

I MINA'TRENTAI SINGKO NA LIHESLATURAN GUÅHAN
Informational Briefing/ Oversight Hearing / Roundtable Hearing

STANDING COMMITTEE / SENATOR	HEARING	COMMITTEE REPORT	HEARING DATE	DATE COMMITTEE REPORT FILED	NOTES
Committee on Heritage and the Arts, Parks, Guam Products, Hagåtña-Revitalization, Self-Determination, and Regional Affairs	Roundtable Hearing	Committee Report on the Guam Trademark Commission Monthly Meeting.	8/26/19 8:30 a.m.	12/20/19 10:17 a.m.	



Senator Kelly Marsh (Taitano), PhD.

Chairwoman of the Committee on Heritage and the Arts, Parks, Guam Products,
Hagatna Revitalization, Self-Determination, and Regional Affairs

Assistant Majority Leader

I Mina' Trentai Singko Na Liheslaturan Guåhan

October 22, 2019

Transmitted via hand-delivery

The Honorable Règine Biscoe Lee

Chairperson, Committee on Rules

I Mina' trentai Singko Na Liheslaturan Guåhan

Guam Congress Building

163 Chalan Santo Papa

Hagåtña, Guam 96910

**Re: Committee Report for the August 26, 2019, Guam Trademark
Commission, Regular Monthly Meeting**

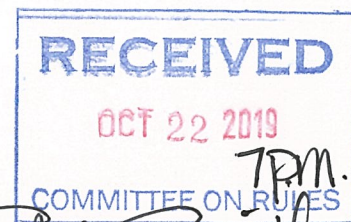
Buenas Yan Håfa Adai:

The Committee on Heritage and the Arts, Parks, Guam Products, Hagatna Revitalization, Self-Determination, and Regional Affairs, hereby transmits the Committee Report of the **August 26, 2019, Guam Trademark Commission, Regular Monthly Meeting.**

Si Yu'us Ma'åse,

Kelly G. Marsh (Taitano), Ph.D.

Attachments



2019 DEC 20 AM 10:17

Revisions Recd. 12/19/19 @ 5:30pm.

Committee Membership

Overall Vice-Chair:

Speaker Tina Muña
Barnes

Heritage and the Arts

Vice-Chair:

Senator Amanda L.
Shelton

Self-Determination Vice-

Chair:

Senator Jose "Pedro"
Terlaje

Regional Affairs Vice-

Chair:

Senator Clynt E. Ridgell

Senator Règine Biscoe
Lee

Senator Joe S. San
Agustin

Senator Therese M.
Terlaje

Contact Details

989-5681/3

office.senatorkelly@guamlegislature.org

Guam Congress
Building

163 Chalan Santo Papa
Hagåtña, GU 96910

Senator Kelly Marsh (Taitano), PhD.
Chairwoman of the Committee on Heritage and the Arts, Parks, Guam Products,
Hagatna Revitalization, Self-Determination, and Regional Affairs
I Mina'trentai Singko Na Liheslaturan Guåhan



COMMITTEE REPORT

Commission Meeting

Guam Trademark Commission

Monday, August 26, 2019, at 8:30 a.m

I Liheslaturan Guåhan's Public Hearing Room



Roland Villaverde <roland.senatorkelly@gmail.com>

First Notice – Guam Trademark Commission, Monthly Meeting, Monday, August 26, 2019, 8:30 am

2 messages

Roland Villaverde <roland.senatorkelly@gmail.com>

Fri, Aug 16, 2019 at 4:35 PM

To: phnotice@guamlegislature.org

Cc: Dafne.Shimizu@revtax.guam.gov, AnnMarie Arceo <annmarie.arceo@dca.guam.gov>, Pilar.laguana@visitguam.org, Melanie Mendiola <mel.mendiola@investguam.com>, law@guamag.org, Francis Guerrero <fguerrero671@aol.com>, Speaker's Office <speaker@guamlegislature.org>, Louise Muna <senatorlouise@gmail.com>, guampedia.rpn@gmail.com, "Laura M.T. Souder" <souder@betances.com>, Jacqueline Balbas <jacqueline.balbas@caha.guam.gov>, jzcruz@guamag.org, rmperez@guamag.org, Matthew Baza <mbaza@investguam.com>

Bcc: "Victor J. Lujan" <victor.senatorkelly@gmail.com>, Retta Hamilton <retta.senatorkelly@gmail.com>

FOR IMMEDIATE RELEASE

August 16, 2019

MEMORANDUM

To: All Senators, Stakeholders, Media

From: Senator Kelly G. Marsh (Taitano), Ph.D.

Chairperson, Committee on Heritage and the Arts, Parks, Guam Products, *Hagåtña* Revitalization, Self-Determination, and Regional Affairs

Subject: First Notice – Guam Trademark Commission, Monthly Meeting, Monday, August 26, 2019, 8:30 am

Buenas yan Håfa adai! In accordance to §8103 and §8107 of Title 5 Guam Code Annotated, the Chair of the Committee on Heritage and the Arts, Parks, Guam Products, *Hagåtña* Revitalization, Self-Determination, and Regional Affairs (“Committee”) will convene the monthly meeting of the **Guam Trademark Commission on Monday, August 26, 2019, at 8:30 am**, at *I Liheslaturan Guåhan*’s Public Hearing Room. Items for discussion are outlined within the attached agenda.

Inquiries may be directed to the Office of Senator Kelly Marsh (Taitano), Ph.D., at 163 Chalan Santo Papa, *Hagåtña*, Guam 96910 or via email to office.senatorkelly@guamlegislature.org. The Guam Trademark Commission Meeting will broadcast on local television, GTA Channel 21, Docomo Channel 117/60.4 and streamed online at www.guamlegislature.org through *I Liheslaturan Guåhan*’s live feed.

Individuals requiring special accommodations, auxiliary aids, or services may contact and submit their request to the office of Senator Kelly Marsh (Taitano), Ph.D., at 163 Chalan Santo Papa, *Hagåtña*, Guam 96910, by phone at 472-3455, or by email at office.senatorkelly@guamlegislature.org.

The Guam Trademark Commission meeting is a public meeting. *Un Dångkolo Na Si Yu'os Ma'åse'!*

Attachment



Roland C.P. Villaverde

Office of the People | Senator Kelly Marsh (Taitano), PhD
Committee on Heritage and the Arts, Parks, Guam Products,
Hagåtña Revitalization, Self-Determination, and Regional Affairs

35th Guam Legislature
I Mina'trentai Singko na Liheslaturan Guåhan
Guam Congress Building
163 Chalan Santo Papa
Hagåtña, Guam 96910

Tel: (671)989-5681

Email: roland.senatorkelly@gmail.com



2 attachments

 **190916 Guam Trademark Commission Meeting First Notice August 26.pdf**
385K

 **190916 Guam Trademark Commission August 26 Agenda.pdf**
358K

Tom Unsiog <sgtarms@guamlegislature.org>
To: Roland Villaverde <roland.senatorkelly@gmail.com>

Fri, Aug 16, 2019 at 5:12 PM

Notice is now on the legislature's website calendar....tom

[Quoted text hidden]



Thomas J. Unsiog
Sergeant at Arms

35th Guam Legislature
I Mina'trentai Singko na Liheslaturan Guåhan

Tel: (671) 969-3514

Email: sgtarms@guamlegislature.org

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Office of Senator Kelly Marsh (Taitano), PhD.
Chairwoman of the Committee on Heritage and the Arts, Parks, Guam Products,
Hagåtña Revitalization, Self-Determination, and Regional Affairs
Assistant Majority Leader
I Mina'trentai Singko Na Liheslaturan Guåhan



FOR IMMEDIATE RELEASE

August 16, 2019

MEMORANDUM

To: All Senators, Stakeholders, Media

From: Senator Kelly G. Marsh (Taitano), Ph.D. *Km*
Chairperson, Committee on Heritage and the Arts, Parks, Guam Products,
Hagåtña Revitalization, Self-Determination, and Regional Affairs

Subject: First Notice – Guam Trademark Commission, Monthly Meeting, Monday,
August 26, 2019, 8:30 am

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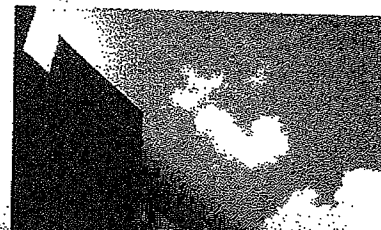
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The Guam Trademark Commission meeting is a public meeting. *Un Dångkolo Na Si Yu'os Ma'åse'!*

Attachment

KOL	CURRENCY EXCHANGE RATES						
	On Aug. 16, \$1 was worth:	52.430 PHPP	106.16 JPY¥	1,211.13 KR₩	31.350 TWD NT\$	7.0418 CNY¥	1.4727 AUD A\$

DOCOMO PACIFIC officially launches new voice service



voucher program.

The Section 8 program receives more than \$30 million per year from HUD.

According to a news release, HUD approved the implementation of a success rate payment standard using Guam's 50th percentile fair market

release.

Payment standard increases

- 2-bedroom from \$1,156 to \$1,241
- 3-bedroom from \$1,672 to \$1,796
- 4-bedroom from \$2,031 to \$2,181

With the ability to pay more for rent, the agency hopes to spend more than \$2 million in federal funds still

rent, a shortage of affordable housing units, difficulty competing with the military and private renters for affordable units, high cost of utility hookups and stringent federal requirements, the release stated.

"At the onset of the Leon Guerrero-Tenorio administration, we

will justify an even higher payment standard, Topasna added.

"I commend my Section 8 management and staff for the hard work they do each day, and for working on the justification for this increase, which is all to benefit our low-income families," Topasna said.

HAFA ADAI BINGO

AT THE GUAM GREYHOUND PARK
MONDAY, AUGUST 19, 2019

DOORS OPEN AT 4:00PM, SESSION STARTS AT 7:30PM | TEL. NUMBER: 969-3673 | ALL MAJOR CREDIT CARDS ACCEPTED

HAFA ADAI BONANZA \$10,000 <small>IN 51 or 52 5 OR LESS 2,000 CONSOLATION</small>	JUNIOR BLACKOUT \$5,000 IN 46 #S <small>OR LESS \$1,000 Consolation</small>	INDIAN STAR \$5,000 IN 27 #S <small>OR LESS \$1,000 Consolation</small>
EARLY BIRD \$500 HALFTIME \$500	LETTER X	7 PACKAGE GAMES
BUNDLES <ul style="list-style-type: none"> • BUNDLE A (50 PKGS. + 3 SPC. EA.) \$10 • BUNDLE B (70 PKGS. + 4 SPC. EA.) \$20 • BUNDLE C (100 PKGS. + 5 SPC. EA.) \$30 • BUNDLE D (110 PKGS. + 6 SPC. EA.) \$40 	\$5,000 IN 14 #S <small>OR LESS \$1,000 Consolation</small>	\$2,500 <small>WOWWWWEE</small>
BUY 2 SAME BUNDLE, GET ONE FREE <small>BUNDLES INCLUDES: Letter X, Indian Star & Jr. Blackout</small>	SPECIAL PACKAGE (BUY 2 SAME SPECIAL PKG, GET ONE FREE PROMO) ALL IN GOLD PKG (100PKG +20 FREE) 8 JR. BLKOUT, 8 LETTER X, 8 IND. STAR \$45 2 SHEET OF E.B., 2 SHEET HALFTIME WRMUP, 1 BONANZA, HOTBALL A & B DIAMOND PKG (110PKG +20 FREE) 10 JR. BLKOUT, 10 LETTER X, 10 IND. STAR \$50 2 SHEET OF E.B., 2 SHEET HALFTIME WRMUP, 1 BONANZA, HOTBALL A & B	

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 MANAGEMENT RESERVES THE RIGHT TO ALTER OR CANCEL ANY EVENT OR PROGRAM WITHOUT PRIOR NOTICE

GUAM TRADEMARK COMMISSION

The Guam Trademark Commission will convene a meeting on **Monday, August 26, 2019, at 8:30am, / Liheslaturan Guåhan's Public Hearing Rm., 163 Chalan Santo Papa, Hagåtña.** Individuals requiring special accommodations, auxiliary aids, services or an agenda may contact Senator Kelly Marsh (Taitano), at 989-5681-3 or office.senatorkelly@guamlegislature.org.

CIVIL SERVICE COMMISSION
Notice of Meeting
Kumision / Setbision Sibit

At 5:45 p.m., Tuesday, August 27, 2019, Bell Tower, 710 W. Marine Corps Dr., Hagåtña, Guam. For special accommodations, call Eric Miller/ADA Coordinator at 647-1855. Agenda at csc.guam.gov. /s/ Daniel D. Leon Guerrero, Executive Director.



Roland Villaverde <roland.senatorkelly@gmail.com>

Second Notice – Guam Trademark Commission, Monthly Meeting, Monday, August 26, 2019, 8:30 am

1 message

Office of Senator Kelly Marsh (Taitano), Ph.D.

Fri, Aug 23, 2019 at 11:38 AM

<office.senatorkelly@guamlegislature.org>

To: phnotice@guamlegislature.org

Cc: Dafne.Shimizu@revtax.guam.gov, AnnMarie Arceo <annmarie.arceo@dca.guam.gov>, Pilar.laguana@visitguam.org, Melanie Mendiola <mel.mendiola@investguam.com>, "Leevin T. Camacho" <law@guamag.org>, Francis Guerrero <fguerrero671@aol.com>, Speaker's Office <speaker@guamlegislature.org>, Louise Muna <senatorlouise@gmail.com>, guampedia.rpn@gmail.com, "Laura M.T. Souder" <souder@betances.com>, Jacqueline Balbas <jacqueline.baibas@caha.guam.gov>, jzcruz@guamag.org, rmperez@guamag.org, Matthew Baza <mbaza@investguam.com>

FOR IMMEDIATE RELEASE

August 23, 2019

MEMORANDUM

To: All Senators, Stakeholders, Media

From: Senator Kelly G. Marsh (Taitano), Ph.D.

Chairperson, Committee on Heritage and the Arts, Parks, Guam Products, *Hagåtña* Revitalization, Self-Determination, and Regional Affairs

Subject: Second Notice – Guam Trademark Commission, Monthly Meeting, Monday, August 26, 2019, 8:30 am

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Attachment



Office of Senator Kelly Marsh (Taitano), PhD
Committee on Heritage and the Arts, Parks, Guam Products,
Hagåtña Revitalization, Self-Determination, and Regional Affairs
I Mina'trentai Singko na Liheslaturan Guåhan | 35th Guam Legislature
Guam Congress Building, 163 Chalan Santo Papa, Hagåtña, Guam 96910
Telephone: (671) 989-5681/2



3 attachments

-  **190916 Guam Trademark Commission August 26 Agenda.pdf**
358K
-  **190923 Guam Trademark Commission Meeting Second Notice August 26.pdf**
385K
-  **Xerox Scan_08232019111013.PDF**
721K

Office of Senator Kelly Marsh (Taitano), PhD.
Chairwoman of the Committee on Heritage and the Arts, Parks, Guam Products,
***Hagåtña* Revitalization, Self-Determination, and Regional Affairs**
Assistant Majority Leader
I Mina'trentai Singko Na Liheslaturan Guåhan



FOR IMMEDIATE RELEASE

August 23, 2019

MEMORANDUM

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Chairperson, Committee on Heritage and the Arts, Parks, Guam Products,
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Attachment

GUAM DAILY POST • FRIDAY, AUGUST 23, 2019

Mark Torre Jr. opposes changes to indictment

By Nick Delgado
nick@postguam.com

Former Guam police officer Mark Torre Jr. wants the Superior Court to deny the prosecution's motion to amend the indictment that was initially handed down against him in 2015.

"The people are attempting to add a new charge to an over four-year-old indictment," defense attorney

shooting death of fellow officer Sgt. Elbert Piolo, is set to stand trial for the second time after his conviction of negligent homicide and aggravated assault was vacated by the Supreme Court.

Torre: New charge requires review by grand jury

The attorney general's motion appears back in court on Sept. 10. Torre seeks to replace the murder and



Mark Torre Jr.

Torre, however, argues that if prosecutors want to pursue a charge of negligent homicide, they must first go before a grand jury and present their case.

He contends the prosecution's request is a violation of his rights.

Torre is scheduled to appear back in court on Sept. 10. The former police officer also has

case and that the title of the property he used to post bail be returned.

A jury in 2017 found him guilty of negligent homicide. He was acquitted of the murder charge. Torre then appealed his conviction to the Supreme Court.

Last month, the high court vacated the conviction and ruled that the Superior Court had erred when it denied the defense motion to suppress body-camera footage,

CIVIL SERVICE COMMISSION

Notice of Meeting

Kumision I Setbision Sibit

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AT THE GUAM GREYHOUND PARK
FRIDAY, AUGUST 23, 2019
 DOORS OPEN AT 4:00PM, SESSION STARTS AT 7:30PM | TEL. NUMBER: 969-3673
 ALL MAJOR CREDIT CARDS ACCEPTED

JUNIOR BLACKOUT	INDIAN STAR
\$4,000 GIVEAWAY	\$4,000 GIVEAWAY
LETTER X	7 PACKAGE GAMES
\$4,000 GIVEAWAY	\$4,000 <small>BAM BAM WOW</small>

SPECIAL PACKAGE (BUY 2 SAME SPECIAL PKG, GET ONE FREE PROMO) ALL IN

GOLD PKG (100PKG +20 FREE) 8 JR. BLKOUT, 8 LETTER X, 8 IND. STAR 2 SHEET OF E.B., 2 SHEET HALFTIME WRMUP, 8 BONANZA, HOTBALL A & B	\$70
DIAMOND PKG (110PKG +20 FREE) 10 JR. BLKOUT, 10 LETTER X, 10 IND. STAR 2 SHEET OF E.B., 2 SHEET HALFTIME WRMUP, 15 BONANZA, HOTBALL A & B	\$75

LETTER X \$3
JR. BLACKOUT \$3
INDIAN STAR \$3
BONANZA \$5
EARLY BIRD \$2
HALFTIME \$2

FIESTA FRIDAY AT HABA ADAL
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I Mina'trentai Singko Na Liheslaturan Guåhan

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Updated as of 8/6/19



Senator Kelly Marsh (Taitano), PhD.

Chairwoman of the Committee on Heritage and the Arts, Parks, Guam Products,
Hagatna Revitalization, Self-Determination, and Regional Affairs

Assistant Majority Leader

I Mina'trentai Singko Na Liheslaturan Guåhan

Committee Membership

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Speaker Tina Muña
Barnes

Heritage and the Arts
Vice-Chair:
Senator Amanda L.
Shelton

Self-Determination Vice-
Chair:
Senator Jose "Pedo"
Terlaje

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Senator Clynt E. Ridgell

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Agenda

Guam Trademark Commission Public Hearing Room – Guam Congress Building Monday, August 26, 2019, 8:30 am

- I. Call to Order by Chairwoman
- II. Old Business
 - a. Continuation - "Findings and review on assigned tasks of items 1, 7, 8, and 9 of §14105(b), Title 2 GCA"
 - i. *Kumision I Fino' CHamoru*
 1. Identification of intangible arts
 - b. Continuation – "Developing Definitions of Arts Forms"
- III. New Business
 - a. Presentation/Workshop – Overview of Guam's trademark and intellectual property rights laws - Office of the Attorney.
- IV. Open Discussion
- V. Adjournment



GUAM TRADEMARK COMMISSION
I Mina'trentai Singko Na Liheslaturan Guåhan
Committee on Heritage and the Arts, Parks, Guam Products,
Hagåtña Revitalization, Self-Determination, and Regional Affairs
 Meeting Sign-in Sheet

Regular Meeting Public Sign-In Sheet

August 26, 2019 • 8:30 A.M. • Guam Congress Building Public Hearing Room

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COMMITTEE REPORT DIGEST

Guam Trademark Commission Regular Monthly Meeting August 26, 2019, 8:30 am

I. OVERVIEW

The Committee on Heritage and the Arts, Parks, Guam Products, *Hagåtña* Revitalization, Self Determination, and Regional Affairs, convened the Guam Trademark Commission, monthly meeting on Monday, August 26, 2019, 8:30 am, *I Liheslaturan Guåhan's*, Public Hearing Room.

a. Public Notice Requirements

Notices were disseminated via electronic mail to all senators, stakeholders and primary broadcasting instrumentalities in accordance with the Open Government Law and the 35th Guam Legislature Standing Rules. The first notice was issued on Friday, August 16, 2019, and an ad published on Monday, August 19, 2019, on "The Guam Daily Post," meeting the five (5) working day notice period. A second notice was subsequently electronically emailed and published at "The Guam Daily Post," on August 23, 2019.

b. Guam Trademark Commissioners Present

- | | |
|-------------------------------|------------------------------|
| • Kelly Marsh (Taitano), PhD. | Committee Chair, Board Chair |
| • Matthew Baza | GEDA- Designated Alternate |
| • Stacy Salas | Attorney General's Office |
| • Rita Nauta | Speaker Representative 1 |
| • Dr. Laura Souder Betances | Speaker Representative 2 |
| • Ann Marie Arceo | DCA- President |
| • Chris Lizama | GVB – Designated Alternate |
| • Frank Rabon | CAHA - Designated Alternate |

II. SUMMARY OF TESTIMONY & DISCUSSION

Senator Kelly Marsh (Taitano), Ph.D., Chairperson of the Committee on Heritage and the Arts, Parks, Guam Products, *Hagåtña* Revitalization, Self Determination, and Regional Affairs; and Chair of the Guam Trademark Commission, presided over the monthly meeting. The meeting was called to order at 8:44 am and adjourning at 9:44 am. Items for discussion on the agenda were:

- I. Call to Order by Chairwoman**
- II. Old Business**

- a. Continuation - “Findings and review on assigned tasks of items 1, 7, 8, and 9 of §14105(b), Title 2 GCA”

- i. *Kumision I Fino’ CHamoru*

- 1. Identification of intangible arts

- b. Continuation – “Developing Definitions of Arts Forms”

III. New Business

- a. Presentation/Workshop – Overview of Guam’s trademark and intellectual property rights laws - Office of the Attorney.

IV. Open Discussion

V. Adjournment

a. Transcription of Hearing (block formatted)

The Guam Trademark Commission monthly meeting was called to order on August 26, 2019, at 8:44 am.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: The Guam Trademark Commission will now be called to order. For the record in accordance with the Open Government Law, meeting notices were given to all Commission, senatorial members, stakeholders and all main media broadcast outlets. The first notice went out on Monday, August 19th, 2019, and the second notice was out on Friday, August 23rd. 2019. Today is Monday, August 26th, 2019, and the time is now 8:44.

