

U.S. DEPARTMENT OF THE INTERIOR OFFICE OF INSPECTOR GENERAL




INDIAN ARTS AND CRAFTS: A CASE OF MISREPRESENTATION



June 1, 2005

Memorandum

To: Secretary

From: Earl E. Devaney 
Inspector General

Subject: Report on Evaluation of Indian Arts and Crafts

In response to concerns raised by the Assistant Secretary of Policy, Management and Budget and the commissioners of the Indian Arts and Crafts Board (IACB), the Office of Inspector General (OIG) conducted a review of counterfeit Indian arts and crafts. In a collaborative effort between OIG evaluators and investigators, we verified and assessed, as well as obtained Indian artists' perspectives on the issue of misrepresentation and counterfeiting in the Indian arts and crafts industry.

As one of the most lucrative and sought after genres of art in the United States, the demand for Indian arts and crafts attracts many non-Indians to pirate the profits. Our review confirmed that an imitation Indian art market exists and that it negatively impacts Indian artisans and communities. However, the extent of this problem is difficult to quantify because of limited statistics, conflicting perceptions of what makes something counterfeit, and public misconceptions regarding federal and state laws.

We found that current laws, while well-intended, do little to protect Indian artisans from the unfair competition created by low-priced, mass-produced imitations of their work. The primary law, the Indian Arts and Crafts Act, is practically unenforceable and does not provide adequate authority to the IACB. As a result, enforcement largely depends upon the cooperation of agencies outside the Department of the Interior's control, such as the FBI and U.S. Customs and Border Patrol. Further, there are conflicts between the Indian Arts and Crafts Act and current trademark law, which prevent the IACB from facilitating the registration of trademarks for Indian artisans.

Finally, we concluded that the IACB has focused most of its enforcement effort on criminal prosecution, which has produced no identifiable results by way of either criminal convictions or a measurable decrease in counterfeit activity. We discuss an alternative approach to enforcement, by which the IACB could pursue action through steadily increasing levels of severity, and an industry best practice. We provided four suggested actions that the Department of the Interior, in cooperation with the IACB, can implement to mitigate the current situation.

We do not require a response to this report, but would appreciate being informed of any actions you take in regard to our suggestions.

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INTRODUCTION

In response to concerns raised by the Assistant Secretary of Policy, Management and Budget and the commissioners of the Indian Arts and Crafts Board (IACB), the Office of Inspector General (OIG) conducted a review to validate and quantify the issue of counterfeit Indian arts and crafts. The OIG conducted the review from October 2004 through February 2005.

During our review, we interviewed artists, gallery owners, museum staff, traders, Indian arts and crafts association officials, and other industry experts and reviewed available literature on the subject. We also conducted a confidential survey of artisans at an Indian arts and crafts market to obtain Indian artists' perspectives on misrepresentation and counterfeiting in the Indian arts and crafts industry.

Background

During the 1970s, the demand for Indian-style arts and crafts increased, prompting a mass importation of imitations. By 1985, the Indian arts and crafts industry had grown to an estimated 400 to 800 million dollars in terms of annual gross sales, according to a Department of Commerce study.¹ By 2000, Indian arts and crafts had become a billion dollar industry in the United States.² The U.S. Customs and Border Patrol (CBP) has estimated that an average of \$30 million in Indian-style arts and crafts is imported annually from countries such as the Philippines, Mexico, Thailand, Pakistan, and China.³ These imports, combined with domestically produced imitations, represent an estimated 400 to 500 million dollars in revenue⁴ that could otherwise belong to Indian artisans.



*IACB Logo- Beadwork
Paul McDaniels, Jr.*

Regulation of the Indian arts and crafts industry is mainly afforded through the federal Indian Arts and Crafts Act (the Act), which was created in 1935 and amended in 1990 and 2000. The Act prohibits the sale or display of any good in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe. Originally, the Act created the Indian Arts and Crafts Board, a separate entity of the Department of the Interior, to promote the economic welfare of Indians through the development and

¹ H.R. Rep. No. 400(I), 101st Cong., 2d Sess. 5 (1990) (Citing Robert E. Watkins, U.S. Department of Commerce, "Study of Problems and Possible Remedies Concerning Imported Native American-Style Jewelry," 1985).

