American Indian and Tribal Intellectual Property Rights

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I. INTRODUCTION

American Indians, Alaskan Natives, and their tribal governments are extremely interested in a wide array of issues that fit within the rubric of intellectual property law. This Essay will briefly highlight some of these subjects. In addition to the points raised here, there are other relatively attenuated IP issues that have not yet been recognized by courts, but arguments are being developed and raised at this time to address these novel issues.[1]

Any discussion regarding federally recognized Indians and Indian tribes has to begin with the understanding that tribes and their citizens have a political, government-to-government relationship with the United States; therefore, actions that the federal government might take to help (or hinder) tribes—and even individual Indians in certain circumstances—do not raise equal protection questions.[2] The United States also has a trust responsibility towards tribal governments and Indian peoples and a legal obligation to protect them in many different

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1. *See, e.g.*, John T. Cross, *Justifying Property Rights in Native American Traditional Knowledge*, 15 TEX. WESLEYAN L. REV. 257, 263-64 (2009); James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL'Y REV. 255, 260 (2001); Alexis A. Lury, *Official Insignia, Culture, and Native Americans: An Analysis of Whether Current United States Trademark Law Should be Changed to Prevent the Registration of Official Tribal Insignia*, 1 CHI.-KENT J. INTELL. PROP. 137, 143-46 (1999); Richard A. Guest, Comment, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111 (1996).

2. *See, e.g.*, Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat 4791 (1994); 25 U.S.C. § 479a note (2006); Morton v. Mancari, 417 U.S. 535, 554 n.24 (1974) (stating that the federal/tribal relationship "is political rather than racial in nature.").

settings.[3] The federal trust responsibility arguably extends to tribal and individual Indian intellectual property issues as well.

II. INDIAN ARTS AND CRAFTS ACT

In 1935, Congress enacted the Indian Arts and Crafts Act (Act) and created the Indian Arts and Crafts Board in the U.S. Interior Department to promote and protect Indian artistic endeavors and to assist with tribal economic development.[4] Amendments in 1990 granted this Board the 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 the U.S. Patent and Trademark Office (USPTO) and assign them to Indians and tribes free of charge.[5] The Act protects Indian works of art by providing for felony criminal sanctions for, among other things, counterfeiting a Board trademark.[6] It also provides for civil causes of action for tribes, the U.S. Attorney General, and Indian arts and crafts organizations in which treble damages, punitive damages, attorney fees, and injunctions can be granted against anyone falsely representing that goods are made by Indians.[7] The Interior Department has enacted regulations pursuant to the Act which extend this federal trademark protection to Navajo all-wool woven fabrics, Alaskan Native handmade products, and Navajo, Pueblo, and Hopi silver and turquoise products.[8]

Commentators have opined that the Act and its protection for "Indian products" could be given a broad reading by courts and be used to protect items such as traditional seeds, cultural ideas and expressions, and property other than the usual works of arts and crafts.[9]

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3. *See* United States v. Mitchell, 463 U.S. 206, 224 (1983) (describing the fiduciary responsibility that the U.S. has toward Indians); Cherokee Nation v. Georgia, 30 U.S. 1, 10 (1831) (asserting that tribes are considered "domestic dependent nations" and "[t]heir relation to the United States resemble that of a ward to his guardian"); ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 165-66 (2006).

4. 25 U.S.C. § 305 (2006).

5. Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat 4662 (1990).

6. 18 U.S.C. §§ 1158-1159 (1994); for examples of litigation involving the Indian Arts and Crafts Act, *see* Native Am. Arts, Inc. v. Waldron Corp., 399 F.3d 871, 873-75 (7th Cir. 2005) (finding against the Indian plaintiff-appellants); Native Am. Arts, Inc. v. Mangalick Enter., Inc., 633 F. Supp. 2d 591, 592-93 (N.D. Ill. 2009) (denying defendant's motion to dismiss); Native Am. Arts, Inc. v. Village Originals, Inc., 25 F. Supp. 2d 876, 878-79 (N.D. Ill. 1998) (holding that the Ho Chunk Indian tribe had standing to assert an Indian Arts and Craft Act private cause of action).

7. 25 U.S.C. § 305.

8. 25 C.F.R. §§ 301, 304, 307, 309-310 (2009).

9. Guest, *supra* note 1, at 136; Cross, *supra* note 1, at 289-90.

III. PROTECTION OF TRIBAL AND INDIVIDUAL NAMES

Tribal names and the names of famous Indians have often been utilized on commercial products, such as automobiles and businesses.[10] Tribes and individual Indians are interested in protecting these names from unauthorized commercial exploitation.