We have seven members plus myself, which represents a quorum. Today's meeting is the Commission's third meeting. There are new faces present for today's meeting. For those present, the Commission's last meeting was held on June 26, 2019, and by law we are required to meet once a month and when the legislature completes the fiscal year 2020 budget, we may be able to establish and set a routine meeting time.

Before we continue, I want to ask those who have been appointed to represent their agency heads, to please fill out the Commissioner enrollment form or who were appointed by others. Everyone who needs one; it looks like this titled “Commission Member.” I can pass one out if needed. Okay great.

Commissioners and alternates that filled out an enrollment form at the May 6th and June 26th Guam Trademark Commission meeting, are not required to fill out the form again. The enrollment form is necessary for the Commission to contact physically or electronically, any Commissioner or their alternates so that everyone becomes well informed of the Commission's activities. Again, I want to emphasize that agency representatives may deliberate or make decisions on Commission matters that could very well affect or impact their organization. Please submit your enrollment form before leaving today.

We are now on item 2A of the agenda. Please reference the Guam Trademark Commission enabling law provided to you, specifically §14105(b) items 1, 7, 8, & 9. At our last meeting we had informed discussions, provided by GEDA the Department of Revenue and Tax and CAHA.

GEDA and the Department of Revenue and Tax provided a cursory overview of the Guam Product Seal and/or application of trademarks within the regulatory and programmatic applications as they currently exist in the government; the process for certifying artist, the process for certifying art organizations, and the process for certifying vendors. These discussions of course, will continue as we look deeper into these issues for CAHA. They began a listing of different categories of the Masters that have been awarded for the types of categories that they represent. Specifically, we looked at types of cultural arts including intangible arts.

These discussions are useful as it provides informed and meaningful direction for the Commission to move forward in creating the framework and the scope necessary in drafting the Guam Cultural Trademark Act and the Guam Trademark and Intellectual Property Rights Act. This morning's discussion on item 2A of the agenda will be on the identification of intangible arts. With that, the CAHA representative who usually supplies such information was not able to be here today. They have conflicting meetings that are happening this week, but we will continue to work with them so that they can be continuing to build up that listing of cultural arts. We are now on item 2B of the agenda. Which is, well, that's item B. In item A, we still have 7, 8 and 9. Let me revisit those and just see if we have anything additional to add.

For GEDA, I know that you did a good job in describing these the last time we met. Is there anything to add at this point to 7, 8 and 9? The proposed process for certifying artists, organizations or vendors?

MATTHEW BAZA, GEDA, DESIGNATED ALTERNATE: Not necessarily Senator, but one of the questions that did come up was when we look at the law and we look at Item B, which was the trademark Guam Cultural Trademark Act, for culture arts manufactured or produced in Guam. One of the questions that came up is, are we only going to concern ourselves with products that are going to be available on the commercial market, or is it only going to be for products that are sold either retail? I mean it's art, retail or if they're going to mass produce a piece of art sell it wholesale, or is the Commission going to extend it that if anyone wants to say that this art, even if it's going to be a gift or just a donation or something, that it needs to have some sort of trademark because remember the Guam Product Seal deals only with commercial products. And it's based off the price of the product, transformation of the product and the value added. That was one of the things that came up in our discussions back at GEDA about when we certify art. Are we only certifying commercially available art or personal art or anything like that? Because like I said, remember the Guam Product Seal already in the rules has an exemption saying if it's like a piece of art, it doesn't need a Guam Product Seal unless they want to explicitly say "It's Made in Guam." Someone just saying "Oh, I painted that; or, I carved that." They don't necessarily need to get a Guam Product Seal all the time, but there is a little gray air between individual piece of art and maybe mass-produced art. That's one of the things that came up a lot in our conversation.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: *Si Yu'os ma'åse* for continuing to be discussing this in and working on this with your colleagues. And I think you brought up a very good point.

This is where our presentation today and our member from the Attorney General's Office Miss Stacy Salas, can provide us some guidance as well as some of the other members here. It's my understanding that we want to be creating something that can apply to either situation. The very little bit of experience that I've had with artists and people who've worked with artists is that some artists in particular, do hold or claim that intellectual property right over the art, whether they produce it or not. It can make a difference as to whether that art becomes part of an exhibit later on, whether somebody later on is interested in mass-producing it. I think that's a very relevant question and really important topic for us to be looking at. Will it automatically apply or is this something that one has to apply for; and, what protections will happen naturally or solely with applying for and achieving some sort of protection through and application.

Again, thank you for looking at that. Did anybody else have some thoughts on the issue? These are the kind of questions that are really important for us to continue to be thinking about and we can't get all the questions at the table the first time around because these are things that as we continue to meet with others, as we continue to read or find material that serves as resources, as we continue to just think about these issues, we'll find that we have questions like this that will come up as pertinent. And that is partly why we're taking our time going through the process and having presentation and issue and situation per meeting so that we can feel like we've really thoroughly exhausted and explored a lot of issues before we get down to some of the actual policy development.

With that, we can move on to item B. I believe CAHA has provided some definitions of art forms. What we can do is we can work on that as an office and then make sure that everybody gets a copy of it and they did put draft on it. That it's something that can be from our different areas of expertise or understanding while working together. With that I do want to throw outin old business as well.

The CAHA board representative. Mr. Frank Rabon had talked with some others about intangible cultural heritage, the intellectual property rights and what people could do before we finish our work here. I just wanted to let people know that I did reach out to the UNESCO intangible cultural heritage representative and she has referred me to somebody in Paris who deals with U.S. Territories specifically. I'm still waiting to hear back from that person and I'm going to have to follow up again, but I think it is important that we reach out to people and just to point out this is really maybe kind of sort of new business, but just to let people know if you hadn't heard there is an intangible cultural heritage workshop going on in Tonga, I think very shortly and those kind of workshops and gatherings go on quite often in areas around us. We might want to explore the ways in which we can touch bases with some of that or participate in one way or another with some of that work.

For new business. we'll go ahead we're pleased to have Miss Stacy Salas from the Attorney General's Office. As I've mentioned before each and everybody's presence here is incredibly important because you each bring such valuable information and experience to the table and that I think is really important part of this legislation and the way that it was written. It was very thoughtful in that way. I'll go ahead and turn the floor over to Miss Salas and I'll be taking notes along with everybody else.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Awesome. Thank you much Senator Marsh (Taitano), *Håfa adai*. I'm Stacy Salas. Good morning, and thank you all for your time. I hope everyone had their coffee.

I'm going to do a presentation on the Guam Trademark Commission Act, only. I'd like to provide a roadmap and start of the expectations of this presentation so that we can digest and absorb the information. This is a huge comprehensive type of law that we're dealing...with respect to intellectual property rights. It's a whole world in itself. The roadmap here is how did this law come to be? The background in history. What does the law say, that we can sort of get into the teeth of it and start you know, moving the dial forward from the previous meeting and sort of what did the legislators point us to direction wise, right? Because there's a Maori sort of; their laws that we can look toward so we don't have to necessarily try to reinvent the wheel.

That's the roadmap and the expectations for this presentation is we are going to just cover this law there are many sections and It is just not realistic and I'd like to reduce the level of confusion as much as possible. What we're not going to cover are the other laws that are on the books. We have criminal statutes pertaining to trademarks. We have a current civil statute and then of course as GEDA knows and everybody does there's the Guam Product Seal. We're not going to cover that. Go ahead and put that in there little bins right now. But what I want to do if you guys want, is in the future meetings, we can cover each law. There are way too many sections. And I think that and we ran through my presentations is already have them at the AG's office. And we're all lawyers. If I'm going present on all the laws, it's overwhelming and I think it just gets us off track.

If you guys have any comments at this point we can make them. Otherwise, I'd like to try to get through the presentation entirely and we can hold off on questions and you can make notes of them as we go and then ask them at the end. I'll try to answer them. And if not, of course and I'll take them under advisement or ask for a written request because that's really the most effective way to communicate what you're asking and how I'm going to answer it. And of course I'm going to have questions. When I ask a question, please participate that's different not one is you know for us to really start thinking about these items and as I mentioned move the dial forward, That's the roadmap and the expectations for this presentation. If we can go ahead and awesome, this is the first slide.

Again, it's the presentation on Guam Trademark Commission Act and I did receive a written request on all the trademark laws. We'll do that as we go along. This is a huge endeavor. I'm glad everybody had their coffee and if not, please take the time to do so.

We're going to move to the next slide legal disclaimer. Of course, this is sort of akin to a legal class. I'm only going to give you the framework that you guys can sort of know what the law says what you guys are supposed to focus on. Like my dad says focus Stacy. This is not legal advice. Legal advice will arise when there's an issue like a real something on the ground. It doesn't create an attorney-client relationship with any specific individual, Guam employee entity, or people in the room. Please know that the relationship is between the Attorney General's Office and the Commission and anything I say here today is my opinion. It is not the opinion of

the office of Attorney General. Please whatever I say just direct it to me and I'm not making a blanket statement for the office. Alright, we're going to move to the next slide.

I want to open the floor to sort of a core of why we're here. The essence of it all is generally not in the legalese fashion not like in you know the 10 page or however many pages, even the U.S. federal law explains what a trademark is. I don't know if it's 10 pages. I'm exaggerating, but I wanted to open the floor. This is where you guys can participate. Does anyone have an idea of what a trademark is, generally?

Do you want to come? Yeah, let's participate is going to make this more of a fun. It's a mark or an idea or something that you want to claim a right to. Mark or something that you want to claim a right to. A creator of something. It creates an ownership right or acknowledgement anything else?

That's all right. Basically what a trademark is a symbol or and we'll go to the next slide. Sorry guys. It's a symbol or words used to represent a company or a product right? When you see a checkmark in the sports field, you're probably more than likely going to think of what brand does anybody know?

Okay, Nike. Okay. That's trademark. It's a symbol with respect to Nike that represents a company or a product athletic products Sports. Okay, awesome. This is where we're going to talk about why is trademarking important. And before we get into it I'd like to illuminate the importance of it through this exercise. It's kind of like a pop quiz and it's not in your presentation because it was kind of, you know thrown in toward the end of it. We're just going to stay on the slide. And what I'm going to do is I'm going to pass out this pop quiz and it's going to illuminate the importance of having a trademark symbol because more often than not we're able to associate a level of value with a symbol and that symbol that we've seen many times we can determine whether it's a real item or a fake item. If you see a Nike check, but the check is not the way that you've been socialized to see it over time, you can tell that it's fake.

Everyone's going to get a page but what I'm going to do is split us up in teams. From Senator Marsh Taitano to my side of the table, we're going to be one team and then the other end of the table is going to be another team. We're going to be in two teams and whoever gets the most correct is the winner. We're going to also name your team. Think of a team name. The object of this pop quiz is to be able to look at the symbol and designate next to the symbol whether you believe it is a true trademark symbol or a fake one.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: When you say true trademark symbol, do you mean one that is utilized not one that could serve as one that is actually used?

STACY SALAS, ATTORNEY GENERAL'S OFFICE: I mean just very simply do you think it's real or fake? Just go ahead and note next to the symbol if you think it's a real or fake symbol.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: What I do with team names is sometimes more freedom to go in our own direction. I'll have a team A and the other team A. So nobody feels like they're not part of the A-Team

STACY SALAS, ATTORNEY GENERAL'S OFFICE: I'll give you guys time. Please work together. If you have any ambiguity or if you're done and you have your final answers, please submit them or let me know just raise your hand I'll come by.

DR. LAURA SOUDER BETANCES, SPEAKER REP 2: Stacy, just to clarify trademark. Is that not also like a brand?

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Yes. It's a brand. When we are talking about it generally.

DR. LAURA SOUDER BETANCES, SPEAKER REP 2: Can it be a tangible brand or it can be a conceptual brand, correct?

STACY SALAS, ATTORNEY GENERAL'S OFFICE: I'm not sure what you mean by tangible or conceptual.

DR. LAURA SOUDER BETANCES, SPEAKER REP 2: Well tangible is Coke, right? Like Nike sneakers or shirt whatever the brand use they're in and then there's also the conceptual brand which is like a signature a signature service product. I'm thinking for example, of our own company. We've trademarked some of our signature products. Which are not tangible, they are conceptual.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Yes. I'm not an expert in the trademark world. But I think for the purposes of this activity, however you view trademark, my goal is just to see if you guys can identify whether it's real or fake. If whether it's conceptual or tangible attention. You got to stick with your team.

Okay, let's give it another minute and a half to go ahead and just enter your answers. It's okay, we're not going to get grades.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: Are we ready to give our team thoughts? Oh, am I supposed to be putting enough there? What's our team name?

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Okay, we have the *Taotao Tãsi* that won by one point.

Yes, *Taotao Tãno* just lost by one point, but everybody's a winner here.

Yes, the Jordan one is not real. I'm sorry the Jordan one is real. the Starbucks 10 is not real. Sorry. You guys thought the coke one was fake. It's real. You thought the Adidas one is real, but its fake and the Starbucks one is also fake. No, the Starbucks one, the star above the mermaid is supposed to be filled in.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: Are you saying that the crust toothpaste is not real?

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Yes, Crust is not real. It's probably just a zoom in for the trademark symbol or something. It's okay guys. The goal of this is to illuminate this confusion. Your ability for the most part to identify what is real and what's not.

Everybody is a winner. I'm going to pass around chocolate if you want some. Those are real Ferraro Rosher whatever they are. I did this exercise because I wanted to show how we do identify certain symbols with a company or a product and that's what the Commission is trying to do is to come up with a symbol, to identify with a product that's authentically *CHamoru*. A *CHamoru* Cultural Art.

How many of you think that someone off the street can identify if something is a *CHamoru* cultural art? For example, we just picked up, you know a cup and it says "*Hâfa Adai*"? How many of you think that someone off the street will know whether or not it's authentically *CHamoru*? Okay, none at all. Yes, off the street. No, no not a master. Just someone off the street. Okay, and most of you were able to identify a lot of these brand names. The Commission is trying to create a symbol that allows people to distinguish between what's authentically *CHamoru*. Cultural Art form and what's not. You guys will come up with it, but you'll want to create the trademark symbol for the *CHamoru* Cultural Arts.

Yes, art form. Yes, well that's what you guys have to determine. The statute says *CHamoru* Cultural Arts.

ANN MARIE ARCEO, DCA, PRESIDENT: Stacy, who would be the organization that will issue or dictate or determine this?

STACY SALAS, ATTORNEY GENERAL'S OFFICE: That's a good question. You guys. We have to start with what the statute says and then create sub committees, because if everybody tries to chime in as to what we need to do and we're not tracking it or we're not being held accountable to how this system is going to work, then it's going to be all over the place. That's a good question. Who, and as we go along we can people can volunteer based off of their expertise or we can sort of delegate right? The goal of this Commission is to one day, be able to put on this pop quiz a *CHamoru* trademark symbol and have people able to identify that it's actually something made by a master blacksmith or somebody who was an apprentice at some point, or somebody who comes from a family, not a biological family, but a family of artists who have experience and a background in this type of work art form.

Thank you all for participating. I do have some items that I came across. I'll pass it around just to have some kind of tangible example of some of the things that are coming out that have been trademarked federally but don't have a *CHamoru* cultural symbol on it and whether or not they want to have that that's a whole other conversation, but I'm going to pass it around just so that we can get more of a feel for what we're trying to do here as a Commission.

These laws stem from issues that occurred with Kmart. I went to Kmart and I looked at what they have. This is an item I'm going to pass around you can take a look at it. I don't see a trademark symbol on it, but you can look at it and see if it has any likeness to things that a local artist could have made and could have probably made money off of selling it themselves as an authentic *CHamoru* Cultural Art. I have a book here that came out 13 months in *Malessso*. It's put out by UOG press and they do have it copy written federally and then some coasters that I found at Kmart as well. They have symbols on them of just local art. You can see the type of things that you guys sort of have the power over when these artists are entrepreneurs. I watched

the last meeting and what they came out with and if they were able to stamp this as an authentic *CHamoru* Cultural Art. You know how people can distinguish who made it and who didn't. That's just to go around that we can have some kind of multi-media kind of learner. Go ahead and look at those things and while we look at that, I want to move forward to the next slide.

We went over that it helps us to distinguish between what's real and fake. People spend their money expecting a certain type of quality or value associated with it. How many of you today would purchase an Apple computer without the apple on it?

How many of you have purchased an Apple computer? Anybody here? You wouldn't purchase it if it didn't have the apple on it?

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: Right, it would perhaps signify that it's not authentic and it doesn't have the actual technology and the guarantee that I would expect.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Okay. If it had a banana on it, you wouldn't buy it and they told you it was an apple. You wouldn't buy it? Correct. How many of you have bought Jordan tennis shoes for a family member? Does anybody know Joe? How many of you would buy it if there was no Jordan symbol on there? If there was no Jordan symbol. No, why not? Why wouldn't you buy it?

CHRIS LIZAMA, GVB, ALTERNATE: My grandson would not accept it as a gift. Why wouldn't he accept it? They're into symbols and brands and they want it to be associated with the Michael Jordan brand.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: That's kind of the goal that the Commission is trying to achieve, to say this is a quality *CHamoru* cultural art. You guys are going to determine what the criteria is.

DR. LAURA M. SOUDER BETANCES, SPEAKER REP.2: Stacy can I clarify again for the record? The law states and uses words like local, Guam and *CHamoru*. It's here in your slide. I just want to clarify what does the law require for *CHamoru* trademark, or for local trademark or for Guam trademark because those are three different things.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Correct. We are going to keep working with these Concepts. We can go ahead and move to the next slide. Where did this law come from? In 2013, part of the background and history of why the Commission came to be is that we wanted to revisit the current statutes that are on the books. What we're talking about with respect to the word local is that the word is in the legislative intent. It's actually not in the statutes unless someone can correct me. If you see the word local and the statutes which is the law, the legislative intent is sort of the conversation around why we needed the Commission. Local is found in the legislative intent, but it's not in the statute. We can go ahead and move forward to the next slide.

The legislature wanted to say we need to revisit the laws that are on the books which are the Guam patents trademarks and copyright law. That's the civil law that we have on the books.

And they also wanted to note that the Guam Product Seal is not what we're looking for. It's good to provide some kind of regulatory accountability for what's created here. But the essence of what the Commission is supposed to do is try to protect General trademark law as well as Chamorro Cultural Arts. Not just necessarily made in Guam but made by or made in some kind of way. That's what differentiates it between the Guam Product Seal. And what we're trying to do here. We can go ahead and move to the next slide.

A huge impetus for the Commission was also the preparation for FestPac in 2016. Chamorro Arts was going to be displayed in a way that was sort of unique and that it was going to be here at home and there's more access for artists to show up and show what they have. Does anyone know any of the concerns that some of these artists had maybe and showing their art without some kind of trademark symbol? Does anybody know any personal stories by artist that they may have been hesitant to show what they know because they didn't want it to be copied? I'm not an expert in the background of this law and why it came about but folks can chime in and sort of talk about it.

FRANK RABON, CAHA, DESIGNATED ALTERNATE: Most of us are in that predicament already. I consider myself an artist. Yeah, we feel the same way because nothing has transpired in order for us. Some of us are not that readily easy to avail are Artistry to especially to visitors as well as to because we're not protected. And right now as it stands anybody can take what we design what we create and manufacture it all over the place and produce it. I've seen it. I've seen pictures of my dancers being used as a candy wrapper at the Duty free show. I have to go over there and tell those people they either remove that candy wrapper or they start paying me royalties because those are my dancers on that wrap and you never asked permission to use that picture as your candy wrapper.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Thank you for sharing. I appreciate that.

ANN MARIE ARCEO, DCA, PRESIDENT: I think the other example would be the *Suruhãno* or there's *Yo'ãmte* you know their practices. I know that was a conversation an issue about how much they share. How much you know on the surface because some of it is not much, that again it goes back to interlock intellectual knowledge and also of our people in our ancestry. And how much of that do we really want to put out in this kind of art or if it's going to be commercialized. I know that that was one of the biggest things not just during FestPac, but even as soon as the whole thing on *Yo'ãmte* and *Suruhãna* has been expanding that's becoming an issue of the *Manãmko'* not wanting to share all of their knowledge. There's boundaries also, cultural boundaries that need to be respected in this Western world of us trying to commercialize everything.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Yes. This is good. You know, that's why we're here today is to try to come up with if not the answer, because the answer probably lies a little bit further out, but what are the components on the ground? We named the medicine and the dancing. And we're talking about art forms to whoever is interested in the categorization.

I know that we mentioned CAHA already. That's good. But I just wanted to open the floor up so that we can sort of remember again, why we are here. We'll go ahead and move to the next slide.

What is the Commission supposed to do? It's a huge endeavor. It's going to take lots of time. This is in Section 14102. You guys are supposed to develop policy and recommendations to the legislature. I'll read this off to you so you can get sort of the expansiveness of what you guys are supposed to do. Recommendations regarding the coordination planning, implementation Administration promotion, compliance and enforcement of; now, this is a really critical piece right to trademark laws. Number one, we have the Guam Trademark and Intellectual Property Rights Act. And number two is the Guam Cultural Trademark Act. Those are the two laws that are named in the statutes, right? I know that in the previous meeting, Senator Marsh Taitano mentioned maybe creating separate committees to tackle each endeavor or you know based off of whatever the resources are, it's up to you guys to figure out maybe the essence of what we're trying to move forward. It could be the Guam Cultural Trademark Act.

DR. LAURA M. SOUDER BETANCES, SPEAKER REP.2: Again Stacy, I asked the question because Guam Trademark and Intellectual Property Rights Act applies to the whole island and to all of the participants on the island, Guam Cultural Trademark Act, but within that there could be a specific component for *CHamoru* trademark correct?

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Not necessarily within it, but I think based off of Section 14105, it's going to be a separate act.

DR. LAURA M. SOUDER, SPEAKER REP.2: It's going to be a separate act.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Yes, That's from my understanding. That is how the statute is written. You have to make one Guam Trademark and Intellectual Property Act and one Guam Cultural Trademark Act. If you have the law in front of you, we can go to §14105. It says the Commission shall work collaboratively to create policy recommendations rules and legislation for two specific areas in defining and developing a Guam trademark law. It says a Guam trademark law, but then it goes into two different laws. I guess you're right. If you guys decide that it's a general one and then within the general one, you do the Guam cultural trademarks act, that's where the recommendation part comes into play if you guys want it to be two different Acts or one within the other.

DR. LAURA M. SOUDER BETANCES, SPEAKER REP.2: A *CHamoru* component. Guam and Chamorro are not synonymous in this context.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Yeah, and that's something to make note of with regard to your committees, right? How is this law? How would you recommend that the legislature structure it? We are at the point of just trying to be as creative as possible, but also simplistic so that it can actually work on the ground. Once we start putting it up in the stars in the sky, forget it. So we will go on to the next slide.

