

# **THE CASE OF THE ZIA: LOOKING BEYOND TRADEMARK LAW TO PROTECT SACRED SYMBOLS**

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## *Abstract*

This Article tells the story of a tribe's fight, over the past two decades, to reclaim its sacred symbol. Members of the Zia tribe, a Native American group located near Albuquerque, New Mexico, have been using their sacred sun symbol in religious ceremonies since 1200 C.E. Today, the symbol appears on the New Mexico state flag, letterhead, and license plate, and on numerous commercial products, including motorcycles and portable toilets. The tribe claims that the state appropriated the symbol without permission in 1925, and that the continued use of the symbol by various parties dilutes its sacred meaning and disparages the Zia people. This Article considers the harms the tribe faces when outsiders appropriate its symbol and the possible solutions within current trademark law. Ultimately, this Article illustrates that, for the Zia, non-legal measures have been more effective than legal ones. The case of the Zia thus suggests that indigenous groups should look beyond trademark law in the fight to protect their sacred symbols.

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## Introduction

Zia Pueblo is a Native American reservation located approximately thirty-five miles northwest of Albuquerque, New Mexico. “[S]ituated on a rocky knoll, where it blends into the landscape like a natural feature of the terrain,” the Pueblo, where approximately 850 members of the federally-recognized Zia tribe reside, is “almost invisible” to passers-by.<sup>1</sup> “[I]nconspicuous” as the Pueblo itself may be, the tribe’s sacred sun symbol—a circle with groups of rays pointing in the four cardinal directions—is eminently familiar, especially to New Mexican citizens.<sup>2</sup> Members of the tribe have been using the symbol in religious ceremonies since 1200 C.E. Today, the symbol appears on the New Mexico state flag, letterhead, and license plate, and on various commercial products, including motorcycles and portable toilets.<sup>3</sup> The tribe claims that the state appropriated the symbol without the tribe’s permission in 1925, and that the continued use of the symbol by various parties dilutes its sacred meaning and disparages the Zia people.<sup>4</sup>

This Article tells the story of the tribe’s fight, over the past two decades, to reclaim its sacred sun symbol. In particular, this Article focuses on the extent to which trademark law has served as a useful tool for the tribe in preventing outsiders—in this case, both the state and commercial entities—from appropriating the symbol for their own uses. In the United States and elsewhere, indigenous groups increasingly have been employing intellectual property laws in order “to lay claim to their own cultural resources.”<sup>5</sup> Most scholars agree that the claims of indigenous groups “have unique attributes [which are] not addressed by the standard [intellectual property] categories.”<sup>6</sup> These scholars point out, for example, that intellectual property laws, “whose underlying logic is to facilitate dissemination, is fundamentally inappropriate to prevent sacred indigenous images from circulation and re-use.”<sup>7</sup> Accordingly, many commentators contend either that lawmakers should amend existing intellectual property laws or that they

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<sup>1</sup> *Zia Pueblo*, INDIAN PUEBLO CULTURAL CENTER, <http://www.indianpueblo.org/19pueblos/zia.html> (last visited Jan. 26, 2012).

<sup>2</sup> *Id.*

<sup>3</sup> See Phil Patton, *Trademark Battle over Pueblo Sign*, N.Y. TIMES, Jan. 13, 2000, <http://query.nytimes.com/gst/fullpage.html?res=9A00E5D7173AF930A25752C0A9669C8B63&sec=&spon=&pagewanted=all>.

<sup>4</sup> See *infra* Part I for detailed discussions of these claims.

<sup>5</sup> Kristen C. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1024 (2009); see also LAW, ETHICS, AND THE VISUAL ARTS 299 (John Henry Merriman & Albert E. Elsen eds., 4th ed. 2002) (“Increasingly, in the United States, Native Americans are relying upon trademark law to protect tribal names and other designs and motifs against unauthorized use by others.”). For examples of this development, see MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2003).

<sup>6</sup> Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Is U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 4 (2004).

<sup>7</sup> Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 4 (1997); see also BROWN, *supra* note 5; Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601, 1604 (2010) (“[I]ntellectual property’s incomplete framework offers little to address the complexities between culture, property, and speech.”); Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected Through Current Intellectual Property Law?*, 7 J. HIGH TECH. L. 180, 180 (2007) (“[T]he scope of [intellectual property] laws may be insufficient to adequately safeguard the unique structure of . . . cultural property.”). For example, trademark law aims “to protect consumers from the mislabeling or misrepresentation of goods in . . . commercial transactions,” a goal that seems ill-suited in the context of sacred symbols. See LAW, ETHICS, AND THE VISUAL ARTS, *supra* note 5, at 299.

should create *sui generis* laws in order to provide better protection for sacred symbols and other cultural resources.<sup>8</sup> Still, other scholars have been more optimistic about the potential for intellectual property laws, especially trademark law, to serve as an important “tool that indigenous peoples may harness to achieve some goals.”<sup>9</sup>

The case of the Zia illustrates both the shortcomings and the possibilities of using trademark law for indigenous groups seeking to protect their sacred symbols. In the early 1990s, the tribe made several attempts to use provisions of the Lanham Act, the federal trademark law in the United States, to stop commercial entities from misappropriating its symbol. Through its efforts, the tribe learned that trademark law does not offer what many indigenous groups would consider the ideal solution: the complete prevention of outsiders’ uses of their sacred symbols. Nevertheless, trademark law may give indigenous groups a sense of control over outsiders’ attempts at cultural appropriation. Moreover, the Zia have been able to use the formal processes afforded by trademark law in order to publicize their cause and to gain political allies, which in turn has helped the tribe find solutions outside of the legal arena.

Ultimately, this Article shows that, on the whole, non-legal measures have been more effective than legal ones in the tribe’s fight to protect its sacred symbol. In the past ten years, the Zia have looked beyond trademark law and fashioned an informal system whereby the tribe is able to control, and obtain monetary benefits from, outsiders’ uses of its symbol. The case of the Zia thus brings to the table an option for indigenous groups that has been overlooked by scholars: indigenous groups should consider employing non-legal approaches—including political lobbying, educational initiatives, and informal negotiations—to protect their sacred symbols and their cultural rights more generally.<sup>10</sup>

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<sup>8</sup> Kremers, *supra* note 6, at 5; *see also* Carpenter et al., *supra* note 5, at 1028 (advocating a “peoplehood” model “for group-oriented legal claims to indigenous cultural property”); Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE HUM. RTS. & DEV. L.J. 51, 54 (2004) (suggesting that “copyright laws can, and must, be expanded . . . so as to protect and maintain the vitality of the artistic and literary works of indigenous cultures”); Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUMAN RIGHTS L. REV. 355, 355-56 (1998) (arguing that “in the context of certain Native American claims implicated in the survival of Native American culture, U.S. courts ought to consider these claims from a group, rather than an individual, rights perspective”); Alexis A. Lury, *Official Insignia, Culture, and Native Americans: An Analysis of Whether Current United States Trademark Law Should Be Changed To Prevent the Registration of Official Tribal Insignia*, 1 CHI-KENT J. INTELL. PROP. 137 (1999); James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Rights Legislation*, 12 STAN. L. & POL’Y REV. 255 (2001).

<sup>9</sup> Susy Frankel, *Trademarks and Traditional Knowledge and Cultural Intellectual Property*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 433, 437 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008); *see also* DAPHNE ZOGRAFOS, INTELLECTUAL PROPERTY AND CULTURAL EXPRESSIONS 1 (2010) (“[O]rigin related intellectual property rights, such as trademarks . . . appear to be conceptually best suited for the protection of [cultural expressions], because of their specific nature and characteristics.”); David R. Downes, *How Intellectual Property Could Be a Tool To Protect Traditional Knowledge*, 25 COLUM. J. ENVTL. L. 253 (2000).

<sup>10</sup> The idea that sometimes “law is not central to the maintenance of social order” has been advanced by other scholars, most famously Professor Robert Ellickson, but not in the context of cultural appropriation. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). *But see* Rachel Clark Hughey, *The Impact of Pro-Football, Inc. v. Harjo on Trademark Protection of Other Marks*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 327, 366 (2004) (noting that certain non-legal approaches might supplement the use of trademark law).

This Article proceeds in four parts. Part I provides background information on the Zia and their sun symbol. This Part considers the harms the tribe faces when the state and commercial entities appropriate its symbol and the complexities involved in finding a solution within current trademark law. Part II looks at the tribe's attempts in the early 1990s to fight against outsiders' uses of its symbol. This Part shows that trademark law may help indigenous groups assert control over their sacred symbols, but attempts to use the law may be costly. This Part also points to the tribe's early successes using non-legal approaches to attract the attention of the federal government. Part III examines the national stir provoked largely by the Zia in the late 1990s. Although the Zia had the opportunity to help fashion a new legal tool for the protection of sacred symbols, the government ultimately refused to move beyond the status quo. Part IV looks at the tribe's conduct during the past decade and focuses on the ways in which the tribe has taken matters into its own hands, using non-legal approaches to fill some of the gaps left by the law. This Article concludes by pointing to the tremendous power that indigenous groups can bring to bear using non-legal measures in lieu of trademark law.

