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The Economics of Cultural Misrepresentation: How Should the Indian Arts and Crafts Act of 1990 Be Marketed?

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The Economics of Cultural Misrepresentation: How Should the Indian Arts and Crafts Act of 1990 Be Marketed?

Cover Page Footnote

Professors Stephen Urice, Alexander Bauer, Professor Kenneth Plevan, the IPLJ staff and board members, Costantino, Sam Cocks and Benjamin Folkinshteyn

The Economics of Cultural Misrepresentation: How Should the Indian Arts and Crafts Act of 1990 Be Marketed?

Jennie D. Woltz*

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INTRODUCTION

Counterfeit goods are everywhere. In an age where counterfeiters sell knock-off¹ designer bags and watches with impunity and society hardly recognizes the casual purchase of counterfeits as a moral wrongdoing,² counterfeit goods—whether in the form of a trendy handbag or burned CD—serve as a prevalent thread in the weave of modern America’s cultural fabric.³ Why stop, then, at creating goods that add to culture, when culture itself can be counterfeited? Factories in Asia produce rugs, dolls, and dream catchers—among other items—that are shipped to America as “authentic American Indian goods,” where retailers rapidly sell these ersatz wares to (usually) non-Indian consumers hungry for a piece of Indian⁴ culture.⁵

Today’s counterfeit goods, which frequently come from overseas sources, are typically mass produced or are otherwise of a lower quality than “authentic” Indian goods, and thus can be sold less expensively.⁶ The high demand for Indian goods, fueled in part by the New Age movement and increased travel and consumerism in America in the 1970s and 1980s,⁷ results in the diversion of millions of dollars a year from Indian communities to counterfeiters, which in turn leads to increased poverty in Indian

¹ This Note uses the words “knockoff,” “counterfeit,” “fake,” and other similar terms interchangeably. The use of varying terms does not connote legal distinctions. This Note employs all such phrases to refer to goods whose makers misrepresent the origin of their goods’ manufacture or production.

² Lauren D. Amendolara, Note, *Knocking Out Knock-Offs: Effectuating the Criminalization of Trafficking in Counterfeit Goods*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 789, 809–10 (2005).

³ See *id.* at 812–13.

⁴ This Note uses the term “Indian” to signify descendents of the indigenous peoples who were living in North America when Europeans first arrived. The Note employs the term “Indian” for the purpose of retaining the terminology of the Indian Arts and Crafts Act. Readers should not construe the term, which this Note uses interchangeably with Native American and American Indian, as pejorative in any way.

⁵ See Jon Parsley, Comment, *Regulation of Counterfeit Indian Arts and Crafts: An Analysis of the Indian Arts and Crafts Act of 1990*, 18 AM. INDIAN L. REV. 487, 489 (1993).

⁶ See *id.* at 495.

⁷ See, e.g., William J. Hapiuk, Jr., Note, *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009, 1016 (2001); Parsley, *supra* note 5, at 489.

communities.⁸ The effect of these fakes is not only economic—the mere existence of cheap, counterfeit goods passed off as “authentic” is offensive to many Native Americans and Native American communities.⁹ Counterfeit products may misappropriate sacred symbols and practices; the products may be misrepresentative of the kind of product traditionally produced by a certain community or may be made with inappropriate materials or methods of production; the inferior quality of the fakes is simply insulting to artists and other Indians, who feel that the inferior quality mocks Indian culture and beliefs.¹⁰

To ameliorate the harm that such counterfeits cause, Congress devised a solution: the Indian Arts and Crafts Act of 1990 (the “IACA,” the “Act,” or the “1990 Act”).¹¹ Modeled after the Lanham Act,¹² the IACA makes it a crime for non-Indians to sell goods in a manner that falsely suggests they are “Indian-made.”¹³ The idea behind this prohibition is logical: a requirement mandating that retailers properly mark crafts made by non-Indians would prevent consumer deception, which in turn would improve consumer confidence and eradicate consumer confusion.¹⁴ There would be no more mistaken purchasing of fake goods by discriminating consumers.¹⁵ No money would be lost to fraudulent sellers and Indian nations could improve economically, leading to greater political and economic autonomy.¹⁶ The proper labeling of

⁸ See Parsley, *supra* note 5, at 495–96.

⁹ See Hapiuk, *supra* note 7, at 1020 n.52 (citing John Henry Merryman, *Counterfeit Art*, 1 INT’L J. CULTURAL PROP. 1, 34 (1992)).

¹⁰ See *id.* at 1021–22.

¹¹ Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662, 4662 (codified as amended at 25 U.S.C. §§ 305, 305d, 305e (2000)).

¹² 15 U.S.C.A. §§ 1051–1129 (West 2006). The Lanham Act is the current federal trademark statute in America. It is not the exclusive law governing trademarks in America, as both common law and state statutes offer trademark protection. A trademark can be any word, phrase, symbol, design, smell, color, or product packaging (trade dress) used by a seller to identify its products or services to distinguish them from other products or services sold or provided by others. For a discussion of trademark law and policies, see *infra* Part IV.B.

¹³ 18 U.S.C. § 1159(a) (2000).

¹⁴ See Parsley, *supra* note 5, at 497.

¹⁵ See *id.*

¹⁶ See *id.* at 496.

fakes as such essentially would solve the problems of misappropriation and misrepresentation as well.¹⁷

Not all people who identify themselves as “Indian,”¹⁸ however, celebrate such a “solution.” In practice, this Act effectively makes Indianness a trademark, vesting the exclusive right to use the term “Indian” to those recognized as “Indian” under the Act.¹⁹ This includes only Indians recognized by federal or state governments as Indian, and artisans certified by tribes.²⁰ The Act’s definition of “Indian” excludes many citizens who identify as Indian ethnically, racially or culturally.²¹ Such individuals are unable to represent their goods as “Indian-made” to consumers, or command a similar market price, without risking prosecution.²² They are therefore disadvantaged when made to compete with counterfeiters, who can sell more goods inexpensively.²³

The economic effects of this Act are supplemented by the implications that the Act has for such individuals’ cultural identity: many are outraged and offended by the Act’s definition of “Indian,” as they feel the Act’s strict demarcation of who “counts” as an Indian undercuts their sense of self, family, and tradition.²⁴ Such sentiments suggest that the Act’s definition of Indianness is imperfect in that it fails to protect many deserving artisans who fall into this Indian Gap²⁵ from potential litigation.²⁶ Thus, despite the

¹⁷ It is interesting to note that the Act does not entirely eliminate economic problems for Indian artisans. Since the Act still permits the sale of fake goods as long as sellers do not hold such wares out as Indian-made, for indiscriminating consumers who are ambivalent as to the authenticity of their purchases, the initiative of the Act may be for naught, as fake goods will still compete with authentic Indian goods in the eyes of such consumers because of their attractively lower price points.

¹⁸ See Hapiuk, *supra* note 7, at 1012–14.

¹⁹ 18 U.S.C. § 1159(a) (2000).

²⁰ 18 U.S.C. § 1159(c) (2000).

²¹ Authorities estimate that this group could include as many as seven million Americans. See GAIL K. SHEFFIELD, *THE ARBITRARY INDIAN: THE INDIAN ARTS AND CRAFTS ACT OF 1990*, at 88 (1997).

²² 18 U.S.C. § 1159(b) (2000).

²³ See Parsley, *supra* note 5, at 495.

²⁴ See Hapiuk, *supra* note 7, at 1033–36.

²⁵ This Note employs this term to refer to Indians who do not qualify for enrollment but who are culturally, ethnically, racially or spiritually affiliated, and nevertheless consider themselves Indian.

noble intentions of the Act's framers, the Act in effect punishes members of the same community it was created to protect.²⁷

The IACA, as demonstrated, is not without flaws.²⁸ First, determining who is an Indian, and therefore able to seek protection under the IACA, is problematic.²⁹ The Act's definition of "Indian" is solely a political demarcation that is insufficient in that it fails to include individuals who deserve protection, but who instead are potentially liable as counterfeiters under the Act. Secondly, it is likely that such a faulty classification system is both an under and over-inclusive filter for what consumers "really want" when buying Indian products.

This Note addresses how this Act affects and fails to protect individuals who fall into the Indian Gap and consequently cannot qualify as legitimate Indian artists under the statute. Specifically, this Note details how varying interpretations and understandings of this Act—both judicial and anthropological—fail to provide any realistic conception of how to alleviate the concerns arising from both the counterfeit Indian goods crisis and the creation of the IACA.

Part I discusses background to the Act, including the enactment of its precursor, the Indian Arts and Craft Act of 1935 (the "1935 Act"),³⁰ in subsection A, and the legislation's problematic definition of Indianness³¹ in subsection B. Part II details the counterfeit Indian goods problem, while it also discusses varying legislative, judicial, and consumer understandings of the IACA as well as the goal it purports to accomplish. Part III discusses the IACA's cultural and economic implications. Part IV discusses the problem of analogizing the IACA to trademark law, especially because of the IACA's cultural implications, and suggests that

²⁶ Similarly, out of fear of exposure to liability under the Act, museums which hold artifacts of Indian heritage have begun to close, because of uncertainty over whether the makers of artifacts labeled "Indian" would meet the Act's definition. *See Hapiuk, supra* note 7, at 1011.

²⁷ *See id.*

²⁸ *See id.* at 1014.

²⁹ *See id.* at 1012–13.

³⁰ Ch. 748, 49 Stat. 891 (current version at 25 U.S.C. §§ 305, 305b, 305c, 305e & 18 U.S.C. § 1159 (2000)).

³¹ *See* 25 C.F.R. § 309.2(a) (2006).

lawmakers remain sensitive to such issues. Part V concludes with a recommendation on how to tailor the act to realign consumer desire with artisan production in an effort to fulfill the Act's intended purpose of preventing counterfeit goods from competing with authentic ones, but without depriving artisans the right to call themselves or their goods "Indian."

I. HISTORY OF THE INDIAN ARTS AND CRAFTS ACT OF 1990

A. *In Need of Economic Aid: The Indian Arts and Crafts Act of 1935*

In the wake of the Meriam Report of 1928,³² which found the living conditions of Native Americans deplorable, a new reformed Indian policy took root in the 1930s, resulting in the creation of the Indian Arts and Craft Act and the establishment of the Indian Arts and Crafts Board (the "IACB" or the "Board") in 1935.³³ The Indian Arts and Crafts Act of 1935 (the "1935 Act") intended to promote the economic well-being of American Indians through the protection and establishment of an authentic arts and crafts market.³⁴ This Act also authorized the Indian Arts and Crafts Board to engage in market and technical research; recommend loans; refer complaints of counterfeiting to the Federal Bureau of Investigation; and administer a system of acquiring trademarks for Indians in order to ensure "genuineness and quality."³⁵

The 1935 Act, a precursor to the 1990 Act, was the product of a changing philosophy on the policy for Indian treatment in

³² The U.S. Secretary of the Interior commissioned "The Problem of Indian Administration," more commonly known as the "Meriam Report," to study conditions of Indian communities forty years after the General Allotment Act failed to promote assimilation among Indian groups. The first sentence of the report reads: "[a]n overwhelming majority of the Indians are poor, even extremely poor, and they are not adjusted to the economic and social system of the dominant white civilization." The Meriam Report, <http://www.skc.edu/netbook/09-IRA.htm> (last visited Oct. 18, 2006).

³³ See WILLIAM THOMPSON, NATIVE AMERICAN ISSUES: A REFERENCE HANDBOOK 99 (1996).

³⁴ See *id.*

³⁵ See Indian Arts and Crafts Act of 1935, ch. 748, § 2, 49 Stat. 891, 892 (current version at 25 U.S.C. § 305a (2000)).

America, from one of forced assimilation and allotment to one of self-sufficiency and autonomy.³⁶ While the 1935 Act did include fines for misappropriating the Boards' marks, the Board did not initiate a single case in the first 50 years of its existence.³⁷

B. *Determining Indianness and the Indian Gap*

Definitions of Indians and Indian tribes in the United States are political determinations, bestowed by federal and state law based on rules of membership.³⁸ Federal and state statutes determine which people and groups are part of a "quasi-sovereign relationship" with the U.S government and are eligible for various governmental programs.³⁹ Cohen's Handbook on Federal Indian Law explains that "[t]he term Indian may be used in an ethnological or in a legal sense . . . [but] the federal government is dealing with members or descendants of political entities, that is, Indian tribes, not with persons of a particular race."⁴⁰ Since tribal membership is the "essential" element in determining Indianness, "a person of complete Indian ancestry who has never had relations with any Indian tribe may be considered a non-Indian for some legal purposes."⁴¹ Hence, the IACA determines whether a product is an "Indian product" based on whether the product's maker is an

³⁶ After efforts to "Americanize" the Indians through a system of land allotment and educational reforms failed, authorities turned to other methods in their effort to solve the "Indian Problem" of poverty, disease, and illiteracy. After Franklin D. Roosevelt assumed the presidency, he installed Indian reformer John Collier as Commissioner of the Bureau of Indian Affairs. As part of the Indian New Deal, Collier promoted Indian mobility, property rights, tribal self-governance, and restoration of Indian cultural and religious heritage, in stark contrast to the policies of assimilation and allotment that had ruled the day prior to that time. The cornerstone of Collier's work, the Indian Reorganization Act of 1934, abandoned the land allotment system and renewed Indian political and social structures, leading the way for the efforts of economic betterment posited by the Indian Arts and Crafts Act of 1935. See ROBERT E. LESTER, A GUIDE TO THE MICROFILM EDITION OF NATIVE AMERICANS AND THE NEW DEAL: THE OFFICE FILES OF JOHN COLLIER, 1933-1945, at v (1994).

³⁷ See SHEFFIELD, *supra* note 21, at 16.

³⁸ See *generally id.* at 32-38 (noting that the extent of Native American tribal sovereignty and its interplay with state and federal law have varied throughout the course of American history).

³⁹ See *id.* at 4.

⁴⁰ RENNARD STRICKLAND ET. AL., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 19 (1982 ed.).

⁴¹ *Id.*

“Indian” using only the political measure of tribal enrollment, without regard to the individual’s sense of his ancestral past.⁴²

The problem with this narrow measure of Indianness is that political demarcation does not necessarily comport with perceptions of Indians by individuals who self-identify as Indian, Indian and non-Indian artisans, or consumers. Gail Sheffield, who has written the seminal work on the IACA,⁴³ elucidates, “[w]hereas the [IACA] speaks to an ethnic activity—the self-identification of an artist in the promotion and sale of his or her work—enrollment in a tribe is a political act or status, although it may be simultaneously an ethnic act as well.”⁴⁴

The IACA only considers individuals who are members of federal or state recognized tribes, or who are certified as artisans by an Indian tribe, “Indian.”⁴⁵ Such individuals are thus the only people who may label their goods as “Indian-made.”⁴⁶ In essence, “[w]hen it comes to making and selling Indian arts and crafts, a non-enrolled Indian ceases to be Indian.”⁴⁷

Seeking enrollment for currently non-enrolled Indians, however, is not easy. Both historically and today, the system of governmental recognition of Indian status and Indian tribes is fraught with problems of arbitrariness,⁴⁸ policies of assimilation and termination,⁴⁹ and logistical hurdles for Indian groups seeking recognition.⁵⁰ Fraud perpetuated by people and groups hoping to claim land allotments likely causes further government distrust of claimed “lost” tribes.⁵¹ As such, the current system of tribal recognition places a heavy burden on any tribe applying for

⁴² See 25 C.F.R. § 309.2(a) (2006) (“Indian as applied to an individual means a person who is a member of an Indian tribe or for purposes of this part is certified by an Indian tribe as a non-member Indian artisan”); 25 C.F.R. § 309.2(d)(1) (2006) (“The term ‘Indian product’ means any art or craft product made by an Indian.”).