Those are the two laws that you guys are tasked with working on. Then we will go with the next slide. You guys know what the makeup of the Commission is? It's supposed to be 11 members. We'll go ahead and move on to the next slide. Subcommittees. You'll want to create those or

form those at some point. Right? Folks that work on visual arts, performing arts, literary arts, and traditional arts; and, this is language from the statutes. Those subcommittees can help with determining how you guys are going to come up with qualifications for what warrants the trademark symbol and what doesn't.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: I just wanted to point out that when this was written, there was maybe a certain thinking involved. We were getting ready for the FestPac I believe. That's how FestPac divides up their committees into these four art disciplines. But we had talked about for this Commission and the things that it needs to do perhaps we would think of other ways to form subcommittees rather than just the for art disciplines because we do we have people with marketing background, legal background and other backgrounds. And there might be ways that help us move forward more effectively.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: In formulating the subcommittees, you're supposed to recommend to the legislature how this will work on the ground. That's important to think of going into it, as a form of just as a recommendation. You don't have to necessarily constrict the imagination to the statute. I mean you want to stick to the statute but you know sort of let them know there may be room for other subcommittees or art types. So, okay, that's good. We'll go ahead and move to the next slide.

You guys know that you're supposed to have monthly meetings. Simply majority constitutes Quorum and then in order to take an action, it has to be done by a simple majority as well. We'll go ahead and move to the next slide.

The Guam Trademarked and Intellectual Property Rights Act is supposed to be created as it relates to U.S. Trademark And Intellectual Property Rights to U.S. Trademark And Intellectual Property Rights. I leave that to you guys, you know, there are federal statutes and that there's not much in the Guam Trademark Commission Law that we have guidance on and with respect to this act. You can look at the statutes. This is probably the only guidance I found for this act and then we'll move to the next slide where I think the meat of the work is the Guam Cultural Trademark Act, right?

You're supposed to create something to promote and license *CHamoru* Cultural Arts manufactured or produced on Guam. I know there's been in conversation as to whether or not you're constricted to or restricted to manufactured or produced on Guam again, it I don't think it hurts to follow the law with respect to recommendations to the legislature. You'll want to make our subcommittees accordingly, based on each issue that arises. We'll be working on this for a while. Don't think that we have to produce this tomorrow. I mean it would be nice.

The Commission can gather information conduct research. The statute provides that you guys can obtain professional services including legal services conduct polls and surveys. We'll go ahead and move on to the next slide.

I think this is a part of the huge items and maybe how you want to structure subcommittees. Who's best suited or better suited to identify a cultural art? And help with the criteria creation. If you're going to buy an Apple computer, somebody said you need to have the Apple logo on the

computer. You need to have it. Start with maybe what does the *CHamoru* trademark logo look like? You want to have a logo. Lineage of cultural knowledge. I'm not quite sure what that term of art is, but if we continue on with the Apple computer analogy or metaphor comparison, Apple has its own lineage. Each computer will tell you this is a two point or one point two. This is like a mountain lion version. Let me know if somebody is not familiar with Apple products because I can also switch it to something else. I just like apple because you pay a pretty penny to have an Apple computer. That marking of the Apple is very important because you expect certain things from it. Authenticity. Who is best suited to make those determinations on what's an authentic level of quality? I leave that to you guys, cultural content. The legislature created these different categories, but it does say in the statute that these items should be discussed, but you're not limited to them. Something else came up with regard to how are you going to certify something as a true, Authentic Chamorro cultural art. If you have some other type of criteria, you're not prohibited from coming up with other requirements.

I'm sure GEDA, you know talking about the Guam Product Seal they have their requirements. That's an example. We can go to the next slide. You guys are looking to create the criteria for the proposed trademark image

Whoever's excited about that should work on it, because some people are going to be more excited about the process of certifying something the symbol itself and quality control, etc. Etc. Come up with a process as I mentioned and the proposed terms of use of the trademark. It's all pretty general pretty big Over time the hope is to be able to narrow and have actual language for what does that mean? Okay. I'm going to move on to the next one.

All right. Again going back to the idea of not Reinventing the wheel. The legislative findings and intent point us to the *Maori* folks in New Zealand. They have their own program. It's called *Toi Iho*. I would recommend going to their website. They do have a registry for artists, etc. Etc. It's a very good place to start. We'll go to the next slide.

I do have a video for you guys. It will take some time to pull it up. I just wanted to play it. I know everybody's seen it but I still think just to sort of wrap it all up and close the loop, that we should watch at least the first three minutes of this video. And that's it. That's all I have. I have the logo that the *Maori* folks use and then that's it and then we can open the floor for questions.

And you will notice in the PowerPoint presentation with the symbols, they've made different symbols for what's Maori made fully and what's been a collaborative work. There's different symbols that they use which is an idea that you can recommend to the legislature.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: *Si Yu'os ma'åse* Stacy for your presentation. It was interactive. It had games and candy. I vote that you do all our presentations and walk us through everything but *si Yu'os ma'åse* for all the thought that you put into it and really helping break it down for us certain elements that we hadn't yet discussed or may be fully understood. It was very useful in that way. Maybe we'll do since we do have session going on very shortly is think about the questions maybe write them down but watch the video and then see if we can adjourn and then take a lot of this food for thought into our next meeting that should be coming up somewhat shortly and we've talked about going through the

different processes. Maybe we could have the presentation on the trademark counterfeiting act or do you think that would be getting too much into the weeds at this point?

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Up to you guys. I can do the presentation or you guys can dive into the meat of things. You guys can decide. We can do the counterfeiting presentation but it's up to you.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: The way that we've been approaching this is kind of getting to understand the landscape. Okay, some of what's out there and then but we are thinking at the same time about subcommittees and so forth. I think you really helped us in those areas.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Do you guys want to know about the counterfeiting? The criminal statutes that we have now, or the Civil one, The Guam Trademark Patent Trademark And Copyright Act.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: Right. That one might be the more natural next step.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: Okay. Alright, the Civil one. Okay.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: Great. So we have that to look forward to.

STACY SALAS, ATTORNEY GENERAL'S OFFICE: I'm not sure if the video is....all right. Awesome

VIDEO PRESENTATION:

"Toi iho, Maori Made Mark"

Duration: Eleven minutes and twenty-five seconds

<https://www.youtube.com/watch?v=FzqH0jilYO4>

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: *Si Yu'os ma'āse* for that. It's important I think to go back to that video from time to time, and I'm glad you suggested going to the website to look at their actual registry because it is so much to absorb. I think every time I see that video or when I go to the website it will seek in a little bit further each time about what all the processes, all the ways to think about this that were really taking on. For the questions, if we can put those down and have them ready for next time. And then we'll have that presentation. *Si Yu'os ma'āse* for being willing to provide yet another presentation that one being on the patents trademarks and copyrights that are presently part of our Guam code. With no further items for discussion at this moment, can I hear a motion to adjourn?

CHRIS LIZAMA, GVB: I motion to adjourn.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: Do I hear a second?

RITA NAUTA, SPEAKER REP.1: I second that.

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: All those in favor?

ALL: AYE

SENATOR KELLY MARSH (TAITANO), PH.D. CHAIR: Motion carries to adjourn this Guam Trademark Commission meeting and the time is 9:44. *Si Yu'os ma'åse* everybody. I think it was a very productive morning and it's wonderful to have you all here. I look forward to our next meeting. *Si Yu'os ma'åse*, and we're now able to get on with our day.

The Guam Trademark Commission monthly meeting was adjourned at 9:44 am.

III. FINDINGS & RECOMMENDATIONS

The Committee on Heritage and the Arts, Parks, Guam Products, *Hagåtña* Revitalization, Self Determination, and Regional Affairs, hereby reports out for public record the August 26, 2019, Committee Digest and transcription of the Guam Trademark Commission monthly meeting.

CHAPTER 14
GUAM TRADEMARK COMMISSION

- § 14101. Short Title.
- § 14102. Guam Trademark Commission, Established.
- § 14103. Convening of the Guam Trademark Commission.
- § 14104. Composition of Guam Trademark Commission.
- § 14105. Duties of Commission.
- § 14106. Conduct of Meetings.

§ 14101. Short Title.

This Chapter shall be known as the Guam Trademark Commission Act.

§ 14102. Guam Trademark Commission, Established.

The Guam Trademark Commission is hereby established for the special purpose of developing policy direction and recommendations relative to coordination, planning, implementation, administration, promotion, compliance and enforcement of the “Guam Trademark and Intellectual Property Rights Act” and the “Guam Cultural Trademark Act.”

NOTE: The Guam Trademark Commission shall remain in effect until its recommendations described in 2 GCA § 14105 are approved by the Guam Legislature, pursuant to P.L. 32-080:5 (Nov. 27, 2013).

§ 14103. Convening of the Guam Trademark Commission.

The Guam Trademark Commission shall be under the direction of the Chairperson of the Legislative Committee with oversight over Cultural Affairs, and convened pursuant to provisions of this Act.

§ 14104. Composition of Guam Trademark Commission.

The composition of the Commission shall be as follows:

- (a) The Legislative Chairperson with oversight over Cultural Affairs shall serve as the Chairperson of the Commission;
- (b) The Director of the Department of Revenue and Taxation (DRT), or his assigned representative, shall serve as the Vice-Chairperson. DRT is empowered to enforce regulations and collect levies and fines from companies found in violation of the law;

The Guam Trademark Commission special purpose is for the Guam Trademark and Intellectual Property Rights Act and the Guam Cultural Trademark Act.

Two separate and distinct documents.

Listing of Commissioners and areas of contribution or expertise.

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CH. 14 GUAM TRADEMARK COMMISSION

(c) The President of the Department of Chamorro Affairs (DCA), or his assigned representative. DCA can offer insight into the uniqueness of the Guam brand and the importance of protecting the aspects of the Chamorro culture and heritage;

(d) The General Manager of the Guam Visitors Bureau (GVB), or his assigned representative. GVB is tasked with promoting the Guam brand in its entirety;

(e) The Administrator of the Guam Economic Development Authority (GEDA), or his assigned representative. GEDA offers programs and opportunities for economic development;

(f) The Attorney General of Guam (AGO), or his designated legal representative from the Office of the Attorney General. The AGO shall provide guidance on intellectual property rights relative to the Guam brand, and legal opinions as requested;

(g) The Chairperson of the Guam Council on the Arts and Humanities (CAHA), or an assigned representative;

(h) One (1) member of *I Liheslatura* Majority appointed by the Speaker. The Speaker may appoint herself, or a designee;

(i) One (1) member of *I Liheslatura* Minority appointed by the Speaker;

(j) Two (2) members appointed by the Speaker of *I Liheslatura*, representing organizations active in the promotion of Chamorro Cultural Arts on Guam.

(k) The Commission shall include additional public and private sector members to serve on subcommittees in the four areas of visual arts, performing arts, literary arts, and traditional arts, demonstration and exhibitions, or elect them as committee members, provided that they possess significant background, knowledge and experience with locally produced products; and the Commission may prescribe special procedures for their participation.

§ 14105. Duties of the Commission.

The Commission shall work collaboratively to create policy recommendations, rules and legislation for two (2) specific areas in defining and developing a Guam Trademark Law:

Listing of Commissioners and areas of contribution or expertise.

Need to determine the applicability of the four sub-committees....

1. Visual Arts
2. Literary Arts
3. Performing Arts
4. Demonstrations and exhibitions.

Perhaps the Commission may need to expand or modify upon the subcommittee listing.

2 GCA LEGISLATIVE BRANCH
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(a) A new "Guam Trademark and Intellectual Property Rights Act" to create and regulate the trademark law in Guam as it relates to or mirrors the current applicable U.S. Trademark and Intellectual Property Rights statute, and provide additional statutes as needed.

(b) A cultural (certification) trademark program, titled, the "Guam Cultural Trademark Act" (similar to that of the Maori "Toilho" program in New Zealand), to promote and license Chamorro cultural arts manufactured or produced on Guam. The Commission may hire professional legal or technical services to assist and perform studies, roundtables, conduct polls, surveys and/or conferences to report findings and present initial guidelines for a Guam Cultural Trademark program so that a proposal can be presented to the broader community as a concrete, well-considered, and cohesive program. Guidelines should be discussed to include, but not be limited to, the following types of issues:

- (1) Identification of initial types of cultural arts for use of trademark.
- (2) Criteria for lineage of cultural knowledge qualifying for use of trademark.
- (3) Criteria for authenticity of works qualifying for use of trademark.
- (4) Criteria for quality of works qualifying for use of trademark.
- (5) Criteria for cultural content qualifying for use of trademark.
- (6) Sources, meanings and extrinsic functions of proposed trademark image.
- (7) Proposed process for certifying artists for use of trademark.
- (8) Proposed process for certifying arts organizations for use of trademark.
- (9) Proposed process for certifying vendors for use of trademark.

Taskings for the Identification of Cultural Arts that could be categorically identified for the use of the the Trademark

Assigned taskings (May 6 Trademark Commission Meeting) - Processes For Certification:

1. Artists
2. Art Organizations
3. Vendors

CAHA - Listing of the categories for the Masters list and cultural arts that include intangible arts classifications.

A listing or categorical identification of intangible art forms is necessary towards determining the cultural/arts that will be covered by the New Trademark Act. The identification of these art forms will assists the Commission on determining the scope and coverage of the proposed Guam Cultural Trademark Act.

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(10) Proposed terms for use of trademark in advertising, marketing, and sales.

The Commission shall submit proposed legislation after its study for a new "Guam Trademark and Intellectual Property Rights (IP) Act" and the "Guam Cultural Trademark Act" to *I Liheslaturan Guåhan* no later than one hundred eighty (180) calendar days from the date of enactment of this Act, and shall be subject to legislative approval and perform all functions necessary to effectuate the mission of the Commission as adopted.

§ 14106. Conduct of Meetings, Quorum.

The Commission shall meet once a month to discuss and assess progress and recommendations.

A simple majority of members of the Commission shall constitute a quorum to do business; any action taken by the Commission shall be by a simple majority of the members.

11 Commissioners

6 Commissioners is simple constitutes a quorum.

4 members of a simple quorum can approve a Commission action.

Guam Trademark Commission Act

(2013)



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Background/History

In 1995, Public Law 23-62 (Title 5 GCA, Chapter 20, Article 4) was enacted to provide an applicant with the ability to locally register a U.S. trademark, patent or copyright within Guam. The statute further provides for a Guam Certificate of Registration for any person desiring to register any print, label or trademark intended to be attached or applied to goods or manufactured articles, or to bottles, boxes or packages containing the goods or manufactured articles. However, the statute needs to be revisited to provide more comprehensive guidelines and better legal protections for those products made and registered exclusively on Guam.



Although the Guam Product Seal Program offers some regulatory control and protection of products made in Guam, *I Liheslatura* finds that we must further protect our native *Chamorro* culture, traditional practices, and new and evolving cultural practices (art, music, dance, lyrics, video, film, photography, etc.) through a comprehensive local intellectual property rights and cultural trademark statute.

Guam Festpac 2016



followers. Public Law 30-83 created the 12th Festival of Pacific Arts Coordinating Committee, with the duties of organizing and planning the Festival. It was discussed in these planning meetings that it is imperative, prior to this Festival, that Guam have a local statute in place for the protection of local intellectual property rights and cultural trademarks for Guam and other participating countries.

Develop policy direction and recommendations regarding:

- Coordination,
- Planning,
- Implementation,
- Administration,
- Promotion,
- Compliance, and
- Enforcement

2 G.C.A. § 14102

Guam Trademark Law

1. Guam Trademark and Intellectual Property Rights Act

-and-

2. Guam Cultural Trademark Act

2 G.C.A. §§ 14105(a)-(b)

Commission

- **Chairperson:** Legislative Chairperson with oversight over Cultural Affairs
- **Vice Chairperson:** Director of Dept. of Revenue and Taxation*
- **Members:**
 - President of the Department of Chamorro Affairs (DCA)*
 - General Manager of the Guam Visitors Bureau (GVB)*
 - Administrator of the Guam Economic Development Authority (GEDA) *
 - Attorney General of Guam (AG)*
 - Chairperson of the Guam Council on the Arts and Humanities (CAHA)*
 - 1 member of the Legislature **Majority** appointed by the Speaker
 - 1 member of the Legislature **Minority** appointed by the Speaker
 - 2 members appointed by the Speaker of the Legislature from organizations actively promoting Chamorro Cultural Arts on Guam

*or an assigned representative

2 G.C.A. §§ 14104(a)-(j)

Subcommittees

- **Visual Arts**
- **Performing Arts**
- **Literary Arts**
- **Traditional Arts, Demonstration, and Exhibitions**
 - **possess significant background, knowledge and experience with locally produced products**

2 G.C.A § 14104(k)

Monthly Meetings

- **The Commission Shall meet once a month**
- **Simple majority constitutes quorum**
- **Any action shall be by simple majority (the most votes)**

2 G.C.A. § 14106

Guam Trademark and Intellectual Property Rights Act

- To create and regulate trademark law as it relates to U.S. Trademark and Intellectual Property Rights Statute.

2 G.C.A. § 14105(a)

Guam Cultural Trademark Act

- Promote and license Chamorro cultural arts manufactured or produced on Guam
- Gather information/conduct research to propose a concrete, well-considered, and cohesive program.
 - Obtain professional services
 - Conduct polls and surveys

2 G.C.A. § 14105(b)

Guidelines to Consider and Discuss

(1) **Identify types of cultural arts** for use of trademark

(2) **Qualification Criteria re:**

- Lineage of cultural knowledge
- Authenticity
- Quality
- Cultural content

2 G.C.A. §§ 14105(b)(1)-(5)

Guidelines to Consider and Discuss (con't)

Criteria for:

- Sources, meanings and extrinsic functions of proposed trademark image.

Proposed process for certifying:

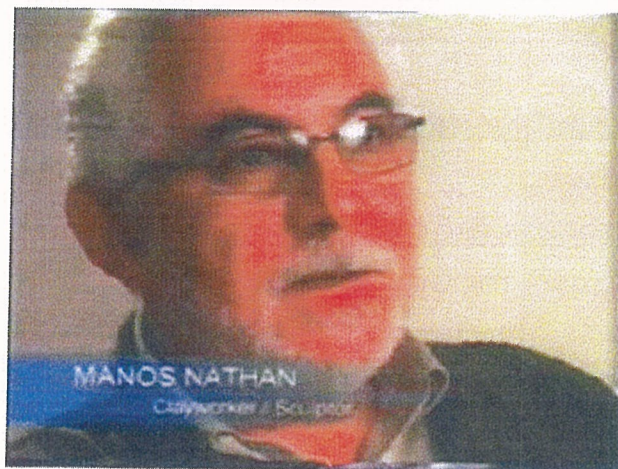
- certifying artists for use of trademark.
- certifying arts organizations for use of trademark.
- certifying vendors for use of trademark.

Proposed terms for use of trademark in advertising, marketing, and sales.

2 G.C.A. §§ 14105(b)(6)-(10)

Legislative Findings and Intent (P.L. 32-00; Bill No. 156-32)

18 One of the most successful examples of a cultural (certification) trademark
 19 program has been the Maori "Toi Iho" program in New Zealand. Initial legislation
 20 was enacted to undertake a process of consultation with the Maori artists and tribal
 21 communities for consensus building beginning in Year 2000, funded with about
 22 \$NZ 2 million. The Toi Iho cultural trademark program was implemented through
 23 legislation enacted in 2002, and is administered through the Arts Council of New
 24 Zealand in consultation with its parallel Maori arts agency, the Te Waka Toi
 25 Cultural Arts Board. In a short time, the Toi Iho program has become successful in
 26 establishing the Toi Iho Logo as a symbol of excellence in Maori cultural arts.





