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## Protection for Native Americans? The Indian Arts and Crafts Act of 1990

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# LEGISLATIVE UPDATES

## PROTECTION FOR NATIVE AMERICANS?

### THE INDIAN ARTS AND CRAFTS ACT OF 1990

#### I. INTRODUCTION

The Indian Arts and Crafts Act of 1990<sup>1</sup> (“Act”) aims to protect Native American artists from unfair competition in the form of counterfeit goods produced domestically and abroad. The Act was originally enacted in 1935, and the current Act is mainly a revision of the earlier law (“1935 Act”).<sup>2</sup>

Given the legislative history of the Act, it is most likely a necessary piece of legislation. However, as often is the case with federal or state legislation, problems have arisen. This has occurred mostly in the cases of museums and Native American artists who have either chosen not to register with a legally recognized Native American tribe or who have been unable to do so. For these enterprises and individuals, it appears that there has been, or will be, some chilling effects on their freedom of expression. However, to date there have been no legal actions challenging the constitutionality of the Act.

The background of the current Act is highly relevant and warrants an in-depth discussion.<sup>3</sup> The Act itself is not very long, only seven sections, and is rather straightforward, but analysis of each section will be useful.<sup>4</sup> Finally, the 1990 Act has had many effects, some of which may provide the bases for future litigation.<sup>5</sup>

#### II. BACKGROUND

As stated above, the Act is more accurately described as amendments of the 1935 legislation.<sup>6</sup> The very superficial legislative history of the law is that it was enacted on August 27, 1935, was amended in a minor fashion on June 25, 1948, then amended again in 1990 to provide us with the current Act. The 1948

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1. 25 U.S.C. §§305-305e and 18 U.S.C. §§1158-1159 (1983 & Supp. 1992).
  2. For descriptions of both versions of the law, *see infra*, section II.
  3. *See infra*, section II.
  4. *See infra*, section III.
  5. *See infra*, section IV.
  6. 25 U.S.C. §305 (1983).

amendments repealed the old sections five and six<sup>7</sup> of the 1935 Act and relocated them to 18 U.S.C. §§ 1158 and 1159, respectively. In 1990, entirely new sections 305d and 305e were written, and existing sections (including sections 1158 and 1159) were amended.

#### A. THE 1935 ACT

The 1935 Act was enacted on August 27, 1935<sup>8</sup> and established the Indian Arts and Crafts Board. Since that time, the Board has been responsible for promoting the development of Indian arts and crafts, improving the economic condition of Native Americans, establishing and expanding marketing opportunities for Native Americans, and aiding Native American tribes in preserving tribal cultural activities.<sup>9</sup> The Board was given the authority to create a trademark of authenticity and to establish standards and regulation for the use of this trademark.<sup>10</sup> The 1935 Act established criminal penalties for counterfeiting the trademark and for misrepresenting (for the purpose of sale) Native American-produced goods,<sup>11</sup> but civil actions were not authorized until the 1990 amendments.<sup>12</sup> The criminal penalties created by the 1935 Act for either counterfeiting the government trademark or misrepresenting the goods as Native American-made were fines of up to \$2,000 and/or imprisonment of up to six months in jail.<sup>13</sup> In addition, one found guilty of counterfeiting the trademark could be enjoined from such further use.<sup>14</sup> The 1935 Act contained a “willful” standard to be found guilty of misrepresentation.<sup>15</sup> Enforcement of the 1935 Act was left solely to local district attorneys.<sup>16</sup>

The 1935 Act created the structural aspects of the Board, which is comprised of five commissioners appointed by the Secretary of the Interior.<sup>17</sup> The original group of five commissioners served staggered term lengths, but their successors each served a term of four years.<sup>18</sup> These commissioners served without compensation, but were reimbursed for all actual expenses (such as travel and office overhead) that the Board could certify as being properly related to the commissioner’s performance of his Board duties.<sup>19</sup>

The Board was given a wide variety of powers, ranging from undertaking market and technical research,<sup>20</sup> to making recommendations for loans to further

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7. 25 U.S.C. §§305d and 305e.

8. Act of August 27, 1935, Ch. 748, 49 Stat. 891 (1935).

9. 25 U.S.C. §305a (1983); H.R. Rep. No. 400(II), 101st Cong., 2nd Sess. (1990).

10. H.R. Rep. No. 400(II) at 5; Ch. 748, §2(g), 49 Stat. 891.

11. *Id.*

12. 25 U.S.C. §§305d and 305e.

13. Ch. 748, §§5 and 6, 49 Stat. 891.

14. Ch. 748, §5, 49 Stat. 891.

15. Ch. 748, §6, 49 Stat. 891.

16. *Id.*

17. Ch. 748, §1, 49 Stat. 891.

18. *Id.*

19. *Id.*

20. Ch. 748, §2(a) and (b), 49 Stat. 891.

the production and sale of Native American products,<sup>21</sup> to offering management assistance,<sup>22</sup> to creating the government trademarks,<sup>23</sup> to negotiating and executing any necessary contracts.<sup>24</sup> The Board was also given the power to promulgate the necessary rules to allow it to perform its other listed powers; these rules were to be submitted to the Secretary of the Interior for approval.<sup>25</sup> However, the Board was specifically not authorized to “borrow or lend money or to deal in Indian goods.”<sup>26</sup> Finally, Treasury appropriations were authorized for execution and administration of the Board’s powers; any income derived by the Board was to be placed in the Treasury to create a fund for necessary Board-authorized expenditures.<sup>27</sup> These powers were given to the Board so it could carry out its duty to “promote the economic welfare of the Indian tribes . . . through the development of Indian arts and crafts and the expansion of the market for the products of Indian arts and craftsmanship.”<sup>28</sup>

As is evidenced in the legislative history of the 1990 Act, the 1935 Act did not have its desired effects. Hence, more than 50 years after the enactment of the 1935 Act, the 1990 Act was introduced to Congress.

