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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

Alexis A. Lury

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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

Alexis A. Lury*

Table of Contents

I. Introduction	137
II. The History of the United States' Treatment of Native Americans.....	139
III. United States Trademark Law, in General, and Section 302 of the Trademark Law Treaty Implementation Act	142
IV. The Harms	146
V. The Effects and Whether Section 302 Is Intended to Be More Restrictive Toward Native Americans Than Section 1052(b) Currently Is to Other Groups	154
VI. How Best to Implement the Change	155
VII. Conclusion.....	156

I. Introduction

The United States is a multinational and multicultural¹ country. As such, the United States must constantly balance the interests of the numerous cultural, ethnic, political and racial groups that exist within its borders. However, differences exist even within each of these groups. Of particular concern to the United States and its people are the role and position of minority cultures that live and exist in the United States.² This Article will focus exclusively on Native Americans and Native American tribes.

* A.B. 1997, *magna cum laude*, Washington University in St. Louis; J.D. expected 2000, The University of Southern California, The Law School. The author would like to thank Professor Nomi Stolzenberg both for providing her with the forum within which to write this article and for her suggestions throughout the writing process.

¹ Multiculturalism has been defined as “aspiring toward ‘a plurality of cultures with [all] members [of society] seeking to live together in amity and mutual understanding with mutual cooperation, but maintaining separate cultures.’” It is premised, in part, on the belief that all cultures are of equal value. Multiculturalism assures the freedom of individuals and groups to engage in diverse cultural traditions and practices, which “define, preserve, and reinforce group differences.” Jonathan Drimmer, *Hate Property: A Substantive Limitation For America’s Cultural Property Laws*, 65 Tenn. L. Rev. 691, 726 (1998) (alteration in original) (citations omitted).

² “Modern societies are increasingly confronted with minority groups demanding recognition of their identity, and accommodation of their cultural differences. This is often phrased as the challenge of ‘multiculturalism.’” Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 10 (1995).

*138 In the United States Native Americans are a “national minority,”³ which denotes a kind of cultural group.⁴ However, herein lies one problem: “culture”⁵ is a broad term that may refer to very specific elements of a particular group or to more general elements that in effect expands the group.⁶ Recently, Native Americans have turned to intellectual property laws “as a means to assert their self-determination, secure economic independence, and protect their cultural identities.”⁷

This Article focuses on Native Americans and the recently proposed changes to the Lanham Act, the United States’ federal trademark act. Specifically, this Article will examine section 302 of the Trademark Law Treaty Implementation Act,⁸ which requires the Commissioner to study the effects of changing current trademark law to prevent the registration of official Native American tribal insignia as trademarks. Section II will provide a brief history of the relations between the United States government and Native Americans since the 1700s. Section III will provide an overview of United States trademark law and will situate section 302 in the context of United States trademark law. Section IV will attempt to define the *139 harms that would be protected by changing section 1052(b), the section of the Lanham Act that section 302 proposes to change, to include Native American tribal insignia. Section V will briefly consider the effects of the

³ *Id.* at 11.

⁴ *Id.* at 23.

⁵ Culture may be defined as “‘the beliefs, and perceptions, values and norms, customs and behaviors of a group or society.’ Such a group might be coterminous with an entire nation or predominantly defined by such tangible traits and ethnicity, language, religion or history.” Drimmer, *supra* note 1, at 698. *See also* Patty Gerstenblith, *Identity And Cultural Property: The Protection Of Cultural Property In The United States*, 75 B.U. L. Rev. 559, 567 (1995) (stating that “[t]he term ‘culture’ describes the relationship between a group and the objects it holds important”).

⁶ Many of these groups do have a distinct culture in one common sense of the word - that is, where “culture” refers to the distinct customs, perspectives, or ethos of a group or association, as when we talk about a “gay culture”, or even a “bureaucratic culture”. This is perhaps the most localized meaning of “a culture”. At the other extreme, using “culture” in the widest sense, we can say that all of the Western democracies share a common ‘culture’ - that is, they all share a modern, urban, secular industrialized civilization, in contrast to the feudal, agricultural, and theocratic world of our ancestors. Kymlicka, *supra* note 2, at 18.

⁷ *See* Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 Am. Indian L. Rev. 111, 111 (1995-1996)

⁸ Trademark Law Treaty Implementation Act, Pub. L. 105-330, 112 Stat. 3064 (October 30, 1998).

changes and will then attempt to determine whether the proposed change is meant to be more restrictive towards Native Americans than section 1052(b) currently is toward other groups. This section will also propose criteria for determining what qualifies as official tribal insignia. Section VI will consider how to implement the change to section 1052(b). Section VII will conclude that the changes section 302 proposes should be made, but that this should be viewed only as an initial step to changing United States trademark law to better reflect Native Americans' and others' concerns.

