

Using Intellectual Property Laws to Protect Indigenous Cultural Property

By Olivia J. Greer

I. Introduction

Last April, a Paris auction house made headlines when it hosted a hotly contested sale of Hopi Indian artifacts, with items selling for as much as \$210,000.¹ The prospect of the auction had produced intense debate over the propriety of the sale, a lawsuit by the Hopi tribe to enjoin the auction, and even an effort by the United States ambassador to France to intervene on behalf of the Hopi. The legal fight culminated in a ruling from a French court allowing the auction to go forward, amidst ongoing protest.² The Hopi argued that the objects being offered for sale were sacred artifacts, stolen from tribal lands and central to the Hopi religion. The Hopi and their supporters regarded the sale of such artifacts as sacrilege.³

The Paris sale is just one recent example of a centuries-old phenomenon of outsiders trying to profit from indigenous cultural property (whether physical objects like masks or intangible goods like symbols). Notwithstanding the outcry of many Americans over the auction, the unauthorized use and sale of American Indian cultural property is a longstanding practice in the United States, one that is actively challenged by indigenous communities here.

This article explores whether and to what extent U.S. intellectual property laws may prevent the unauthorized exploitation of tangible and intangible indigenous cultural property. IP does not apply neatly to these issues. At a fundamental level, there is a very real mismatch between Western individualized intellectual property rights principles (to protect and incentivize the creation of products of individual genius) and indigenous principles of community creation and ownership. “In general, indigenous peoples’ worldviews hold communally owned property and stewardship as paramount.”⁴ Intellectual property laws provide protection that tends to be limited in scope and duration.⁵ For this reason, there is a reasonable critique that intellectual property laws are “insufficient for representing indigenous interests.”⁶

This is true particularly for indigenous communities that view native culture, and even its existence, as threatened by outsiders’ use of cultural property.⁷ From this vantage point, compensation is not an adequate remedy. The ideal—and perhaps only acceptable—solution is to prevent outsiders from making any use of sacred artifacts and symbols. Economic solutions also “may be not only inadequate, but insulting” to tribal members seeking to protect traditions and sacred practices.⁸ But it is arguably impossible, in this day and age, to fully prevent outsiders from making unauthorized use of intellectual property.

Therefore, others argue, if outsiders are going to benefit commercially from the appropriation of indigenous cultural objects and intangible property, the originator(s) of that property should receive at least some compensation.⁹ From this perspective, the primary issue is loss of control over cultural property and the resulting loss of ability to ensure that “the investment in that culture goes back to [the] communities.”¹⁰

Is a tribe best served by seeking to fully prevent others’ use of its cultural property or by allowing such use and seeking to benefit financially from it? “Although both sets of concerns are likely to be operating simultaneously in some situations, because these two motivations are so different, it may be that the law will sometimes satisfy one while it frustrates the other.”¹¹

This article focuses on three examples of trademark or copyright law being used, with varying degrees of success, to assert and protect the rights of indigenous communities in their cultural property. The examples involve the Navajo Nation, which owns numerous trademarks related to its name and is currently litigating to enforce those marks; the Zia Pueblo of New Mexico, which has sought to block the registration of trademarks that use the tribe’s sacred sun symbol; and the Mardi Gras Indians of New Orleans, members of which have registered copyrights in their ceremonial Mardi Gras suits in order to block their unauthorized commercial exploitation. These efforts illustrate the benefits and limitations of invoking intellectual property laws to protect indigenous cultural property.

Intellectual property laws are not the only legal protections available for indigenous cultural property. Two federal statutes directly address American Indian property: the Native American Graves Repatriation Act requires the return of certain artifacts and human remains to tribes from museums and private holders, and the Indian Arts and Crafts Act is a consumer protection law prohibiting the mislabeling of goods as crafted by American Indians.¹² Some American Indian tribes also have passed their own laws, which tend to claim ownership in, as well as decision-making authority over, a wide range of objects, writings, and cultural practices.¹³ The laws draw on traditional intellectual property concepts, but they go further to prohibit unauthorized appropriation of cultural property by outsiders and (in contrast to and conflict with federal intellectual property law) allow ownership interests to be held in perpetuity.¹⁴ These federal and tribal laws provide very limited protection, however. The federal statutes protect only physical artifacts and only in specific, lim-

ited contexts. The tribal laws, although wide-reaching in protective scope, cannot be enforced against non-Indians acting outside of Indian territories.¹⁵ Given these limitations, intellectual property laws become a compelling option. The question is how effective they can be.

