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A Questionable Categorization – Trademark's Struggle to Protect Tribal Cultural Property

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A QUESTIONABLE CATEGORIZATION— TRADEMARK’S STRUGGLE TO PROTECT TRIBAL CULTURAL PROPERTY

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I. INTRODUCTION: THE USE OF TRIBAL NAMES AND INSIGNIA BY THIRD PARTIES

Trademarks and Native American tribes have received substantial media attention over the last few years as major sports teams with derogatory and offensive names and mascots have taken steps towards pursuing more culturally appropriate brands. For example, the Washington Redskins, who have held federally registered trademarks in the “WASHINGTON

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REDSKINS” name since 1972, now go by the Washington Commanders,¹ and the former Cleveland Indians took on the new name of the Cleveland Guardians after completion of the 2021 season.² While certainly harmful to the representation and perception of Native Americans in the United States, the federal registration of derogatory nomenclature, caricatures, and slurs are not the only ways in which Native American identity can be undermined and injured. In fact, the mere use of a tribe’s name or official insignia can have detrimental effects on how members of a tribe consider their own identity while simultaneously influencing the general public’s understanding of the tribe. An example can be found in the federally recognized Zia tribe in rural New Mexico.³ The Zia Pueblo, though almost invisible to a traveler’s untrained eye, has existed for over 600 years and is home to the Zia people.⁴ In addition to its beautiful traditional artwork and annual feast day Corn Dances, Zia Pueblo is well known for its tribal sun symbol, consisting of four sets of four lines, arranged in a “t” shape, and forming a circle at the center.⁵ The symbol has been used by the tribe in religious ceremonies dating back to 1200 C.E.⁶ and it has a culturally significant meaning—four is a sacred number symbolizing the Circle of Life, consisting of four winds, four seasons, four directions, and four sacred obligations, with the circle “bind[ing] the four elements of four together.”⁷

1. *Trademark Search*, U.S. PATENT AND TRADEMARK OFFICE, <https://tmsearch.uspto.gov/search/search-information> (last visited Dec. 21, 2023); Eric Levenson, *These teams faced pressure to change their Native American names. Here’s what’s happened since*, CNN, (Dec. 14, 2020), <https://www.cnn.com/2020/12/14/us/cleveland-washington-native-american/index.html>. As of Dec. 21, 2023, multiple trademarks for “WASHINGTON REDSKINS” are still active on the Principal Register and the registration for “WASHINGTON COMMANDERS” marks are pending registration.

2. *Cleveland Indians officially changing name to Guardians on Friday*, ESPN, (Nov. 17, 2021), https://www.espn.com/mlb/story/_/id/32655434/cleveland-indians-officially-changing-name-guardians-friday/. Some teams have taken partial steps towards retiring offensive references to Native American tribes, such as the Kansas City Chiefs, who have not changed their name but have retired their mascot, a horse that went by the name “Warpaint,” in favor of their new mascot, K.C. Wolf. Joe Brennan, *2023 Super Bowl: What is the controversy around the Kansas City Chiefs mascot?*, AS, Feb. 12, 2023 (<https://en.as.com/nfl/2023-super-bowl-what-is-the-controversy-around-the-kansas-city-chiefs-mascot-n/>).

3. *Zia Pueblo*, NEW MEXICO TRUE, <https://www.newmexico.org/native-culture/native-communities/zia-pueblo/> (last visited Apr. 15, 2022).

4. *Id.*

5. PUEBLO OF ZIA, <https://www.ziapueblo.org/> (last visited Apr. 15, 2022); Stephanie B. Turner, *The Case of the Zia: Looking Beyond Trademark Law to Protect Sacred Symbols*, 11 CHI.-KENT J. INTELL. PROP. 116 (2012) (describing the sacred sun symbol as “a circle with groups of rays pointing in the four cardinal directions.”)

6. *Id.*

7. PUEBLO OF ZIA, *supra* note 5.

In addition to its sacred meaning to the Zia people, the sun symbol has been adopted as the official state insignia of New Mexico and appears on the state flag. It has even been integrated into the New Mexico Legislature's salute: "I salute the flag of New Mexico, the Zia symbol of perfect friendship among united cultures."⁸ In contrast to the legislature's claim of "perfect friendship among united cultures," the tribe claimed the state appropriated the symbol without permission, leading to the use of the symbol by various parties in ways that "dilute[ed] its sacred meaning and disparage[ed] the Zia people."⁹ Without citizenship at the time of the initial appropriation, the Zia people lacked the power and money to further object to the state's use of the symbol.¹⁰ Zia Pueblo turned to trademark law in 1992, looking to regain rights to their sacred symbol by objecting to the trademark registration of the sun symbol with the United States Patent and Trademark Office (USPTO) by Coulston International Corporation.¹¹ After legal battles, proceedings, and arguments, the Zia's fight ended when the USPTO established its Native American Tribal Insignia database, and the Zia people were left without sufficient recourse.¹²

The purpose behind providing this brief summary of the struggles of the Zia tribe as they fought to gain protection of a symbol that was integral to their identity is not to provide an analysis of arguments or rulings but to demonstrate the actual harms that arise when a third party makes use of a tribe's name, symbols, or insignia. In public hearings conducted by the USPTO in an attempt to gain insight into the official insignia of Native American tribes, a member of Zia Pueblo explained that, "[w]ith the exploitation of these symbols, their meaning is depleted. This, in turn, invariably affects our self-worth and sense of dignity."¹³ This member went on to explain that native people desired control

8. NEW MEXICO TRUE, *supra* note 3. The symbol was initially introduced to the New Mexican people by Harry and Reba Mera in 1923, when they submitted a design featuring the Zia sun symbol to a contest requesting submissions for a new state flag. Turner, *supra* note 5, at 120. As an archaeologist, Reba had seen the symbol on a ceremonial pot, though the Zia people insisted the pot in question must have been stolen as ceremonial pottery could not leave Zia Pueblo. *Id.* Mera's design was adopted as the official state flag. *Id.* at 121.

9. Turner, *supra* note 5, at 117. As of 2012, the Zia sun symbol was used in many different ways, from commercial companies offering pest control services, to motorcycle sales, to products such as portable toilets. *Id.* at 120. It is not difficult to see how such uses could disparage the Zia people, who have honored this symbol for years as part of their deep-rooted culture.

10. Phil Patton, *Trademark Battle over Pueblo Sign*, N.Y. TIMES, Jan. 13, 2000, <https://www.nytimes.com/2000/01/13/garden/design-notebook-trademark-battle-over-pueblo-sign.html> (last visited Apr. 15, 2022).

11. Turner, *supra* note 5, at 129. Coulston later withdrew its application after various proceedings, meaning the Trademark Trials and Appeals Board did not render a decision on this objection. *Id.*

12. *Id.* at 130.

