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**The Protection of Cultural Intellectual Property
Resources: The Indian Arts and Crafts Act**

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I. INTRODUCTION

This presentation paper provides an overview of the Indian Arts and Crafts Act (“IACA”),¹ twenty years after its last amendment in 1990, and discusses Federal, Tribal, and State efforts ongoing to address needs left unmet by the IACA.

Counterfeit Indian-made goods are everywhere, and the effect of these counterfeit goods is not only economic. The existence of inexpensive and inauthentic goods is offensive to Tribal communities and Tribal people, not only because it may misappropriate Tribal traditional symbols, but also because the use of inappropriate materials is viewed by some to make a mockery of Tribal culture and beliefs. Moreover, counterfeit items deprive Indian artisans of much needed revenue, act to push authentic arts out of the market through price competition, and decrease consumer confidence in Indian art and artisans.

The IACA was enacted to ameliorate some of the harm caused by these counterfeits in the marketplace. However, since 1990, cultural misappropriation has not stopped. This presentation argues that the IACA has fundamentally failed Indian artists because a Federal truth-in-advertising law is aimed at protecting the consumer, not the Indian artisan. Indian artisans continue to suffer grave economic injustice.

II. OVERVIEW OF THE IACA

The IACA, is a truth-in-advertising law designed to prevent the sale of goods that are falsely represented to have been made by Indians or sold in a way that conveys the impression that they were made by Indians. The IACA handles this by requiring truthful labeling as to the Indian heritage and tribal affiliation of the producers of Indian arts and crafts. The IACA applies to the producer of the product, not the seller. Therefore, a non-Indian vendor would not be in violation of the IACA for selling Indian artwork, as long as advertising of the Indian product met the guidelines of the IACA. The IACA covers all Indian and Indian-style traditional and contemporary arts and crafts produced after 1935 that are marketed and sold by any person in the United States.

The IACA takes a restrictive definition of an “Indian.” An Indian is defined as either a person who is member of a federally or officially state-recognized Indian tribe or a person who has been certified as an Indian artisan by a federally or state-recognized Indian tribe. This political entity-focused definition excludes those who identify themselves as “Indian” ethnically, racially, and/or culturally, but might not be formally enrolled or enrollable with an Indian tribe. Such artisans are unable to represent their goods as “Indian”-made, placing them at a disadvantage when forced to compete against counterfeiters. For purposes of selling “Indian” made art, a non-enrolled Indian ceases to be “Indian.” This problem is exacerbated by the definition of Indian tribe in the IACA, which focuses only on tribes that have received formal recognition by either the Federal or a State government.

¹ 25 U.S.C. § 305 *et seq.*

Another key definition in the IACA is that of an “Indian product.” An Indian product means any art or craft product made by an Indian. This means that an Indian must have provided either the artistic work or the labor necessary to make the product. The labor component must be entirely Indian; for example, if twenty people make up the labor to create the product(s), and one person is not an Indian, the product is not an “Indian product.” Similarly, any product that is designed by an Indian, but is produced by a non-Indian, is not considered an Indian product. The craft work may be in either a traditional or non-traditional style. What is an “Indian product” can best be defined by looking at what does not qualify as an Indian product. Examples of products that would not qualify as an “Indian product” include those in the style of an Indian art or craft which are: (1) made by non-Indian labor; (2) assembled from a kit; (3) produced in an assembly line or related production line process where not all of the production workers are Indian; and (4) industrial products. However, arts and crafts that do not qualify as Indian products may be sold without violating the IACA. It is only a violation of the IACA if such products are advertised as “Indian product.”

How the IACA works in practice can be complicated. For example, if an Indian artist designs a greeting card with traditional Indian style artwork, and produces each individual greeting card by hand and advertises the cards as being “Indian Art Cards”, there is no IACA violation. Likewise, if the same Indian artist designs a greeting card by hand with traditional Indian style artwork, but instead of producing each card by hand, he sends the card to a printing press to be mass produced and he discloses as much, there is no violation of the IACA. However, if the same Indian artist designs a greeting card by hand with traditional Indian style artwork, sends the cards out to be mass produced, but only advertises his cards as “Indian Art Cards” with no mention of the fact they were mass produced at a printing press, he has violated the IACA because it is false advertising. Mass production by a source that is non-Indian does not meet the requirements for an Indian product and, therefore, cannot be advertised as an Indian product.²

The IACA imposes both civil and criminal penalties for violations of the Act. Civil penalties may be imposed against those who directly or indirectly offer or display for sale, any good in manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian tribe or Indian arts and craft organization resident within the United States. Civil penalties include an injunction to stop the sales and the recovery of damages, including any profits received by the person as a result of the alleged violations of the IACA. A civil action may be filed in Federal Court by any of the following: (1) the United States Attorney General upon the request of the Secretary of the Interior on behalf of an Indian, Indian tribe, or Indian arts and crafts organization; (2) by an Indian tribe on its own behalf or on behalf of a tribal member or Indian arts and crafts organization; or (3) by an Indian arts and crafts organization.

