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FROM THE TRAIL OF TEARS TO TAM: HOW UNITED STATES TRADEMARK LAW FAILS NATIVE AMERICANS

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ABSTRACT

The power of trademarks has long been evidenced in American society. Trademarks wield tremendous commercial and social power, capitalizing on the psychological function and effect of symbols to provide legal protection to brands. Yet, what happens when an entity creates and owns a trademark that is a representation of a people or race who have no connection to the entity, makers of the product, or the product itself? What happens when a brand misappropriates Native American culture and imagery in its trademark because it is commercially advantageous? Should trademark protection be extended to a brand that publicly reinforces misconceptions and stereotypes? Prior to 2017, section 2(a) of the Lanham Act barred trademark registration for disparaging trademarks. However, in 2017, the Supreme Court held in *Matal v. Tam* that the disparagement clause of section 2(a) unconstitutionally violated the First Amendment. Not only did the *Matal v. Tam* decision extend trademark protection to disparaging trademarks (such as the Redskins), it also facilitated the continued misappropriation of Native American culture in trademarks. At the least, it is disheartening that the Lanham Act aims to protect the goodwill that a brand has amassed over the years yet refuses to recognize and protect the cultural goodwill that Native Americans have built over centuries. This Article explores the treatment of Native Americans through trademarks, analyzes the impact of the *Matal v. Tam* decision on current and future protection of Native American culture, and proposes a legal solution that seeks to balance Native American cultural rights with the First Amendment right to freedom of speech.

I. INTRODUCTION

In 2005, the American Psychological Association (“APA”) published a resolution recommending the immediate retirement of American Indian mascots, symbols, images, and personalities by schools, colleges, universities, athletic teams, and organizations.¹ The APA relayed conclusive findings of the negative social and psychological impact of the use of such symbols in organizational settings. Amongst these negative psychological, social, and organizational effects, the APA reported that the continued use of such symbols not only “undermines the ability of American Indian Nations

¹ AMERICAN PSYCHOLOGICAL ASSOCIATION, APA RESOLUTION RECOMMENDING THE IMMEDIATE RETIREMENT OF AMERICAN INDIAN MASCOTS, SYMBOLS, IMAGES, AND PERSONALITIES BY SCHOOLS, COLLEGES, UNIVERSITIES, ATHLETIC TEAMS, AND ORGANIZATIONS, <http://www.apa.org/about/policy/mascots.pdf> (last visited Aug. 31, 2020). [hereinafter RESOLUTION].

to portray accurate and respectful images of their culture, spirituality, and traditions,”² but serves as a form of “discrimination against Indigenous Nations” that may violate the “civil rights of American Indian people[.]”³

In its resolution, the APA acknowledged that racism and racial discrimination are attitudes and behaviors that are “learned and . . . threaten human development.”⁴ The continued use of American Indian mascots, symbols, images, and personalities by organizations not only serves as an avenue through which such attitudes and behaviors are learned, but also establishes “unwelcome” and “hostile . . . environments” that “undermine the . . . experiences of members of all communities—especially those who have had little or no contact with Indigenous peoples.”⁵

Considering these findings, the continued misappropriation, registration, and commercial use of Native American representations as trademarks provides an interesting study in the modern treatment of a marginalized group through both commerce and the law. Prior to 2017, section 2(a) of the Lanham Act prevented trademark registration for disparaging marks.⁶ However, in *Matal v. Tam*⁷ (“*Tam*”) the Supreme Court held that the disparagement clause in section 2(a) of the Lanham Act unconstitutionally violated the First Amendment.⁸ The *Tam* decision facilitates the continued marginalization and disenfranchisement of Native Americans. In light of the *Tam* decision, the Lanham Act serves as a safe harbor and provides commercial protection for brands that misappropriate Native American culture.

This Article first discusses the important psychological role trademarks play in society. Next, this Article analyzes current legal protections afforded to Native American intellectual property and trademarks through the Indian Arts and Crafts Act. This Article then considers how the recent Supreme Court decision in *Tam* shapes the landscape of current and future protection of Native American intellectual property and culture. Finally, this Article addresses the deficiencies of solutions under the Lanham Act and proposes a legal solution that seeks to balance the protection of Native American peoples and tribal groups with the First Amendment right to free speech.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ 15 U.S.C. § 1052(a).

⁷ 137 S. Ct. 1744 (2017).

⁸ *Id.* at 1751.

II. THE PSYCHOLOGY OF TRADEMARKS

A. Overview

“The protection of trade-marks [sic] is the law’s recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them.”⁹ Trademarks wield tremendous commercial and legal power. Not only do trademarks serve as source identifiers, they direct commerce by acting as imbuers of value and meaning in the minds of consumers while simultaneously providing legal protections to brands.¹⁰ Undoubtedly, trademarks influence consumer choices daily, and thus, trademarks have innate psycho-social characteristics that play a significant role in commerce and intellectual property protection under United States law.¹¹

Trademark law, and invariably trademark protection, is premised on the psychological assumption that the exposure to such marks will trigger ideas and emotions in the mind of a consumer.¹² Both the registration process and protection afforded to trademarks by their governing body of law affirm the role of these psychological aspects. This impact is further evidenced by the common requests of circumstantial evidence and surveys used to distinguish consumer response to marks in various legal tests under the Lanham Act.¹³

Thus, in the quest to create a successful trademark, commercial entities and service providers have turned to various modes of investigation—such as neuromarketing—to study the psychological effects and efficacy of brands and branding techniques.¹⁴ Through such studies, branding experts and psychologists have discovered that consumers transfer feelings about a product’s trademarks to the product itself, and experts have identified a physical correlate between the

⁹ *Mishwaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U.S. 203, 205 (1942).

¹⁰ See, e.g., Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1730 (1999) (“The argument that trade symbols acquire intrinsic value—apart from their usefulness in designating the source—derives from consumers’ investing those symbols with value for which they are willing to pay real money.”).

¹¹ *Id.*

¹² Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 508 (2008).

¹³ See, e.g., *Nat’l Pork Bd. v. Supreme Lobster & Seafood Co.*, 96 U.S.P.Q.2d (BNA) 1479, 1484 (T.T.A.B. 2010) (noting that survey evidence is relevant in determining whether a mark is famous for a dilution claim).

¹⁴ Tushnet, *supra* note 12, at 508.

consumer experience before and after a consumer is exposed to the trademark.¹⁵

Repetitive exposure to a mark improves its credibility within the human mind and has been linked to very real neurological changes, which can “transform ‘objective’ sensory information, such as taste, in a consumer’s memory, prior to the judgement process, and after the consumer ha[s] tasted the product.”¹⁶ Exposure to the mark transforms the consumer’s perception of their objective experience, thereby altering the experience itself. For example, one study found that in a blind taste test, 51% of test subjects preferred Diet Pepsi, while only 44% preferred Diet Coke.¹⁷ Conversely, in a branded taste test, 65% of subjects preferred Diet Coke, while 23% preferred Diet Pepsi.¹⁸ In the branded taste test, the subjects were “tasting the trademark.”¹⁹ Repeated exposure to a trademark allows the mark to control a piece of the consumer’s mind and solidifies power of the mark. As marketers often contend, “the strongest brands in the world own a place in the consumer’s mind.”²⁰

B. The Psychological Difference Between Design and Word Marks

Design marks are processed more efficiently in the human brain than word marks. The human mind responds to and processes visual stimuli quicker and more effectively than any other type of data, including words.²¹ Specifically, visuals are processed 60,000 times faster than text.²² Researchers have also found that it takes a twentieth of a second for consumers to form opinions and biases about websites.²³

¹⁵ *Id.* at 514.

¹⁶ *Id.* at 515.

¹⁷ *Id.* at 513, n. 20 (citing Sanjoy Ghose & Oded Lowengart, *Taste Tests: Impacts of Consumer Perceptions and Preferences on Brand Positioning Strategies*, 10 J. TARGETING, MEASUREMENT & ANALYSIS FOR MKTG. 26, 30 (2001)).

¹⁸ *Id.*

¹⁹ *Id.* at 513–14.

²⁰ Tushnet, *supra* note 12, at 516.