13. *Id.* at 123 (quoting *Public Hearings on Official Insignia of Native American Tribes*, Albuquerque, New Mexico (1999)).

over their tribal symbols to ensure that they remained sacred rather than become part of the mainstream.¹⁴ In allowing third parties to register and claim legal rights to tribal symbols and insignia, the U.S. government was stripping the tribes of legal rights to what others appropriated.¹⁵

Scholars have provided further insights into the harms tribes endure when third parties make use of their names, symbols, and insignia, especially when tribes do not intend to use these things to derive profit. Professor Christine Farley's formulation of "traditional" and "realist" groups of thought regarding the desire for intellectual property protection of indigenous works presents a helpful framework in understanding the harms presented by appropriation.¹⁶ The traditional group of thought, Professor Farley explains, seeks to "prevent what may be characterized as a cultural or psychological harm caused by the unauthorized use of their art"¹⁷ out of a concern that "the expropriation of their living culture will cause their imagery to lose its original significance, which will lead to a disruption of their practiced religion and beliefs and a dissolution of their culture."¹⁸ In reference to the Zia people, traditionalist concerns arise in the fear that the sacred significance of the sun symbol would be lost as a result of its commercialization. With wide use of the symbol, its true meaning becomes diluted and confused. People walking down the street may see the symbol and think of Zia Pueblo and the Circle of Life, or they may think of the state of New Mexico, or, in seeing the symbol on a commercial product, may see it as a source identifier of a sale item. Viewers who recognize the symbol as associated with Zia Pueblo may mistakenly believe that the use of the symbol on a commercial product means the Zia tribe endorsed or is otherwise affiliated with the third-party user, and such beliefs may negatively impact the tribe's public and self-image.¹⁹

The realist group focuses on the economic benefits of intellectual property protection by seeking compensation for their artwork via licensing.²⁰ To reap

14. *Id.*

15. *Id.* at 123.

16. Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 14 (1997). It is important to note that Professor Farley's work considers specifically the implications of U.S. copyright law on the intellectual property protection available for the protection of indigenous artwork. Though her frameworks and analyses are presented in the context of copyright law, they provide a helpful guide to identifying some of the cultural and economic harms that result from cultural appropriation in general, and demonstrate the rationale behind arguments for increased protection of all forms of indigenous and tribal intellectual and cultural property.

17. *Id.*

18. *Id.* at 15.

19. Turner, *supra* note 5, at 123.

20. Farley, *supra* note 16, at 14.

such economic benefits, those in the realist group of thought believe that they must gain control of their work and imagery to “ensure that the public gets an accurate account of indigenous culture and that the investment in that culture goes back to their communities.”²¹ A lack of control prevents the tribe from economically benefiting from unjust appropriation and, though tribes may primarily hope that their work and symbolism remain unsold, if “sales are inevitable,” the best solution would be to allow the true creators to take in the monetary benefits.²² To relate back to the Zia people, the realist concerns come into play as third-party users receive monetary profits from the exploitation of tribal culture, such as receiving payment for products portraying the sun symbol. It is important to reiterate that, in many cases, tribes would much prefer that their works and cultures remain uncommercialized.²³ The desire to take on monetary benefits from appropriation serves as an attempt to rectify the harms caused by appropriation and to ensure that those profiting are actual creators.

Whether adhering to a traditional or realist framework, it is clear that tribes face real harm as a result of third-party usage of their names, symbols, and insignia, whether through a loss of potential commercial value or through the dilution of something held as sacred.

II. DIFFERENTIATING BETWEEN CULTURAL AND INTELLECTUAL PROPERTY

In considering tribal insignia in the context of intellectual property and trademark law, it is essential to differentiate between cultural and intellectual property. Both can be categorized as forms of intangible property. Intangible property is frequently used in taxation law and intellectual property law and is defined as “such property as has no intrinsic and marketable value but is merely the representative or evidence of value.”²⁴ However, despite their similar

21. *Id.*

22. Turner, *supra* note 5, at 124 (quoting Carol Rose, Book Review, *Property in All the Wrong Places?*, 114 YALE L.J. 991, 997 (2005)); Turner, *supra* note 5, at 124 (“When an indigenous group cannot completely stop outsiders from using its symbol, not allowing it to obtain monetary benefits adds insult to injury.”)

23. That being said, this author in no way criticizes or questions a tribe’s decision whether or not to commercialize any aspect of their identity—this is a choice to be made by the tribe itself, in accordance with their own beliefs and reasoning, rather than third-party users.

24. *Intangible Property*, BLACK’S LAW DICTIONARY (2d ed. 1910) (<https://thelawdictionary.org/intangible-property/>). Common examples of intangible property include stocks, bonds, and promissory notes. Courts have offered additional clarification on what constitutes intangible property. Applying California law, one court stated that intangible property “is generally defined as property that is a ‘right’ rather than a physical object.” *Microsoft Corp. v. Franchise Tax Bd.*, 212 Cal. App. 4th 78, 87.

categorization in property law, cultural and intellectual property are inherently different in the eyes of both individuals and the law.

Cultural property can take on expansive or narrow definitions. For an expansive definition, *Cohen's Handbook of Federal Indian Law* defines cultural property as “any property of great importance to the cultural heritage of a people.”²⁵ In contrast, in their analysis of the adequacies of current cultural protection of Native American tribes, Chante Westmoreland adopted a narrower definition, using cultural property to refer to “intangible sacred traditional knowledge that has been fixed in a tangible medium.”²⁶ Whether adopting Cohen's or Westmoreland's definition, it seems clear that tribal insignia fits within either. Tribal insignia, such as the Zia sun symbol, are of great importance to a tribe's “cultural heritage,”²⁷ and an understanding of the cultural meaning of such insignia can certainly be classified as a type of “intangible sacred traditional knowledge.”²⁸ Therefore, tribal insignia can be identified as the cultural property of a given tribe.

Intellectual property, on the other hand, is defined as a “category of intangible rights protecting commercially valuable products of the human intellect.”²⁹ As previously discussed, the problem with categorizing tribal insignia as intellectual property arises when considering the “commercially valuable” portion of the definition as many tribes do not want to take commercial value from their insignia. Intellectual property law, therefore,

25. Chante Westmoreland, *An Analysis of the Lack of Protection for Intangible Tribal Property in the Digital Age*, 106 CALIF. L. REV. 959, 962 (2018) (citing COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 20.01, 1267 (Nell Jessup Newton ed., 2012)). The United States Department of State's Bureau of Educational and Cultural Affairs has adopted a definition of cultural property as well:

Cultural property is a unique, nonrenewable resource that is important for learning about the diversity of human history and cultures. Common types of cultural property include archaeological artifacts, rare manuscripts, and objects used in ceremonies. These objects may be important for community identity and practices, recognized as part of a group's cultural heritage, and protected by law or tradition.

Cultural Property, BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS, <https://eca.state.gov/cultural-heritage-center/cultural-property> (last visited Feb. 2, 2023).

26. Westmoreland, *supra* note 25, at 962. Westmoreland identifies tangible mediums to include “(1) photographs of tribal members on tribal lands on sacred grounds or using sacred resources; (2) written and transcribed field notes from anthropological visitors to tribal lands; and (3) sound and audiovisual recordings of intimate tribal affairs, including the recitation of creation stories, interviews with tribal members, and the performance of traditional dances and ceremonies.” *Id.*

27. *Id.* (citing COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 20.01, 1267 (Nell Jessup Newton ed., 2012)).