II. Trademark Law

A. Overview

A trademark is a word, symbol, or phrase used to identify a seller's goods or services and to distinguish them from goods or services provided by others.¹⁶ Trademark law is aimed at preventing consumer confusion in the marketplace and allowing companies to establish reputations and goodwill.¹⁷ It governs only the *use in commerce* of words, symbols, and phrases. Trademarks are governed by both state and federal law, but the federal Lanham Act has become the primary source of trademark regulation.¹⁸

Under the Lanham Act, to qualify as a trademark, a mark must be "distinctive," that is, capable of identifying the source of a particular good or service.¹⁹ When a mark qualifies as a trademark, a party may establish exclusive rights in the mark by either being the first to use the mark in commerce or the first to register it with the U.S. Patent and Trademark Office (PTO).²⁰

A trademark does not have to be registered with the PTO to be protected, but registration provides a number of benefits, including the ability to sue for infringement in federal court and establishing a trademark as "incontestable" after five years of use following registration. An application for trademark registration also provides an immediate test of the mark: the PTO may reject a mark for a variety of reasons, including that it will cause confusion with another mark. Once the PTO approves a mark for registration, it is "published" for a period of thirty days, during which interested parties may oppose registration.²¹

Trademark law would not have provided a remedy for the Hopi seeking to prevent the sale of sacred artifacts in Paris. The artifacts themselves are neither trademarks nor protectable trade dress, and the sale of a unique object would, in any event, be protected by the first sale doctrine.²² But, in addition to artifacts, the words and symbols of traditional cultures have long been widely appropriated by outsiders, from the Jeep Cherokee to the American Indian words used as the names of towns on Long Island. Trademark law provides a possible tool—albeit an imperfect one—for addressing certain unauthorized uses of indigenous words and symbols. In fact, trademark law may be a particularly flexible tool, as it can be wielded as both a shield and a sword. Trademark registration is best characterized as a defensive act, proactively establishing rights that later may be asserted against infringers. In comparison, opposing the trademark registration of another party is generally

offensive, challenging another party's assertion of rights. (Trademark opposition also may also be seen as defensive in seeking to prevent harm that would result if another party's trademark were registered.)

Trademark registration and opposition each have drawbacks as means of protecting indigenous words and symbols. Registration is particularly problematic because use in commerce is an absolute requirement for trademark registration. The words or symbols for which indigenous communities might seek protection are not likely to be used in commerce—in fact, commercial use could be anathema to community members and leadership.²³ Opposition to trademark registration must be based on a statutorily established ground, such as that the proposed mark will cause confusion with another trademark; is not distinctive, deceptive or fraudulent, or not in commercial use; or another specified reason.²⁴ Thus, the mere fact that a registrant is using an indigenous word or symbol as a mark is not, by itself, a sufficient ground for opposition. A tribe seeking to oppose registration must be able to establish one of the statutory grounds for rejecting the application, which may not always be possible.

Despite these hurdles, at least two American Indian tribes have used trademark law to challenge unauthorized uses of their marks—through both registration and opposition. The Navajo Nation, decades ago, pro-actively registered numerous trademarks related to its name and currently is litigating to enforce its rights in connection with those trademarks. The Zia Pueblo of New Mexico has sought to prevent unauthorized uses of its unregistered symbol in part by opposing the registration of marks incorporating that symbol. These two cases well illustrate the pros and cons of using trademark law to protect indigenous words, phrases, and symbols from unauthorized commercial exploitation.

B. Enforcing a Registered Mark: *Navajo Nation v. Urban Outfitters*

The Navajo Nation is one of the largest organized American Indian tribes, with an established tribal government and a history of both cooperative engagement with "outsiders" and successful litigation to protect its rights and property.²⁵ In a prescient move, the Navajo Nation began registering trademarks connected to the Navajo name in 1943 and now holds numerous registered trademarks in connection with the sale of goods and services, including clothing, jewelry, housewares, and accessories.²⁶ In February 2012, the Navajo Nation sued clothing company Urban Outfitters and its subsidiaries Anthropologie and Free People as well as the companies' websites (collectively, "UO"), alleging that UO infringed its trademarks by using the name "Navajo" in connection with its sale of goods ranging from jewelry to underwear to flasks.²⁷ UO entities marketed, for instance, a "Vintage Handmade Navajo Necklace," "Navajo Hipster Panty," and "Navajo Print Fabric Wrapped Flask."²⁸ The

complaint alleged trademark infringement, trademark dilution by blurring and tarnishment, and violation of the Indian Arts and Crafts Act, which, as noted, prohibits the sale of goods labeled falsely as made by American Indians.²⁹

The Navajo Nation argued that UO used the word “Navajo” in direct competition with the Navajo Nation’s own sale of goods in the same channels of trade in a way that deceived and confused customers. The tribe claimed that UO’s goods were “designed to convey to consumers a false association or affiliation with the Navajo Nation, and to unfairly trade off of the fame, reputation, and goodwill of the Navajo Nation’s trademarks.”³⁰ UO countered that its use was merely descriptive—that it had used the mark not as an identifier of source but as an identifier of a particular style—and that the use therefore was not actionable trademark use.³¹ The parties’ arguments addressing the trademark dilution claims and the Indian Arts and Crafts Act claim focused on whether the Navajo Nation had adequately alleged those claims and whether the Indian Arts and Crafts Act could be invoked in relation to contemporary goods or was limited to traditional arts and crafts.³²