² Testimony of the Council for Indigenous Art and Culture presented by Andy P. Abeita, submitted to the U.S. Senate Committee on Indian Affairs' Oversight Hearing on the Implementation of the American Indian Arts and Crafts Protection Act, Public Law 101-644, May 17, 2000.

³ Id.

⁴ John Shiffman, "\$1billion Industry Reeling as Faux Crafts Flood Market," *USA Today*, April 8, 1998. James Brooke, "American Indian Crafts Lose Native Edge as Foreign Fakes Flourish," *International Herald Tribune*, August 1, 1997.

expansion of the Indian arts and crafts industry. It also authorized the establishment of a government trademark for genuine Indian products, and provided misdemeanor penalties for counterfeiting the government trademark and knowingly misrepresenting goods as Indian produced.⁵

After 55 years without a single criminal conviction, the Act was amended in 1990 in order “to protect Indian artists from unfair competition from counterfeits.”⁶ The amendments provided civil sanctions and increased penalties for knowingly misrepresenting Indian products from a misdemeanor to a felony. If convicted, individuals can now be ordered to pay a fine up to \$250,000 and sentenced up to 5 years in prison for the first offense and up to \$1 million and 15 years in prison for subsequent violations. Businesses can be fined up to \$1 million for the first offense and up to \$5 million for subsequent violations. The amendments also authorized the IACB to refer complaints to the FBI for investigation and potential criminal prosecution or recommend that the Secretary of the Interior refer the matter for civil action. Civil suits can also be brought by an Indian tribe on behalf of itself, an individual Indian, or an Indian arts and crafts association.

In response to the continued influx of imitation Indian arts and crafts, the Act was amended again in 2000 “to improve the enforcement of the Act for the protection of the economic and cultural integrity of authentic Indian arts and crafts.”⁷ The amendment expanded civil enforcement by authorizing Indian arts and crafts organizations as well as individual Indians to file civil suits on their own. It also enabled them to file suit against the manufacturers, wholesalers, and others involved in the chain of distribution, instead of only against the final retailer.



*Squash Blossom
Necklace
L. Benally
Navajo*



*Basket
Rose M. Johnson
Navajo
Copyright 1986 Rose M. Johnson*

⁵ 25 U.S.C. § 305(d)-(e) (1988). These sections were repealed in 1948 and the penalty provisions were moved to the criminal code in 18 U.S.C. §§ 1158-1159 (1988).

⁶ House Report 101-400 (I) – “Indian Arts and Crafts Act of 1990.”

⁷ Senate Report 106-452 – “To Improve the Cause of Action for Misrepresentation of Indian Arts and Crafts.”

RESULTS OF REVIEW

Our firsthand observations, survey results, and interviews confirm that an imitation Indian art market exists and that it negatively impacts Indian artisans and communities. However, we cannot adequately quantify the extent of this problem because of limited statistics. Misconceptions regarding the federal law and the various interpretations of what constitutes counterfeit may also exacerbate the perception that there are more violations of the Act than actually occur. Nevertheless, laws intended to protect Indian artisans from unfair competition are weak and extremely difficult to enforce.

Confirmation of Counterfeit Market

Field Observations

To observe firsthand how Indian-style jewelry and other artwork were being represented, we visited retail stores, street vendors, and airport gift shops in cities renowned for their Indian art: Scottsdale and Sedona, Arizona, and Santa Fe, Gallup, and Albuquerque, New Mexico. We observed a number of questionable business practices. For example, in airport gift shops, we observed items that had adhesive price tags strategically placed on top of their “Made in China” stickers. We also noticed that the same items seemed to appear in multiple stores, indicative of mass production.

In some establishments we visited sales staff stated that everything in the store was Indian handmade, yet offered huge, unadvertised discounts. For example, a belt buckle set marked \$1,200 was offered for \$295. In some Arizona stores, display cases contained unlabeled non-authentic Indian-style jewelry, which is not only misleading to consumers but also violates Arizona state law. However, simply displaying these unlabeled imitations is not a violation of federal law.