Criminally, an individual who violates the IACA for the first time may be fined up to \$250,000 or imprisoned up to five years, or both. For subsequent violations, an individual may be fined up to \$1,000,000 or imprisoned up to fifteen years, or both. A business may be fined up

² Sales can be made by non-Indians on behalf of Indian artisans. For example, an Indian artist designs greeting cards by hand and individually produces each card. This artist does not have time to travel to art shows to sell his artwork so he hires a non-Indian to take his cards to powwows and art shows for sale. The non-Indian attends the art shows and advertises the cards to be “Indian Art Cards.” Because the artwork is an authentic Indian product, neither the Indian artist nor the non-Indian vendor is in violation of the IACA.

to \$1,000,000. For subsequent violations, a business may be fined up to \$5,000,000. Criminal cases in Federal Court are initiated by the United States Attorneys Office within the United States Department of Justice.

Complicating matters somewhat, the IACA also provides for an Indian Arts and Crafts Board. The Indian Arts and Crafts Board is part of the United States Department of the Interior. Its mission is to promote the economic welfare of Indian tribes and Indians through the promotion of Indian arts and crafts. Among other things, the Board may investigate complaints of alleged violation of the IACA and recommend prosecution of the violators.

III. RESPONSES TO SHORTCOMINGS IN THE IACA

The U.S. Congress, many states, Indian artisans, and some Indian tribes have recognized significant shortcomings in the IACA. Some of the efforts to fill in gaps left by the IACA are discussed below.

A. U.S. Congress

Once again, the 111th Congress has seen the introduction of legislation to amend the Indian Arts and Crafts Act to protect Indian arts and crafts through the improvement of applicable criminal proceedings to provide for the investigation and punishment of individuals misrepresenting Indian produced goods and products. Senator John McCain introduced S. 151, “The Indian Arts and Crafts Amendments of 2009” on January 6, 2009.³

Much like its predecessor legislation, on July 24, 2009, the bill was passed by the U.S. Senate by unanimous consent. On August 19, 2009, the bill was referred to the U.S. House Subcommittee on Crime, Terrorism, and Homeland Security. A companion bill, H.R. 725, has received position attention in the U.S. House of Representatives.⁴ H.R. 725, more commonly known as the Indian Arts and Crafts Amendments Act of 2010, was introduced on January 27, 2009 by Rep. Edward Pastor of Arizona. The bill passed in the House of Representatives on January 19, 2010. The two bills must be reconciled.

There a few major procedural changes the two bills would make to the current law. This bipartisan legislation would amend the IACA to authorize any federal law enforcement officer (not just the Federal Bureau of Investigation as is currently the case), including an officer under the Indian Law Enforcement Reform Act acting in coordination with a federal law enforcement agency on a violation outside Indian Country, to investigate offenses involving the sale of arts and crafts that are misrepresented as Indian products. The bill would also revise the requirements for initiating civil actions for the misrepresentation of Indian-produced goods to make it easier for the enforcement of IACA by allowing an Indian tribe, a tribal member, or an Indian arts and crafts association to bring suit. Also, the bill modifies the penalties for misrepresentation. Under the new legislation, if the goods were sold for \$1,000 or more, for a first offense, violators would be subject to criminal fines of up to \$250,000 for an individual and up to \$1,000,000 for a group,

³ S. 151, 111th Cong. (2009).

⁴ H.R. 725, 111th Cong. (2009).

and imprisonment for up to five years. For a second offense, violators would be subject to criminal fines up to \$5,000,000 and imprisonment for up to fifteen years.

These procedural changes seek to increase the number of violators prosecuted by increasing the resources available to do so, both in the number of agencies that will be able to prosecute and the support those agencies will receive if they do choose to prosecute. Again, however, the focus is not on the needs, economic or otherwise, of the Indian artisan.