²¹ Douglas R. Vogel, et al., *Persuasion and the Role of Visual Presentation Support: The UM/3M Study* (Mgmt. Info. Sys. Res. Ctr. Sch. Mgmt. U. Minn., Working Paper No. MISRC-WP-86-11, 1986), <http://misrc.umn.edu/workingpapers/fullpapers/1986/8611.pdf>; see also Rachel Gillet, *Why We’re More Likely to Remember Content with Images and Video (Infographic)*, FAST COMPANY (Sept. 18, 2014), <https://www.fastcompany.com/3035856/why-were-more-likely-to-remember-content-with-images-and-video-infogr>.

²² Gillet, *supra* note 21.

²³ Tushnet, *supra* note 12, at 508, n.1 (citing Gitte Lindgaard et al., *Attention Web Designers: You Have 50 Milliseconds to Make a Good First Impression!*, 25 BEHAV. & INFO. TECH. 115, 115 (2006) (stating the results of a study on visual appeal)).

Thus, visual information conveyed through design marks is not only processed more quickly than information contained in word marks, but design marks also almost instantly evoke an opinion in the consumer's mind.²⁴ After this initial opinion is formed, cognitive biases make it easier for consumers to reinforce the initial opinion gleaned from the design mark, as opposed to considering new information that might undermine or change their initial assessment.²⁵

Because of the immediate and lasting impact of visual stimuli, it is difficult for Native Americans, as an already marginalized and disenfranchised group, to reclaim and take control of negative cultural or racial stereotypes used in design marks. Individually, these design marks create microimpressions that, collectively, reinforce Native American stereotypes based in culture and identity.²⁶ When non-Native entities register and use design marks that culturally appropriate visual representations of Native Americans, the registrant can change, shape, and control the meaning of an identity and culture.²⁷ This kind of appropriation leads to an immediate and effective dilution or misrepresentation of the meaning of a people's identity and cultural products.

From the earliest days of colonization, some Americans have sought to strip Native Americans of their culture and identity,²⁸ and trademark law is no exception. By permitting non-Natives to misappropriate Native American culture in design marks and subsequently register and use these marks in commerce, United States trademark law facilitates the stripping of Native American's control over their identity, consequently eviscerating their ability to commercially use and advance their own cultural products and identity.²⁹ At best, these marks deliberately suggest a misleading source identifier that strategically exploits, for commercial advantage, the identity of a race and culture. At worst, these marks mock, demean, and crudely characterize a group that has been systematically oppressed for centuries.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Sari Sharoni, *The Mark of a Culture: The Efficacy and Propriety of Using Trademark Law to Deter Cultural Appropriation*, 26 FED. CIR. B.J. 407, 413–14 (2017).

²⁸ "Assimilation Boarding Schools" are just one example. See, e.g., Renee Montagne, *American Indian Boarding Schools Haunt Many*, NPR (May 12, 2008, 12:01 AM), <https://www.npr.org/templates/story/story.php?storyId=16516865>; see also Becky Little, *How Boarding Schools Tried to 'Kill the Indian' Through Assimilation*, HISTORY (Aug. 16, 2017), <https://www.history.com/news/how-boarding-schools-tried-to-kill-the-indian-through-assimilation>.

²⁹ RESOLUTION, *supra* note 1, at 1.

C. The Psycho-Socio-Economic Effects of Misappropriation of Racial Representations in Design Marks

The psychological effects of repeated exposure to misappropriating marks have far-reaching implications on intellectual property rights and trademark law. Non-Native use and registration of marks using Native American representations not only undermines the ability of American Indians to portray accurate and respectful images of themselves and their culture, but it also directly affects how Native Americans are treated in society.³⁰ The appropriation of Native American identity through design marks is especially damaging, considering that these marks have the ability to convey a more detailed, immediate message that remains in the human psyche and dominates judgment heuristics.³¹

Moreover, the psycho-social repercussions of trademarks containing ethnic slurs and stereotypical representations of Native Americans are cyclical and invidious.³² Research compiled and submitted by psychology professors in an *amicus curiae* brief to the United States Supreme Court in *Harjo v. Pro-Football, Inc.*³³ demonstrated that members of a group subject to ethnic slurs were more likely to be segregated into ethnic neighborhoods, deemed suitable for hazardous work, and portrayed to children in negative ways, among other social and economic consequences.³⁴ Specifically, research relating to the use of Native American mascots, and subsequently trademarks, showed that the images not only perpetuated a narrow and false public perception of American Indian culture and identity, but they also diminished and degraded the Native American identity itself.³⁵ Even when the stereotyped individual did not personally believe the stereotype, these adverse effects remained, potentially because such stereotypes dehumanize and trivialize Native American culture.³⁶ This degradation of identity has been internalized by Native Americans, leading to higher rates of depression and suicide.³⁷

The socio-economic and commercial implications for Native Americans of this kind of cultural appropriation, identity representation, and cultural disparagement through trademarks is dire. Not only do

³⁰ *Id.* at 2.

³¹ Tushnet, *supra* note 12, at 508, 513–14.

³² Christine Haight Farley, *Registering Offense: The Prohibition of Slurs as Trademarks*, in PROTECTING AND PROMOTING DIVERSITY WITH INTELLECTUAL PROPERTY LAW 105,110 (Irene Calboli & Srividhya Ragavan, eds., 2014).

³³ 558 U.S. 1025 (2009).

³⁴ Brief of Psych. Professors as Amici Curiae in Support of Petitioners at 14, *Harjo v. Pro-Football, Inc.*, 558 U.S. 1025 (2009) (No. 09–326) (cert. denied).

³⁵ *Id.* at 11–12, 14–15.

³⁶ *Id.* at 18.

³⁷ *Id.* at 12.

these design marks psychologically disempower a class of individuals with a long history of persecution and discrimination, but they place Native Americans at a particular disadvantage. By permitting non-Native individuals and companies to capitalize on and profit off of Native American cultural misappropriation, these design marks render Native Americans the victims of economic exploitation. Logically, if a consumer sees ten products featuring Native representations as design marks on a shelf, and only one of the products was actually created by Native Americans, the likelihood of commercial success for that Native product is less than if there was only one product that both featured a Native representation as a design mark and was actually a Native product. Because trademark law seeks to prevent unfair competition and minimize likelihood of confusion between competing marks, it inherently follows that the misappropriation of Native American likenesses and identities on non-Native products or services undermines that purpose.

Ultimately, the government has a substantial interest in ending the legal, economic, and psychological exploitation, discrimination, and stereotyping of Native Americans and their culture due to the history of oppression and exploitation in the United States. Although exploitation of Native Americans through trademarks should not deserve governmental protection, the Lanham Act, in the wake of *Tam*, currently provides a safe harbor for such misappropriation. However, Congress has demonstrated its willingness to serve this compelling government interest of protecting Native Americans by passing both the Indian Arts and Crafts Acts of 1935 and 1990.

III. THE INDIAN ARTS AND CRAFTS ACT

A. Background and Legislative History of the Indian and Crafts Acts of 1990

Pursuant to the Indian Arts and Crafts Act of 1935 (“IACA 1935”), the Indian Arts and Crafts Board (“IACB”) was created by Congress³⁸ 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.”³⁹ IACA 1935 was specifically enacted to improve the economic status of Native Americans, establish and expand marketing opportunities for Indian people, and assist Indian tribes in developing a

³⁸ Protection of Products of Indian Art and Craftsmanship, 68 Fed. Reg. 35, 164 (June 12, 2003) (to be codified at 25 C.F.R. pt. 309).

³⁹ Indian Arts and Crafts Act of 1935, ch. 748, 49 Stat. 891 (to be codified at 25 U.S.C. 305) (hereinafter IACA 1935).

framework to support the preservation and evolution of tribal cultural activities.⁴⁰ Through IACA 1935, the IACB was empowered to create a government trademark of genuineness, register trademarks in the United States Patent and Trademark Office (“USPTO”) without charge, and establish standards and regulations for the use of such trademarks.⁴¹

IACA 1935 also established criminal penalties for counterfeiting and misrepresenting the IACB’s trademark of genuineness in the sale of Indian-produced goods and products.⁴² Specifically, the language of Section 6 of IACA 1935 provides that:

[a]ny person who shall willfully offer for sale any goods, with or without any Government trademark, 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.⁴³

Unfortunately, IACA 1935 was without teeth because little enforcement action was taken.⁴⁴ Thus, when Congress considered enacting the Indian Arts and Crafts Act of 1990 (“IACA 1990”), Congress had little quantitative data on whether the IACB assisted Native American artists in the registration of trademarks or instituted criminal actions against infringers under section 6.⁴⁵

However, Congress was ultimately provided information on the sales of Indian arts and crafts.⁴⁶ In 1985, the United States Department of Commerce issued a report estimating that the annual sale of Indian arts and crafts totaled several hundred million dollars.⁴⁷ The report further detailed that unmarked, foreign imitations of Indian arts and crafts took advantage of the essentially unregulated industry, “siphoning off 10 to 20 percent of the market for genuine handicrafts

⁴⁰ H.R. REP. NO. 101-400(i), at 4 (1990) [hereinafter HOUSE REPORT 1990].