In another Arizona store, a salesperson, who claimed that everything in the store was Indian handmade, showed us a coral and silver necklace stamped “Mexico 92” on the back (“Mexico 92” indicates that the silver is sterling from Mexico). When asked about it, the salesperson responded that it must mean “New Mexico.” The manager suddenly appeared and told us that his store carried “Southwestern Jewelry” from all over the world, and he explained that the display cases contained authentic Indian-made pieces alongside imported pieces. He politely showed us which pieces were imported, yet nothing was labeled. When asked why a bracelet from Thailand made of synthetic stones was just as expensive as a similar Indian one, he claimed that some synthetic stones were more expensive than natural stones. However, we found that synthetic stones are typically only a fraction, sometimes as low as one-tenth, of the cost of natural stones.

In short, the stores we visited did not misrepresent non-Indian made items when we asked about the origin of the items. However, non-Indian made items were rarely marked as such and were sometimes located in the same display case with Indian-made items.

Thus, uninformed buyers could easily assume that non-Indian made items were authentic Indian made.

Which is Authentic Indian Handmade?



The piece on the left is authentic Zuni jewelry, and the one on the right is an imitation manufactured in the Philippines.



Survey Results

We distributed a survey to over 300 Indian artists selling their work at the 28th Annual Pueblo Grande Museum Indian Market in Phoenix, Arizona, in December 2004. A total of 91 surveys were completed by artists representing 33 different tribes and a wide variety of mediums, including jewelry, paintings, pottery, sculpture, and carvings. Results from the artist survey indicate that counterfeit art continues to be a serious problem for artists as well as legitimate vendors:

- 78 percent of respondents stated they had seen imitation artwork represented as authentic Indian artwork.
- 65 percent of respondents believed that the sale of imitation artwork affects them financially.

Nearly half of respondents indicated that they had seen or heard about a counterfeit of their own artwork, and more than half had seen or heard about a counterfeit of another artist's work. When asked to describe the circumstances, one artist provided the following example: "We sold turtle shell drums and shields to a shop in Oregon. The next time we went in, he had a whole wall of them. He took our shield and drum to Mexico and had them mass-produced." Another artist commented, "I have seen designs and styles that I developed being mass-produced after I have done a public show. They change it just enough to get by the copyright laws."

Such encounters were typical, as survey respondents echoed these concerns: "It is hard to compete with mass production," and "Imitations flood the market, take sales, bring prices down, and misrepresent the value and quality of artwork." Others indicated that they saw misrepresentation in Albuquerque, Gallup, and Phoenix, or simply "all over." Misrepresented items were also seen on QVC, the Home Shopping Network, the Internet, Pow Wows, art shows, Indian-owned gift shops, wholesale businesses, and flea markets.

Interviews With Industry Experts

Most of the 19 industry experts we interviewed had firsthand knowledge of misrepresented Indian-style art. According to the experts, the vast majority of imitations target the low to mid-range market, such as mass-produced fetish carvings. The most prevalent genre for imitations is low- to medium-priced Indian jewelry, typically retailing for \$10 to \$200, which is often mass-produced and affordable for the majority of consumers. High-end, collector's pieces created by famous artists are generally not counterfeited because the buyer either purchases directly from the artist or is careful to verify the origin of the piece. According to one industry expert, counterfeiting is based solely on the fact that large quantities of an item, such as a small, silver turtle, can be mass-produced at a low price. There is no financial incentive to copy and produce a high-end product "if you can only sell six of them," the expert told us.



*Pin
Myra Tucson
Zuni Pueblo*

The influx of imitation Indian arts and crafts diminishes consumer confidence in the cultural integrity of the market and decreases sales. Since imitation Indian arts and crafts are generally mass-produced at a substantially reduced cost, traditional Indian artisans must also undercut their prices by as much as 50 percent to compete, drastically reducing their profit margins. Even Indians are sometimes driven to sell the imitations as their own work in order to make a living. According to industry experts, retailers carry these overseas products because they sell. If business owners refuse to carry these items, in many ways they are "shooting themselves in the foot," according to an interviewee, because their competitors will carry the items and sell them at a lower price.