⁴³ See SHEFFIELD, *supra* note 21.

⁴⁴ *Id.* at 4.

⁴⁵ 25 C.F.R. § 309.2.

⁴⁶ *Id.*

⁴⁷ Hapiuk, *supra* note 7, at 1012.

⁴⁸ See SHEFFIELD, *supra* note 21, at 56.

⁴⁹ See *id.* at 60.

⁵⁰ See *id.* at 61 (“Fairly or unfairly, the Branch of Acknowledgement and Research has been criticized for various alleged shortcomings.”).

⁵¹ See *id.* at 106.

governmental recognition to demonstrate its roots existed from “time immemorial.”⁵² Eligibility requirements for a tribe include proving:

(1) that it has existed from historic times until the present on a continuous basis and that it has been identified as Indian by various outside sources; (2) that most of its members inhabit a community or specific locale and are descended from members of an Indian tribe that historically inhabited a certain area; and (3) that it has been continuously an autonomous entity exercising political authority over its members.⁵³

Furthermore, the tribe “cannot be composed principally of members of other tribes or of tribes that Congress has terminated or otherwise rejected for . . . federal relationship status.”⁵⁴ Because of these difficult burdens of proof and the expensive, lengthy and arduous application process, scholars estimate that only half of potentially eligible groups are actively pursuing tribal recognition.⁵⁵

When the government recognizes a tribe, the relationship between the two entities is one of one government to another, and the members of the tribe are “enrolled.”⁵⁶ Each recognized tribe uses a system to establish identity usually based on blood quantum and/or descent.⁵⁷ As part of a policy of tribal autonomy, the government grants individual tribes the authority to create their own rules of membership.⁵⁸ The standards for tribal membership vary greatly between tribes. To qualify as a Cherokee, for instance, one only needs to be able to trace an ancestor to someone on the Dawes roll.⁵⁹ Other tribes require as much as one-fourth

⁵² See *id.* at 57.

⁵³ *Id.* at 60–61.

⁵⁴ *Id.* at 61 (explaining the requirements of 25 C.F.R. § 83.3 (1993)).

⁵⁵ See *id.* at 61 (noting an estimate Frank W. Porter made in 1983).

⁵⁶ See *id.* at 4–5.

⁵⁷ Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 277 (2000–01).

⁵⁸ See *id.* at 307.

⁵⁹ See *id.* at 310. Congress created the General Allotment Act of 1887 in a twofold effort to assimilate Indians by turning them into farmers through allotting them pieces of land, and to free up surplus land for white settlers. Unsurprisingly, not every Indian

Indian blood.⁶⁰ Differing tribal requirements can lead to obscure results. Kay WalkingStick aptly notes:

To be a tribal member of the Salish of Montana, for example, one must have been born on the Salish reservation. In order to be a Hopi, one's mother must be a Hopi tribal member. This means that if your father is Hopi and your mother is Salish and you were born in Saint Louis, you cannot be a member of either tribe, even though you are a full-blooded Native American.⁶¹

Further complications, such as changing governmental recognition practices throughout history, exacerbate the problem of including all the people Congress intended the IACA to help.⁶² Authorities estimate that approximately one-third of all American Indian tribes and Alaskan Native villages are without federal recognition as Indian tribes as a direct result of U.S. governmental exertion of plenary power nullifying or refusing the terms of treaties, or unilaterally terminating or otherwise dissolving the sovereign rights of individual tribes.⁶³ As a result, even if someone has the requisite tribal requirements, the hurdles involved in verifying it may prove prohibitively difficult or even impossible to overcome.

Additionally, some Indians who could seek tribal recognition refuse to do so as a matter of principle.⁶⁴ Political agendas, anger over past treatment of Indians by the U.S. government, or disgust

signed up, and since the government was doling out goods, some of the people that did sign up were not in fact Indians. See SHEFFIELD, *supra* note 21, at 106. This lends credence to the notion that tribes who use a decent-based identification system related to recorded names on the Dawes Roll also include many non-Indians under their purview. See *id.* at 107.

⁶⁰ See Brownell, *supra* note 57, at 309–10.

⁶¹ Kay WalkingStick, *Democracy, Inc.: Kay WalkingStick on Indian Law*, ARTFORUM, Nov. 1991, at 20, 20–21.

⁶² In 1953, the Eisenhower Administration used termination policies to terminate federal recognition of a number of tribes. Not all of these tribes have been re-recognized to date, again placing clearly Indian citizens outside the scope of protection under the Indian Arts and Craft Act of 1990. See THOMPSON, *supra* note 33, at 119; Joanne Barker, *Indian™ USA*, 18 WICAZO SA REVIEW, Spring 2003, at 25, 50–51.

⁶³ Barker, *supra* note 62, at 55.

⁶⁴ See Dianna Hunt, *Native Texans; Tribal Lawsuits Stake Claims to Most of Texas; An Indian? It Depends*, HOUS. CHRON., June 26, 1994, at A11.

at the idea that a person must prove that he is what he already knows himself to be may motivate such a refusal.⁶⁵ Kenneth Ryan, an Assiniboine in Montana, expressed this sentiment when he declared before a gathering of Indian leaders in Oklahoma in 1993 that, “American Indians, horses, and dogs are the only warm-blooded mammals in the world who have to carry papers to show who they are.”⁶⁶

Gail Sheffield argues that “[t]he political nature of tribal status is one step removed from considerations of ‘ethnicity’; reapply the political definitions to a sphere such as art and they are two steps removed, an arbitrary process that creates arbitrary effects.”⁶⁷ Employing such “arbitrary” and exclusive definitions produces some substantial risks: First, potential emotional repercussions exist for those excluded from governmental classification of an Indian if one’s sense of self does not comport with one’s political demarcation. Second, there exists the practical and economic risk that the crafts produced by the class of individuals who can label their crafts as “Indian” under the IACA may not comport with the class of crafts (either over or under-exclusively) that consumers may want to purchase.⁶⁸

II. THE COUNTERFEIT INDIAN GOODS PROBLEM

A. *Hungry for a Piece of Indian Culture*

With growing consumerism and tourism, as well as the advent of the New Age movement and burgeoning interest in Native American art, the 1970s and 1980s became a time of exponential

⁶⁵ *See id.*

⁶⁶ *Id.* (Kenneth Ryan is also a college professor).

⁶⁷ SHEFFIELD, *supra* note 21, at 5.

⁶⁸ One should note that the IACA does grant authority to state and federally recognized tribes to certify artisans who are not able or do not want to enroll in the tribes. *See* 25 C.F.R. § 309.2(a) (2006). Sheffield notes that “it is not clear how the two powers, that of the sovereign right to determine membership and that of the statutory authority to certify nonmembers, will interact.” SHEFFIELD, *supra* note 21, at 49. Such a system may solve some of the problems associated with defining Indianness that this Note outlines, but certification of an artisan nevertheless remains dependent on acceptance by a tribe rather than on an independent self-determination of Indianness.

growth for Indian arts and crafts from a small tourist market into a multi-million dollar industry.⁶⁹ Sources estimated that in 1985 the industry garnered approximately \$800 million a year in gross sales,⁷⁰ while by 2000, the industry generated over \$1 billion in sales.⁷¹

The growth of consumer desire for Indian goods and the corresponding increase in supply of Indian art and commerce, however, were accompanied by the appearance of increasing amounts of counterfeit art on the market.⁷² Overseas factories manufacture much of this counterfeit art using inauthentic materials and procedures, thereby producing poorly-made products.⁷³ Authorities estimate that more than half of the goods marketed as Indian in origin could be counterfeit, meaning that Native American artisans are losing over half a billion dollars a year at the hands of fraudulent sellers who sell their imitation goods as “the real thing.”⁷⁴

The problems that the presence of imitation art in the marketplace creates are (at least) four-fold. First, fake crafts deprive Indian artisans and communities of much needed income and contribute to increased economic hardship in Indian communities.⁷⁵ Imitation goods are in direct competition with Indian goods, as they can appear more desirable to consumers since they are usually cheaper and are accessible in a wide range of venues, such as hotel gift shops, roadside tourist stops, and powwows.⁷⁶ This is especially problematic because the arts and

⁶⁹ Parsley, *supra* note 5.

⁷⁰ *Id.*

⁷¹ See S. REP. NO. 106-452, at 1 (2000), *reprinted in* 2000 U.S.C.C.A.N. 2123, 2123 (citing John Shiffman, *\$1 Billion Industry Reeling as Faux Crafts Flood Market*, USA TODAY, Apr. 8, 1998, at A2; James Brooke, *American Indian Crafts Loose Native Edge as Foreign Fakes Flourish*, INT'L HERALD TRIB., Aug. 4, 1997, at 11).

⁷² See Hapiuk, *supra* note 7, at 1017.

⁷³ See *id.*

⁷⁴ See *The Implementation of the Indian Arts and Crafts Act of 1990: Oversight Hearing on Pub. L. No. 101-644 Before the S. Comm. on Indian Affairs*, 106th Cong. 23 (2000) [hereinafter *Hearing*] (statement of Sen. Jon Kyl).

⁷⁵ See S. REP. NO. 106-452, at 1–2, *reprinted in* 2000 U.S.C.C.A.N. 2123, 2123.

⁷⁶ See generally, Hapiuk, *supra* note 7, at 1020 (noting that if counterfeit Native American goods result in lower prices for even authentic Native American goods, the presence of counterfeits in the market may help consumers more than it hurts them).

crafts industry is a huge source of income for Native American communities.⁷⁷ For instance, approximately 85% of the population in the Zuni Pueblo claims arts and crafts sales as either primary or secondary sources of income, and assert it has become harder to sell their work, even when they price their wares at levels lower than those their goods commanded ten years ago.⁷⁸ Sources further estimate that 37% of the Hopi Tribe's working population is involved in the arts and crafts industry in some way.⁷⁹

Second, fake crafts contribute to cultural extinction by potentially pushing legitimate producers, and hence "authentic" goods, out of the market.⁸⁰ If Indian artisans cannot afford to produce Indian crafts because of the fierce and unfair competition, tribal cultures and practices as a whole risk eventually dying out.⁸¹

Third, fakes decrease consumer confidence in the Indian art industry.⁸² Imitation goods may be difficult to differentiate from authentic goods, resulting in consumers potentially purchasing counterfeit goods when they believe they are buying legitimate Indian crafts. Consequently, if consumers doubt that what they are buying is genuine, this may lead to diminished sales among prospective buyers who are only interested in purchasing authentic goods.⁸³

Fourth, imitation crafts in the market are offensive or hurtful to Indians who are sensitive to the cultural associations many Indian goods carry with them. While authentic Indian artisans handcraft their wares from quality materials that take time and skill to hone into finished products, manufacturers of fake goods frequently

⁷⁷ See, e.g., *Hearing, supra* note 74, at 23 (statement of Sen. Jon Kyl) (noting that the Hopi tribe derives \$11.2 million of income from its arts and crafts business).

⁷⁸ *Hearing, supra* note 74, at 42 (statement of Tony Eriacho, Jr., Board Member, Indian Arts and Crafts Assoc.).

⁷⁹ *Hearing, supra* note 74, at 23 (statement of Sen. Jon Kyl).

⁸⁰ See Hapiuk, *supra* note 7, at 1020. Hapiuk, however, also notes that as long as drastic decreases in prices do not entirely eradicate legitimate producers from the market, lower prices may benefit consumers more than they hurt producers, by increasing consumer choices through providing cheaper substitute goods. *Id.*

⁸¹ See Hapiuk, *supra* note 7, at 1021.

⁸² See S. REP. NO. 106-452, at 2 (2000), *reprinted in* 2000 U.S.C.C.A.N. 2123, 2124; Hapiuk, *supra* note 7, at 1020-21.

⁸³ See Hapiuk, *supra* note 7, at 1020-21. The increasing presence of counterfeits, however, may also simply drive consumers to become more educated before purchasing.

utilize inferior materials and methods of craftsmanship that are often culturally false or misleading, and devoid of the personal integrity of handcrafted items.⁸⁴ The invasion of cut-rate imitations cheapens tribal culture, undermining entire communities and beliefs.⁸⁵ More seriously, such creations may violate socially-constructed norms and destroy the social order by blasphemously exposing and defiling sacred knowledge.⁸⁶

Jodie Bernstein, the Director of the Federal Trade Commission's Bureau of Consumer Protection, summed up these concerns: "[a]uthentic American Indian arts and crafts are prized for their beauty, originality, and workmanship When counterfeit arts and crafts are sold as authentic, it not only hurts Tribes and individual artists, but the consumers who don't get what they pay for."⁸⁷

*B. Legislative Reactions to the Counterfeit Indian Goods
Problem: The Indian Arts and Crafts Act of 1990*

Congress enacted the Indian Arts and Crafts Act of 1990 in an Indian-focused effort to combat the problems of counterfeit Indian goods.⁸⁸ The 1990 Act gave teeth to the 1935 Act by "creating a private cause of action that enabled injured plaintiffs—sellers of authentic Indian arts and crafts—to recover substantial damage awards from violators of the Act."⁸⁹ The Indian Arts and Crafts Act of 1990 is a truth-in-advertising law⁹⁰ which states: "[i]t is unlawful to offer or display for sale or sell any good . . . in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or

⁸⁴ See S. REP. NO. 106-452, at 2 (2000), *reprinted in* 2000 U.S.C.C.A.N. 2123, 2123–24; Hapiuk, *supra* note 7, at 1022.

⁸⁵ See Hapiuk, *supra* note 7, at 1021.

⁸⁶ Michael F. Brown, *Can Culture Be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193, 198 (1998).

⁸⁷ Press Release, Federal Trade Commission, American Indian Arts and Crafts "Surf Day" (October 24, 2000) (on file with author), *available at* <http://www.ftc.gov/opa/2000/10/indianart.htm>.

⁸⁸ See Parsley, *supra* note 5, at 487.

⁸⁹ *Native Am. Arts, Inc. v. Hartford Cas. Ins. Co.*, 435 F.3d 729, 731 (7th Cir. 2006).

⁹⁰ Truth-in-Advertising laws are laws that bar advertisers from advertising products in an unfair or deceptive manner. See 25 C.F.R. § 309.7 (2006).