## I. The Zia and Their Sun Symbol

The Zia tribe is a federally-recognized Native American tribe, which consists of approximately 850 members. The tribe resides at Zia Pueblo, a reservation situated near the Jemez River in New Mexico.<sup>11</sup> Members of the tribe generally speak Keresan, Spanish, Navajo, and/or English, and many are artists who create unique pottery.<sup>12</sup> More so than other Native American groups, the Zia people "have retained most of their traditional beliefs and ways of living."<sup>13</sup> For example, the Zia do not "allow photographing of their ceremonies, have strict protocol . . . for visitors, and discourage sharing information about their culture with the outside world."<sup>14</sup> As a result, "there is very little information [available] specifically about the Zia Indians."<sup>15</sup> Nevertheless, the tribe's sacred sun symbol is well-known. Indeed, according to a brochure created by the tribe, "The Zia Pueblo . . . is most famous for the Zia sun symbol."<sup>16</sup> This Part demonstrates how this statement came to be true, and why it is so problematic.

### A. The Symbol

For the Zia people, the sun symbol is "an exceptionally significant religious and cultural symbol."<sup>17</sup> As former governor of Zia Pueblo, Amadeo Shije, has explained, "The Zia sun symbol was and is a collective representation of the Zia Pueblo. It was and is central to the pueblo's religion. It was and is a most sacred symbol. It represents the tribe itself."<sup>18</sup> The tribe considers the number four to be a sacred number. Accordingly, the symbol presents the four directions of the Earth, the four seasons, the four phases of the day, the four stages of life, and

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<sup>11</sup> JAMES MINAHAN, 3 ENCYCLOPEDIA OF THE STATELESS NATIONS 1523-25 (2002).

<sup>12</sup> *Id.*

<sup>13</sup> *Zia Pueblo Indians*, PUEBLO INDIANS, [http://puebloindians.aaanativearts.com/zia\\_pueblo.htm](http://puebloindians.aaanativearts.com/zia_pueblo.htm) (last visited Jan. 28, 2012).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Zia Pueblo Welcome Brochure*, available at [http://www.zia.com/images/zia\\_pueblo\\_photos/ZiaInfo.jpg](http://www.zia.com/images/zia_pueblo_photos/ZiaInfo.jpg).

<sup>17</sup> *Public Hearings on Official Insignia of Native American Tribes*, Albuquerque, New Mexico (1999) (statement of Peter Pino, Tribal Administrator, Zia Pueblo) [hereinafter *Albuquerque Hearings*], available at <http://www.uspto.gov/trademarks/law/tribal/nahear3.jsp>.

<sup>18</sup> *Id.* (statement of Amadeo Shije, Governor, Zia Pueblo).

the four aspects of being, all bound together “in a circle of life and love.”<sup>19</sup> Zia artists often depict the symbol on their distinctive pottery.<sup>20</sup> The tribe uses such pottery “in rituals ranging from the ceremonies that welcome new babies into this world to the funerals that usher the dead into the next.”<sup>21</sup>

The Zia claim that the symbol has existed since time immemorial—“long before Columbus landed on this continent, long before the United States was even founded and even before the presence of the Europeans and even before the Lanham Act was implemented,” in Shije’s words.<sup>22</sup> In fact, archaeological evidence suggests that the tribe has depicted the symbol on ceremonial pottery for several hundred years.<sup>23</sup> In the 1950s, anthropologist Florence Hawley worked with members of the tribe to excavate an ash pile in the Pueblo. She identified numerous artifacts and dated the oldest items back to 1200 C.E. (though tribal administrator Peter Pino has said that the Zia were in the area long before that date).<sup>24</sup> At that time, the tribe consisted of approximately 15,000 members. After Spanish settlers plundered the Pueblo in 1689, however, less than 100 remained.<sup>25</sup> The history of the tribe has been one of hardship and violence. That the Zia people survive to this day is, according to Pino, a testimony to the tribe’s “physical and cultural, and above all, spiritual strength, and strength of the symbol that we hold sacred.”<sup>26</sup>

### *B. How It Got Away*

In 1923, the New Mexico chapter of the Daughters of the American Revolution, a nonprofit women’s organization, hosted a contest challenging participants to create a flag symbolizing New Mexico’s heritage. Dr. Harry Mera, a Santa Fe physician, and his wife, Reba, submitted the winning entry: a bright yellow flag containing a red stylized version of the Zia sun symbol in the center.<sup>27</sup> Mera, who was also an avocational archaeologist, had seen the symbol

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<sup>19</sup> Zia Pueblo Welcome Brochure, *supra* note 16. According to one member of the tribe, the symbol is meant to portray “Sun and Father Moon, the givers of light, day and night.” Albuquerque Hearings, *supra* note 17 (statement of Peter Pino, Tribal Administrator, Zia Pueblo). In addition, “[t]he Zia . . . believe that man has four sacred obligations: to develop a strong body, a clear mind, a pure spirit and a devotion to the wellbeing of the people.” *Zia Pueblo Indians*, *supra* note 13.

<sup>20</sup> Zia pottery usually depicts the sun symbol, animal motifs, and/or geometric designs on a white background. One source notes that “Zia pottery styles show virtually no European and little curio-market influence, and have changed very little since the mid-1700s. . . . One of the most important ways Zia pottery differs from their neighbors is the use of hand ground basalt stone as temper for their hand dug clay. This creates a working mixture that is very time-consuming to prepare, but is very strong when fired.” *See id.* For more information about and images of Zia pottery, see FRANCIS H. HARLOW & DWIGHT P. LANMON, *THE POTTERY OF ZIA PUEBLO* (2003).

<sup>21</sup> BROWN, *supra* note 5, at 71.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Spanish settlers arrived at the Pueblo in the late 1500s, bringing Christianity with them. The tribe’s relationship with the settlers was always tense, and in the late 1600s the Zia participated in a regional uprising, overthrowing the Spanish regime. Years later, the Spanish returned and sacked the Pueblo. For a complete account of the tribe’s interactions with Spanish settlers in the sixteenth and seventeenth centuries, see generally MARGARET SZASZ, *BETWEEN INDIAN AND WHITE WORLDS: THE CULTURAL BROKER* (2001).

<sup>26</sup> Albuquerque Hearings, *supra* note 17 (statement of Peter Pino, Tribal Administrator, Zia Pueblo).

<sup>27</sup> The original symbol contained a face in the center of the circle; for the sake of simplicity, Mera removed the face. *See* Wendy Brown, *Pueblo Seeks Respect for Zia Symbol*, SANTA FE NEW MEXICAN, Oct. 31, 2007, [http://www.santafenewmexican.com/Local%20News/Pueblo\\_pleas\\_for\\_respect\\_for\\_Zia\\_symbol](http://www.santafenewmexican.com/Local%20News/Pueblo_pleas_for_respect_for_Zia_symbol).

represented on a ceremonial pot. The Zia contend that that pot must have been stolen, because only ceremonial pottery would have contained the symbol, and no ceremonial pottery was ever to leave the Pueblo.<sup>28</sup> No evidence exists of tribal elders giving permission for the pot to leave the Pueblo.<sup>29</sup> Regardless, in March of 1925, Governor Arthur T. Hannett signed the legislation that proclaimed Mera's design as the official state flag.<sup>30</sup> When asked in 2000 why the tribe failed to object to the state's actions at the time, Roberta Price, a lawyer for the tribe, explained, "They were not even citizens. . . . They had no power and no money."<sup>31</sup>

As a result of the state's appropriation, the Zia sun symbol has become deeply embedded in the identity of New Mexico over the past century. As one scholar explains, "once appropriated," the cultural expressions of indigenous groups often are "marketed as an integral part of the identity of these wider communities."<sup>32</sup> For example, in March of 2006, Governor Bill Richardson held another competition, this time challenging the citizens of New Mexico to create designs for a state quarter. Over one thousand designs were submitted, and the New Mexico Coin Commission narrowed down the entries to four to send to the United States Mint. All four entries contained the Zia sun symbol. The final design, which "was meant to symbolize New Mexico's history and culture while being recognizable to people from outside the state," depicts the symbol superimposed onto a topographic map of New Mexico.<sup>33</sup> In addition, the symbol is featured prominently on the New Mexico state letterhead, license plates, and on various other state documents.<sup>34</sup> The state's use of the symbol both recognizes that it belongs to the Zia people and suggests that it simultaneously belongs to and represents the culture of New Mexico.<sup>35</sup>

The state's adoption of the symbol as the state's symbol also places the Zia into strange legal territory: it "creates a situation whereby the State of New Mexico's use of the Zia sun

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<sup>28</sup> Patton, *supra* note 3.

<sup>29</sup> *Id.* The pot was returned to the Pueblo in 2002, a gesture by the state suggesting that it had in fact been stolen in the first place. *Id.*

<sup>30</sup> The New Mexico Code reads, "That a flag be and the same is hereby adopted to be used on all occasions when the state is officially and publicly represented, with the privilege of use by all citizens upon such occasions as they may deem fitting and appropriate. Said flag shall be the ancient Zia sun symbol of red in the center of a field of yellow. The colors shall be the red and yellow of old Spain. The proportion of the flag shall be a width of two-thirds its length. The sun symbol shall be one-third of the length of the flag. Said symbol shall have four groups of rays set at right angles; each group shall consist of four rays, the two inner rays of the group shall be one-fifth longer than the outer rays of the group. The diameter of the circle in the center of the symbol shall be one-third of the width of the symbol. Said flag shall conform in color and design described herein." N.M. STAT. ANN. § 12-3-2.

<sup>31</sup> Patton, *supra* note 3 (internal quotation marks omitted). The Indian Citizenship Act of 1924, 8 U.S.C. § 1401 (2006), granted citizenship to some Native Americans, but it is not clear how this law affected the Zia at that time.