Crazy Horse was a famous and beloved spiritual and political leader of the Oglala Lakota people.[11] Regrettably, his name has been used in connection with alcoholic products and a multitude of other businesses.[12] Many Oglala people, including Crazy Horse's descendants, have taken steps to protect his name and reputation.[13] In 1992, their efforts paid off when Congress enacted a statute which banned the use of the name "Crazy Horse" on any alcoholic beverage.[14] A federal court in New York, however, held that the statute violated the First Amendment and repealed the ban.[15]

In 1994, the administrator of the Crazy Horse estate continued to fight against the use of the name "Crazy Horse" on an alcoholic beverage and filed suit against a brewery and its officials in the Rosebud Sioux Tribal Court.[16] Ultimately, the United States Court of Appeals for the Eighth Circuit held that the tribal court lacked jurisdiction over the defendants.[17]

However, the Rosebud Sioux Tribe and the descendants of Crazy Horse did not give up this fight. In 2001, a federal judge denied a motion to dismiss their federal action against the brewery and brewery officials.[18] The plaintiffs have continued to challenge the use of the name "Crazy Horse" in the manufacture, sale, and distribution of an alcoholic beverage and the alleged defamation, misappropriation and misuse of inheritable property rights, privacy violations, and violations of the

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10. Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 376 (1998). There are currently sixty-seven registered trademarks using "Cherokee," sixty-five using "Navajo," and fifty-three using "Sioux." U.S.P.T.O. TRADEMARK ELECTRONIC SEARCH SYSTEM, http://tess2.uspto.gov/ (last visited Oct. 26, 2010).

11. Antonia Novello, *Crazy Horse Malt Liquor Beverage: The Public Outcry To Save the Image of a Native American Hero*, 38 S.D. L. REV. 14, 14 n.3 (1993).

12. *Id.*

13. *Id.*

14. Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 120-393, 106 Stat 1729 (1992).

15. Hornell Brewing Co. v. Brady, 819 F. Supp. 1227, 1245-46 (E.D.N.Y. 1993).

16. Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1089 (8th Cir. 1998).

17. *Id.* at 1093-94.

18. Estate of Witko v. Hornell Brewing Co., 156 F. Supp. 2d 1092, 1102 (D.S.D. 2001).

Indian Arts and Crafts Act, the Lanham Act, and the Federal Trademark Dilution Act.[19]

Other tribes have also gone to court to protect their tribal names. In a 2001 decision, the Supreme Court of Connecticut ruled that the federally recognized Mohegan tribe could not prevent an incorporated group of individuals of Mohegan ancestry from using the words "Mohegan" and "Mohegan Tribe."[20] But the tribe's claims to protect its name under the Lanham Act and Connecticut's common law theory of unfair competition failed.[21] Commentators have suggested, however, that tribal governments could seek some limited protection for their tribal names under the Lanham Act.[22]

IV. U.S. PATENT & TRADEMARK OFFICE

Tribes and Indian individuals have also raised claims with the USPTO. A group of Indians were successful in challenging the registration of the word "Redskins" by the NFL's Washington Redskins.[23] In 1999, the USPTO Trademark Trial and Appeal Board ordered that the trademark registration be canceled on the grounds that the "Washington Redskin" mark may disparage Native Americans and may bring them into contempt or disrepute.[24] The football team prevailed, however, after appealing this decision through multiple cases in federal court.[25] Others believe that the registration of marks for the Chief Wahoo symbol of the Cleveland Indians baseball team and other sports mascots, including the Florida State Seminoles, will eventually be challenged in court.[26]

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19. *See* SHERRY HUTT, CULTURAL PROPERTY LAW: A PRACTITIONER'S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES 114 (2004).

20. Mohegan Tribe of Indians of Conn. v. Mohegan Tribe & Nation, Inc., 769 A.2d 34, 48 (Conn. 2001).

21. Interestingly, however, the Connecticut court mentioned, "An entity that, for example, has no colorable claim of Mohegan tribal status presumably could be enjoined from identifying itself as a Mohegan tribe under the Lanham Act upon a showing of likelihood of confusion as to the source of the entity's products or services." *Id.* at 43 n.23.

22. Guest, *supra* note 1, at 131-32, 138.

23. Harjo v. Pro-Football, Inc., 50 U.S.P.Q. 2d 1705, 1999 WL 375907, at *48 (T.T.A.B. 1999).

24. *Id.*

25. Pro-Football, Inc. v. Harjo, 565 F.3d 880 (D.C. Cir. 2009); Pro-Football, Inc. v. Harjo, 567 F. Supp. 2d 46 (D.D.C. 2008); Pro-Football, Inc. v. Harjo, 415 F.3d 44 (D.C. Cir. 2005).