In April 2013 (the same month that the Hopi tribe was fighting in a Paris court), a federal court in New Mexico denied UO’s motion to dismiss.³³ The court found that the Navajo Nation had sufficiently alleged that UO used the word “Navajo” as a trademark in a way that could lead to consumer confusion.³⁴ The court concluded that the word “Navajo,” which UO argued was descriptive and thus unenforceable, had “a primary meaning that refers to the Navajo tribe and its people” and that the term therefore conveyed information about source even when used descriptively as an adjective.³⁵ The court denied UO’s motion to dismiss the trademark infringement claim, finding that the Navajo Nation adequately alleged that UO’s use was on similar goods that the Navajo Nation markets and sells; that the goods competed in many of the same channels of commerce; and that buyers exercising reasonable care could be deceived into thinking they were buying a product made by the Navajo Nation or a member of the tribe. The court also denied UO’s motion to dismiss the remaining claims.³⁶

In the wake of the district court’s ruling, the parties agreed to submit to mediation, but they recently informed the court that the mediation had been unsuccessful.³⁷ The parties are likely to be back in court soon and could end up going to trial, with a number of possible results. It is possible that UO will be enjoined from using the Navajo mark. Such a ruling would send a strong message to “outsiders” that native culture is not freely available for appropriation. It is also possible the court could find that UO used the Navajo mark only descriptively and that the use was not likely to confuse consumers as to a connection with the Navajo people. In a worst case scenario for the tribe, it is also possible that

the court could find the “Navajo” mark to be generic and not enforceable. In its motion to dismiss ruling, the court held that the tribe had adequately alleged that the term “Navajo” has secondary meaning and is not generic,³⁸ but the issue remains open. This is a case to watch as it progresses, as it could produce a seminal ruling on the effectiveness of trademark law in protecting indigenous names and other tribal marks.

C. Protecting an Unregistered Symbol: The Zia Pueblo of New Mexico

Even if a mark is not registered, trademark law is still an available means of policing and protecting indigenous words, phrases, and symbols—as the Zia Pueblo has established over the course of more than two decades. Zia Pueblo is an American Indian reservation in New Mexico. Its sacred sun symbol has been used in religious ceremonies since at least 1200.³⁹ A former governor of the Zia Pueblo has explained that the symbol “was and is a collective representation of the Zia Pueblo. It was and is central to the Pueblo’s religion. It was and is a most sacred symbol. It represents the tribe itself.”⁴⁰ In 1925, the State of New Mexico established its official state flag, which features a stylized version of the Zia sun symbol. Over time, the symbol has “become deeply embedded in the identity of New Mexico”⁴¹—so embedded, in fact, that a variety of New Mexico commercial ventures, including pest control companies, window cleaning services, motorcycles, and public toilets, has incorporated the symbol into their logos.⁴²

Members of the Zia Pueblo claim that outsider appropriation of the sun symbol has harmed its sacred significance. A tribe member explained, “With the exploitation of these symbols, their meaning is depleted. This, in turn, inevitably affects our self-worth and sense of dignity.”⁴³ But recourse has been limited. The Zia people could not assert exclusive trademark rights once the symbol became part of the state flag because section 2(b) of the Lanham Act bars registration of any mark that “consists of or comprises” the flag or other insignia of a state.⁴⁴ However, because section 2(b) prevents only the *registration* and not the *use* of the symbol, numerous business entities have been able to use the Zia sun symbol in logos, with these uses going largely unchallenged.

Instead of seeking to register the sun symbol, the Zia Pueblo embarked on a legal campaign to contest the registration of marks incorporating the symbol.⁴⁵ The tribe engaged in two separate efforts to oppose trademark registrations on the ground that, under section 2(a) of the Lanham Act, the proposed trademark would falsely suggest a connection with the Zia Pueblo.⁴⁶ In both instances, after lengthy proceedings, the commercial entities attempting to register marks that incorporated the Zia sun symbol withdrew their applications.⁴⁷

Although these withdrawals represented isolated victories for the Zia Pueblo, the withdrawals produced

no precedent that might discourage other commercial entities from registering similar marks,⁴⁸ giving the Zia Pueblo little ammunition for future challenges. However, the Zia Pueblo's legal efforts did lead to considerable local publicity that appears to have conveyed the message that the Zia sun symbol should not be used without permission. Since then, the Zia Pueblo has successfully negotiated licenses with businesses for use of the sun symbol in exchange for a donation to the Zia Pueblo's scholarship fund.⁴⁹