II. The History of the United States' Treatment of Native Americans

The United States has used various mechanisms in dealing with Native Americans throughout its history. Initially, it seemed that Native Americans would be protected, as reflected by the Northwest Ordinance of 1787:

The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress, but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.⁹

However, by 1830, "influential leaders ... proposed moving the eastern tribes to the western territories."¹⁰ For this reason, the time period from 1830-1850 was referred to as the Removal Era.¹¹

***140** By the second half of the nineteenth century, the United States began a policy of assimilation where Indians were forced to adopt white ways.¹² The idea, which was supported by Thomas Jefferson, was that "with adequate resources and coaxing Indians could be 'civilized' and live in harmony with their white neighbors."¹³ Far from

⁹ U.S. Commission on Human Rights, *A Historical Context for Evaluation, in Native Americans and Public Policy* 13, 18 (Fremont J. Lyden & Lyman H. Legters eds., 1992).

¹⁰ *Id.* at 19. This 1830 legislation was called The Indian Removal Act of 1830. "Thousands of Indian people, almost the entire Indian population that had existed in the southeastern United States, were moved west." *Id.*

¹¹ "Although removal was theoretically based on the consent of those removed, it is clear that the eastern tribes were coerced." *Id.*

¹² "Large and small missions were strung out across America. They were to provide the Indians with European concepts of work, time, savings, and Christian orthodoxy to the end that 'as tribes and nations the Indians must perish and live only as men!'" *Id.* at 20.

¹³ *Id.*

merely “coaxing,” the assimilation efforts essentially prohibited Native Americans from engaging in their own cultural practices.¹⁴ Additionally, “allotment was advocated as a means of further civilizing Indians by converting them from a communal land system to a system of individual ownership.”¹⁵

Then, in 1934, the Indian Reorganization Act of 1934 was passed.¹⁶ This Act supported the United States’ new policy that some tribal self-government and tribal resources should be restored to Native Americans.¹⁷ The Reorganization Era thus ended the Assimilation and Allotment Era.¹⁸ The Reorganization Era *141 was quickly followed by the Termination Era, where the United States sought to “terminate” tribes and remove tribes from the realm of federal protection.¹⁹

The Termination Era ended in 1965 as “the federal government began to reject termination.”²⁰ “The policy that subsequently emerged in the Nixon administration [was] labeled ‘self-determination.’ It is a policy that favors maintaining the federal protective role, but providing at the same time increased tribal participation and functioning in

¹⁴ A major thrust of the assimilation efforts was to educate Indians in American ways. In 1879 the Carlisle Indian Training School was established by a former military officer. Its philosophy of separating Indian children totally from their Indian environment and forcing them to adopt white ways became the basis for a widescale [sic] boarding school movement that eventually removed thousands of Indian children from their cultural settings and families ... Everything “Indian” came under attack. Indian feasts, languages, certain marriage practices, dances, and any practices by medicine [sic] or religious persons were all banned by the Bureau of Indian Affairs. *Id.* at 22.

¹⁵ *Id.* at 24 (The General Allotment Act, also known as the Dawes Act, was passed in 1887).

¹⁶ *See Id.* at 25-26.

¹⁷ “Federal policy ... ultimately favor[ed] restoration of some measure of tribal self-government and tribal resources.” *Id.* at 25.

¹⁸ The major instrument for [the reorganization] policy was the Indian Reorganization Act of 1934, which, with companion legislation affecting the Oklahoma tribes, essentially provided by an end to allotment, for measures to restore Indian land bases, and for the establishment of a revolving credit fund to promote economic development. Also included were the regulation of resources, mechanisms for chartering and reorganizing tribal governments, and the establishment of an employment preference policy for Indians within the federal government. *Id.* at 25-26.

¹⁹ *See Id.* at 27.

²⁰ *Id.* at 28.

crucial areas of local government.”²¹ Nevertheless, in 1982, the Reagan administration made severe cuts in the federal expenditures towards Native Americans, including the complete elimination of funds for “the construction of water and sanitary facilities on Indian reservations.”²²

Today, the United States recognizes that Native Americans have tribal sovereignty; however, even this seems threatened.²³ Therefore, throughout history, the United States has viewed Native Americans as inferior and has sought to control or “change” them to better reflect the “European” image upon which the United States was created. With the recent pressures Native Americans are exerting to protect their rights, however, the United States must seek to respect Native Americans and appreciate their differences when formulating laws and public policies. *142

III. United States Trademark Law, in General, and Section 302 of the Trademark Law Treaty Implementation Act

Trademark law falls within the realm of Intellectual Property. However, unlike the other areas of intellectual property (copyright, patent, and trade secret), which are concerned with protecting inventions and expressions from “theft,”²⁴ trademark law is primarily concerned with protecting the consumer.²⁵ For instance, the following is a summarized explanation of trademark law:

Trademarks are traditionally viewed as a source identifier. They are words and designs whose purpose is to distinguish the goods or services of one company from the goods or services of another company. The underlying premise in the treatment of trademarks as a source identifier rests on the assumption that consumers read these identifiers as representing consistency between goods bearing the same identifier - that different goods bearing the same trademark emanate from the same source, and that trademarks

²¹ *Id.* at 28.

²² C. Patrick Morris, *Termination by Accountants: The Reagan Indian Policy*, in *Native Americans and Public Policy* 63, 66 (Fremont J. Lyden & Lyman H. Legters eds., 1992) (budget cuts included \$136.9 million in Indian Health Service and \$72.9 million from the Bureau of Indian Affairs).