### B. THE 1990 ACT

Though the law had been around since 1935, little had been done in the way of enforcement.<sup>29</sup> The registration of the government-owned trademark under the old law did not guarantee exclusive rights. Rather, it merely allowed the owner to use the mark to distinguish his or her goods from those of others.<sup>30</sup> Registering trademarks was also cumbersome since the Board’s office is in Washington, D.C., far away from where most Native American goods are produced and sold. Finally, the old law did not provide any meaningful deterrent against misrepresentation of imitation Indian arts and crafts.<sup>31</sup> Testimony at the time the 1990 Act was enacted showed there had been no prosecution under the law for over fifty years, mainly because the law required “willfulness” and “intent” for there to be a violation.<sup>32</sup> Many states<sup>33</sup> had enacted regulations regard-

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21. Ch. 748, §2(f), 49 Stat. 891.

22. Ch. 748, §2(e), 49 Stat. 891.

23. Ch. 748, §2(g), 49 Stat. 891.

24. Ch. 748, §2(i), 49 Stat. 891.

25. Ch. 748, §3, 49 Stat. 891.

26. Ch. 748, §2, 49 Stat. 891.

27. Ch. 748, §4, 49 Stat. 891.

28. Ch. 748, §2, 49 Stat. 891.

29. H.R. Rep. No. 400(II).

30. *Id.*

31. *Id.*

32. *Id.*

33. The states which currently have state laws prohibiting the fraudulent sale of Native American artwork are: ARIZ. REV. STAT. §44-1231 to §44-1231.04 (1987 & Supp. 1991) (provides for civil penalties not to exceed \$5000 and for injunctive relief); CAL. BUS. & PROF. CODE §17569-§17569.9 (West 1987 & Supp. 1991) (no penalties listed); COLO. REV. STAT. §12-44.5-101 to §12-44.5-108 (1990 & Supp. 1992) (provides for criminal penalties ranging from six months in prison and/or \$500

ing the sale of Native American arts and crafts,<sup>34</sup> but enforcement was often hampered due to the ambiguity of the state laws, especially in regards to who had the responsibility for enforcement.<sup>35</sup> However, a section was deleted from the bill which would have preempted state legislative actions in this area.<sup>36</sup>

A 1985 Commerce Department report to Congress estimated that the Native American arts and crafts market had a value of \$400 to \$800 million annually.<sup>37</sup> The report also indicated that unmarked imported imitations of Native American arts and crafts were siphoning off ten to twenty percent of the market for the genuine artwork produced domestically.<sup>38</sup> The Commerce Department also found most of the counterfeit market was composed of jewelry production that was underselling the genuine Zuni-, Hopi-, and Navajo-produced jewelry by up to fifty percent.<sup>39</sup> Supplies and samples were being sent to foreign countries such as the Philippines and Mexico where they could be copied at a substantially reduced cost.<sup>40</sup> The samples were then duplicated and shipped back to the United States, passing through Customs by the use of peel-off tags indicating the country of origin. The goods were then sold as Indian or American made, concentrating in major marketing areas<sup>41</sup> for Native American arts and crafts and

fine to 24 months in prison and/or \$5000 fine and for private remedy of actual damages plus costs of suit including attorneys fees); MONT. CODE ANN. §30-14-601 to-§30-14-604 (1991) (provides for criminal penalties of up to six months in prison and/or up to \$500 fine); NEB. REV. STAT. §69-1801 to-§69-1808 (1990) (provides for \$100 to \$500 fine); N.M. STAT. ANN. §30-33-1 to §30-33-11 (Michie 1989 & Supp 1992) (provides for injunctive relief; for civil penalties of up to \$500 fine per violation; for criminal penalties which vary with the value of the property counterfeited, ranging from \$100 fine per violation per day to \$5000 fine per violation per day and/or from up to 6 months in prison to up to 18 months in prison; and for private remedies of actual damages and costs of suit, including attorney fees, and treble damages if the violation was willful); OKLA. STAT. tit. 78 §71 - §75 (1987 & Supp. 1992) (provides for fines of \$25-\$200 and/or 30-90 days in prison); S.D. CODIFIED LAWS ANN. §37-7-1 to §37-7-2.1 (1986 & Supp. 1992) (provides for criminal penalties of \$100 and/or 30 days in prison); TEX. BUS. & COMM. CODE ANN. §17.851-§17.853 (West 1987 & Supp. 1992) (provides for criminal penalties of up to \$1500 and/or up to 180 days in prison).

34. For issues of possible federal preemption of the state laws, see *Gade v. National Solid Wastes Management Assn.*, \_\_\_ U.S. \_\_\_, \_\_\_, 112 S.Ct. 2374, 2383 (1992) (“the ultimate task in any preemption case is to determine whether state regulation is consistent with the structure and purpose of the federal law as a whole”); *English v. General Electric Co.*, 496 U.S. 72, 87 (1990) (“usually, mere existence of a federal regulatory or enforcement scheme does not by itself imply preemption of a state statute”); *Boyle v. United Technologies Corp.* 487 U.S. 500, 507 (1988) (“displacement of state law will occur only where significant conflict exists between identifiable federal policy or interest and operation of state law, or where application of state law would frustrate specific objectives of federal legislation”); and *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988) (“even where Congress does not entirely displace state regulation in a particular field, state law is preempted when it actually conflicts with the federal law, and such conflict will be found when it is impossible to comply with both the federal and state law or where the state law stands as an obstacle to accomplishment of the full purposes and objectives of Congress”).