In addition, in 1994, the Zia began a campaign seeking compensation from New Mexico for its use of the sun symbol on the state flag.⁵⁰ Although the campaign has not succeeded in securing compensation for what the Zia people see as seventy years of unauthorized use, it does appear to have opened lines of communication and negotiation between the Zia Pueblo and the State. First, the State issued a memorandum acknowledging that the symbol belongs to the Zia Pueblo and that the State appropriated it without proper permission and authority.⁵¹ Then, in 2008, when the State sought to create a new state quarter, it approached the Zia Pueblo to request permission to use the Zia sun symbol in the new design, which the Zia Pueblo granted.⁵²

The story of the Zia sun symbol demonstrates that even without trademark registration, trademark law can offer indigenous communities a means of exerting pressure on entities that might exploit indigenous words, phrases, or symbols. The outcome of the Navajo Nation lawsuit remains to be seen, and the Zia Pueblo tribe cannot claim sole ownership of its symbol, with "its use continu[ing] to be abused, to the detriment of the tribe."⁵³ But, at the very least, trademark law does provide a basis for demanding compensation for the use of a mark and thereby creating enough public awareness to meaningfully affect the interaction between indigenous communities and outsiders in connection with indigenous marks.

III. Copyright Law

A. Overview

U.S. copyright law is grounded in the Constitution, which authorizes Congress to "promote the Progress of Science and useful Arts" by creating a limited monopoly in original creative works, securing for their creators a suite of exclusive rights for a limited period of time.⁵⁴ For the duration of the copyright, its owner holds the sole right to reproduce the work, to create derivative works (new works based on or using the original work), to distribute copies, to publicly perform the work, and to publicly distribute the work.⁵⁵ Although an author must register a work with the Copyright Office to be able to enforce the copyright in court, a work need not be registered to be copyrighted; copyright rights inhere from the moment the work is "fixed" in a "tangible medium of expression."⁵⁶

At first glance, copyright law may appear to be an ideal tool for protecting cultural property such as the Hopi artifacts auctioned in Paris. But, in fact, copyright law (like trademark law) does not prevent sale of a unique object or a lawfully acquired copy. Under the "first sale" doctrine, codified in section 109 of the Copyright Act, once a copyright owner sells or otherwise assigns an original work to another party, that party is free to resell the work (but not to reproduce it).⁵⁷

The potential benefits of copyright protection for indigenous cultural property are also complicated by the focus of copyright law on the rights of a given work's creator. The law's focus on the creator or creators of a work, to the exclusion of others who may have an interest in or connection to the work, poses a challenge in seeking to advance the interests of a group of people in protecting their history and legacy as reflected in cultural artifacts. Relatedly—and perhaps of most practical importance—copyright protection is limited in duration, generally to the life of the author plus seventy years. This limitation prevents perpetual monopolies on works, instead dedicating them eventually to the public domain.

At least one indigenous group in the United States, the Mardi Gras Indians of New Orleans, has chosen to register the copyrights in the intricate costumes and head-dresses used for parading during the city's annual Mardi Gras celebration.

B. Copyright Law and the Mardi Gras Indians of New Orleans

The Mardi Gras Indians form a culture unique to New Orleans. A spiritual and social order, the Mardi Gras Indians trace their roots back to a legend about a runaway slave who found refuge with area American Indians.⁵⁸ The culture is secretive and relies on oral tradition to transmit customs of chanting, dancing, and—most publicly—creating and displaying Mardi Gras suits, "ornate works of sculptural art featuring brightly colored ostrich feathers, reams of rich velvet, and thousands of glass beads, rhinestones, and sequins sewn into intricate, handmade details and designs."⁵⁹ Mardi Gras Indians consider their suits to be not merely works of art, but sacred, "a spiritual expression of [their] true selves."⁶⁰

For at least 100 years, members of Mardi Gras Indian tribes have worked all year to create their suits and have displayed them on Mardi Gras, parading through the city. This public aspect of their ritual has made it possible for photographers to capture images of Mardi Gras suits, often selling their photographs for as much as \$500 each without seeking permission from or providing any compensation to the suits' creators.⁶¹

After decades of this casual exploitation—photographs of Mardi Gras suits can be found for sale all over New Orleans, from postcard shops to fine art galleries—Mardi Gras Indians have sought to prevent unauthorized

commercial exploitation of their sacred ritual by registering the copyrights in their suits.⁶² As the authors of registered works of art, the creators of Mardi Gras suits have the exclusive right to create, or license the creation of, derivative works, including photographs.⁶³ The Mardi Gras Indians emphasize that they do not wish to prevent spectators from taking casual photographs for personal use or for educational use; they merely seek to prevent unauthorized commercial exploitation.⁶⁴