28. *Id.*

29. BLACK'S LAW DICTIONARY (10th ed. 2014). Intellectual property offers protection to trademarks, copyrights, patents, trade secrets, publicity, and protects against unfair competition. *Id.* This edition of Black's Law Dictionary also includes “moral rights” within its definition of intellectual property. *Id.* What the term “moral rights” entails is up for debate, though cultural appropriation does often raise issues of morality, depending on one's definition of what is “moral.”

appears to exclude, or at least severely limit, the protection of non-commercial cultural property such as tribal insignia and fails to provide adequate recourse to those seeking to take protective measures against potential appropriation. However, intellectual property law provides a helpful framework for considering the protection of cultural property in the United States, and trademark law specifically may be the greatest tool available to tribes as they attempt to protect their intangible cultural property.³⁰

Cultural context must be considered when looking at the intersection of cultural and intellectual property. Though Westmoreland considers intellectual property law a “helpful framework” as “IP laws are the most analogous form of intangible property rights in Western society,” they note that intellectual property inherently fails at protecting intangible cultural property due to the “diverging interests of IP law and tribes.”³¹ The western system, Westmoreland explains, “is based on economically benefiting investors and consumers” while “the tribal focus is largely on maintaining the cultural integrity of the group.”³² Tribes tend to collectively use tribal property, meaning it is not necessarily owned by a certain individual, at least not in the sense that the western system considers ownership.³³ Therefore, though viewing cultural property through an intellectual property lens can offer helpful insight, it is essential to note that the two are not analogous and, in fact, an understanding of intellectual property is insufficient to fully explain the sacred importance of cultural property.

However, even though viewing cultural property through an intellectual property framework is insufficient, in many cases it is the best that is available considering the United States’ lack of substantive law offering protection to cultural property. Within the vast realm of intellectual property law, trademarks are likely the most useful to tribes.³⁴ With this in mind, the United States’

30. Westmoreland, *supra* note 25, at 977. See also Jenny D. Woltz, *The Economics of Cultural Misrepresentation: How Should the Indian Arts and Crafts Act of 1990 Be Marketed?*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 443, 482 (2006).

A [] problem with attempting to fit questions of cultural heritage into existing intellectual property regimes is that this approach fails to adequately meet the needs of those who argue for absolute preservation of cultural heritage. Generally, such interest groups seek to retain eternal property over their crafts. Intellectual property law, however, mandates that such rights must enter the public domain after the monopolies protecting these rights for a limited duration expire. Such limited monopolies serve only as a means to an end: to provide incentive for invention and artistic creation.

31. Westmoreland, *supra* note 25, at 969.

32. *Id.* at 970.

33. *Id.* Westmoreland further explains that different authors have “argued that certain items of cultural property are so central to a tribe’s identity, there is no logical way to commercialize, must less individualize, ownership.” *Id.*

34. *Id.* at 977. Westmoreland also considers the adequacy of protection offered by other sources of intellectual property protection: trade secrets, copyrights, and patent law. *Id.* at 969. Westmoreland found trade secret protection insufficient due to requirements of profitability and secrecy as intangible

government has taken different steps towards offering more adequate protection to tribes by outlining already-existing methods of protection and enforcement available to all parties, and through initiatives aimed at offering additional protection to tribes in particular, including the Tribal Insignia Database.

III. AVAILABLE TRADEMARK PROTECTIONS FOR TRIBAL INSIGNIA

As discussed above, while intellectual property law may be inadequate to properly address the concerns surrounding Native American tribes' ability to protect their cultural property, it arguably offers the best methods of protection.³⁵ As it stands, trademark law offers, among other things, the opportunity to register trademarks on the federal Principal Register and to contest, oppose, or seek to cancel pending and existing registrations.³⁶ Other initiatives have been implemented by statute to offer protection to Native American tribes specifically, meaning these programs are not offered to any and all persons seeking protection.

The purpose of this article is to consider the effectiveness of the most recent body of legislation, the Tribal Insignia Database, and therefore, the bulk of the following analysis is aimed at this particular method of protection. However, brief summaries of other methods of protection are provided to create a well-rounded understanding of other resources available to tribes at this time.

A. Common Law Protections and Trademark Registration

Trademark law, as a distinctive subset of intellectual property law, offers various protections to those seeking to protect their brands in the marketplace. In particular, common law trademark rights grant protection to those without registrations, and state and federal registration options work to enhance and

cultural property is often not intended for profit and is well known throughout a tribe or closed community. *Id.* at 971–72. Copyrights were found to be similarly insufficient, mainly because bodies of “sacred traditional knowledge likely [have] a near-ancient date of creation” and is therefore part of the public domain and not generally protectable. *Id.* at 974. Patents fail to offer adequate protection due to the rigorous requirements of patent prosecution and the intangible nature of many forms of cultural property. *Id.* at 975.

35. *Id.* at 977.

36. Sahar A. Ahmed, *Recognizing Tribal Marks: The Native American Tribal Insignia Database*, STERNE KESSLER GOLDSTEIN & FOX (May 2021), <https://e.sterneessler.com/cv/dbbf7f94b1d90cd80436bd7ec940d4bee10ff4f4/p=5409886>. Ahmed describes the avenues of available trademark protection as follows:

If a tribe believes that it will be damaged as a result of a pending application, it may follow the traditional means of protecting its insignias, names, and symbols by filing a Letter of Protest with the USPTO, and possibly filing its own application. Likewise, a tribe may contest a mark published or registered on the Principal Register by filing a notice of opposition with the Trademark Trial and Appeal Board (TTAB) or file a petition for cancellation of a registration with the TTAB.

solidify such protections. The following subsections are brief overviews of the availability of common law, state registration, and federal registration, with federal registration receiving the most attention as the most robust form of protection. While each avenue differs in the rights granted and the limitations imposed, they all struggle to offer the requisite protection indigenous individuals and communities require to properly protect their names and insignia.

i. Common Law Protections

As commonly understood and articulated in trademark law, trademark rights arise from use rather than registration.³⁷ Therefore, a Native American tribe can protect their common law trademark rights, absent registration, by policing the use of such marks, which includes monitoring the marketplace for potential misappropriation, sending cease and desist letters to potential infringers, and pursuing litigation should the need arise. Tribes, and other individuals seeking to put potential infringers on notice of existing trademark rights, can use the “TM” symbol in association with their mark.³⁸ However, common law trademarks are more limited than federally registered trademarks and apply to the specific geographic area the goods or services in question are being provided in.³⁹ Furthermore, in accordance with the general purposes of trademark law, common law rights are still determined by use in commerce.⁴⁰ As a general matter, common law trademarks offer significantly less protection than registered trademarks and still fail to properly address the protection of cultural property that is not used in commerce.

ii. State Registration

Trademarks are protected on a state level as well, but such registrations create rights only in that particular state.⁴¹ Therefore, if a mark is used across state lines, a state registration will not equate to protection in such additional states.⁴² Different states also have varying requirements and methods of

37. *What is a trademark?*, U.S. PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademarks/basics/what-trademark> (last visited Feb. 9, 2023).

38. Benjamin D. Schwartz, *Common Law™ v. Federally Registered® Trademark Rights*, THE NATIONAL LAW REVIEW (May 6, 2022) (<https://www.natlawreview.com/article/common-law-v-federally-registered-trademark-rights>).

39. *Id.*

40. PROTECTING YOUR TRADEMARK: ENHANCING YOUR RIGHTS THROUGH FEDERAL REGISTRATION, U.S. PATENT AND TRADEMARK OFFICE, 13 (Sept. 2020) (<https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf>).

41. *Why register your trademark?*, U.S. PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademarks/basics/why-register-your-trademark> (last visited Feb. 9, 2023).