35. H.R. Rep. No. 400(II) at 5.

36. 136 Cong. Rec. H8291, H8292; H.R. Rep. No. 400 (II) at 8.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. These areas are mainly Denver, Colorado; Albuquerque, New Mexico; and Phoenix, Arizona.

usurping up to 50 percent of the Native American jewelry market.

The sponsors of the current law, which was enacted on November 29, 1990, were Representatives Jon Kyl (R-Ariz.) and (now Senator) Ben Nighthorse Campbell (D-Colo.).<sup>42</sup> Debates in the House and the Senate were heard in September and October of 1990,<sup>43</sup> though the Interior and Insular Affairs Committee held a field hearing on August 17, 1989 and considered the bill as early as November, 1989.<sup>44</sup> The bill was considered by the Interior Committee in February, 1990, was amended, and then considered by the Judiciary Committee in September, 1990.<sup>45</sup> The general purposes of the Act were to expand the powers of the Indian Arts and Crafts Board<sup>46</sup> and to promote the "Federal Indian policy of economic self-sufficiency."<sup>47</sup>

To accomplish these goals the Act expands the Board's power by allowing registration of trademarks for individuals and tribes in addition to the government-owned trademark provided for in the 1935 Act.<sup>48</sup> As before, registration is to be free of charge.<sup>49</sup> Furthermore, the Board is specifically authorized to pursue and defend actions.<sup>50</sup> Finally, the Act amends the criminal provisions, clarifying the procedures for prosecuting claims and increasing the penalties for counterfeiting and for misrepresentation.<sup>51</sup> The Act upgrades the criminal penalties making them more consistent with existing penalties for comparable crimes under federal law<sup>52</sup> and creating new civil penalties for misrepresentation.<sup>53</sup> There are other ways in which the Act amends the 1935 version. At the discretion of the Board, enforcement can be undertaken by the United States Attorney General,<sup>54</sup> rather than by local district attorneys.<sup>55</sup> This will allow the Board and Native American tribes and individuals access to the more expansive resources of the Federal government, such as the Federal Bureau of Investigation and the Attorney General's office, in enforcing the Act. Originally, the Act would have allowed prosecution in civil actions by state attorneys general, but this provision was stricken because it was believed inappropriate to have state officials enforcing federal statutes.<sup>56</sup> In addition, the Act gives the Board the power to pursue or defend any determinations made by the Patent and Trade-

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H.R. Rep. No. 400(I) at 5.

42. H.R. Rep. No. 400(II) at 6.

43. *Id.* at 4.

44. *Id.*

45. H.R. Rep. No. 400; 1990 U.S.C.C.A.N. 6382.

46. H.R. Rep. No. 400(I) at 5.

47. 136 Cong. Rec. at H8292 (statement of Representative Rhodes of Arizona).

48. H.R. Rep. No. 400(II) at 6.

49. Ch. 748, §2(g), 49 Stat. 891; 25 U.S.C. §305a(g)(3).

50. *Id.*

51. *Id.*

52. *Id.* at 7.

53. *Id.*

54. 25 U.S.C. §305e.

55. Ch. 748, §6, 49 Stat. 891.

56. H.R. Rep. No. 400(II) at 8.

mark Office.<sup>57</sup>

In light of the market abuses described above, much of the focus has been on curbing the importation of foreign imitations. For example, a law<sup>58</sup> requiring permanent marking of country-of-origin on imported Indian-style jewelry. But problems also existed in the domestic market.<sup>59</sup> Therefore, focus has begun to shift to the domestic issue as well, through the introduction of the Act. The domestic problem is similar to the problems of foreign counterfeiting: misrepresentation of non-Native American artwork as genuine Native American artwork. The difference is that these goods are produced in America by artists who claim to be members of a Native American tribe.<sup>60</sup> The Act attempts to remedy domestic problems by expanding Native American-owned marketing enterprises to more directly benefit Native American tribes and individuals.<sup>61</sup>

### C. RELATION TO THE LANHAM ACT

The Lanham Act,<sup>62</sup> the general trademark law in America, makes provisions for registration of certification marks. A certification mark, as defined by the Lanham Act, is any word, name or symbol that is “used by a person other than its owner, or which an owner has a bona fide intention to permit a person other than its owner to use in commerce . . . to certify regional or other origin, material, mode of manufacture, quality, accuracy . . . or that the work or labor on the goods or services was performed by members of a union or other organization.”<sup>63</sup> In general, trademarks are intended to help the consumer identify the source of a particular product and to protect the manufacturer from unfair trade practices by competitors. However, an intended goal of certification marks is to allow the maker of the product to signal to the consumer the product conforms to the standards set by the organization named on the mark. In looking for a particular certification mark, a consumer may be more interested in being assured the product meets a particular baseline level of quality rather than whether the product was made by a certain manufacturer.

The Board-, craft organization-, and tribe-owned trademarks provided for in the Act are similar to certification marks in that the Act’s trademarks are not to aid in source-identification or to prevent consumer confusion between products. Rather, like the Lanham Act’s certification marks, the Act’s trademarks are merely a symbol of quality, genuineness, and that the maker of the product was a member of a Native American tribe. The marks do not necessarily inform the consumer of the specific source of the particular item, rather only that the item is in fact a genuine Native American product and meets the standards that have

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57. 25 U.S.C. §305a(g)(4).

58. This particular section of the Omnibus Trade Act, P.L.-100-418 (1988) is codified at 19 U.S.C. §1304 (Supp. 1992).

59. H.R. Rep. No. 400(II) at 6.

60. *Id.*

61. *Id.*

62. 15 U.S.C. §§1051-1127 (1983 & Supp. 1992).