Extent of Counterfeit Market

Nature of the Industry

Although estimates exist, it is virtually impossible to quantify the actual extent of the counterfeit market for a number of reasons. First, although a number of authentic Indian arts and crafts companies exist, Indian arts and crafts producers are typically individuals or small, loosely organized groups. Thus, unlike other organized industries, production statistics and economic data are scarce. While there is a major trade association for Indian arts and crafts, it does not compile statistics on the Indian art industry. Sales by individual artisans at Pow Wows, flea markets, Indian markets, roadside stands and the like are not tracked. Likewise, reliable statistics on the number of imported and domestically produced imitations are not available.

Varying Interpretations of “Counterfeit”

Second, estimates of the extent of the counterfeit market are clouded by conflicting perceptions of what constitutes an “imitation” or a “counterfeit.” Federal law only addresses the misrepresentation of Indian-style products, yet the term “counterfeit” is used by many people to denote much broader issues, such as unfair competition with imports, traditional versus modern production methods, and the “borrowing” of religious traditions from other tribes. For example, many traditional Indian jewelers who use only hand tools and tufa⁸ stone casts are likely to consider jewelry made with power tools and centrifugal casting as “counterfeit.” Another example of perceived “counterfeiting” is the making of the *kachina*⁹ doll by tribes other than the Hopi. Kachina dolls were originally made only by Hopi Indians as part of their religious practice. As Hopi carvers began to market these dolls commercially, other tribes, whose religious practices do not include kachinas, began making and selling their own versions. To a Hopi tribal member, a kachina carved by someone from any other tribe would almost certainly be considered a “counterfeit.” In fact, some artists who responded affirmatively to the survey question “Have you ever seen or heard about a counterfeit copy of another artist’s work?” mentioned “inter-tribal” counterfeiting, such as Navajos producing Hopi kachina dolls. Neither of these examples would be a violation of federal law.



Kachina Doll
Herbie Talahastewa
Hopi Pueblo

Although 78 percent of survey respondents indicated that they had seen imitation artwork represented as authentic Indian artwork, many of their interpretations of “imitation” or “counterfeit” do not actually constitute misrepresentation as defined by federal law. One artist’s example of counterfeit products illustrates this misconception: “Sometimes on the reservation Indians who are unable to make the real *heishi*¹⁰ buy plastic imported beads and sell them as authentic *heishi* art work.” In this case, if the Indian artisan conceived the design of the necklace and strung the plastic beads himself, he would not be in violation of federal law.

Differences in Federal and State Laws

Finally, quantifying the extent of the counterfeit market is complicated by differences in federal and state laws. Currently, there are 12 states with various laws regulating the sales of Indian arts and crafts, ranging from the materials used to pricing and advertising. For example, according to Arizona state law, if a product contains unnatural turquoise, the

⁸ Tufa is porous rock formed from volcanic ash and used to form a casting mold.

⁹ Authentic kachinas (or katsinas) are religious icons, meticulously carved by Hopi artists from cottonwood root and painted to represent figures from Hopi mythology. Since it takes years of practice and religious study to master kachina carving, genuine kachina dolls are made by only a small number of Hopi carvers.

¹⁰ *Heishi* means “shell” and originally referred to pieces of shell that had been drilled, ground into beads, and strung onto necklaces. Today, it also refers to tiny beads made of any natural material.

vendor must disclose whether the stone is stabilized, treated, reconstituted, or synthetic. According to federal law, however, it is only illegal to misrepresent a product as Indian made when it is not; the material used to make the product is irrelevant. The average artist, consumer, and vendor are not likely to distinguish the federal from the state law. Thus, conflicting aspects of the very laws designed to protect the integrity of Indian arts and crafts may exacerbate the perception that there are more federal criminal violations than there really are.