Indian arts and crafts organization, resident within the United States.”⁹¹ Individual violators of the IACA can face up to \$1 million in fines and up to fifteen years in prison for subsequent violations of this Act.⁹² To qualify for protection under this Act, a seller of goods labeled as Indian must be a federally or state recognized Indian, or recognized by a tribe as an Indian artisan.⁹³

At the hearing before the Committee on Indian Affairs, the creators of the Act—then-Colorado Senator Ben Nighthorse Campbell, a former Native artisan himself, and then-Arizona Senator Jon Kyl—endorsed the legislation.⁹⁴ The Senate also invited tribal leaders to testify on behalf of the pending law at this hearing. Jacob H. Lonetree, President of the Ho-Chunk Nation, called the Act “vitaly important to the protection of Indian artisans and crafts people,”⁹⁵ and stated “[t]he Ho-Chunk Nation is proud of its collaboration with Native American Arts Inc. to pursue the enforcement of [the A]ct.”⁹⁶ Clan elders of the Ho-Chunk Nation further elucidated the connection between the economic viability of Indian people and the preservation of Indian culture: “[t]hrough necessity and survival, the native people continue to make crafts for profit to feed their families, but in all of that, they still look to the Creator for inspiration and thank Him for the talent, the ideas, the colors, and the materials to make the Arts and Crafts.”⁹⁷ Through this explanation they expressed their firm support of the Act’s mission of trying to secure economic viability for Native American citizens.

In November of 1996, the IACB released its final regulations in an effort to help solve ambiguities in interpreting the IACA.⁹⁸ While these regulations provided answers to some problems, such as the question of who qualifies for certification as an Indian

⁹¹ 18 U.S.C. § 1159(a) (2000).

⁹² 18 U.S.C. § 1159(b)(2) (2000).

⁹³ 18 U.S.C. § 1159(c)(1) (2000).

⁹⁴ See *Hearing, supra* note 74, at 2 (statement of Sen. Ben Nighthorse Campbell); *id.* at 22 (statement of Sen. Jon Kyl).

⁹⁵ *Id.* at 30 (testimony of Jacob H. Lonetree, President, Ho-Chunk Nation).

⁹⁶ *Id.* at 31.

⁹⁷ *Id.* at 109 (Written Testimony of Traditional Court (Clan Elders) of Ho-Chunk Nation).

⁹⁸ See 25 C.F.R. §§ 309.1–.2, .6–.27 (2006).

artisan,⁹⁹ they also raised additional concerns. For example, the Final Regulations forbid the unqualified use of the designation “Native American,” in addition to the unqualified use of “Indian” that the statute itself forbids, but allow the use of “Indian-style” or “Native American-style.”¹⁰⁰ Furthermore, the regulations fail to qualify the definition of “made” in terms of what constitutes “Indian-made,” and offer no guidance as to how much Indian labor must, or non-Indian labor may, play a part in the final product to qualify.¹⁰¹ The Indian Arts and Crafts Enforcement Act of 2000, billed as “[a]n Act [t]o improve the cause of action for misrepresentation of Indian arts and crafts”¹⁰² added additional amendments to clarify the language of the 1990 Act.¹⁰³

The revised Act made notable strides for Indian people by increasing civil penalties, creating new criminal charges to deter potential counterfeiters, and extending standing to sue under the Act to individuals and Indian tribes in addition to the government attorneys previously authorized to bring such actions.¹⁰⁴ Empowering independent parties to refer claims for investigation helps to expose a greater number of IACA violations,¹⁰⁵ establishes greater social involvement in upholding the Act’s ideals,¹⁰⁶ and reinforces notions of tribal sovereignty.

Equally important is what the Act does *not* do: as a truth-in-advertising law, the IACA seeks to limit only the way in which retailers market, advertise, and label goods for sale.¹⁰⁷ Advertising

⁹⁹ 25 C.F.R. § 309.4(a) (2006) (limiting those who can be certified to people of Indian lineage).

¹⁰⁰ 25 C.F.R. § 309.3(a) (2006). See *infra* Part II.D for a discussion of the Seventh Circuit’s interpretation of this regulation.

¹⁰¹ See 25 C.F.R. § 309.2(d) (2006).

¹⁰² Indian Arts and Crafts Enforcement Act of 2000, Pub. L. No. 106-497, § 1, 114 Stat. 2219, 2219 (codified as amended at 25 U.S.C. § 305e (2000)).

¹⁰³ *Id.* § 2, 114 Stat. 2219–20.

¹⁰⁴ See Indian Arts and Crafts Act of 1935, ch. 748, § 6, 49 Stat. 891, 893 (current version at 25 U.S.C. § 305e (2000)).

¹⁰⁵ *Hearing, supra* note 74, at 15–16 (statement of Faith Roessel, Chairperson, IACB, Dep’t of Interior).

¹⁰⁶ The IACB has started a toll-free number, 1-888-ART-FAKE, that artists and consumers can use to file complaints or to obtain more information about fake art. See, e.g., Diana Marrero, *Fakes Grow in Indian Art Market, Experts Say*, SIOUX FALLS ARGUS-LEDGER, May 22, 2006, at A1.

¹⁰⁷ See 25 C.F.R. §§ 309.7–.9 (2006).

methods may include brochures and print advertisements, labeling of individual goods, or any other commercial representation which is likely to confuse consumers as to whether Indians made the goods in question.¹⁰⁸ The IACA does not limit creative expression of artists in designing their products. The distinction between regulating advertising methods versus artists' creative expression is relevant in determining the scope of protection afforded Indian artisans, as well as the constitutionality of the Act.¹⁰⁹ In one of the first cases brought under the IACA, *Native American Arts v. Village Originals*,¹¹⁰ Village Originals, a nationwide operator of arts and crafts retail stores, challenged the IACA's constitutional validity on First Amendment grounds.¹¹¹ The court rejected Village Originals' claim that the IACA regulated the content of its crafts by prohibiting it from utilizing "Southwest" designs which oftentimes resemble Native American designs.¹¹² In a strong defense of the Act, the court noted "[t]o the contrary, IACA does not restrict the artistic quality of Village Originals' merchandise. Rather, it merely regulates the means through which such merchandise is marketed."¹¹³

C. Implications for Consumers' Expectations of "Authenticity"

Since the IACA targets only the way artisans can label their goods, rather than the style used in the creation of the goods, the success of the Act in decreasing Indian poverty is reliant on consumers making the "right" choice between Indian and non-

¹⁰⁸ See 18 U.S.C. § 1159(a) (2000); 25 U.S.C. §305e(a) (2000).

¹⁰⁹ See *Native Am. Arts, Inc. v. Vill. Originals, Inc.*, 25 F. Supp. 2d 876, 880–81 (N.D. Ill. 1998).

¹¹⁰ 25 F. Supp. 2d 876.

¹¹¹ See *id.* at 880.

¹¹² See *id.* at 880–81. See also 1 ANNE GILSON LALONDE ET AL., GILSON ON TRADEMARK PROTECTION AND PRACTICE § 1.03[7][a] (2006 ed.) ("Courts have been wary about extending trademark law protection to copyrighted material in particular. They appear to be suspicious of any overlap between trademark and copyright protection, not wanting to safeguard intellectual property under both schemes and speculating that plaintiffs may be benefiting unduly from double protection. In fact, courts probably should be concerned about attempts to plead an essentially copyright-based claim as a Lanham Act claim, too, and look to the policies of both copyright and trademark law to ensure that one does not overwhelm the other.")

¹¹³ *Vill. Originals*, 25 F. Supp. 2d at 880.

Indian goods.¹¹⁴ It is therefore imperative that any choice that consumers have between “Indian” and “non-Indian” products comports with consumer notions of what the terms “Indian” and “non-Indian” signify with respect to their purchase. If the IACA’s scope is too broad, such that a consumer can still buy what is purportedly Indian and not get what he or she wants, consumers will not make purchasing choices based on the demarcations set out by the IACA. Conversely, if the IACA’s scope is too narrow, consumers will either purchase goods produced by artisans falling outside the ambit of the Act—thereby defeating the Act’s purpose—or will unduly limit their search to products falling under the Act. The repercussions of such an overly narrow scope would include decreasing revenue to some arguably deserving artisans as well as Indian communities at large—again defeating the purpose of the Act—restricting the pool of products available for purchase, and encouraging fetishism and increased notions of homogeneity among Indian groups.

1. What is “Authenticity” Anyway?

What are consumers seeking and what do they think they’re getting by “buying Indian”? How much of a role does the “Indian” element play in consumers’ decision to purchase goods? Based on the large range of consumers—from serious art collectors, to hobbyists, “wannabe” Indians, New Age hippies, and tourists visiting Native American communities—there are undoubtedly varied answers to these questions.¹¹⁵ Scholars speculate that a general belief—whether misguided or not—that Indian societies are essentially spiritual and artistic in nature has fueled the increased consumer demand for Native American goods of the last few decades.¹¹⁶ Scholars maintain this belief fosters “[t]he current tendency [of consumers] to “put the ‘sacred,’ the ‘traditional’ the ‘natural’ and ‘artistic’ at the heart of all Indian life [while overlooking] the commercial, the bureaucratic, the secular, the

¹¹⁴ See Hapiuk, *supra* note 7, at 1055–56.

¹¹⁵ See SHEFFIELD, *supra* note 21, at 88–93; Hapiuk, *supra* note 7, at 1017.

¹¹⁶ See Hapiuk, *supra* note 7, at 1022 (quoting BARRY M. PRITZKER, *NATIVE AMERICA TODAY: A GUIDE TO COMMUNITY POLITICS AND CULTURE* 3 (1999)).

inventive.”¹¹⁷ This tendency to define Indian life, and hence the arts and crafts created by Indians, as sacred or heavily imbued with cultural “authenticity” and meaning thus becomes a stand-alone quality of Indian goods, beyond whatever aesthetic or utilitarian function they otherwise possess. Such romanticism, however, likely constitutes an overly simplistic view of the large Indian arts industry, for it is unmindful of the hurdles and basic market forces that all sellers face when trying to sell goods in a competitive marketplace.

“Authenticity” itself is a slippery subject, especially when dealing with cultural creations. Cultures are, by definition, ever changing and transforming over generations.¹¹⁸ Because of movements of people and changes in circumstance, the manner in which societies pass on cultural elements or practices can change both substantively, and in terms of the values and mores members of a culture employ to relate what and how they are thinking, practicing, performing and otherwise expressing themselves. Specifically in terms of creating art, where different artisans in a single community may employ divergent methods, materials, and rituals to produce the same type of good over many years, who is to say what the “authentic” way is? Since divergent methods of production stem from the same vast and ancient “culture,” which member’s way is best? At what time would one fix “authenticity”? A fixed conception of authenticity, which makes unrealistic presumptions regarding temporal change and concurrent variation, is at odds with the way societies evolve and transmit their cultures. There likely never was such a thing as one traditional way of fabricating Indian art.¹¹⁹ While some artisans do certainly draw on religious or cultural traditions to influence their work, they often combine such inspiration with western or non-symbolic influences as well.¹²⁰ Like any group of suppliers that must tailor its products to the needs and desires of the market, the Indian arts and crafts

¹¹⁷ Richard White, *Representing Indians*, NEW REPUBLIC, Apr. 21, 1997, at 28, 33.

¹¹⁸ See Brown, *supra* note 86, at 197.

¹¹⁹ See Hapiuk, *supra* note 7, at 1053–54.

¹²⁰ See *id.* at 1054.

community has undoubtedly changed over time to reflect changing consumer preferences.¹²¹

Furthermore, even if one could deduce a single method of production for an object at a specific moment in time, it makes little sense to freeze such an idea as the sole mode of expression. For one thing, this inhibits innovation moving forward. Secondly, it fails to account for other “authentic” methods that existed in the past—or may arise in the future—and presents an incomplete view of a changing society. Thirdly, the imposition of a rigid formula would actually make for less authentic products than untouched organic creation. Such a regime would reduce the act of creation to the replication of a rote formula, rather than an act of processed inspiration. As one scholar notes, the most effective means of “preserving” aspects of an indigenous group’s “culture” do not generally consist of “locking songs and stories in the strongbox of ‘genuine tradition,’ but in the[] creative application of core cultural insights to solving the problems presented by evolving historical contexts.”¹²²

When considering the question of authenticity, it is also worth asking “authentic as opposed to what?”¹²³ Authenticity is a concept “whose meaning remains uncertain until we know what dimension of its referent is being talked about.”¹²⁴ Denis Dutton explains that “a forged painting, for example, will not be inauthentic in every respect: a Han van Meegeren forgery of a Vermeer is at one and the same time both a fake Vermeer and an authentic van Meegeren.”¹²⁵ Dutton draws a further comparison between “nominal authenticity” and “expressive authenticity,” the former being simply a correct identification of the author, and the latter representing an object’s character as the true expression of an individual’s or a society’s values and beliefs.¹²⁶ Dutton cautions purchasers against a strong “temptation to imagine that

¹²¹ *See id.*

¹²² Stephen D. Osborne, *Protecting Tribal Stories: The Perils of Propertization*, 28 AM. INDIAN L. REV. 203, 236 (2003).

¹²³ Denis Dutton, *Authenticity in Art*, in THE OXFORD HANDBOOK OF AESTHETICS 258, (Jerrold Levinson ed., 2003).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

ascertaining nominal authenticity will inevitably favor some ‘old’ or ‘original’ object over a later artefact [sic].”¹²⁷ Because the IACA allows only artisans who are politically recognized as “Indian” the right to market their creations as “Indian,” the Act speaks merely to nominal authenticity, rather than the expressive authenticity of the arts and crafts sold as Indian-made.¹²⁸ This is problematic because it is likely that consumers are more interested in expressive authenticity than nominal authenticity when it comes to Indian goods.

When a consumer expresses an interest in purchasing “authentic” Indian goods, whether a particular seller is recognized politically as Indian is likely neither necessary nor sufficient to convince such a buyer that the goods he sells are “authentic.” Rather, consumers likely view the criteria of “authenticity” as relating to immeasurable qualities of the goods such as the meaning imbued in a piece by its creator; the time, effort and quality of the materials invested in making a piece; the similarity of a good to ancient, ritual or traditional goods of the same type; or a sense that the artist somehow incorporated her Indian experiences and identity into her production of the good.¹²⁹ By failing to take into account these relevant factors in consumers’ decisions to purchase Indian goods, the IACA draws an imperfect divide between what consumers desire and what the framers of the IACA want consumers to purchase. Artists in the Indian Gap suffer in two ways: first, the IACA fails to account for them in its definition of “Indian”; second, they are passed up by consumers who do not realize that the “Indian” label on goods carries only a narrow legal and political definition and would otherwise purchase their goods.

The IACA also fails to account for the nominal/expressive authenticity distinction in matters of intertribal fraud among governmentally recognized Indians. In one documented incidence of intertribal misappropriation, members of the Hopi tribe accused Navajo manufacturers of creating fake Kachina dolls, Hopi figures

¹²⁷ *Id.*

¹²⁸ See 25 U.S.C. § 305e(a) (2000); 18 U.S.C. § 1159(a) (2000).