Despite the general rule that the Copyright Act does not protect clothing or costumes, members of Mardi Gras Indian tribes have been able to register copyrights in their suits as three-dimensional sculptural works.⁶⁵ They have argued that the suits satisfy the originality, authorship, and fixation requirements of the Copyright Act under *Mazer v. Stein*, the Supreme Court ruling that first recognized the copyrightability of sculpture.⁶⁶ “As three-dimensional works of sculptural art, Mardi Gras Indian suits are created and showcased in public settings by an indigenous community of authors as part of cultural tradition, heritage, and practice.”⁶⁷ The suits are worn, but over clothing and only once. In fact, many Mardi Gras Indians ritually destroy their suits after each Mardi Gras and immediately begin work on the next year’s suit.⁶⁸

Perhaps the strongest argument that Mardi Gras suits are artistic works that qualify for copyright protection is that those that are not destroyed are increasingly displayed as stand-alone objects in museums.⁶⁹ As David O. Carson, then General Counsel of the U.S. Copyright Office, stated when asked about the copyright registrations of Mardi Gras Indian suits, “I am not so sure the Mardi Gras costumes are really articles of clothing. There is a case that they are really works of art.”⁷⁰

To date, no Mardi Gras Indians have sued for infringement of their suits. However, as with the Zia Pueblo, increased attention to the intellectual property rights of the Mardi Gras Indians has led to opportunity. At least one formal licensing partnership has developed—between the New Orleans Mardi Gras Indian Council and an organization called Fotos for Humanity. Fotos for Humanity has assigned the copyright in photographs taken by its founder to the New Orleans Mardi Gras Indian Council, which has in turn licensed the images back to Fotos for Humanity under a profit-sharing scheme.⁷¹ (It is not entirely clear how the Council manages or distributes the profits.)

The story of the Mardi Gras Indians’ suits demonstrates that although copyright registration is far from a perfect solution to unauthorized commercial exploitation of indigenous cultural property—with the limited duration being one glaring problem—it has reduced uncompensated appropriation.

C. The Visual Artists Rights Act

In addition to the exclusive rights provided by section 106 of the Copyright Act, the Visual Artists Rights Act (VARA), enacted in 1990, gives the creators of visual art (paintings, sculptures, drawings, prints, and some photographs) certain “moral rights” in their work—the rights of “attribution” and “integrity.”⁷² These rights allow the creator of a work to prevent it from being displayed without proper attribution and to prevent intentional “distortion, mutilation, or other modification” of the work that “would be prejudicial to [the artist’s] honor or reputation.”⁷³

However, courts have held that VARA does not apply to unauthorized reproductions of a work. For instance, in *Silberman v. Innovation Luggage*, when an artist licensed a company to create posters using one of the artist’s photographs, and the image was ultimately used in an advertisement without the artist’s consent, the district court dismissed a VARA claim on the ground that the advertisements were not signed originals of the photograph but rather reproductions, and only the artist’s signed and numbered prints fell within VARA.⁷⁴ Under *Silberman*, a photograph of a Mardi Gras suit would not amount to display of an artwork without proper attribution because the photograph is not the original work; nor could a photograph of a suit qualify as a “distortion, mutilation, or other modification” of the suit itself. VARA, therefore, most likely does not cover Mardi Gras suits.

Several states have passed their own laws that provide the same rights of integrity and attribution as VARA but with broader reach. One of these is Louisiana’s Artists’ Authorship Rights Act (AARA), which prohibits the display or publication of a work of fine art, or a reproduction of that work, without attribution to the artist.⁷⁵ The statute further prohibits the display or publication of a work of fine art, or a reproduction of that work, “in an altered, defaced, mutilated, or modified form.”⁷⁶ This statute on its face could plausibly apply to an unauthorized photograph of a work, but no court has yet construed the statute in this manner. Moreover, cases under a similar New York law have held that it is preempted by VARA.⁷⁷ Thus, it is unclear whether or how much assistance the Louisiana AARA—or related laws in other states—can potentially provide in protecting indigenous cultural property.

IV. Conclusion

Trademark and copyright laws are not ideally suited to the problem of modern indigenous cultural appropriation. Trademark law requires registration and careful monitoring and cannot reach each and every unauthorized use of a mark. Copyright law also has limitations, not the least of which is its life-plus-seventy-years duration. And, of course, pursuing legal remedies is expensive. Nevertheless, as we have seen, intellectual property law can provide a basis for indigenous communities to

prevent at least some unauthorized exploitation of their cultural property.

The history of indigenous communities, including a great deal of unauthorized exploitation and an ongoing power imbalance, may argue for a *sui generis* regime to protect indigenous cultural property, as some have advocated.⁷⁸ But nothing along these lines appears to be imminent. The central question is how to provide recourse for those who live and create within a Western legal system but are not necessarily proponents or adopters of its commercial values. This is a question whose answer will inevitably depend on specific contexts and ultimately must involve a balancing act that will not always be fully satisfactory.