Ineffective Protections and Laws

As one of the most lucrative and sought after genres of art in America, the demand for Indian arts and crafts attracts many non-Indians to pirate the profits. While well-intended, the laws that pertain to Indian arts and crafts do little to protect Indian artisans from the unfair competition created by low-priced, mass-produced imitations of their work. The primary law, the Indian Arts and Crafts Act, is practically unenforceable and does not provide adequate authority to the IACB. In addition, the vast majority of imported Indian-style items will be marked as such with removable sticky labels, string tags, or nothing at all due to weak country of origin marking regulations. Enforcement of these laws largely depends upon the cooperation of agencies, such as the U.S. Attorneys Offices, the FBI, and U.S. Customs and Border Patrol, all of which are outside the Department's control. In addition, there are conflicts between the Act and current trademark law,¹¹ which prevent the IACB from facilitating the registration of trademarks for Indian artisans.

Problems With the Act

IACB's Lack of Authority

Currently, the IACB has no investigative authority of its own, but instead must depend on the FBI (or other government entities) to investigate possible violations of the Act. Unfortunately, the FBI has very limited resources and is often unable to accommodate the IACB's requests for assistance. Other entities, such as the Bureau of Indian Affairs and the OIG, have similarly limited resources.

In other industries, regulatory agencies can typically revoke licenses, suspend operations, or levy fines. The IACB, however, has no such authority. In fact, there is little it can do directly to enforce the Act beyond sending alleged violators a letter advising them of the Act's provisions.

In 2004, the Senate Committee on Indian Affairs attempted to remedy the IACB's lack of authority by including amendments to the Act in the failed Senate Bill 2843. If the bill had passed, it would have allowed the IACB to impose administrative fines and penalties of up to 100 percent of the price of the goods offered or displayed for sale in violation of

¹¹ The Lanham Act, 15 U.S.C. § 1051 et seq.

the Act. In addition, the IACB would have been authorized to investigate violations of the Act itself, rather than referring cases to the FBI.

Prosecutorial Difficulties

During its 70-year history, the Act has established, expanded, and clarified a legal enforcement vehicle that is seldom used. Despite the strengthened enforcement provisions of 1990 and 2000, there have been only two federal indictments and there has yet to be a single federal civil or criminal conviction under the Act.

For example, in the late 1990s, the OIG investigated allegations that a South Dakota jeweler was falsely selling his work as Indian made. Our investigation found that the jeweler was not an enrolled member of any federally recognized Indian tribe, although he routinely sold artwork marked as “Indian” to various purchasers. In December 1998, a federal grand jury indicted him on two counts of misrepresentation of Indian-produced goods and products and one charge of illegally collecting feathers from a protected species. He ultimately pleaded guilty to a misdemeanor charge of possession of golden eagle parts and was sentenced to a year of probation and a fine of \$250.¹² As part of the plea arrangement, he agreed to remove the words “Indian” from the goods he sold and to cease making claims that he was Indian. Although this case resulted in a “criminal conviction,” it was not a conviction under the Indian Arts and Crafts Act.

Based on the experience of the OIG investigations office in New Mexico, which has conducted the majority of OIG counterfeit investigations, as well as our discussions with federal prosecutors in a number of jurisdictions where Indian arts and crafts abound, we have learned that there are a number of reasons why criminal prosecution under this statute is difficult, and thus unlikely. Specifically:

- **Knowledge and Intent**

In a criminal case, the government must prove, beyond a reasonable doubt, that the defendant knowingly and intentionally misrepresented the origin of the product. It is often relatively easy for the defense to prove that the product was accidentally or unintentionally misrepresented. The series of individuals in the distribution chain of mass-produced, Indian-style products presents an additional hurdle to successful prosecution. The following example is illustrative.

In 1994 a well-known Hopi artist found copies of a piece of his jewelry for sale in an Arizona retail store. A subsequent investigation revealed that the copies had been made using a wax mold created from the original work at the request of a wholesaler, who then sold them to the retail store. The investigation revealed that the retailer believed that the items were authentic, but that the wholesaler had made no representations to the retailer about the origin of the jewelry. As a result, prosecutors

¹² Hugh O’Gara, “Who Makes Indian Art? Rapid City Man is First to Be Prosecuted Under Indian Arts and Crafts Act of 1990,” *Rapid City Journal*. (S.D.), Sept. 19, 1999; “Man Charged With Selling Fake Goods,” *Rapid City Journal* (S.D.), Dec. 23, 1998.

were unable to prove that the retailer “knowingly” sold the jewelry in a manner that “falsely suggested” that it was Indian made.