¹²⁹ See Dutton, *supra* note 123, at 270.

with no basis in Navajo culture.¹³⁰ The Navajo producers carved the dolls from balsa wood, though the Hopi traditionally make the dolls from cottonwood.¹³¹ Though the marketing and sales of such dolls as authentic Indian products is misrepresentative and misleading to consumers, under the current IACA, the Hopi artisans have no recourse against this type of behavior.¹³² Navajo producers are free to label such dolls “Indian-made,” since they are indeed Indians. This loophole exemplifies why legislative reliance on political categorization alone is insufficient to cure the counterfeit Indian goods problem and to ensure that consumers get what they pay for.

D. Judicial Interpretations: Prosecution under the IACA

Despite the longtime existence of the Act, few parties have referred valid, actionable complaints to the IACB,¹³³ and even fewer courts have imposed liability under the Act.¹³⁴ Even more surprisingly, until 2005, none of these cases reached the appellate court level.¹³⁵

Native American Arts Inc., an Indian arts and crafts organization, brought the first case under the Indian Arts and Crafts Act when it filed suit against J.C. Penney in May of 1998.¹³⁶ Another case brought that same year, *Native American Arts Inc. v. Village Originals*,¹³⁷ was the first to recognize that the legislative history of the IACA indicated that the Act’s “falsely suggests”

¹³⁰ Mark Shaffer & Bill Donovan, *Hopi Kachina Doll Carvers Protest Navajo Replicas*, N.O. TIMES-PICAYUNE, Jan. 30, 1994, at A12.

¹³¹ Hapiuk, *supra* note 7, at 1074.

¹³² *See id.* But see Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111, at 137–38 (1995–1996) (positing that the Hopi could bring a claim against the Navajo under the IACA).

¹³³ *See Hearing*, *supra* note 74, at 16 (statement of Faith Roessel, Chairperson, IACB, Dep’t of Interior).

¹³⁴ *See, e.g.*, *Native Am. Arts, Inc. v. Chico Arts, Inc.*, 8 F. Supp. 2d 1066, 1069 (N.D. Ill. 1998); *Native Am. Arts, Inc. v. J.C. Penney Co.*, 5 F. Supp. 2d 599, 604 (N.D. Ill. 1998) (both holding that Native American Arts did not have standing to sue under the IACA).

¹³⁵ *See Native Am. Arts, Inc. v. Waldron Corp.*, 399 F.3d 871, 873 (7th Cir. 2005).

¹³⁶ *See J.C. Penney*, 5 F. Supp. 2d at 600.

¹³⁷ 25 F. Supp. 2d 876 (N.D. Ill. 1998).

clause should be construed as “parallel and analogous” to 15 U.S.C. § 1125, a section of the Lanham Act.¹³⁸

An Indian Arts and Crafts Act violation is a separate and distinct claim from a Lanham Act violation.¹³⁹ A violation of both, neither, or either is theoretically possible in any given circumstance.¹⁴⁰ In situations involving potentially counterfeit Indian goods, for instance, plaintiffs have brought cases alleging only violations of the Indian Arts and Crafts Act, and not the Lanham Act.¹⁴¹ In 2005 and 2006, however, judges ruling on the first two appellate court cases brought under the Indian Arts and Crafts Act nevertheless couched their discussion of the IACA in Lanham Act terms,¹⁴² even though the plaintiffs in these two cases did not allege Lanham Act violations in the respective lower court proceedings.¹⁴³ While these two cases were not the first to note the clear legislative intent to model the IACA’s use of the phrase “falsely suggesting” after the Lanham Act,¹⁴⁴ the analogous treatment these courts afford the two statutes is unprecedented.¹⁴⁵ While scholarly criticism and commentary surrounding the Act¹⁴⁶

¹³⁸ See *id.* at 881 (citing H.R. Rep. No. 101-400, pt. 1, at 11 (1990), reprinted in 1990 U.S.C.C.A.N. 6382, 6390). See *infra* Part IV.B for a discussion of the policies that underlie governmental protection of commercial trademarks in the United States.

¹³⁹ See *Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1089 (8th Cir. 1998).

¹⁴⁰ An imitation of a Silver Hand logo or another other IACB-certified trademark, for instance, would likely qualify for protection under both the Lanham Act and the IACA. Where there is no trademark infringement, but only a manner of advertising that is suggestive of goods being Indian-made, however, protection is only available under the IACA. Of course, goods can also violate the Lanham Act’s “regular” trademark protections without deceptive advertising suggesting such wares are Indian-made.

¹⁴¹ See, e.g., *Native Am. Arts, Inc., v. Earth Dweller, Ltd.*, No. 01-C-2370, 2001 WL 910394, at *1 (N.D. Ill. Aug. 10, 2001); *J.C. Penney*, 5 F. Supp. at 600.

¹⁴² See *Native Am. Arts, Inc. v. Hartford Cas. Ins. Co.*, 435 F.3d 729, 733–34 (7th Cir. 2006); *Native Am. Arts, Inc. v. Waldron Corp.*, 399 F.3d 871, 873–74 (7th Cir. 2005).

¹⁴³ See *Hartford*, 435 F.3d at 730–31; *Waldron*, 399 F.3d at 873.

¹⁴⁴ See *Native Am. Arts, Inc. v. Vill. Originals, Inc.*, 25 F. Supp. 2d 876, 881 (N.D. Ill. 1998) (“House Report 101-400 (I) . . . further stated that the ‘falsely suggests’ clause was intended to be construed as parallel and analogous to the Lanham Act, 15 U.S.C. § 1125.” (citing H.R. REP. NO. 101-400, pt. 1, at 11 (1990), reprinted in 1990 U.S.C.C.A.N. 6382, 6390)).

¹⁴⁵ Compare *id.*, with *Hartford*, 435 F.3d at 734 (noting that a violation of the IACA equates with a trademark violation), and *Waldron*, 399 F.3d at 873 (noting that the IACA “makes ‘Indian’ the trademark denoting products made by Indians”).

¹⁴⁶ See *infra* Part III.A.

has for the most part been limited to the cultural implications of the legislation—who is and who is not allowed to call himself an Indian, and why this line is arbitrary¹⁴⁷—these two cases, both of which the Seventh Circuit decided, shed light on how courts interpret and apply the Act from an economic standpoint.¹⁴⁸ The existence of such divergent—or perhaps dovetailing—frameworks surrounding the same Act demonstrates how authorities must understand “Indianness” as both a powerful cultural quality and a potent economic asset, neither of which should be overlooked in thinking about and applying the IACA.

1. Native American Arts, Inc. v. The Waldron Corporation¹⁴⁹

In 2001, Native American Arts, Inc. (“NAA”) sued Earth Dweller, Ltd. (“Earth Dweller”) for violations of the Indian Arts and Crafts Act of 1990 and the Indian Arts and Crafts Enforcement Act of 2000, seeking punitive damages.¹⁵⁰ NAA alleged that Earth Dweller fraudulently offered, displayed and sold goods labeled as “Indian” that were in truth not Indian-made.¹⁵¹ The district court refused a jury instruction sought by NAA regarding 25 C.F.R. § 309.24(a),¹⁵² which provides that “the unqualified use of the term ‘Indian’ or . . . of the name of an Indian tribe . . . in connection with an art or craft product is interpreted to mean . . . that . . . [t]he art or craft product is an Indian product.”¹⁵³ The trial court

¹⁴⁷ See generally SHEFFIELD, *supra* note 21, at 151 (“[The IACA] confuses or juxtaposes nonsimilar categories and treats them identically, with no recognition of the possible divergence of consequences.”); Hapiuk, *supra* note 7, at 1014 (“[The IACA] is flawed because it fails to acknowledge the historical development of both Indian tribes and Indian arts and crafts and to appreciate fully the dialogical ways that contemporary Indian identity is construed.”); Parsley, *supra* note 5, at 488 (“Congress, in its attempt to help Native Americans, has actually stolen the heritage of some Indians and caused massive infighting among Native Americans residing in the United States”).

¹⁴⁸ See *Hartford*, 435 F.3d at 733–34; *Waldron*, 399 F.3d at 874.

¹⁴⁹ 399 F.3d 871 (7th Cir. 2005).

¹⁵⁰ *Native Am. Arts, Inc., v. Earth Dweller, Ltd.*, No. 01-C-2370, 2001 WL 910394, at *1 (N.D. Ill. Aug. 10, 2001).

¹⁵¹ *Id.* at *1.

¹⁵² *Waldron*, 399 F.3d at 873.

¹⁵³ 25 C.F.R. § 309.24(a) (2006). 25 C.F.R. § 309.24(a) is one of the regulations that “define[s] the nature and Indian origin” of the goods the IACA protects “from false representations” and details how the IACB “interpret[s] certain conduct for enforcement purposes. 25 C.F.R. § 309.1 (2006).

reasoned that such a regulation was inconsistent with the plain language of the IACA,¹⁵⁴ “too far reaching in its regulation of commercial speech,”¹⁵⁵ and too vague to adequately instruct someone looking to follow the regulation how to “qualify” his or her use of the term “Indian.”¹⁵⁶

NAA took issue with the district court’s finding in favor of the defendants as well as the jury’s verdict and moved for a new trial, arguing that the district court erred in refusing the jury instructions NAA sought pertaining to 25 C.F.R. § 309.24(a).¹⁵⁷ When the district court denied NAA’s request for a new trial, NAA appealed to the Court of Appeals for the Seventh Circuit.¹⁵⁸ NAA argued that the district court should not have refused to base an instruction to the jury on the regulation on the grounds of the regulation’s unconstitutionality, because the court should not have found the regulation unconstitutional in the first place.¹⁵⁹ NAA additionally disputed the validity of the district court’s ruling that the “unqualified use” regulation infringed upon freedom of speech and was unconstitutionally vague and overbroad.¹⁶⁰

The Seventh Circuit opinion, which Judge Posner wrote, immediately struck down the district court’s ruling that the regulation was unconstitutional, noting that if the district court judge was right, “trademark law would be unconstitutional.”¹⁶¹ The opinion continued: “[i]n effect the regulation makes “Indian” the trademark denoting products made by Indians, just as ‘Roquefort’ denotes a cheese manufactured from sheep’s milk

¹⁵⁴ *Native Am. Arts, Inc. v. Waldron Corp.*, No. 01 C 2370, 2004 WL 1687184 at *3 (N.D. Ill. July 23, 2004). Judge Deryeghiayan opined that because unqualified use of the word “Indian” would not in all cases “falsely suggest” to a consumer that a product was Indian-made, as the IACA requires for a violation, the differing standards of the IACA and the regulations the government employs the promulgate could mislead a jury. *See id.*

¹⁵⁵ *Id.* at *4. The court noted that “[d]efendant’s jewelry was thus artwork and was the end product of her expression of the various cultures that she learned about. Such speech is protected even if the jewelry is eventually sold.” *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at *1.

¹⁵⁸ *Native Am. Arts, Inc. v. Waldron Corp.*, 399 F.3d 871, 873 (7th Cir. 2005).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

cured in limestone caves in the Roquefort region of France.”¹⁶²

The appellate court reasoned:

A non-Indian maker of jewelry designed to look like jewelry made by Indians is free to advertise the similarity but if he uses the word “Indian” he must qualify the usage so that consumers aren’t confused and think they’re buying not only the kind of jewelry that Indians make, but jewelry that Indians in fact made.¹⁶³

The court held that there was no constitutional violation.¹⁶⁴

The Seventh Circuit also grappled with the potentially troubling fact that use of the term “Indian” in connection with faux Indian goods will not lead to consumer confusion in every case, and that the term will not be present in every instance where consumer confusion does exist.¹⁶⁵ If a seller labels his goods “not Indian-made,” for instance, clearly no confusion exists, even though the word “Indian” is used. Conversely, one can “falsely suggest” goods are Indian-made in a variety of ways other than overtly labeling goods “Indian” as Earth Dweller did.¹⁶⁶ One may use the name of a tribe in connection with a good traditionally made by that tribe (i.e. Navajo Rugs, or Hopi Kachina Dolls). One may advertise goods having a Southwest design as being “authentic” without qualification. Additionally, using certain designs and motifs on the goods themselves, independent of any advertising or labeling, may be enough to confuse some non-discerning consumers. In the past, one vendor sold jewelry under the brand name “Indian Maid,” so that if consumers asked him if his goods were “Indian-made” he could truthfully respond “yes.”¹⁶⁷ Another seller actually convinced a small village in the

¹⁶² *Id.* at 873–874 (citing 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:91 (4th ed. 2004 supp.)).

¹⁶³ *Id.* at 874.

¹⁶⁴ *Id.*

¹⁶⁵ *See id.* at 874–75.

¹⁶⁶ *Id.* at 874–75 (“Perhaps the most natural meaning of ‘unqualified use of the term ‘Indian’” or of the name of an Indian tribe is using the word or the name to denote an Indian product without including a disclaimer, such as ‘Indian style,’ or, more emphatically, if rather off-putting, ‘not manufactured by Indians.’”).

¹⁶⁷ Hapiuk, *supra* note 7, at 1043–44.

Philippines to change its name to “Zuni” so that when he built a factory there to create what he passed off as Indian goods, he could label them “Made in Zuni,” falsely suggesting such goods were made in the town of Zuni, New Mexico, which is inhabited by Indians of the Zuni tribe.¹⁶⁸ Of course, in balancing policies of creative expression, fair business practices, and attempts to deter sellers of fraudulent goods, the IACA will not and should not forbid all manners of selling products which *may* confuse *some* consumers, just as the Lanham Act does not bar all brand names which *may* confuse *some* consumers as to a product’s source.¹⁶⁹ The Seventh Circuit limited its discussion to the narrow sliver of possible IACA violations involving the unqualified use of the term “Indian.”¹⁷⁰ Thus, the court made no overbroad generalizations regarding other types of potentially violative actions by sellers and manufacturers that have not been challenged under the IACA. The court also upheld the IACB’s authority to determine what an “Indian product,”¹⁷¹ and consequently, what an “Indian” is, thereby helping preserve tribal self-governance.¹⁷²

The court characterized the “unqualified use” provision as “policy that will guide [the Board] in deciding whether to refer matters to the Department of Justice for possible action.”¹⁷³ The Seventh Circuit’s opinion concluded that even if the regulation did govern, it would be pertinent only in a case where there was no additional context to guide a consumer as to the nature of the product sold.¹⁷⁴ In such a case, asking whether a defendant falsely suggested it was selling Indian products and asking whether it failed to qualify its use of the names of Indian tribes would be the

¹⁶⁸ *Id.* at 1044.