26. *See* Jack Achiezer Guggenheim, *The Indians' Chief Problem: Chief Wahoo as State Sponsored Discrimination and a Disparaging Mark*, 46 CLEV. ST. L. REV. 211 (1998); Jim Parsons, *Indians Say Fight over Nicknames Isn't Going Away*, MINNEAPOLIS-ST. PAUL STAR TRIB., Oct. 21, 1995, at 1A; Jack Wheat, *Real Seminoles Resent the Profits FSU Makes Off Their Tribal Name*, MIAMI HERALD, Feb. 11, 1993, at 7B.

Tribes have also sought USPTO protection of tribal insignias and other items.[27] In 1998, these concerns led Congress to direct the USPTO to study the issues of protecting tribal insignia and to submit a report to Congress by September 30, 1999.[28] This in turn led to the creation of a database of official tribal symbols and affirmed that trademark law protects the symbols from being trademarked in a way that falsely implies a connection with a tribe or disparages a tribes' beliefs.[29] There will no doubt be more tribal and Indian activity in the USPTO in the future.

V. FUTURE ISSUES

Indians and their tribes have a host of other concerns that could fall within the IP arena. These include the protection of tribal and individually owned songs, totems, crests, stories, and other cultural items. Many tribes consider items such as these to be personal property that were and are privately owned by families and/or individuals.[30] In Canada, native peoples have already secured governmental trademark protection for ancient petroglyphs,[31] and are seeking protection from international designers who profit from unique native clothing traditions.[32] In many indigenous communities around the world, people

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27. Rebecca Lopez, *Tribes Seek Trademark Protection for Sacred Symbols*, ASSOCIATED PRESS, July 9, 1999, *available at* http://www.onlineathens.com/stories/070999/new_tribe.shtml. One author states: "There is no question that Native American tribes can seek federal registration of their tribal names under the Lanham Act for goods and services they currently sell or contemplate selling in the future." Guest, *supra* note 1, at 129.

28. Trademark Law Treaty Implementation Act, Pub. L. No. 105-330, § 302, 112 Stat 3071 (1998).

29. DEP'T OF COMMERCE, U.S. PATENT & TRADEMARK OFFICE, RIN 0651-AB30, ESTABLISHMENT OF A DATABASE CONTAINING THE OFFICIAL INSIGNIA OF FEDERALLY RECOGNIZED NATIVE AMERICAN TRIBES (2000).

30. Many Indians from what is now Alaska, Washington, and Oregon, for example, owned the sole rights to use the carvings on their houses, dances, marriage ceremonies, names, songs, stories, medicines, masks, rituals, and specific hunting and fishing grounds. *See* Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 ORE. L. REV. 757, 773-75 (2001); 7 SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS 418 (Wayne Suttles ed., 1990); ROBERT H. RUBY & JOHN A. BROWN, THE CHINOOK INDIANS: TRADERS OF THE LOWER COLUMBIA RIVER 11 (1976); KALERVO OBERG, THE SOCIAL ECONOMY OF THE TLINGIT INDIANS 55 (1973); ELIZABETH COLSON, THE MAKAH INDIANS: A STUDY OF AN INDIAN TRIBE IN MODERN AMERICAN SOCIETY 4 (1953).

31. Michael F. Brown, WHO OWNS NATIVE CULTURE? 84-85 (2004). Ten petroglyphs were trademark listed by the Canadian Intellectual Properties Office for a Vancouver Island Indian band and now are off-limits for use on t-shirts, jewelry etc. *Id.*

32. J.M. FINGER & PHILIP SCHULER, POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 122-23 (2004). Canadian indigenous women sought trademark protection and government aid to protect their traditional designs and

are also interested in protecting local knowledge of healing and agricultural plants and traditional seeds and crops.[33] Numerous IP issues concerning American Indians, their tribes, and indigenous peoples around the world are anticipated to arise in the future.

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materials from fashion designers such as "Donna Karan, who purchased . . . designs from the Inuit woman, then used them as 'inspiration' for a collection being designed." *Id.*

33. *See, e.g.*, Rachel Durkee Walker & Jill Doerfler, *Wild Rice: The Minnesota Legislature, A Distinctive Crop, GMOS, and Ojibwe Perspectives*, 32 HAMLINE L. REV. 499 (2009); Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1024-25 (2009); WINONA LADUKE, RECOVERING THE SACRED: THE POWER OF NAMING AND CLAIMING 11 (2005); Guest, *supra* note 1, at 116-23; Lester I. Yano, *Protection of the Ethnobiological Knowledge of Indigenous Peoples*, 41 UCLA L. REV. 443, 479-86 (1993).