In addition, prosecutors have told us that a successful prosecution under this statute would be more likely if there were multiple offenses by a particular defendant, which would prove misrepresentation “beyond a reasonable doubt.” However, extensive investigative time and effort would be required to establish and thoroughly document such a pattern of conduct. Faced with a multitude of more serious offenses, most investigative agencies cannot dedicate the resources necessary to undertake such an effort.

- **Resources v. Financial Impact**

Although the successful prosecution of even a small case might have a significant overall impact on the counterfeit trade, the potential impact of the case must be weighed against the competing interests of other cases. Limited financial impact often weighs against prosecution under the Act because the individual value of misrepresented products, like jewelry, is relatively small.

- **Possession is not a Violation**

In many criminal investigations, the mere possession of a particular item is evidence that a crime has occurred. During our review, we heard several accounts involving “rooms full” of “Indian looking” products that appeared to be manufactured overseas. Although the existence of a large number of such products suggests that misrepresentation may ultimately occur, possession, alone, is not a criminal violation unless and until a misrepresentation has actually occurred.

- **Case Subjects**

Experience has shown that many persons who violate the Indian Arts and Crafts Act are small-scale vendors who operate from the trunks of their cars or a blanket on the sidewalk. Despite convincing evidence that the law was violated, prosecutors fear that a jury may be unwilling to convict a defendant who barely earns enough money to support a family. On the other hand, prosecutors would be interested in prosecuting a large-scale vendor who is earning large sums from the sale of misrepresented items. If these defendants are also engaged in other illicit activities, however, such as money laundering or tax evasion, prosecutors would likely focus their efforts on the crimes with proven conviction rates, rather than on the misrepresentation of Indian goods.

While it is difficult to bring a successful criminal prosecution in a misrepresentation case, the standard of proof in a civil case is considerably lower. Civil suits may result in large monetary fines that provide much more of a deterrent than a minor criminal sanction, such as probation. For example, in one OIG investigation, criminal prosecution was declined, but the defendant ultimately paid a \$10,000 civil fine under New Mexico state law.

Customs Law and Trademark Law

Currently, there are laws in place that address authentication, specifically identifying the country of origin and establishing trademarks. Many industry experts and artists told us that one of the most effective solutions to the problems of misrepresentation and unfair competition would be to strengthen and enforce the country of origin marking regulations for Indian-style arts and crafts.

Customs

Customs and Border Protection Regulations¹³ require that unless a statutory marking exception applies, Indian-style arts and crafts must be indelibly marked with the country of origin by cutting, die-sinking, engraving, stamping, or some other equally permanent method in a conspicuous location. Indian-style jewelry may be marked with a permanently attached metal or plastic tag, and textiles may be marked with sewn-in labels. Unfortunately, conditions for the statutory marking exceptions are easily met: if it is “technically or commercially infeasible to mark in the manner specified”¹⁴ or if the article is produced in a North American Free Trade Agreement (NAFTA) country, the article need only be marked by an adhesive label or a string tag. In addition, the origin of Indian-style jewelry may be indicated by simply marking the jewelry’s container, instead of marking the jewelry itself.

Thus, the vast majority of imported Indian-style items will be marked with removable sticky labels, string tags, or nothing at all (once removed from the wrapper or container). These items can easily be misrepresented, intentionally or unintentionally, as genuine Indian made at any point in the distribution chain.

According to industry experts and artists the exceptions to the marking regulations should be reduced or eliminated. One expert explained: “Individual consumers could then make an informed decision as to which product to buy. If they want an authentic Indian-made product, then they will be willing to pay a higher price for it. Otherwise, they can purchase the cheaper, non-authentic product. But either way, the consumer will know the difference and will not be fooled into purchasing a counterfeit article.”