²³ “[T]here is a[] ... strong argument that much of the legal power the tribes had in the past has eroded over the years. The Supreme Court has strayed from the notion of Indian tribes as ‘nations within a nation.’” Christopher V. Panoff, Note, *In re the Exxon Valdez Alaska Native Class v. Exxon Corp.: Cultural Resources, Subsistence Living, and the Special Injury Rule*, 28 *Envtl. L.* 701, 722 (1998).

²⁴ Robert P. Merges, et al., *Intellectual Property in the New Technological Age* (Aspen Publishers, Inc. ed. 1997), at 525 and 22-26.

²⁵ *Id.* at 523.

represent the promise of consistent quality.²⁶

Thus, the purpose of trademark law is to enable a consumer to identify a product or service with a source, even if that source is unknown, and to distinguish that product or service from those of others.²⁷ In other words, trademark law attempts to prevent *143 customer confusion with respect to goods and services. This notion of marking products in order for consumers to identify a source has been around since antiquity.²⁸

The Trademark Act of 1946, codified in 15 U.S.C.²⁹ 1052, however, lists certain symbols, words and other matter that are not considered registerable trademark material.³⁰ Included in section 1052(b) is the provision that goods whose nature “consists 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”³¹ will be refused registration on the principal register. This provision suggests that there are certain symbols and matter that belong to everyone or that are culturally “sacred” and thus no person can be granted ownership in those items.

It is this idea that individuals should not be granted ownership in certain material

²⁶ Keith Aoki, *How the World Dreams Itself to Be American: Reflections on the Relationship Between the Expanding Scope of Trademark Protection and Free Speech*, 17 Loy. L.A. Ent. L.J. 523, 531 (1997). “A trademark is a word, name, symbol, device, or other designation, or a combination of such designations, that is distinctive of a person’s goods or services and that is used in a manner that identifies those goods and services and distinguishes them from the goods or services of others.” Jane C. Ginsburg, et al., *Trademark And Unfair Competition Law: Cases and Materials*, 2d ed., 81 (1996) (citing Restatement (Third) of Unfair Competition §9). “Consumers may also use [trademarks] to classify themselves and build an identity of both association with and differentiation from others.” Aoki, *supra*, at 529-30.

²⁷ Ginsburg et al., *supra* note 25.

²⁸ Ida Madieha Azmi, et al., *Distinctive Signs and Early Markets: Europe, Africa and Islam*, in *Perspectives on Intellectual Property: Vol. 1: The Prehistory and Development of Intellectual Property Systems* 123, 133 (Alison Firth ed., 1997).

²⁹ Title 15 of the United States Code (15 U.S.C.) is referred to as the Lanham Act and will be so called throughout this Article.

³⁰ In general terms, nonregisterable material includes immoral, deceptive, scandalous, or disparaging matter (§1052(a)); the certain insignia (§1052(b)); marks that are similar to existing marks (§1052(c)); and marks that are merely descriptive or deceptively misdescriptive of the goods or services they are connected with (§1052(e)). See Lanham Act § 1052.

³¹ Lanham Act § 1052(b).

that lies at the crux of section 302 of the Trademark Law Treaty Implementation Act. Section 302 states:

(a) IN GENERAL - The Commissioner of Patents and Trademarks shall study the issues surrounding the protection of the official insignia of federally and State recognized Native American tribes. The study shall address at least the following issues:

(1) The impact on Native American tribes, trademark owners, the Patent and Trademark Office, any other interested party, or the international legal obligations of the United States, of any change in law or policy with respect to –

*144 (A) the prohibition of the Federal registration of trademarks identical to the official insignia of Native American tribes;

(B) the prohibition of any new use of the official insignia of Native American tribes; and

(C) appropriate defenses, including fair use, to any claims of infringement.

(2) The means for establishing and maintaining a listing of the official insignia of federally or State recognized Native American tribes.

(3) An acceptable definition of the term “official insignia” with respect to a federally or State recognized Native American tribe.

(4) The administrative feasibility, including the cost, of changing the current law or policy to –

(A) prohibit the registration, or prohibit any new uses of the official insignia of State or federally recognized Native American tribes; or

(B) otherwise give additional protection to the official insignia of federally or State recognized Native American tribes.

(5) A determination of whether such protection should be offered prospectively or retrospectively and the impact of such protection.

(6) Any statutory changes that would be necessary in order to provide such protection.

(7) Any other factors which may be relevant.³²

The Commissioner’s study must be completed by September 30, 1999.