<sup>32</sup> Barry Steven Mandelker, *Indigenous People and Cultural Appropriation: Intellectual Property Problems and Solutions*, 16 CANADIAN INTELL. PROP. REV. 367, 368 (2000).

<sup>33</sup> Jerri C. Raitz, *Enchanted: New Mexico's State Quarter*, THE NUMISMATIST, Apr. 2008, available at <http://www.money.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=13159>.

<sup>34</sup> In addition, in 1963, the state adopted a flag salute that references the symbol: "I salute the flag of the State of New Mexico and the Zia symbol of perfect friendship among united cultures." For more information on the origins of the flag salute, see Jan Compton Ross, *New Mexico Flag Salute*, NEW MEXICO OFFICE OF THE STATE HISTORIAN, [http://www.newmexicohistory.org/filedetails\\_docs.php?fileID=22040](http://www.newmexicohistory.org/filedetails_docs.php?fileID=22040) (last visited Jan. 22, 2012). The New Mexico legislature adopted the salute on March 13, 1963. *Id.*

<sup>35</sup> State documents describe the sun symbol as a "distinctive design [that] reflects the pueblo's tribal philosophy, with its wealth of pantheistic spiritualism teaching the basic harmony of all things in the universe." See BROWN, *supra* note 5, at 69.

symbol is protected but the Pueblo of Zia's use of their own symbol is not."<sup>36</sup> Paradoxically, "through trademark law, it is the appropriator of the symbol . . . that is often given a property right in the symbol."<sup>37</sup> Under Section 2(b) of the Lanham Act, the United States Patent and Trademark Office (USPTO) must refuse registration of a mark if it "[c]onsists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation."<sup>38</sup> In theory, then, no one—not even the Zia people themselves—can register a mark containing the Zia sun symbol as it is represented on the New Mexico flag<sup>39</sup> (though slight variations of the symbol may be fair game<sup>40</sup>). The purpose behind Section 2(b) is to discourage commercial uses of insignia that represent any nation or state, because such insignia are considered "culturally sacred."<sup>41</sup>

In the case of the Zia sun symbol, however, it is not clear that this provision has deterred commercial entities from appropriating the symbol at all. Today, the symbol appears on logos for companies offering a variety of services, including pest control and window cleaning services.<sup>42</sup> The symbol can also be found on numerous commercial products, ranging from motorcycles to portable toilets.<sup>43</sup> Many of the commercial entities that use the symbol do not own registered trademarks, but at least a few have registered with the USPTO. A search through the Trademark Electronic Search System (TESS), the USPTO's online database, reveals several registered trademarks that integrate the symbol—among them, logos for a gold buying company, a film rental store, and a photography studio.<sup>44</sup> It is clear that the Zia sun symbol has become incorporated not only into the state's identity, but also into the identities of commercial entities throughout New Mexico.

### C. *The Harms*

The Zia people contend that the harms they experience when outsiders appropriate their symbol are "very, very deep."<sup>45</sup> But what exactly are those harms? It is difficult to say for sure, but here Professor Christine Farley's distinction between "traditionalist" and "realist" concerns provides a helpful framework.<sup>46</sup> Groups with traditionalist concerns "believe that their culture

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<sup>36</sup> Albuquerque Hearings, *supra* note 17 (statement of David Mielke, General Counsel, Zia Pueblo).

<sup>37</sup> Dougherty, *supra* note 8, at 355.

<sup>38</sup> 15 U.S.C. § 1052(b) (2006).

<sup>39</sup> Note that the Zia, and any other entity, may still use the symbol. This provision simply precludes parties from registering a trademark containing the symbol with the USPTO. *See generally* LEE WILSON, *THE TRADEMARK GUIDE: A FRIENDLY GUIDE TO PROTECTING AND PROFITING FROM TRADEMARKS* (2004).

<sup>40</sup> Indeed, Section 2(b) leaves a loophole of sorts: commercial entities may register trademarks that contain look-alikes, but not exact replicas, of state or national symbols. For instance, one company explains on its website that "[w]hile our company logo resembles the Zia Sun symbol, we use only three points . . . . The real Zia logo is used by the state of New Mexico . . . ." *About the Zia Pueblo in NM*, ZIA PRODUCTS FOR FIXED INCOME DEALERS, [http://www.zia.com/home/zia\\_info.html](http://www.zia.com/home/zia_info.html) (last visited Jan. 28, 2012).

<sup>41</sup> Lury, *supra* note 8, at 137.

<sup>42</sup> *See* Julie Cart, *A Culture Clash of Symbolism, Commercialism: Tribes Like the Zia May Get Patent Office Help in Discouraging the Use of Their Sacred Insignias as Sales Tools*, L.A. TIMES, July 15, 1999, <http://articles.latimes.com/1999/jul/15/news/mn-56235>.

<sup>43</sup> *Id.*

<sup>44</sup> *Trademark Electronic Search System*, U.S. PATENT AND TRADEMARK OFFICE, <http://tess2.uspto.gov/> (last visited Jan. 23, 2012).

<sup>45</sup> Albuquerque Hearings, *supra* note 17 (statement of Amadeo Shije, Governor, Zia Pueblo).

<sup>46</sup> Farley, *supra* note 7.

and existence are threatened by others' incorporation of their cultural property, because others do not understand the significance and meanings of many objects that Native Americans hold sacred."<sup>47</sup> These groups "worry that the expropriation of their living culture will cause their imagery to lose its original significance which will lead to a disruption of their practiced religion and beliefs and a dissolution of their culture."<sup>48</sup> The ideal solution for these groups would be to prevent outsiders completely from appropriating their sacred symbols. On the other hand, groups with realist concerns worry about "non-indigenous competitors" benefiting commercially from their cultural property.<sup>49</sup> For these groups, it is loss of control that is most troubling, because it takes away their ability "to ensure that the public gets an accurate account of indigenous culture and that the investment in that culture goes back to their communities."<sup>50</sup> Farley explains that these two categories are not mutually exclusive.

Members of the Zia have suggested that the tribe falls into both categories. In traditionalist terms, when outsiders appropriate the tribe's symbol for their own purposes, the sacred significance of the symbol may be lost. Over the past century, the Zia sun symbol has become tied to multiple, often conflicting, identities so that it no longer represents only the tribe. For example, when a consumer purchases a chemical fertilizer bearing the symbol, she may recognize the symbol but associate it with the state of New Mexico or some other entity, and not the Zia people. Even if she does understand the connection between the symbol and the tribe, it is unlikely that she will recognize the sacred meaning of the symbol for the Zia people. If the consumer does recognize the symbol as connected to the Zia, she might think that the tribe endorses or is affiliated with the product or company. All this confusion might undermine the tribe's own use of the symbol in sacred religious practices. Moreover, the false associations that are created might negatively impact the tribe's own self-image.<sup>51</sup> As one young member of the tribe, Michiko Thompson, has put it, "With the exploitation of these symbols, their meaning is depleted. This, in turn, inevitably affects our self-worth and sense of dignity."<sup>52</sup>

In realist terms, the Zia have lost control over their symbol in several respects. Thompson has said that "[a]s Native people, we feel that it is important to be in control of our own government, natural resources, industry, schools, and so on . . . [W]e feel that we should also be in control of these symbols and what they represent so that they can remain sacred to our culture."<sup>53</sup> Since the state appropriated the symbol for use in the New Mexico flag, the Zia lack the legal rights to their symbol. They also cannot control the dissemination of their symbol or variations of it; under Section 2(b) of the Lanham Act, anyone is free to use the symbol, so long as they do not attempt to obtain a registered trademark.<sup>54</sup> Furthermore, with so many outsiders using the symbol to convey so many different meanings—some of which may contradict with and/or offend the tribe's beliefs<sup>55</sup>—the Zia lack control over the meanings projected by their

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<sup>47</sup> Lury, *supra* note 8, at 148 (citing *id.*).

<sup>48</sup> Farley, *supra* note 7, at 15.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See Dougherty, *supra* note 8, at 356.

<sup>52</sup> Albuquerque Hearings, *supra* note 17 (statement of Michiko Thompson, Zia Pueblo).

<sup>53</sup> *Id.*

<sup>54</sup> See *supra* notes 38-39 and accompanying text.

<sup>55</sup> For example, the messages sent by a portable toilet producer likely conflict with the sacred religious meaning of the symbol for the tribe.



symbol. This lack of control makes it difficult for the Zia to benefit monetarily from outsiders' appropriation. Even though "[f]irst best . . . might be no sales at all," in a world where "sales are inevitable," the "second-best solution might be that the money goes to the creators and their progeny."<sup>56</sup> When an indigenous group cannot completely stop outsiders from using its symbol, not allowing it to obtain monetary benefits adds insult to injury.

#### *D. Possible Solutions in Trademark Law*

Unfortunately, finding a solution within current trademark law for these harms proves complicated. At least in theory, the Lanham Act provides two options for indigenous groups looking to protect their sacred symbols. The first option is offensive: a group can obtain a registered trademark in its symbol. Registration with the USPTO creates "[a] legal presumption of the registrant's ownership of the mark and the registrant's exclusive right to use the mark nationwide."<sup>57</sup> In other words, an indigenous group that owns a registered trademark in its symbol can prevent others from using the symbol. In addition, the group may be able to charge other parties for permission to use the symbol.