¹⁶⁹ *See generally* Johnson & Johnson * Merck Consumer Pharm. Co. v. SmithKline Beecham Corp., 960 F.2d 294, 298 (2d Cir. 1992) (“[W]here the plaintiff cannot demonstrate that a statistically significant part of the commercial audience holds the false belief allegedly communicated by the challenged advertisement, the plaintiff cannot establish that it suffered any injury as a result of the advertisement’s message. Without injury there can be no claim, regardless of commercial context, prior advertising history, or audience sophistication.”).

¹⁷⁰ *See Waldron*, 399 F.3d at 874–75.

¹⁷¹ *Id.* at 874.

¹⁷² *See SHEFFIELD*, *supra* note 21, at 47.

¹⁷³ *Waldron*, 399 F.3d at 875.

¹⁷⁴ *Id.*

same thing.¹⁷⁵ However, because there was “plenty of context” in the instant case, it was not just the use of the phrase “Indian” by the defendant that was responsible for creating consumer confusion.¹⁷⁶ It was, rather, the entire sales package, including advertising, labeling, and place of sale, that violated the IACA by suggesting the goods in question were produced by Indians.¹⁷⁷ In ruling that 25 C.F.R. § 309.24(a) is intended to guide a court’s understanding of the IACA, rather than prescribe a method of determining whether consumers are likely to be confused, the court preserved a flexible measure for determining whether consumer confusion is likely to occur based on the facts and circumstances of a given case.¹⁷⁸

The significance of the Seventh Circuit’s opinion is two-fold. First, the analogy between trademark law and the IACA evidences how the court expects that representations of Indianness, when affixed to goods, operate in the minds of consumers.¹⁷⁹ Second, the court’s recognition that the authority of the IACB to determine what constitutes an “Indian product” does not bestow upon the Board the power to determine what constitutes consumer confusion, helps define the role of the regulations in what is ultimately, as applied by the court, a trademark-like “consumer confusion” analysis.¹⁸⁰ Such a rule helps maintain flexibility and thoughtfulness. In any event, a rule that unqualified use of the term “Indian” affixed to goods creates consumer confusion as a matter of law, and thus constitutes an IACA violation, would be out of touch with the needs of advertisers and the realities of consumer perception in many instances.¹⁸¹ Supporting this

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 874.

¹⁷⁹ *Id.* at 873–74.

¹⁸⁰ *Id.* at 874.

¹⁸¹ The Court appeared sensitive to the difficult issue of what the “baseline” should be regarding what the term “falsely suggests” means to the average consumer:

The instruction might have said that the name of a tribe suggests an Indian product unless the context rebuts the suggestion. But the difference between this formula and the statutory “falsely suggests,” which were it not for the regulation would allow a jury to award a verdict to a defendant even if the name of the tribe was not qualified, is probably too fine to sway a jury.

practical concern, the Lanham Act permits fair use of even the most protected trademarks by parties other than the trademark owner, for instance, in the context of informational advertising.¹⁸²

2. *Native American Arts, Inc. v. Hartford Casualty Insurance Co.*¹⁸³

The second appellate court case to address a potential Indian Arts and Crafts Act violation was *Native American Arts Inc. v. Hartford Casualty Insurance Co.*¹⁸⁴ This case began in 2001 when Native American Arts, Inc. (“NAA”) sued Stravina Operating Company (“Stravina”) for a violation of the IACA.¹⁸⁵ NAA alleged that Bloom Brothers and Artistic Impressions, two divisions of Stravina, manufactured and sold inauthentic Native American crafts and jewelry in violation of the IACA.¹⁸⁶ NAA claimed that Stravina deceived the public and harmed legitimate Indian artisans by selling its products in a way that falsely suggested the products were Indian-made.¹⁸⁷ Stravina asked its insurers, Hartford Casualty Insurance Co. (“Hartford”), to defend Stravina against NAA’s claims, but Hartford refused.¹⁸⁸ NAA and Stravina settled the case, and as part of the settlement, Stravina assigned NAA its rights under the insurance policy.¹⁸⁹ NAA subsequently brought an action against Hartford alleging that Hartford had breached its duty to defend Stravina in the original lawsuit.¹⁹⁰

Id. at 875.

¹⁸² See 2 ANNE GILSON LALONDE ET AL., GILSON ON TRADEMARK PROTECTION & PRACTICE § 5.09[3] (2006 ed.) (“A trademark is not, after all, a right ‘in gross’ which is protectible in the abstract against any and all use by others irrespective of a lack of likelihood of confusion. In these circumstances, the courts weigh the right of a business to inform the public through advertising against the right of the public to be free from deception and confusion, and draw a line between collateral, informational use of a competitor’s trademark and infringing use, i.e., that which causes likelihood of confusion.”).

¹⁸³ 435 F.3d 729 (7th Cir. 2006).

¹⁸⁴ See *id.* at 731.

¹⁸⁵ *Id.* at 730.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 730–31.

¹⁸⁸ *Id.* at 731.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

The basis upon which Hartford had refused to defend Stravina in the lawsuit was that the policy did not obligate Hartford to defend Stravina against claims based on the Indian Arts and Crafts Act.¹⁹¹ Hartford argued that an Indian Arts and Crafts Act violation fell under two distinct exceptions to the general rule of coverage for an “advertising injury” under the terms of the insurance policy.¹⁹² First, Hartford claimed that marking one’s goods as “Indian” did not constitute an advertisement because use of the word fell under a general exception for “the design, printed material, information or images contained in, on or upon the packaging or labeling of any goods or products.”¹⁹³ Second, Hartford maintained that the violation NAA alleged was an “‘advertising injury’ arising out of [the] infringement of [a] trademark, trade name, service mark or other designation of origin or authenticity”¹⁹⁴ or, more generally, an injury “[a]rising out of any violation of any intellectual property rights, such as patent, trade secret, trademark, trade name, service mark or other designation of origin or authenticity,”¹⁹⁵ which sufficiently exempted Hartford from its duty to indemnify or defend.¹⁹⁶

The court rejected Hartford’s first defense, holding that Stravina’s violated the IACA not only by mislabeling goods but

¹⁹¹ *Id.*

¹⁹² *Id.* at 732. “Stravina’s policy read: ‘We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal injury” or “advertising injury” to which this insurance applies. We will have the right and duty to defend any “suit” seeking those damages.’” *Id.* (quoting Stravina’s insurance policy). The policy defined “advertising injury” as:

- a. Oral or written publication of material in your “advertisement” that slanders or libels a person or disparages a person’s or organization’s goods, products or services;
- b. Oral or written publication of material in your “advertisement” that violates a person’s right of privacy;
- c. Copying, in your “advertisement,” a person’s or organization’s “advertising idea” or style of “advertisement”; or
- d. Infringement of copyright, slogan, or title of any literary or artistic work, in your “advertisement.”

Id. (quoting Stravina’s insurance policy).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 733 (quoting the policy providing Stravina’s insurance coverage from 1999 to 2001).

¹⁹⁵ *Id.* (quoting the policy providing Stravina’s insurance coverage from 2001 to 2003).

¹⁹⁶ *Id.*

also through advertising activity and marketing methods, which included distributing misrepresentative catalogues and brochures.¹⁹⁷ Since NAA's advertisements stressed the authenticity of their goods, by falsely doing the same, Stravina's advertisements copied NAA's "style of advertisement," which was covered under the policy.¹⁹⁸ The court held that Stravina's actions therefore constituted an "advertising injury" against which Hartford had a duty to defend.¹⁹⁹

The court, however, found Hartford's second defense persuasive.²⁰⁰ While NAA attempted to argue that this exception applied narrowly to Lanham Act claims—and since NAA did not allege any Lanham Act complaints, neither the trademark nor the "origin or authenticity" exclusion applied²⁰¹—the Court rejected this view.²⁰² The court explained that applying the exceptions narrowly to trademark violations "would do serious violence" to the language of the policy.²⁰³ NAA's allegations of false representations of "Indianness" fell squarely within the "designation of origin or authenticity" of Stravina's products.²⁰⁴ The court reasoned that alternatively, even if the exclusion from coverage was limited to traditional forms of intellectual property such as trademarks, NAA's claim would still fail because of the IACA's "trademark-like" qualities.²⁰⁵ The court thus affirmed Hartford's motion for summary judgment.²⁰⁶

The significance of this outcome is that it clarifies the court's understanding of the IACA by forcing it to define what the IACA means. When the court categorized the IACA as a trademark statute, it implied that one's ability to call one's self "Indian" is not so much an expression of culture as an advertisement of it; it is an asset one can use for commercial gain rather than a means of

¹⁹⁷ *Id.* at 732–33.

¹⁹⁸ *Id.* at 733.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 733–34.

²⁰¹ *Id.* at 733.

²⁰² *Id.* at 734.

²⁰³ *Id.* at 733.

²⁰⁴ *Id.* at 734.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 735.

establishing cultural identity. The Court expressed this understanding when it opined that in misrepresenting its goods as Indian, Stravina “traded upon a reputation, history, and sales advantage that it did not deserve. . . . and took sales away from those whose heritage gives them the right to capitalize on the market value and goodwill associated with authentic, Native American-made products.”²⁰⁷

The categorization of the IACA as a trademark law further indicates how Courts conceive the Act as functioning in practice. As in *Waldron*, the *Hartford* court recognized that contextual clues relating to the style of advertising, rather than sellers affixing “Indian” labels to the goods in question, are often responsible for causing consumer confusion over the authenticity of Indian goods.²⁰⁸ The *Hartford* court even referenced the *Waldron* case when it reaffirmed that as a functional matter, the IACA and its implementing regulation, 25 C.F.R. § 309.24(a), make “Indian” a trademark denoting products made by Indians, and concurred that the Lanham Act ought to guide jurisprudential analysis of the IACA.²⁰⁹ By moving its focus on the Act from one questioning the labeling rights of artisans to one pondering how consumers will view labels of Indian authenticity, the court adopts a consumer-focused analysis of the Act.

The *Waldron* and *Hartford* courts demonstrate that the differences between trademark provisions and the IACA are dwindling in the minds of the judiciary. But does this consumer-driven analysis, indicating that judges interpret the IACA as intended to protect consumers rather than Indian communities, conflict with the initially expressed purpose of the Act as envisioned by Congress in 1935 and 1990? The next part will discuss the two main reasons why the merging of these two areas of law, while convenient, may prove problematic.

²⁰⁷ *Id.* at 733. For a discussion of this right to capitalize, see Brown, *supra* note 86, at 194. The *Hartford* court was not the first court to suggest that cultural groups possess an inherent property right in collective cultural innovations and creations. See, e.g., *Indrogo v. U.S. Army*, 18 F. Supp. 2d 25, 27–28 (D.D.C. 1998) (holding that individuals who have no ties to any Indian tribe lack standing to bring a claim for the repatriation of Native American remains).

²⁰⁸ *Hartford*, 435 F.3d at 733.

²⁰⁹ *Id.* at 734.

III. A CULTURAL AND ECONOMIC ASSET

A. *A New Perspective: Why the Indian Arts and Crafts Act of 1990 is Not a Cultural Heritage Law*

In the sixteen years since Congress enacted the IACA, speculation that the goal of the Act was to preserve Indian cultural heritage has fueled most of the commentary on the statute.²¹⁰ Native American congressmen, after all, promoted the Act²¹¹ in response to an Indian outcry regarding the lack of enforcement of the 1935 version of the Act.²¹²

It is puzzling, then, that in recent litigation involving the Act, Courts have viewed IACA violations as analogous to trademark violations, ruling with a policy toward consumer protection from confusion, rather than Indian protection from the existence of fakes.²¹³ Furthermore, the government markets the IACA as a “truth-in-advertising” law—the policies of which focus on protecting consumers rather than creators.²¹⁴ Critics seem justified in criticizing the act for failing as a cultural heritage act: in practice, the IACA does not do an adequate job of protecting Indians—especially those in the Indian Gap—from misrepresentation at the hands of non-Indians, or in some cases, even at the hands of Indians outside of their tribe.²¹⁵ Cultural misappropriation has not ceased, it has merely taken a less obvious form. Perhaps critics are merely off beam regarding what the law is trying to accomplish. Perhaps the purpose of the Act is not to protect cultural heritage, but rather to secure economic viability for

²¹⁰ Hapiuk deems the IACA “a legal regime designed to ensure cultural survival.” See, e.g., Hapiuk, *supra* note 7, at 1044 (asserting one can construe the IACA as “a legal regime designed to ensure ‘cultural survival’”); Antonia De Meo, *More Effective Protection for Native American Cultural Property Through Regulation of Export*, 19 AM. INDIAN L. REV. 1, 52 (1994) (classifying the IACA as a “cultural property” law).

²¹¹ Parsley, *supra* note 5, at 493 & nn.64–65.

²¹² See *id.* at 493 (citing *To Expand the Powers of the Indian Arts and Crafts Board: Hearing on H.R. 2006 Before the H. Comm. on Interior and Insular Affairs*, 101st Cong. 65 (1989) (statement of Rep. Jon Kyl)).

²¹³ See *Hartford*, 435 F.3d at 733, *Native Am. Arts, Inc. v. Waldron Corp.*, 399 F.3d 871, 874 (7th Cir. 2005).

²¹⁴ See 16 C.F.R. § 0.17 (2006); 25 C.F.R. § 309.7 (2006).

²¹⁵ See Hapiuk, *supra* note 7, at 1072–74.

an economically underdeveloped community. In this case, an analysis based on the IACA's failure to preserve cultural heritage by using an economic measure misses a fundamental principle.

The Act itself is vague in its purpose. The full title of the legislation that eventually became the Indian Arts and Crafts Act of 1990 reads, "[a]n [a]ct to expand the powers of the Indian Arts and Crafts Board, and for other purposes,"²¹⁶ while the Indian Arts and Crafts Enforcement Act of 2000 bills itself as "[a]n [a]ct to improve the cause of action for misrepresentation of Indian arts and crafts."²¹⁷

In light of the impetus for the 1935 Act and the explicit responsibilities given to the IACB,²¹⁸ however, it seems that the preservation of cultural heritage, if any, that results from the Act is merely a byproduct of the Act's original intent: to improve the economic status of Indian communities.²¹⁹ One finds further evidence for this hypothesis when one considers the ease with which Congress could have crafted a cultural misrepresentation provision, and the legislative silence regarding inter-tribal misrepresentation.²²⁰

If economic improvement is indeed the purpose of the Act, then it should come as no surprise that the ultimate beneficiaries of the Act are consumers of Indian goods and politically recognized Indians, while the Act leaves those in the Indian Gap only slightly

²¹⁶ Pub. L. No. 101-644, 104 Stat. 4662, 4662 (codified as amended at 25 U.S.C. §§ 305, 305d, 305e (2000)).

²¹⁷ Pub. L. No. 106-497, 114 Stat. 2219, 2219 (codified as amended at 25 U.S.C. § 305e (2000)).

²¹⁸ These responsibilities include "promoting the development of American Indian and Alaska Native arts and crafts, improving the economic status of members of Federally-recognized tribes, and helping to establish and expand marketing opportunities for arts and crafts produced by American Indians and Alaska Natives." Protection for Products of Indian Art and Craftsmanship, 61 Fed. Reg. 54,551, 54,551-52 (Oct. 21, 1996) (supplementary background information for regulations to be codified at 25 C.F.R. pt. 309).