**Submit Proposed Legislation
after study, technically 180
days from enactment**

2 G.C.A. § 14105(b)(10)

CAHA MASTERS LISTING

1997

1	Ada, Dolores (Deceased)	Master Kosturera (Seamstress/ Dressmaker)
2	Ada, Joaquin & Maria (Deceased)	Master Hatsadot Hotnon Antigu (Builder - Old Chamorro Outside Oven)
3	Ada, Josef (Deceased)	Master Haboneru (Soap maker)
4	Aflague, Vicente Torres "Katson" (Deceased)	Master Plateru (Goldsmith)
5	Aguon, Jose & Immaculada (Deceased)	Master Talayeron Manahak (Fisherman of Baby Rabbit Fish)
6	Bayani, Magdalena Santos San Nicolas	Master Techa (Prayer Leader)
7	Benavente, Elena Cruz (Deceased)	Master Pandanus Leaf Weaver
8	Blas, Segundo (Deceased)	Master Carver - Ifit Wood
9	Borja, Alejandro Munoz	Master Peskadot Ayuyu (Coconut Crab Hunter)
10	Borja, Emilio (Deceased)	Master Botdat Galaide (Canoe Carver)
11	Calvo, Oscar Lujan Monsignor (Deceased)	Master Collector of Chamorro Culture
12	Castro, Ramon (Deceased)	Master Canoe Carver
13	Celis, Francisca (CNMI)	Master Atupadot (Sling Maker)
14	Cepeda, Juan (Deceased)	Master Suruhanu (Male Herbal Doctor)
15	Crisostomo, Jesus Meno (Deceased)	Master Bilembaotuyan Instrumentalist
16	Crisostomo, Maria Palacios (CNMI) (Deceased)	Master Weaver (Pandanus Leaf)
17	Cruz, Jesus "Tang" (Deceased)	Master Esteladot - Aguazente (Whiskey Maker - distilled from Tuba, fresh coconut sap)
18	Cruz, Juan	Master Guagualo (Farmer)
19	Duenas, Gregorio & Joaquin (Deceased)	Master Plateru (Goldsmith)
20	Eustaquio, Jose (Deceased)	Master Hasadot Hotnot Antigu (Builder - Old Chamorro Outside Oven)
21	Flores, Alfred San Nicolas (Deceased)	Master Lancheru (Rancher)

22	Franquez, Francisco Garrido (Deceased)	Master Instrumentalist (Harmonica)
23	Gould, Clotilde Castro (Deceased)	Master Storyteller
24	Guerrero, Joaquin C. (Deceased) & Anthony	Master Talayeru (Fisherman) & Fishnet Maker
25	Leon Guerrero, Ana N. (Deceased)	Master Bilen Maker (Builder of Shrine representing the manger Jesus Christ was born in.)
26	Lujan, Joaquin "Jack" (Deceased)	Master Blacksmith
27	Mafnas, Jose	Master Nabahadot (Knife Maker)
28	Manley, Peter	Master Tuberu (Beverage made from fresh coconut sap)
29	Meno, Francisco (Deceased)	Master Kakahat Sagualle (Hut Builder)
30	Naputi, Joaquin (Deceased)	Master Sapateru (Shoe Maker)
31	Palacios, Angela Sayona (Deceased)	Master Suruhana (Female Herbal Doctor)
32	Palacios, Jose Cruz (Deceased)	Master Peskadot Binadu (Deer Hunter)
33	Pangelinan, Pedro Muna (Deceased)	Master Trap maker
34	Paulino, Dolores Flores (Deceased)	Master Pandanus Leaf Weaver
35	Paulino, Floren Meno	Master Weaver – Coconut Leaf
36	Punzalan, Jose (Deceased)	Master Talayeru (Fisherman/ Fishnet Maker)
37	Quinata, Rosabella (Deceased)	Master Weaver - Pandanus Leaf
38	Rabon, Francisco B.	Master of Chamorro Dance
39	Reyes, Enrique Chaco (Deceased)	Master Bullcart Builder
40	Sablan, Phillip	Master Weaver
41	Sablan, Vicente Salas (CNMI)	Master Talayeru (Fisherman)& Fishnet Maker
42	San Nicolas, Juan A. (Deceased)	Master Peskadot Fanihi (Fruit Bat Hunter)
43	San Nicolas, Rosita	Master Fafamfok Nasa (Shrimp Trap Maker)
44	Santos, Carmen (Deceased)	Master Estoriandot (Storyteller)
45	Santos, Rosario	Master Weaver

	(Deceased)	
46	Saralu, Genaro (Deceased)	Master Amti Espirituat (Spiritual Healer)
47	Taijeron, Juan (Deceased)	Master Instrumentalist - Accordion
48	Taimanglo, Ignacio Meno (Deceased)	Master Hut Builder
49	Taitano, Robert	Master Ifit Wood Carver
50	Terlaje, Regina Mafnas & Jesus Salas (Deceased)	Master Suruhana & Master Suruhanu (Female & Male Herbal Doctors)
51	Topasna, Albert (Deceased)	Master Peskadot Haggan (Turtle Hunter)
52	Torres, Lucia (Deceased)	Master Weaver
53	Yatar - McDonald, Maria	Master Attistan Tatu (Tattoo Artist)
54	Yoshida, Margarita Meno (Deceased)	Master Salineru (Salt Maker)
55	Cruz, Asuncion (Deceased) ; Taitague Lourdes (Deceased) ; Paulino, Floren; Meno, Vicente; Meno, Ben; Crisostomo, Maria (Deceased) ; Aguon, Marcella (Deceased) ; Anderson, Angelina (Deceased) ; Gould, Clotilde (Deceased)	Master Kantan Chamorrita Singers

2011 - 2015

56	Josefa "Tan Pai" Cruz Certeza, (Deceased)	Sainan Suruhana (Master Healer)
57	Francisco C. Lizama	Sainan Hereru (Master Blacksmith)
58	Greg T. Pangelinan,	Sainan Lalasgue (Master Carver)
59	Eileen R. Meno,	Sainan Bailan Chamorro (Master of Chamorro Dance)
60	Leonard Z. Iriarte	Sainan Minenhalom Manlâlai Chamorro (Master of Chamorro Chant)

61	Vincent J.C. Reyes	Sainan Minenhalom Bumailan Chamorro (Master of Chamorro Dance)
62	Julie Q. Benavente	Sainan Minenhalom Manlasgue – Adotnon I Tataotao (Master Carver – Body Ornamentation)
63	Peter R. Onedera	Sainan Minenhalom Sinangan Ginen I Hila’ (Master Storyteller)

THE MARK OF A CULTURE:
THE EFFICACY AND PROPRIETY OF USING
TRADEMARK LAW TO DETER CULTURAL
APPROPRIATION

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INTRODUCTION

An American pop star dresses as a geisha for her performance at an award show.¹ A French fashion designer uses a Mexican indigenous pattern on a blouse.² American celebrities wear Indian bindis at music festivals.³ A white actress appears on a talk show with her hair in cornrows, a distinctly African-American hair style.⁴ A Major League Baseball team has a caricature of a Native American chief as its mascot.⁵

In recent years, instances of cultural appropriation, or the act of taking some product from a “source community” culture and repurposing it in a different culture, have drawn the scrutiny and condemnation of major news outlets and social media mobilizers alike.⁶ Popular criticism of cultural appropriation often centers on the lack of compensation to the source community for the use of their cultural product, or reputational harm due to perpetuation of negative stereotypes.

¹ Jessica Goldstein, *Katy Perry Should Talk to Questlove About Cultural Appropriation*, THINKPROGRESS (July 30, 2014, 4:01 PM), <http://thinkprogress.org/culture/2014/07/30/3465849/katy-perry-questlove-cultural-appropriation/>; Cathy Young, *To the New Culture Cops, Everything is Appropriation*, WASH. POST (Aug. 21, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/08/21/to-the-new-culture-cops-everything-is-appropriation/>.

² Krithika Varagur, *Mexico Prevents Indigenous Designs From Being Culturally Appropriated—Again*, HUFFINGTON POST (Mar. 17, 2016, 2:04 PM ET), http://www.huffingtonpost.com/entry/mexico-prevents-indigenous-designs-from-being-culturally-appropriated-again_us_56e87879e4b0b25c9183afc4.

³ Lauren O’Neil, *Celebrity Bindis at Coachella: Fashion Trend or Cultural Appropriation?*, CBC NEWS (Apr. 14, 2014, 5:53 PM),

<http://www.cbc.ca/newsblogs/yourcommunity/2014/04/celebrity-bindis-at-coachella-fashion-trend-or-cultural-appropriation.html>; Parul Sehgal, *Is Cultural Appropriation Always Wrong?*, N.Y. TIMES MAG. (Sept. 29, 2015),

<http://www.nytimes.com/2015/10/04/magazine/is-cultural-appropriation-always-wrong.html>.

⁴ Kareem Abdul-Jabbar, *Cornrows and Cultural Appropriation: The Truth About Racial Identity Theft*, TIME (Aug. 26, 2015),

<http://time.com/4011171/cornrows-and-cultural-appropriation-the-truth-about-racial-identity-theft/>; see also, e.g., Jenni Avins, *The Dos and Don’ts of Cultural Appropriation*, ATLANTIC (Oct. 20, 2015),

<http://www.theatlantic.com/entertainment/archive/2015/10/the-dos-and-donts-of-cultural-appropriation/411292/>; Browntourage & Mo Juicy, *Appropriation v. Appreciation*, INTERRUPT MAG. (Sept. 23, 2014, 11:30 AM), <http://interruptmag.com/article/appropriation-vs-appreciation>; Sehgal, *supra* note 3; Michelle Y. Talbert, *You Have to Pay Us for It: Curbing Cultural Appropriation Through Ownership*, FOR HARRIET (last visited Mar. 29, 2016, 1:08 PM PT), <http://www.forharriet.com/2015/10/you-have-to-pay-us-for-it-curbing.html#axzz44KAZV35C>.

⁵ Daniel McGraw, *Native Americans Protest Chief Wahoo logo at Cleveland Indians Home Opener*, GUARDIAN (Apr. 11, 2015, 11:52 AM EDT), <http://www.theguardian.com/sport/2015/apr/11/native-americans-protest-chief-wahoo-logo-at-cleveland-indians-home-opener>.

⁶ See *supra* notes 1-5.

Source communities looking for remedial or preventative measures often turn to intellectual property regimes for protection in Western legal systems, where intellectual property laws often serve as the foremost line of defense for those intangible types of property.⁷ In the United States, source communities are turning to trademark law as a means for preventing non-community members from using their cultural products, with largely undetermined success.⁸ While much scholarship has been devoted to analyzing the applicability and efficacy of copyright law for curbing cultural appropriation,⁹ the applicability and efficacy of trademark law to achieve the same end has been given only a cursory treatment.

This paper, grounded in social science literature on cultural appropriation and foundational legal texts on trademark law, examines whether trademark law is suited to grappling with cultural appropriation. Part I forms the literature review of this paper: it includes a definition of “cultural appropriation,” a first glance at the occurrence of cultural appropriation in the marketplace, and description of the harms and benefits of cultural appropriation and the potential harms and benefits of policing it. Part II attempts to apply trademark law to cultural appropriation, first by introducing the purposes of trademark law, then by presenting the requirements for trademark protection, before analyzing how source communities may be able to register their cultural products as marks and protect them from third party uses through trademark causes of action, given the particular characteristics of source communities and cultural products. Part III draws on the analysis in Part II to examine the potential efficacy of trademark law in grappling with cultural appropriation, the potential harms and benefits to the source community and to society by using trademark law to police cultural appropriation, and the propriety of applying trademark law to prevent cultural appropriation given the purposes of trademark law. The conclusion of this paper briefly reiterates the author’s findings: that trademark law is not particularly well suited to addressing cultural appropriation, and successful causes of action in trademark will be both difficult to achieve and, if successful, ineffective, or even counterproductive.

I. CULTURAL APPROPRIATION AND INTELLECTUAL PROPERTY

A. *Theories of Cultural Appropriation in Social Science*

The term “cultural appropriation” is often invoked by university students, news media, and online commentators to describe and decry instances in which a person or group acts in a way that offends persons of a different culture. Despite the term’s recent incorporation into the popular lexicon, the meaning of

⁷ See *infra* Parts I.C & I.D.

⁸ See, e.g., Guy Trebay, *An Uneasy Cultural Exchange*, N.Y. TIMES (Mar. 14, 2012), <http://www.nytimes.com/2012/03/15/fashion/an-uneasy-exchange-between-fashion-and-navajo-culture.html>; see also *infra* Part I.D.

⁹ See *infra* Part I.D.

“cultural appropriation” has developed in social science literature over the last thirty years. The most often cited definition of cultural appropriation, by Professors Bruce Ziff and Pratima V. Rao, is “the taking from a culture that is not one’s own of intellectual property, cultural expressions or artifacts, history and ways of knowledge.”¹⁰ Most definitions in the literature fit this basic frame: A person or group of a certain culture (“the appropriator”) “takes” certain tangible or intangible objects (“cultural products”) from a different culture (“the source community”). Professor Rosemary J. Coombe and Nicole Aylwin explain the “taking” of the cultural product from the source community as “improperly recontextualiz[ing],” or “mov[ing] or remov[ing] [it] from its authoring context.”¹¹

Other definitions have ascribed additional attributes to cultural appropriation. Professor Sally Engle Merry adds that the cultural product that is “taken” from the source community is replayed by the appropriator “with different meanings or practices.”¹² Professor Merry and others highlight the often commercial nature of the “taking,” and power imbalance between the two cultures. Within the context of intellectual property, Professor Merry describes cultural appropriation as “the processes by which dominant groups take, and often profit from, the artistic, musical, and knowledge productions of subordinate groups”¹³ Professor Susan Scafidi adds that “outsiders borrow cultural products not only for their intrinsic value, but also in order to invoke, describe, or caricature the source community.”¹⁴ Professor Jonathan Hart

¹⁰ Bruce Ziff & Pratima V. Rao, *Introduction to Cultural Appropriation: A Framework for Analysis*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 1, 1 (Bruce Ziff & Pratima V. Rao eds., 1997); see Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected Through Current Intellectual Property Law?*, 7 *J. HIGH TECH. L.* 180, 188 (2007) (quoting Ziff & Rao); Sally Engle Merry, *New Direction: Law, Culture, and Cultural Appropriation*, 10 *YALE J.L. & HUMAN.* 575, 585-86 (1998) (same); Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 *J. GENDER RACE & JUST.* 69, 73 (2000) [hereinafter Sunder, *Identity Politics*] (same); Rebecca Tsotsie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 *ARIZ. ST. L.J.* 299, 300, 310 (2002) (same); Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of (Cultural) Appropriation*, 93 *TEX. L. REV.* (forthcoming 2016) (manuscript at 104) (on file with SSRN) (same).

¹¹ Rosemary J. Coombe & Nicole Aylwin, *The Evolution of Cultural Heritage Ethics via Human Rights Norms*, in *DYNAMIC FAIR DEALING: CREATING CANADIAN CULTURE ONLINE* 201, 201-02 (Rosemary J. Coombe, Darren Weshler, and Martin Zeilinger eds., 2014).

¹² Merry, *supra* note 10, at 585; see Tsotsie, *supra* note 10, at 310-11 (quoting Merry).

¹³ Merry, *supra* note 10, at 585-86; see also Michael F. Brown, *Respondent: Why Property and Democracy are Not Always Allies*, 50 *ST. LOUIS L.J.* 843, 846 (2006) (“‘Cultural appropriation,’ the fear that elements of folklore and traditional knowledge are being privatized by industry through increasingly aggressive application of intellectual property (IP) law.”); Riley & Carpenter, *supra* note 10, at 104. Merry goes on to explain that cultural appropriation is not limited to dominant groups taking from subordinate groups—“it can be done the other way as well.” Nevertheless, she emphasizes the centrality of power relations to the concept of cultural appropriation. Merry, *supra* note 10, at 585-86.

¹⁴ Susan Scafidi, *Intellectual Property and Cultural Products*, 81 *B.U. L. REV.* 793, 824 (2001).

questions the propriety of the invocation, description, or caricature of the source community, given a power imbalance between the two cultures.¹⁵

Key to “cultural appropriation” is the taking of a *cultural product*. The term “cultural product” is commonly given a broad and nebulous definition. At base, it includes both tangible and intangible materials. Tangible materials include “prehistorical and historical objects that significantly represent a group’s cultural heritage,”¹⁶ or even “all of the . . . tangible forms of culture produced by humans to adapt and exercise control over their environment.”¹⁷ If tangible cultural products are a broad category, intangible cultural products are even broader. Intangible materials have been described as the knowledge “considered significant by the members of a culture.”¹⁸ Intangible materials are “aspects of the whole body of cultural practices, resources and knowledge systems” developed by a people,¹⁹ and are often “collectively owned and transmitted orally from generation to generation.”²⁰

Though the potential expansiveness of “cultural appropriation” may obscure its meaning, current examples of cultural appropriation abound. Cultural appropriation often occurs when a source community’s words, names, designs, motifs, symbols, artworks, art styles, songs, musical genres, stories, or dances are used in a different cultural group’s creative works²¹ or consumer products, without the permission of the source community.²²

In the United States, we often see creative works and consumer products use Native American words and imagery.²³ Jeep Grand Cherokees, Pontiac Aztecs, Washington Redskins, University of North Dakota Fighting Sioux, Land O’Lakes Butter packaging images, Natural American Spirit cigarettes, all use some word, name, or image from Native Americans on a non-Native

¹⁵ Jonathan Hart, *Translating and Resisting Empire: Cultural Appropriation and Postcolonial Studies*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 137, 137 (Bruce Ziff & Pratima V. Rao eds., 1997).

¹⁶ Kelley, *supra* note 10, at 183.

¹⁷ *Id.*

¹⁸ *Id.* 183-84.

¹⁹ Peter J. Chalk, *Indigenous Trade Marks and Human Rights: An Australian and New Zealand Perspective*, 99 *TRADEMARK REP.* 956, 2 (2009).

²⁰ K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 *AM. U. J. GENDER SOC. POL’Y & L.* 365, 383 (2007) [hereinafter Greene, *Intellectual Property*].

²¹ Chalk, *supra* note 19, at 2; Riley & Carpenter, *supra* note 10, at 104. Inaccurate or offensive depictions of groups, such as Native Americans, in television, movies, and literature have also been considered cultural appropriation. Kelsey Collier-Wise, *Identity Theft: A Search for Legal Protections of Intangible Indigenous Cultural Property*, 13 *GREAT PLAINS NAT. RESOURCES J.* 85, 87 (2010); Kelley, *supra* note 10, at 188.

²² Brown, *supra* note 13, at 846; Kelley, *supra* note 10, at 188.

²³ Chalk, *supra* note 19, at 2. While many examples of cultural appropriation in the United States derive from use of Native American cultural products, there have also been instances of cultural appropriation of cultural objects from a number of other cultures, including Jewish and African American culture. See Nathaniel T. Noda, *Perpetuating Cultures: What Fan-Based Activities Can Teach Us About Intangible Cultural Property*, 44 *CREIGHTON L. REV.* 429, 436 (2011); Scafidi, *supra* note 14, at 824.

American product.²⁴ Outkast's performance at the 2004 Grammy Awards has gained notoriety as a particularly egregious example of cultural appropriation of Native American music and imagery. In their performance, the group wore headdresses, war paint, costumes with feathers and fringe, and sampled a sacred Navajo song, thus misrepresenting and detaching these cultural products from their meaning in their source community.²⁵

Another commonly cited example of cultural appropriation is the use of the Zia Sun symbol by the State of New Mexico and by private companies. The Zia Sun is a sacred religious symbol for the Zia Pueblo people of New Mexico.²⁶ For the Zia people, the sun symbol is "an exceptionally significant religious and cultural symbol" used in religious ceremonies since 1200 C.E.²⁷ Today, the Zia Sun appears on the New Mexico state flag, license plates, motorcycles, and portable toilets.²⁸ For the Zia people, the continued use of their symbol dilutes its sacred meaning and disparages their community.²⁹

B. Harms of Cultural Appropriation to Source Communities

Cultural appropriation is often described as a practice that is harmful to the source community whose cultural product is appropriated by another group. At first pass, cultural appropriation is harmful to a source community when the way the community's culture is depicted is offensive or disparaging.³⁰ Some acts of appropriation "carelessly mimic[] sacred . . . rituals, names and images,"³¹ or stereotype and demean minority cultures.³² Use of Native American names and images for sports teams and their mascots is seen as hurtful and confusing because they "perpetuate historically erroneous, racist images of the past."³³ Second, appropriation of non-disparaging cultural

²⁴ Collier-Wise, *supra* note 21, at 86; Kelley, *supra* note 10, at 188; *see also* Noda, *supra* note 23, at 437-38; Riley & Carpenter, *supra* note 10, at 104. "In 1998, there were 94 registered trademarks that used the name Cherokee, 35 that used the name Navajo, and 208 that referred to the Sioux." Collier-Wise, *supra* note 21, at 86; *see also* Maury Audet, *Native American Tribal Names as Monikers and Logos: Will These Registrations Withstand Cancellation Under Lanham Act § 2(b) After the Trademark Study on Official Insignia of Native American Tribes?*, 2 CHI.-KENT J. INTELL. PROP. 4, 4 (2000); Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 376 (1998).

²⁵ Collier-Wise, *supra* note 21, at 87; Noda, *supra* note 23, at 436.

²⁶ Collier-Wise, *supra* note 21, at 87; Stephanie B. Turner, *The Case of the Zia: Looking Beyond Trademark Law to Protect Sacred Symbols*, 11 CHI.-KENT J. INTELL. PROP. 116, 116-17 (2012).

²⁷ Turner, *supra* note 26, at 116-17, 119.

²⁸ *Id.* 116-17; *see also* Collier-Wise, *supra* note 21, at 87.

²⁹ Turner, *supra* note 26, at 116-17.

³⁰ Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 267 (2006) [hereinafter Sunder, *IP3*].

³¹ Kelley, *supra* note 10, at 188-89.

³² K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 358 (1999) [hereinafter Greene, *Copyright*].

³³ Kelley, *supra* note 10, at 191; *see* Dougherty, *supra* note 24, at 377 ("Army had a mule, Navy a goat, Georgia had a bulldog and Syracuse had an Indian."); *see also* Justin G.

products by dominant cultures often causes source communities to suffer an economic harm, because they are generally not compensated for the commercial use of their product,³⁴ and they may even be disabled from using their own cultural product in commerce.³⁵ Additionally, the commercialization of the source community's cultural product, notwithstanding the economic harm to the community, may by its nature be destructive to the religious or cultural use of a cultural product.³⁶

In social science literature, cultural appropriation begets a multi-level harm. At the surface level, when an appropriator takes a source community's cultural product, he changes the meaning of the cultural product—the harm to the source community is both a dilution or misrepresentation of the meaning of its cultural product, and a loss of control over that meaning.³⁷ When the appropriator is a dominant group in society, and the source community is subordinate, the appropriator's assumption of control over the meaning of the source community's product is said to entrench “systems of dominance and control that have been used to colonize, subdue and destroy” the source community.³⁸ Acts of appropriation by dominant groups that may be characterized as “homage,” such as an non-Native artist misusing the symbolism of the sweatlodge ceremony based on his childhood visit to a Plains Indian museum, while potentially well intentioned, no less contribute to the source community's loss of control over the meaning of its cultural product.³⁹

Blankenship, *The Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words that Offend?*, 72 U. COLO. L. REV. 415, 424 (2001) (“Appropriating American Indian dress, dance, and tradition and using them for purely entertainment purposes has a particularly deleterious effect because it trivializes the very basis of many cultural and religious beliefs.”).

³⁴ Chalk, *supra* note 19, at 7; Greene, *Copyright*, *supra* note 32, at 368-69; Sunder, *Identity Politics*, *supra* note 10, at 73; Tsotsie, *supra* note 10, at 313; Ziff & Rao, *supra* note 10, at 8-9.

³⁵ Scafidi, *supra* note 14, at 829.

³⁶ Tsotsie, *supra* note 10, at 300, 314; Ziff & Rao, *supra* note 10, at 8.

³⁷ Rosemary J. Coombe, *Cultural and Intellectual Properties: Occupying the Colonial Imagination*, 16 POL. & LEGAL ANTHROPOLOGY REV. 8, 11 (1993).

³⁸ David M. Meurer & Rosemary J. Coombe, *Atopia: Lifting, Digital Media and the Informational Politics of Appropriation Media and the Informational Politics of Appropriation* 20, 22, in *LIFTING*, (Atopia Projects eds., 2009) (explaining that appropriation in media industries “reinscribe[s] power relations existing between privileged and underprivileged classes, dominant and marginalized cultures, and developed and developing nations.”); Tsotsie, *supra* note 10, at 311 (“Many Native people argue, however, that they must control representations of their cultures as a means to ensure cultural survival. The failure to protect Native cultures, they argue, perpetuates significant harm to Native people as distinctive, living cultural groups.” *Id.* at 310); see Collier-Wise, *supra* note 21, at 89 (quoting Tsotsie); Riley & Carpenter, *supra* note 10, at 104-06 (same); see also Greene, *Copyright*, *supra* note 32, at 385; Noda, *supra* note 23, at 439; Madhavi Sunder, *Property in Personhood*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 164, 168-69 (Martha M. Ertman & Joan C. Williams eds., 2005) [hereinafter Sunder, *Property*]; cf. Ziff & Rao, *supra* note 10, at 5 (“[Appropriation] teach[es] us about power relationships.”).