However, this option is purely theoretical for most indigenous groups, including the Zia. The Zia cannot obtain a registered trademark in their symbol, because it appears in the New Mexico flag and Section 2(b) prohibits the registration of such symbols.<sup>58</sup> Likewise, trademark law precludes a party from registering a symbol if another entity already owns a trademark in that symbol.<sup>59</sup> The USPTO requires parties to "search the USPTO database before filing [an] application to determine whether anyone already claims trademark rights in a particular mark."<sup>60</sup> If a commercial entity has appropriated an indigenous groups' symbol, and the entity owns a registered trademark, then the group itself will not be able to register the symbol.<sup>61</sup>

Even if no state or commercial entity has laid claim to an indigenous groups' symbol, the group still may not be able to obtain a registered trademark due to the very nature of trademark law. In order to be eligible for registration with the USPTO, an entity must show either that it uses or that it intends to use the mark in interstate commerce.<sup>62</sup> The mark must be a "word, phrase or symbol that identifies and distinguishes the source of the goods of one party from those of others."<sup>63</sup> These requirements present problems for indigenous groups, including the Zia, who do not constitute commercial entities and who do not use their symbols for commercial purposes.<sup>64</sup> In addition, trademark law vests ownership rights in individual entities.<sup>65</sup> But many

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<sup>56</sup> See Carol Rose, Book Review, *Property in All the Wrong Places?*, 114 YALE L.J. 991, 997 (2005).

<sup>57</sup> *All About Trademarks*, STOPFAKES.GOV, <http://www.uspto.gov/smallbusiness/trademarks/registering.html> (last visited Jan. 28, 2012).

<sup>58</sup> See *supra* notes 36-41 and accompanying text.

<sup>59</sup> See *All About Trademarks*, *supra* note 57.

<sup>60</sup> *Id.*

<sup>61</sup> However, the group may still have the option of filing for cancellation of the commercial entity's trademark. See *supra* notes 68-70 and accompanying text.

<sup>62</sup> See *All About Trademarks*, *supra* note 57.

<sup>63</sup> *Trademark, Patent, or Copyright?*, U.S. PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/trademarks/basics/definitions.jsp> (last visited Jan. 28, 2012). See generally WILSON, *supra* note 39.

<sup>64</sup> Of course, some Native American tribes *do* wish to use their symbols as identifying marks on commercial products. In such cases, obtaining a trademark would be more feasible and appropriate.

<sup>65</sup> See Lury, *supra* note 8, at 152.

indigenous groups, including the Zia, “believe that their property belongs to the group and not to an individual.”<sup>66</sup> As such, “there is a concern as to whom the trademark registration would be registered and how the trademark would remain a group right.”<sup>67</sup>

Still, trademark law provides a second option: an indigenous group can use trademark law defensively to block another entity from registering a symbol or to cancel an already registered trademark. Under Section 2(a) of the Lanham Act, the USPTO will refuse registration of a trademark if it “[c]onsists 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.”<sup>68</sup> This provision allows the USPTO to “disallow[] the registration” of marks “which falsely suggest a connection with particular institutions.”<sup>69</sup> For instance, “[i]f a mark that a party wishes to register as a trademark resembles an insignia of a Native American tribe, the USPTO might conclude that use of that mark would suggest a false connection with the tribe.”<sup>70</sup>

In fact, the USPTO has refused registration to a software company and to a maker of cocktail mixes whose logos contained variations of the Zia sun symbol on these grounds.<sup>71</sup> However, “sometimes trademark regulators are unaware of the connection [of a given symbol] to Indian culture,”<sup>72</sup> and thus, some marks may get through the USPTO’s review process even though they violate Section 2(a). In such cases, interested parties can file a formal opposition, asking the USPTO not to allow the registration. Finally, if neither the USPTO nor any other party opposes registration initially, and a mark therefore gets through the registration process, a party may later file a petition to cancel the mark.<sup>73</sup>

Importantly, this defensive option does not provide what many indigenous groups, including the Zia, would consider the ideal solution: it does not allow such groups to prevent

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 15 U.S.C. § 1052(a) (2006). Many scholars criticize this provision on constitutional grounds. *See e.g.*, Jeffrey Lefstin, Note, *Does the First Amendment Bar Cancellation of REDSKINS?*, 52 STAN. L. REV. 665 (2000); Robert H. Wright, *Today’s Scandal Can Be Tomorrow’s Vogue: Why Section 2(a) of the Lanham Act Is Unconstitutionally Void for Vagueness*, 48 HOWARD L.J. 659 (2004). For an interesting discussion of how the constitutional conflict might be reconciled, *see* Katyal, *supra* note 7.

<sup>69</sup> *Frequently Asked Questions*, U.S. PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/trademarks/law/tribal/index.jsp> (last visited Jan. 23, 2012). In *Harjo v. Pro-Football*, a group of Native Americans argued that the Washington Redskins’ registered trademark was both scandalous and disparaging to Native Americans within the meaning of Section 2(a). The Trademark Trial and Appeal Board held that the trademark was disparaging but not scandalous. *Harjo v. Pro-Football, Inc.*, 1999 WL 375907 (T.T.A.B.). The case was later reversed on other grounds. *Pro-Football, Inc. v. Harjo*, 284 F.Supp.2d 96 (D.D.C. 2003), *aff’d*, *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005).

<sup>70</sup> *Frequently Asked Questions*, *supra* note 69.

<sup>71</sup> BROWN, *supra* note 5, at 77.

<sup>72</sup> Brooke A. Masters, *Seeking To Build Bridges for Indians; AU Program To Foster Trust Between Government and Tribes*, WASH. POST, Aug. 11, 1994.

<sup>73</sup> *See TTAB Facts and Questions*, U.S. PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/trademarks/process/appeal/guidelines/ttabfaq.jsp> (last visited Jan. 28, 2012).

outsiders from using their symbols entirely.<sup>74</sup> Nor does it allow such groups to obtain monetary benefits from outsiders' cultural appropriation.<sup>75</sup> Still, this option may allow groups like the Zia to exert some control over outsiders' uses of their symbol. Part II will illustrate that, when the Zia took their fight to the legal stage in the early 1990s, they employed this option.

## II. The Battle Begins: The Early 1990s

Over fifty years after the creation of the New Mexico flag, the Zia people began the fight to reclaim their sacred sun symbol. This Part outlines their early efforts, both legal and non-legal, to protect the symbol. Although the tribe found some success early on using legal measures, this Part shows that the Zia found more success using non-legal approaches.

### A. Important Developments

First, however, it is important to note that the tribe's efforts, though seemingly sudden, were many years in the making. Native Americans saw their rights expand greatly in the latter half of the twentieth century.<sup>76</sup> After "surviv[ing] centuries of cultural genocide inflicted on them by non-Native Americans"—and keeping "their values . . . intact" all the while—"Native Americans increasingly were recognized by non-Native America for their "valuable contributions . . . to American culture."<sup>77</sup>

Several broad developments paved the way for the tribe's fight in the 1990s.<sup>78</sup> Starting in the mid-1940s, the United States government dealt with Native Americans through a termination policy, which sought to assimilate indigenous peoples into mainstream society.<sup>79</sup> Under this policy, many Native Americans lost land and were uprooted from their reservations and into cities.<sup>80</sup> The result was that "poverty and deprivation [were] common" for Native Americans by the early 1960s.<sup>81</sup> However, in the 1960s and 1970s, as Native Americans "watch[ed] both the development of Third World nationalism and the progress of the civil rights movement, [they] became more aggressive in pressing for their own rights."<sup>82</sup> "A new generation of leaders," took their grievances onto the legal stage, going "to court to protect what was left of tribal lands [and]

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<sup>74</sup> Under Section 2(b), other parties, including the state and commercial entities, are still permitted to use the symbol; they simply cannot register a mark containing the symbol with the USPTO. *See supra* notes 38-41 and accompanying text.

<sup>75</sup> Indeed, Part II *infra* demonstrates that the process of formally opposing a trademark registration comes with substantial costs.

<sup>76</sup> JAMES STUART OLSON & RAYMOND WILSON, *NATIVE AMERICANS IN THE TWENTIETH CENTURY* (1986); *see also* RED POWER: THE AMERICAN INDIANS' FIGHT FOR FREEDOM (Alvin M. Joseph et al. eds., 1999) [hereinafter RED POWER].

<sup>77</sup> *Id.*

<sup>78</sup> This Section simply describes some of the developments in the latter half of the twentieth century, which gave rise to the Native American cultural rights movement. The aim is to give some context for the Zia people's later actions, which are outlined later in this Article. A comprehensive account of the history of Native American rights is beyond the scope of this Article.

<sup>79</sup> *See Decades of Change: 1960-1980*, AMERICA.GOV, <http://www.america.gov/st/educenglish/2008/April/20080407123655eafas0.7868769.html> (last visited Jan. 23, 2012) [hereinafter *Decades of Change*].

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* *See generally* STEVEN L. COUTURE, *THE AMERICAN INDIAN MOVEMENT: A HISTORICAL PERSPECTIVE* (1996); KENNETH SAUL STERN, *LOUD HAWK: THE UNITED STATES VERSUS THE AMERICAN INDIAN MOVEMENT* (2002).

to recover what had been taken . . . in previous times.”<sup>83</sup> The government responded by “channel[ing] funds to Native-American-controlled organizations and assist[ing] neglected Native Americans in the cities.”<sup>84</sup>

Although this movement at times got violent,<sup>85</sup> it gave rise to many positive developments for Native Americans. For example, in 1975, Congress signed into law the Indian Self-Determination and Education Assistance Act,<sup>86</sup> “mark[ing] a revolutionary break with” the government’s termination policy.<sup>87</sup> Under this law, “Indian tribes were released from the strict control and supervision of the Bureau of Indian Affairs under a contracting provision, and the door was opened for tribal governments to take charge of many reservation social, economic, and political activities and programs.”<sup>88</sup> In addition, in 1978, Congress passed the American Indian Religious Freedom Act,<sup>89</sup> which was meant to protect the religious practices of Native Americans. These developments, which focused on Native Americans’ human rights, created an environment that was ripe for the recognition of Native American cultural rights.