⁴¹ *Id.*

⁴² IACA 1935 § 5.

⁴³ *Id.* § 6.

⁴⁴ Brendan Johnson, *The Indian Arts and Crafts Act - A Powerful Tool*, LAW360 (June 30, 2015, 11:32 AM), <https://www.robinskaplan.com/resources/publications/2015/06/the-indian-arts-and-crafts-act>.

⁴⁵ HOUSE REPORT 1990, *supra* note 40, at 4.

⁴⁶ *Id.*

⁴⁷ *Id.* at 4–5.

produced domestically.”⁴⁸ This amounted to an estimated theft of forty to eighty million dollars a year from the genuine manufacturers’ markets.⁴⁹

The Department of Commerce report played a significant role in the enactment of IACA 1990, as Congress elected to expand the scope of IACA 1935 in order to effectively protect Native Americans from infringement.⁵⁰ Congress revised IACA 1935 to expand the powers of the IACB to include registration of trademarks on behalf of any “Indian Individual, Indian Tribe or group,” instead of maintaining the IACA 1935 standard of registering a single government trademark for genuineness for use on all Indian products.⁵¹ This amendment permitted the IACB to register trademarks for Native Americans with the USPTO free of charge and to establish standards and regulations for the use of government-owned trademarks.⁵² Moreover, IACA 1990 extended the IACB’s enforcement capacity and permitted the United States Attorney General, rather than local district attorneys, to bring enforcement actions.⁵³ Further, IACA 1990 allowed the IACB to refer complaints to the FBI for investigation.⁵⁴

Some of the most significant additions to IACA 1990 involved stricter criminal and civil penalties for the misrepresentation of Indian products and provided a host of remedies for Native American litigants.⁵⁵ IACA 1990 increased criminal fines and penalties for entities that “knowingly” misrepresent their goods as Indian products.⁵⁶ Notably, IACA 1990 added a civil cause of action for misrepresentation that permits aggrieved parties to obtain injunctive relief, punitive costs of the lawsuit, reasonable attorneys’ fees, damages (including treble damages), and an alternate remedy of no less than \$1,000 for each day on which a violation continues.⁵⁷

IACA 1990 also added an amendment to 18 U.S.C. § 1159(a) that closely parallels the false designation provision of section 43(a) of the Lanham Act.⁵⁸ The words “in a manner that falsely suggests” were specifically added to 18 U.S.C. § 1159(a), which governs the criminal

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 5–6.

⁵² *Id.* at 4.

⁵³ *Id.* at 6.

⁵⁴ Deborah Spector, *Protection for Native Americans? The Indian Arts and Crafts Act of 1990*, 4 DEPAUL J. ART, TECH. & INTELL. PROP. L. 231, 238 (2008) (quoting IACA 1935 § 6).

⁵⁵ *Id.* at 235.

⁵⁶ *Id.* at 240–41.

⁵⁷ *Id.*

⁵⁸ Compare 18 U.S.C. § 1159(a), with 15 U.S.C. § 1125(a).

finer imposed for the misrepresentation of Indian produced goods and products.⁵⁹ Crucial to this language is that it is unlawful to “offer or display for sale or sell any good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced”⁶⁰ Together, these additions to IACA 1990 created a civil cause of action that incentivized private enforcement of the Indian Arts and Crafts Act.

B. It Is Beneficial for Plaintiffs to Bring Claims Under the Indian Arts and Crafts Act of 1990 Because There is a Lower Burden of Proof

Section 1159, in conjunction with 25 U.S.C. § 305(e) and 18 U.S.C. § 1158 of IACA 1990, which permit aggrieved parties to seek minimum statutory damages, affords Native Americans a significant advantage over litigants who pursue false advertising claims under the Lanham Act or related state law.⁶¹ Under IACA 1990, litigants may bring a civil or criminal suit against violators of the truth-in-advertising law and its trademark provisions.⁶² However, unlike the showing of proof required under the Lanham Act or other related state laws, plaintiffs bringing claims under the criminal and civil sections of IACA 1990 are not required to prove damages.⁶³

This lowered burden of proof significantly helps Native American litigants, as it is often difficult to prove actual harm stemming from the use or misuse of an identity mark or a design mark containing a Native American representation.⁶⁴ This standard is indicative of the dual purpose of IACA 1990 which, as expressed in the legislative history, is to preserve both (1) the market for American Indian arts and crafts and (2) Native American culture itself.⁶⁵

C. Deficiencies of the Indian Arts and Crafts Act of 1990

IACA 1990 is not without critics. While some scholars interpret IACA 1990 as preventing the unauthorized appropriation of Native

⁵⁹ § 1159(a).

⁶⁰ *Id.*

⁶¹ 25 U.S.C. § 305(e); 18 U.S.C. §§ 1158 (2009); § 1159.

⁶² Protection of Products of Indian Art and Craftsmanship, *supra* note 38.

⁶³ *See id.*

⁶⁴ *See* Mark Trahan, *Native American imagery is all around us, while the people are often forgotten*, NAT'L GEOGRAPHIC (Oct. 5, 2018), <https://www.nationalgeographic.com/culture/2018/10/indigenous-peoples-day-cultural-appropriation/> (discussing how Native American culture and symbols are used in the United States).

⁶⁵ William J. Hapiuk, Jr., Note, *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009, 1028 (2001).

American “property” in the form of Native American identity, others dismiss this notion as farfetched, concluding there is no evidence that Congress intended to recognize Native American identity as a property right.⁶⁶ While IACA 1990 does not explicitly confer a property right in identity, IACA 1990 does attempt to protect the intellectual property of an oppressed culture and legislate cultural survival.⁶⁷

Further, many Native Americans object to what they consider to be the “chilling effect” of IACA 1990 on the production of Indian arts and crafts.⁶⁸ IACA 1990 limited its definitions of “Indian,” “Indian tribe, band, nation,” and “Indian group” to people enrolled in a tribe or those that have proof of state or federal recognition.⁶⁹ Certainly, this limited definition deters non-Native entities that wish to exploit and benefit from the sale of Native look-a-like products. However, for Native Americans that have chosen not to register with a tribe or for tribes who have not received formal state or federal recognition, these limited definitions are problematic and exclude unregistered peoples from IACA 1990’s protection.⁷⁰ Though final regulations interpreting IACA 1990 were promulgated in November 1996, many questions remain unresolved about protection under IACA 1990 in areas such as collaborative works between Native Americans and non-Natives, Native American owned factories and the products produced from such factories, and Native Americans creating products overseas.⁷¹

Additionally, while IACA 1990 does not require Native American plaintiffs to prove damages, plaintiffs may still be required to prove an injury in fact in order to meet Article III standing requirements.⁷² The Seventh Circuit in *Native American Arts, Inc. v. Peter Stone Co.*⁷³ reaffirmed the Supreme Court’s recent decision in *Spokeo, Inc. v. Robbins*⁷⁴ and underscored that despite the lowered burden under IACA 1990, a plaintiff must prove a concrete injury—even in the context of a statutory violation—to have Article III standing.⁷⁵

Notably, while the Seventh Circuit cited the Supreme Court’s decision in *Spokeo* as support for ruling against the plaintiff in *Native American Arts, Spokeo* did not pertain to an IACA 1990 plaintiff or

⁶⁶ *Id.* at 1028–29.

⁶⁷ *Id.* at 1029, n.101 (citing 136 CONG. REC. H893 (daily ed. Sept. 27, 1990) (statement of Rep. Kastenmeier)).

⁶⁸ *Id.* at 1035.

⁶⁹ 25 C.F.R. § 309.2 (2003).

⁷⁰ Hapiuk, *supra* note 65, at 1034.

