American Indians and Alaskan Natives and their tribal governments are extremely interested in a wide array of issues that might fit within the rubric of intellectual property law. This article will briefly highlight some of these subjects. The argument for IP protection regarding other more speculative issues have not yet been recognized by courts, but they are being raised and developed at this time.¹

Any discussion of issues regarding federally recognized tribes and their members has to begin with the understanding that tribes and their citizens have a political, government-to-government relationship with the United States so that actions the federal government takes that helps or harms tribes do not raise equal protection questions.² The United States also has a trust responsibility towards tribes and Indian people and has a legal obligation to protect these entities in many different settings.³ This trust responsibility might arguably extend to IP issues.

1. Indian Arts & Crafts Act

In 1935, Congress enacted the Indian Arts & Crafts Act which created an Indian Arts & Crafts Board in the Interior Department to promote and protect Indian artistic endeavors as part of tribal economic development.⁴ Amendments in 1990 granted this Board the authority to assign trademarks of artistic genuineness and quality to individual Indians or tribes, to set


standards for the use of the trademarks, to charge for licenses to use the marks, and to register the marks with the U.S. PTO and assign them to Indians and tribes free of charge. The Act protects Indian works of art by creating felony criminal sanctions for, among other things, counterfeiting a Board trademark, and by creating civil causes of action for tribes, the U.S. Attorney General, and Indian arts and crafts organizations, which include treble damages, punitive damages, attorney fees, and injunctions, against anyone falsely representing that goods are Indian made. The Executive Branch has enacted regulations pursuant to this Act which extend this federal trademark protection to Navajo all-wool woven fabrics, Alaskan Native hand made products, and Navajo, Pueblo and Hopi silver and turquoise products.

Commentators have opined that this Act and its protection for “Indian products” could possibly 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 just the usual works of arts and crafts.

2. Protection of tribal and individual names

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

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


8 See, e.g., Guest, supra note 1, at 136.


In 1994, a descendant and the administrator of the estate of Crazy Horse 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. Ultimately, the Eighth Circuit held that the tribal court lacked jurisdiction over the defendants.\(^{12}\) The Rosebud Sioux Tribe and the descendants of Crazy Horse have not given up this fight. In 2001 a federal judge denied a motion to dismiss their federal action against the brewery and brewery officials.\(^ {13}\) The plaintiffs continue to challenge the use of the name Crazy Horse in the manufacture, sale, and distribution of an alcoholic beverage and are alleging defamation, misappropriation and misuse of inheritable property rights, privacy violations, and violations of the Indian Arts and Crafts Act, the Lanham Act, and the Federal Trademark Dilution Act.

Other tribes have also gone to court to protect their names. In a 2001 decision, the Connecticut Supreme Court 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.”\(^ {14}\) The federally recognized tribe’s claims for protection of its trade name under the Lanham Act and Connecticut’s common-law theory of unfair competition failed.\(^ {15}\) Commentators have suggested, however, that tribes could seek some limited protection for tribal names under the Lanham Act.\(^ {16}\)


Recently, tribes and Indian individuals have been actively involved in PTO affairs. A group of Indians have so far successfully challenged the registration of the word “Redskins” by the Washington D.C. N.F.L. football team.\(^ {17}\) The PTO Trademark Trial and Appeal Board

\(^{12}\) Hornell Brewing Co. v. The Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998).


\(^{15}\) Interestingly, however, the Connecticut court mentioned that “[a]n 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.

\(^{16}\) Guest, supra note 1, at 131-32, 138.

ordered in 1999 that the trademark registration be canceled on the grounds that the mark may
disparage Native Americans and may bring them into contempt or disrepute. After this success,
it is possible that the registration of marks for the Chief Wahoo symbol by the Cleveland baseball
team and other sports mascots will also be challenged.\footnote{18}

Tribes have also been interested in gaining PTO protection of tribal insignias and other
items.\footnote{19} These concerns led Congress in 1998 to direct the PTO to study the issues surrounding
protecting tribal insignia and to submit a report to Congress by September 30, 1999.\footnote{20} The
subsequent report recommended creating a database of official tribal symbols and affirms 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.\footnote{21} This database is now in place at the
PTO and provides some protection for tribal insignia.\footnote{22} There will no doubt be more tribal and
Indian activity in the PTO in the future.

4. 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 individual songs, totems, crests, stories, and other
cultural items. Many tribes consider items such as these to be properties that were and are
privately owned by families or individuals.\footnote{23} In Canada, native peoples have already secured

\footnote{18} See Jack Acheier Guggenheim, The Indians’ Chief Problem: Chief Wahoo as State Sponsored
Discrimination and a Disparaging Mark, 46 Cleve. St. L. Rev. 211 (1998); Jim Parsons, Indians
Say Fight Over Nicknames Isn't Going Away, Minneapolis-St. Paul Star Tribune, 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.

\footnote{19} Rebecca Lopez, AP yahoo news, Tribes Seek Protection for Symbols, July 9, 1999 (on file
with author) (California tribes are asking for protection of their pictographs, basket designs,
dance regalia and tribal songs; the Zia Indians of New Mexico are looking to the PTO to stop
commercial exploitation of their sacred sun symbol; the Tribe wants $74 million dollars from the
state of New Mexico for its use of the tribal symbol on the state flag for the past 74 years). 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, \textit{supra} note 1, at 129.


\footnote{22} Paula Peters, \textit{Wampanoag vow to fight non-Native use of ‘wampum’}, Indian Country Today,
Apr. 5, 2000, at A1, \url{http://indiancountry.com/?2270}.

\footnote{23} Many Indians from what is now Alaska, Washington and Oregon owned the sole rights to use
the carvings on their houses, specific fishing grounds, dances, marriage ceremonies, names,
governmental trademark protection for ancient petroglyphs and are seeking protection from international designers who are inspired by and profit from unique native clothing traditions. In many indigenous communities around the world, persons are also interested in protecting local knowledge of healing plants and traditional seeds and crops, for example. Numerous IP issues concerning American Indians, their tribes, and indigenous peoples around the world can be anticipated to arise in the future.


24 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. Indian band applies for trademark on ancient petroglyphs, Feb 16, 2000 AP (on file with author); Rick Mofina, Culture Confiscated for High Fashion: Inuit Women Want to Trademark Tradition to fend off Fashion Industry’s Exploitation, The Ottawa Citizen, Nov. 16, 1999, (Canadian indigenous women are seeking trademark protection and government aid to fight use of their traditional designs and knowledge).