Section 302, which was submitted by Senator Bingamen, who believes there is a need to protect insignias that have significance as religious symbols, arose from *145

³² Trademark Law Treaty Implementation Act § 302, Pub. L. 105-330, 112 Stat. 3064 (October 30, 1998) (§ 302: Official Insignia of Native American Indian Tribes).

continued pressure of the Zia Pueblo³³ with regard to their sun symbol.³⁴ The Zia Pueblo argue that the sun symbol, seen on New Mexico's State flag and other goods and services throughout New Mexico, is a sacred symbol that belongs to the Pueblo and as such should not be afforded trademark status. Even New Mexico's State Legislature recognizes that the Sun Symbol belongs to the Zia Pueblo, as evidenced by its salute, "I salute the flag of the State of New Mexico, the Zia symbol of perfect friendship among united cultures."³⁵

Section 302 therefore implemented a study in order to determine whether current United States trademark law should be amended to include a provision that prevents people or businesses from registering official Native American insignia as trademarks. However, it is unclear whether the proposed change would specifically address Senator Bingaman's and the Zia Pueblo's attempt to prevent religious symbols from being registered as trademarks. In order to determine whether section 302 addresses their concerns, one must understand the definition of "official insignia."

Section 1052(b) of the Lanham Act specifically concerns governmental insignia.³⁶ According to guidelines developed by the Patent and Trademark Office, governmental insignia consist of specific designs that "are formally adopted to serve *146 as emblems of governmental authority."³⁷ Additionally, "other insignia" refers to "those emblems and devices which are used to represent national authority and are of the same general class and character as flags and coats of arms."³⁸ Similarly, "'national insignia' is

³³ The Zia Pueblo is located sixteen miles northwest of Bernalillo, New Mexico. The tribe remains a "small community of agricultural workers and livestock raisers" who are known for their pottery that often includes a bird motif. *See* Zia Pueblo (visited July 10, 1999) <<http://www.indianpueblo.org/zia.html>>.

³⁴ In offering this amendment, Bingaman explained that many tribal insignias have significance as religious symbols and deserve protection from being used as trademarks. As an example, he noted that New Mexico's Zia Pueblo hold the "sun symbol" that appears on the state flag as sacred, and explained that it would be sacrilegious for the [Patent and Trademark Office] to grant trademark protection for this symbol. However, Bingaman reported that many businesses have tried to include this symbol in trademark applications, forcing the Pueblo to go to the trouble and expense to oppose registration. *Patent and Trademark Office: PTO Seeks Comments on Barring Registration of Native American Symbols, Trademarks for Indian Symbols*, in *Pat. Trademark & Copyright J. (BNA)* at 183 (Jan. 7, 1999).

³⁵ Zia Pueblo (visited July 10, 1999) <<http://www.indianpueblo.org/zia.html>>.

³⁶ Trademark Manual of Examining Procedure, Section 1203: Refusal on Basis of Government Insignia, 104 (1977).

³⁷ *Id.*

³⁸ *Id.*

restricted to the official symbols of a government.”³⁹ By analogy section 302 must be limited to those Native American insignia that represent governmental authority, or that when seen cause individuals to associate the insignia with a particular tribe. One might argue that Native American tribal insignia would not include “sacred” or religious symbols and therefore that section 302’s proposed change would fail to protect Native Americans to the extent that Senator Bingamen and the Zuni Pueblo desire. However, Native American tribes believe religion “pervades every aspect of Indian life.”⁴⁰ In fact, “the language makes no distinction between religion, government, or law. Tribal customs and religious ordinances are synonymous. All aspects of life are tied in to one totality.”⁴¹ Therefore, it is reasonable to assume that tribal insignia have sacred and religious meanings and thus that by protecting official tribal insignia, section 302 will simultaneously protect the tribes’ religious symbols - after all, Native American language fails to make a distinction between religious and governmental insignia and symbols.

IV. The Harms

Before considering the effects of changing the law, the specific harms being addressed must be defined. Since little literature exists on this subject, and little to no discussion occurred regarding the implementation of section 302, the author has drawn upon other areas of law that impact Native Americans in order to gain a possible perspective of the specific harms that section 302 seeks to address.

Throughout United States’ history, Native Americans have fought for respect, recognition, and the freedom to continue their cultural practices. Much time has been devoted to Native Americans and the issues of cultural property. Native Americans believe their cultural property reflects and represents their society including who they are, where they come from, and their specific tenets and *147 practices.⁴² For example, one anthropologist explained the importance groups place on their possessions by stating the following:

it is our culture and history, which belong to us alone, which make us what we are, which constitute our identity and assure our survival ... within cultural nationalism a group’s survival, its identity or objective oneness over time, depends upon the secure possession of a culture ... [and] culture and history become synonymous because the

³⁹ *Vuitton Et Fils S.A. v. J. Young Enterprises, Inc.*, 644 F.2d 769, 775 (9th Cir. 1981).

⁴⁰ Bowen Blair, Note, *Indian Rights: Native Americans Versus American Museums - A Battle for Artifacts*, 7 Am. Indian L. Rev. 125, 127 (1979).

⁴¹ *Id.* (quoting Chief Oren Lyons of the Onondaga tribe).

⁴² These elements explain cultural nationalism, which is “based on the relation between cultural property and cultural definition.” John Henry Merryman, *Thinking About the Elgin Marbles*, 83 Mich. L. Rev. 1881, 1912 (1985).

group's history is preserved and embodies in material objects - cultural property.⁴³

Cultural property, therefore, refers to “objects that embody the culture - principally archaeological, ethnographical and historical objects, works of art, and architecture ...”⁴⁴ “For [Native American] populations, cultural property is of vital importance *148 to their communities because these items are often viewed as integral elements of their religion.”⁴⁵

Native Americans believe that their culture and existence are threatened by others' incorporation of their cultural property, because others do not understand the significance and meanings of many objects that Native Americans hold sacred.⁴⁶ For

⁴³ Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 Can. J.L. & Juris. 249 (1993) (originally printed by Richard Handler, *Who Owns the Past? History, Cultural Property, and the Logic of Possessive Individualism*, in *The Politics of Culture*, at 66 (Brett Williams ed. 1991)).