³⁹ Coombe, *supra* note 37, at 13.

Appropriation of a cultural product and destruction of the source community is linked through the “distinctive relationship” between a community’s products and their “dignity, autonomy, and potential self-determination.”⁴⁰ “The taking of a people’s cultural product is akin to a taking of control over the people,”⁴¹ because the people is no longer able to define itself and establish its own identity.⁴²

The first-order harm of cultural appropriation is loss of a cultural product’s traditional meaning.⁴³ When a dominant culture appropriates a source community’s cultural product, the public may begin to perceive the cultural product in a way that exclusively conforms with the dominant culture’s new meaning.⁴⁴ In the case of the Zia Sun, many associate the symbol exclusively with the State of New Mexico, and have no sense of its religious significance to the Zia people.⁴⁵ A cultural product’s loss of traditional meaning may disrupt a community’s religious practice, or in other ways incrementally disrupt or destroy a community’s culture.⁴⁶ The new meaning attributed to the cultural object may misrepresent the source community’s identity,⁴⁷ which may result in public misperception of the culture, development of harmful ethnic stereotypes, and discrimination.⁴⁸

The second-order harm of cultural appropriation is total loss of group identity.⁴⁹ When a dominant culture exerts control over a source community’s cultural product, it disenfranchises and dehumanizes the source community, representing the source community as “historical relics instead of human beings.”⁵⁰ In effect, the practice of cultural appropriation strips the source community of its ability to ascribe meaning to its cultural products, which severely limits its ability to identify itself and perpetuate its culture.

Though cultural appropriation is often described as having devastating consequences for the source community, some scholars have pushed back on this notion, and claimed that cultural appropriation is good for culture. Cultural appropriation is considered by some scholars “an inevitable part of the process of cultural change.”⁵¹ It is not exclusively the dominant culture that takes

⁴⁰ Coombe & Aylwin, *supra* note 11, at 203-04.

⁴¹ Kelley, *supra* note 10, at 191.

⁴² Hart, *supra* note 15, at 139; Sunder, *IP3*, *supra* note 30, at 267 (“Power derives from the ability to shape and influence culture; inversely, those who do not have power to create and contest culture truly are powerless.” (internal quotations omitted) (citation omitted)); Tsotsie, *supra* note 10, at 313-14.

⁴³ Turner, *supra* note 26, at 124.

⁴⁴ Scafidi, *supra* note 14, at 829; Tsotsie, *supra* note 10, at 313-14.

⁴⁵ Tsotsie, *supra* note 10, at 314; Turner, *supra* note 26, at 121.

⁴⁶ Sunder, *Identity Politics*, *supra* note 10, at 73-74; Turner, *supra* note 26, at 123.

⁴⁷ Hart, *supra* note 15, at 139; Scafidi, *supra* note 14, at 824.

⁴⁸ Noda, *supra* note 23, at 443-44, 452; Tsotsie, *supra* note 10, at 313; Turner, *supra* note 26, at 123.

⁴⁹ Tsotsie, *supra* note 10, at 300.

⁵⁰ Blankenship, *supra* note 33, at 424; Collier-Wise, *supra* note 21, at 89-90; Dougherty, *supra* note 24, at 377; *see also* Sunder, *Property*, *supra* note 38, at 169.

⁵¹ Sunder, *Identity Politics*, *supra* note 10, at 91.

cultural products from the subordinate culture—dominant cultures take from other dominant cultures, subordinate cultures take from dominant cultures, and subordinate cultures take from other subordinate cultures.⁵² Cultures interact, merge, and blend with one another; cultures exchange people, ideas, resources, goods, values, and traditions.⁵³ Perpetuation of a culture in a multi-cultural world necessitates changes over time; these changes often derive from other cultures.⁵⁴

Some cultural appropriation may in fact benefit source communities, particularly when another culture's uses of a source community's cultural product simultaneously conveys the significance of the product to the source community, and its new meaning in the appropriator's culture.⁵⁵ The practice of cultural appropriation depends on a heterogeneous society—if cultures were the same, there would be no reason for appropriators to take from source communities—thus both appropriators and source communities are served by preserving heterogeneity. Moreover, cultural appropriation likely does not deprive source communities of their intangible cultural products.⁵⁶ By their nature, intangible products are nonrivalrous, and thus an outsider's use of a source community's idea, song, or symbol does not prevent the source community from continuing their traditional use of the product.⁵⁷

C. Cultural Appropriation in the Marketplace: IP in Cultural Products

In Western legal systems, intellectual property and cultural appropriation are intimately linked. Not only has intellectual property served as a vehicle for cultural appropriation, but source communities have increasingly used it as a tool to combat the practice, revealing both the power and shortcomings of intellectual property in this realm.

Within intellectual property, copyright is often characterized as a tool used by appropriators to advantageously “take” unprotected (or unprotectable) cultural products from a source community, and protect their expression of the cultural product through copyright,⁵⁸ thereby insulating themselves from any recourse from the source community. This practice can be seen in white copyright of black music throughout United States history,⁵⁹ and Native American works used without recompense by the entertainment industry.⁶⁰

⁵² Scafidi, *supra* note 14, at 828; Ziff & Rao, *supra* note 10, at 5.

⁵³ Merry, *supra* note 10, at 585-86; Noda, *supra* note 23, at 432-33; Sunder, *Identity Politics*, *supra* note 10, at 92; Ziff & Rao, *supra* note 10, at 4-5; *see, e.g.*, Hart, *supra* note 15, at 144.

⁵⁴ Noda, *supra* note 23, at 432-33; *see also* Hart, *supra* note 15, at 139.

⁵⁵ Scafidi, *supra* note 14, at 826-27, 839.

⁵⁶ Ziff & Rao, *supra* note 10, at 4.

⁵⁷ *Id.*; *see also*, Noda, *supra* note 23, at 441-42.

⁵⁸ Greene, *Intellectual Property*, *supra* note 20, at 370.

⁵⁹ For an account of how copyright was routinely used by white artists to appropriate black music, *see id.* at 370, 373-74.

⁶⁰ Kelley, *supra* note 10, at 190.

Through copyright, appropriators, rather than source communities, have been able to acquire protection for their uses of cultural products.⁶¹

This seemingly lop-sided result is caused by the nature of copyright, and the divergent nature of cultural products. Cultural products, in their use by the source community, often fail to garner copyright protection because (1) they are the result of cumulative knowledge, and there is no recognized individual author,⁶² (2) there is no singular user of the cultural product—the use is shared in a community commons, (3) often the cultural product is not fixed (for example, oral traditions and improvisation) or is an “idea” rather than an “expression” (such as musical genres and rites or ceremonies),⁶³ and (4) often the cultural product is extremely old or of indeterminate age, and any term of protection would have already lapsed.⁶⁴ As a result, in copyright, cultural products are frequently cast as de facto public domain material.⁶⁵

Trademark is viewed as a vehicle for cultural appropriation because of its power to contribute to public discourse, and its instrumentality in affecting consumers’ perceptions of their world and interactions with others.⁶⁶ Trademarks used in advertising sometimes convey stereotyped or derogatory images of source communities. Professor K.J. Greene points out stereotypes of African Americans that pervade American advertising: Uncle Ben and Aunt Jemima, the chef on Cream of Wheat cereal, and the “Mammy” image of domineering matriarchs.⁶⁷

Additionally, much like copyright, trademark has been used by appropriators to protect their uses of a source community’s cultural product. Federal trademark protection has applied to non-Native Americans’ commercial use of Native American symbols and images,⁶⁸ either simultaneously with or in absence of trademark protection for the source community’s use of their product. In the Zia Sun case, the State’s use of the Zia Sun symbol is protected, but the Zia people’s use is not.⁶⁹ Of the hundreds of registered trademarks that use the name “Cherokee,” “Navajo,” and “Sioux,” some may be owned by Native Americans, but many are not.⁷⁰ Though trademark law has enabled and entrenched a good deal of cultural appropriation, it may also provide a formidable means for protecting cultural products from a certain amount of appropriation. The ability of trademark law

⁶¹ Turner, *supra* note 26, at 122.

⁶² Meurer & Coombe, *supra* note 38, at 22.

⁶³ Greene, *Intellectual Property*, *supra* note 20, at 371-72; Kelley, *supra* note 10, at 187-88; Sunder, *Property*, *supra* note 38, at 168.

⁶⁴ Greene, *Intellectual Property*, *supra* note 20, at 384.

⁶⁵ Coombe & Aylwin, *supra* note 11, at 204; Dougherty, *supra* note 24, at 374. For a study of Western law as a vehicle for cultural appropriation in the global music industry, see Meurer & Coombe, *supra* note 38, at 22.

⁶⁶ Greene, *Intellectual Property*, *supra* note 20, at 374.

⁶⁷ For an in depth account of African American stereotypes in trademark and advertising, see *id.* at 376-77.

⁶⁸ Dougherty, *supra* note 24, at 376.

⁶⁹ Turner, *supra* note 26, at 122.

⁷⁰ See *supra* note 15 and accompanying text.

to protect cultural products from appropriation has not yet received as thorough treatment as copyright: in Part II, this paper applies trademark law to cultural products, and in Part III assesses whether trademark is an effective and appropriate tool for protection.⁷¹

D. *Benefits and Drawbacks of Deterring Cultural Appropriation*

Though cultural products often fail to fit the mold of intellectual property, source communities have recently turned to intellectual property, and specifically trademark law, to protect whatever products they can.⁷² Cultural groups often want to be able to control, restrict, authorize, or license uses of their cultural products by non-group members, in order to prevent or mitigate the perceived harm of cultural appropriation.⁷³ Some cultural groups seek to restrict cultural appropriation in order to receive economic compensation for use of their cultural products through license fees. Others seek to prevent changes in the meaning of their cultural products, by either restricting or prohibiting use by non-group members.⁷⁴ In Western legal systems, control over cultural property would likely derive from intellectual property laws, which may be used by individuals or groups to restrict others from copying their expressions, including inventions, writings, art, and design.

These communities see trademark as a powerful means of exercising control over their intangible cultural products,⁷⁵ that would enable them to share in profits, exclude unwanted outside uses, and gain recognition and social power as a result.⁷⁶ For example, in the Zia Sun case, the Zia people attempted to use provisions of the Lanham Act—the source of United States federal trademark law—to stop commercial entities from profiting by using their religious symbol.⁷⁷ Native Americans have also contested the trademark held by the Washington Redskins as demeaning.⁷⁸ Additionally, Native Americans have argued that use of a spiritual leader's name to sell malt liquor violates a right to publicity.⁷⁹ More recently, the Navajo Nation sued Urban Outfitters for

⁷¹ See *infra* Parts II & III.

⁷² Sunder, *Property*, *supra* note 38, at 167-68. Internationally, Australian aborigines have sought collective copyrights in their artwork, and Canadian First Nations have sought copyrights in their traditional stories. *Id.* at 168.

⁷³ Collier-Wise, *supra* note 21, at 90 (citing to Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 13-15 (1997)).

⁷⁴ Audet, *supra* note 24, at 11; Collier-Wise, *supra* note 21, at 13-15.

⁷⁵ Turner, *supra* note 26, at 118.

⁷⁶ Sunder, *IP3*, *supra* note 30, at 269-71, 273-74; Sunder, *Property*, *supra* note 38, at 167-68; Sunder, *Identity Politics*, *supra* note 10, at 71-72.

⁷⁷ Kelley, *supra* note 10, at 185; Sunder, *Property*, *supra* note 38, at 168; Turner, *supra* note 26, at 118.

⁷⁸ *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005).

⁷⁹ Sunder, *Property*, *supra* note 38, at 168; see Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse in Tribal Court*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 195, 211 (Bruce Ziff & Pratima V. Rao eds., 1997).

trademark infringement based on Urban Outfitters naming items of clothing “navajo.”⁸⁰

However, the idea that cultural appropriation should be restricted by any means, particularly intellectual property, has drawn sharp criticism. Scholars have claimed that any restriction of cultural appropriation would likely be counterproductive for the source community. In order to police cultural appropriation, boundaries must be cast around the constituency of the source community and its membership. In order to define its membership, there must be some test of group belonging,⁸¹ some standard by which to decide whether a cultural product belongs to a particular group, and some kind of “authenticity” requirement to assess whether a use of the culture’s product conforms with the rules they set out to govern it.⁸² Not only is it difficult to define the parameters of a cultural group (that is not static over time), it is difficult to justify a group’s possession of a particular cultural object, which may have been taken or borrowed from some other group at an earlier time.⁸³ Boundaries drawn around a culture, its membership, and its products, for the sake of restricting cultural appropriation, may “freeze” a culture at a particular moment,⁸⁴ in effect rendering it a “historical relic.”

Scholars critical of restricting cultural appropriation have cast doubt on the propriety of using intellectual property rights for that purpose. For some source communities, propertization of their culture counteracts community norms of common ownership.⁸⁵ There is some concern that a property right may also trivialize or minimize the importance of the cultural product.⁸⁶ Moreover, just as defining a culture, its membership, and its product may freeze a culture, intellectual property rights in a cultural product may “insulate cultures from interaction with other communities, creating ossified and static cultures that reinforce traditions through law.”⁸⁷ Additionally, restricting cultural appropriation through intellectual property may itself perpetuate systems of dominance and oppression, as source communities are relegated to defining themselves and their products through the dominant culture’s construct of property law.⁸⁸

Moreover, intellectual property may be an inadequate means of restricting cultural appropriation. For instance, the idea of perpetually restricting the use of an idea because it is a cultural product is particularly abhorrent to copyright

⁸⁰ Navajo Nation v. Urban Outfitters, Inc., 935 F. Supp. 2d 1147 (D. N.M. 2013).

⁸¹ Sunder, *Identity Politics*, *supra* note 10, at 94 (quoting Ziff & Rao); Ziff & Rao, *supra* note 10, at 3.

⁸² Tsotsie, *supra* note 10, at 349-50.

⁸³ Ziff & Rao, *supra* note 10, at 3.

⁸⁴ Scafidi, *supra* note 14, at 817; Collier-Wise, *supra* note 21, at 100.

⁸⁵ Sunder, *Property*, *supra* note 38, at 170.

⁸⁶ Collier-Wise, *supra* note 21, at 99; Newton, *supra* note 79 **Error! Bookmark not defined.**; Tsotsie, *supra* note 10, at 352.

⁸⁷ Sunder, *Property*, *supra* note 38, at 173-74.

⁸⁸ Collier-Wise, *supra* note 21, at 100; Tsotsie, *supra* note 10, at 352.

and free speech⁸⁹: Copyright does not grant ownership in ideas alone—all ideas are accessible to anyone who may wish to use them in a particular expression.⁹⁰ The author of the expression, not the incipient of the idea, receives copyright protection.⁹¹ While trademark does not contain as explicit an idea/expression dichotomy as copyright, trademark inherently protects visually, auditorily, or otherwise sensorially perceptible marks, rather than the ideas from which they originate.⁹² Accordingly, seeking copyright and trademark protection for certain cultural products may misconstrue the purpose of intellectual property, and threaten “our common cultural heritage and the free circulation of ideas.”⁹³

Despite some scholars’ misgivings about using intellectual property to curb cultural appropriation, source communities see the potentially profound limiting effect trademark law could have on cultural appropriation. If source communities are able to either extensively enjoin or otherwise deter companies from using their cultural products as trademarks, they could severely diminish the use of their cultural products by non-members.⁹⁴ If trademark law is used to protect cultural products, source communities may be able to regain their ability to define the product’s meaning and prevent would-be appropriators from profiting from their cultural product—potentially perpetually. The next parts of this paper apply trademark law to cultural appropriation, first to determine the extent to which trademark law can be used to restrain cultural appropriation, then to analyze whether trademark law ought to be used for this end, given the core purposes of trademark law.

II. USING TRADEMARK LAW TO DETER CULTURAL APPROPRIATION

A. *Purposes of Trademark Law*

The two most commonly espoused purposes of trademark law are avoiding consumer confusion, and preventing the appropriation of a producer’s good will.⁹⁵ Though scholars disagree on which of the two is the “true” purpose of trademark law, much of trademark law serves these two purposes in tandem, and in many cases, these two purposes are wholly compatible.⁹⁶ Moreover, both purposes inure to an unequivocal underlying purpose of trademark law—fostering a more competitive market.

⁸⁹ Collier-Wise, *supra* note 21, at 94.

⁹⁰ Coombe, *supra* note 37, at 10.

⁹¹ *Id.*

⁹² See *infra* notes 123-126 and accompanying text.

⁹³ Sunder, *Property*, *supra* note 38, at 171; see also Tsotsie, *supra* note 10, at 347.

⁹⁴ Removing a cultural product from trademark use would limit consumers’ exposure to the cultural product, in effect inhibiting to some extent the diffusion of its use (and its meaning) in society.

⁹⁵ Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 786 (2004).

⁹⁶ *Id.* at 786.

A central goal of trademark law—reducing consumer search costs—serves primarily to avoid consumer confusion, and secondarily to prevent appropriation of a producer’s good will. Professor Mark Lemley, a champion of the “Consumer Search Costs” school, has explained that trademarks result in a more competitive market through their “informative value.”⁹⁷ That is, trademarks become a shorthand indicator of source and quality, which makes it easier and less expensive for consumers to be informed about a particular product.⁹⁸ Trademarks are only valuable insofar as they denote consistent quality⁹⁹; trademark law, in turn, protects the accuracy of trademarks, thereby fostering the flow of information in markets.¹⁰⁰ Buyers benefit from trademark law because they do not have to expend much time or undertake research before making a purchase; sellers benefit because they can invest in their reputation (their good will), knowing competitors will not appropriate it.¹⁰¹

The requirements underlying trademark protection are designed to reduce consumer search costs. Covered in greater detail in Part II.B, trademark protection is conditioned on use in commerce and distinctiveness, both of which must be present to establish a trademark’s good will. Landes & Posner explain that if a trademark is not used in commerce, it cannot identify and distinguish goods, and accordingly it confers no benefit on consumers (or producers for that matter).¹⁰² A trademark must also be distinctive to provide an informative value to consumers—if a trademark does not identify the product or distinguish it from that of other producers, the mark cannot provide information that reduces consumer search costs.¹⁰³

In contrast to the “Consumer Search Costs” school, the “Unfair Competition” school, championed by Professor Mark McKenna, views trademarks and trademark law as primarily protecting producers from illegitimate diversions of trade, and secondarily as protecting consumers from confusion.¹⁰⁴ Consumer confusion is relevant to protecting producers from illegitimate diversions of trade insofar as it is an effective way of stealing a competitor’s trade.¹⁰⁵ McKenna views the trademark protection as a property right in the mark itself; however, he clarifies that “it [is] not the words or

⁹⁷ This view is also supported by Professor William Landes and Judge Richard Posner. William Landes & Richard Posner, *The Economics of Trademark Law*, in *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 166, 168 (2003); see also Deven R. Desari, *The Chicago School Trap in Trademark*, 37 *CARDOZO L. REV.* 551, 603 (2015).

⁹⁸ Dogan & Lemley, *supra* note 95, at 786-88.

⁹⁹ Landes & Posner, *supra* note 97, at 168.

¹⁰⁰ Dogan & Lemley, *supra* note 95, at 778, 786-88; Landes & Posner, *supra* note 97, at 173 (“[T]rademarks lower consumers’ search costs by providing them with valuable information about brands and encourage quality control rather than create social waste and consumer deception.”); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 *NOTRE DAME L. REV.* 1839, 1844 (2007).

¹⁰¹ Dogan & Lemley, *supra* note 95, at 786-88.

¹⁰² Landes & Posner, *supra* note 97, at 181.

¹⁰³ *Id.* at 187.

¹⁰⁴ McKenna, *supra* note 100, at 1840-41.

¹⁰⁵ *Id.* at 1848.

symbols themselves that were protected; those [are] merely the representations of the property”¹⁰⁶—the property is the producer’s good will. Recently, the “Unfair Competition” school has expanded from the notion of trademark law as protecting the producer’s property right in his good will: The advent of merchandising positions trademarks as goods whose value are independent of their underlying product.¹⁰⁷

Regardless of the order of priority between avoiding consumer confusion and protecting producers’ good will, the touchstone of trademark law is fostering competition in the marketplace. As a result of its marketplace focus, and the common use of words, symbols, and images as trademarks, trademark law is self-conscious of the potential for incursion into the domain of free speech in its effort to promote competition.¹⁰⁸ Overly restrictive trademark law can stifle both competition and free speech, by blocking competitors from access to a word they need to describe their product. Some built-in features of trademark law attempt to limit the potential for an adverse effect on competition and free speech: the trademark-use requirement, as well as nominative and descriptive fair use.¹⁰⁹ The trademark-use requirement and nominative fair use go hand-in-hand—a trademark may be used by anyone—competitors, consumers, and the media included—to refer to the trademarked product, by consumers referring to both the product and its alternatives, by competitors for comparative advertising, by critics and parodists to lambast or poke fun at the product.¹¹⁰ To the same end, descriptive fair use preserves competitors’ rights to use a trademark-protected descriptive term in its descriptive sense.¹¹¹ While trademark law on its face protects the informative value of trademarks and their representation of producers’ good will, it also seeks to prevent protection of a trademark that would chill free speech or inhibit competition.

B. Requirements for Trademark Protection

By definition, protection of a trademark through trademark law, regardless of the type of mark, is predicated on a mark’s use in commerce and its distinctiveness. Lanham Act section 45 defines a trademark as

any word, name, symbol, or device, or any combination thereof—(1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act, to identify and distinguish his or her goods, including a unique product, from

¹⁰⁶ *Id.* at 1885.

¹⁰⁷ Desari, *supra* note 97, at 603-04.

¹⁰⁸ Dogan & Lemley, *supra* note 95, at 809 (“The speech-oriented objectives of trademark use doctrine . . . prevent trademark holders from asserting a generalized right to control language . . .”).

¹⁰⁹ Dogan & Lemley, *supra* note 95, at 788.

¹¹⁰ *See, e.g., id.* 809-10, 796-97, 828.

