing public and the trademark owner. IACA is designed to protect Indian artists and "the unsuspecting buyer."[128] Both can be used against those who market their products as authentic, when in fact, it was not produced by Native Americans. The case below is an excellent example of trademark laws and IACA being used together against a retailer using a Native American tribe's name in describing its products.

## VI. URBAN OUTFITTERS USE OF "NAVAJO" IN THEIR PRODUCTS

Urban Outfitters caused a controversy when the company started using "Navajo" to describe approximately twenty items the company sold.[129] Two items sold by Urban Outfitters especially upsetting to the Native American community, were the "Navajo Print Fabric Wrapped Flask" and the "Navajo Hipster Panty."[130] There was so much dissatisfaction with Urban Outfitters that Sasha Houston Brown, a Native American, sent the Urban Outfitters' CEO an open letter expressing her distress over the actions taken by the company.[131]

Urban Outfitters' use of "Navajo" is not the first time "Navajo" has been used to sell products.[132] Mazda used "Navajo" as the name for one of its earlier SUVs, and clothing lines have used "Navajo" to describe their products, according to Navajo Times contributor Bill Donovan.[133] The difference in those previous cases and in Urban Outfitters' use of "Navajo," is that those companies requested permission to use the term from the Navajo Nation, and promised to use the term with respect.[134] Urban Outfitters did not. On the contrary, The Navajo Nation sent Urban Outfitters a cease and desist letter, and while Urban Outfitters stopped using "Navajo" online, the company continued to use "Navajo" or "Navaho" in their retail stores.[135]

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[127] Mittal, *supra* note 7, at 16.
[128] Viola, *supra* note 64, at 191.
[129] Navajo Nation v. Urban Outfitters, Inc., 935 F. Supp. 2d 1147, 1154 (D.N.M. 2013).
[130] *Id.*
[131] Sasha Houston Brown, *An Open Letter to Urban Outfitters on Columbus Day,* Oct. 10, 2011, RACIALICIOUS, *available at* http://www.racialicious.com/2011/10/10/an-open-letter-to-urban-outfitters-on-columbus-day (last visited March 18, 2014).
[132] Michel Martin, *Navajo Nation Sues Urban Outfitters Over Trademark,* April 5 2012, *available at* http://www.npr.org/2012/04/05/150062611/navajo-nation-sues-urban-outfitters-over-trademark (last visited March 18, 2014).
[133] *Id.*
[134] *Id.*
[135] *Navajo Nation v. Urban Outfitters, Inc.,* 935 F. Supp. 2d at 1155.

The Navajo Nation brought suit against Urban Outfitters with six claims: (1) trademark infringement, (2) trademark dilution, (3) unfair competition, (4) false advertising, (5) commercial practice laws violations, and (6) violation of the Indian Arts and Crafts Act.[136] The first and fourth claims will be discussed in this section.

Navajo Nation alleged that Urban Outfitters committed trademark infringement, alleging the infringement occurred when Urban Outfitters used the marks of "Navajo" and "Navaho" in connection with products sold by Urban Outfitters, which caused confusion in the marketplace. According to the Navajo Nation, this confusion occurred when "a buyer exercising ordinary care might be deceived into thinking they were buying a product manufactured by the Navajo Nation or member thereof."[137] The Navajo Nation thus claimed that Urban Outfitters violated 15 U.S.C. §§114 and 1117. 15 U.S.C. §1114, which states:

> (1) Any person who shall, without the consent of the registrant—
> (a) Use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
> (b) Reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided.

15 U.S.C. §1117 allows an owner of a trademark "to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." The potential for awards in these types of case can be high. Brian Lewis, an Attorney for the Navajo Nation, stated that, in the Urban Outfitters case, "[t]he tribe is seeking monetary damages from the company of up to seven or eight figures."[138]

Navajo Nation claims that Urban Outfitters violated IACA by falsely suggesting its products were produced by an Indian tribe.[139] IACA, as discussed above, is a truth-in-advertising law, which ensures that items that are labeled as produced by Indians are actually made by Indians.[140]To support its claim, the Navajo Nation cited the "Navajo Bracelet," "Vintage Men's Woolrich Navajo Jacket," and "Navajo Glove," all of which

[136] *Navajo Nation v. Urban Outfitters, Inc.,* 935 F. Supp. 2d at 1155
[137] *Id.* at 1163.
[138] Alysa Landry, *Deadline Looming for Settlement in Urban Outfitter Case,* NAVAJO TIMES, May 30, 2013, *available at* http://www.navajotimes.com/news/2013/0513/053013urb.php#.Ux2z7PldWSo (last visited March 11, 2014).
[139] *Id.* at 1156.
[140] *Id.* at 1169-70.