⁷¹ *Id.* at 1037.

⁷² *See infra* Part V.C.1.

⁷³ *Native Am. Arts, Inc. v. Peter Stone Co.*, 222 F. Supp. 3d 643, 646 (N.D. Ill. 2016).

⁷⁴ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

⁷⁵ *Native Am. Arts*, 222 F. Supp. 3d at 646.

involve any specific considerations afforded to plaintiffs under IACA 1990.⁷⁶ Even though the Seventh Circuit rejected the argument that a violation of IACA 1990 was sufficient to confer Article III standing, other circuit courts, including the Ninth Circuit, have reached the opposite conclusion.⁷⁷ Thus, some jurisdictions may have more favorable standing requirements for IACA 1990 plaintiffs.⁷⁸

D. The Indian Arts and Crafts Act of 1990 Provides a Base to Protect Native American Trademark Rights

Even with these deficiencies, IACA 1990 provides an excellent base from which narrowly tailored amendments can be made to protect Native American intellectual property. Such amendments can prevent the misappropriation and exploitation of Native American representations in trademarks. The use of IACA 1990 and the IACB to regulate and protect Native American intellectual property and cultural identity provides distinct advantages over solutions under the Lanham Act, especially in light of the Supreme Court's recent decision in *Matal v. Tam*.

IV. THE SUPREME COURT'S DECISION IN *MATAL V. TAM* DENIES NATIVE AMERICANS EFFECTIVE TRADEMARK PROTECTION UNDER THE LANHAM ACT

A. The Case: *Matal v. Tam*

Section 2(a) of the Lanham Act bars trademark registration for a mark that “consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute.”⁷⁹ In determining whether a mark is considered disparaging, the USPTO engages in a two-prong analysis.⁸⁰ First, the examining attorney analyzes the:

likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner

⁷⁶ *Spokeo*, 136 S. Ct. at 1549.

⁷⁷ Johnson, *supra* note 44.

⁷⁸ *Id.*

⁷⁹ 15 U.S.C. § 1052(a).

⁸⁰ *Matal v. Tam*, 137 S. Ct. 1744, 1753 (2017).

in which the mark is used in the marketplace in connection with the goods or services.⁸¹

If the examining attorney finds that the mark referred to persons, institutions, beliefs, or national symbols, the examining attorney then explores “whether that meaning may be disparaging to a substantial composite of the referenced group.”⁸² If the examining attorney finds that a “substantial composite” of the referenced group would find the mark disparaging, then a prima facie case of disparagement is made and the burden shifts to the applicant to demonstrate that the mark was not disparaging.⁸³

On June 19, 2017, the Supreme Court in *Matal v. Tam* unanimously concluded that the disparagement clause of section 2(a) of the Lanham Act violated the First Amendment.⁸⁴ The Supreme Court was confronted with the ideal case for abolishing the disparagement clause: favorable facts and a compelling plaintiff. In *Tam*, a rock band consisting of Asian-American musicians wanted to trademark their band name, “The Slants.”⁸⁵ While “slants” is a derogatory term for Asian-Americans, the band wanted to use the term in their name to create a positive association and reclaim the term.⁸⁶ The USPTO denied The Slants’ application based on the disparagement clause in section 2(a), finding that a number of dictionaries defined “slants” as a “derogatory or offensive” term and that a substantial composite of people found the term offensive.⁸⁷

After granting certiorari, the Supreme Court first rejected the government’s argument that trademarks are government speech, not private speech, and thus, section 2(a) was immune from a First Amendment challenge.⁸⁸ The Supreme Court reasoned that the government neither creates nor edits trademarks prior to registration.⁸⁹ Further, an examining attorney does not evaluate whether a mark aligns with government policy or the viewpoints of other marks on the

⁸¹ *Id.* (quoting TMEP § 1203.03(b)(i) (8th ed. Apr. 2017)).

⁸² *Id.* at 1753–54.

⁸³ *Id.* at 1754.

⁸⁴ *Id.* at 1751.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 1751, 1754.

⁸⁸ *Id.* at 1754; *see, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Government speech is not regulated by the First Amendment, given that the government essentially adopts a viewpoint when it takes a position and it would be “paralyzing” for the government to have to engage in viewpoint neutrality. *Tam*, 137 S. Ct. at 1757.

⁸⁹ *Tam*, 137 S. Ct. at 1758.

Principal Register.⁹⁰ Instead, an examining attorney engages in a content-neutral evaluation and cannot deny an application unless the mark meets one of the statutory exceptions to registration.⁹¹ Third parties are responsible for challenging the mark prior to registration.⁹² The Court found that trademarks traditionally have not been used to convey a government message and there is no evidence to suggest that the public associates the government with trademarks.⁹³ The Court noted that:

[I]t is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.⁹⁴

Analogously, if the Supreme Court found that trademarks were government speech, then the same should necessarily apply to copyrights.⁹⁵ The Supreme Court rejected the government’s distinction that First Amendment protections should remain in place for copyrights because copyrights are “the engine of free expression.”⁹⁶ Instead, the Supreme Court went beyond the traditional notions of trademarks as source identifiers and found that trademarks, like copyrights, “often have an expressive content.”⁹⁷ Ultimately, as the Supreme Court succinctly stated, “[t]rademarks are private, not government, speech.”⁹⁸

After the Supreme Court determined that trademarks were not government speech, the opinion proceeded in three separate concurrences, with each Justice concluding that the disparagement

⁹⁰ *Id.*

⁹¹ *Id.* (citing 15 U.S.C. § 1052).

⁹² *Id.* (citing 15 U.S.C. §§ 1058, 1064; 37 C.F.R. §§ 2.111(b), 2.160); *see also* 15 U.S.C. § 1064.

⁹³ *Id.* at 1760.

⁹⁴ *Id.* at 1758.

⁹⁵ *Id.* at 1760.

⁹⁶ *Id.* (citation omitted).

⁹⁷ *Id.*; *see also* Mark Conrad, *Matal v. Tam—A Victory For The Slants, A Touchdown For The Redskins, But An Ambiguous Journey For The First Amendment and Trademark Law*, 36 CARDOZO ARTS & ENT. L.J. 83, 115–16 (2018) (noting that the Supreme Court’s expressive aspect argument “opens up the question of whether trademarks are only commercial in nature or can have extra-commercial practices[.]”).

⁹⁸ *Tam*, 137 S. Ct. at 1760.

clause was unconstitutional viewpoint discrimination.⁹⁹ First, Justice Alito rejected the government's argument that the trademark registration process was analogous to a government-provided subsidy or government program.¹⁰⁰ While the Supreme Court has occasionally found that viewpoint discrimination within government subsidy programs is constitutionally permissible, trademark registrations are not such a case.¹⁰¹ Even though the government expends funds by operating the USPTO, the government does not subsidize the registration of trademarks; thus, viewpoint discrimination is impermissible.¹⁰² While the disparagement clause "applies equally" to marks on either side of an issue, denial of "disparaging" marks is viewpoint discrimination because "[g]iving offense is a viewpoint."¹⁰³

After disposing of the government speech issue, Justice Alito declined to address whether trademarks constituted commercial speech. Instead, he found that even if trademarks are considered commercial speech, the disparagement clause could not survive *Central Hudson*¹⁰⁴ review because the disparagement clause is not "narrowly drawn."¹⁰⁵ The idea that the government has an interest in preventing offensive speech "strikes at the heart of the First Amendment."¹⁰⁶ Justice Alito concluded that "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"¹⁰⁷

While the government tried to pass *Central Hudson* review by asserting that they had a substantial interest in "protecting the orderly flow of commerce," given that trademarks can be analogized to

⁹⁹ See *id.* at 1760–65 (Justice Alito concurring with three justices); *id.* at 1765–69 (Justice Kennedy concurring in part and concurring in judgment with three justices); *id.* at 1769 (Justice Thomas concurring in part and concurring in judgment). Justice Gorsuch did not participate in the decision of the case. See *id.*

¹⁰⁰ *Id.* at 1760–63.

¹⁰¹ *Id.* at 1760.

¹⁰² *Id.* at 1761.

¹⁰³ *Id.* at 1763.