63. *Id.* §§1127.

been set to qualify as such.

Additionally, there is some similarity between section four of the Act and the Lanham Act's provision for false designation. The Lanham Act makes illegal any "false designation of origin, false or misleading description of fact or false or misleading representation of fact which is likely to cause confusion or to cause mistake or to deceive as to the affiliation . . . or as to the origin, sponsorship, or approval of his goods . . . by another person."<sup>64</sup> Similarly, the basic goal of the Act is to prevent individuals from passing off non-Native American goods as genuine Native American goods, though this would clearly be illegal even without the Act. The Act serves to particularize the offense to Native American goods and to specify and define the rather hefty penalties for such activities.

### III. PROVISIONS OF THE LAW

A section-by-section analysis of the law is the most useful way to approach this statute. There are four areas provided for in the Act: definitions of terms used, the powers of the Indian Arts and Craft Board, criminal penalties, and civil penalties. Section one simply designates the act as the "Indian Arts and Crafts Act of 1990."<sup>65</sup>

#### A. DEFINITIONS

Section four contains definitions of the Act's key terms. For the purposes of this Act, the term "Indian" refers to any individual who is a member of a Native American tribe or who is certified as a Native American artisan by a Native American tribe.<sup>66</sup> The term "Indian tribe" refers to any Native American "tribe, band, nation, Alaska Native village, or other organized group or community which is recognized as eligible for the special . . . services provided by the United States to Indians because of their status as Indians,"<sup>67</sup> or "any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority."<sup>68</sup> The term "Indian arts and crafts organization" refers to "any legally established arts and crafts marketing organization composed of members of Indian tribes."<sup>69</sup>

#### B. POWERS OF THE INDIAN ARTS AND CRAFTS BOARD

Section two establishes the various functions of the Board, including engaging in technical research, offering assistance to different groups for the furtherance of specific projects, and making recommendations to appropriate agencies for loans

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64. *Id.* §§1125(a)(1).

65. 25 U.S.C. §305 *et seq.*

66. 18 U.S.C. §1159(c)(1) (1984 & Supp. 1992).

67. *Id.* §1159(c)(3)(A).

68. *Id.* §1159(c)(3)(B).

69. *Id.* §1159(c)(4).



to aid the production and sale of Native American goods.<sup>70</sup> Most importantly, this section gives the Board the power to create and register a trademark of genuineness and quality for Native American products;<sup>71</sup> the registration may be on behalf of the Board, an individual Native American, a Native American tribe, or Native American arts and crafts organization.<sup>72</sup> The registration of the trademark is always free.<sup>73</sup> The Board also has the power to set regulations and guidelines for the use of government-owned trademarks and to pursue or defend any action or appeal in court regarding these trademarks.<sup>74</sup> Provisions are also made for the employment of officers and personnel as may be necessary to implement the Act.<sup>75</sup> This section also changes the way in which Board members receive reimbursement. Rather than reimbursement for actual expenses as provided for in the 1935 Act, Commissioners are still to serve without compensation, but are to receive per diem payment (instead of subsistence and other expenses) as set forth in Title 5, section 5703.<sup>76</sup>

Section three, a new section, permits the Board to receive complaints of violations of the Act and to refer the complaints of violations to the Federal Bureau of Investigation for investigation.<sup>77</sup> Upon receipt and review of the investigative report, the Board may then recommend to the United States Attorney General that criminal proceedings be commenced.<sup>78</sup> The Board may also recommend that the Secretary of the Interior refer the complaint to the Attorney General for civil prosecution.<sup>79</sup>

Though not detailed in the Act itself, the Board does possess other varied powers, as set out in the Code of Federal Regulations.<sup>80</sup> These powers range from regulation of standards and trademarks for turquoise and silver products,<sup>81</sup> to standards and trademarks for wool products,<sup>82</sup> to the certificates of genuineness that are to accompany the general trademarks for any genuine Native American handicraft.<sup>83</sup>

The Board's powers are very specific as indicated by the power given to it regarding the trademarks which are the subject of the Act (and the certificates of

70. 25 U.S.C. §305a.

71. *Id.* §305a(g).

72. *Id.* §305a(g)(1).

73. 15 U.S.C. §1113(b) (1983 & Supp. 1992).

74. 25 U.S.C. §305(g).

75. *Id.* §305a(g)(2).

76. *Id.* §305. The referenced section of Title 5 states, "An employee serving intermittently in the Government service as an expert or consultant and paid on a daily when-actually-employed basis, or serving without pay . . . , may be allowed travel or transportation expenses, under this subchapter, while away from his home or regular place of business and at the place of employment or service." 5 U.S.C. §5703 (1983 & Supp. 1992).

77. 25 U.S.C. §305d(a).

78. *Id.* §305d(a).

79. *Id.* §305d(b).

80. 25 C.F.R. §§301-310 (1992).

81. *Id.* §§301 and 304.

82. *Id.* §307.