We recognize that enforcement of the country of origin marking regulations is difficult. Currently, CBP officers are only able to inspect approximately 2 percent of the sea containers entering the country. Even if the exceptions to the marking regulations were removed today, there still would not be enough CBP officers to adequately enforce them.

¹³ 19 CFR Part 134 implements the country of origin marking requirements and exceptions of 19 U.S.C. § 1304.

¹⁴ 19 CFR § 134.43 (c) (3).

Trademarks

Discussions with industry experts also indicated that the establishment of trademarks for Indian artists could help the public identify genuine Indian products and thus help mitigate unfair competition with imitations. The Act's original trademark provisions provided for the registration of Indian artists under a government-owned trademark, which most artists were not interested in as it did not give them exclusive rights. Currently, pursuant to the 1990 amendments, the IACB is authorized to establish a government trademark for genuine Indian products, register these trademarks, and assign them to individual Indians or tribes without charge. However, two ambiguities in the statutory language of the Act have prevented the IACB from developing a trademark registration program.¹⁵ First, although one section of the Act authorizes the IACB to create trademarks of genuineness and quality for individual Indians, Indian tribes, and Indian arts and crafts organizations,¹⁶ a later section only authorizes the IACB to register those trademarks with the U.S. Patent and Trademark Office (PTO) for individuals and tribes.¹⁷ This silence about the registration of trademarks for arts and crafts organizations appears to be a drafting oversight.

Second, and more importantly, the Act's trademark registration provision conflicts with federal trademark law as set forth in the Lanham Act. Currently, the Act authorizes the IACB to register a genuineness and quality "trademark owned by the Government in the United States Patent and Trademark without charge and assign it and the goodwill associated with it to an individual Indian or Indian tribe without charge."¹⁸ Thus, according to the Act, the trademark rights would first belong to the U.S. Government and then be transferred to an Indian individual or tribe. However, according to the Lanham Act, the applicant to register a trademark must be the owner, or if the application is for intent-to-use, the applicant must be entitled to use the mark and have a bona fide intention to use the mark.¹⁹ Under the Act's current trademark registration provision, the U.S. Government does not meet this definition of "owner." Therefore, the registration by the IACB of a trademark in which an Indian was the true owner would be defective under the Lanham Act, and thus void,²⁰ as there is no way to cure a defective registration after the fact.

¹⁵ Although the chair of the IACB testified about these deficiencies at the May 2000 Senate Committee on Indian Affairs Oversight Hearing on Indian Arts and Crafts, and explicitly offered to provide statutory language to amend the IACA, Congress did not clarify the trademark sections of the Act when it amended other sections of the IACA in October 2000.

¹⁶ 25 U.S.C. § 305a(g)(1) (1994)

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 15 U.S.C. § 1051 (1994).

²⁰ *Id.*

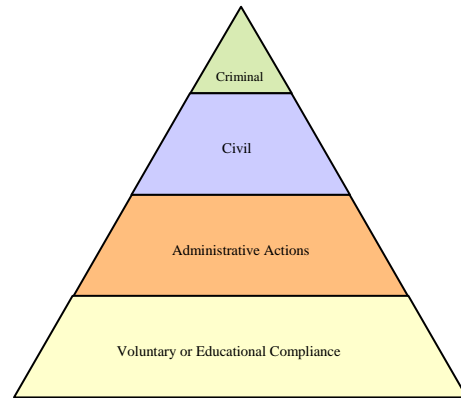
An Industry Best-Practice

Given all these impediments to successful enforcement against counterfeiters of Indian arts and crafts, it is unrealistic to expect that federal law enforcement agencies – or even state or local agencies – will investigate allegations of Indian arts and crafts counterfeiting or misrepresentation. Indian artisans are not alone, of course, when it comes to counterfeiting. Major manufacturers of well-known, brand-name products have taken a number of advocacy measures in the fight against counterfeiting. One such measure is to hire a private investigative firm to conduct an investigation, compile evidence, and present a package to prosecutors. These firms, typically staffed with former federal and state criminal investigators, help corporations enforce their rights in both civil and criminal cases. They are familiar with counterfeiting operations and have experience following small dealers to their large-scale suppliers. We researched several such firms. One interviewee cautioned that “you can slow the counterfeit market down, but you can never stop it.” One representative also stressed that victims of counterfeiting, such as Indian artisans, cannot rely solely on Customs to stop counterfeiting. If the problem is significant enough, hiring a private firm to do this kind of work may provide just enough deterrent effect to make a difference.