⁴⁴ J. H. Merryman, *The Public Interest in Cultural Property*, 77 Calif. L. Rev. 339, 341 (1989). See Jason C. Roberts, Comment, *The Protection of Indigenous Populations' Cultural Property in Peru, Mexico and the United States*, 4 Tulsa J. Comp. & Int'l L. 327, 329 (1997). There are three elements of cultural property:

The first element is that the property embody some aspect of a group's cultural identity. It does so by representing an important aspect of the group's heritage or celebrating the mores, practices, and beliefs that bind the collection of individuals as a culture. The second element linking cultural properties is their function for the group of origin ... They help to indicate and reinforce the group's shared norms and values and are valued “as the authentic works of a distinct collectivity, integral to the harmonious life of an ahistorical community.” Cultural property thus is critical “to the esteem that people hold for themselves” and helps to foster unity and attachment to current group structures. The final element defining cultural property is that it is “incomprehensible outside of ‘cultural context.’” Only by construing the object in the framework of the culture of origin, interpreting its meaning in light of the group's tenets and norms, can one fully and properly understand the object.

Drimmer, *supra* note 1, at 701-02.

⁴⁵ Roberts, *supra* note 43, at 329.

⁴⁶ “[T]he loss of important cultural objects does not merely leave tribal members without the social symbols that sustain cultural identity, but can also make it difficult or impossible for tribal members to practice traditional religious ceremonies.” Christopher S. Byrne, *Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects*, 8 J. Envtl. L. & Litig. 109, 109 (1993). “Central to all of these practices [using Native American symbols and possessing Native American cultural property] is the experience of having Native cultural identity extinguished, denied, suppressed, and/or classified, named, and designated by others.” Coombe, *supra* note 42, at 273.

instance, museums sought to preserve and display the Zuni War Gods, but the Zuni tribe explained that the museums failed to understand the significance of the War Gods and the care they needed.⁴⁷ The Zuni tribe argued that if museums are going to keep the War Gods, they must leave them untouched because the War Gods are supposed to be exposed to the elements and eventually deteriorate.⁴⁸ Additionally, the pervasive use of Native American cultural symbols and images by others often serves to portray Native Americans as a dying or dead culture, rather than as a living and growing culture.⁴⁹ This in turn may cause some Native Americans, particularly *149 children, to feel as if they are “dead” or at least that they are somehow an inferior class.⁵⁰

A further concern may be that if others appropriate their symbols, insignia and cultural property, the “true” and often “sacred” meanings of the symbols, insignia and cultural property will be lost.⁵¹ For instance, the Zuni War Gods are created for certain ceremonies after which they “are placed on specific mountain peaks ... where they

⁴⁷ “Basically, Indians contend that because museums do not share the Indian’s religious concern and knowledge for [the War Gods], the artifacts are not well cared for.” Blair, *supra* note 39, at 128-29.

⁴⁸ *Id.*

⁴⁹ Nell Jessup Newton has argued that the prevalence of these dehumanizing images reinforces “the fact that (Native Americans) [sic] are presented as ahistorical and timeless ... By rendering native people as inhuman, timeless, and essentialized, these images help promote the myth of the vanishing Indian and in so doing deprive Indians not just of their history but of their present reality.” Thus, such images relegate Native Americans in cultural consciousness to a status of “relics of the past.” Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 Colum. Hum. Rts. L. Rev. 355, 377 (1998) (alteration in original) (citation omitted). “Indian people are forever being discovered and rediscovered, being surrounded by thicker and thicker layers of mythology. And every generation predicts our inevitable and tragic disappearance.” Coombe, *supra* note 42, at 273 (quoting Robert Allen Warrior, member of the Osage nation).

⁵⁰ Multiculturalist theorists note that for an individual, a connection to a heritage is necessary in shaping cultural identity. In contrast, denying access to such a heritage threatens to foster “false consciousness,” a phenomenon whereby a minority group member unknowingly accepts the unfavorable stereotypes traditionally imposed on that group by a dominant class and thereby aids in her own subordination. Drimmer, *supra* note 1, at 727.