83. *Id.* §308.

genuineness that are to indicate the presence of such trademarks). Each Native American individual or organization that registers a trademark must be given the right by the Board to attach a certificate of genuineness to that trademark.<sup>84</sup> The certificate declares the trademark is authorized by the Board and the seller of the handicraft is a recognized Native American enterprise dealing in genuine goods.<sup>85</sup> The general rationale behind this provision is to “ensure the widest distribution of genuine Indian handicraft products, and to protect the various enterprises organized by individual [or groups of] Indian craftsmen.”<sup>86</sup>

Additionally, there are certain conditions that must be met before an artisan will be given the right to attach one of these certificates to the product being sold.<sup>87</sup> First, the enterprise must be selling only Native American-made genuine handicraft products; these are defined as “objects produced by Indian craftsmen with the help of only such devices as allow the manual skill of the maker to condition the shape and design of each individual product.”<sup>88</sup> Second, the enterprise must be entirely owned by an individual Native American or a group of Native Americans.<sup>89</sup> Third, the enterprise must agree to apply these certificates only on products that meet the quality standards prescribed by the Board at the time the certificate is attached to the product.<sup>90</sup> Finally, the enterprise must agree to get the approval of the Board regarding the manner of producing the certificates.<sup>91</sup> Of course, if an enterprise fails to meet these conditions after gaining the right to use the certificate, the Board retains the right to revoke such privilege of attachment.<sup>92</sup>

Section seven of the Act, another new section, authorizes recognized Native American tribes to certify individuals who would not otherwise qualify as members of the tribe as Native American artisans. However, the tribe may not impose a fee for certifying the individual as a Native American artisan.<sup>93</sup>

### C. CRIMINAL PENALTIES FOR MISREPRESENTATION

The penalties for violation of the Act are rather substantial, whether the penalties imposed are civil or criminal. Section four 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 suggests 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.<sup>94</sup>

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84. *Id.* §308.2(a).

85. *Id.*

86. *Id.*

87. *Id.* §308.3.

88. *Id.* §308.3(a).

89. *Id.* §308.3(b).

90. *Id.* §308.3(c).

91. *Id.* §308.3(d).

92. *Id.* §308.4.

93. 25 U.S.C. §305.

94. 18 U.S.C. §1159(a).

This section enumerates the criminal penalties for such “knowing” misrepresentation.<sup>95</sup> The penalty for an individual first-time offender is a fine of not more than \$250,000 and/or imprisonment of not more than five years.<sup>96</sup> Subsequent violations by an individual are to be punished by a fine of not more than \$1,000,000 and/or imprisonment of not more than fifteen years.<sup>97</sup> The penalties for a first-time offender other than an individual is a fine of not more than \$1,000,000.<sup>98</sup> Subsequent violations by a person other than an individual are to be punished by a fine of not more than \$5,000,000.<sup>99</sup> “Person other than an individual” is currently undefined in the statute. The language “in a manner that falsely suggests” was added into the Act to avoid any potential overbreadth defense.<sup>100</sup> Additionally, this language parallels the false designation provision of the Lanham Act.<sup>101</sup>

Section six of the Act relates to one who counterfeits any government trademark used or devised by the Board. Penalties can be imposed upon one who counterfeits or “colorably imitates” any such trademark;<sup>102</sup> one who affixes a trademark without having the authorization to do so;<sup>103</sup> one who “knowingly, willfully, and corruptly” affixes a copy, counterfeit or “colorable imitation” on any product, label, sign, package, or wrapper intended for sale;<sup>104</sup> or one who knowingly makes a false statement in order to obtain the use of such trademark.<sup>105</sup>

The penalties imposed under section six are similar to the criminal penalties imposed under section four for misrepresentation. The monetary fines and sentencing structure are the same as those in section four. The difference is that this section provides that the offender shall be enjoined from any further carrying on the act(s) complained of.<sup>106</sup>

#### D. CIVIL PENALTIES FOR MISREPRESENTATION

Section five, another new section, establishes the civil penalties for the misrepresentation of Native American produced goods and allows standing to sue for

95. *Id.* §1159(b).

96. *Id.* §1159(b)(1).

97. *Id.* §1159(b)(2).

98. *Id.* §1159(b)(1).

99. *Id.* §1159(b)(2).

100. H.R. Rep. No. 400(I) at 11.

101. *Id.* The relevant portion of the Lanham Act, 15 U.S.C. §1125(a)(1), refers to “false designation of origin, false or misleading description of fact or false or misleading representation of fact which is likely to cause confusion or to cause mistake or to deceive as to the affiliation . . . or as to the origin, sponsorship, or approval of his goods . . . by another person.”

102. 18 U.S.C. §1158.

103. *Id.* §1158.

104. *Id.* §1158.

105. *Id.* §1158.

106. *Id.* §1158(3).

such violations.<sup>107</sup> Civil actions may be brought by the United States Attorney General upon request of the Secretary of the Interior on behalf of a Native American who is a member of a tribe or on behalf of a Native American tribe or Native American arts and crafts organization.<sup>108</sup> A civil suit may also be brought by a Native American tribe on its own behalf or on the behalf of a Native American arts and crafts organization<sup>109</sup> or by any Native American aggrieved by the prohibited conduct.<sup>110</sup>

Any person with the proper standing to sue for a violation of the Act may obtain injunctive or other equitable relief.<sup>111</sup> He may also recover the greater of treble damages<sup>112</sup> or, in the case of each aggrieved individual Native American, Native American tribe, or Native American arts and crafts organization, not less than \$1,000 for each day on which the display/offer for sale or sale continues.<sup>113</sup> In addition to the above relief, section five also grants the court the power to award punitive damages, the costs of suit, and reasonable attorney's fees.<sup>114</sup> All damages recovered under section five are to be paid to the individual Native American, Native American tribe or Native American arts and crafts organization, with only two exceptions.<sup>115</sup> First, in the situation where the Attorney General brings the suit, he may deduct a sum from the amount recovered as reimbursement for the costs of suit and reasonable attorney's fees.<sup>116</sup> Second, in the situations where the tribe brings suit on behalf of itself or on behalf of an arts and crafts organization or where the aggrieved individual brings suit, the amount recovered for the costs of suit and reasonable attorney's fees may be deducted from the amount awarded as the choice between treble damages or not less than \$1,000 per day of damage noted above.<sup>117</sup>

#### IV. IMPACT

As is the case with nearly every piece of legislation enacted in the United States, there are effects that result from the Act. Some are positive, and some are negative, depending on one's point of view. The major effects of the Act have been the problems in determining Native American status and the fears of liability for only displaying the artwork.