²¹⁹ Of course, it is impossible to have "authentic" goods without some culture to authenticate, but economic wellbeing and cultural wellbeing are not always exclusively synonymous.

²²⁰ For an example of inter-tribal misrepresentation, see Hapiuk, *supra* note 7, at 1073-74.

better off, if it assists them at all.²²¹ It follows, then, that while the Act may not be fair to some because of its limited definition of Indianness, criticism of the Act's failure to address further concerns that Native Americans have about their identity and its portrayal in society at large is unfair.

Certainly, it may be a valid criticism that the Indian arts counterfeit problem *should* have been solved by means of a cultural heritage law, one that focused on preserving the heritage of Indians, which would have likely included an economic component.²²² There is no doubt that the economic bolstering of Indians will in some way affect cultural change, no matter how one delineates what it takes to qualify as an Indian.²²³ Indians stuck in the Indian Gap are unlikely to find solace in this Act so long as the statutory definition of Indian remains rooted purely in politics; for as long as the Act precludes Indian Gap Indians from qualifying as Indians, they cannot benefit from the consumer protection restrictions the Act affords.²²⁴ Unaccounted for as either Indians or consumers, such Indians are not only arbitrary under the Act; they are invisible.

B. Indian v. Knock-off: The Only Dichotomy?

The prohibition against a non-enrolled artisan labeling his goods as Indian-made, coupled with consumer desire for expressive over nominal authenticity, results in a peculiar tension when it comes to goods made by artisans who fall into the Indian Gap. Products made by this group are neither "Indian" in the sense of being made by an enrolled Indian nor knockoffs in the sense of being factory-made overseas. The current binary conception of the IACA—under which a product is either Indian-made or counterfeit—treats products produced by Indians in the Indian Gap

²²¹ See Hapiuk, *supra* note 7, at 1013, 1028, 1056.

²²² See *id.* at 1021–22.

²²³ Can one not conversely argue that laws everywhere have a cultural heritage aspect to them, though in most instances it is the majority culture's preservation at stake? See *id.* at 1059 ("Now to be sure, many 'tribes,' in both the ethnological and the political sense, had existed long before this articulation by the Supreme Court—and well before 1492.")

²²⁴ See *id.* at 1013, 1056.

as counterfeit,²²⁵ despite the fact that in many circumstances consumers, based on their notions of “authenticity” and cultural heritage, would conceive of such wares as falling under the “Indian” category.²²⁶ Therefore, while consumers would likely want to purchase such goods, and such artisans would want to sell them, the rigid statutory terms of the IACA frustrate both parties.²²⁷

One should also remember that not all enrolled Indians create goods that consumers would consider “authentic.”²²⁸ Thus, between the number of “fraudulent Indians” who the Act recognizes as members of Indian tribes, and the number of non-enrolled individuals who identify themselves as Indians but cannot or will not seek recognition, the IACA proves to be both over-inclusive and under-inclusive in terms of its classification of artisans capable or willing to create “authentic” Indian arts and crafts that consumers would be interested in purchasing. The IACA takes a flat view of “Indianness” as an economic asset, and forgets that it has powerful identity importance to those individuals who use the term “Indian” to describe who they are.²²⁹ The United States needs a better solution to the counterfeit Indian goods problem. The next part of this Note discusses necessary considerations for constructing such a better solution.

IV. THE PROBLEM WITH LEGAL ANALOGIES

A. *The Use of Intellectual Property Rights in Matters of Cultural Heritage*

Using the western notion of trademarks to solve what more conventional means likely should have already solved is not as radical an idea as one may think. Over the course of the last few

²²⁵ See 18 U.S.C. § 1159; 25 U.S.C. § 305e; Hapiuk, *supra* note 7, at 1013.

²²⁶ See Hapiuk, *supra* note 7, at 1056.

²²⁷ See *id.*

²²⁸ See *id.* at 1074. As demonstrated *supra*, the mere fact that a Native American creates goods does not verify he uses authentic materials or methods, or that his works are not culturally misrepresentative in other ways.

²²⁹ See *id.* at 1014, 1031–32.

decades, both attorneys and anthropologists have advocated using intellectual property rights to assist in preserving issues of cultural heritage for indigenous groups.²³⁰ In the international context, this has begun to prove successful.²³¹ In the United States, however, using copyright and patent law to protect elements of cultural heritage remains a largely unproven practice because of the many practical implementation problems of such regimes.²³²

1. Legal Analogy to Intellectual Property Regimes May Lead to Absurd Results in Cultural Heritage Contexts

One of the problems with creating new areas of legal rights by analogy is that “they tend to impose a mature, elaborated system on what may well be an unformulated situation.”²³³ Existing legal regimes, specifically older ones, evolved over time according to a complex blend of considerations in an attempt to balance policy; fairness; practical and technological limitations on enforcement; historical or traditional practices; and impact on special interest groups. Blindly applying an existing legal regime to solve a new legal problem—such as applying trademark law to cure the counterfeit Indian goods problem—therefore fails to account for

²³⁰ For a broad introduction, see, for example, *INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK* (Tom Greaves ed., 1994). For more in-depth studies, see, for example, Michael F. Brown, *supra* note 86; MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (2003), or ROSEMARY COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW* (1998).

²³¹ See *Bulun Bulun v. R & T Textiles Pty.* (1998) 86 F.C.R. 244, 262–63 (Austl.) (finding in favor of aboriginal artists in their copyright infringement suit against Australian manufacturers and retailers who used the artists’ folkloric designs on textiles).

²³² Such practical problems abound. The limited monopolies that copyright and patent law authorize conflict with proponents of cultural heritage protection, who seek unlimited temporal preservation. *But see* Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 796 (2001) (“[I]ntellectual property law, through modification of its authorial and temporal limitations and creation of community-specific protections such as an ‘authenticity mark,’ has the potential to strike an equitable balance between source community rights and the public interest in cultural products.”). Additionally, the requirements of the American copyright and patent schemes that a work must be attributable to a single author who created the work or reduced an idea to practice at a specifically-defined moment in time ignore the fact that cultural creations are necessarily the product of the work of many authors or creators over an extended span of time. *See id.* at 795.

²³³ Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1127 (1980).

the considerations which significantly shaped the existing regime in the first place. Such application may lead to at best unpredictable, and at worst unwanted, results.

Specifically, using intellectual property regimes to remedy cultural heritage problems has not proven in practice to be the cure-all it may be in theory. Michael F. Brown, a scholar who has written extensively on the subject of misapplication of intellectual property regimes in the cultural heritage context,²³⁴ observes:

[T]he debate over intangible cultural property as it has been conducted by anthropologists, legal scholars, and indigenous activists has tended toward a polemical romanticism that produces memorable bumper-sticker slogans (“Give the natives their culture back!”) but little in the way of sober reflection on the difficult balancing act required to formulate policies that provide reasonable protection for minority populations while maintaining the flow of information essential to a liberal democracy.²³⁵

Brown argues that such proposals to expand the notion of copyright to defend indigenous cultures “are often formed by romantic assumptions that ignore the broader crisis of intellectual property and the already imperiled status of the public domain.”²³⁶ Brown instead posits that effective policies for thinking about indigenous cultural and intellectual property should come from ideas which are “not only ethically sound but also thoroughly grounded in the practical realities of cultural creativity, information storage and transfer, the fluidity of ethnic boundaries, and the limitations of the judicial process in developed and developing nations alike.”²³⁷

2. Intellectual Property Rights Have Practical Application Limitations

A second problem with attempting to fit questions of cultural heritage into existing intellectual property regimes is that this

²³⁴ See, e.g., Brown, *supra* note 86; BROWN, *supra* note 230.

²³⁵ Brown, *supra* note 86, at 195.

²³⁶ *Id.* at 193.

²³⁷ *Id.* at 195.

approach fails to adequately meet the needs of those who argue for absolute preservation of cultural heritage.²³⁸ Generally, such interest groups seek to retain eternal property over their crafts.²³⁹ Intellectual property law, however, mandates that such rights must enter the public domain after the monopolies protecting these rights for a limited duration expire.²⁴⁰ Such limited monopolies serve only as means to an end: to provide incentive for invention and artistic creation.²⁴¹ The United States Constitution grants Congress broad power to determine how long such limited monopolies may last.²⁴² Thus, while ascribing to the “authors” of certain elements of cultural heritage the bundle of rights that accompanies intellectual property treatment at first glance appears to adequately protect such elements, once the limited monopoly protecting these rights under intellectual property law expires, the rights themselves effectively expire as well.

That the IACA attempts to address a problem that is not solely cultural, but economic too, further distorts the balancing test. “Purely mercantile” cultural heritage conflicts, such as an agribusiness’ acquisition of native crop varieties for genetic engineering purposes,²⁴³ or the incorporation of indigenous graphic designs into consumer goods without permission,²⁴⁴ involve only a single issue: how the native population can seek a fair share of the profits.²⁴⁵ The counterfeit Indian goods problem, however, extends well beyond Indian efforts to obtain compensation for lost profits. But the counterfeit Indian goods crisis can also be distinguished from other “purely cultural” native grievances, such as those against the commoditization or publication of sacred or secret symbols, ideas and motifs that westerners stole or otherwise

²³⁸ See *id.* at 197.

²³⁹ See *id.*

²⁴⁰ *Id.* at 196.

²⁴¹ *Id.* at 195–96.

²⁴² See *Eldred v. Ashcroft*, 537 U.S. 186, 199–204 (2003) (holding that the Copyright Term Extension Act’s extension of existing copyrights for an additional twenty years did not exceed Congress’ power under the Copyright Clause).

²⁴³ See Brown, *supra* note 86, at 195. For a more expansive discussion and examples, see *INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK* (Tom Greaves ed., 1994).

²⁴⁴ See Brown, *supra* note 86, at 195.

²⁴⁵ See *id.*

misappropriated.²⁴⁶ Unlike the offended groups in such cases, Indian artisans adversely affected by counterfeit iterations of their goods do not seek a blanket prohibition on the sale of all Indian-style arts and crafts, Indian arts and crafts of a certain type, or even goods bearing certain markings, but rather aim to proscribe the sale only of those goods which are counterfeit relative to their maker.²⁴⁷ Because the counterfeit Indian goods crisis is neither a “purely mercantile” nor “purely cultural” problem, but falls somewhere in between, the United States needs an innovative solution that duly considers assumptions implicit in both models.

3. Cultural Heritage Involves Forms and Notions not Contemplated by Traditional Intellectual Property Regimes

The cultural offense counterfeit Indian goods pose typifies a third reason why the use of intellectual property regimes to protect aspects of cultural heritage is often problematic: while modern intellectual property law affords to creators rights only to a limited singular expression of an idea, or particular idea reduced to practice, expressions of “cultural heritage” encompass ideas and concepts for which modern intellectual property schemes do not provide.²⁴⁸

Furthermore, fundamental differences between western and indigenous cultural perspectives concerning how freely information ought to flow—and to whom it should flow—pose a particular problem in protecting cultural heritage through intellectual property regimes.²⁴⁹ Situations involving native notions of sacredness highlight such concerns. Indeed, the American value of championing free speech and invention, which justifies the implementation of intellectual property rights, is oftentimes diametrically opposed to the Native American

²⁴⁶ See *id.* (noting that such grievances are about obtaining a fair share of the profits).

²⁴⁷ See 25 C.F.R. § 309.9 (2006) (“A non-Indian can make and sell products in the style of Indian art or craft products . . . if the non-Indian or other seller does not falsely suggest to consumers that the products have been made by an Indian.”).

²⁴⁸ See Brown, *supra* note 86, at 197.

²⁴⁹ See *id.* at 198 n.11 (noting the “fundamental difference” between the Native American and Western cultural perspectives on encouraging inquiries regarding the unknown).

commitment to secrecy concerning sacred matters.²⁵⁰ Similarly, the current American system grants writings and inventions intellectual property protection because the law views such writings and inventions as non-rivalrous and non-exclusive.²⁵¹ In contrast, native peoples often view sacred knowledge as “a limited good that cannot properly exist in several places at once.”²⁵² Brown explains this view, observing that “[r]eligious knowledge that resides in inappropriate places may find its power diminished or dangerously distorted, hence the common practice of compartmentalizing information in order to limit access to the inner meaning of religious symbols.”²⁵³ The misuse of a symbol imbued with inherent power therefore “is at least an affront to [believers’] dignity, at worst a dangerous form of blasphemy capable of unleashing a genuine misfortune.”²⁵⁴

B. Trademarks: The Next Frontier in Indian Reform

In light of current problems with the use of copyright and patent regimes to encourage cultural heritage preservation, could trademark law be the solution? Or is the IACA merely the next chapter in a fruitless search for an intellectual property regime capable of addressing indigenous concerns? The disparity between the policies behind the creation of trademark law and the creation of the IACA suggests that trademark law may not be the answer.

Trademarks developed in response to the needs of consumers to differentiate between goods and assure a consistent level of quality.²⁵⁵ The government affords trademarks legal protection because of the numerous functions they serve in a competitive marketplace.²⁵⁶ Gilson on Trademark Protection and Practice cites six such functions:

²⁵⁰ See *id.* at 198.

²⁵¹ See *id.* at 196.

²⁵² *Id.* at 197.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ 1 GILSON LALONDE ET AL., *supra* note 112, § 1.03[3][a]. It is curious then, that Congress enacted the IACA, a statute that gives trademark-like status to the term “Indian,” in response to a problem primarily plaguing producers.

²⁵⁶ See *id.* § 1.03[7][a].

- (a) designating the source or origin of a particular product or service;
- (b) denoting a particular standard of quality embodied in the product or service;
- (c) identifying a product or service and distinguishing it from the products or services of others;
- (d) symbolizing the good will of its owner and motivating consumers to purchase the trademarked product or service;
- (e) representing substantial advertising investment and being treated as a species of property; and
- (f) protecting the public from confusion and deception, insuring that consumers are able to purchase products or services it wants, and enabling courts to fashion a standard of acceptable business conduct.²⁵⁷

In contrast, when one differentiates between goods that are Indian-made and non-Indian-made, one preserves only two of the aforementioned functions: identifying a product and distinguishing it from the products of others; and protecting the public from confusion and deception to ensure consumers that they are able to purchase the products they want.

Section 43(a) of the Lanham Act, which forbids sellers from using “a false designation of origin, or any false description or representation” in connection with their goods, addresses such policies.²⁵⁸ The courts in the *Waldron* and *Hartford* cases similarly suggest that calling or labeling goods “Indian” is not simply a means of brand identification for consumers, but is a “false designation of origin” under § 43(a) of the Lanham Act.²⁵⁹

²⁵⁷ *Id.* § 1.03[1].

²⁵⁸ See 15 U.S.C. § 1125(a)(1) (2000) (“Any person who, on or in connection with any goods or services, or any container for goods, uses . . . any false designation of origin, false or misleading description of fact, or false or misleading representation of fact . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”).