42. *Id.*

maintaining their trademarks,⁴³ so registration in multiple states is likely time consuming and ineffective. A complete examination of state trademark registration benefits and shortcomings is not necessary for the purpose of this Article and would be unduly burdensome considering the numerous applicable state laws, departments, and agencies. For the purposes at hand, it is most important to acknowledge the availability of state trademark registrations to Native American tribes attempting to protect their insignia but understand that such protection is very limited in scope.

iii. Federal Registration

Pursuing federal registration opens up additional protections, including a legal presumption of ownership, nationwide priority, inclusion in the USPTO's online database, the right to use the federal registration symbol "®", a basis for foreign filings, a right to bring infringement actions in federal court, and the ability to record registration with the U.S. Customs and Border Protection.⁴⁴ Tribes are able to apply for federal trademark registration through the USPTO like any other party in the United States.⁴⁵ According to the USPTO, the process of registering a federal trademark takes twelve to eighteen months and is described as a "complex procedure that involves your application moving through various stages."⁴⁶ Due to this complexity, it is strongly recommended that applicants hire an attorney to help them through the application and registration process.⁴⁷

The USPTO claims that, because tribes can register for a federal trademark like any other party, "Native American tribes currently stand on equal footing with all other potential applicants in terms of legal rights."⁴⁸ However, the USPTO also recognized that there are some unique hurdles tribes must confront. For example, tribes may lack the financial backing required to hire outside counsel to properly police use of any registered marks or file opposition and cancellation proceedings as needed.⁴⁹ Tribes may also struggle with

43. *State trademark information links*, U.S. PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademarks/basics/state-trademark-information-links> (last visited Feb. 9, 2023).

44. PROTECTING YOUR TRADEMARK, *supra* note 40.

45. PATENT AND TRADEMARK OFFICE, REPORT ON THE OFFICIAL INSIGNIA OF NATIVE AMERICAN TRIBES 27 (Sept. 30, 1999).

46. *How long does it take to register?*, U.S. PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademarks/basics/how-long-does-it-take-register> (last visited Dec. 21, 2023).

47. *Trademark process*, U.S. PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademarks/basics/trademark-process#step4> (last visited Feb. 8, 2023). See also PROTECTING YOUR TRADEMARK RIGHTS, *supra* note 40, at 11.

48. *Id.*

49. *Id.* See also Westmoreland, *supra* note 25, at 977.

obtaining registration and may not even want to register, as they may not be looking to gain any commercial benefits from their insignia but would rather prevent undue appropriation.⁵⁰ As the guiding legislation in the United States for trademark registration, the Lanham Act specifies that registration requires either use of a mark in commerce or a bona fide intent to use such mark in commerce in the near future.⁵¹ The USPTO offers the following definition of a trademark: “A trademark can be any word, phrase, symbol, design, or a combination of these things that identifies your goods or services. It’s how customers recognize you in the marketplace and distinguish you from your competitors.”⁵² Therefore, trademarks are primarily designed to “prevent consumer confusion, incentivize product quality control, and make life easier on consumers by allowing them to easily identify the source of their goods and services.”⁵³ Thus, tribes that are not looking to market their insignia, symbols, or other potential trademarks are blocked from registration because the protection they seek falls outside of the scope of trademark law.

Due to the challenges and conflicts tribes are presented with when considering federal registration of a trademark and whether registration would in fact be effective, it is essential to consider other avenues of protection. Though tribes may not wish to use their marks in commerce, they still have intrinsic cultural value that begs for protection from the commercialization of others. Hence, trademark law has attempted to find a place for the unique needs of Native American tribes.

B. Letters of Protest

Parties are able to submit letters of protest to the USPTO regarding pending trademark applications in an attempt to make the Office aware of evidence affecting the registrability of the pending application.⁵⁴ These letters must include specific and relevant legal ground on which an examining attorney

Trademark protection requires monetary and legal resources to register and enforce; the need for these resources may preclude certain tribes from attaining protection. Larger tribes ... are more capable of obtaining trademark protection because of their relative affluence and their commercial use of their traditional symbols. Meanwhile, smaller tribes might lack the ability to commercialize or register their symbols, much less enforce their rights against infringers.

50. REPORT ON THE OFFICIAL INSIGNIA OF NATIVE AMERICAN TRIBES, *supra* note 45, at 27.

51. 15 U.S.C. § 1051.

52. *What is a trademark?*, *supra* note 37.

53. Westmoreland, *supra* note 25, at 975.

54. *Letter of protest practice tip*, U.S. PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademarks/trademark-updates-and-announcements/letter-protest-practice-tip#Appropriate%20reasons> (last visited Feb. 2, 2023).

should refuse registration of the pending application.⁵⁵ The USPTO provides a list of appropriate reasons to be included in a letter of protest:

- The trademark in the protested application is likely to be confused with a trademark in a U.S. registration or prior pending application.
- The trademark in the protested application is merely descriptive of or generic for the identified goods or services.
- The trademark in the protested application suggests a false connection with the protestor or some other party.
- The trademark in the protested application is a widely used or commonplace message and does not function as a trademark.
- A registered trademark appears in the identification of the goods or services in the protested application.

The specimens of use in the protested application feature an image that is used by third parties without the mark in question or an image that appears in multiple prior registrations or applications all bearing different marks.⁵⁶

Tribes without a federally registered trademark are able to file a letter of protest if a pending application is either “likely to cause confusion or suggests a false connection.”⁵⁷ After the letter is submitted in accordance with proper procedures, the USPTO reviews the submitted evidence and determines whether or not an examining attorney should take such evidence into consideration when considering the registrability of the pending mark.⁵⁸ A letter of protest can be filed prior to publication of the pending application or within thirty days of publication of the pending application.⁵⁹ Submission of this letter also requires payment of a fee which, as of 2023, was set at \$50.00.⁶⁰

It is important to note that submitting a letter of protest is not a method of protection unique to Native American Tribes but is instead a method offered to any party that foresees harm as a result of a pending application. Therefore, letters of protests were not designed to offer additional protection to cultural property but are instead a way in which tribes can use the already existing system.

55. *Id.*

56. *Id.*

57. *Native American tribal insignia*, U.S. PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademarks/laws/native-american-tribal-insignia?msclkid=35b0496aba8311eca7f85f8366d81421> (last visited Dec. 21, 2023)

58. *Id.*

59. *Id.*

60. *USPTO fee schedule*, U.S. PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule#7011> (last visited Dec. 21, 2023).

C. Proceedings Through the Trademark Trial and Appeals Board

Parties may turn to the Trademark Trial and Appeal Board (TTAB), which “handles appeals involving applications to register marks, appeals from expungement or reexamination proceedings involving registrations, and trial cases of various types involving applications or registrations.”⁶¹ Through the TTAB, tribes can either file a notice of opposition or a petition for cancellation.⁶²

A notice of opposition is available if a tribe has evidence that they will be harmed by the registration of a particular mark on the Principal Register, and can be filed within thirty days of the date of publication of such mark, or within any extension period the TTAB has granted.⁶³ A petition for cancellation can be utilized if a tribe has evidence that they will be harmed by a federally registered mark currently on the Principal Register, and these petitions are subject to a longer time restraint of five years after the date of registration.⁶⁴ Both of these proceedings require the payment of filing fees.⁶⁵ It is also important to note that both of these proceedings only relate to marks added to, or being added to, the Principal Register and not the Supplemental Register.⁶⁶

As with letters of protest, filing a motion for opposition or a petition for cancellation with the TTAB is a method of protection offered to any party fearing harm, but it again fails to address the unique concerns of Native American tribes attempting to protect their cultural property.

61. *Trademark Trial and Appeal Board*, U.S. PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademarks/ttab?msclkid=95267a01ba8911ec8740d59a1ce29949> (last visited Apr. 15, 2022).

62. *Native American tribal insignia*, *supra* note 57.