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107. 25 U.S.C. §305e.

108. *Id.* §305e(c)(1)(A).

109. *Id.* §305e(c)(1)(B).

110. *Id.* §305e(c)(1)(B).

111. *Id.* §305e(a)(1).

112. *Id.* §305e(a)(2)(A).

113. *Id.* §305e(a)(2)(B).

114. *Id.* §305e(b).

115. *Id.* §305e(c)(2).

116. *Id.* §305e(c)(2)(A).

117. *Id.* §305e(c)(2)(B).

## A. TRIBAL MEMBERSHIP AND NATIVE AMERICAN STATUS

The Act was intended to keep cheap imitations of Native American art out of the market, and it will have that effect by making it a crime to represent the lower-priced imitation artwork as genuine Native American artwork. The Act has been described as “truth-in-advertising” legislation. While it will not prevent an artist from displaying and selling his work, the Act does prevent him from describing his art as Native American where it is not.<sup>118</sup> A problem that has recently arisen takes the form of artists of Native American ancestry who are not formally affiliated with a tribe. These artists have claimed the Act is posing serious harm to their livelihoods.<sup>119</sup>

Though the Act defines “Indian” as one who is a formally enrolled tribe member or someone whom the tribe has certified as a Native American artist,<sup>120</sup> even this latter provision has not helped some artists. Additionally, some artists who are members of tribes object to having to prove membership in order to sell their work.<sup>121</sup> Many Native Americans resent the Act’s attempt to legislate the tribal issue of who is a real Native American and who is not.<sup>122</sup> Others, however, feel the Act serves as an effective way to preserve the integrity of the various Native American cultures.<sup>123</sup>

For example, Andrew Alvarez, an artist in Long Beach, California, is part Native American and part Mexican.<sup>124</sup> He was recently excluded from exhibiting his work at a crafts fair because he could not prove membership in a tribe.<sup>125</sup> He is in the process of obtaining membership in the Navajo tribe, but obtaining such membership is not like registering to vote or getting a library card. Rules vary from tribe to tribe, but the process generally takes a great many months.<sup>126</sup> For a Native American not born and raised on an Indian reservation, obtaining membership can be an ordeal. Until he is able to obtain such membership, he must advertise his jewelry as Indian-style or Southwestern-style.<sup>127</sup> Many urban Native Americans have been excluded from art fairs, crafts shows and other expositions simply because they had no formal affiliation with a Native American tribe.<sup>128</sup> There is much warranted concern that these urban Native Americans will have greater difficulty in proving tribal affiliations than will other Native Americans.<sup>129</sup>

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118. Stephanie Goldberg, *Made in America*, 78 A.B.A.J. 32 (Apr. 1992).

119. *Id.*

120. 25 U.S.C. §305e(d)(1).

121. Michelle Quinn, *Ethnic Litmus Test a Problem for American Indian Artists*, L.A. TIMES, June 18, 1992, at F1, col. 2.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

The first hurdle is determining “What is a tribe?” because Native American status is defined in terms of tribal membership. The Act considers only those tribes which are registered with either an appropriate federal or state agency to be legal Native American Tribes.<sup>130</sup> A problem arises in that some Native American organizations never registered with either the federal or state government out of fear and protest over the establishment of the reservations. For example, California has 100 recognized tribes, but as of 1990, only 48,000 of the 242,164 who said they were Native American were officially registered with a *recognized* tribe.<sup>131</sup>

The matter then becomes even more complex because of the differing standards each tribe may set for membership. Some tribes require a certain percentage of Native American blood while others recognize only those whose mothers or fathers are members of the tribe.<sup>132</sup> In the general realm of all federal laws, the answer to “Who is a Native American?” often depends on the context of the federal law, and the racially-based answer may be different than the legally-based one.<sup>133</sup> Federal laws define “Indian” in different ways.<sup>134</sup> But in the absence of a definition, courts generally use a two part test.<sup>135</sup> First, the individual must have some Native American blood, and second, the individual must be recognized as Native American by the Native American community.<sup>136</sup>

This second part is where many of the problems arise because of the differing standards for each tribe. Though most tribes require that the person have at least one-fourth Native American blood to become a member,<sup>137</sup> other tribes require five-eighths,<sup>138</sup> one-half,<sup>139</sup> one-sixteenth,<sup>140</sup> or one-thirtysecond.<sup>141</sup> A few tribes have still other requirements such as residence on the reservation for a certain period of time or filing the enrollment application within a few years of the applicant’s birth.<sup>142</sup> Some tribes will only allow a child to become a member if his father is a member.<sup>143</sup> In one situation a tribe refused to enroll children whose mother was a full-blooded tribal member, but whose father did not

130. 25 U.S.C. §305e(d)(3)(A) and (B).

131. Quinn, *supra* note 121.

132. *Id.*

133. PEVAR, *THE RIGHTS OF INDIAN TRIBES* 12 (ACLU 1992).

134. Even though one who is an accepted member of a particular tribe might not necessarily be considered Native American for every federal purpose, PEVAR, *supra* note 133, at 13, this is not an issue in the Act’s context. This is so because the Act considers one to be a Native American as long as he is a member of a recognized Native American tribe. 18 U.S.C. §1159(C)(1) and (3). Additionally, section seven of the Act specifically includes any person who is certified by the tribe as an artisan, even if that person would not normally qualify for membership in that tribe.

