

ADDITIONAL COMMENTS OF THE
NATIVE AFFAIRS & DEVELOPMENT GROUP
ON THE OFFICIAL STUDY OF INSIGNIA OF NATIVE AMERICAN TRIBES
STATUTORILY REQUIRED UNDER PUBLIC LAW 105-330

The Native Affairs & Development Group representing the Pueblo of Picuris, the Chickasaw Nation, the Pueblo of San Juan, and as a special matter, the Mohegan Tribe of Connecticut expresses its appreciation to the Commissioner and staff of the United States Patent and Trademark Office for the opportunity to provide additional comments and respond to questions on the procedures to be adopted in responding to Public Law 105-330.

A. Background

Public Law 105-330 requires that the Patent and Trademark Office study a variety of issues surrounding trademark protection for the official insignia of federally or state recognized Native American tribes. There are over 550 tribal governments in the United States of America under the federal trust relationship. It is an intrinsic part of every tribal nations culture to protect its heritage, art, emblems and culture. Native American insignia is an inherent part of a tribe's culture. The statutorily required study of Public Law 105-330 is appropriate to determine whether Native American culture is fully protected under the trust relationship and it is appropriate that the United States Patent and Trademark Office as an extension of the trust responsibility be directly involved because of its commitment to the protection and promotion of commerce within the United States under the trademark laws.

The Bureau of Indian Affairs in the Department of the Interior maintains the registry formally recognizing American Indian tribes of the United States. Indeed the State of North Carolina recognizes nine tribes who live within its borders who are not recognized by the United States Government. For the purposes of this study and any legislation or rule making which might follow, it is our suggestion that rights be granted only to Native American tribal governments officially recognized by the United States or by the several states through official acts of the state legislature.

The Congress is involved and interested in the protection of Native American insignia because of its responsibility under the Commerce Clause of the

Constitution. This clause is the basis for the federal trust relationship with tribal governments. Congress has plenary power to oversee the policies that are embodied in the relationship between the national government and its indigenous peoples. Protection of culture and the associated commerce and good will appertaining thereto is important to the overall Public Good.

Native American tribal governments are domestic sovereigns having authority over marks, seals, and designs which make up the unique art which is a significant part of each tribes culture. Presently, Native American insignia are not protected outside the zone of tribal affairs because these marks and symbols do not fit within the scope of protections generally afforded by the law. Native Americans are often negatively impacted by the failure to formally recognize and protect Native American insignia both culturally and commercially. Tribal culture is harmed by the failure to fully protect Native American insignia whenever an uninformed public finds in the stream of commerce items which misrepresent the cultural identity of Native American peoples. Tribal commerce is harmed by the failure to fully protect Native American insignia whenever an uninformed public finds in the stream of commerce items which are not authentic.

It is our belief that much of the harm to both the culture of Native Americans and commerce can be avoided by a simple system of registration for Native American insignia on a register similar in nature to the Supplemental Register as defined under 15 U.S.C. 1091 through 1095 but without the restrictions of 15 U.S.C. 1092 and 1096. Our comments and response are directed to this solution which we believe will be supported by both tribal governments as well as trademark owners. Because this solution has administrative similarity to the existing trademark practice, we believe it is administratively feasible and cost effective. Importantly, there should be no cost to the public.

B. Comments and Response to Initial Questions

(1) How should the term “Official Insignia” be defined?

We believe the insignia of Native Americans are those traditional symbols adopted and used by tribal governments which come from the culture, art and history of its people. These include marks, seals, and designs which make up the unique art which is a significant part of its culture. One such example is the Great Seal of the Chickasaw Nation.

One definition which we commend reads as follows: The term “Native American insignia” shall mean any word, name, symbol, or device or any combination thereof used by Native Americans and/or adopted by tribal governments which come from the culture, art and history of its people, and which is not in use in commerce.

Words, names, symbols and devices which are in use in commerce can be protected under present law.

(2) How should the PTO Establish and Maintain a list of Official Insignia

Native American insignia are not presently protected outside the zone of tribal affairs because these marks and symbols do not fit within the scope of protections generally afforded by the law. Protection can be established under the concepts and procedures of the present trademark law by establishing a simple system of registration for Native American insignia on a register similar in nature to the Supplemental Register as defined under 15 U.S.C. 1091 through 1095 but without the restriction of 15 U.S.C. 1092 and 1096.

Specifically we propose:

Establishment of the Native American Insignia Register whereby Native American insignia which are qualified for protection can be registered;

Generally following the present procedures of the PTO, applications for the registration of Native American insignia should be received only from tribal governments officially recognized by the United States or by the several states through official acts of the state legislatures;

The application should conform to the existing rules for trademark applications including the requirement for drawings and fees except that no recitation of use or use in commerce shall be required. Specimens shall be received, if available, to demonstrate the insignia, and the declaration shall state that the insignia has cultural significance to Native Americans represented by the applicant tribal government and that to the knowledge of applicant, the insignia to be registered is not used in commerce;

The application should be examined and upon a determination that the insignia is not identical to or in such near resemblance to any mark of another as to cause confusion, or to cause mistake or to deceive when used by or under the authority of applicant, the same should be published for opposition and thereafter placed on the Native American Insignia Register;

That between the fifth and sixth year of registration, registrant shall be required to file a statement that continued registration of the mark is requested by applicant; but no declaration under Sections 8 and/or 15 (15 U.S.C. 1058 and 15 U.S.C. 1065) be received; and

Renewal of registrations on the Native American Insignia Register may be accomplished in accordance with present procedures.