B. Indian tribes

The Cherokee Nation adopted its own version of the Indian Arts and Crafts Act in January 2008. The act, Truth in Advertising for Native Art Act, requires anyone selling Indian art within Cherokee Nation lands to be a member of a federally-recognized Indian tribe. The act's main purpose is to foster authentic Indian art and combat non-Indians selling art as Indian art by defining an "Indian" as a federally-recognized tribal citizen. The definition is more limited than that of the Federal IACA. The Cherokee Nation act also expands the definition of "art" from the Federal IACA to include all art forms, such as performance art, as well as physical act. "Art" is defined as "an object or action that is made with the intention of stimulating the human senses as well as the human mind/and or spirit regardless of any functional uses," including crafts, handmade items, traditional storytelling, contemporary art or techniques, oral histories, other performing arts and printed materials.

The passage of the act by the Cherokee Nation represents an important step in the development of tribal protection for Indian arts and crafts that takes into account specific tribal cultural values and fills gaps left by the IACA. This may provide a model for other tribes to follow.

C. State laws

At least twelve states have enacted laws designed to protect the authenticity of Indians arts and crafts. A range of approaches can be seen in the overview provided below.⁵

- Alaska. Alaska establishes a state certification program, which identifies authentic Indian arts and crafts using a special seal.⁶ Authentic means an article made in Alaska, composed of natural materials, and produced by an Alaska Native.⁷ Criminal punishments are provided.⁸

⁵ Thank you to Amber Penn-Roco with Northwest Justice Project for researching the state law and cooperative measures.

⁶ A.S. § 45.65.010.

⁷ *Id.* § 45.65.070.

⁸ *Id.* § 45.65.060.

- Arizona. Arizona makes it unlawful to sell products as “authentic Indian arts and crafts” unless they are made of natural materials by an Indian.⁹ Civil and criminal penalties are provided.¹⁰
- California. California makes it unlawful to sell any article as “authentic” unless it is produced wholly by an Indian.¹¹
- Colorado. Colorado enacted the “Indian Arts and Crafts Sales Act”¹² which makes it unlawful to sell any product as “authentic” unless it was handcrafted by Indian labor and is not made from artificial materials.¹³ It is also unlawful to make misleading statements about Indian arts and crafts, if the person has intent to deceive.¹⁴ The law establishes civil and criminal penalties.¹⁵
- Minnesota. Minnesota requires goods that are not made by Indians to be labeled as “not Indian-made” before sale to the public.¹⁶ The law establishes civil and criminal penalties.¹⁷
- Montana. Montana makes it unlawful to distribute imitation Indian arts and crafts without clearly designating those articles as imitation and physically segregating those articles from authentic Indian articles.¹⁸ Montana defines “imitation” to mean those articles made by machine, made wholly out of synthetic materials, or not made by Indian labor.¹⁹ The law establishes criminal penalties.²⁰
- Nebraska. Nebraska enacted the “American Indian Arts and Crafts Sales Act”²¹ that requires products labeled as “authentic” to be handcrafted by an American Indian and made of natural materials.²² If the product is an imitation, the seller must clearly designate the product as such with either a tag or display card.²³ The law also protects against false advertising on silver, turquoise and spin cast jewelry.²⁴ Criminal penalties are provided.²⁵

⁹ A.R.S. § 44-1231.

¹⁰ *Id.* § 44-1231.03.

¹¹ Cal.Bus. & Prof. Code § 17569.

¹² C.R.S.A. § 12-44.5-101.

¹³ *Id.* §§ 12-44.5-103, 12-44.5-105.

¹⁴ *Id.* § 12-44.5-106.

¹⁵ *Id.* §§ 12-44.5-107, 12-44.5-108.

¹⁶ M.S.A. §§ 325F.43, 325F.44, 325F.45.

¹⁷ *Id.* § 325F.46.

¹⁸ M.C.A. § 30-14-602.

¹⁹ *Id.* § 30-14-601.

²⁰ *Id.* § 30-14-604.

²¹ Neb. Rev. St. § 69-1801.

²² *Id.* § 69-1803.

²³ *Id.* § 69-1807.

²⁴ *Id.*

²⁵ *Id.* § 69-1808.