¹⁰⁴ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). *Central Hudson* is a form of intermediate scrutiny utilized for commercial speech. *Id.* at 573. *Central Hudson* is essentially a four-prong test, asking: (1) whether the expression is protected by the First Amendment and concerns lawful activity that is not misleading, (2) whether the asserted governmental interest is substantial, (3) whether the regulation directly advances the governmental interest asserted, and (4) whether the regulation is more extensive than necessary to serve that interest. *Id.* at 566.

¹⁰⁵ *Tam*, 137 S. Ct. at 1764.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

discriminatory conduct, Justice Alito rejected such an argument.¹⁰⁸ Because the disparagement clause “reaches any trademarks that disparages *any person, group, or institution*,” it is not narrowly drawn and necessarily fails *Central Hudson* review.¹⁰⁹ Thus, Justice Alito concluded that the disparagement clause in section 2(a) violated the free speech clause of the First Amendment.¹¹⁰

In a separate concurrence, Justice Kennedy wrote for four Justices and argued that the disparagement clause clearly implicated First Amendment protections for viewpoint discrimination, considering that “[a] subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral.”¹¹¹ Further, the concurrence rejected the Government’s argument that the disparagement clause is viewpoint neutral because an examining attorney rejects a mark on the basis of the applicant’s audience’s reaction, and not the individual applicant’s views.¹¹² The dissonance between the Government’s interpretation that this is a disparaging trademark and the Slants’ desire to reclaim the racial slur “confirms the constitutional vice of the statute.”¹¹³

Justice Kennedy noted that regardless of whether trademarks are considered commercial speech, trademarks denied under the disparagement clause are necessarily subject to heightened scrutiny because of viewpoint discrimination.¹¹⁴ This concurrence also avoided the question of whether trademarks are commercial speech, though Justice Kennedy asserted that “[t]o the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment’s requirement of viewpoint neutrality.”¹¹⁵

Justice Thomas also wrote a short concurrence, arguing that regardless of whether speech is commercial, strict scrutiny is appropriate where the government regulates speech based on the idea it conveys.¹¹⁶ Following the *Tam* decision, the Supreme Court ruled that the “immoral and scandalous” clause of section 2(a) was also

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1764–65 (emphasis in original) (“It is not an anti-discrimination clause; it is a happy-talk clause.”).

¹¹⁰ *Id.* at 1765.

¹¹¹ *Id.* at 1765–66.

¹¹² *Id.* at 1767 (“Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise.”).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1769.

unconstitutional under the First Amendment, given that it engaged in the same viewpoint discrimination condemned in *Tam*.¹¹⁷

B. The Supreme Court’s Decision in *Tam* Heightens the Divide Between Freedom of Speech and Continued Marginalization of Native Americans

Ultimately, the Supreme Court in *Tam* reaffirmed First Amendment protections for trademarks and the “the thought that we hate,” though they failed to determine whether trademarks are commercial speech.¹¹⁸ Morality and the law are not always congruent and, under *Tam*, a registrant’s freedom of speech trumps considerations of disparagement, immorality, and scandal. In light of this holding, an applicant can theoretically register design marks with people in blackface. Or, an applicant could trademark a band named “The Wetbacks,” in an attempt to celebrate immigration restrictions.¹¹⁹ So long as these marks are used in commerce, they can be approved for registration, given that section 2(a) no longer precludes registration.

After the Supreme Court rendered their *Tam* decision, Simon Tam, a member of The Slants and the mark’s registrant, stated that “if people want to use so-called disparaging (or to that extent, scandalous and immoral) speech, then there will be consequences. But those consequences will and should be decided by the affected communities, not the government.”¹²⁰ Such an argument is necessarily premised on the idea that market forces will step in to fill the gap left by section 2(a). However, for Native Americans, who lack the political, social, and economic power to bring about these consequences and keep disparaging trademarks in check, the *Tam* decision deals yet another blow to this marginalized community.¹²¹ Where market forces prohibit a company from selling an iPhone entitled “Blackface,” they conversely encourage companies to use Native Americans in their logos and design

¹¹⁷ *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019).

¹¹⁸ *Tam*, 137 S. Ct. at 1764 (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

¹¹⁹ Conrad, *supra* note 97, at 123.

¹²⁰ *Id.* at 125 (citing “E-mail from Simon Tam, lead singer of The Slants, to Mark Conrad, Assoc. Prof. of Law and Ethics, Gabelli School of Business, Fordham University (July 7, 2017, 07:10 PM EST)); *see also* Tanya Behnam, Article, *Battle of the Band: Exploring the Unconstitutionality of Section 2(a) of the Lanham Act and the Fate of Disparaging, Scandalous, and Immoral Trademarks in a Consumer-Driven Market*, 38 LOY. L.A. ENT. L. REV. 1, 28–34 (2017) (noting that proponents of *Tam* argue that the decision will not cause an influx of disparaging trademark applications, because it is not economically advantageous to use such marks in commerce).

¹²¹ *See, e.g.*, Conrad, *supra* note 97, at 147.

marks to capitalize on the cultural goodwill that Native Americans have engendered.¹²²

Ultimately, the *Tam* decision heightens the divide between freedom of speech and the continued marginalization of Native Americans. In 2014, Time Magazine found that there were over 600 active design marks featuring Native American men and women, registered to 450 companies.¹²³ While the *Tam* case involved a word mark, “The Slants,” and the opportunity to reclaim a derogatory racial slur, this right of reclamation does not directly translate to design marks. Unlike word marks, design marks are processed more quickly in the brain, almost “instantaneously evoke[] an opinion in the consumer’s mind,” and, for marks misappropriating Native American culture, create micro-impressions that reinforce racial and cultural stereotypes.¹²⁴ In light of the oppressive history of Native Americans and the continued use of Native American culture in design marks by non-Native companies, Native Americans do not have a meaningful right of reclamation in design marks.

C. The Tobacco Industry Demonstrates Cultural Misappropriation of Native Americans in Trademarks¹²⁵

The tobacco industry is an excellent case study in the continued misappropriation of Native American culture in trademarks. Native Americans were the original cultivators of tobacco, using the unprocessed crop, known as traditional tobacco, for spiritual, religious, and cultural ceremonies, and “to honour and welcome guests, to communicate with the Creator, as a prayer offering or to share wisdom.”¹²⁶ Since the 1900’s, the tobacco industry intentionally incorporated Native American culture into their trademarks and advertisements to insinuate that their product is associated with Native Americans, conjure images of naturality, create emotional connections, and blur the lines between traditional and commercial tobacco products.¹²⁷ In 1951, Lorillard explicitly admitted that they utilized Native Americans in their logos as “an enduring tribute,” considering

¹²² See *infra* Part IV.C.

¹²³ Chris Wilson, *The 450 Companies That Still Have Indian Mascots*, TIME (June 18, 2014, 1:35 PM), <https://time.com/2894357/redskins-trademark-indian-interactive/>.

¹²⁴ Tushnet, *supra* note 12, at 508.

¹²⁵ The statements in this section are documented evidence of third-party historical reflections and in no way reflect the current opinions of the University, this Journal, or its members.

¹²⁶ Joanne D’Silva, et al., *Tobacco Industry Misappropriation of American Indian Culture and Traditional Tobacco*, 27 TOBACCO CONTROL 57, 57 (2018).

¹²⁷ *Id.* at 57, 61.

that tobacco was “their race’s gift to grateful humanity” and that Lorillard was indebted to the “red man” for introducing the world to tobacco.¹²⁸

Lorillard was not the only tobacco company to utilize Native Americans in their trademarks; Natural American Spirits, Kent Cigarettes, and Red Man Chewing Tobacco were among the well-known brands participating in this “enduring tribute.”¹²⁹ In a 1949 advertisement for Old Gold cigarettes, Lorillard featured a Native American male in a headdress with the text, “No heap big medicine talk.”¹³⁰ In 1941, R.J. Reynolds used a fictionalized encounter with a Native American in a radio advertisement for Camel Cigarettes, in which the Native American character stated “me dumb Injun.”¹³¹ Santa Fe Natural Tobacco Company’s packaging featured a man smoking a “peace pipe.”¹³² A 1960’s Kent Cigarettes television commercial involved Native Americans approaching a pioneer wagon train, as if the Native Americans were about to attack, though the Native Americans ultimately showed the pioneers their broken “peace pipe” and asked to trade for Kent cigarettes.¹³³

By “enduring tribute,” perhaps the tobacco companies more accurately meant: “reinforc[ing] public misconceptions of Native people while ignoring the rich history that traditions and words have for many native cultures.”¹³⁴ Market studies demonstrated that the use of Native American imagery on tobacco products “bond[ed] people with America’s origins,” led consumers to believe that they were supporting a “worthy Native cause,” blurred the lines between commercial and traditional tobacco products, and insinuated that tobacco products were natural and healthy.¹³⁵

Further, such associations were affirmed and perpetuated in tobacco industry documents, which acknowledged that the imagery used in design marks created explicit ties to the Native American community

¹²⁸ *Id.* at 60 (quoting DOWNEY FL. LORILLARD, LORILLARD AND TOBACCO 10 (1951) <https://www.industrydocuments.ucsf.edu/docs/#id=mffp0015>).