²⁵⁹ See *Native Am. Arts, Inc. v. Hartford Cas. Ins. Co.*, 435 F.3d 729, 733–34 (7th Cir. 2006); *Native Am. Arts, Inc. v. Waldron Corp.*, 399 F.3d 871, 873–74 (7th Cir. 2005).

The *Hartford* court states that “[t]he purpose of the Indian Arts and Crafts Act is to protect consumers and the makers of authentic Native American goods from false representations of a product’s ‘origin or authenticity.’”²⁶⁰ The analogy the *Waldron* court coins likening the “Indian” mark to marks of geographic origin, such as “Roquefort” to denote a particular cheese made in France,²⁶¹ serves as further evidence of courts interpreting IACA violations as § 43(a) violations.²⁶²

Both the *Waldron* and *Hartford* courts, however, overlook the unique implications of forbidding a non-enrolled artisan from using the term “Indian” to describe his product, under the logic that such a term is a “false designation of origin” when the seller is not an Indian under the Act.²⁶³ Where most suits brought under § 43(a) involve sellers misrepresenting a quality of their goods, cases brought under the IACA question sellers misrepresenting a quality about themselves.²⁶⁴ The ability to label one’s goods as Indian is commercial in the sense that it allows a seller to advertise what he believes to be desirable about his product and also demand a greater price for his goods. This narrow view of the purpose of labeling one’s goods “Indian,” however, ignores a problem of identity: any restriction a statute imposes on labeling goods Indian-made that does not reference an external legal definition of who qualifies as “Indian” necessarily and implicitly restricts individuals’ freedom to call themselves “Indian.” Courts should not overlook such an identity problem when interpreting and applying the IACA.

1. False Designation of Indianness as a Lanham Act § 43(a)

²⁶⁰ *Hartford*, 435 F.3d at 733. The court also references background information appended to a final rule of the IACB that deems the IACA “‘essentially a truth-in-marketing law designed to prevent, through both civil and criminal sanctions, marketing of products in a manner that falsely suggests such products are produced by Indians when the products are not, in fact, made by an Indian as defined by the 1990 Act.’” *Id.* (quoting Protection of Products of Indian Art and Craftsmanship, 68 Fed. Reg. 35,164, 35,164 (June 12, 2003) (supplementary background information for regulations to be codified at 25 C.F.R. pt. 309)).

²⁶¹ *Waldron*, 399 F.3d at 873–874.

²⁶² See also *Hartford*, 435 F.3d at 734 (citing *Waldron*, 399 F.3d at 873–74).

²⁶³ See *Hartford*, 435 F.3d at 733; *Waldron*, 399 F.3d at 874.

²⁶⁴ See, e.g., *Waldron*, 399 F.3d at 873.

Violation

A case of false advertising under § 43(a) requires the following elements:

- (1) A false or misleading statement of fact about a product;
- (2) Such statement either deceived, or had the capacity to deceive a substantial segment of potential consumers;
- (3) The deception is material, in that it is likely to influence the consumer's purchasing decision;
- (4) The product is in interstate commerce; and
- (5) The plaintiff has been or is likely to be injured as a result of the statement at issue.²⁶⁵

Interestingly, the statute does not require the presence of fraudulent intent.²⁶⁶ Based on these factors, there are a number of reasons why one should be skeptical about applying § 43(a) reasoning to the counterfeit Indian goods problem.

a) Can Notions of Self-Identity be “False”?

With regard to the first element, individuals calling themselves “Indian” when they do not qualify as such under the IACA should not necessarily constitute a “false” statement, as such a designation may have cultural or ethnic significance in addition to political import. “Essential to any claim under section 43(a) of the Lanham Act is a determination of whether the challenged statement is one of fact—actionable under section 43(a)—or one of general opinion—not actionable under section 43(a).”²⁶⁷ The *Pizza Hut* court explained that “a statement of fact is one that (1) admits of being adjudged true or false in a way that (2) admits of empirical

²⁶⁵ See, e.g., *Pizza Hut v. Papa John's Int'l*, 227 F.3d 489, 495 (5th Cir. 2000) (citing *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1500 (5th Cir. 1990); *Cooke Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246 (9th Cir. 1990)).

²⁶⁶ See, e.g., Alison M. Andrews, Note, *Implied Misrepresentations in Advertisements Under Section 43(a) of the Lanham Trademark Act: American Home Products Corp. v. Johnson & Johnson*, 47 ALB. L. REV. 97, 113–14 (1982).

²⁶⁷ *Pizza Hut*, 227 F.3d at 495–96.

verification.”²⁶⁸ As discussed above, individuals proclaiming themselves to be “Indian” may be making false statements in one context—as in whether one is an “Indian” as defined under the Act—but not in another.²⁶⁹ Courts should therefore not automatically deem a non-enrolled individual’s unqualified use of the term “Indian” false and misleading for purposes of a false advertising statute.²⁷⁰

Similarly, holding the practice of individuals labeling their goods “Indian” as potentially violative of § 43(a) implies that either (1) the fact that a product’s maker was an enrolled Indian is a quality of a good in itself; or (2) the Indian authenticity which such a class of persons could provide is a quality that can be quantified with empirical verification. There is no reason, however, to presume there is any difference in the quality of goods made by “Indians” as opposed to “non-Indians,” since “Indian” goods do not possess common standards of quality,²⁷¹ in terms of either craftsmanship²⁷² or the elusive quality of “authenticity.” As stated, authenticity is an inexact measure of an amorphous idea of culture that, for various reasons, statutes cannot deem capable of “empirical verification.”²⁷³

²⁶⁸ *Id.* at 496 (citing *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 679 (5th Cir. 1986)).

²⁶⁹ See discussion *supra* Part I.B.

²⁷⁰ See *Native Am. Arts, Inc. v. Waldron Corp.*, 399 F.3d 871, 874–75 (7th Cir. 2005).

²⁷¹ “[T]he public ha[s] come to rely on the trademark primarily as representing a satisfactory level of product quality emanating from a common, though anonymous, source.” 1 GILSON LALONDE ET AL., *supra* note 112, § 1.03[3][a] (citing Frank Schechter, *The Rational Basis for Trademark Protection*, 40 HARV. L. REV. 813, 816–19 (1927)). Nothing in the IACA or in its definition of Indianness is capable of curbing variance among the quality levels of Indian-made products. For a discussion on changing the quality of one’s product after one has established a trademark, see *id.*

²⁷² It is ironic that one of the reasons Indians pushed for trademark-like protection of Indianness was because Indian-made goods—often handmade, or traditionally made—were of better quality than the mass-produced fakes producers fabricated overseas using lower-quality materials and inferior means of production, since the “solution” of relying on a producer’s political affiliation guarantees neither that Indian producers will make high-quality goods, nor that non-affiliated artisans will produce wares of lesser quality than those Indians make. In fact, leading authorities unsurprisingly estimate that “the quality of the fakes is getting ‘better’—that is, more authentic-looking and thus harder to detect. Hapiuk, *supra* note 7, at 1043 (citing John Shiffman, *\$1 Billion Industry Reeling as Faux Crafts Flood Market*, USA TODAY, Apr. 8, 1998, at A2).

²⁷³ See discussion *supra* Part II.C.

Furthermore, as a practical matter, the group of artisans the IACA authorizes to label their goods “Indian” is too varied to accurately designate a source of origin from such a mark. Not all Indians live, work or originate from the same location.²⁷⁴ Not all Indians have experienced similar historical events or treatment at the hands of the government.²⁷⁵ Nor are “Indian” artisans incorporated or affiliated in some way that would make Indianness a useful designation of origin. Even if “origin” in this context were to mean cultural, racial, ethnic or religious origin, “origin” in § 43(a) of the Lanham Act refers to geographic origin and origin of production or manufacture, and not authorship of a creative work.²⁷⁶ For the foregoing reasons, courts should not consider non-enrolled individuals who declare themselves and their goods “Indian” to be making false statements of fact about a product for the purposes of § 43(a).

b) The Strict Liability Requirement

Even if § 43(a) of the Lanham Act appropriately governs one’s status as an enrolled Indian under the Act, the IACA should allow Indian Gap Indians—who use the word “Indian” in its descriptive rather than legal sense—to employ the term. Even if one reads most of the restrictions on advertisements under § 43(a) into the IACA, one should not include the current strict liability standard at work under regular § 43(a) violations.

Under § 43(a) of the Lanham Act, a defendant need not have had any intent to make a false or misleading representation, or evidence an intent to deceive consumers.²⁷⁷ This policy is a conscious deviation from the 1920 Trademark Act, from which § 43(a) of the Lanham Act derives.²⁷⁸ Section 3 of the 1920 Act requires that sellers must make any false designation “willfully and

²⁷⁴ See Hapiuk, *supra* note 7, at 1063 (“Demographic changes . . . are altering the relationship that many Indians have with Indian tribes.”).

²⁷⁵ See *id.* 1059 (noting that the federal government has created some tribes where none existed before, while on other occasions it has divided single tribes into multiple bands, and even terminated altogether).

²⁷⁶ 1 GILSON LALONDE ET AL., *supra* note 112, § 1.03[3][b].

²⁷⁷ See Andrews, *supra* note 266, at 114.

²⁷⁸ Gary S. Marx, *Section 43(a) of the Lanham Act: A Statutory Cause of Action for False Advertising*, 40 WASH & LEE L. REV. 383, 391 (1983).

with an intent to deceive.”²⁷⁹ This change in the Lanham Act—which Congress created in 1946—evinces Congress’ desire to bring a broader class of misrepresentative commercial actions—beyond the willful attempts of one seller to pass off her goods as those of another seller—under the ambit of statutory trademark protection.²⁸⁰ Since even unintentional misrepresentations are violations of § 43(a), damages allowable under the provision are limited to civil remedies, and not punitive damages.²⁸¹

The IACA is itself silent on the issue of intent.²⁸² Because courts construe § 305e of the IACA as parallel and analogous to the Lanham Act, however, they impose strict liability for each “commercial transaction involving a ‘false suggestion’ that merchandise was manufactured by Indians,”²⁸³ and do not inquire into the intent of the defendant in cases brought under the IACA.²⁸⁴ Nonetheless, there is evidence in the construction of the statute that an intent element should be a necessary precondition of liability under the IACA.

First, in contrast to the exclusively civil remedies available under § 43(a) of the Lanham Act, the IACA contains criminal provisions.²⁸⁵ The IACA further provides that courts may hold violators liable for treble damages, or up to \$1,000 per day for the duration of the infraction, whichever is greater.²⁸⁶ Courts may also award punitive damages. In other areas of American law, the government typically enacts strict liability statutes in limited circumstances only—when there is an unreasonable risk of harm²⁸⁷—that are not present in the field of the Indian goods trade.

²⁷⁹ *Id.*

²⁸⁰ Andrews, *supra* note 266, at 103.

²⁸¹ *Id.* at 100–01 n.12.

²⁸² See 18 U.S.C. § 1159(a) (2000); 25 U.S.C. § 305e(a) (2000). See also *Native Am. Arts, Inc. v. Vill. Originals, Inc.*, 25 F. Supp. 2d 876, 881 (N.D. Ill. 1998).

²⁸³ *Id.* at 881–82 (N.D. Ill. 1998). See also *Native Am. Arts, v. Earthdweller, Ltd.*, No. 01 C 2370, 2002 WL 1173513, at *5 (N.D. Ill. May 29, 2002) (“The IACA imposes strict liability for each IACA violation, regardless of [the defendant’s] intent.”).

²⁸⁴ See, e.g., *Native Am. Arts*, 2002 WL 1173513.

²⁸⁵ See 18 U.S.C. § 1159(b) (2000)

²⁸⁶ 25 U.S.C. § 305e(a)–(b) (2000).

²⁸⁷ Thomas C. Galligan, Jr., *Strict Liability in Action: The Truncated Learned Hand Formula*, 52 LA. L. REV. 323, 325 (1991).

Second—also in contrast to § 43(a)'s enhanced scope of liability, which broadens the ambit of the statute beyond actions in which sellers attempt to pass off their products as someone else's—Congress enacted the IACA precisely to combat the problem of non-Indians passing their products off as "Indian."²⁸⁸ This suggests that Congress aimed for the IACA to punish fraudulent conduct, not simply eradicate all forms of consumer confusion. It is thus unnecessary and overly restrictive for the IACA to utilize a similar strict liability measure of intent.

C. It's Just Too Personal: Why Lawmakers Should be Sensitive to Issues of Identity

From a policy standpoint, perhaps the most important reason why § 43(a) is ill-suited to combat the problem of fake Indian crafts is because the form of "false designation of origin . . . or any false description or representation" used "in connection with"²⁸⁹ the sale of Indian goods—like the IACA itself—has more than economic implications. The ability to label one's goods "Indian-made" is not just a statement about the goods, but also about the producer. While the text of § 43(a) is not definitive on the question of whether false representations must pertain to a quality of the goods—versus a quality of the maker, such as Indianness—no § 43(a) case currently appears to exist in which the ethnicity of the maker of a good is the relevant legal inquiry. Section 43(a) cases focus on factual matters relating to qualities of the goods themselves—whether about ingredients used in making a particular product,²⁹⁰ the geographic region of a product's manufacture,²⁹¹ or

²⁸⁸ See *Native Am. Arts, v. Earth Dweller*, No. 01-C-2370, 2001 WL 910394, at *4 (N.D. Ill. Aug. 8, 2001) ("Non-Indian makers of such goods must not 'pass off' their products as ones made by Indians, Indian tribes or Indian arts and crafts organizations when they are not" (citing *Ho-Chunk Nation v. J.C. Penney*, No. 98 C 3924, 1999 WL 1068700 at *4 (N.D. Ill. Nov. 17, 1999))). See also *Barker*, *supra* note 62, at 46–47 ("It's all a matter of dollars and cents; that is why these impostors want to call themselves Indian. But our motives are pure. We are only interested in the good of Indian culture.").

²⁸⁹ 15 U.S.C.A. §§ 1125 (West 2006).

²⁹⁰ See generally *Pizza Hut v. Papa John's Int'l*, 227 F.3d 489, 495–98 (5th Cir. 2000).

²⁹¹ See generally *Cmty. of Roquefort v. William Faehndrich, Inc.*, 198 F. Supp. 291, 294 (S.D.N.Y. 1961) ("[A]nyone who makes sheep's milk blue-mold cheese in the Community of Roquefort can call it 'Roquefort.' In the second place, anyone can make

otherwise whether a product is what it claims to be.²⁹² In such cases, no likelihood exists for hurt feelings. No personal attacks on individual identity are conceivable. If a court finds that a producer violated § 43(a) because his cheese is not, as labeled, made in France, or because his pizza dough is not made with filtered water, the producer has a choice of whether to stop labeling his products as such, or instead alter his business practices to reflect his representations and make them true. Artisans whom the IACA does not classify as Indians and who cannot seek tribal enrollment, however, have no similar recourse. They cannot, through making new products, or using different methods of production, achieve the arbitrarily determined quality of Indianness as required under the IACA. When Indianness becomes a commodity for sale in and of itself, sellers cease to exclusively sell goods and begin to sell themselves. The result is a unique form of objectification and sale of the Indian—mostly by white consumers—that smacks of hypocrisy when the government touts the IACA as a law bent on increasing Indian sovereignty and social amelioration.