- Nevada. Nevada makes it unlawful to distribute imitation Indian arts and crafts without the seller clearly and legibly designating the articles as imitation.²⁶ Nevada defines “imitation” to mean those articles that are made by machine, made out of synthetic materials, or not made by Indian labor.²⁷ Criminal penalties are provided.²⁸
- New Mexico. New Mexico enacted the “Indian Arts and Crafts Sales Act”²⁹ which makes it unlawful to sell products as “authentic” if the products are “known in fact not to be authentic.”³⁰ New Mexico defines “authentic” as products that are made by an Indian and not by a machine.³¹ The law requires truthful advertising when using terms such as “Indian handmade” and “Indian crafted,” and when advertising that products are made of specific materials.³² There is a general prohibition against false, misleading, or deceptive advertising.³³ The law establishes detailed criminal and civil penalties.³⁴
- Oklahoma. Oklahoma adopted, in 1974, the “American Indian Arts and Crafts Sales Act”³⁵ which makes it unlawful to sell articles represented as being made by American Indians unless the article is actually made by American Indian labor.³⁶ The law establishes criminal penalties.³⁷
- South Dakota. South Dakota makes it unlawful to sell imitation articles without clearly labeling the articles as such, to distribute products without labeling the article with the place of manufacture of the article, and to mislabel an article as to place of manufacture.³⁸ Imitation articles are those that were not Indian handcrafted.³⁹
- Texas. Texas makes it unlawful to sell a product as authentic Indian arts and crafts unless it is Indian handcrafted, not made by a machine, and not made from unnatural materials.⁴⁰ Any products that are non-authentic must be clearly labeled as such.⁴¹ There are also specific labeling requirements for products made from turquoise and silver.⁴²

In general, these state laws follow the truth-in-advertising model of the IACA. These laws, by focusing on the consumer, fail to remedy the needs of Indian artisans.

²⁶ N.R.S. § 597.900.

²⁷ *Id.*

²⁸ *Id.*

²⁹ N.M.S.A. § 30-33-3.

³⁰ *Id.* § 30-33-7.

³¹ *Id.* § 30-33-4.

³² *Id.* § 30-33-7.

³³ *Id.*

³⁴ *Id.* §§ 30-33-9, 30-33-10.

³⁵ 78 Okl. St. Ann. § 71.

³⁶ *Id.* § 74.

³⁷ *Id.* § 75.

³⁸ S.D.C.L. §§ 37-7-1, 37-7-2, 37-7-2.1.

³⁹ *Id.* § 37-7-4.

⁴⁰ V.T.C.A., Bus. & C. § 17.851.

⁴¹ *Id.* § 17.853.

⁴² *Id.*

D. Other models

Indian artisans have also attempted to take matters into their own hands by forming certification programs or cooperatives, sometimes in conjunction with state laws that facilitate the creation of the programs.

In a certification program, Indian artists register with a central organization. The artist then promotes his or her art using a seal or logo provided by the organization. The seal or logo certifies that the art is made by an Indian artist. The specific criteria required for registration may vary, depending upon the organization. Generally, a certification program is organized by a third party non-profit organization. The organization usually provides some sort of additional service, usually in the form of a show where registered artists sell their materials. An example of a certification program is the “Silver Hand Program” in Alaska.⁴³

A cooperative is, usually, a for-profit, jointly-owned business that produces and distributes goods and services and is run for the benefit of its members. The benefits and services offered by cooperatives vary widely, from simply listing information on their web site, to selling their member’s artwork in a storefront.

IV. CONCLUSION – AN IACA IN WASHINGTON STATE?

Washington State is conspicuously absent from the list of states with a variation on the IACA, despite the substantial Tribal population in general, and the number of Indian artisans in particular. It seems clear that the Federal IACA is not working as promised to truly protect the interests of the Indian artisan. However, just because there is no Washington State law on-point does not mean that a Washington IACA is the best – or only answer.

Certainly, from the above list of Federal, Tribal, and State measures, it is possible to glean elements that a Model State or Tribal IACA could resemble. For instance, such a Model Act should address the following: (1) the limitations on the definition of “Indian” and “Indian tribe” in the Federal IACA; (2) expansively define “art” to protect other cultural property; (3) address the slippery concept of “authenticity”; and (4) provide creative and expansive private rights of action to enforce the law. Any Washington State or Tribal legislation incorporating such elements would mark a drastic improvement in the protections for all Indian artisans in the marketplace, and would alleviate much of the economic injustice Indian artisans face in bringing their goods to market.

⁴³ Alaska State Council on the Arts, *Mission and History*, <http://www.eed.state.ak.us/Aksca/about.htm>.