In 1990, Congress passed two important laws that recognize Native Americans’ cultural rights. The Indian Arts and Crafts Act<sup>90</sup> “is a truth-in-advertising law that prohibits misrepresentation in marketing of Indian arts and crafts products within the United States.”<sup>91</sup> This law makes it “illegal to offer or display for sale, or sell any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian Tribe or Indian arts and crafts organization, resident within the United States.”<sup>92</sup> The Native American Graves Protection and Repatriation Act<sup>93</sup> requires federal agencies and institutions that receive federal funding to return Native American cultural items and remains to their respective peoples.<sup>94</sup> Although neither of these laws directly help the Zia to protect their symbol,<sup>95</sup> they laid the foundation for the tribe’s own fight, which began just two years later.

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<sup>83</sup> *Decades of Change*, *supra* note 79. The American Indian Movement, an activist group founded in 1968, was particularly influential. *See generally* COUTURE, *supra* note 82.

<sup>84</sup> *Decades of Change*, *supra* note 79.

<sup>85</sup> *See id.*

<sup>86</sup> 25 U.S.C. § 450 (2006).

<sup>87</sup> RED POWER, *supra* note 76, at 119.

<sup>88</sup> *Id.* (“In 1969 a landing party of 78 Native Americans seized Alcatraz Island in San Francisco Bay and held it until federal officials removed them in 1971. In 1973 [the American Indian Movement] took over the South Dakota village of Wounded Knee, where soldiers in the late 19th century had massacred a Sioux encampment. Militants hoped to dramatize the poverty and alcoholism in the reservation surrounding the town. The episode ended after one Native American was killed and another wounded, with a government agreement to re-examine treaty rights.”).

<sup>89</sup> 42 U.S.C. § 1996 (2006).

<sup>90</sup> 25 U.S.C. § 305 (2006).

<sup>91</sup> *The Indian Arts and Crafts Act of 1990*, U.S. DEPARTMENT OF THE INTERIOR: INDIAN ARTS AND CRAFTS BOARD, <http://www.doi.gov/iacb/act.html> (last visited Jan. 28, 2012).

<sup>92</sup> *Id.*

<sup>93</sup> 25 U.S.C. § 3001 (2006).

<sup>94</sup> These include funerary objects, sacred objects, and objects of cultural patrimony. *Id.*

<sup>95</sup> The Indian Arts and Crafts Act might help the Zia with the problem of false association created when commercial entities use the symbol, but only if those entities use the symbol for the purpose of pretending that their products are Zia-produced. For a discussion of how this law might aid indigenous groups seeking to protect their intellectual property, see Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111 (1995).

## B. Turning to Trademark Law

In 1992, members of the Zia tribe turned to trademark law for the first time to challenge an outsiders' use of their symbol. That year, Coulston International Corporation, a primate laboratory located in Alamogordo, New Mexico,<sup>96</sup> attempted to register a trademark containing a variation of the Zia sun symbol.<sup>97</sup> The tribe formally objected to the registration, arguing that allowing Coulston to register the trademark would violate Section 2(a) of the Lanham Act by falsely suggesting a connection to the tribe and bringing the Zia people into disrepute.<sup>98</sup>

During the opposition proceedings, Alphonso Ortiz, a professor of cultural anthropology at the University of New Mexico, spoke on behalf of the tribe. Ortiz explained the importance of the sun symbol to the tribe and described “the deep offense the members of the tribe felt” by Coulston’s attempt to register a logo including the symbol.<sup>99</sup> He also noted that “versions of the symbol—with proportions distorted—did not serve to distinguish the deformed symbol from the original Zia Sun Symbol, but only increased the offense by desecrating and mocking the symbol.”<sup>100</sup> Indeed, Ortiz pointed to the traditionalist concerns described by Farley, suggesting that *all* uses of the symbol—even uses of variations of the symbol—threaten the tribe’s culture and disparage the Zia people.<sup>101</sup>

Coulston responded to the tribe’s actions “fiercely.”<sup>102</sup> The company refused to comply with a motion by the tribe requesting a three-day extension. In addition, the company argued against an order that would make certain depositions—those in which tribal elders would discuss sacred matters—non-public.<sup>103</sup> These actions suggested that Coulston would not back down.

In 1995, however, after a lengthy series of proceedings, Coulston withdrew its trademark application. The TTAB was scheduled to issue a decision just a few days later.<sup>104</sup> This withdrawal might be viewed in an optimistic light—as a symbolic victory for the Zia people. The fact that Coulston revoked its application right before the TTAB was to issue a decision suggests that the company worried that the TTAB would not rule in its favor. In fact, this move indicates

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<sup>96</sup> Coulston conducted chemical testing for drug and chemical companies. *See The Rise of Coulston*, PROJECT R&R: RELEASE & RESTITUTION FOR CHIMPANZEES IN U.S. LABORATORIES, <http://www.releasechimps.org/labs/labs-closed/the-coulston-foundation/the-rise-of-coulston/> (last visited Jan. 23, 2012). Apparently, Coulston had become “notorious for its record of animal neglect and poor veterinary care” at the time. *Id.*

<sup>97</sup> USPTO Application No. 74-123,180; *see* Letter from Amadeo Shije, Governor, Zia Pueblo to Eleanor Meltzer, Attorney, Office of Legislative and International Affairs, USPTO (Apr. 26, 1999), *available at* <http://www.uspto.gov/web/offices/com/hearings/natinsign/comments/zia.pdf> [hereinafter Zia Pueblo Comments].

<sup>98</sup> *See* Brown, *supra* note 27. Once an application has been filed, and assuming the USPTO does not raise any objections to the registration, the USPTO will publish the mark in the *Official Gazette*, a weekly publication. *What Happens After I File My Application?*, U.S. PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/trademarks/process/afterapp.jsp> (last visited Jan. 28, 2012). “Any party who believes it may be damaged by registration of the mark” then has thirty days “to file . . . an opposition to registration.” *Id.* An opposition proceeding is “similar to a proceeding in a federal court, but is held before the Trademark Trial and Appeal Board, a USPTO administrative tribunal.” *Id.*

<sup>99</sup> Zia Pueblo Comments, *supra* note 97, at 3.

<sup>100</sup> *Id.* (internal quotation marks omitted).

<sup>101</sup> *See supra* Section I.C.

<sup>102</sup> Zia Pueblo Comments, *supra* note 97, at 2-3.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

that the company was intimidated by the tribe's opposition. The tribe showed Coulston—and by extension, other commercial entities—that the Zia people would fight for their symbol. Those seeking to register marks containing the symbol should beware.

However, the tribe did not rejoice at Coulston's withdrawal. Instead, members of the tribe felt that “[t]he Pueblo's scarce resources were wasted on an opposition that did not result in any helpful precedent.”<sup>105</sup> This experience showed the tribe that using trademark law can be costly; the Zia had expended a large amount of resources in formally opposing Coulston. Moreover, the tribe had hoped that the TTAB would rule in its favor, creating legal precedent that would make it harder for commercial entities to register similar marks in the future.<sup>106</sup> Short of reaching that goal, the Zia felt that their efforts had been futile. Their fight against Coulston undoubtedly soured the tribe's stance toward taking legal approaches

Of course, the Zia's efforts were not entirely wasted; they *did* stop Coulston from registering the trademark, an important step toward exerting control over their symbol. But they did not succeed thanks to trademark law as such. Rather, the tribe used the processes afforded by trademark law in order to exert social and political pressure, which in turn would help the tribe to find solutions outside of the legal arena.<sup>107</sup>

### C. Non-Legal Strides

In 1994, in part due to the Zia's involvement in the proceedings against Coulston, the USPTO “undertook . . . to compile a list of official insignia” of Native American tribes.<sup>108</sup> The idea behind this list was to help the USPTO “better uphold the letter and spirit of the [Lanham] Act.”<sup>109</sup> With an informal collection of images of tribal insignia in hand, the USPTO would be able to determine more easily whether a given trademark application violated Section 2(a) of the Lanham Act.<sup>110</sup> The USPTO hoped “to insure [sic] that others didn't pass themselves off as Native Americans, or as Native American Tribes, through the registration of trademarks that create the false impression of the true origin of goods or services.”<sup>111</sup> At the time, the USPTO sent out letters to approximately 500 federally-registered Native American tribes, asking for information about the tribes' official insignia.<sup>112</sup> The USPTO received fewer than ten responses, one of which came from the Zia.<sup>113</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> This scenario presents an interesting twist on the idea of “bargaining in the shadow of the law”—the idea that an individual or entity's bargaining power depends on the legal chips that they bring to the table. This Article shows that the Zia used legal processes to gain certain non-legal chips—such as publicity and political allies—which helped them at the metaphorical bargaining table.

<sup>108</sup> *Public Hearings on Official Insignia of Native American Tribes*, San Francisco, California (July 12, 1999) (statement of Todd Dickinson, Acting Commissioner of Patents and Trademarks, USPTO) [hereinafter *San Francisco Hearings*], available at <http://www.uspto.gov/trademarks/law/tribal/nahear1.jsp>.