The mere fact that Congress did not design the IACA primarily as a cultural heritage law²⁹³ does not mean that lawmakers should settle for a law that fails to account for what is a cultural heritage problem: individuals' inability to call themselves what they believe they are. When it comes to "economic" regulations that effectively tell American citizens which parts of their cultural identities—especially the immutable parts—they can identify with, courts and legislatures should be especially sensitive to the possibility of cultural harm that could result.²⁹⁴ In the case of the IACA, the

sheep's milk blue-mold cheese and can market it under any name he sees fit except that if it is not made in the Community of Roquefort he may not call it 'Roquefort Cheese.'").

²⁹² See generally *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F. 2d 312 (2d Cir. 1982) ("The [orange juice] ad makes an explicit representation that Premium Pack is produced by squeezing oranges and pouring the freshly-squeezed juice directly into the carton. This is not a true representation of how the product is prepared.").

²⁹³ See, e.g., S. REP. NO. 106-452, at 1 (2000), reprinted in 2000 U.S.C.C.A.N. 2123, 2123.

²⁹⁴ See SHEFFIELD, *supra* note 21, at 6–7 ("[A]ny law, statutory or otherwise, that defines an ethnic group will have social implications beyond the narrow focus of the law, at least in the United States. Federal Indian law . . . is assumed to have an even greater potential for social impact. Indian law calls out for anthropological treatment—not

marginalization of a significant portion of Indian Gap artisans easily outweighs any benefits that may arise from decreasing consumer confusion. If the IACA cannot eradicate consumer confusion without marginalizing and offending huge numbers of potential contributors to the Indian art community, Congress should be willing to consider that perhaps no law at all is better than a bad one.

V. IN NEED OF A SOLUTION

A. *Aligning Consumer and Indian Interest: A Game of Redefinition*

The first hurdle in implementing any effective solution lies in ensuring that given assumptions are consistent with the realities of the operating forum, and that one adequately accounts for such assumptions. If Congress is to enact a solution that helps to preclude misguided consumers from purchasing fake Indian goods, consumers must be both aware of the IACA's existence and genuinely confused about the origins of the goods they purchase.²⁹⁵

Assuming consumers are in fact confused, the government must next determine which goods it will deem real and which it will consider counterfeit, as well as which consumers need this form of statutory protection. Under the IACA, "non-authentic" and "Indian" are mutually exclusive terms: artisans who are politically Indian produce authentic products, while non-politically Indian artisans cannot.²⁹⁶ As demonstrated above, this model is flawed. Similarly, if consumers are aware of the disparity between

because it deals with American Indians, but because it exists solely to maintain and enhance (and sometimes destroy) their social and political existence as peoples separate from the dominant society of the United States.").

²⁹⁵ In the fashion industry, consumers intentionally purchase knock-off jewelry, handbags, and clothing every day because such ersatz goods are less expensive than their genuine counterparts. See generally Amendolara, *supra* note 2. Is it not thus unreasonable to question the extent to which consumer confusion actually plays a role in the number of counterfeit items sold? Since consumers intentionally purchase counterfeit goods regardless of the labels such goods bear, a statute like the IACA likely has no effect on consumer purchasing patterns.

²⁹⁶ See 18 U.S.C. § 1159(a) (2000); 25 U.S.C. § 305e(a) (2000).

their notions of “Indianness/authenticity” and the IACA’s notions of “Indianness/authenticity,” they may begin to disregard such labels all together—if they do not do so already—thereby rendering the Act meaningless. Since the current system of tribal enrollment fails to adequately comport with consumer notions of the groups capable of making “authentic” Indian goods, and therefore risks consumer disregard of the entire statutory scheme, the current labeling regime must change.

1. Redefining Indianness

One solution would be for Congress to modify the IACA’s definition of Indian while allowing the Act to function the way it does now, thereby permitting the newly defined “Indians” to label their goods as “Indian-made.”

Since the IACA does not bar manufacturers from producing “look-a-like” goods, but rather merely regulates how sellers label and market such wares, the Act places a great deal of faith in the ability of consumers to choose the “correct” good.²⁹⁷ This model implicitly hopes that market forces rather than legal means will be effective in driving counterfeit Indian goods from the marketplace. If the Act relies on consumers’ purchasing patterns to drive sellers of fake goods from the market, the Act’s definition of what is “real” and what is not must comport with consumer desires, or else a model based on consumer choice is bound to prove ineffectual.

While such a solution sounds ideal in theory, the logistics of such a system would prove as problematic as the current system of delineation. These logistical difficulties are most evident if one divides the current artisan population and their goods as sellers and presently market them into a matrix involving quadrants as follows: (1) enrolled authentic—the party traditionally aggrieved by knockoffs; (2) enrolled and inauthentic—artists such as the

²⁹⁷ Leaving the extinction of fake Indian goods in the hands of consumers begs a normative question as well as a practical one: is consumer awareness of and desire for goods which are “Indian” and “authentic” even something to be encouraged? Or does it simply promote fetishism and quaint notions of traditionalism that are better off eradicated? In an age that seeks ever-increasing racial and ethnic equality and tolerance, one could argue that encouraging such a stagnant view of Indian culture is detrimental to this goal.

Navajo producers who make the inauthentic kachina dolls; (3) non-enrolled and authentic—representing the Indian Gap; and (4) non-enrolled and inauthentic—artisans who either have no cognizable basis for calling themselves Indian and/or are not misrepresenting their goods as Indian-made.²⁹⁸ The current IACA allows only Indians in quadrants one and two to label their products as “Indian-made” and bars artisans in quadrants three and four from making use of such labels.²⁹⁹ At its crux, the aim of drawing a new Indian line would be to reclassify Indian Gap Indians³⁰⁰ alongside the Indians the IACA currently protects, thereby merely adding quadrant three to quadrants one and two.³⁰¹ Such a redefinition, however, fails to account for the fraudulent practices of the artisans in quadrant two. Consequently, some marketing practices would likely continue to confuse consumers, and some Indian traditions would still risk misrepresentation without recourse. An ideal law would protect the artisans in quadrants one and three while excluding those in quadrants two and four.³⁰² Such a change would eliminate the under/over-inclusiveness problem that plagues the current IACA and other laws that use a political yardstick to measure Indianness.

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(1) Enrolled Authentic	(2) Enrolled Inauthentic
(3) Non-Enrolled Authentic	(4) Non-Enrolled Inauthentic

²⁹⁹ Shaded areas represent categories of people covered under the current IACA categorization of “Indian.”

(1) Enrolled Authentic	(2) Enrolled Inauthentic
(3) Non-Enrolled Authentic	(4) Non-Enrolled Inauthentic

³⁰⁰ See discussion *supra* Part I.B.

³⁰¹ Shaded areas represent categories of people covered under a hypothetical alteration to the IACA’s current categorization of “Indian.”

(1) Enrolled Authentic	(2) Enrolled Inauthentic
(3) Non-Enrolled Authentic	(4) Non-Enrolled Inauthentic

³⁰² Shaded areas represent the groups of people covered under an ideal formulation of “Indian” for purposes of the IACA as the statute presently exists.

(1) Enrolled Authentic	(2) Enrolled Inauthentic
(3) Non-Enrolled Authentic	(4) Non-Enrolled Inauthentic

However, absorbing Indian Gap Indians into the Indian category is not an easy task. There is no objective way for one to determine which individuals fall into the Indian Gap without resorting to a method as arbitrary as the tribal enrollment process³⁰³ because queries of whether an Indian fits within the Gap fail to account for change over time and generations. Supporting this contention, Gail Sheffield maintains that “[e]ven the most cleverly drawn definition [of Indian status] will not conform exactly to social reality in a world of fluid social and ethnic boundaries.”³⁰⁴ One should thus greet any effort to redefine Indianness with repugnance. From a societal stand point, “hairsplitting between and among Indian people that is invited by efforts to legislate Indianness is both divisive and counterproductive.”³⁰⁵ Additionally, lawmakers should be wary of redefining Indianness in any way that would infringe on the sovereignty of individual Native American tribes to determine who their members are.³⁰⁶

2. Redefining Authenticity

A second, and perhaps better solution, is for the government to implement a new regime that focuses on the nature of the work created and hence, the product’s independent “authenticity,” regardless of the artist’s political affiliation. A false advertising statute based on the relationship between an artist and his work, rather than on an artist’s political demarcation could entirely avoid inconsistencies regarding an individual’s relationship to a tribe or a tribe’s relationship to the U.S. Government, either of which may not recognize the artisan as an “Indian.” Furthermore, such a system does not risk encroaching upon tribal autonomy.

³⁰³ SHEFFIELD, *supra* note 21, at 4.

³⁰⁴ *Id.* at 4.

³⁰⁵ *Id.* at 28.

³⁰⁶ Every federally-recognized Indian tribe possesses a basic power as sovereign entity to determine the makeup of its own membership. The Supreme Court recognized this power in 1897. *See* *Roff v. Burney*, 168 U.S. 218, 222 (1897). Stripping Indian tribes of such an elemental right would contradict the overriding policy of self-determination and increased tribal government that has been a hallmark of Indian policy since 1965. *See* SHEFFIELD, *supra* note 21, at 45.

Congress could avert the problems associated with determining which individuals qualify as “Indian” while still proscribing the sale of fake goods to unknowing consumers by changing the inquiry of the IACA from a question of whether consumers would incorrectly believe a product’s maker is an enrolled Indian, to one of whether the consumer would incorrectly believe the product is authentic to its maker either culturally, spiritually, traditionally, or by some other measure. Under such a conception, wares artisans make with inauthentic materials—as is the case in many instances of intertribal misappropriation, against which the current Act fails to protect—and goods manufacturers mass produce in overseas factories could not bear “Indian-made” labels. Such a revised scheme, however, would not preclude an artisan from labeling his products as “Indian-made” simply because he failed to qualify for tribal enrollment. When the government’s belief in an artist’s Indianness and the artist’s belief in his own Indianness conflict, the latter, rather than the former, will likely satisfy consumers’ hunger for authenticity. Thus, tribal status should be irrelevant, so long as the artist crafting the goods believes his self-identification as an Indian imbues his wares with meaning stemming from his Indianness.

While this system is not perfect, the policies of heightened ownership of one’s identity and increased creativity and invention this reformulation furthers are not small, easily-discarded considerations. Any modification of the current system must in some way focus on the goods rather than on the ethnicity of their makers, so as to depersonalize the inquiry—if any—that relates to whatever quality “Indianness” correlates to in both consumers’ and Indians’ minds.

A solution that refocuses the “Indian” question away from tribal recognition may not be completely out of line with the goals of the IACA, because Indian Gap Indians may comprise part of the group of Indians Congress intended the Act to help in the first place. From its genesis in 1935, the goal of the Act was to help Indian communities, and even in 1935 enrolled Indians did not constitute the entirety of such communities.

3. Requiring Intent to Deceive

A third solution would be for Congress to alter the way authorities enforce the IACA by premising accountability under the statute on intent rather than strict liability. Congress could fulfill this aim by implementing a requirement wherein a plaintiff who sues under the IACA must demonstrate that a seller acted with the intent to “falsely suggest” mislabeled goods were Indian-made in order to prevail under the statute. Such a solution would be relatively easy to enforce, would not require altering the definition of Indian or authenticity, and would be in keeping with the legislative intent of the Act.³⁰⁷ Such a policy would, furthermore, protect innocent artisans who in no way mean to “falsely suggest” their goods are Indian-made against careless purchasers. Such an enforcement mechanism would encourage informed and careful shopping, benefiting the consumers most likely to care about artisans and the craftsmanship of their goods. Elimination of the strict liability element would distinguish an IACA cause of action from regular false advertising or truth-in-advertising laws, to which Indian and non-Indian goods alike remain subject.

B. Additional Efforts

Artisans themselves are also employing less legalistic alternatives to help curb the proliferation of counterfeit goods sales. Certification programs, for instance, such as the Indian Arts and Crafts Association’s logo effort³⁰⁸ and the Made in Alaska³⁰⁹ program—of which artisans are making increasing use—help to heighten consumer awareness of the existence of fakes and encourage consumers to be vigilant when making purchases. Such initiatives educate consumers about the prevalence of Indian fakes in particular and the negative repercussions of such goods. As consumers become increasingly aware of such programs, they may change their purchasing patterns, bolstering sales of “real” Indian goods—however the government defines them—and decreasing

³⁰⁷ See *supra* Part IV.B.1.b.

³⁰⁸ See The Indian Arts & Crafts Association, About Us, <http://www.iaca.com/?page=about> (last visited Oct. 23, 2006).

³⁰⁹ Alaska Division of Community Advocacy, Made in Alaska Program, <http://www.dced.state.ak.us/dca/mia/home.htm> (last visited Oct 23, 2006).

instances of consumer confusion, thereby fulfilling the aims of the IACA.

VI. CONCLUSION

The controversy surrounding which individuals may refer to themselves as Indians under the Indian Arts and Crafts Act is just one example of the problems that can occur when race and the law mix. Marlon B. Ross, a writer and scholar on the subject of race and identity politics, aptly notes that as a historical view of racism in America demonstrates:

Race marks categories that determine who is legally allowed and culturally endowed to hold certain kinds of property. . . . [I]t is also a category that marks the bonds and bounds of property itself; that is, who gets included and excluded from the right to determine the value of intellectual properties of others.³¹⁰

Ross illustrates this point by quoting Albion W. Tourgée, lead counsel for Plessy in *Plessy v. Ferguson*,³¹¹ the 1896 case that challenged “separate but equal” treatment of African Americans:

Six-sevenths of the population is white. Nineteen-twentieths of the property of the country is owned by white people. . . . Under these conditions, is it possible to conclude that the reputation of being white is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?³¹²

Brownell agrees, definitively stating that “[a]s long as race is the basis of the government’s definition of Indian, self determination will not be.”³¹³ In the context of Indian arts, then,

³¹⁰ Marlon B. Ross, *The New Negro Displayed: Self-Ownership, Proprietary Sites/Sights, and the Bonds/Bounds of Race*, in CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY 259 (Elazar Barkan ed., 2002).

³¹¹ 163 U.S. 537 (1896).

³¹² *Id.*

³¹³ Brownell, *supra* note 57, at 317.

the problem with any governmental definition of Indian status lies not so much in the substantive definition of Indianness the government employs, but rather in who creates such a definition and from where it originates. If Congress implements a new enforcement system for properly identifying authenticity that does not hinge on any definition of Indianness, it could well avoid difficult issues of sovereignty, government intrusion, and individual identity.