⁵¹ Native Americans “worry 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.” Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 15 (1997).

continue to serve a religious purpose;”⁵² thus, their removal to museums destroyed their religious significance until the Zuni tribe eventually regained possession of them through repatriation.⁵³ The concern that “sacred” meanings will be lost if others adopt and use the symbols, insignia and cultural property may be particularly true with regard to trademark law because when a name or symbol is connected with a number of items from different sources the original meaning becomes blurred or weakened. “Currently, there are 94 registered trademarks that use the name ‘Cherokee,’ 35 that use the name ‘Navajo,’ and 208 *150 that refer to the Sioux.”⁵⁴ Therefore, others’ use of Native American names, symbols and tribal insignia may be dehumanizing and disparaging to Native Americans.⁵⁵

This is especially true of certain sacred designs that serve to explain a tribe’s history or sacred beliefs.⁵⁶ For instance, the Australian Aboriginal peoples have no written history; thus the designs are the main means by which culture is passed down through the generations.⁵⁷ For this reason, only a select few individuals are permitted to reproduce them.⁵⁸ Furthermore, these designs are so sacred that they are only viewed during certain ceremonies, and even then only certain people are able to see them.⁵⁹ Therefore, “to reproduce these designs on commercial items intended for a non-Aboriginal market mean[s] that the designs would both be depicted and seen by unauthorized persons. Furthermore, the designs would be uprooted from their familiar

⁵² Byrne, *supra* note 45, at 124-25.

⁵³ See Blair, *supra* note 39, at 128.

⁵⁴ Dougherty, *supra* note 48, at 376.

⁵⁵ “Native American cultural symbols are used by a considerable number of non-Native businesses to sell products, and at times the symbols are used in a manner that is disparaging to ... Native American cultural identity.” *Id.* at 356. “Use of these names and images, some more than others, is dehumanizing to many Native Americans.” *Id.* at 376.

⁵⁶ “[A]rt may serve as [Native Americans’] recorded history as well as their spiritual teachings. As such, the symbolism of the designs are [sic] of great significance. These symbols can be understood as mnemonics for the visual memorization of their history and beliefs.” Farley, *supra* note 50, at 9. “In song and dance, in rock engraving and bark painting we re-enact the stories of the Dreamtime, and myth and symbol come together to bind us inseparably from our past, and to reinforce the internal structures of our society.” *Id.* (quoting an Aboriginal artist).

⁵⁷ *Id.* at 5.

⁵⁸ *Id.*

⁵⁹ *Id.*

context and placed in one in which sacred symbols would become meaningless.”⁶⁰

*151 However, it is also important to recognize that there is not necessarily agreement between the tribes or even within tribes regarding others’ use of their symbols. For example, some Native Americans desire their symbols to be reserved for their tribe and therefore want intellectual property laws to prevent others from using or incorporating the symbols in any way.⁶¹ Meanwhile, other Native Americans want to be compensated for others’ use of their symbols, thereby enhancing their economic stature.⁶² Still other Native Americans “seek to use ... intellectual property laws in an effort to control and restrict the flow of images, thereby securing the meaning of their art,”⁶³ culture, and identity. In particular this last group wants “to be able to deny certain uses of their art [and symbols], especially those that would amount to spiritual violations.”⁶⁴ Interestingly, this is exactly what section 302 seems to address and seeks to ensure.

One might argue that rather than making official tribal insignia nonregisterable, the United States should suggest that Native Americans be the first to register the symbols and insignia as trademarks, thereby expressly preventing from using the mark.⁶⁵

⁶⁰ *Id.* See Coombe, *supra* note 42, at 278 (“The use of Native motifs, imagery, and themes in the ‘spirituality’ marketed as New Age religion is particularly offensive, both because of its commodification and its distortion of Native traditions”). When “non-designated persons ... produc [e] the work, the work may be reproduced in an inaccurate or unfaithful manner, and the image may be viewed by the uninitiated so that secret texts will be revealed. Furthermore, the trivial use to which many sacred works are put denigrates the special significance of the art.” Farley, *supra* note 50, at 10.

⁶¹ Some [Native Americans] ... want to use intellectual property laws to prevent what may be characterized as a cultural or psychological harm caused by the unauthorized use of their art. They see intellectual property laws as offering a means to control the circulation of their art. They want to be able to restrict its dissemination and, in some cases, prevent dissemination altogether. Farley, *supra* note 50, at 14-15.

⁶² Some [Native Americans] want to be able to benefit from the economic rights provided by intellectual property laws. They want to be compensated for their contribution to the artwork through licensing, and they want to exclude non-[Native American] competitors from the market by preventing unauthentic products from being marketed as made by [Native Americans]. *Id.* at 14.

⁶³ *Id.* at 13.

⁶⁴ *Id.*

⁶⁵ Of course, this is not exactly true since trademark law allows others to use the same mark, provided the mark is not ‘famous,’ as long as consumers will not be confused as to the source. See Guest, *supra* note 7, at 129 (“Generally, the Lanham Act simply does not preclude others from using the same tribal name in association with their products as long as there is no confusion to the public as to source”).