CONCLUSION

The results of our review suggest that the IACB has spent most of its effort focusing on the highest, and most difficult, level of counterfeit enforcement: criminal prosecution. However, as we have documented in this report, this level has produced no identifiable results, by way of either criminal convictions or a measurable decrease in counterfeit activity.

The enforcement pyramid presumes that most behaviors can be corrected with the least amount of activity or force, or the lowest level of the pyramid. For example, at the base of the pyramid, the IACB currently disseminates educational brochures containing information on the Act. (In fact, our survey respondents favored education over enforcement as a means to obtain compliance.)



Enforcement Pyramid

When voluntary measures fail, the IACB could pursue action through steadily increasing levels of severity, such as administrative actions or civil remedies that are provided by the Act. At the highest level, criminal charges could be brought against significant violators who failed to respond to the lesser enforcement efforts. Since the criminal level requires the most time and effort to be successful, it should be employed only as a last resort in instances where lesser measures have failed.

SUGGESTED ACTIONS

With many Indian communities plagued by unemployment and stagnant economies, the deluge of imitation arts and crafts is undermining one of the few forms of entrepreneurship and economic development on Indian reservations.²¹ While imported and domestic imitations hurt the Indian artisan, they are not illegal. In the current global economy, the problem of unfair competition may simply be one that federal law cannot adequately address, as is the case with other U.S. industries such as textiles. For Indian artisans, the playing field will never be level as long as imitation Indian-style arts and crafts can be manufactured overseas or mass-produced domestically at significantly reduced prices.

The Congress amended the Act in 1990 “to protect Indian artists from unfair competition from counterfeits.” Although there is no single course of action to solve the numerous problems facing the Indian art industry, there are some actions the Department can take to mitigate the current situation. We suggest the Department, in cooperation with the IACB, should:

1. Encourage the re-introduction of the Indian Arts and Crafts Act Amendments in Section 3 of Senate Bill 2843. These amendments would give the IACB the authority to (a) investigate violations of the Act; (b) enforce the Act through the imposition of fines for violations; (c) enforce the Act through injunctive relief; and (d) enter into a reimbursable support agreement with federal, state, tribal, regional, and local law enforcement entities.
2. Collaborate with the CBP to revise the country of origin marking regulations to remove exceptions and require that Indian-style jewelry items (and other applicable items) be indelibly marked, not just their containers.
3. Work with the Congress to amend the Act to clarify that the IACB is authorized to facilitate the registration of trademarks that are owned directly by Indian individuals, tribes, and arts and crafts organizations and/or enter into a Memorandum of Understanding with the Department of Commerce to allow the IACB to register and assign trademarks on behalf of Indian individuals, tribes, and arts and crafts organizations.
4. Consider seeking civil penalties for misrepresentation before resorting to criminal penalties. If the amendments in Section 3 of Bill S. 2843 pass, the IACB should also focus on administrative actions.

²¹ Implementation of the Indian Arts and Crafts Act of 1990: Oversight Hearing Before the Senate Committee on Indian Affairs, *106th Congress* (2000).

COVER PHOTOS:

**INDIAN ARTS AND CRAFTS BOARD
DEPARTMENT OF THE INTERIOR**

**Baskets:
(Left to right)
Eva Wolfe, Helen Smith, Cherokee;
Marion John, Coughatta**

**Mask
Murray Clayton, Tinglit**

**Bracelets:
Top left and center: Jimmie Harrison, Navajo
Copyright 1984**

**Top right: Harvey Begay, Navajo
Copyright 1983**

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COUNCIL FOR INDIGENOUS ARTS AND CULTURES

Photos taken by Tony Eriacho

Report Fraud, Waste, Abuse, and Mismanagement



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