63. *Id.* The harm caused can include either dilution by blurring or dilution by tarnishment.

64. *Id.*

65. *Id.* As of 2023, the filing fee for a TTAB petition for cancellation or a notice of opposition is \$600.00 per contested class. *USPTO fee schedule*, *supra* note 60.

66. *Native American tribal insignia*, *supra* note 57.; TBMP § 301.02 (2021), <https://tbmp.uspto.gov/RDMS/TBMP/current#/current/TBMP-300d1e1.html> (last visited Apr. 15, 2022).

*D. The Indian Arts and Crafts Board*⁶⁷

The Indian Arts and Crafts Board (IACB) offers indigenous communities⁶⁸ an additional mechanism for redress by serving as a “truth-in-advertising law that provides criminal and civil penalties for marketing products as ‘Indian-made’ when such products are not made by Indians, as defined by the Act.”⁶⁹ In this way, the IACB is distinguishable from the other methods of protection discussed in this Article because it is an independent entity, completely separate from a tribe, and works to defend the physical works of art created by indigenous communities. The IACB offers additional services as well, such as business and marketing advice, promotional activities, the production of a directory of “Indian owned and operated” arts and crafts businesses, and the operation of Sioux Indian Museum, the Museum of the Plains Indian, and the Southern Plains Indian Museum.⁷⁰ In doing so, the Department of the Interior proudly states that the IACB is “the only federal agency that is consistently and exclusively concerned with the economic benefits and cultural development of federally recognized tribes.”⁷¹

The IACB was created by the Indian Arts and Crafts Act in 1935—later amended in 1990—to grant the IACB additional authority relating specifically to trademarks.⁷² In particular, the IACB was vested with authority to:

assign trademarks of artistic genuineness and quality to individual Indians and/or tribes, to set standards for the use of these trademarks, to charge for licenses to use the marks, and to register the marks with

67. The Indian Arts and Crafts Board, and the Indian Arts and Crafts Act, have an interesting and important procedural history, and there is extensive information available about their operation and effectiveness that is outside of the scope of this Article. For a comprehensive look at the history of the Indian Arts and Crafts Act, the concerns surrounding counterfeit Indian goods, and the issue of grouping cultural heritage into intellectual property regimes, this author recommends the reader turn to Woltz, *supra* note 30.

68. *Who We Are – IACB*, U.S. DEPARTMENT OF THE INTERIOR, Indian Arts and Crafts Board, <https://www.doi.gov/iacb/who-we-are> (last visited Feb. 9, 2023). The Department of Interior provides advantages to “federally recognized[] American Indians and Alaska Natives (Indians)...” *Id.*

69. *Id.* As it reads today, the Indian Arts and Crafts Act states:
It is unlawful to offer or display for sale or sell any good, with or without a Government trademark, in a manner that falsely suggest it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States.
18 U.S.C. § 1159 (2022).

70. *Who We Are – IACB*, *supra* note 68.

71. *Id.*

72. Robert J. Miller, *American Indian and Tribal Intellectual Property Rights*, 13 TUL. J. TECH. & INTELL. PROP. 179, 180 (2010).

the U.S. Patent and Trademark Office (USPTO) and assign them to Indians and tribes free of charge.⁷³

In addition, the Indian Arts and Crafts Act created felony criminal sanctions for the counterfeiting of a trademark registered by the IACB and gave the tribes, the U.S. Attorney General, and various native arts and crafts organizations civil causes of actions “in which treble damages, punitive damages, attorney fees, and injunctions can be granted against anyone falsely representing that goods are made by Indians.”⁷⁴ Tribes, along with third parties, are able to report potential violations of the Indian Arts and Crafts Act via online submission with the U.S. Department of the Interior.⁷⁵

While incredibly important in attempting to combat “[t]he [c]ounterfeit Indian [g]oods [p]roblem,”⁷⁶ the Indian Arts and Crafts Act and the IACB is limited in its scope, specifically in its nature as a truth in advertising law, which “seeks to limit only the way in which retailers market, advertise, and label goods for sale.”⁷⁷ The Act does not limit “creative expression of artists in designing their products,”⁷⁸ nor does it consider the appropriation of marks or designs outside of the context of physical products such as arts and crafts for sale in the market.⁷⁹ Therefore, it does not address many of the primary issues discussed throughout this Article, mainly the protection of *intangible* cultural property that is not consistently offered for sale in the public marketplace. Furthermore, the U.S. Department of the Interior explicitly states what it considers “outside of the scope of the [Act],” including “[n]on-art and craft products, such as literary works, films, audio recordings, mascots, educational workshops, industrial products (T-shirts, cookbooks, etc.)” and issues of cultural appropriation.⁸⁰

73. *Id.*

74. *Id.* Woltz, *supra* note 30, at 457 (stating that “the 1990 Act gave teeth to the 1935 Act by ‘creating a private cause of action that enabled injured plaintiffs—sellers of authentic Indian arts and crafts—to recover substantial damage awards from violators of the Act’” (citing *Native Am. Arts, Inc. v. Hartford Cas. Ins. Co.*, 435 F.3d 729, 731 (7th Cir. 2006))).

75. *Should I Report a Potential Violation?*, U.S. DEPARTMENT OF THE INTERIOR, <https://www.doi.gov/iacb/should-i-report-potential-violation> (last visited Feb. 9, 2023).

76. Woltz, *supra* note 30, at 457.

77. *Id.* at 459.

78. *Id.* at 460.

79. Furthermore, “[non-art and craft products, such as literary works, films, audio recordings, mascots, educational workshops, industrial products (T-shirts, cookbooks, etc.), are outside the scope of the Act’]. *Should I Report a Potential Violation?*, *supra* note 75.

80. *Id.*

E. The Tribal Insignia Database

In response to the questions surrounding the adequacy of protection offered to Native American tribes seeking to protect their sacred symbols and insignia, including the contentions surrounding the Zia people's sacred sun symbol, the U. S. government took the first steps towards what would become the Tribal Insignia Database.⁸¹ This database, created and maintained by the USPTO, serves as a compilation of different official insignia of Native American tribes and is intended to be a resource for examining attorneys who consider whether or not marks that have applied for federal trademark registration should be added to the Principal Register.⁸² If the mark proposed for registration "impermissibly suggests a connection to a Native American tribe," the examining attorney will reject its application.⁸³ An in-depth examination of this database, including its creation, operation, benefits, shortfalls, and overall effectiveness can be found in Part IV as follows.