<sup>109</sup> *Id.*

<sup>110</sup> See *supra* notes 68-72 and accompanying text.

<sup>111</sup> *San Francisco Hearings*, *supra* note 108 (statement of Todd Dickinson, Acting Commissioner of Patents and Trademarks, USPTO).

<sup>112</sup> *Id.*

<sup>113</sup> See *id.*; Albuquerque Hearings, *supra* note 17 (statement of Roberta Price, Attorney, Zia Pueblo).

The tribe sent a packet of materials to the USPTO, describing the history of Zia Pueblo and “demonstrat[ing] the central importance of the Zia Sun Symbol in the tribe’s religion.”<sup>114</sup> The materials provided evidence of the tribe’s “official use . . . for many decades” of several different variations of the symbol. In addition, the materials included statements from tribal elders “about how deeply offensive the commercial use of the symbol was to them and their religion, and how federal registration of the symbol was a betrayal.”<sup>115</sup> Shije, the tribe’s governor, remarked that he “understood from conversations with David Bucher [the Executive Director of Trademark Examining at the USPTO] that these materials would be placed in the Trademark Office library in a separate file created for the Pueblo of Zia.”<sup>116</sup> This effort served as an important precursor to the tribe’s interactions with the USPTO that would follow.

That same year, the tribe also made a shocking demand to the state of New Mexico: it demanded that the state compensate the tribe for the state’s appropriation of the Zia sun symbol by paying \$45 million. Soon, that number rose to \$76 million—one million dollars for each year that the symbol had been used in the state’s flag.<sup>117</sup> The legislature undeniably took the tribe’s demand seriously; almost immediately, it began to consider a bill in response.<sup>118</sup> Regional press, on the other hand, saw the tribe’s request as outlandish, and responded with “expressions of skepticism and anger.”<sup>119</sup> In an article entitled *Lawmakers Tackle Asparagus-Bashing, State Dinosaur, Square-Dancing Lobby*, the Associated Press suggested that the proposed bill “was in the same league as a South Carolina measure making it illegal to lick hallucinogenic toads.”<sup>120</sup>

Outlandish or not, the tribe’s demand had an important result: it made a symbolic statement and exerted serious political pressure on the state of New Mexico. As the *New York Times* reported at the time, “Tribal officials don’t really expect the state to pony up \$74 million for use of the symbol . . . but they do hope there will at least be a recognition of the tribe’s rights.”<sup>121</sup> Much like the tribe’s opposition to Coulston’s attempted trademark registration, the tribe’s demand made clear that the Zia would not sit back while outsiders misappropriated their sacred symbol. Part III will show that this use of political pressure paid off, spurring responses not only from the New Mexico legislature but also from the federal government.

### III. The National Stage: The Late 1990s

The tribe’s early actions, particularly its non-legal efforts, made a big impact. This Part demonstrates that the tribe attracted the attention of the federal government. With its early successes in hand, the tribe continued to push forward in the fight for its sacred symbol, and soon

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<sup>114</sup> Zia Pueblo Comments, *supra* note 97, at 1.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> BROWN, *supra* note 5, at 70.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*; see *Lawmakers Tackle Asparagus-Bashing, State Dinosaur, Square-Dancing Lobby*, ASSOCIATED PRESS, April 16, 1994; see also Letter to the Editor, Shirley Kinney, ARIZONA REPUBLICAN, Feb. 13, 1994 (complaining that “[t]he Zia Pueblo . . . should be proud to be American and have the tribe’s symbol used on the state flag. We are one people, not separate, in this great country.”).

<sup>121</sup> Patton, *supra* note 3.

its grievances became central to a national conversation about legal protections for tribal insignia. But first, the Zia faced another stumbling block.

### A. Another Legal Battle

In 1998, American Frontier Motorcycle Tours, “a Santa Fe-based company specializing in travel on Harley-Davidson motorcycles,”<sup>122</sup> submitted an application to the USPTO for a trademark containing a variation of the Zia sun symbol. Despite their disappointment at the resolution of the Coulston case, members of the tribe decided to make another attempt at using trademark law defensively to oppose the company’s registration. The tribe’s lawyer, Roberta Price, sent an official protest to the USPTO regarding the pending registration.<sup>123</sup> The USPTO told Price that she had replied too late in the consideration process, and thus the tribe’s opposition would not be heard.<sup>124</sup> Price was “outraged.”<sup>125</sup> “You couldn’t imagine Star of David motorcycles or Virgin Mary PortaPottis, could you?” she asked the *New York Times*.<sup>126</sup> Once again, the tribe was left feeling disappointed and disillusioned by the legal approach.

This time, though, the Zia had help. The tribe’s demand for money from the state of New Mexico just a few years earlier had caught the attention of Senator Jeff Bingaman of New Mexico. When Bingaman heard about the tour company’s attempt to register a trademark containing the symbol, he set out to help the tribe. Although the Zia were precluded from litigating against American Frontier, they could take a non-legal approach with the help of Bingaman. Accordingly, Bingaman asked the USPTO to reject the company’s application.<sup>127</sup> He also expressed his stance to the media: “Attempting to register a sacred symbol as a trademark is wrong, and I strongly think it should be illegal,” he told the Associated Press at the time.<sup>128</sup>

The article featuring Bingaman’s statement also contained an explanation from Mike Gallen, owner of the tour company. Gallen explained that he “meant no disrespect by using the symbol.”<sup>129</sup> “I’m not trying to upset anyone by using it, or use a religious symbol sacrilegiously,” he said.<sup>130</sup> Despite Gallen’s seemingly innocuous intentions, the negative publicity and political pressure brought on by Bingaman’s intervention caused the company to withdraw its trademark application soon after the article was published.<sup>131</sup> The Zia succeeded—and not through trademark law—at stopping a commercial entity from using their sacred sun symbol.

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<sup>122</sup> BROWN, *supra* note 5, at 70.

<sup>123</sup> Patton, *supra* note 3.

<sup>124</sup> *Id.* (internal quotation marks omitted).

<sup>125</sup> *Id.* (internal quotation marks omitted).

<sup>126</sup> *Id.* But see STAR OF DAVIDSON MOTORCYCLE CLUB, <http://www.starofdavidson.com/> (last visited Jan. 24, 2012).

<sup>127</sup> *Bingaman Aims To Limit Use of Zia as Trademark*, ASSOCIATED PRESS, May 31, 1998, <http://lubbockonline.com/stories/053198/LG3017.shtml>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (internal quotation marks omitted).

<sup>130</sup> *Id.* (internal quotation marks omitted).

<sup>131</sup> BROWN, *supra* note 5, at 71.



## B. An Opportunity for a Remedy

With Bingaman on their side, the Zia people continued to exert influence on the federal government. In 1998, Congress passed the Trademark Law Treaty Implementation Act.<sup>132</sup> This law made several changes to the Trademark Law of 1946, incorporating provisions from the Trademark Law Treaty, which the United States had signed four years earlier.<sup>133</sup> Most notable for the Zia and other indigenous groups was Section 302 of the Act, which had been included largely due to Senator Bingaman's efforts on behalf of the tribe.<sup>134</sup> Section 302 provided that "[t]he Commissioner of Patents and Trademarks shall study the issues surrounding the protection of the official insignia of federally and State recognized Native American tribes."<sup>135</sup> It further indicated that the Commissioner should consider making changes to the Lanham Act, including "the prohibition of the Federal registration of trademarks identical to the official insignia of Native American tribes; . . . the prohibition of any new use of the official insignia of Native American tribes; and . . . appropriate defenses."<sup>136</sup> These suggestions opened up the possibility that Native American tribes, including the Zia, would be granted a new legal tool for protecting their sacred symbols.

In addition, Section 302 gave indigenous groups the opportunity to play a role in shaping this tool. It directed the Commissioner "to obtain as wide a range of views as possible from Native American tribes, trademark owners, and other interested parties" by requesting public comments and holding field hearings on the issue.<sup>137</sup> As part of this effort, on December 29, 1998, the USPTO put a request in the *Federal Register* calling for comments on "how best to conduct the study, where public hearings should be held, and who should be consulted during the study process."<sup>138</sup> The USPTO received comments from numerous groups, including the American Intellectual Property Law Association, the Bristol Bay Native Association, the Mohawk Carpet Corporation, and the Zia Pueblo.<sup>139</sup>

Once again, the tribe took advantage of an opportunity to educate the USPTO on its position. The Zia's comments indicated that the sun symbol should not be contained in any

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<sup>132</sup> Pub. L. No. 105-113, 112 Stat. 3064 (1998).

<sup>133</sup> The Trademark Law Treaty was adopted in Geneva, Switzerland on October 27, 1994. See P. Jay Hines, *The Trademark Law Treaty, the Trademark Law Treaty Implementation Act, and Changes in United States Trademark Practice*, 90 TRADEMARK REP. 513, 513 (2000), available at <http://www.oblon.com/sites/default/files/news/72.pdf> ("The original goal of the World Intellectual Property Organization ('WIPO') was to harmonize substantive trademark law. This goal, however, proved too lofty a pursuit. Ultimately, the aim became the harmonization of administrative procedures for trademark applications, assignments and renewals, etc. . . .").