¹¹¹ *Zatarain’s, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786 (5th Cir. 1983).

those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.¹¹²

The requirements of “use in commerce” and “distinctiveness” not only ensure that the Lanham Act—a federal law—firmly maintains its basis in the Commerce Clause,¹¹³ but also serve the purposes of trademark law: preventing consumer confusion and protecting producers’ good will.¹¹⁴

Ownership of a trademark, which serves as the basis for certain causes of action under trademark law, goes to the first entity to use a distinctive mark in commerce as a trademark.¹¹⁵ Actual use, not registration, initiates the rights and priority that accrue to the trademark owner.¹¹⁶ Actual use requires “the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in the mark.”¹¹⁷ Moreover, registration will only issue once a mark has been used in commerce, meaning “goods bearing a trademark must have been sold ‘in’ interstate commerce, or that services are rendered ‘in’ interstate commerce.”¹¹⁸ Though “use in commerce” may be read to require a trademark to be used in the course of a *sale*, trademarks used by non-profit and charitable organizations—that do not “sell” their goods or services—are equally considered “used in commerce.”¹¹⁹

A mark “used in commerce” only garners trademark protection if it is also distinctive. In order to serve as a trademark, a mark must be “so distinctive that it is capable of performing the function of identifying and distinguishing the goods that bear the [mark].”¹²⁰ Distinctiveness of a trademark is generally ascertained categorically: if a mark is fanciful, arbitrary, or suggestive, it is considered “inherently distinctive,” meaning upon viewing, it immediately communicates the source of the goods. A descriptive mark, which primarily describes some feature of the good, may “acquire” distinctiveness through “secondary meaning,” when its use by the seller has created a strong association in the consumer’s mind, sufficient to convey source. A generic

¹¹² Lanham Act § 45, 15 U.S.C. § 1127 (2015). An analogous definition applies to service marks, with the word “service” taking the place of the word “goods” in the definition. *Id.*

¹¹³ Though trademark law is viewed as a branch of intellectual property law, it derives its constitutional justification not in the Copyright Clause, U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts”), as do copyright and patent law, but in the Commerce Clause, *id.* art. I, § 8, cl. 3 (“To regulate Commerce . . . among the several States”). As a result of its basis in the Commerce Clause, trademark protection must be limited to marks used in commerce.

¹¹⁴ See *infra* Part II.A.

¹¹⁵ *In re Trade-Mark Cases*, 100 U.S. 82, 94, (1879) (“At common law the exclusive right to it grows out of the use of it, and not its mere adoption.”); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 16:1 (Clark Boardman Callaghan ed., 4th ed. 2016).

¹¹⁶ MCCARTHY, *supra* note 115, § 16:1.

¹¹⁷ *Id.* § 16:8; § 1127.

¹¹⁸ MCCARTHY, *supra* note 115, § 19:10.

¹¹⁹ *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188 (11th Cir. 2001); MCCARTHY, *supra* note 115, § 9:5.

¹²⁰ MCCARTHY, *supra* note 115, § 3:1.

mark, which is the general name for the kind of good, regardless of source, altogether lacks distinctiveness, because it is incapable of identifying its producer or distinguishing a good from those made by another producer.¹²¹ Marks that were once inherently distinctive may “enter the public domain” by becoming the generic term for the good; once a mark has become generic, it can no longer be protected as a trademark.¹²² Aspirin, cellophane, and escalator all started as fanciful marks, and have since become the generic names for those products.¹²³

Distinctiveness and use in commerce together enable a mark to represent the “good will,” or the reputation and business value, of the mark holder.¹²⁴ Though “good will” is not named in the Lanham Act as a requirement for trademark protection, it serves as a shorthand for the value the trademark is protecting, and is in essence an implicit requirement.¹²⁵ “A trademark has no existence separate from the good will of the product or the service it symbolizes. Good will and its tangible symbol, a trademark, are inseparable.”¹²⁶ Because consumers cannot use non-distinctive marks to identify the source of a good or distinguish it from those from another source, such a mark does not represent the business’s good will, and thus does not serve any purpose worthy of trademark protection.¹²⁷

C. *Registering Culture: Requirements and Benefits of Registration*

Cultural groups, whether they constitute tribes, racial groups, or some other discernable community, whose cultural products are distinctive and used in commerce, may be able to register their cultural products as trademarks and thereby gain the benefits of registration.¹²⁸ The Lanham Act section 2 establishes fairly permissive requirements to register a valid trademark (one that is distinctive and used in commerce), stating, “No trademark . . . shall be refused registration . . . unless it . . .” gives rise to one of the enumerated

¹²¹ Restatement (Third) of Unfair Competition § 15, comment a (1995); MCCARTHY, *supra* note 115, §§ 3:1, 12:1.

¹²² MCCARTHY, *supra* note 115, §§ 11:9; 12:29.

¹²³ *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126 (2d Cir. 1979); MCCARTHY, *supra* note 115, § 11:9.

¹²⁴ MCCARTHY, *supra* note 115, §§ 2:17, 2:30; *see Lifeguard Licensing Corp. v. Gogo Sports, Inc.*, 108 U.S.P.Q.2d 1454, 1457 n.2 (S.D. N.Y. 2013); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109 (8th Cir. 1999) (“The goodwill of a company is an intangible business value which reflects the basic human tendency to do business with a merchant who offers products of the type and quality which the consumer desires and expects.”).

¹²⁵ MCCARTHY, *supra* note 115, § 3:2.

¹²⁶ *Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 U.S.P.Q.2d 1134, 1147 (T.T.A.B. 2013) (“Any transfer of a trademark must include the goodwill associated with the mark, because without goodwill, there is no trademark to transfer.”); MCCARTHY, *supra* note 115, § 2:15.

¹²⁷ MCCARTHY, *supra* note 115, § 16:1.

¹²⁸ *Collier-Wise*, *supra* note 21, at 94.

statutory bars to registration.¹²⁹ These statutory bars include: (a) immoral, deceptive, or scandalous matter; matter which may disparage, falsely suggest a connection with, or bring into contempt or disrepute living or dead persons, institutions, beliefs, or national symbols; (b) the flag or coat of arms or other insignia of the United States, or of any State or municipality; (c) the name, portrait, or signature of a living person; (d) a mark confusingly similar to a registered mark owned by someone else and not abandoned;¹³⁰ (e) a merely descriptive or deceptively misdescriptive mark, including mere surnames, and functional matters, and (f) a mark that will likely dilute another registered mark.¹³¹

Due to the permissive requirements for trademark registration, there has been a wide variety of registered marks. Not only are words, images, and symbols often registered, but a series of musical notes (the NBC chimes), scents, and film characters have also been registered as trademarks. With respect to cultural products, source communities may be able to register their names, certain phrases, symbols, designs, artwork, certain music, and characters in oral tradition as trademarks, as long as they serve as a valid trademark, and do not fall under any of the statutory bars to protection. However, some cultural groups whose products have already been appropriated may not be able to register their marks. If appropriators have already registered a cultural product for trademark protection, the source community may be barred from registration under section 2(d) because their mark would be confusingly similar to the appropriator's already registered mark. In the Zia Sun case, the Zia people could not register a mark containing the Zia Sun symbol because it is on the flag of the State of New Mexico, and barred under section 2(b), even though the Zia's religious use of the sun symbol predates its appearance on the State flag.¹³²

Registration provides several advantages for trademark owners over state and common law protection.¹³³ First, registration is prima facie evidence of the mark's validity and the mark owner's ownership and exclusive right to the registered mark.¹³⁴ Registration is a constructive notice of the owner's claim of ownership,¹³⁵ and also confers to the owner nationwide priority in use.¹³⁶

¹²⁹ Lanham Act § 2, 15 U.S.C. § 1052 (2015).

¹³⁰ Added later, a mark that is likely to cause dilution by blurring or dilution by tarnishment under section 43(c) may also be refused registration. *Id.* §1125(c).

¹³¹ *Id.*

¹³² Turner, *supra* note 26, at 122. In 1999, a question was raised as to whether all Native American insignia should be barred from registration under section 2(b), and the USPTO released a study finding that Native American insignia do not qualify for the bar to registration as "insignia of the United States." For an extensive account of the USPTO study and its findings, see Audet, *supra* note 24, at 13, 16-19, 21, 66-67, and Turner, *supra* note 26, at 136-38.

¹³³ Blankenship, *supra* note 33, at 419-20.

¹³⁴ §§ 1057(b), 1115(a); MCCARTHY, *supra* note 115, § 19:9; Blankenship, *supra* note 33, at 419-20.

¹³⁵ MCCARTHY, *supra* note 115, § 19:9; Blankenship, *supra* note 33, at 419-20; § 1072.

¹³⁶ McCarthy, *supra* note 115, § 16:1.

Registration also serves as prima facie evidence that a mark is not confusingly similar to another registered mark, and, if descriptive, that the mark has acquired secondary meaning.¹³⁷ Additionally, registration granted to a use-based application is prima facie evidence that the mark has been used in interstate commerce prior to registration.¹³⁸ A registered mark may also become “incontestable” after five years of continuous use, which limits potential challengers to fewer arguments for cancellation.¹³⁹ In *Navajo Nation v. Urban Outfitters*, the Navajo Nation, which has a registered trademark in the name “Navajo,” used its registered status to argue that it owns a valid, incontestable trademark, and as such could not be cancelled for being “merely descriptive.”¹⁴⁰

In trademark infringement disputes, a registered mark establishes federal jurisdiction without the required amount in controversy,¹⁴¹ and in federal courts, profits, damages, and costs are recoverable, and treble damages and attorney’s fees are available.¹⁴² Moreover, registration may be used to stop the importation into the United States of infringing articles.¹⁴³

Unregistered marks are entitled to common law protection so long as they are distinctive and are used in commerce. However, unlike federally registered marks, unregistered marks are not entitled to nationwide priority in use—they must be both distinctive and used in commerce in the state in which infringement occurs for the unregistered mark holder to assert senior use in that state.

The idea that cultural groups should register their cultural products as trademarks to receive the concomitant protection has been met with strong criticism from some indigenous rights scholars, calling trademark registration “offensive” and “fundamentally inappropriate.”¹⁴⁴ Trademark laws are constructed to facilitate dissemination, which is inherently incompatible with some cultural groups’ intention to prevent cultural products from circulation and appropriation.¹⁴⁵ There is also concern about to whom the trademark would be registered, and how the group can maintain group ownership or a group right to use the mark.¹⁴⁶ Registration may also inadvertently prevent other groups for whom the mark serves as a cultural product from using the mark in

¹³⁷ *Liberty Mut. Ins. Co. v. Liberty Ins. Co.*, 185 F. Supp. 895 (E.D. Ark. 1960); McCarthy, *supra* note 115, § 19:9.

¹³⁸ *Li'l Red Barn, Inc. v. Red Barn System, Inc.*, 322 F. Supp. 98 (N.D. Ind. 1970), *aff'd per curiam*, 174 U.S.P.Q. 193 (7th Cir. 1972); *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538 (2d Cir. 1956); MCCARTHY, *supra* note 115, § 19:9.

¹³⁹ §§ 1065, 1115(b); MCCARTHY, *supra* note 115, § 19:9; Blankenship, *supra* note 33, at 419-20.

¹⁴⁰ *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1162-63 (D. N.M. 2013).

¹⁴¹ Blankenship, *supra* note 33, at 419-20.

¹⁴² § 1117; MCCARTHY, *supra* note 115, § 19:9.

¹⁴³ § 1124; MCCARTHY, *supra* note 115, § 19:9; Blankenship, *supra* note 33, at 419-20.

¹⁴⁴ Turner, *supra* note 26, at 117, 124.

¹⁴⁵ *Id.* at 117.

¹⁴⁶ Audet, *supra* note 24, at 12; Turner, *supra* note 26, at 124-25.

the same manner.¹⁴⁷ Some cultural groups also believe that certain religious or sacred symbols will lose their qualities and meanings if registered as a trademark—just as they would if appropriated and used by non-group members.¹⁴⁸ Instead of trademark registration, some groups would prefer to see an absolute prohibition of registration of their cultural products.¹⁴⁹

While many cultural products would be eligible for trademark registration under the Lanham Act if used in commerce and distinctive of a single source, some may not even meet this threshold requirement.¹⁵⁰ Cultural groups may seek to protect their products that are not used in the course of a sale, and do not designate a single source, but instead the whole source community. Accordingly, cultural groups may find more suitable protection under the Lanham Act as collective or certification marks. In the Lanham Act, collective marks and certification marks are registrable in the same manner and with the same effect as trademarks, as long as the owner exercises legitimate control over use of the marks, even though the owner may not be a commercial establishment.¹⁵¹

A collective mark is any trademark or service mark that is used by the members of a cooperative, an association, or some other collective group or organization.¹⁵² A collective mark may be symbolic of membership in some collective group or organization, or of the goods or services provided by members of the organization.¹⁵³ The collective owns the mark, and all of its members use the mark to identify and distinguish their goods or services.¹⁵⁴ The collective organization itself usually neither sells goods nor performs services under the mark, but it may advertise and promote the goods or services sold by its members.¹⁵⁵ Examples of collective marks include agricultural cooperatives, the Professional Golfers Association, and the Realtor mark for

¹⁴⁷ For example, some Native American tribes use the same or highly similar symbols, names, or images, sometimes because of common origin, but also sometimes because different tribes have borrowed cultural products from one another. Audet, *supra* note 24, at 12; *see supra* Part I.B.

¹⁴⁸ Audet, *supra* note 24, at 12; *see supra* Part I.B.

¹⁴⁹ This view has taken hold in Canada, Australia, and New Zealand. *See Chalk, supra* note 19, at 4.

¹⁵⁰ *See Audet, supra* note 24, at 12.

¹⁵¹ Lanham Act § 4, 15 U.S.C. § 1054 (2015). “Subject to the provisions relating to the registration of trademarks, so far as they are applicable, collective and certification marks, including indications of regional origin, shall be registrable under this chapter, in the same manner and with the same effect as are trademarks, by persons, and nations, States, municipalities, and the like, exercising legitimate control over the use of the marks sought to be registered, even though not possessing an industrial or commercial establishment, and when registered they shall be entitled to the protection provided in this chapter in the case of trademarks, except in the case of certification marks when used so as to represent falsely that the owner or a user thereof makes or sells the goods or performs the services on or in connection with which such mark is used.” *Id.*

¹⁵² § 1127; MCCARTHY, *supra* note 115, § 4:16.

¹⁵³ MCCARTHY, *supra* note 115, § 4:16.

¹⁵⁴ *Id.* § 19:99.

¹⁵⁵ *Id.*

real estate sales services.¹⁵⁶ Collective marks may also be regional in nature, and may indicate membership in a collective of sellers from a specific geographical region.¹⁵⁷ Collective membership marks do not require any sales of goods or services by members: they may be protected insofar as they are used by members to indicate membership in an organization.¹⁵⁸ However, collective membership marks must also qualify as valid trademarks in order to be protected on goods bearing the mark. Regardless of a collective mark's protection as a trademark, a third party's unauthorized use of the collective name as a trademark may be confusingly similar to the collective mark, and may be barred from registration or enjoined.¹⁵⁹ In a cancellation proceeding or an infringement litigation, the collective represents the shared interest of its members.

A certification mark is any word, name, symbol, or device, used by a person other than its owner in commerce, to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of the goods or services, such as that the work was performed by members of a certain organization.¹⁶⁰ There are three types of certification marks: those that certify quality, those that certify regional origin, and those that certify work was performed by union/organized labor.¹⁶¹ A certification mark is a symbolic guarantee that the product meets certain standards.¹⁶² As an indication of regional origin, geographical certification marks do not require proof of secondary meaning.¹⁶³ Certification marks impose more requirements on mark owners than do collective marks. Unlike a collective mark, a certification mark cannot be used by the mark owner in the course of sales, or as a trademark.¹⁶⁴ A certification mark owner must also control the use of its mark,

¹⁵⁶ *Jacob Zimmerman v. National Association of Realtors*, 70 U.S.P.Q.2d 1425 (T.T.A.B. 2004); *Professional Golfers Ass'n v. Bankers Life & Casualty Co.*, 514 F.2d 665 (5th Cir. 1975); MCCARTHY, *supra* note 115, § 19:99.

¹⁵⁷ MCCARTHY, *supra* note 115, § 19:99.

¹⁵⁸ *Id.* § 19:101.

¹⁵⁹ *Allstate Life Ins. Co. v. Cuna International, Inc.*, 169 U.S.P.Q. 313 (T.T.A.B. 1971), *aff'd* without op., 487 F.2d 1407 (C.C.P.A. 1973); *Boise Cascade Corp. v. Mississippi Pine Mfrs. Ass'n*, 164 U.S.P.Q. 364 (T.T.A.B. 1969).

¹⁶⁰ Lanham Act § 45, 15 U.S.C. § 1127 (2015); MCCARTHY, *supra* note 115, § 4:15.

Certification marks are a very popular form of protection for indigenous groups in New Zealand, and have come to serve as "labels of authenticity" to indicate true indigenous origin of their goods. For an extensive account, see Chalk, *supra* note 19, at 3-7, 10, 12-13. For a critique of the use of certification marks by source communities to protect cultural products, see Scafidi, *supra* note 14, at 817-20, 822-23.

¹⁶¹ MCCARTHY, *supra* note 115, § 19:91.

¹⁶² *Id.* §§ 4:16, 19:99.

¹⁶³ § 1052(2)(e)(2); *Community of Roquefort v. William Faehndrich, Inc.*, 303 F.2d 494, 497 (2d Cir. 1962) ("A geographical name does not require a secondary meaning in order to qualify for registration as a certification mark."); MCCARTHY, *supra* note 115, § 19:91.

¹⁶⁴ Restatement (Third) of Unfair Competition § 11, comment a (1995); MCCARTHY, *supra* note 115, §§ 19:92, 19:94. In re Florida Citrus Comm'n, 160 U.S.P.Q. 495 (T.T.A.B. 1968); see In re Allied Stores Corp., 153 U.S.P.Q. 84 (T.T.A.B. 1967); Holtzman, "Tips from the Trademark Examining Operation—Certification Marks: An Overview," 81 TRADEMARK

and it cannot permit use of the mark other than to certify, or discriminately refuse to certify the goods of any person who maintains the standards set by the certification mark owner.¹⁶⁵ Lack of control, either by giving permission to use a certification mark when standards are not met, or by failing to police unlicensed uses, constitutes grounds for cancellation of the mark.¹⁶⁶ In a cancellation or infringement proceeding against a confusingly similar mark, the certification mark owner represents the mark users.¹⁶⁷

Registration as a collective or a certification mark may overcome some scholars' concerns about the incongruence of requirements for trademark protection with the norms of source communities. Both collective marks and certification marks allow for either group ownership, or organizational ownership on behalf of the group, allow group members (or those meeting certain standards) to use the mark, and establish the organization's standing in cancellation proceedings or infringement claims against confusingly similar or unauthorized users of the mark. Both collective marks and certification marks, however, would require a cultural group to erect some boundaries to membership. A collective mark needs to have some enforced definition of group membership, and a certification mark needs to have some enforced standards for certification; the mark owner must decide who is an authentic member, or what is an authentic product. If group membership or certification is too permissive, the mark may lose its distinctiveness, and as a result, its protection.

Registration as a collective mark avoids the more stringent requirements of a certification mark—a collective mark owner does not have to guarantee that products bearing the mark meet certain quality standards, and can use the collective mark in addition to members' use. Collective marks also allow cultural groups to simultaneously register their marks as trademarks, if possible, whereas certification marks cannot serve as trademarks.

Collective marks on balance seem more beneficial to cultural groups, because they offer the same general benefits as certification marks, have less stringent requirements, and allow for simultaneous trademark registration. Some groups may find that registration as a geographic certification mark may be an easier avenue to registration, because it does not require proof of secondary meaning when used as an indication of regional origin.

D. *Resisting Appropriation: Trademark Causes of Action*

Source communities that seek to utilize trademark law to combat cultural appropriation may be able to initiate two kinds of actions against appropriators:

REP. 180, 187 (1991) (“[I]f a party filing a certification mark application owns an existing registration for the same mark on goods, the applicant may be subject to refusal on two grounds: (1) applicant is engaged in the production of goods and (2) applicant is using the mark for purposes other than to certify.”).

¹⁶⁵ § 1064(5)(C)-(D); MCCARTHY, *supra* note 115, § 19:92.

¹⁶⁶ § 1064(5)(A); MCCARTHY, *supra* note 115, § 19:92.

¹⁶⁷ MCCARTHY, *supra* note 115, § 19:92.50.

opposition or cancellation proceedings, and infringement actions. Opposition or cancellation of a registered trademark, and a successful infringement action, markedly differ from one another in the grounds that could give rise to a successful claim, and the resultant limitations imposed on the appropriator's use of the source community's cultural product. When possible, initiators of trademark infringement actions often argue that the allegedly infringing mark ought to be cancelled, to impose limits under both kinds of trademark actions.

An opposition or cancellation proceeding is a challenge raised against a mark that has been filed for registration but not yet received it (opposition) or against a registered mark (cancellation), to respectively prevent it from being registered, or remove it from the register. Anyone who "believes that he would be damaged by the registration of a mark" has standing to initiate an opposition or cancellation proceeding.¹⁶⁸ Under this permissive standard, the challenger need not own or use a trademark whose value would be damaged by the challenged mark; as long as the challenger could argue some theory of harm under one of the grounds for cancellation, he will have standing to initiate a cancellation proceeding.¹⁶⁹

There are a number of potential grounds for opposition or cancellation of a registered mark; however, whether the grounds can be argued depends on whether the challenged mark has become "incontestable" through five years of continuous use after registration.¹⁷⁰ For a contestable mark, any of the bars to registration in Lanham Act section 2 can serve as grounds for opposition or cancellation¹⁷¹; for an incontestable mark, those grounds are limited to (a) immoral, deceptive, or scandalous matter, or matter which may falsely suggest a connection with persons, institutions, beliefs, or national symbols, or bring them into contempt or disrepute¹⁷²; (b) the flag, or coat of arms, or other insignia of the United States, or of any State or municipality; (c) the name, portrait, or signature of a living individual; generic marks; functional marks; abandoned marks; marks that misrepresent source; and marks obtained through fraud.¹⁷³ The only grounds that can be raised for cancellation of a contestable mark that cannot be raised against an incontestable mark are: (d) that a mark is merely descriptive or deceptively misdescriptive; (e) that a mark is confusingly

¹⁶⁸ §§ 1063, 1064.

¹⁶⁹ *Id.* § 1063; MCCARTHY, *supra* note 115, § 20:46.

¹⁷⁰ §§ 1064, 1065.

¹⁷¹ *Id.* § 1064; MCCARTHY, *supra* note 115, § 20:52; Blankenship, *supra* note 33, at 421.

¹⁷² *See* MCCARTHY, *supra* note 115, § 19:76; §§ 1064, 1052(a).