were sold at Urban Outfitters.[141] Urban Outfitters countered this argument by saying clothing items, such as the ones mentioned, were not arts and crafts as defined by IACA. The court, however, found that 25 C.F.R. 309.15 applied. Examples of Indian products are given in 25 C.F.R. 309.15 which states that:

> (a) Apparel made or substantially decorated by an Indian, including, but not limited to, parkas, jackets, coats, moccasins, boots, slippers, mukluks, mittens, gloves, gauntlets, dresses, and shirts, are Indian products.
> (b) Specific examples include, but are not limited to: seal skin parkas, ribbon appliqué dance shawls, smoked moose hide slippers, deer skin boots, patchwork jackets, calico ribbon shirts, wing dresses, and buckskin shirts.

The court found that modern apparel, such as the items being sold by Urban Outfitters with the mark "Navajo," were "arts" and "crafts" items that were protected by the IACA.[142] In the eyes of the court, the Navajo Nation therefore "sufficiently alleged facts to support a cause of action under the IACA to survive Defendants' motion to dismiss."[143] The case is still in litigation[144] but the language from the District Court of New Mexico, quoted above, seems to indicate the Navajo Nation has a very strong case against Urban Outfitters.

## VII. EXAMPLE OF TRIBAL NAME USAGE AND SOLUTIONS

### *A. Tribal Names Used Successfully and Not Successfully*

Native American tribes' views on their names being used by nontribal third parties vary, and that use has been met with both support and rejection. The Apache Tribal Council supported a Boeing "AH-64D Apache Longbow" by holding a ceremony and blessing the helicopter.[145] The strong support for the helicopter comes from the fact the helicopter is made in Mesa, Arizona, where the Apache are located and a large percentage of Apache are veterans.[146] It must be noted, however, that not all Native Americans support the helicopter being named after the Apache. Vernon Bellecourt, the president of the National Coalition on Racism in Sports and Media, is against naming the helicopter after the Apache but concedes that "[a ]lot of the Apache are veterans who take great pride in their fighting spirit and their military service."[147]

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[141] *Id.*
[142] *Id.* at 1171.
[143] Landry, supra note *Id.* at 1170
[144] Status of the case: Discovery Order on the U.S. District Court for the District of New Mexico website filed on Feb. 27, 2014. Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel Discovery [Doc. 88], Navajo Nation v. Urban Outfitters, Inc., 935 F.Supp.2d 1147 (2013), *available at* http://www.nmcourt.fed.us/Drs-Web/view-file?unique-identifier=0005866698-0000000000.
[145] Ben Greenman, *Dept. of Namesakes,* THE NEW YORKER, June 7, 1999, 32, 33, *available at* http://archives.newyorker.com/?i=1999-06-07#folio=032.
[146] *Id.*
[147] *Id.* at 32, 33.

Additionally, the Seminole tribe allows Florida State University to use "Seminoles" as a mascot.[148] The Seminole Tribe of Florida, Seminole Nation of Oklahoma, and the Miccosukee Tribe of Indians of Florida (a tribe that split from the Seminoles in the 1960's) all support Florida State University's use of the "Seminoles" as a mascot.[149] The Seminole Tribe of Florida was involved with the creation of Florida State University's mascot Chief Osceola.[150] Not all relationships between schools with Native mascots and tribes are so positive. The NCAA had to intervene and ban colleges' use of hostile and abusive mascots and nicknames from post-season play.[151]

Brian Lewis a Navajo Department of Justice Attorney, made the tribes' position clear when he stated, "the Navajo name belongs to the people."[152] As such, The Navajo Nation has allowed non-tribal third parties to use their name, and has also opposed non-tribal third party use. The Navajo Nation allowed Mazda to use "Navajo" after Mazda consulted with the Navajo Nation and gave the Navajo Nation one of the vehicles for its use at its government offices.[153] However, the Navajo Nation sued Urban Outfitters when Urban Outfitters used their name without permission.

Using the examples above, one may conclude that the two biggest factors in determining if tribal names are used successfully and appropriately, are whether the tribe has been consulted about the use of their name and the context in which the tribe's name is being used. If there is consultation and the use is respectful, then the tribes are more likely to allow a third party to use their name in that third party's product.