(3) What is the Impact of Proposed Changes in Current Law or Policy?

Current trademark registration law and policy is focused upon the use or intent to use a mark commercially. The creation of a Native American Insignia Register and the intent to register insignia which are culturally significant to Native Americans but not used or intended to be used as marks in commerce represents a departure from the present regime.

Registration on the Native American Insignia Register is not intended to preclude subsequent registration on the Principal Register by the tribal government, but is intended to protect insignia which are not used “in commerce” as that phrase is generally understood.

It is believed that the departure from traditional trademark registration concepts is unlikely to be creative of significant trademark conflict. The purpose of the proposed procedure is to allow filing by a tribal government authority, examination as it is generally conducted, publication with the right of opposition reserved to any person who believes that they will be damaged by registration, issuance as it is generally conducted, re-affirmance of interest in the registered insignia during the first term of the registration, and renewal.

(4) What will be the Impact of Prohibition on Federal Registration and New Uses of Official Insignia

Congress has plenary power to oversee the policies that are embodied in the relationship between the national government and its federally recognized tribal governments and citizens of these governments. Protection of culture and the associated commerce and good will appertaining thereto is important to the overall public good.

Recognition of the traditional symbols adopted and used by tribal governments which come from the culture, art and history of its people will enhance commerce by allowing each tribe as a domestic sovereign to control and maintain authority over its marks, seals, and design which make up the unique art which is a significant part of its culture.

Prohibition of federal registration of marks which are confusingly similar should have the expected result of denying registration of marks which could be creative of confusion in the marketplace. Under the present proposal, it is contemplated that new uses of official insignia will only be allowed under the authority of the tribal governments.

(5) What will be the Administrative Feasibility

We believe that the administrative feasibility, including costs, of changing the current law to allow registration of Native American insignia will be minimal.

The proposed regime is substantially identical to the present trademark registration procedure and follows the broad themes of existing law so that impact on both the substance of the law and the administration of the same should be minimal.

The presence of presently registered marks which are substantially similar to insignia proposed to be registered on the Native American Insignia Register will preclude such registration in the same manner as registration is presently denied. Because the proposed procedure is substantially similar to existing examination, it is believed that no substantial burden will be imposed upon the PTO. Because the proposed procedure follows existing examination procedures, it is expected that fees presently charged for filing will be sufficient to cover the costs incurred.

(6) What will be the Timing of Changes in Protection

Under the proposal to create the Native American Insignia Register suggested herein, all protection is suggested prospective. Accordingly, there should be no cost to the public or business and no loss of existing rights will occur.

(7) What Statutory Changes May Be Necessary

Under the simple system of registration for Native American insignia on a Native American Insignia Register, it would be required to amend Title 15 of the United States Code to create the Native American Insignia Register in a form substantially similar in nature to the Supplemental Register as defined under 15 U.S.C. 1091 through 1095 but without the restrictions of 15 U.S.C. 1092 and 1096.

In addition, 15 U.S.C. 1127 should be amended to include the definition of insignia which should read as follows:

“The term ‘Native American insignia’ shall mean any word, name, symbol, or device or any combination thereof --

(1) used by Native Americans and/or adopted by tribal governments which come from the culture, art and history of its people, and

(2) which is not in use in commerce.”

Additionally, a new subsection to 15 U.S.C. 1051 should be added as follows:

“Applications to Register Based on Native American Insignia

(f) Any Native American nation or tribal government recognized by the United States or by the several states through official acts of the state legislature who has Native American insignia may apply to register the insignia under this Act on the Native American Insignia Register hereby established:

(1) By filing in the Patent and Trademark Office--

(A) a written application, in such form as may be prescribed by the Commissioner, verified by the applicant specifying the federal or state authority recognizing applicant, the Native American insignia, including a statement to the effect that applicant believes the insignia comes from the culture, art or history of its Native American people, is not in use in commerce, and that registration in the identical form or in such near resemblance will not be likely to cause confusion, or to cause mistake, or to deceive; and

(B) a drawing of the insignia

(2) By paying in the Patent and Trademark Office the prescribed fee.

(3) By complying with such rules or regulations not inconsistent with law, as may be prescribed by the Commissioner.”

Conforming changes would additionally be required in the Trademark Act to reference the new Native American Insignia Register.

(8) Are There Other Relevant Factors?

We believe that American culture is harmed by the failure to fully protect Native American insignia. Confusion and misrepresentation of cultural identity is harmful in any society. As noted earlier, harm exists whenever an uninformed public finds in the stream of commerce items which misrepresent the cultural identity of people. Commerce is harmed by the failure to fully protect culture whenever an uninformed public finds in the stream of commerce items which are not authentic.

C. Conclusion

We offer our services to assist the United States Patent and Trademark Office in this undertaking and thank you for the opportunity to be a part of this important study.

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