¹²⁹ *Id.* at 57, 59.

¹³⁰ *Id.* at 58 (citing Lorillard, *No Heap Big Medicine Talk*, RICHARD W. POLLAY CIGARETTE ADS COLLECTION (1949), <https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=sgwg0026>).

¹³¹ *Id.* (citing IKJ National Broadcasting, *Uncle Ezra’s Radio State. # 51*, R. J. REYNOLDS RECORDS (June 28, 1941), <https://www.industrydocuments.ucsf.edu/docs/#id=grdc0079>).

¹³² *Id.* at 59 (citing *Natural American Spirit*, PHILIP MORRIS RECORDS (Mar. 4, 1995), <https://www.industrydocuments.ucsf.edu/docs/#id=lpbn0154>).

¹³³ *Id.* at 58 (citing Burke Marketing Research, *Kent Cigarettes Television Commercial On-Air Study ‘Wagon Train’*, LORILLARD RECORDS (Oct. 31, 1967), <https://www.industrydocuments.ucsf.edu/docs/#id=yfbg0129>).

¹³⁴ *Id.* at 61.

¹³⁵ *Id.*

and misled consumers to believe they were supporting Native American companies.¹³⁶ “Given historical trauma and continued disenfranchisement of Native people, there is a need for the immediate end to discriminatory and degrading use of Native imagery that takes a toll on health and undermines the intellectual property rights of Indigenous communities.”¹³⁷ Notwithstanding that need, the decision in *Tam* placed a significant roadblock in the path of Native Americans and their reclamation of their culture’s potential for commercialization.

D. Unlike the Slants in *Tam*, Native Americans Do Not Have a Meaningful Right of Reclamation

In light of *Tam*, Native Americans do not have a meaningful right of reclamation because their culture and goodwill have been claimed, marketed, and profited by many non-Native people and brands. The misappropriation of Native American culture in the tobacco industry is one example of this systemic problem. As seen through the tobacco industry, market forces encourage brands to utilize Native American culture and identity in their design marks.¹³⁸ These companies are not seeking to reclaim a derogatory term; they are merely using designs of a culture they bear no relation to in an attempt to capitalize on the Native American culture’s goodwill.¹³⁹ If one of the overarching purposes of trademark law is to protect the goodwill that a brand has built around their mark,¹⁴⁰ then inherently, the mass registration of Native American design marks by non-Native individuals and companies undermines this goal. It is inimical and disheartening that the Lanham Act has been interpreted to protect the goodwill that a brand has amassed over the years, yet it refuses to protect an ethnic group that has amassed similar cultural goodwill.

¹³⁶ *Id.*; see, e.g., *Natural American Spirit*, PHILIP MORRIS RECORDS, *supra* note 132.

¹³⁷ *Id.* at 61 (citations omitted).

¹³⁸ *Id.*

¹³⁹ Marlene B. Hanson & W. Casey Walls, *Protecting Trademark Goodwill: The Case for a Federal Standard of Misappropriation*, 81 TRADEMARK REP. 480, 487 (1991) (noting that the word “goodwill” refers to “an intangible business value, reflective of the consumer’s propensity to continue doing business with a particular seller”).

¹⁴⁰ *Park ‘n Fly v. Dollar Park & Fly*, 469 U.S. 189, 198 (1985) (“The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.”).

**V. IN LIGHT OF THE *TAM* HOLDING, THE INDIAN ARTS AND CRAFTS
ACT OF 1990 PROVIDES THE BEST ROUTE FOR EFFECTIVE
TRADEMARK PROTECTION FOR NATIVE AMERICANS**

**A. Trademark Law Has Become a Two-Tiered Litigation System
That Contributes to the Cycle of Misappropriation That
Disenfranchises Native Americans**

Trademark cases, for the aforementioned reasons, require individualized considerations, especially when such cases involve marginalized groups. Trademark law intersects with various other disciplines and involves balancing rights that are fundamental to our pursuit of equal protection, our judicial processes, and our freedoms. As such, courts have gradually moved from relying upon predictable but imperfect rules (i.e. section 2(a)) to creating rules that are more fluid.¹⁴¹

While these open-ended rules are theoretically more tailored to the situation, these rules have also created a variety of defenses “for particular defendants in particular cases on particular issues.”¹⁴² Such a system has caused trademark litigation costs to skyrocket, made case outcomes unpredictable, and excluded entities that can no longer afford to participate in the trademark system.¹⁴³ This financial barrier effectively inhibits entities from asserting their trademark rights or defending themselves against overreaching assertions.¹⁴⁴

As stated by Glynn S. Lunney, Jr. in his article *Two-Tiered Trademarks*, the rising cost of litigation has resulted in trademark law becoming a two-tiered system. In the upper tier, parties can afford to litigate, while in the lower tier, one party can afford to litigate and the other cannot.¹⁴⁵ For disputes that fall in the lower tier, parties that cannot afford the high cost of participation in the trademark system lose.¹⁴⁶ Thus, two disputes that are nearly identical on the merits, but that fall into different tiers, will be resolved differently within the trademark system.¹⁴⁷

The implication of this two-tiered trademark system for marginalized groups seeking to protect their intellectual property, cultural products, and the use of representations of their racial and

¹⁴¹ Glynn S. Lunney, Jr., *Two-Tiered Trademarks*, 56 HOUS. L. REV. 295, 296 (2018).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 297.

cultural identity in trademarks is apparent. In seeking justice for the few that can litigate, the judicial system has rewritten law that very aptly might have served the interest of the many.¹⁴⁸ In light of the recent changes in section 2(a) of the Lanham Act, Native Americans must seek trademark protection elsewhere. Protection must be extended in order to safeguard the interest of the marginalized populations that are caught in a cycle of misappropriation that strips them of psychological, political, and economic capital, and neuters their ability to fight injustices within the trademark system.

B. After *Tam* and the Abolition of the Disparagement Clause, Lanham Act Remedies Are Insufficient to Protect Native Americans from Cultural Appropriation in Trademarks

Following the abolition of the disparagement clause, there are no viable paths under the Lanham Act for Native Americans to defend against cultural misappropriation in design marks. While it is theoretically possible to replace the “disparagement” and “immoral and scandalous” clauses of section 2(a) with a clause barring registration of obscene trademarks, obscenity only protects against sexual speech.¹⁴⁹ Thus, such an amendment is useless in protecting Native Americans, given that such design marks traditionally do not involve sexual speech.¹⁵⁰

1. Certification Marks Are an Insufficient Remedy Because Infringers Are Still Permitted to Use Their Misleading Design Marks

Considering that IACA 1990 permits the IACB to obtain trademark registrations free of charge for Native Americans and tribes,¹⁵¹ there is an argument for increased registration of certification marks by the IACB. Certification marks are used to identify and certify sources that meet external standards established by the mark’s owner.¹⁵² Certification marks are used to identify “regional or other origin, material, mode of manufacture, quality, accuracy, or other

¹⁴⁸ *Id.* at 296, 298–99.

¹⁴⁹ *Miller v. California*, 413 U.S. 15, 25 (1973). Obscene speech is not protected by the First Amendment. To qualify as obscene, speech must fit the *Miller* test, which requires that the work, taken as a whole, appeals to the prurient sexual interest, that the work be patently offensive, and that the work lacks serious literary, artistic, political, or scientific value. *Id.*

¹⁵⁰ *See, e.g.,* Wilson, *supra* note 123.

¹⁵¹ 8 U.S.C. § 1158 (2009); 8 U.S.C. § 1159; 25 U.S.C. § 305(e).