¹⁷³ §§ 1052 (a)-(c), 1064, 1115; MCCARTHY, *supra* note 115, § 20:56-60; Blankenship, *supra* note 33, at 421-22; *see also* Audet, *supra* note 24, at 10-11. Incontestable certification marks are subject to cancellation if the mark owner cannot or does not legitimately exercise control over use of the mark, or engages in the production or marketing of goods to which the mark is applied, or permits the mark's use for something other than certification, or discriminately refuses to certify goods of anyone who maintains the standards required for certification. § 1064(5); MCCARTHY, *supra* note 115, § 20:61.

similar to another registered mark; and (f) that the mark will likely dilute another registered mark.¹⁷⁴

Of the possible grounds for cancellation, Lanham Act section 2(a) has been invoked most frequently to challenge marks that are offensive to particular cultures,¹⁷⁵ or falsely suggest a connection to a Native American tribe.¹⁷⁶ A group's interest in not being disparaged constitutes harm sufficient to establish standing to initiate a cancellation proceeding.¹⁷⁷ "Heeb," a derogatory term for Jewish people, and "Slants," which makes reference to the appearance of Asian people, were both barred from registration because they were considered disparaging towards the respective groups.¹⁷⁸ The mark owners' membership in the respective cultural group did not bear on their disparaging nature.¹⁷⁹

While the constitutionality of the section 2(a) bar has been called into question because it may be considered a content-based restriction on speech,¹⁸⁰ it is important to bear in mind the rather narrow limitations imposed by cancellation. A successful cancellation proceeding brought under section 2(a) removes the trademark from the register—it does not limit the trademark owner's exclusive right to use the mark.¹⁸¹ If cancelled, the trademark owner

¹⁷⁴ § 1052(d)-(f).

¹⁷⁵ See MCCARTHY, *supra* note 115, § 19:76 for a more expansive account of section 2(a). § 1052(b); Greene, *Intellectual Property*, *supra* note 20, at 377.

¹⁷⁶ § 1052(b); MCCARTHY, *supra* note 115, § 19:78.50. The Zia pueblo challenged registration of a primate laboratory's mark incorporating the Zia Sun symbol on section 2(a) grounds, arguing it falsely suggests a connection to the tribe, and brings the Zia people into disrepute. Turner, *supra* note 26, at 128.

¹⁷⁷ Dougherty, *supra* note 24, at 380.

¹⁷⁸ *In re Tam*, 108 U.S.P.Q.2d 1305 (T.T.A.B. 2013); *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071 (T.T.A.B. 2008); MCCARTHY, *supra* note 115, § 19:77.25. Other examples include Koran for wine, Senussi for cigarettes, Madonna for wine. *In re Lebanese Arak Corporation*, 94 U.S.P.Q.2d 1215 (T.T.A.B. 2010); *In re Reemtsma Cigarettenfabriken G.m.b.H.*, 122 U.S.P.Q. 339 (T.T.A.B. 1959); *In re Riverbank Canning Co.*, 95 F.2d 327 (C.C.P.A. 1938); MCCARTHY, *supra* note 115, § 19:77. Marks incorporating racial epithets for African Americans have also been denied registration. *Riley & Carpenter*, *supra* note 10, at 154. However, the mark "Amish" for cigars passed the section 2(a) bar, because most Amish men smoked, and there was no religious prohibition against smoking. *In re Waughtel*, 138 U.S.P.Q. 594 (T.T.A.B. 1963); *Blankenship*, *supra* note 33, at 432; *cf.* Dougherty, *supra* note 24, at 380 ("In *In re Condas*, the Patent and Trademark Board determined that a mark may pass the scrutiny of section 2(a) if the potential owner of the mark is a member of the group that is allegedly disparaged." (italics added)).

¹⁷⁹ *In re Tam*, 108 U.S.P.Q.2d 1305 (T.T.A.B. 2013); *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071 (T.T.A.B. 2008); MCCARTHY, *supra* note 115, § 19:77.25; *see also* Chalk, *supra* note 19, at 4-5.

¹⁸⁰ *In re Tam*, 785 F.3d 567 (Fed. Cir. 2015).

¹⁸¹ *Crash Dummy Movie, LLC v. Mattel, Inc.*, 601 F.3d 1387 (Fed. Cir. 2010); *Keebler Co. v. Rovira Biscuit Corp.*, 624 F.2d 366, 370 (1st Cir. 1980) ("[R]egistration does not create the underlying right in a trademark. That right, which accrues from the use of a particular name or symbol, is essentially a common law property right ... and cancellation cannot extinguish a right that federal registration did not confer."); *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881, 888 (1969) ("[T]he acquisition of the right to exclude others from the use of a trademark results from the fact of use and the common law, independently

will lose the benefits conferred by federal registration, which are a presumption of ownership and validity of the mark, national priority in use, access to statutory damages and import limitations on infringing goods.¹⁸² If the trademark owner continues to use the mark in commerce, he is still entitled to bring claims for infringement and dilution of his mark under common law.¹⁸³ Cancellation proceedings brought under certain other statutory bars may additionally abrogate the trademark owner's common law protection. However, abrogation of the trademark owner's common law protection will not ban the trademark from use in commerce in general; rather, it may enable wider third-party use of the mark by dismantling the trademark owner's monopoly.

Absent accompanying infringement litigation, cancellation proceedings will do little to prevent appropriators from using source communities' cultural products as trademarks in commerce, even when the marks disparage or falsely suggest a connection to the source community. However, it may be more difficult for a group to establish standing for an infringement claim: trademark infringement claims require the potential plaintiff to own a valid mark.¹⁸⁴ In order to pursue a trademark infringement claim, source communities must have valid marks—trademarks, collective marks, or certification marks—in the cultural product claimed to be appropriated. While registration is not necessary, as explained in Part II.C, it is helpful insofar as it establishes a presumption of ownership and validity of the mark, and national priority in use.¹⁸⁵

There are two potential causes of action for trademark infringement: consumer confusion, and dilution of a famous mark. Consumer confusion is commonly deemed the classic cause of action for trademark infringement¹⁸⁶—Company B uses a trademark that is confusingly similar, either in sight, sound, or meaning, to a trademark owned by Company A, on Company B's products, in such a way that confuses consumers into thinking either Company B's products are made by Company A, or Company A's goods are made by Company B.¹⁸⁷ Trademark dilution, a newer cause of action under trademark

of registration in the Patent [and Trademark] Office.”); *Hammermill Paper Co. v. Gulf States Paper Corp.*, 337 F.2d 662 (1964) (“[W]e point out that this [opposition] proceeding has nothing to do with divestiture or cancellation of trademarks. We are concerned only with a refusal to register a mark and the cancellation of a registration. Appellant's right to use it is not before us.”); MCCARTHY, *supra* note 115, §§ 20:40, 20:68.

¹⁸² See *supra* note 143 and accompanying text.

¹⁸³ *Centaur Communications, Ltd. v. A/S/M Communications, Inc.*, 830 F.2d 1217 (2d Cir. 1987); MCCARTHY, *supra* note 115, § 27:14; *Blankenship*, *supra* note 33, at 446, 450-51.

¹⁸⁴ *E.T. Browne Drug Co. v. Cococare Products, Inc.*, 538 F.3d 185 (3d Cir. 2008); *Donchez v. Coors Brewing Co.*, 392 F.3d 1211 (10th Cir. 2004) (“For an unregistered mark, it is the plaintiff's “burden to demonstrate that it is protectable under § 43(a).”); *Yarmuth-Dion, Inc. v. D'ion Furs, Inc.*, 835 F.2d 990 (2d Cir. 1987); cf. MCCARTHY, *supra* note 115, § 27:13.

¹⁸⁵ See *supra* Part II.C.

¹⁸⁶ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 154 (1989) (“[T]he States may place limited regulations on the circumstances in which such designs are used in order to prevent consumer confusion as to source.”); MCCARTHY, *supra* note 115, § 23:1.

¹⁸⁷ Lanham Act §§ 32, 43, 15 U.S.C. §§ 1114, 1125(a)(1)(A) (2015); MCCARTHY, *supra* note 115, §§ 23:11.50; 25:26. For the factors used to determine likelihood of consumer confusion,

law,¹⁸⁸ is more expansive insofar as it does not require a likelihood of consumer confusion, and instead requires either “blurring” of the distinctiveness, or “tarnishment” of the mark;¹⁸⁹ however, it is narrower insofar as it can only be raised by owners of “famous marks.”¹⁹⁰ While valid trademarks must just be distinctive and used in commerce, famous marks must be “widely recognized by the general consuming public of the United States as a designation of the source of the goods or services of the mark’s owner.”¹⁹¹

In *Navajo Nation v. Urban Outfitters*, a case currently being litigated in the District Court of New Mexico, the Navajo Nation, which holds 86 registered trademarks in names, words, and symbols of the Navajo people, sued Urban Outfitters, a clothing retailer, for trademark infringement due to consumer confusion, dilution by blurring, and dilution by tarnishment.¹⁹² The Navajo Nation claimed that Urban Outfitters’ use of the words “navajo” and “navaho” to name a variety of their products, including clothing, underwear, and flasks, confused consumers as to the source of the goods, diluted the distinctiveness of the Navajo mark, and tarnished the Navajo mark because of the misspelling of Navajo, and the association of the Navajo mark with “scandalous” items such as panties and flasks.¹⁹³ While the case has yet to be decided, the District Court has dismissed the Navajo Nation’s claim of tarnishment due to misspelling, and has otherwise denied Urban Outfitters’ motion to dismiss.¹⁹⁴

If a source community is able to successfully argue that their marks were infringed or diluted, the limits they could impose on appropriators reach much further than those levied by cancellation. A successful infringement action would likely entitle the source community to an injunction, and where appropriate, monetary damages.¹⁹⁵ Through an injunction, a court can order the appropriator to cease using the mark that infringes the source community’s mark on a nationwide basis, or otherwise require the appropriator to take affirmative steps to distinguish its products, so as to indicate their real

see *id.* § 23:19. For the elements of a prima facie case for trademark infringement under section 43(a), see *id.* § 27:13.

¹⁸⁸ Pub. L. No. 106-43, 113 Stat. 218 (August 5, 1999); MCCARTHY, *supra* note 115, § 20:20.50.

¹⁸⁹ § 1125(c). The theory behind dilution by blurring is that if customers or prospective customers see the famous mark used by persons other than the famous mark owner, to identify other sources for many different goods, then the ability of the famous mark to identify and distinguish only one source will be weakened. MCCARTHY, *supra* note 115, § 24:69. For dilution by blurring factors, see § 1125(c)(2)(B)(i)-(vi) and MCCARTHY, *supra* note 115, § 24:119. Dilution by tarnishment, in contrast, results from an unauthorized use of a famous mark to create negative associations with the mark, and thereby harm the reputation of the mark holder. MCCARTHY, *supra* note 115, § 24:70.

¹⁹⁰ § 1125(c)(1).

¹⁹¹ § 1125. For the elements of a prima facie case for trademark dilution under section 43(c), see § 1125(c) and MCCARTHY, *supra* note 115, § 24:99.

¹⁹² *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1153-55 (D. N.M. 2013).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1169.

¹⁹⁵ §§ 1116, 1117; MCCARTHY, *supra* note 115, § 30:1.

source.¹⁹⁶ While monetary damages may sometimes be awarded for successful consumer confusion actions, they are rarely awarded for successful dilution claims.¹⁹⁷ In addition to an injunction, and possibly monetary damages, the courts have discretion to sua sponte cancel the infringing mark's registration.¹⁹⁸

On balance, it may be easier for source communities to pursue cancellation of appropriator's trademark using their cultural product, because they need not own trademarks to establish standing, and they need not prove confusion or blurring of their marks to effect a cancellation. However, the lack of legal constraints imposed on an appropriator through a successful cancellation proceeding may render it little more than a public "slap on the wrist," because the appropriator may still be entitled to common law protection for her unregistered mark. Even if the cancellation proceedings result in the appropriator losing common law protection, the result would be counterproductive for source communities: the mark would be available for broader use by third parties.

If source communities simply want to publicize the scandalousness of the appropriator's mark, or publicly disclaim a connection to the appropriator, cancellation is certainly the easier way to do so. But if source communities seek to prevent non-community members from appropriating and using their cultural products, pursuing an infringement action, which can lead to an injunction, would be more appropriate. That said, infringement actions impose a higher burden on source communities: not only must they have a trademark to be infringed, they must prove that consumers are likely to be confused about source, sponsorship, or affiliation. If source communities are able to either register or otherwise successfully argue that they hold a trademark in their cultural product, pursuing simultaneous infringement and cancellation actions would avail them of all of the mechanisms provided by trademark law to encumber cultural appropriation.

III. THE LIMITATIONS OF TRADEMARK LAW PROTECTION

A. *Efficacy of Trademark Law to Resist Cultural Appropriation*

A successful trademark infringement suit may be a boon to a source community seeking to prevent outsiders' use of their cultural products. However, the limits built in to trademark law circumscribe the conditions under which a source community can avail itself of trademark protection, and the potential expansiveness of that protection.

¹⁹⁶ MCCARTHY, *supra* note 115, §§ 24:132, 30:5. For criteria for a preliminary injunction see *id.* § 30:31. *See also* Pub. L. No. 106-43, 113 Stat. 218 (Aug. 5, 1999); *B. H. Bunn Co. v. AAA Replacement Parts Co.*, 451 F.2d 1254 (5th Cir. 1971); *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938).

¹⁹⁷ § 1117(a); MCCARTHY, *supra* note 115, §§ 24:132, 30:57, 30:59, 30:61-64, 30:74, 30:89, 30:100.

¹⁹⁸ § 1119; *Empresa Cubana del Tabaco v. Culbro Corp.*, 541 F.3d 476 (2d Cir. 2008); MCCARTHY, *supra* note 115, § 30:109.

The first challenge source communities will encounter is establishing ownership of a valid trademark. While ownership of a valid trademark is not necessary to pursue cancellation of an appropriator's trademark, it is necessary for the source community to accrue the benefits of registration, and even if unregistered, to pursue an infringement action against an appropriator.¹⁹⁹ Many cultural products, however, may not qualify as valid trademarks because they may fail to meet either the use in commerce or distinctiveness requirements.

Though non-profit and charitable organizations' marks may qualify as "used in commerce" despite a lack of sales, and collective mark and certification mark owners need not (or per se cannot) use their marks to sell goods or services, all of their marks must be used in some interstate commercial activity to receive trademark protection.²⁰⁰ For non-profits and charities this may be fundraising,²⁰¹ and for collective marks and certification marks it may be the use of the mark in the course of a sale by members of the collective,²⁰² or certified producers. A source community's words, names, symbols, and other cultural products that are religious, historic, or otherwise unrelated to any kind of commerce, may not be eligible for trademark protection because they fail to meet the "use in commerce" requirement.²⁰³

A source community's cultural product may also fail to meet the "distinctiveness" requirement to serve as a valid trademark. Just as Urban Outfitters challenged the Navajo Nation's trademark of "navajo" as descriptive,²⁰⁴ in the minds of consumers, many cultural products may not call to mind a single source, especially given the transfer of cultural products across cultures throughout history.²⁰⁵ For instance, while the term "Blues" for music may meet the use in commerce requirement, because the performance and sale of blues music involves transactions, "Blues" does not identify a single source or distinguish one producer's song from that of another; it is the generic term for that style of music.

If a source community's cultural product meets the use in commerce and distinctiveness requirements for validity as a trademark, it can raise infringement claims against appropriator's uses of its cultural product, but it may nevertheless be unable to raise dilution claims if it has not achieved a

¹⁹⁹ See *supra* notes 115-119 and accompanying text.

²⁰⁰ *Id.*

²⁰¹ *American Diabetes Ass'n, Inc. v. National Diabetes Ass'n*, 533 F. Supp. 16, 21 (E.D. Pa. 1981), *aff'd*, 681 F.2d 804 (3d Cir. 1982) ("Plaintiffs may also suffer the loss of potential donations . . ."); *Purcell v. Summers*, 145 F.2d 979, 985 (C.C.A. 4th Cir. 1944); *MCCARTHY*, *supra* note 115, § 9:5.

²⁰² Collective membership marks do not require collective members to use the mark in the course of sales in order to be registrable. However, these marks are not protected as trademarks—to identify the source of a good or service—unless they can additionally serve as valid trademarks. See *supra* notes 158-159 and accompanying text.

²⁰³ *Audet*, *supra* note 24, at 12; see, e.g., *Turner*, *supra* note 26, at 125 ("These requirements present problems for indigenous groups, including the Zia, who do not constitute commercial entities and who do not use their symbols for commercial purposes.").

²⁰⁴ *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D. N.M. 2013).

²⁰⁵ See *supra* notes 51-54 and accompanying text.

certain level of recognition. In general, relatively few trademarks have achieved enough nationwide recognition to be considered “famous,” and it may be even more difficult for source communities to meet that threshold. For source communities that seek to limit outsiders’ access to their cultural property, it will be difficult to show sufficient “duration, extent, and geographic reach” of advertising and publicity of the mark, and sales of goods or services offered under the mark, let alone to show actual recognition of the mark.²⁰⁶ For source communities with diffuse membership who use the cultural product, it will be particularly difficult to show “substantially exclusive use” of the mark.²⁰⁷

Even if a source community is able to establish its ownership of a valid trademark, registration or unregistered trademark ownership does not confer to the owner an exhaustive exclusive right to use the mark.²⁰⁸ First, the infringement and dilution analyses allow for concurrent uses (and even registrations) of the same mark where consumers are unlikely to make a mistake as to source or affiliation of a product.²⁰⁹ Second, non-trademark uses of a protected mark are generally permissible if they do not cause a likelihood of confusion.

In order for a source community to successfully argue that an appropriator’s use of its cultural product constitutes trademark infringement, the source community must establish that there is a “likelihood of confusion” between the appropriator’s use of the cultural product and the source community’s use.²¹⁰ Even if the marks are identical (i.e., Delta for an airline and Delta for a sink faucet), if consumers are unlikely to think that both goods come from a single source, or the appropriator’s goods come from the source community, or vice versa, there is no trademark infringement.²¹¹ The Navajo Nation, which uses its distinctive cultural products in commerce to signal the source of its goods, may not be able to prevent producers of unrelated goods, such as Mazda, from using the community’s cultural product as a trademark, because consumers are unlikely to mistakenly think that the Navajo Nation made the Mazda Navajo automobile, or that Mazda made the Navajo Nation’s goods, or that the car and the Navajo Nation’s goods come from a single

²⁰⁶ Lanham Act § 43, 15 U.S.C. § 1125(c)(2)(A)(i)-(iii) (2015).

²⁰⁷ *Id.* § 1125(c)(2)(B)(iii).

²⁰⁸ Audet, *supra* note 24, at 12 (“[E]ven once someone registers a trademark, that mark can still be used by others, albeit in a limited way, thus not precluding outsiders’ use of the mark.”).

²⁰⁹ Lanham Act § 2(d), 15 U.S.C. § 1052(d): “[I]f . . . confusion, mistake, or deception is not likely to result from the continued use by more than one person of the same or similar marks under conditions and limitations as to the mode or place of use of the marks or the goods on or in connection with which such marks are used, concurrent registrations may be issued to such persons when they have become entitled to use such marks as a result of their concurrent lawful use in commerce Concurrent registrations may also be issued . . . when a court of competent jurisdiction has finally determined that more than one person is entitled to use the same or similar marks in commerce.” *Id.*

²¹⁰ See *supra* notes 186-187 and accompanying text.

²¹¹ MCCARTHY, *supra* note 115, § 24:11.

source.²¹² Similarly, in order for an appropriator's use of a mark to dilute a source community's famous mark, the appropriator's use must cause consumers to "associate" it with the source community's famous, even if the two marks are identical.²¹³

Additionally, third parties are entitled to make non-trademark use of a protected mark, such that their use does not give rise to a likelihood of confusion. Non-trademark uses are by their nature unlikely to cause a likelihood of confusion, because they are not being used by a third party to indicate the source of the third party's goods.²¹⁴ Moreover, third parties' interest in freedom of speech weighs heavily against allowing trademark owners to enjoin non-trademark uses.²¹⁵

Non-trademark uses include expressive uses, such as entertainment, parody, and commentary, as well as comparative advertising, nominative fair use, and descriptive fair use.²¹⁶ Permissible expressive uses of a trademark can take on many forms: a scathing review of a product made by a certain producer that names the product and producer and includes the image of the product and its logo; a parodic reference to a popular children's toy in a song; a painting in which an artist depicts a trademark-protected image or symbols.²¹⁷ Comparative advertising allows a third party to name its competitor in the course of advertising its own product (i.e., "Same active ingredient as Advil."), and nominative fair use allows competitors and non-competitors alike to refer to a company's trademark when talking about its product (i.e., "We sell Serta mattresses.")²¹⁸ Descriptive fair use allows competitors to continue to use a descriptive mark in its descriptive sense after it has acquired secondary meaning²¹⁹—as Urban Outfitters would argue, even if the term "navajo" has acquired secondary meaning, the fashion retailer's use of it is to merely describe the "Native American" look of their product, not to indicate source.²²⁰

Though source communities may own and register valid trademarks, they may find themselves unable to leverage their trademarks to prevent a vast many appropriated uses of their mark, whether in commerce or in expressive works.

²¹² Cf. Navajo Nation Sues Urban Outfitters Over Trademark, NPR (Apr. 5, 2012), <http://www.npr.org/2012/04/05/150062611/navajo-nation-sues-urban-outfitters-over-trademark>. Mazda obtained the Navajo Nation's consent to use the name Navajo as the model for its vehicles. *Id.*

²¹³ § 1125(c)(2)(B)(v)-(vi).

²¹⁴ MCCARTHY, *supra* note 115, § 23:11.50.

²¹⁵ Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989).

²¹⁶ MCCARTHY, *supra* note 115, §§ 10:22, 11:45, 31:139.

²¹⁷ Expressive uses must meet the higher standard established by the *Rogers* test to be prohibited as trademark infringement: there must be "no artistic relevance" of including the trademark to the underlying work, or if there is artistic relevance, use of the mark in the work must "explicitly mislead[] as to the source or the content of the work." 875 F.2d at 1001; see *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008).

²¹⁸ MCCARTHY, *supra* note 115, §§ 31:139, 11:45.

²¹⁹ *Id.* § 11:45.

²²⁰ Navajo Nation v. Urban Outfitters, Inc., 935 F. Supp. 2d 1147 (D. N.M. 2013).