<sup>134</sup> See Albuquerque Hearings, *supra* note 17 (statement of Todd Dickinson, Acting Commissioner of Patents and Trademarks, USPTO) ("As many of you already know, due to Senator Bingaman's efforts, the 105th Congress passed a law which requires that the Patent and Trademark Office study a variety of issues surrounding trademark protection for the official insignia of federally- and/or state-recognized . . . tribes.").

<sup>135</sup> § 302, Pub. L. No. 105-113, 112 Stat. 3064 (1998).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Official Insignia of Native American Tribes; Statutorily Required Study, Request for Comments, 63 Fed. Reg. 71,619 (Dec. 29, 1998). A second notice was posted on March 16, 1999. See Official Insignia of Native American Tribes; Statutorily Required Study, Request for Comments, 64 Fed. Reg. 13,004 (Mar. 16, 1999).

<sup>139</sup> The Zia responded to both calls for comments. For a full list and PDFs of all the public comments received by the USPTO, see *Public Comments on the Statutorily Required Study on Official Insignia of Native American Tribes*, U.S. PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/trademarks/law/tribal/natinsegn.jsp> (last visited Jan. 24, 2012).

registered trademark for two reasons. First, “use of [the symbol] by a non-Native American business for its products disparages the religion and people of the Pueblo of Zia, and brings them into disrepute.”<sup>140</sup> In other words, attempts to register marks containing the symbol violate Section 2(a) of the Lanham Act. Second, “the symbol is the design which appears on the State of New Mexico flag, and therefore it is not registrable under [Section 2(b) of the Lanham Act].”<sup>141</sup> Strikingly, the tribe attempted to use the state’s appropriation of its symbol to its own benefit.

Furthermore, the tribe made a proposal for changing the law. Rather than attempt to work with trademark law as it stood—that is, rather than continue trying to use the complicated legal remedies suggested earlier in this Article<sup>142</sup>—the government should actually change the law. The tribe recommended that Congress amend Section 2(b) of the Lanham Act to include Native American tribes. In other words, “official insignia of the tribes” should get “the same status as official insignia of cities and states and foreign nations,” so that neither commercial entities nor any other party would be allowed to register trademarks containing the symbol.<sup>143</sup> This argument found support from Bingaman, as well as from many scholars.<sup>144</sup> It also became central to the discussion that followed at the USPTO’s field hearings.

### C. *The Hearings*

In 1999, the USPTO held three field hearings. “The dispute over the sun symbol secured a prominent place” in all three hearings.<sup>145</sup> At the first hearing, which was held in Albuquerque, New Mexico on July 8, 1999, several members of the Zia tribe testified, building upon the arguments put forth in the tribe’s public comments. For example, Amadeo Shije recommended that Congress amend Section 2(b) of the Lanham Act. He remarked that “[w]hat our tribal members and our pueblo government ask today is very little; that the Lanham Act treat us like any other governmental entities.”<sup>146</sup> The tribe’s general counsel, David Mielke, emphasized that treating tribal insignia like other governmental symbols would “not only permit the federal government to fulfill its Trust responsibility to tribes but [would] help avoid costly and unnecessary litigation such as that fought a few years ago by the Pueblo of Zia against a chemical fertilizer/pesticide company seeking registration for the sun symbol.”<sup>147</sup> Mielke suggested that using trademark law defensively—the only avenue available to tribes like the Zia in the existing legal regime<sup>148</sup>—was too costly to provide a realistic remedy. Roberta Price agreed, adding that giving tribal insignia protection under Section 2(b) would save indigenous

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<sup>140</sup> Zia Pueblo Comments, *supra* note 97, at 1.

<sup>141</sup> *Id.*

<sup>142</sup> *See supra* Section I.D.

<sup>143</sup> Zia Pueblo Comments, *supra* note 97. This kind of approach would not be without legal precedent. In other areas of federal law, Native American tribes are considered states. For example, several federal environmental laws authorize the Environmental Protection Agency to treat federally-recognized tribes as states for the purposes of “implementing and managing certain environmental programs.” *Treatment in the Same Manner as a State*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/tp/laws/tas.htm> (last visited Jan. 28, 2012).

<sup>144</sup> *See, e.g.*, Lury, *supra* note 8, at 156 (“[I]t is the author’s hope that [changing the Lanham Act] will be only the first of a series of changes that the United States implements in order to recognize and acknowledge Native Americans and other cultural and minority groups”).

<sup>145</sup> BROWN, *supra* note 5, at 71.

<sup>146</sup> Albuquerque Hearings, *supra* note 17 (statement of Amadeo Shije, Governor, Zia Pueblo).

<sup>147</sup> *Id.* (statement of David Mielke, General Counsel, Zia Pueblo).

<sup>148</sup> *See supra* Section I.D.

groups valuable resources that they would otherwise spend litigating. She emphasized that “tribal resources saved could be used in hundreds of other necessary and productive ways.”<sup>149</sup>

When asked how to solve the problem of past misappropriations, Mielke suggested that “[p]ast misappropriations should not be sanctioned, rather . . . misappropriators should have an incentive to reach an amicable resolution with the tribe whose symbol they used for commercial gain.”<sup>150</sup> Mielke indicated that outsiders who had gained monetarily from using the symbol should negotiate—presumably, reach a monetary settlement—with the tribe. Tribal administrator Peter Pino also included the state in this call for an “amicable resolution”:

We do not want to stop the State of New Mexico from using the symbol. We want recognition of the taking, a formal apology, and some kind of gesture of remuneration to us—not that money can ever make up for this taking but because it is a wrong that needs to be righted. Many wrongs cannot ever be righted in western law but are atoned for, partially, by monetary payment. . . . If any symbol or object of religious significance is used with disrespect, there is an imbalance. We feel that the world today is out of balance.<sup>151</sup>

Both Mielke and Pino argued that the tribe should be able to benefit monetarily from outsiders’ uses of its symbol, especially given that commercial entities have benefited from using the symbol. Even if this solution would be second-best—the ideal, Pino’s testimony suggested, would be that the symbol never be used at all—it would allow outsiders to “atone[] . . . partially” for their wrongs.<sup>152</sup> Tribal elder Ysidro Pino echoed these sentiments in an article published around the same time, in which he stated: “We have been so many times stepped on, pushed around, slapped around . . . . [I]f we’re going to let businesses use it, we want royalties.”<sup>153</sup>

While those who testified pointed to a potential solution, they also hinted at the gaps left by current trademark law. Members of the tribe pointed out that Section 2(a) of the Lanham Act gave indigenous groups like the Zia the opportunity to block and/or cancel registrations—an opportunity that the Zia took twice in the 1990s. However, as symbolically successful as those attempts were for the Zia, they were costly, limiting the amount of control that the tribe realistically could assert in the future. Moreover, those efforts did not further the tribe’s goal of obtaining monetary benefits from outsiders’ uses of its symbol.

Note, however, that amending the Lanham Act would not necessarily solve these problems. Treating tribal symbols like other governmental symbols might give groups like the Zia more control over their symbols by discouraging others from using those symbols for commercial purposes, and it might show a higher level of respect for tribal symbols by putting them into the category of “culturally sacred” insignia.<sup>154</sup> In addition, it would take away at least some of the need for tribes to litigate to block registration of their symbols under Section 2(a). But this solution would not entirely stop outsiders from using tribal insignia without permission.

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<sup>149</sup> Albuquerque Hearings, *supra* note 17 (statement Roberta Price, Attorney, Zia Pueblo).

<sup>150</sup> *Id.* (statement of David Mielke, General Counsel, Zia Pueblo).

<sup>151</sup> *Id.* (statement of Peter Pino, Tribal Administrator, Zia Pueblo).

<sup>152</sup> See *supra* note 54 and accompanying text. This effort to mask what seems like a market transaction and to consider it a form of healing may seem strange to some. For a fascinating discussion of this concept of “earmarking” money for special purposes, see VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* (1994).

<sup>153</sup> Jennifer Auther, *Use of Sacred Sun Symbol Causes New Mexico Controversy*, CNN.COM, Sept. 14, 1999, <http://www.cnn.com/US/9909/14/new.mexico.flag/index.html>.

<sup>154</sup> Lury, *supra* note 8, at 137.

As Section I.B demonstrated, the existing Section 2(b) has not necessarily deterred commercial entities from using the Zia sun symbol as it appears in the New Mexico flag.<sup>155</sup> Nor would it help indigenous groups like the Zia obtain monetary benefits from outsiders' uses of their symbols.<sup>156</sup> Nevertheless, given that current trademark law had proven mostly inadequate at serving the Zia's needs, the tribe likely felt that any change would be a positive one.

#### *D. An Unsatisfying Result*

Unfortunately, change did not come. On September 30, 1999, the USPTO released the results of the statutorily required study in the *Report on the Official Insignia of Native American Tribes*.<sup>157</sup> The report took into consideration the arguments put forth in the public comments and at the hearings and arrived at a number of conclusions. For example, the report stated:

Existing trademark laws provide the legal tools necessary to prohibit registration of "official insignia," or simulations thereof, where the applicant is not the Native American tribal owner. . . . Any new legislation aimed at examination and registration issues is unnecessary and may offer unforeseen complications for innocent parties. . . . Providing additional procedural or statutory protection for the official insignia of Native American tribes is unnecessary and might risk violation of U.S. international treaty obligations if it offers exclusive trademark protection to a particular indigenous group.