Endnotes

1. See Tom Mashberg, *Auction of Hopi Masks Proceeds After Judge's Ruling*, N.Y. Times ArtsBeat blog, Apr. 12, 2013, 8:20AM, <http://artsbeat.blogs.nytimes.com/2013/04/12/french-judge-rules-that-auction-of-hopi-masks-can-proceed/> [hereinafter Mashberg, Apr. 12, 2013]; Tom Mashberg, *Hopis Try to Stop Paris Sale of Artifacts*, N.Y. Times, Apr. 3, 2013, available at <http://www.nytimes.com/2013/04/04/arts/design/hopi-tribe-wants-to-stop-paris-auction-of-artifacts.html?pagewanted=all>.
2. Mashberg, Apr. 12, 2013, *supra* note 1.
3. *Id.*
4. Erin M. Genia, *The Landscape and Language of Indigenous Cultural Rights*, 44 ARIZ. ST. L.J. 653, 670 (Summer 2012); see also Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected Through Current Intellectual Property Law?*, 7 J. HIGH TECH. L. 180 (2007) (“[T]his Western concept of a limited monopoly over a symbol, song or ceremony contradicts Native American conceptions of cultural property and what it means to them and their existence both as a sovereign community and as an individual.”).
5. Patent law is not a subject of this paper, but it is worth noting the particularly disruptive use of patent law against the interests of indigenous communities. “Because of the array of biodiversity that exists in indigenous territories such as forests, many companies will send a researcher there to find ‘new’ plants that cure ailments. This has been a continuing practice, one that is very detrimental to indigenous peoples, in which companies patent seeds, genes and other parts isolated from flora that have been cultivated by indigenous people for thousands of years, in some cases effectively eliminating a tribe’s ability to use them.” Genia, *supra* note 4, at 668.
6. *Id.* at 667.
7. See *id.*; Stephanie B. Turner, *The Case of the Zia: Looking Beyond Trademark Law to Protect Sacred Symbols*, 11 CHI.-KENT J. INTELL. PROP. 116, 120 (Spring 2012).
8. See Cortelyou C. Kenney, *Reframing Indigenous Cultural Artifacts Disputes: An Intellectual Property-Based Approach*, 28 CARDOZO ARTS & ENT. L.J. 501, 520 (2011).
9. Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 14 (1997); see also Kenney, *supra* note 8, at 520.
10. Kenney, *supra* note 8, at 520 (quoting Farley, *supra* note 9, at 15).
11. Farley, *supra* note 9, at 15.
12. The Native American Graves Repatriation Act, 25 U.S.C. § 3001 *et seq.* (1990); The Indian Arts and Crafts Act of 1990, Pub. L. 101-644, codified at 25 U.S.C. § 305 (1990).
13. Kenney, *supra* note 8, at 525; George P. Nicholas & Kelly P. Bannister, *Copyrighting the Past? Emerging Intellectual Property Issues in Archaeology*, 45 CURRENT ANTHROPOLOGY 327, 329 (2004).
14. Kenney, *supra* note 8, at 525; Nicholas & Bannister, *supra* note 13, at 329; Kelley, *supra* note 4, at 180 (citing Suzanne Milchan, Note, *Whose Rights Are These Anyway? A Rethinking of Our Society's Intellectual Property Laws in Order to Better Protect Native American Religious Property*, 28 AM. INDIAN L. REV. 157, 161 (2003)).
15. *Montana v. United States*, 450 U.S. 544 (1981) (setting out the general rule that tribes do not possess legal authority over non-Indians who come within their borders).
16. The Lanham Act § 1127, 15 U.S.C. § 1051, *et seq.* (1946).
17. 1 McCarthy on Trademarks and Unfair Competition § 2:1 (4th ed.).
18. 3 McCarthy on Trademarks and Unfair Competition §§ 22:1-22:2.
19. See *Star Indus., Inc. v. Bacardi & Co. Ltd.*, 412 F.3d 373, 381 (2d Cir. 2005) (“To qualify for registration a mark must be sufficiently “distinctive” to distinguish the registrant’s goods from those of others.”).
20. 2 McCarthy on Trademarks and Unfair Competition § 16:18.
21. 15 U.S.C. § 1063.
22. See *Sebastian Int'l, Inc. v. Longs Drug Stores Corp.*, 53 F.3d 1073, 1074 (9th Cir. 1995) (per curiam) (“[T]he right of a producer to control distribution of its trademarked product does not extend beyond the first sale of the product.”).
23. Further, it has been argued that trademark protection should not be extended to traditional marks, on the grounds that such marks may be considered generic or belonging to entire communities and therefore unprotectable. Sonali Maulik, *Skirting the Issue: How International Law Fails to Protect Traditional Cultural Marks from IP Theft*, 13 CHI. J. INT'L LAW 239, 245 (2012). However, the argument that such marks are generic is a limited one, given that application of an indigenous mark to a non-indigenous product would most likely not be a generic use. A generic term is one that is commonly used as the name of a *type* of goods, unlike a trademark, which identifies the *source* of a product. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992); *Liquid Controls Corp. v. Liquid Control Corp.*, 802 F.2d 934 (7th Cir. 1986). Further, although it is true that trademarks are typically held by individuals or discrete entities, community ownership is not an insurmountable barrier to entry, given the possibility of collective ownership of a mark. The Lanham Act provides protection to “trade names”—typically, the names of corporate, professional, charitable, political, educational and religious organizations—that is identical to the protection afforded to trademarks. 1 McCarthy on Trademarks and Unfair Competition § 9:1 (4th ed.). A designation that is used as both a trade name and a trademark can be registered as a trademark. *Id.* § 9:14. At issue then is not whether an indigenous mark *may* be trademarked, but rather whether trademark law provides the type of protection that such marks require.
24. 15 U.S.C. § 1052.
25. Navajo Nation Government Official Site, “History,” <http://www.navajo-nsn.gov/history.htm> (last visited Aug. 16, 2013).
26. *Navajo Nation v. Urban Outfitters, Inc.*, ___ F. Supp. 2d ___, 2013 WL 1294670, at *1 (D. New Mexico 2013).
27. *Id.* at *2.
28. *Id.*
29. Amended Complaint for Injunctive Relief and Damages, *Navajo Nation v. Urban Outfitters, Inc.*, No. 1:12-cv-00195-LH-WDS, May 21, 2012, ¶ 1.
30. *Id.* ¶ 5; The Navajo Nation’s Response in Opposition to Defendants’ Motion to Dismiss the Complaint, *Navajo Nation v. Urban Outfitters, Inc.*, No. 1:12-cv-00195-LH-WDS, July 24, 2012, at 1.
31. Motion to Dismiss the Amended Complaint and Memorandum in Support, *Navajo Nation v. Urban Outfitters, Inc.*, No. 1:12-cv-00195-