IV. AN EXAMINATION OF THE USPTO'S TRIBAL INSIGNIA DATABASE

As briefly described above, the Native American Tribal Insignia Database was created and implemented by the USPTO in response to concerns regarding tribes' ability to protect their insignia. This database provides tribes with the opportunity to formally notify the USPTO of the existence of their official insignia and gives examining attorneys a database to turn to when trying to determine whether or not a pending application for a mark infringes upon the rights of such tribes.⁸⁴ In making these determinations, examining attorneys rely on the Lanham Act Section 2(a) to provide a basis for refusal of federal registration.⁸⁵ The USPTO explains this rationale for refusal as follows:

Applications for marks containing names of Native American tribes, recognizable likenesses of Native Americans, symbols perceived as being Native American in origin, and any other application which the [USPTO] believes suggests a connection with Native Americans or Native American-made products may be refused registration under [Section 2(a)] of the Trademark Act. Thus, the Trademark Act *already*

81. Turner, *supra* note 5, at 130.

82. Brian Zark, *Use of Native American Tribal Names as Marks*, 3 AM. INDIAN. L. J. 537, 546 (2015).

83. *Id.*

84. *Id.*

85. REPORT ON THE OFFICIAL INSIGNIA OF NATIVE AMERICAN TRIBES, *supra* note 45, at 34.

provides a basis to prohibit Federal registration of marks identical to the “official insignia” of Native American tribes.⁸⁶

Prior to the establishment of the Tribal Insignia Database, the USPTO refused registration of certain marks under Section 2(a) and claims to have “made substantial efforts to accumulate evidence sufficient to support these refusals.”⁸⁷ In 1994, the USPTO sent letters to over 500 federally recognized Native American tribes in an attempt to create a list of “official insignia” and allow the USPTO to “better uphold the letter and spirit of the Trademark Act.”⁸⁸ Despite only receiving ten responses, the USPTO insists that it has taken affirmative steps towards preventing third parties from registering marks that give “false impression of the true origin of the goods and services.”⁸⁹ As part of these efforts, the USPTO assigns trademark applications that contain “tribal names, recognizable likeness of Native Americans, symbols perceived as being Native American in origin, and any other application which the [US]PTO believes suggests an association with Native Americans” to examining attorneys with “expertise and familiarity in this area.”⁹⁰ This process has resulted in refusals of various applications.⁹¹

Therefore, the USPTO appears to have claimed that the establishment of a database of the official insignia of Native American tribes would not create an entirely new procedure but would instead offer examining attorneys a database to reference in considering pending applications under an already existing framework.⁹² Theoretically, having such a database would make it easier for examining attorneys to identify instances in which registration should be denied under Section 2(a) and, by extension, would make it more likely that insignia is given protection. However, it is arguable that this theoretical ideal has yet to come to fruition and this database, though a step in the right direction, fails to actually make a recognizable impact.

86. *Id.* (emphasis in original). The USPTO’s reference to the “Trademark Act” in this particular quotation is synonymous with the “Lanham Act.”

87. *Id.*

88. *Id.* at 14.

89. *Id.*

90. *Id.*

91. *Id.* The USPTO cites the following rejected registrations as examples: Application Serial No. 75-265350, [“ZIA SYSTEMS” with Zia Sun Symbol design, for “stationery, computer software products and packaging, and advertising,” refused on the basis of likely false association with the Pueblo of Zia]; Application Serial No. 75-447770, [“ZIA” with Zia Sun Symbol design, for “cocktail mixes,” refused on the basis of likely false association with the Pueblo of Zia and possible disparagement of the tribe].

92. *Id.* at 34.

A. Creation and Operation of the Database

The Native American Tribal Insignia database was created as result of Public Law 105-330, signed by President Clinton in 1997.⁹³ Section 302 of this new law called on the Commissioner of Patents and Trademarks to study “the issues surrounding the protection of the official insignia of federally and State recognized Native American tribes,” and was required to address a total of seven issues, including the impact a change in law would have on Native American tribes, trademark owners, the USPTO and interested parties, the “acceptable” definition of “official insignia,” and “the administrative feasibility” of altering existing law to better prohibit new uses of official insignia or give additional protection to official insignia.⁹⁴ After the enactment of the law, the Commissioner had a total of sixty days to request public comment on the identified issues and was required to submit a completed study of the identified issues to the chairman of the Committee on the Judiciary of the Senate and the chairman of the Committee on the Judiciary of the House of Representatives.⁹⁵

To fulfill its obligations, the USPTO published two Federal Register notices that asked for comments regarding the multiple issues laid out and thirty-three different groups submitted written comments in response.⁹⁶ After these comments were received, the USPTO announced public hearings that were conducted across the United States, giving different people the opportunity to provide oral testimony regarding the issues presented.⁹⁷ Twenty-six parties gave oral testimony, including the All Indian Pueblo Council, American Intellectual Property Law Association, The Chickasaw Nation, and the Energy Resource Tribes.⁹⁸

93. *Id.* at 2.

94. Trademark Law Treaty Implementation Act of 1998 § 302, Pub. L. No. 105-330, 112 Stat. 3064, <https://uscode.house.gov/statutes/pl/105/330.pdf#:~:text=Public%20Law%20105-330%20105th%20Congress%20An%20Act%20To,the%20United%20States%20of%20America%20in%20Congress%20assembled%2C?mselkid=56e207adba9511ec850fd61c6c13317f>; *See also* REPORT ON THE OFFICIAL INSIGNIA OF NATIVE AMERICAN TRIBES, *supra* note 45, at 2.

95. Trademark Law Treaty Implementation Act of 1998, *supra* note 94.

96. REPORT ON THE OFFICIAL INSIGNIA OF NATIVE AMERICAN TRIBES, *supra* note 45, at 3.

97. *Id.* Public hearings took place in Albuquerque, New Mexico; San Francisco, California; and Arlington, Virginia throughout 1999. *Id.* The hearing in Albuquerque had the highest number of oral testimonies given. *Id.* Transcripts of the hearings are no longer readily available on the USPTO website as the page was archived. *Public Hearings*, U.S. PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/patents/laws/public-hearings?mselkid=74630653ba9811eca29b26ffad34c5c6> (last visited Dec. 21, 2023). Persons looking for information on a number of different public hearings, including the public hearing on Official Insignia of Native American Tribes, must contact the USPTO’s Office of Policy and International Affairs. *Id.*

98. REPORT ON THE OFFICIAL INSIGNIA OF NATIVE AMERICAN TRIBES, *supra* note 45, at 3.

One of the first issues the USPTO discussed in their study was how to define “official insignia” in the context of Native American tribes.⁹⁹ According to the USPTO, the majority of survey respondents did not provide much insight into how the term should be defined, though they did stipulate that the USPTO would need to adopt an official definition.¹⁰⁰ Furthermore, these respondents “indicated that Native American tribes themselves must designate the actual ‘official insignia.’ In other words, it would be unacceptable for the U.S. Government to attempt to impose a determination of specific ‘official insignia’ for each tribe.”¹⁰¹ Some respondents suggested that tribes identify “official insignia” through tribal resolutions,¹⁰² and many expressed the opinion that “official insignia” should include independent words such as tribal names, along with “words in combinations with figurative elements,” phrases, and designs.¹⁰³ Others recommended turning to the dictionary for a definition of “insignia” and still others believed that “official insignia” should be defined in the same way “hallmarks, emblems, and other official insignia of States and municipalities are defined for purposes of Section 2(b) ... [of the Lanham Act].”¹⁰⁴

In response to these recommendations, the USPTO first turned to the current definition of “insignia,” as specified by Section 2(b) of the Lanham Act, which prohibits trademark application of a mark that “[c]onsists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.”¹⁰⁵ While Native American tribes could not be classified as foreign nations, states, or municipalities given their legal status as “domestic dependent nations under the protection of the United States,”¹⁰⁶ this definition provided insight into how the USPTO should approach use of the term “official insignia” in the tribal context. After considering statutory constructions, TTAB proceedings, and case law, the USPTO settled on the following definition of “insignia” under Section 2(b) of the Lanham Act:

99. *Id.* at 15.

100. *Id.*

101. *Id.*

102. *Id.* As explained by the USPTO, tribal resolutions “are an accepted tribal-government decision-making mechanism.” *Id.*

103. *Id.* at 16.

104. *Id.* at 16–17.

105. *Id.* at 17; 15 U.S.C. § 1052(b).