To be able to enjoin an appropriator's use of a cultural product using trademark law—the goal of source communities seeking to restrict cultural appropriation—the source community must initiate an infringement action. Even if the Zia people owned a trademark in the Zia Sun symbol, they likely would not succeed on an infringement case against a plumber from using the symbol in his logo, because it would not cause a likelihood of confusion, and almost definitely would not succeed against a non-Zia artist from incorporating the Zia Sun into her painting, because her artwork is protected as free speech. Successful trademark infringement suits will likely be limited to instances in which the appropriator uses the source community's mark to compete with the source community in the market, or to sell goods or services in a close enough market to cause a likelihood of confusion. While cancellation of appropriators' marks may be easier for source communities to pursue than infringement actions, it does not prevent appropriators from continuing to use their marks,²²¹ and it does not give the source communities any trademark rights in the appropriated cultural product. Actually, a successful cancellation proceeding may prevent a source community member from being able to register her mark.²²²

Considering all of the limits built in to trademark protection, trademark is not a particularly effective source of law for source communities to leverage in their attempt to combat cultural appropriation. A successful trademark infringement or dilution suit—which could enable a source community to permanently enjoin an appropriator's use of their cultural product—while potent, will be especially difficult for source communities to achieve. Many intangible cultural products would likely not qualify as valid trademarks, because of the nature of the product, or the source community, or both. A source community's religious symbol, character from oral tradition, name of a deity, ceremonial song will in many cases fail to satisfy the “use in commerce” requirement because the source community deliberately withholds these products from commerce to preserve their religious, historic, or cultural value.²²³ Even those cultural products a source community uses in commerce—such as a ceremonial dance, a style of music, a design of an object, a pattern of a tapestry—may fail to satisfy the “distinctiveness” requirement, because the diffuseness of the source community (e.g., the Jewish diaspora), or previous intercultural exchange disables the product from being able to identify a single source.

Those cultural products that do qualify as valid trademarks, such as the Navajo Nation's name “navajo” in connection with the various apparel and crafts it sells, do not entitle their source community to exclude third-party uses where there is no likelihood of confusion as to source or association. If an appropriator takes a source community's cultural product, and uses it on a good or service that does not relate to any good or service provided by the source

²²¹ See *supra* Part II.D.

²²² See *supra* note 179 and accompanying text.

²²³ See *supra* note 36 and accompanying text.

community, the source community will likely not be able to enjoin the appropriator's use. If an appropriator uses a source community's cultural product in an expressive work, such as a novel, a painting, or a television show—even if it is used to mock or disparage the community, the source community will likely not be able to enjoin the appropriator's use. If an appropriator uses a source community's cultural product to describe its own product (i.e., Cherokee-style necklace), the source community will likely not be able to enjoin the appropriator's use. However, in those situations where there may be a likelihood of confusion (even absent direct competition), such as Urban Outfitters' sale of "Navajo panties," when the Navajo Nation sells apparel but not underwear,²²⁴ source communities seeking to prevent cultural appropriation may find it beneficial to sue for trademark infringement, because they may be able to enjoin the appropriator's use.

B. *Benefits and Harms of Using Trademark Law for Source Communities and Society*

Given the difficulties source communities will likely face in meeting the requirements for trademark protection, and the narrow scope of appropriators' activity to which protection extends, source communities may find that utilizing trademark law to deter cultural appropriation is more harmful to the source community than the appropriator. Cancellation proceedings and infringement actions, while of limited help, impose requirements on source communities that are likely adverse to their interests.

First, source communities have come to view cancellation proceedings under Lanham Act section 2(a) as a tool to prevent individuals and organizations, who appropriate stereotypes or cultural symbols from source communities, from using marks that disparage or falsely suggest a connection to the source community.²²⁵ In practice, however, cancellation proceedings do not prevent appropriators from using disparaging or falsely-connecting marks in commerce: removal from the register merely relegates the mark to common law protection, which requires that the mark owner prove validity and ownership of the mark (unlike registration, which provides a presumption of validity and ownership), and limits some remedies available (registration allows for statutory damages and import control) when the mark owner pursues an infringement action against a third party.²²⁶ In theory, these additional hurdles, and the potential public shame that accrues from being deemed "disparaging," may influence (though in no way legally require) appropriators to abandon their use of those marks. However, source communities may find that pursuing cancellation proceedings under section 2(a) has a negative collateral effect on the source community—when a mark is deemed "disparaging," the mark owner's membership or non-membership in the source

²²⁴ *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D. N.M. 2013).

²²⁵ *See supra* Part II.D.

²²⁶ *Id.*

community is of no consequence,²²⁷ and so a source community member will not be able to “re-appropriate” and register that mark later.

Second, source communities may view infringement actions as a way to redress the economic harms and loss of control cause by cultural appropriation. In certain limited circumstances—where source communities use their distinctive cultural product in commerce, and the appropriator uses the cultural product in a way that confuses consumers as to the source of the appropriator or source community’s product—trademark infringement actions enable source communities to regain control (via injunction) over outside uses of their cultural products, and may entitle them to monetary damages.²²⁸ An injunction would benefit source communities that seek to regain control, or seek monetary compensation: the source community may entirely withhold the mark from use by that infringer, or require the infringer to pay license fees. Despite the attractiveness of this possible, albeit limited, recourse for source communities, the requirements source communities will have to meet in order to have access to this form of legal redress may undermine the source community’s use of its own cultural products.

While registration as a collective or certification mark enables group ownership of the mark—thus preserving group ownership of the cultural product, and does not require the mark owner to use the mark in commerce, it requires the mark owner to exert control over who or what can bear the mark, and group members to use the mark in commerce.²²⁹ The control requirement casts light on the shortcomings of fitting cultural products into property law pointed out by scholars: requiring source communities to define who constitutes an authentic community member, and to limit how community members can use their cultural products “freezes” the community at that moment those boundaries are cast, and disables it from the growth and adaptation necessary to perpetuate a culture.²³⁰ The requirement that members use the cultural product in commerce may be similarly counter-effective: for source communities that seek to preserve the exclusively non-commercial use of a cultural product, such as a religious, historical, or ritualistic use, subjecting the product to any kind of use in commerce could eviscerate the traditional meaning of the cultural product by monetizing it.²³¹

In addition to the potential blowback for source communities, using trademark law to police cultural appropriation may have negative consequences for a multi-cultural society. Source community ownership of trademarks in its name, symbols, images, and other cultural products, coupled with the boundaries the community must cast around “rightful users” to preserve ownership and validity of its marks, may prevent other source communities with the same or highly similar cultural products (e.g., two tribes that use the

²²⁷ See *supra* note 179 and accompanying text.

²²⁸ See *supra* notes 195-197 and accompanying text.

²²⁹ See *supra* notes 152-167 and accompanying text.

²³⁰ See *supra* notes 81-84 and accompanying text.

²³¹ See *supra* note 36 and accompanying text.

same symbol to represent their religion), from using their products in a way that would infringe the mark owner's trademark.²³² Source community ownership of trademarks in its cultural products would constrain the intercultural exchange of cultural products to a licensing system, which would encumber the merger and blending of cultures that naturally occurs in interactive, multicultural societies.²³³ Moreover, trademark ownership held by source communities in their cultural products may disenfranchise individuals who are simultaneously members of a source community and an outside culture from repurposing or reinventing a cultural product, either because of the controls imposed by source communities to maintain ownership over their trademarks, or the risk of being subject to an injunction and monetary damages.

C. Propriety of Trademark Law to Deter Cultural Appropriation

Considering the incongruence of trademark law with the needs and characteristics of source communities, it is unsurprising that restricting cultural appropriation is incompatible with the core purposes of trademark law: avoiding consumer confusion, and preventing appropriation of a producer's good will. Restricting cultural appropriation through trademark law would likely not result in a more competitive market, and would likely adversely affect free speech in the market.

Unlike trademarks, cultural products are not meant to serve as a shorthand indicator of source and quality. They are meant to serve some traditional function within the source community, not to inform consumers of a good or service that the product they are consuming comes from the source community. Cultural products are not valuable because of their ability to convey information to a consumer; they are valuable because their preservation helps perpetuate the culture.²³⁴ Protection of cultural products as trademarks does not serve the purpose of reducing consumer search costs.

Similarly, protecting cultural products as trademarks does not serve the purpose of protecting producers from illegitimate diversions of trade. Insofar as source communities are not trading on their cultural products, and seek to entirely foreclose the trade of their cultural products, appropriation of source communities' cultural products does not deprive them of potential sales.²³⁵ The "Unfair Competition" school, which views trademark protection as a property right in the mark itself, may appear to conform more closely to the source community's relation to its cultural product. However, the property right trademark law protects is not the mark's form, but the good will it represents.²³⁶ Source communities do not value their cultural products because of the

²³² See *supra* note 83 and accompanying text.

²³³ See *supra* notes 51-54 and accompanying text.

²³⁴ Compare notes 97-103 and accompanying text with notes 40-42 and accompanying text.

²³⁵ Compare notes 104-107 and accompanying text with notes 40-42 and accompanying text.

²³⁶ See *supra* note 106 and accompanying text.

reputation or business value they embody; they value their cultural products because they are integral to the practice and perpetuation of their culture.²³⁷

Moreover, resisting cultural appropriation through trademark law would not foster a more competitive market, and would impose a limit on free speech. Entirely removing a word, image, symbol, or other cultural product from the market, or requiring third parties to pay license fees to be able to use it, does not help producers differentiate themselves, or otherwise incentivize competition in any discernable way. Instead, using trademark law to resist cultural appropriation would limit individuals' and organizations' abilities to use a cultural product as a mark in a way that reduces consumers' search costs or embodies a business's good will.

CONCLUSION

Trademark law, with its potential for perpetual protection against unauthorized third-party uses of a mark, may be enticing to source communities seeking to prevent appropriation of their cultural products. However, the requirements and limitations built in to trademark law make it particularly difficult for source communities, given their specific characteristics, to protect their cultural products through this body of law. Moreover, even successful cancellation proceedings or infringement suits against appropriators impose requirements and limitations on source communities that may be abhorrent to their culture and its norms. Accordingly, source communities will likely find that trademark law is largely ineffective for, or even counterproductive to, the deterrence of cultural appropriation. Likewise, given the core purposes of trademark law, courts should find that deterrence of cultural appropriation is outside the provenance of trademark law.

²³⁷ Compare notes 102-103 and accompanying text with notes 40-42 and accompanying text.

Guam Trademark Commission
Chairwoman Senator Kelly Marsh (Taitano), PhD.



Commission Member

Name: _____ Agency/Organization: _____

Email: _____ Title: _____

Address: _____

Office Number: _____

Cell Number: _____

Alternate Designee

Name: _____ Agency/Organization: _____

Email: _____ Title: _____

Address: _____

Office Number: _____

Cell Number: _____

GUAM TRADEMARK COMMISSION
Office of Senator Kelly Marsh (Taitano), PhD.
I Mina' Trentai Singko Na Liheslaturan Guåhan



Document Listing

1. Guam Trademark Commission Act – 5 GCA, Chapter 14
2. Patents, Trademarks and Copyrights – 5 GCA, Chapter 20, Article 4
3. Guam Product Seal – 12 GCA, Chapter 20, Article 2
4. The Guam Product Seal Task Force Act – 5 GCA, Chapter 2, Article 2
5. Made in Guam Incubator Program – 12 GCA, Chapter 1, Article 4
6. Trademark Counterfeiting Act – 9 GCA, Chapter 47
7. Dept. of Revenue and Taxation, Guam Trademark and Service Mark Registration Application
8. Dept. of Revenue and Taxation, Guam Trademark and Service Mark Renewal Application
9. Protecting Intellectual Property, Summary Workshop Report, August 10, 2013

Know the Law



The Indian Arts and Crafts Act of 1990 is a truth-in-advertising law. It is illegal to offer or display for sale, or sell, any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian tribe.



ABOVE
Basket
Lucy George
Eastern Band Cherokee

COVER
Buffalo Scouts
Sculpture
Sharon Dry Flower Reyna
Taos Pueblo

All photographs in this brochure feature authentic Indian handcrafted products.

The Indian Arts and Crafts Act of 1990 (PL 101-644), as amended, prohibits misrepresentation in marketing of Indian arts and crafts products within the United States. The Indian Arts and Crafts Act is a truth-in-advertising law. It is illegal to offer or display for sale, or sell, any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian tribe.

Under the Act—

Indian is defined as a member of a federally or officially State recognized tribe, or certified Indian artisan;

Certified Indian artisan means an individual who is certified by the governing body of an Indian tribe as a non-member Indian artisan;

Indian product means any art or craft product made by an Indian;

Indian labor makes the Indian art or craft object an Indian product;

Indian tribe means—

- 1) Any federally-recognized Indian tribe, band, nation, Alaska Native village, or organized group or community, or
- 2) Any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority.

Civil and Criminal Penalties

For a first time violation of the Act, an individual can face civil penalties or criminal penalties up to a \$250,000 fine or a 5-year prison term, or both. If a business violates the Act, it can face civil penalties or can be prosecuted and fined up to \$1,000,000.

Scope of the Indian Arts and Crafts Act of 1990

Covering all Indian and Indian-style traditional and contemporary arts and crafts produced after 1935, the Act broadly applies to the marketing of arts and crafts by any person in the United States.



ABOVE
Beaded Box
Delores Sloan
Athbascan

All products must be marketed truthfully regarding the Indian heritage and tribal affiliation of the producers so as not to mislead the consumer. It is illegal to market an art or craft item using the name of a tribe if a member, or certified Indian artisan, of that tribe did not actually create the art or craft item.

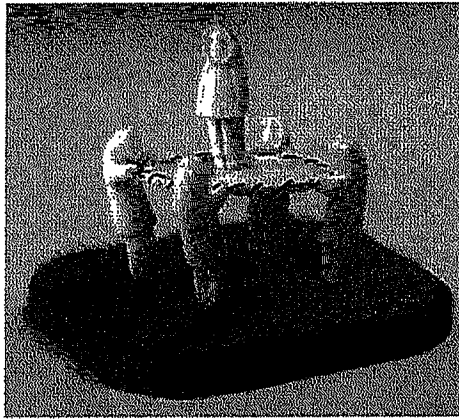


ABOVE
Pendant
Ronald Wadsworth
Hopi

For example, products sold using a sign claiming "Indian Jewelry—Direct from the Reservation to You", would be a violation of the Indian Arts and Crafts Act if the jewelry was produced by someone other than a member, or certified Indian artisan, of an Indian tribe. Products advertised as "Hopi Jewelry" would be in violation of the Act if they were produced by someone who is not a member of the Hopi Tribe.

The types of products that are copied and may be misrepresented vary from region to region. Some traditional items made by non-Indians include jewelry, pottery, baskets, carved stone fetishes, woven rugs, katsina dolls, and clothing in the style of Indian products.

RIGHT
Blanket Toss
Percy Milligrock
Eskimo



**How to File a
Complaint with
the Indian Arts and
Crafts Board**

While the beauty, quality, and collectability of authentic Indian arts and crafts make each piece a unique reflection of our American heritage, it is important that buyers be aware that fraudulent Indian arts and crafts compete daily with authentic Indian arts and crafts in the nationwide marketplace. The Indian Arts and Crafts Board, an agency within the U.S. Department of the Interior, receives and screens complaints of possible violations for further investigation, and can request prosecution.

If you become aware of any market activity that you believe may be in violation of the Act, please contact the Indian Arts and Crafts Board with the relevant information. Complaints may be filed anonymously online, by writing to the Indian Arts and Crafts Board, or by calling its toll-free number:

Website: www.iacb.doi.gov

Address: Indian Arts and Crafts Board
U.S. Department of the Interior
1849 C Street, NW, MS 253 I-MIB
Washington, DC 20240

Telephone: (888) ART-FAKE, or (888) 278-3253

Please include, or have available, copies of any other documentation, such as advertisements, catalogs, business cards, photos, or brochures.

**What Else You
Can Do to Stop
Misrepresentation
of Indian Arts
and Crafts**



As an alternative to a formal complaint, you may want simply to pass along information about a potential violation of the Act. This information may provide an invaluable lead to uncovering violations of the Act.

The Indian Arts and Crafts Board needs to hear from the arts community and the buying public regarding your first-hand exposure to misrepresentation in the marketing of Indian arts and crafts. Your information plays a key role in our efforts to ensure that the market for authentic Indian arts and crafts remains healthy; that the buying public is protected from fakes and misrepresented products; and that the Indian artists and craftspeople, Indian businesses, and Indian tribes can sell their products in a marketplace free of imitation Indian arts and craftwork.

**How to Protect
Yourself as a
Consumer**

To avoid purchasing misrepresented Indian arts and crafts, buy from a reputable dealer. Ask the dealer for written verification that the item is authentic Indian art or craftwork. In light of the Act, the dealer should be able to provide you with this documentation.

If you purchase an art or craft product represented to you as Indian-made, and you learn that it is not, first contact the dealer to request a refund. If the dealer does not respond to your request, you can also contact your local Better Business Bureau, Chamber of Commerce, and the local District Attorney's office, as you would with any consumer fraud complaint. Second, contact the Indian Arts and Crafts Board with your complaint regarding violations of the Indian Arts and Crafts Act.

ABOVE
Doll
Rhonda Holy Bear
Cheyenne River Sioux



ABOVE
Burntwater Rug
Victoria Keoni
Navajo

Before buying Indian arts and crafts at powwows, annual fairs, and other events, check the event requirements on the authenticity of products being offered for sale. Many events list the requirements in newspaper advertisements, promotional flyers, and printed programs. If the event organizers make no statements on compliance with the Act or on the authenticity of Indian arts and crafts offered by participating vendors, you should obtain written verification from the individual vendors that their Indian arts or craftwork were produced by tribal members or by certified Indian artisans.

Know the Law

For a free copy of the Indian Arts and Crafts Act of 1990 (P.L. 101-644), the amendment (P.L. 106-497), and corresponding regulations:

Website www.iacb.doi.gov
E-mail iacb@ios.doi.gov
Call (202) 208-3773
or Toll Free (888) ART-FAKE
Write Indian Arts and Crafts Board
U.S. Department of the Interior
1849 C Street, NW, MS 253 I-MIB
Washington, DC 20240

Indian Arts and Crafts Act of 1935

[Public-No. 355-74th Congress]
[S. 2203]

AN ACT

To promote the development of Indian arts and crafts and to create a board to assist therein, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a board is hereby created in the Department of the Interior to be known as "Indian Arts and Crafts Board", and hereinafter referred to as the Board. The Board shall be composed of five commissioners, who shall be appointed by the Secretary of the Interior as soon as possible after passage of this Act and shall continue in office, two for a term of two years, one for a term of three years, and two for a term of four years from the date of their appointment; the term of each to be designated by the Secretary of the Interior, but their successors shall be appointed for a term of four years except that any person chosen to fill a vacancy shall be appointed for the unexpired term of the commissioner he succeeds. Both public officers and private citizens shall be eligible for membership on the Board. The Board shall elect one of the commissioners as chairman. One or two vacancies on the Board shall not impair the right of the remaining commissioners to exercise all the powers of the Board.

The commissioners shall serve without compensation: Provided, That each Commissioner shall be reimbursed for all actual expenses, including travel expenses, subsistence, and office overhead, which the Board shall certify to have been incurred as properly incidental to the performance of his duties as a member of the Board.

SEC. 2. It shall be the function and the duty of the Board to promote the economic welfare of Indian tribes and the Indian wards of the Government through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship. In the execution of this function the Board shall have the following powers: (a) To undertake market research to determine the best opportunity for the sale of various products; (b) to engage in technical research and give technical advice and assistance; (c) to engage in experimentation directly or through selected agencies; (d) to correlate and encourage the activities of the various governmental and private agencies in the field; (e) to offer assistance in the management of operating groups for the furtherance of specific projects; (f) to make recommendations to appropriate agencies for loans in furtherance of the production and sale of Indian products; (g) to create Government trade marks of genuineness and quality for Indian products and the products of particular Indian tribes or groups; to establish standards and regulations for the use of such trade marks; to license

corporations, associations, or individuals to use them; and to charge a fee for their use; to register them in the United States Patent Office without charge; (h) to employ executive officers, including a general manager, and such other permanent and temporary personnel as may be found necessary, and prescribe the authorities, duties, responsibilities, and tenure and fix the compensation of such officers and other employees: Provided, That the Classification Act of 1923, as amended, shall be applicable to all permanent employees except executive officers, and that all employees other than executive officers shall be appointed in accordance with the civil-service laws from lists of eligibles to be supplied by the Civil Service Commission; (i) as a Government agency to negotiate and execute in its own name contracts with operating groups to supply management, personnel, and supervision at cost, and to negotiate and execute in its own name such other contracts and to carry on such other business as may be necessary for the accomplishment of the duties of the Board: Provided, That nothing in the foregoing enumeration of powers shall be construed to authorize the Board to borrow or lend money or to deal in Indian goods.

SEC. 3. The Board shall prescribe from time to time rules and regulations governing the conduct of its business and containing such provisions as it may deem appropriate for the effective execution and administration of the powers conferred upon it by this Act: Provided, That before prescribing any procedure for the disbursement of money the Board shall advise and consult with the General Accounting Office: Provided further, That all rules and regulations proposed by the Board shall be submitted to the Secretary of the Interior and shall become effective upon his approval.

SEC. 4. There is hereby authorized to be appropriated out of any sums in the Treasury not otherwise appropriated such sums as may be necessary to defray the expenses of the Board and carry out the purposes and provisions of this Act. All income derived by the Board from any sources shall be covered into the Treasury of the United States and shall constitute a special fund which is hereby appropriated and made available until expended for carrying out the purposes and provisions of this Act. Out of the funds available to it at any time the Board may authorize such expenditures, consistent with the provisions of this Act, as it may determine to be necessary for the accomplishment of the purposes and objectives of this Act.

SEC. 5. Any person who shall counterfeit or colorably imitate any Government trade mark used or devised by the Board as provided in section 2 of this Act, or shall, except as authorized by the Board, affix any such Government trade mark, or shall knowingly, willfully, and corruptly affix any reproduction, counterfeit, copy, or colorable imitation thereof upon any products, Indian or otherwise, or to any labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of such products, or any person who shall knowingly make any false statements for the purpose of obtaining the use of any such Government trade mark, shall be guilty of a misdemeanor, and upon conviction thereof shall be enjoined from further carrying on the act or acts complained of and shall be subject to a fine not exceeding \$2,000, or imprisonment not exceeding six months, or both such fine and imprisonment.

SEC. 6. Any person who shall willfully offer for sale any goods, with or without any Government trade mark, as Indian products or Indian products of a particular Indian tribe or group, resident within the United States or the Territory of Alaska, when such person knows such goods are not Indian products or are not Indian products of the particular Indian tribe or group, shall be guilty of a misdemeanor and be subject to a fine not exceeding \$2,000 or imprisonment not exceeding six months, or both such fine and imprisonment.

It shall be the duty of each district attorney, to whom the Board shall report in writing any violation of the provisions of this section which has occurred within his jurisdiction, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States for the enforcement of the penalties herein provided.

Approved, August 27, 1935.