This position fails to understand the tensions involved and the inadequacies of current trademark law as it applies to Native American *152 culture. First, different Native Americans and their tribes may hold the same symbol as an official insignia or sacred symbol of their group. Therefore, if one person or tribe registers the symbol as a trademark, then all other groups would be prevented from using the symbol, at least in the same manner. Second, it is unclear who speaks for the various Native American people and their tribes; each tribe may have conflicts within it that would prevent a common view regarding the designation of one or more official insignia. Third, Native Americans may believe that an official insignia will lose its qualities and meanings if it becomes a registered trademark, or adopted and used by people outside of the tribe. Fourth, many Native American tribes live at poverty levels and might not be able to effectively litigate to protect use of their marks or even be familiar enough with trademark law to challenge others' trademarks. Fifth, even once someone registers a trademark, that mark can still be used by others, albeit in a limited way, thus not precluding outsiders' use of the mark. Sixth, Native American tribes are communal organizations.⁶⁶ They believe that their property belongs to the group and not to an individual, as trademark law presumes. Therefore, there is a concern as to whom the trademark registration would be registered and how the trademark would remain a group right.⁶⁷ Finally, in order for a trademark to be valid, the mark must be used commercially in interstate commerce and must serve to distinguish one's goods or services. Native Americans clearly do not use their sacred marks in commerce, nor is it likely that they use their official insignia on goods or services; therefore, it is questionable that they would *153 even be able to obtain trademark registration and protection for their symbols and insignia should trademark law remain unchanged.

Apart from the harms that Native Americans may experience if section 302's proposal is not implemented, others might be harmed should the law change. People and

⁶⁶ "[T]he United States has approached the concerns of Native Americans as group concerns." Dougherty, *supra* note 48, at 363. Native American tribes "often view their cultural artifacts as communal property which cannot be sold by individual tribal members." Byrne, *supra* note 45, at 111.

The distinctive characteristic of communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property ... as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.

Id. at 123 (alteration in original) (citations omitted).

⁶⁷ There is a possibility that "if Native Americans [a]re able to claim group rights in contexts when cultural survival [i]s at stake, they w[ill] be able to exert control over their cultural symbols and prevent the devaluation and depletion of their culture." Dougherty, *supra* note 48, at 376.

companies that currently use an official tribal insignia for their goods or services would suffer an economic harm because they may be required to change their trademark. These people and companies would have to endure the costs of litigation, of finding a new trademark and of educating the public as to their new trademark. This would also be true of those people who had intended to use an official tribal insignia and had already spent money on research, planning, developing and marketing to that effect. This may be of particular concern to those people and businesses who have spent great sums of money on advertising, promotion, and product or service labeling, as well as to those who have acquired customer recognition as producing a reliable and good product or service. For instance, many businesses in New Mexico use the Zia Pueblo's Sun Symbol as a trademark. If the Sun Symbol were to become barred from registration, then all of these businesses would stand to suffer. Nevertheless, although others may suffer economic harms, these harms seem minimal as compared to those that Native Americans may suffer should current trademark law remain unchanged.

Opponents to section 302 might also argue that “the texts embodied by symbols do not remain stagnant over time.”⁶⁸ In other words, meanings of symbols might change over time due to the “recodification and rescripting of meaning.”⁶⁹ For example, the swastika, which was initially “recognized as an amulet or charm, a sign of benediction, the visual embodiment of a blessing for long life, good fortune and good luck,”⁷⁰ is now seen as the “most vilified symbol of human history.”⁷¹ Therefore, tribal insignia and cultural symbols should not be found nonregisterable because their meaning over time has or will change, especially in the case of tribal insignia, symbols and names that are already largely used in commerce by other people and companies. This argument, although valid, still seems to fall short of the harms caused to Native Americans if the change is not implemented. *154

V. The Effects and Whether Section 302 Is Intended to Be more Restrictive Toward Native Americans than Section 1052(b) Currently Is to Other Groups

The effects of changing section 1052(b) will vary depending on whether the change is applied prospectively or retrospectively. If the change is applied retrospectively, then the Patent and Trademark Office may be bombarded with canceling trademarks that use official tribal insignia. Furthermore, people and companies who have trademarks that incorporate official tribal insignia will have to adopt a new trademark. On the other hand, if the change is applied prospectively, then trademarks using official tribal insignia that are already in use will remain, thus limiting the effectiveness of the amended

⁶⁸ Aoki, *supra* note 25, at 526.

⁶⁹ *Id.*

⁷⁰ *Id.* at 527.

⁷¹ *Id.*

law. Additionally, the change, especially if applied retrospectively, will enable Native Americans to regain some control over their identity and culture and will cause public perception to shift, thus accepting Native Americans as living peoples.⁷² However, Native Americans will also be prevented from using the insignia as trademarks and thus will lose any economic value that they could otherwise claim.

Section 302 considers the possible inclusion of official Native American tribal insignia as a statutory bar to be added to section 1052(b) of the Lanham Act. Currently section 1052(b) fails to include the word “official” when it discusses insignia. This suggests that section 302 may seek to impose an additional restriction when referring to Native American insignia. After all, section 1052(b) merely states “insignia,” while section 302 refers to “official tribal insignia.” However, it is important to note that section 302 merely requires a study and that the language of section 1052(b), should it be changed to include Native American tribal insignia, might exclude the word “official.” Nevertheless, it is worth questioning why section 302 was written to include this language. Perhaps it was motivated by the fact that the drafters wanted to ensure that only the insignia from federally or State recognized tribes applied. This raises an interesting question as to how an official Native American tribal insignia would be identified.