106. REPORT ON THE OFFICIAL INSIGNIA OF NATIVE AMERICAN TRIBES, *supra* note 45, at 17-20.

As applied in the case law, the term “insignia” is restricted to flags, coats of arms, or designs (which may include words) formally adopted to serve as emblems of governmental authority, and to those emblems and devices which also represent governmental authority (even if not formally adopted) and which are of the same general class and character as flags and coats of arms.¹⁰⁷

Pulling from the recommendations of the survey respondents and the definition under Section 2(b), the USPTO presented a proposed definition of “Official Insignia of Native American Tribes:” “... 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.”¹⁰⁸

Importantly, the USPTO proposed this definition with the intention of incorporating the language of Section 2(b) of the Lanham Act “so that the presumptions and interpretations arising out of Section 2(b) would apply to ‘Official Insignia of Native American Tribes,’” though they explicitly stated that they did not recommend any amendment to the Lanham Act.¹⁰⁹ The USPTO rationalized this recommendation by explaining that amending Section 2(b) to explicitly apply to Native American tribal insignia would make Section 2(b) the method of exclusive protection for such insignia.¹¹⁰ In offering such exclusive protection, the USPTO believed that federal trademark registration for official tribal insignia would be prohibited and, by simply defining “official insignia” in reference to Section 2(b) without amendment to the Lanham Act, “the ‘official insignia’ of Native American tribes are identified as emblems of governmental authority without prohibiting their use, if desired, by tribes as proprietary commercial properties.”¹¹¹

After determining the definition of “official insignia” and opining that an amendment to the Lanham Act was unnecessary, the USPTO considered the statutory protections already in existence, including the Indian Arts and Crafts Board and the availability of full-blown federal trademark registration.¹¹² They then considered a multitude of other relevant factors, including the effect various actions such as “retroactive cancellation and special statutory protection” would have on Native American tribes, third parties and the United

107. *Id.* at 20.

108. *Id.* at 24.

109. *Id.* at 25.

110. *Id.*

111. *Id.*

112. *Id.* at 26-29.

States' international legal obligations.¹¹³ After considering these factors, the USPTO concluded that a compilation of a list of "Official Insignia of Native American tribes" would be the best solution to the issues presented as it would give examining attorneys reference and support in refusing registration of such insignia under the Lanham Act Section 2(a).¹¹⁴ Upon conclusion of their study, the USPTO outlined the multiple conclusions they had reached, including the following, which is particularly relevant to the discussion undergone within this Article: "Any new legislation aimed at examination and registration issues is unnecessary and may offer unforeseen complications for innocent parties."¹¹⁵ In other words, the USPTO rejected the idea of taking any action that would revamp their examination procedures or amend statutes to explicitly address the issues presented and instead found a database that helped streamline already existing procedures as sufficient.

Once the study was completed, the USPTO presented their findings via a report to the House and Senate Judiciary Committee in November of 1999.¹¹⁶ In response to the recommendation that an "accurate and comprehensive database containing the official insignia of all federally and state-recognized Native American tribes," the Senate Committee on Appropriations authorized the USPTO to begin creation of the Tribal Insignia Database.¹¹⁷ As the USPTO initially intended, the database serves to assist examining attorneys as they consider the registrability of third-party marks that "falsely suggest a connection to the official insignia of a Native American tribe."¹¹⁸ The database is accessible on the USPTO website through the Trademark Search.¹¹⁹ Tribes are not required to participate in the database but are able to request inclusion of their official insignia by submitting requests to an inbox maintained by the USPTO under the subject line: "Native American tribal insignia submission."¹²⁰ The request must include a written request to enter the insignia, a JPG image of the insignia that meets certain specifications, a copy of the tribal resolution in which the insignia was adopted as the tribe's "official" insignia, and a signed statement by a tribal official asserting that the submitted insignia

113. *Id.* at 30-33.

114. *Id.* at 37.

115. *Id.* at 44.

116. Native American Tribal Insignia Database, 85 Fed. Reg. 14926 (Mar. 16, 2020).

117. *Id.*

118. *Id.*

119. *Id.* The tribal insignia database can be found in the Trademark Search by taking the following steps:

1. Enter the following search term, including quotation marks and capitalization: nonregistration:"Native American Tribal Insignia"2. Submit the query.

Native American tribal insignia, supra note 57.

120. *Id.*; *See also* FEDERAL REGISTER 14827.

is in fact the insignia adopted via the tribal resolution.¹²¹ Tribes that are recognized only by a state government must also provide either a document from a state official identifying the Native American tribe as a tribe or a citation to a statute that designates the entity as a tribe.¹²² All “proper” requests are assigned a serial number and entered into the database without additional investigation from the USPTO into whether the insignia is in fact the official tribal insignia.¹²³ After acceptance of a request, the tribe receives notification that their tribal insignia has been entered into the database.¹²⁴

B. Protections and Shortfalls

The Tribal Insignia Database continues to operate today, with a total of ninety-three insignia currently registered,¹²⁵ as a “front-end means of preventing trademark applicants” from obtaining registrations for a mark that may be confusingly similar to that of a Native American tribe’s official insignia.¹²⁶ As explained by the USPTO, inclusion in the database “gives [tribes] the benefit of helping to protect [their] intellectual property and cultural heritage.”¹²⁷ Tribes are now able to take steps towards protecting their insignia outside of the context of traditional preventative measures and recourse, such as federal registration and TTAB proceedings, and the database grants a form of protection to tribes that do not wish to, or have simply not elected to, use their marks or insignia in the commercial space. Furthermore, inclusion in this database is free and relatively simple as tribes need not complete any type of form as part of the request process.¹²⁸ Therefore, the process is cheaper and less onerous than some of the other available options. The following description summarizes the primary advantages of the database as it operates today:

The USPTO’s introduction of the Native American Tribal Insignia Database demonstrates the Office’s appreciation for the culture and heritage of federally or state-recognized Native American tribes. It provides a new affordable means for tribes to protect their insignias by preventing new applicants from securing registrations on confusingly similar or infringing marks. While the Database does not alter the rights

121. *Native American tribal insignia*, *supra* note 57.

122. *Id.*; *See also* Native American Tribal Insignia Database, 85 Fed. Reg. 14926, 14927 (Mar. 16, 2020).

123. *Id.*; *See also* *Native American tribal insignia*, *supra* note 57.

124. *Id.*

125. *Trademark Search*, *supra* note 1. This number was obtained by utilizing the steps outlined in note 119.

126. Ahmed, *supra* note 36.

127. *Native American tribal insignia*, *supra* note 57.

128. *Id.*

of holders of preexisting registrations, the Database presents a new hurdle to trademark applicants wishing to popularize their brands by appropriating Native American references.¹²⁹

While the database certainly offers an avenue that tribes did not have previously, one cannot help but question its actual effectiveness in providing tribes with protections to not only what can be classified as a trademark or insignia, but also to their cultural property as a whole. As stated previously, ninety-three official tribal insignias are included within the database while there were 574 recognized tribal entities eligible for funding and services from the U.S. Department of the Interior's Indian Affairs Bureau as of January 2022.¹³⁰ Of course, the USPTO cannot be held absolutely responsible for a failure to ensure that every tribe submits to this optional database, and tribes may very well be aware of the existence of the database and simply choose not to participate. However, such a low rate of participation indicates that the database is perhaps not as widely recognized as it should be, or as valued as was intended.