¹⁵² 15 U.S.C. § 1127.

characteristic[s].”¹⁵³ Similar to how certification marks are used to identify gluten-free food products, the IACB could obtain a certification mark to certify genuine Native American products.

However, certification marks do not resolve the root of the problem. Because certification marks are used to demonstrate that a good or service meets external standards, a product that does not meet the standard is only barred from placing the certification mark on their product.¹⁵⁴ Brands can continue to sell goods or services without a certification mark, with one repercussion being that consumers may recognize that the good or service is not certified.¹⁵⁵ However, companies misappropriating Native American culture and goodwill in their logos do not need a certification mark to communicate that their product is produced by Native Americans; their misleading design marks inherently act as a quasi-certification mark. Thus, it is not helpful for the IACB to obtain a certification mark, considering that it would still permit companies to use Native American representations in their design marks.

2. *Protection Under Lanham Act § 32 and § 43 Is Also Insufficient Because Native Americans Lack Standing to Bring Suit Under These Provisions*

Further, protection under section 32 of the Lanham Act is unlikely to provide a viable remedy, given that likelihood of confusion requires the plaintiff to have a registered mark to prevail.¹⁵⁶ Native Americans seeking to protect their cultural integrity and goodwill may not have a registered mark to provide standing under section 32. Thus, a likelihood of confusion claim under section 32 is unlikely to provide a remedy for Native Americans.

While section 43(a) of the Lanham Act codifies common law and permits unregistered mark owners to bring suit, a claim under section 43(a)(1)(A) for false association is also unlikely to be successful.¹⁵⁷

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Jeanne C. Fromer, *The Unregulated Certification Mark(et)*, 69 STAN. L. REV. 121, 126 (2017).

¹⁵⁶ 15 U.S.C. § 1114(1)(a) (providing that a person who uses in commerce “any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . . shall be liable in a civil action by the registrant”).

¹⁵⁷ 15 U.S.C. § 1125(a)(1)(A) (providing a civil cause of action for a mark that “is likely . . . to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person[.]”).

Even though the text of section 43(a) theoretically permits “any person who believes that he or she is or is likely to be damaged” to bring a civil action, courts generally require plaintiffs to “allege some probable injury to a commercial activity” in order to have standing to sue under the false association prong of section 43(a).¹⁵⁸ Native Americans that do not have a commercial interest at stake, yet seek to protect themselves from cultural misappropriation, would not have standing under section 43(a)(1)(A). Thus, in light of *Tam* and the abolition of the disparagement clause in section 2(a), there is no viable path under the Lanham Act for Native Americans to challenge marks that misappropriate their culture and goodwill.

C. Expansion of the Indian Arts and Crafts Act of 1990 Provides Effective Trademark Protection for Native Americans

A more feasible solution is the expansion of the Indian Arts and Crafts Act beyond just arts and crafts to include representations of Native American identity and culture in trademarks. While the *Tam* decision essentially eradicates any possibility of a cultural sensitivity argument within the Lanham Act, IACA 1935 and IACA 1990 are testaments to Congress’s desire to protect the cultural integrity of Native Americans.¹⁵⁹ Specifically, section 305(e)(b) of IACA 1990 provides a civil cause of action against a person who “directly or indirectly, offers or displays for sale or sells a good, with or without a Government trademark, in a manner that *falsely suggests* it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization.”¹⁶⁰

Thus, by expanding IACA 1990 to include representations of Native American identity and culture in trademarks, it would be possible to bring suit against companies, like Natural American Spirits and Red Man Chewing Tobacco, that utilize a design mark that falsely suggests a connection to Native Americans. While the “falsely suggest” language from section 305(e)(b) parallels the language used in the disparagement clause of section 2(a), expanding protection under IACA 1990 to include representations of Native American culture and identity would not trigger a fatal First Amendment challenge because section 305(e)(b) does not have the same arbitrary, content-based distinctions that section 2(a) suffered from.¹⁶¹

¹⁵⁸ 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 27:39 (5th ed. 2019).

¹⁵⁹ Indian Arts and Crafts Act of 1935, ch. 748, 49 Stat. 891 (to be codified at 25 U.S.C. 305); 18 U.S.C. §1158 (2009); 8 U.S.C. § 1159; 25 U.S.C. § 305(e).

¹⁶⁰ 25 U.S.C. § 305(e)(b) (emphasis added).

¹⁶¹ Compare 25 U.S.C. § 305(e)(b), with 15 U.S.C. 1052(a); see also *Matal v.*

I. Although Standing May Present an Issue in Certain Jurisdictions, Viewing the Injury Suffered as an Injury to Native American Culture May Provide a Remedy

Expanding protection under IACA 1990 is not without its flaws. In order to bring a lawsuit, a plaintiff must have standing, meaning that the plaintiff must have “alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.”¹⁶² The Supreme Court has delineated three elements to meet the constitutional minimum of Article III standing:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical[.]’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative” that the injury will be “redressed by a favorable decision.”¹⁶³

It can be difficult for IACA plaintiffs to meet this standing requirement. For example, in *Native American Arts, Inc. v. Peter Stone, Co.*,¹⁶⁴ Native American Arts (“NAA”) sued Peter Stone under IACA 1990.¹⁶⁵ NAA alleged that Stone sold a jewelry collection entitled the “Wolfwalker” Collection and advertised the collection as “Authentic Native American Jewelry,” and “Genuine Indian Handmade,” among other descriptors.¹⁶⁶ While the jewelry designer was never specifically asked if she was Native American, she noted that she used the word “Wolfwalker” because her “*spiritual roots* are Native American.”¹⁶⁷

In dismissing NAA’s claim for lack of standing, the Court noted that the injury suffered goes beyond mere speculation and requires evidence,

Tam, 137 S. Ct. 1744, 1753 (2017).

¹⁶² Warth v. Seldin, 422 U.S. 490, 498–99 (1975) (citation omitted) (internal quotations omitted).

¹⁶³ Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (alterations in original) (citations omitted).

¹⁶⁴ No. 08 C 3908, 2015 U.S. Dist. LEXIS 74187 (N.D. Ill. June 9, 2015).

¹⁶⁵ *Id.* at *1.

¹⁶⁶ *Id.* at *9–10.

¹⁶⁷ *Id.* at *10 (emphasis in original).

which can be demonstrated through loss of sales or evidence of competition.¹⁶⁸ Additionally, the Court spent time distinguishing NAA's arguments that "the products that Peter Stone sells is diverting a sale from a company *like* [NAA]."¹⁶⁹ Diverting sales from a company "like" NAA was insufficient. NAA was required to demonstrate that Stone *actually* diverted sales from NAA; the injury must have been "fairly traceable" from Stone to NAA.¹⁷⁰

As the Court stated, "[t]he mere fact that someone falsely designate[d] a product as Native American d[id] not imbue NAA—or any other Indian Arts and Crafts organization—with Article III standing without proof of a concrete injury in fact, fairly traceable to the company being sued."¹⁷¹ However, as previously mentioned, the sentiments of courts in the Seventh Circuit, as stated here, may not be echoed or supported in other jurisdictions.¹⁷² Even though standing requirements may be more stringent in certain jurisdictions, a plaintiff bringing a case under IACA 1990 must be mindful of the Article III standing requirements and circuit precedent.

Thus, while the expansion of IACA 1990 provides the best theoretical prospects for Native Americans, a lack of standing may be inhibiting in certain jurisdictions, such as the Seventh Circuit. One solution to standing issues under IACA 1990 could be to view the actual injury suffered as "an injury to Indian heritage or culture as a whole."¹⁷³ Considering that IACA 1990 was enacted to protect Native American culture from infringement and misappropriation, this argument is particularly compelling. "Given stagnant economics and high unemployment, together with a history of oppression and outright colonization, American Indians ought to profit, or at least control who profits, from sales of Indian arts and crafts."¹⁷⁴ Broadening the standard for what constitutes an "actual injury" provides such a remedy.

2. *Congress Has Demonstrated Support for Expanding IACA 1990 in Recent Years*

Further, an amendment to IACA 1990 that permits Native Americans to seek recourse from entities that exploit Native American representations and identities in their trademarks has gathered support in recent years. In July 2017, a Senate Hearing was held to explore the

¹⁶⁸ *Id.* at *24–26 (citations omitted).

¹⁶⁹ *Id.* at *27 (emphasis in original).

¹⁷⁰ *Id.* at *27, *33.