135. PEVAR, *supra* note 133, at 12.

136. *Id.*

137. *Id.* at 13.

138. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 8 (West 1981).

139. PEVAR, *supra* note 133, at 13.

140. *Id.*

141. *Id.* at 86.

142. *Id.*

143. *Id.*

have any tribal blood.<sup>144</sup> Still other tribes use matriarchal descent as an added requirement.<sup>145</sup> Such extra demands upon membership, though they might be considered discriminatory, have been upheld by the Supreme Court as being within tribal power.<sup>146</sup>

Native American artists who are unable to display their artwork for lack of proof of membership in recognized tribes would have the most to gain in challenging the Act. Overturning the Act would allow these artists access to the publicity and income that can be obtained through art exhibitions and fairs. However, at least one United States Attorney feels the Act is constitutional.<sup>147</sup> This is likely to be the case in light of earlier Supreme Court rulings. The Supreme Court has previously held that tribal membership is solely a tribal concern and that since Native Americans are a political, as opposed to racial group, they can be singled out for different treatment under the Fourteenth Amendment.<sup>148</sup> This was the holding of *Morton v. Mancari*,<sup>149</sup> where hiring preferences were upheld because the classification was directed only at “members of federally recognized tribes” and was therefore a political, rather than racial, classification.<sup>150</sup> Furthermore, since the preference was more akin to an employment criterion than an invidious racial classification, rational basis review was used.<sup>151</sup> This means that as long as the special treatment can be rationally linked to “Congress’ unique obligation toward the Indian,”<sup>152</sup> legislative judgments will not be disturbed.<sup>153</sup> The Court felt the power of Congress to legislate on behalf of federally recognized Native American tribes came from the “unique” legal status of Native American tribes under federal law through a history of treaties and the assumption of a “guardian-ward status.”<sup>154</sup> The Court noted that if all legislation singling out Native Americans for a certain special treatment were deemed invidious racial discrimination, all of Title 25 of the U.S. Code would be wiped out and the “commitment of the Government toward the Indians would be jeopardized.”<sup>155</sup>

In the situation created by the Indian Arts and Crafts Act of 1990, the differentiation is also based on membership in recognized tribes. Those who are registered can advertise their art as Native American art; those who are not registered,

144. *Santa Clara Pueblo v. Martínez*, 436 U.S. 49 (1978).

145. *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 12* (Deloria, Jr., ed., University of Oklahoma Press 1985).

146. *Id.*

147. Goldberg, *supra* note 118. (Statement by Assistant United States Attorney Herb Becker of Albuquerque, N.M.).

148. *Id.*

149. 417 U.S. 535 (1974).

150. Peter Tasso, *Greywater v. Joshua and Tribal Jurisdiction over Non-member Indians*, 75 *IOWA L. REV.* 685, 760 (1990).

151. *Morton*, 417 U.S. 535.

152. *Id.* at 556.

153. *Id.*

154. *Id.* at 551.

155. *Id.* at 552.

cannot.<sup>156</sup> As such, the Act must only be rationally or reasonably related to governmental ends that are legitimate or valid. The governmental ends of protecting Native American culture and preserving the market for Native American goods from the effects of counterfeiters, foreign competitors and misrepresentation are arguably greater than merely “legitimate” or “valid.” The means used to achieve this goal appear to be at least reasonably and rationally related. The requirements and definitions of the Act seem to be the least restrictive method to achieve the purpose of the Act. To set the broader guidelines than those currently existing under the Act would most likely diminish the effects of the law. Legislative determinations that a certain sector, namely the Native American arts and crafts market, needed certain protection for its preservation will therefore probably not be tampered with by the courts.

It is unfortunate that many genuine Native American artists may be excluded from fairs or expositions, but this may be necessary to protect other artists from the ill-effects of foreign undercutting and domestic misrepresentation. Further, a non-member Native American still has the option of registering with the tribe of his ancestry. Though this can be an arduous process with complex regulations, matters of tribal membership is an area into which the federal and state governments do not have the authority to intrude.<sup>157</sup> Additionally, an artist has the second option of becoming certified as a Native American artisan by a Native American tribe. The rules on this, too, may vary from tribe to tribe, but tribes are prohibited from charging a fee for this certification.<sup>158</sup>

#### B. DISPLAY OF NATIVE AMERICAN ART

Another problem has cropped up not in the context of the *sale* of Native American art, but rather in the *display* of Native American art, such as in a museum. Though the Act was written to apply to art for sale only, many museums have been reluctant to display artwork without proof of tribal membership.<sup>159</sup> As a result of the Act, museum curators have begun requiring proof of membership in a Native American tribe before the artist’s works will be shown in the museum.<sup>160</sup> Some exhibitions in western and southwestern states have voluntarily shut down because the museums are afraid of losing their tax-exempt status.<sup>161</sup> A more tangible fear is that of the stiff penalties imposed upon institutions by the Act, up to \$1 million for a first time violation, and up to \$5 million for any subsequent violations.<sup>162</sup> By the wording of the law, these fines would not apply to museums since they are only displaying the artwork; however, museums have been afraid that the law *will* be applied to them and they will

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156. 25 U.S.C. §305e.