- LH-WDS, June 22, 2012, at 2 [hereinafter UO Motion to Dismiss]; Reply in Support of Defendants' Motion to Dismiss the Amended Complaint, *Navajo Nation v. Urban Outfitters, Inc.*, No. 1:12-cv-00195-LH-WDS, August 7, 2012, at 1-2.
32. UO Motion to Dismiss, *supra* note 32, at 4-5.
 33. *Navajo Nation*, 2013 WL 129670, at *1.
 34. *Id.* at *13 ("The Amended Complaint alleges sufficient facts that consumers view the 'NAVAJO' mark as a source identifier for the Navajo Nation.").
 35. *Id.* at *12.
 36. *Id.* at *18 (allowing trademark dilution claims to proceed); *id.* at *20 ("None of the cases Defendants cited stand for the proposition that contemporary clothing, as a matter of law, cannot constitute an 'art' or a 'craft' under the IACA."); *id.* (allowing Indian Arts and Crafts Act claims to proceed). The court did reject the Navajo Nation's theory of dilution by tarnishment based on the use of the Navajo name in connection with a flask for alcohol and the spelling of "Navaho." The court found that these uses were "not sufficiently unwholesome or unsavory" and "not sufficiently 'scandalous' to state a claim for dilution by tarnishment." *Id.* at *17.
 37. Joint Status Report, *Navajo Nation v. Urban Outfitters, Inc.*, No. 1:12-cv-00195-LH-WDS (Jul. 29, 2013).
 38. *Navajo Nation*, 2013 WL 129670, at *15.
 39. Turner, *supra* note 7, at 116.
 40. *Public Hearings on Official Insignia of Native American Tribes*, Albuquerque, New Mexico (1999) (statement of Amadeo Shije, Governor, Zia Pueblo), available at <http://www.uspto.gov/trademarks/law/tribal/nahear3.jsp> [hereinafter *Public Hearings on Official Insignia of Native American Tribes*].
 41. Turner, *supra* note 7, at 119.
 42. *See id.* at 119-120; Milchan, *supra* note 14, at 157.
 43. *Public Hearings on Official Insignia of Native American Tribes*, *supra* note 40 (statement of Michiko Thompson, Zia Pueblo).
 44. 15 U.S.C. § 1052(b).
 45. Turner, *supra* note 7, at 122.
 46. 15 U.S.C. § 1052(a); Turner, *supra* note 7, at 124.
 47. Turner, *supra* note 7, at 124, 126.
 48. They did, however, gain sufficient attention that Congress in 1998 passed the Trademark Law Treaty Implementation Act, one section of which required the Commissioner of Patents and Trademarks to study issues surrounding the protection of the official insignia of American Indian tribes. Pub. L. No. 105-113, 112 Stat. 3064 (1998). The study led to the creation of the Native American Tribal Insignia database, aimed at aiding the USPTO in preventing the registration of marks containing American Indian symbols. Turner, *supra* note 7, at 130. It has been argued that the database has had little practical effect, as very few tribes have registered their sacred symbols—perhaps because publishing such symbols is anathema or perhaps because tribes have limited access to the resources and legal assistance that would be needed to do so. *See id.* at 130-31. However, that such action was taken by Congress is a testament to the concerted efforts of the Zia Pueblo to protect their cultural property.
 49. *Id.* at 131-32.
 50. *Id.* at 125.
 51. Genia, *supra* note 4, at 669.
 52. Turner, *supra* note 7, at 133.
 53. Genia, *supra* note 4, at 669.
 54. U.S. CONST. art. 1, § 8, cl. 8.