¹⁷¹ *Id.* at *34–35.

¹⁷² *See supra* Part III.C.

¹⁷³ Hapiuk, *supra* note 65, at 1042.

¹⁷⁴ *Id.* at 1021.

expansion of IACA 1990 to include greater protection for cultural identity concepts.¹⁷⁵ Specifically, one speaker stated: “Just as there is trademark and patent protection for intellectual property concepts, so too should there be for . . . cultural identity concepts.”¹⁷⁶ Such an amendment could potentially permit tribes to bring a class action lawsuit against a non-Native company that used a Native American representation in their trademarks. Not only would such an amendment serve the compelling government interest of preserving genuine Native American source identifiers, it would also prevent the proliferation of misleading marks that confuse consumers and exploit the goodwill of Native American culture through unfair trade practices.

3. *Expansion of IACA 1990 to Include Representations of Native American Culture and Identity in Trademarks Would Likely Pass the Central Hudson Test for Commercial Speech*

An expansion of IACA 1990 to include protection for Native Americans and a cause of action against entities that misappropriate Native American representations in design marks would likely pass the *Central Hudson* Test for commercial speech.¹⁷⁷ Although the Supreme Court in *Tam* evaded the question of whether trademarks are considered commercial speech, the *Tam* decision was focused on the expressive, not commercial, aspects of the trademark.¹⁷⁸ Yet, trademarks can theoretically be both expressive and commercial speech.¹⁷⁹ Trademarks are specifically registered for a commercial purpose. By requiring marks to be (1) distinctive and (2) used in commerce (or registered with a bona fide intent to be used in commerce) to be eligible for trademark protection, the Lanham Act inherently recognizes this commercial purpose.¹⁸⁰

¹⁷⁵ *Field Hearing Before the Committee on Indian Affairs: Cultural Sovereignty Series: Modernizing the Indian Arts and Crafts Act to Honor Native Identity and Expression: Hearing Before the S. Comm. on Indian Affairs*, 115th Cong. 115-75 (2017) (statement of Dallin Maybee, Chief Operating Officer, Southwestern Association for Indian Arts).

¹⁷⁶ *Id.*

¹⁷⁷ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 565 (1980). *Id.*

¹⁷⁸ *Matal v. Tam*, 137 S. Ct. 1744, 1763–64, 1767, 1769 (2017).

¹⁷⁹ See Gary Myers, *Trademarks & The First Amendment After Matal v. Tam*, 26 J. INTELL. PROP. L. 67, 75 (2019) (“The commercial nature of a trademark does not preclude consideration of the expressive nature of this speech[.]”).

¹⁸⁰ See 15 U.S.C. § 1127 (2006); 15 U.S.C. § 1051; *Zatarain’s, Inc. v. Oak Grove Smoke House, Inc.*, 698 F.2d 786, 792–93 (5th Cir. 1983), *abrogated by* *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 125 (2004).

As the trademark itself is a creation of the commercial need to identify sources and prevent both consumer confusion and unfair business practices in commerce,¹⁸¹ it logically follows that trademark laws should be afforded the intermediate scrutiny traditionally afforded to laws regulating commercial speech. Thus, proceeding under the assumption that trademarks are commercial speech, such an amendment would likely pass the *Central Hudson* test because the amendment would be narrowly tailored to curb the registration and use of trademarks by non-Natives that misappropriate and exploit Native American culture and goodwill by non-Natives. This assumption is further supported by Justice Alito's concurrence in *Tam*, where he argued that the disparagement clause necessarily failed *Central Hudson* review because it was not narrowly drawn.¹⁸² Section 2(a) reached "any trademark that disparages *any person, group, or institution.*"¹⁸³ Inherently, this suggests that a solution under IACA 1990 would survive *Central Hudson* review because it is narrowly tailored to apply only to Native Americans.

Ultimately, the legislative history of IACA 1935 and 1990 clearly demonstrate the government's substantial interest in protecting Native American culture and economic development. Such expansions of IACA 1990 directly advance the substantial government interest in protecting Native American culture and craft. Accordingly, the expansion of IACA 1990 would survive *Central Hudson* review under a First Amendment challenge. The government has a substantial interest in protecting Native Americans from misappropriation in trademarks, regulation under IACA 1990 would directly advance the asserted government interest, and the regulation is narrowly tailored and not more extensive than necessary to serve that interest, given that IACA 1990 only extends protections to Native Americans.

VI. CONCLUSION

This Article contends that Native American trademark rights can be effectively protected by expanding the Indian Arts and Crafts Act of 1990 beyond just arts and crafts to include representations of Native American identity and culture in trademarks. Design marks that misappropriate Native American identity and culture have been shown to create micro-impressions that reinforce racial and cultural stereotypes. By permitting non-Native companies to misappropriate and register marks featuring Native American representations,

¹⁸¹ See, e.g., 15 U.S.C. § 1052(d).

¹⁸² *Tam*, 137 S. Ct. at 1749.

¹⁸³ *Id.* at 1765 (emphasis in original).

trademark law not only undermines the ability of Native Americans to portray accurate and respectful images of themselves and their culture, but it facilitates the marginalization and disenfranchisement of Native Americans. The psycho-socio-economic effects of such exploitative marks necessitate a narrowly tailored solution.

Unfortunately, the Lanham Act, in the wake of the Supreme Court's decision in *Matal v. Tam*, currently provides a safe harbor for such misappropriation and heightens the divide between freedom of speech and the continued marginalization of Native Americans. By finding the disparagement clause in section 2(a) of the Lanham Act unconstitutional, the Supreme Court neutered Native Americans' ability to protect their culture and identity from misappropriation in trademarks.

Expansion of the Indian Arts and Crafts Act of 1990 to include representations of Native American identity and culture in trademarks provides an effective solution. By passing the Indian Arts and Crafts Acts of 1935 and 1990, Congress demonstrated its intent to protect the culture and economic welfare of Native Americans. Because the Indian Arts and Crafts Act only provides remedies to Native Americans, such a solution would effectively balance protection for Native Americans with the First Amendment right to free speech.

In the interim, all hope is not completely lost. Since the initial writing of this Article, the Black Lives Matter movement has swept the nation, bringing racial injustice and inequity issues to the forefront and causing brands to take a look at how their trademarks perpetuate harmful stereotypes. In 2020 alone, Aunt Jemima,¹⁸⁴ Land O'Lakes,¹⁸⁵ and Uncle Ben's,¹⁸⁶ among others,¹⁸⁷ have all committed to change their logos to remove antiquated and stereotypical images and designs. Yet, there is still work to be done. As of 2014, there were over 600 active trademarks—registered to 450 different companies—that featured Native Americans.¹⁸⁸ Ultimately, while the Lanham Act currently lacks legal protections for Native Americans, “[b]rands can no longer stand

¹⁸⁴ Tiffany Hsu, *Aunt Jemima Brand to Change Name and Image Over 'Racial Stereotype'*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/business/media/aunt-jemima-racial-stereotype.html>.

¹⁸⁵ Christine Hauser, *Land O'Lakes Removes Native American Woman From Its Products*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/business/land-o-lakes-butter.html>.

¹⁸⁶ Maria Cramer, *After Aunt Jemima, Reviews Underway for Uncle Ben, Mrs. Butterworth and Cream of Wheat*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/business/aunt-jemima-mrs-butterworth-uncle-ben.html>.

¹⁸⁷ *Id.* (noting that Mrs. Butterworth's brand was undergoing a complete redesign and that Cream of Wheat's parent company was reviewing its packaging to ensure Cream of Wheat does not “inadvertently contribute to systemic racism”).

¹⁸⁸ Wilson, *supra* note 123.

apart from social movements and activism. In order to succeed, they have to personify change—to *be the change*—through rebranding themselves, or risk serious criticism.”¹⁸⁹

From the Trail of Tears to *Tam*, the United States has permitted, and continues to permit through trademark law, the systematic stripping of Native American culture, identity, and goodwill. Expansion of the Indian Arts and Crafts Act of 1990 provides an effective legal remedy to this systemic problem and allows Native Americans the chance to reclaim their cultural identity.

¹⁸⁹ Angela R. Riley & Sonia K. Kaytal, *Opinion: Aunt Jemima is Gone. Can We Finally End All Racist Branding?*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/opinion/aunt-jemima-racist-branding.html>.