Furthermore, while it has been noted that the Tribal Insignia Database provides additional protection to Native American tribes, it is essential to note that this database does not offer any affirmative rights. In fact, the USPTO explicitly states this on their website, declaring that inclusion in the database “does not grant any rights to the tribe that submitted the tribal insignia” and that “entry is not the legal equivalent of registering the tribal insignia as a trademark.”¹³¹ Instead, the database serves as a type of defensive mechanism that makes examining attorneys aware of the existence of insignia. This in turn begs an important question—What was the true purpose of this database? Was it to find a way to best protect the rights of Native American tribes, or was it simply a way to appease certain concerns by amplifying the existence of an already insufficient policy? As stated by the USPTO, examining attorneys had been engaging in the practice of rejecting the registration of marks resembling tribal insignias under Section 2(a) of the Lanham Act since 1994,¹³² meaning that the database did not provide a new remedy but rather breathed some additional life into an old one.

Perhaps most importantly, the database fails to offer actual recourse to tribes. Serving as a defensive mechanism, the database gives tribes no path of

129. Ahmed, *supra* note 36.

130. Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (Jan. 28, 2022) (amending 86 FR 7554 and 86 FR 18552), <https://www.govinfo.gov/content/pkg/FR-2022-01-28/pdf/2022-01789.pdf>.

131. *Native American tribal insignia*, *supra* note 57.

132. REPORT ON THE OFFICIAL INSIGNIA OF NATIVE AMERICAN TRIBES, *supra* note 45, at 34.

offense as they look to defend their insignia. To best understand the practical difference between defensive and offensive protections, a brief examination of patent law doctrines is illustrative. One doctrine allows a defendant to argue that a patent claim is invalid by comparing the patent claims to what is already in existence.¹³³ This allows defendants to take an offensive approach because, once established that the patent claims fall into the scope of the prior art, the initially asserted claim is “unenforceable against the world, not just the accused infringer.”¹³⁴ In contrast, another doctrine allows a defendant to show that their own action falls within the prior art, and therefore is not infringing on an existing patent.¹³⁵ This method is defensive as it only exonerates the defendants specific accused acts, allowing the claim to “survive[] to be used by the patentee against other defendants.”¹³⁶ Relatedly, the current operation of the Tribal Insignia Database allows examining attorneys to identify potential misuse of a tribe’s official insignia, but such determination does not offer any legal validity to the insignia but instead prohibits a single use, leaving others to openly infringe against the mark and attempt registration. Furthermore, the actual defensive action of rejecting registrations is made by the USPTO examining attorney rather than the tribe itself, further distancing the tribe from affirmative action. While the aforementioned patent law doctrines consider defenses against infringement while the Tribal Insignia Database considers the availability of protection against infringers, both are representative of the idea that offensive and defensive mechanisms have drastically different results, with defensive mechanisms often offering less decisive rules and decisions. In other words, by only giving the tribes defensive protection mechanisms, a USPTO registration rejection of a mark that potentially confuses the use or meaning of official tribal insignia fails to put tribes in a substantially better position.

V. CONCLUSION

The creation of the Native American Tribal Insignia Database has provided Native American tribes with an additional way to protect their tribal insignia and, by extension, some forms of their tribal intellectual and cultural property. Inclusion in the database gives examining attorneys more information about the

133. Timothy Lau, *Defensive Use of Prior Art to Exonerate Accused Acts in U.S. and Chinese Patent Litigation*, 27 COLUM. J. ASIAN L. 51, 44 (2013). Prior art is defined as “knowledge that is publicly available (as from the description in an already existing patent, from publications, or from public use or sale) before the date of filing a claim for a patent for an invention.” MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/prior%20art> (last visited April 27, 2022).

134. Timothy Lau, *Defensive Use of Prior Art to Exonerate Accused Acts in U.S. and Chinese Patent Litigation*, 27 COLUM. J. ASIAN L. 51, 55 (2013).

135. *Id.*

136. *Id.*

existence of certain tribes and insignia and encourages them to give sufficient consideration to these tribes when determining the registrability of third-party marks. With the database at their fingertips,¹³⁷ they can now more easily identify when a pending mark may be likely to cause confusion regarding a particular mark's connection with a tribe, and such can lead them to decisions that better protect from cultural appropriation. However, the database continues to fail in giving proper recognition to a tribe's cultural property, which can be explained by a single recognition—cultural and intellectual property law are fundamentally different. Intellectual property law, as it has developed in the United States, is largely reflective of western concepts of ownership, which are intrinsically tied to economic advantage. Individuals and entities assert property rights over the things they have created, and, in turn, are able to control how others use such creations,¹³⁸ usually resulting in some type of economic benefit to the original creator through licensing, sale, or other means. There is no way to completely analogize this concept of individualized and economic ownership, and this type of property protection, with the more communal and integrity-based understanding of many indigenous communities.¹³⁹ Since the two cannot be reconciled, it logically follows that they require different types of legal protection, similar to how patent law and trademark law each have their own understandings, rules, laws, and regulations. Therefore, intellectual property law, as a whole, is inadequate in protecting cultural property, simply because intellectual and cultural property are, by definition, not the same.

Therefore, though trademark law currently stands as one of the best mechanisms for tribes in protecting their cultural property, governmental attempts to stretch trademark law to provide adequate protection will always fall short. If the law insists on continuing to categorize cultural property as intellectual property, there are limited options that may prove advantageous. First, a new sub-field of intellectual property could be developed to address unique concerns of ownership and sacred symbolism. This would differ from the United States' current approach because, rather than attempting to force trademark law to encompass cultural property, it would simply allow trademark law and cultural property to develop on their own terms as independent subjects within a broader area of practice. Therefore, just as trademark, copyright, patent, and trade secret law stand out as distinct subsets of intellectual property, so too would cultural property.

137. However, any claims relating to an easily accessible database must be hedged by the recognition that a limited number of tribes have made use of the Tribal Insignia Database.

138. Westmoreland, *supra* note 25, at 970.

139. *Id.*

However, while categorizing cultural property as its own subset of intellectual property would solve some of the issues at hand, and would allow cultural property to begin developing independently, it still does not properly address the inherent differences between cultural and intellectual property. Keeping them in the same practice area, however broad that practice area may be, fails to offer cultural property the recognition it deserves as a representative of identity and integrity. Therefore, a more comprehensive, and certainly more onerous, solution would be to better develop cultural property as its own form of intangible property, just as financial assets such as stocks have taken on their own robust legal practice areas. This would be a difficult undertaking, requiring dedication from legislators, the courts, tribes, and attorneys alike as all would have to participate in this endeavor. A comprehensive statutory structure, or at the very least a regulatory framework, would have to be adopted to legally define and protect cultural property, and such would have to provide broad protections to all forms of cultural property while developing unique solutions for indigenous peoples. Courts and attorneys would need to be prepared to effectuate such laws and regulations and indigenous communities would have to take affirmative efforts to utilize available protections. Allowing cultural property to stand on its own, outside of the shadow of intellectual property, would give it proper recognition as an essential body of property that encapsulates the identity of entire communities, generations, and cultures.

No matter the course the United States takes in the upcoming years, there is hope for development in this area of the law. The USPTO's Report on the Official Insignia of Native American Tribes, and the resulting development of the Tribal Insignia Database, show that the government and the legal field are aware of the issues at hand, and demonstrate a willingness to explore options. However, it is arguable that the Tribal Insignia Database serves as more of a bandage than a cure, and continued conversations about its inefficiencies, as well as its successes, will assist in fostering future developments in the hopes of providing tribal and indigenous communities with adequate protections of their cultural property and identities.