 55. The Copyright Act of 1976 § 102(a), 17 U.S.C. § 101, *et seq.* (1976).
 56. *Id.*
 57. *Id.* § 109.
 58. Ashlye M. Keaton, *Using the Copyright Act to Protect Cultural Properties: Copyright Protection of Mardi Gras Indian Suits*, 15 TUL. J. TECH. & INTELL. PROP. 89, 91 (2012).
 59. *Id.*
 60. *Id.* at 95 (quoting Interview with Howard Miller, Mardi Gras Indian Chief of Creole Wild West and president of the Mardi Gras Indian Council, in New Orleans, La. (June 26, 2011)).
 61. *Id.* at 92; Mary Foster, *Mardi Gras Costumes Inspire Photographers—and a Copyright Claim*, THE WASHINGTON POST, Feb. 8, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020706635.html>.
 62. Keaton, *supra* note 58, at 93-94.
 63. 17 U.S.C. §§ 101, 106.
 64. *Mardi Gras Indians Seek to Copyright Costumes*, NPR, Feb. 8, 2011, <http://www.npr.org/2011/02/08/133600362/Mardi-Gras-Indians-Seek-To-Copyright-Costumes> ("We have no problem with people taking pictures for education purpose, for, you know, if you want to take a picture for your private—you know, you have in your home. There's no problem with that. It's just—if you want to take it to make money, then that's where we say we should be also compensated."); *see also* Keaton, *supra* note 58, at 97.
 65. Keaton, *supra* note 58, at 94; Rachel Waters, *Mardi Gras "Indian" Suits: Fit for Copyright Protection?*, JOURNAL OF BUSINESS & INTELLECTUAL PROPERTY LAW (July 29, 2011), <http://ipjournal.law.wfu.edu/2011/07/mardi-gras-%E2%80%99Cindian%E2%80%9D-suits-fit-for-copyright-protection/>.
 66. *Mazer v. Stein*, 347 U.S. 201 (1954). *See also* Copyright Office, *Registrability of Costume Designs*, 56 FR 56530-02, No. RM-91-5A (Nov. 5, 1991), at 56530 (a "useful article" is one that has "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information," and is not subject to copyright protection).
 67. Keaton, *supra* note 58, at 95.
 68. *Id.* at 91-94.
 69. *Id.* at 92; Backstreet Cultural Museum, "Exhibitions," <http://www.backstreetmuseum.org/#/collections-exhibitions/4544609175> (last visited Aug. 14, 2013) ("The Backstreet Cultural Museum is proud to host an extensive collection of Mardi Gras Indian regalia...").
 70. Jessica Edmundson and Elizabeth Townsend Gard, *Conversations with Renowned Professors and Practitioners on the Future of Copyright*, 14 TUL. J. TECH. & INTELL. PROP. 1, 75 (2011).
 71. Keaton, *supra* note 58, at 95.
 72. 17 U.S.C. § 106(a).
 73. *Id.*
 74. *Silberman v. Innovation Luggage*, No. 01 Civ. 7109(GEL), 2003 WL 1787123 (S.D.N.Y. 2003).
 75. Artists' Authorship Rights Act § 51.2154, La. Rev. Stat. Ann. § 51.2151, *et seq.* (1986) (emphasis added).
 76. *Id.* § 51.2153.
 77. *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01 CIV.1226 DAB, 2003 WL 21403333, at *15-16 (S.D.N.Y. June 17, 2003); *see also Broughel v. Battery Conservancy*, No. 07-CV-7755 (GBD), 2009 WL 928280, at *10-11 (S.D.N.Y. Mar. 30, 2009) (noting that "some courts of this district have held that the VARA preempts the AARA" but ruling on the merits without addressing preemption).
 78. *See, e.g., J. Janewa OseiTutu, A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 Marq. Intell. Prop. L. Rev. 147, 150 (Winter 2011).

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