The only example of an official tribal insignia (that refers to itself as such) is from the Yankton Sioux Tribe.⁷³ It is of a design that was adopted by the tribe in *155 1975 and includes the quote: “Land of the Friendly People of the Seven Council Fires,” as well as pictures of a pipe, a zigzag, a teepee and the colors red and yellow. Each of the elements contains special meanings and messages for the tribe. The lack of examples suggests that it may be difficult to identify official tribal insignia. Perhaps one could look at each tribe’s artwork or written communications with one another and specifically with the tribal courts in order to gain a sense of marks that each tribe seems to incorporate as its own identification. However, the official tribal insignia must be distinguished from mere motifs that are used on artwork. The best policy might necessitate asking each tribe’s “chief” what constitutes their official tribal insignia; however, this might be problematic if any one chief and other tribal members differ as to the correct insignia of their tribe.

⁷² “In North American commercial culture, imagery of Indians and the aura of ‘Indianness’ is pervasive, but living human peoples with Native ancestry are treated as dead, dying, vanishing or victimized, and in need of others to speak on their behalf.” Coombe, *supra* note 42, at 272. This perception may change if section 302 is implemented.

⁷³ See Yankton Sioux Tribe, South Dakota (visited July 10, 1999) <<http://lewisandclarktrail.com/sponsors/yanktonsioux/sect1.htm>>. The Yankton Sioux Tribe is from South Dakota. This is the only specific official tribal insignia found by the author.

VI. How Best to Implement the Change

It seems that the change must be implemented retrospectively in order to ensure protection of all official tribal insignia. Each of the federally and State recognized tribes must be approached and asked to submit a drawing of their official tribal insignia, the mark(s) that identify(ies) and distinguish(es) their tribe from all others. Alternatively, the Patent and Trademark Office could relegate this duty of collecting official tribal insignia and compiling a list to the tribal courts or to the Bureau of Indian Affairs, which would then turn the completed list into the Patent and Trademark Office. Each of these marks must then be entered onto the federal register in order to effectively bar future attempts to register these marks.

The Patent and Trademark Office must then compile a list of all those using the marks, based on the amended statutory bar and inform those people that the marks are now and forever more nonregisterable and nonenforceable. After notifying them, the Patent and Trademark Office must implement cancellation proceedings for all invalidated marks. Additionally, the Patent and Trademark Office should allow continued use of the mark for a reasonable period of time, thus allowing businesses to change their marks while militating against the suggested economic harms they might suffer. *156

VII. Conclusion

The history of relations between the United States and Native Americans has been less than ideal; however, section 302 of the Trademark Treaty Implementation Act provides the United States with an opportunity to rectify some of the harms caused to Native Americans. Section 302 proposes to amend section 1052(b) of the Lanham Act to include official tribal insignia. This would effectively bar any and all official tribal insignia from being registered as trademarks.

Currently non-Native American people and companies use Native American names and symbols as trademarks.⁷⁴ Often these uses are disparaging or offensive to Native Americans, and continue to perpetuate the stereotype that Native Americans are inferior and dying peoples. This is particularly true with regard to the use and incorporation of Native American cultural property and sacred symbols. Implementing the proposed change to section 1052(b), the United States will be recognizing Native American tribes as legitimate, important and equal governmental bodies (at least in terms of United States trademark law), and Native Americans as living rather than dying peoples. Moreover, current trademark law essentially prevents Native Americans from registering their insignia and symbols because United States trademark law recognizes the individual and provides ownership to the individual, while Native Americans hold their insignia and symbols as communal property whereby every member owns it, but no

⁷⁴ “Native American tribal names have been appropriated and used by a variety of companies as part of their corporate names and/or as trademarks to identify their goods or services.” Guest, *supra* note 64, at 126.

individual owns it exclusively. Therefore, the proposed change offers Native American tribes an opportunity to regain their communal share of the insignia.⁷⁵

Section 302's proposed change should be implemented and section 1052(b) of the Lanham Act should reflect this, thus including a statutory bar for official tribal insignia. The United States should embrace this opportunity to preserve some aspects of Native American culture and identity. However, it is important that this change be considered an initial step, rather than a final step, in recognizing Native Americans' rights to their insignia and cultural symbols.

In conclusion, it has been said that "[f]or effective legislative action at least two aspects need to be considered: the accurate delineation of the problem and the *157 determination of the most effective kinds of action available."⁷⁶ This Article has attempted to do just that; namely, explain the problem and the various harms that either implementing or failing to implement section 302's proposed change will cause; ask whether that change should be implemented; and show how that change could best be implemented. Finally, in light of the history of relations between the United States and Native Americans, section 302 is a refreshing piece of legislation and should be treated as such by implementing the proposed change to section 1052(b) of the Lanham Act, thus effectively barring registration of official tribal insignia. Ultimately, it is the author's hope that this will be only the first of a series of changes that the United States implements in order to recognize and acknowledge Native Americans and other cultural and minority groups.

⁷⁵ "[T]he things that we call intellectual property are really rights to do certain things, to authorize others to do certain things, and to prevent others from doing certain things." *Id.* at 113.

⁷⁶ P.J. O'Keefe & L. V. Prott, *Law and the Cultural Heritage, Volume I: Discovery & Excavation*, 15 (1984).