### *B. Potential Solution: More Funding for IACA and Minor Changes in Current Law*

The above examples display how a Native American tribe's name can be used by a non-tribal third party both with and without the support of the tribe. Consultation and context of the use largely determine if the tribe's name usage is appropriate. If a tribe finds that their name is used inappropriately, they should consider the options available to them just as the Navajo Nation did when they responded to Urban Outfitters' usage of "Navajo" to label its products.

Potential harm caused by a non-tribal third party's use of a tribe's name is a major reason that a tribe should guard against inappropriate usage. This harm can take

[148] Robert Powell, *Florida State Can Keep Its Seminoles,* N.Y. TIMES, August 25, 2005, *available at* http://www.nytimes.com/2005/08/24/sports/24mascot.html?pagewanted=all&_r=0.
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] Alysa Landry, *Deadline Looming for Settlement in Urban Outfitters Case,* NAVAJO TIME, May 30, 2013, *available at* http://www.navajotimes.com/news/2013/0513/053013urb.php#.Ux5toPldWSo (last visited March 18, 2014).
[153] Michel Martin, *Navajo Nation Sues Urban Outfitters Over Trademark,* NATIONAL PUBLIC RADIO, April 5 2012, *available at* http://www.npr.org/2012/04/05/150062611/navajo-nation-sues-urban-outfitters-over-trademark (last visited March 18, 2014).

the form of a major retailer selling an item labeled "Navajo fabric wrapped whiskey flask" which in turn the consumer believes comes from the same source as Navajo rugs. In actuality, the "Navajo fabric wrapped whiskey flask" is not made by an Indian. Another harm is a retailer simply selling a flask with the Navajo name. The sale of this flask is particularly offensive because The Navajo Nation bans the sale of alcohol within its borders.[154] The Navajo Nation's driving reasons for this ban are that Native Americans are 514% more likely to die from alcoholism compared to other Americans and the high rate of alcohol related crimes on the Navajo Reservation.[155]

Despite the examples cited above, protection for Native American products has come a long way. A large part of the expansion of those protections is that trademark law and IACA have also come a long way. The original IACA had a minor penalty that was rarely enforced. Today, the Board has a website set up to report violations, and the penalties for violators are heavy. Trademark law has evolved so far as to disallow a trademark for the R*dskins football team, and now applications for a trademark that contain the word R*dskins are turned down.

Even though IACA and trademark law have progressed so far, there are still potential changes that can improve both of them as they relate to tribal names. One potential change that can reap large dividends is to increase the funding of the Board so the Board can hire more investigators and conduct a study of the amount of misrepresentation currently taking place in the Indian arts and craft industry. Presently, the Board has funding to reimburse one investigator, but more funding would enable the increase of their team of investigators from eight to ten. Additionally, funding is needed to determine just how much misrepresentation is currently taking place in the Indian arts and crafts industry. Once the amount of misrepresentation is determined, the Board can justify giving the Indian arts and crafts industry higher priority when potential violations are reported. Finally, the Board should release the number of complaints they receive each year, so it can be determined whether the misrepresentation of Native American arts and crafts are increasing or decreasing.

Trademark law should allow individual tribes to trademark on their own.[156] This change would force non-tribal third parties to consult with the tribe whose name the third party seeks to use, and the consultation would ensure the tribe's name is used in the context the tribe determines best. This would, in turn, increase the freedom of tribes to authorize the usage of their names when they believe the usage is appropriate, and would likely have prevented Urban Outfitters' use of "Navajo" when describing a flask and women's underwear. Unfortunately, because the law did not give the Navajo Nation

[154] Gregg Yee, *Navajo Nation Officials Say Lifting Ban on Alcohol is Not an Option, South Dakota Tribe Votes to Legalize*, THE DAILY TIMES, Aug. 16, 2013, *available at* http://www.daily-times.com/ci_23864765/navajo-nation-officials-say-lifting-ban-alcohol-is (last visited April 16, 2014).
[155] *Id.*
[156] The idea of allowing the tribe as a group to own their tribe's trademark instead of an individual is similar to the argument of having Indigenous groups own their Intellectual Property rights which Angela R. Riley argues for in *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities.*

ownership of their own name, the tribe ultimately had to go to court and use both trademark and IACA protections available to them.

Both trademark law and the IACA currently provide some level of protection for Native American tribal names, but, as Brian Lewis, attorney with the Navajo Department of Justice, says, the Navajo name belongs to the Navajo people. To that same end, the law should reflect this concept, and should apply to all tribes so a tribe's name can belong directly to its people.