157. Tasso, *supra* note 150, at 691.

158. 25 U.S.C. §305 *et seq.*

159. Quinn, *supra* note 121.

160. *Id.*

161. *Id.*

162. 18 U.S.C. §1158(1) and (2).



be assessed the fines. Museums have closed art shows, even after the show had been on display for a while, because the artist could not prove registration with a tribe.<sup>163</sup>

It is clear Congress, at least up to this point in time, did not intend the Act to apply to museums. Especially since the wording of the Act clearly states (and stated in 1935, as well), “[i]t is unlawful to offer or display for sale or sell any good . . . .”<sup>164</sup> There is no reference to display for the sake of observation only. But many museum boards of directors have decided to self-regulate and set standards to avoid the not inconsequential harm that could result if it was ever found in violation.<sup>165</sup>

This may have been an unintended side-effect, but it is nonetheless significant. It would seem that in light of the economic objectives of the Act, museums should be exempted as long as the museum does not sell any of the artwork it displays. If there is no sale involved, the consumer is not at risk of purchasing Native American artwork that is not really Native American, and the Native American artwork market is not in danger of losing revenue to foreign counterfeits. When there is no sale involved, the governmental ends lose their vitality. But due to museum self-censorship, the Act may be having a chilling effect on the First Amendment freedom of expression of those artists whose artwork is not for sale, but only for display. The freedom of speech has been interpreted to include purely artistic expression, as long as the art is not obscene in the legal sense, even in cases of pornographic or otherwise offensive artwork.<sup>166</sup> The Supreme Court has stated in dicta, “[t]he actor on stage or screen, the artist whose creation is in oil or clay or marble . . . are beneficiaries of freedom of expression.”<sup>167</sup> As the artworks hanging in museums are generally not for sale, the commercial speech exception (allowing greater regulation of commercial speech) set forth in the *Central Hudson Gas v. Public Service Commission*<sup>168</sup> line of cases would not apply.<sup>169</sup> It is true that a museum may buy the artwork from the artist in order to display it and therein would lie the sale.<sup>170</sup> However, when

163. Quinn, *supra* note 121.

164. 18 U.S.C. §1159(a).

165. 25 U.S.C. §305 *et seq.*

166. *Piarowski v. Illinois Community College District* 515, 759 F.2d 625, 628 (7th Cir. 1985), *cert. den.*, 474 U.S. 1007 (1985); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

167. *Poe v. Ullman*, 367 U.S. 497, 514 (1961), *reh'g den.*, 368 U.S. 869 (1961).

168. 447 U.S. 557 (1980).

169. *Id.* at 562 (commercial speech is “speech proposing a commercial transaction”). However, there have been instances where speech that was not explicitly for the purpose of selling an item has nonetheless been deemed regulatable under the commercial speech doctrine. *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (informational material regarding prophylactics and venereal disease considered commercial speech). The difference between those situations and the artwork hanging in a museum is that though the informational material may look like informational material, one would be hard pressed to argue that the advertiser was distributing the material for solely altruistic reasons. In the case of a museum hanging a painting on a wall, there is no product being described, nor is a sale of that painting even being contemplated.

170. It is true that many museums do have some sort of “museum shop” where jewelry and other types of artwork and crafts are sold. However, in that case, the Act would clearly apply, since those

one is dealing with a (presumptively) experienced curator, it does not seem as necessary to protect him from purchasing fraudulent goods.

The other side of this equation is that even though the “consumer” of a museum is not purchasing the artwork in the museum, there is still the potential for misleading the average visitor to a museum or exhibition. One who visits a museum expects that the artwork he sees there will be accurately described by the cards that usually accompany the pieces of art. It is fair to say that one visiting a museum has the right to be presented with accurate descriptions of the artwork. This would certainly be so in the case of a museum that charged admission, since the visitor is paying for the privilege of viewing genuine artwork. However, because of the purported role of museums, to educate its visitors and expose them to a variety of experiences not usually accessible to the average person, this right would apply to free, public museums as well. If the artist is described as Native American, the visitor will believe this, relying on the curator’s expertise. If a curator does not have proof of the artist’s tribal membership, he or she could be unknowingly misleading the public. Admittedly, the work is still “genuine” if the artist is a non-affiliated Native American since tribal affiliation is arguably not the only mark of a “true” Native American. But in order to guarantee that “genuineness” it may be necessary to utilize the tribes’ standards and limit displays to those Native Americans who can establish their tribal affiliation. And in this respect, it may be necessary for curators to limit the displays to Native American tribe members.

However, the bottom line may turn out to be the fact that the statute only refers to goods being *displayed for sale*.<sup>171</sup> As a museum does not fit this description, it is regrettable that some are voluntarily placing limits on cultural expression, even before Congress has expressed the intent to apply the statute to non-commercial displays. It seems logical that museum curators would have greater access than the general public to methods of ensuring the authenticity of artwork before it is purchased and hung on the wall for display.

## V. CONCLUSION

The rationales behind the Indian Arts and Crafts Act of 1990 are valid. It has become necessary to prevent foreign imitations from siphoning revenues away from a legitimate market for Native American culture and to prevent domestically-produced goods from being misrepresented as Native American. The twin aims are to maintain the integrity of the Native American artwork market and to protect the consumer from purchasing goods which are fraudulently advertised as Native American.

However, the Act seems to be flawed. Some Native American artists are

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goods would then be FOR SALE. 18 U.S.C. §1159(a). The Act makes provisions for fraudulent sale by “persons other than an individual,” 25 U.S.C. §305 *et seq.*, and appears that a museum shop would fit that category. The problems discussed in this article arise only in the case of artwork that is hanging on the wall for DISPLAY ONLY, as differentiated from the case of museum shops.

<sup>171</sup>. 25 U.S.C. §305 *et seq.*

suffering simply because they have chosen not to register with a recognized Native American tribe, or have been unable to do so. The other flaw is the chilling effect the Act has already had on museums, which have closed their doors in fear of sanctions for displaying artwork lacking proof it was created by legal Native Americans. It is possible the Act only needs minor fine tuning, and it is possible this may happen. Until then, the Indian Arts and Crafts Act of 1990 will stand as written.

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