After the comments and testimonies revealed the ways in which trademark law did *not* adequately protect tribal insignia, the report indicated that, in fact, existing trademark law was sufficient to safeguard sacred symbols. Therefore, the report explained, the Lanham Act need not be amended at all. Instead, the USPTO recommended that "[a]n accurate and comprehensive database containing the official insignia of all state and federally recognized Native American tribes should be created,"<sup>158</sup> Essentially, the USPTO said that it would revive the effort that it started in 1994.<sup>159</sup>

Accordingly, the USPTO created the Native American Tribal Insignia (NATI) database. In 2001, the USPTO posted several notices in the *Federal Register*, which explained how the NATI database would work.<sup>160</sup> These notices made clear that "[a]cceptance of the insignia for recordal will not be a determination as to whether a particular insignia for which recordal has been requested would be refused registration as a trademark pursuant to [the Lanham Act]."<sup>161</sup> In other words, while the database might help the USPTO to exert "the power to reject applications for similar marks,"<sup>162</sup> it would not guarantee that result. Moreover, inclusion in the database

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<sup>155</sup> See *supra* Section I.B.

<sup>156</sup> See BROWN, *supra* note 5, at 83 ("If the USPTO were to declare tribal insignia equivalent to other government symbols, . . . then tribes would be unable to license them for commercial uses, thereby losing a potential source of income.").

<sup>157</sup> U.S. PATENT AND TRADEMARK OFFICE, REPORT ON THE OFFICIAL INSIGNIA OF NATIVE AMERICAN TRIBES (1999), available at <http://www.uspto.gov/web/offices/com/sol/notices/insgstudy.pdf>.

<sup>158</sup> *Id.*

<sup>159</sup> See *supra* Section II.C.

<sup>160</sup> See, e.g., Establishment of a Database Containing the Official Insignia of Federally Recognized Native American Tribes, 66 Fed. Reg. 44603 (Aug. 24, 2001) [hereinafter Database Notice].

<sup>161</sup> *Id.*

<sup>162</sup> Patton, *supra* note 3.

would not be equivalent to registering a trademark, and so “any benefits adhering to such registration [would] not [be] available to the tribes.”<sup>163</sup>

Despite the efforts of the Zia, Senator Bingham, and countless others, the database would not provide any new legal protections for tribal insignia at all. Rather, the notice indicated, it would serve as an informational tool: “The USPTO will use the official insignia recorded by the USPTO as information useful in the examination of certain applications for registration of trademarks and as evidence of what a federally or state-recognized tribe considers to be its official insignia.”<sup>164</sup> The NATI database would simply help the USPTO to enforce the status quo by identifying marks that suggest false associations with tribes in violation of Section 2(a) of the Lanham Act.<sup>165</sup>

The Zia and their supporters could not hide their disappointment at this result. Soon after the USPTO released the report, Senator Bingaman expressed that, while he was “pleased with some of the recommendations made in the report,” he was “disappointed it was not recommended that tribal insignia be added to the list of flags, coats of arms and other official symbols that are protected from trademarking.”<sup>166</sup> Roberta Price told the *New York Times* that the report was “a very George Orwell, bureaucratic document” that did not commit the USPTO “to do anything two or three years hence.”<sup>167</sup> “[L]isting did not work well in 1994,” she pointed out, so why would that technique work well now?<sup>168</sup>

In fact, the database has had little effect in practice.<sup>169</sup> The USPTO created the database in 2001, adding it to the already existing Trademark Electronic Search System (TESS). To access the NATI database, one must go to the free-form search option in the TESS and type in “Native American Tribal Insignia.” A list will appear containing the symbols of those tribes that have registered.<sup>170</sup> As of 2009, when a group of scholars at the University of Nebraska-Lincoln conducted a study on the database, twenty tribes had registered.<sup>171</sup> As of this writing (in 2011), twenty-five tribes have registered—among them, the California Miwok Tribe, the Seminole Tribe of Florida, and the Oneida Indian Nation. The Zia are conspicuously missing from the list, as are over 500 other federally-recognized tribes.<sup>172</sup>

There are many possible reasons for this result, and one can only speculate as to why more tribes have not participated. The small size of the database does not necessarily suggest that it has not served its purpose; certainly, it may be the case that the database has helped the

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<sup>163</sup> Charles Bernholz, Linda G. Novotny & Ana L. Gomez, *American Indians and the United States Patent and Trademark Office: The Native American Tribal Insignia Database*, 26 GOV. INFO. Q. 180, 182 (2008), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1186&context=libraryscience>.

<sup>164</sup> Database Notice, *supra* note 160.

<sup>165</sup> See *supra* notes 38-41 and accompanying text.

<sup>166</sup> *Federal Government To Protect Tribal Insignia*, ALBUQUERQUE J., Dec. 3, 1999, <http://www.mail-archive.com/nativenews@mlists.net/msg05205.html>.

<sup>167</sup> Patton, *supra* note 3 (internal quotation marks omitted).

<sup>168</sup> *Id.*

<sup>169</sup> *But see* Bernholz et al., *supra* note 163, at 184 (noting that the database has had certain expressive effects, such as “lead[ing] to a better understanding of the peoples among all the citizens of the United States”).

<sup>170</sup> *Frequently Asked Questions*, *supra* note 69.

<sup>171</sup> Bernholz et al., *supra* note 163, at 183.

<sup>172</sup> As of August 11, 2009, 564 tribes were federally-recognized. See 74 Fed. Reg. 40218 (Aug. 11, 2009).

USPTO to better police trademark registrations. But the small participation size does suggest that Native American tribes do not see the database as a particularly helpful tool. Perhaps tribes like the Zia have simply lost faith in the existing trademark regime and no longer wish to participate. Alternatively, tribes may not want to publicize their sacred symbols specifically because they are sacred.<sup>173</sup>

Regardless of the reason, the fact is that many tribes, the Zia included, have not turned to the NATI database. What are these groups to do? The Zia's conduct during the past decade provides one intriguing possibility. Part IV will demonstrate that, rather than turn back to trademark law to protect their sacred sun symbol, the Zia have shifted their focus to what has always been successful for them: non-legal measures.

#### **IV. The Past Decade: An Informal System**

Even though the tribe's efforts to inform the federal government did not result in a change in the law, the Zia did grab the attention of both commercial entities and the state. Through their fight, the Zia made one thing clear: they would not sit back while outsiders appropriated their sacred sun symbol without the tribe's permission. This message did not change that the symbol is deeply embedded in the identity of New Mexico, nor that commercial entities seek to appropriate the symbol for their own uses. However, this Part demonstrates that it *has* affected the ways in which both commercial entities and the state approach using the symbol today. The result has been that the Zia have moved away from using trademark law and toward functioning through non-legal approaches to protecting their sacred symbol.

##### *A. Negotiations with Commercial Entities*

In the late 1990s, Southwest Airlines hoped to create “a specially painted aircraft christened ‘New Mexico One,’” a tribute to New Mexico. which would display the Zia sun symbol.<sup>174</sup> In the midst of the USPTO's hearings, at which the tribe publicly emphasized its position, Southwest worried that using the symbol would anger the Zia. The airline “considered approaching the pueblo for several years” to ask for permission, but it hesitated because it “feared a hostile response” from the tribe.<sup>175</sup>

Finally, in 2000, executives from Southwest “contacted Zia's tribal government, and negotiations went smoothly.”<sup>176</sup> Importantly, Southwest was not required by law to ask the tribe to use the symbol. Indeed, so long as Southwest did not wish to register a trademark, they were free to use it without the tribe's (or any other party's) permission. Still, Southwest felt the weight of the political pressure exerted by the Zia in the preceding decade, and executives decided that the airline should negotiate with the tribe. After a series of informal negotiations, the tribe agreed to allow Southwest to use the sun symbol—but not for free. As part of the arrangement, “the

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<sup>173</sup> Submitting a symbol for entry into the database is not a particularly difficult or burdensome task. A tribe need only fill out a few forms and send a copy of the symbol to the USPTO.

<sup>174</sup> BROWN, *supra* note 5, at 91.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

airline gave an undisclosed sum to the tribe's scholarship fund."<sup>177</sup> Both the Zia and Southwest benefitted from the company's use of the symbol.

The Southwest deal paved the way for the tribe's negotiations with at least twenty other commercial entities during the past decade.<sup>178</sup> The Zia's efforts throughout the 1990s alerted commercial entities to the tribe's concerns, and Southwest's success at earning the tribe's permission undoubtedly influenced other commercial entities to take a similar approach. "I think that they were pleasantly surprised that we were civilized people," Pino said of the Southwest deal.<sup>179</sup> The result has been that many companies now approach the tribe and ask for permission before using the symbol. Generally, these entities also "donat[e] money to a fund in exchange for" the tribe's permission.<sup>180</sup> Pino has stressed that the money the Pueblo receives in these deals does not mean that the tribe is selling the symbol; he claims that the money "should be described as a donation rather than as compensation."<sup>181</sup> "It's a trust fund," he has said, the interest from which will "give monies to our tribal members so they can pursue a college education."<sup>182</sup>

Notably, this solution might not be ideal for the tribe. That is, "in the best of worlds the symbol would never have come into public circulation."<sup>183</sup> But it does address the "realist" concerns described by Farley—and with much more success than any legal approach available under the current Lanham Act. These deals put the Zia into a position of control; that is, they allow the Zia to have some say over who uses their sacred symbol and how. In addition, the tribe is able to benefit monetarily from outsiders' uses of its symbol—a benefit that trademark law never could provide.

These deals may also have benefits other than monetary ones for the tribe. For example, the Zia's agreement with the New Mexico Bowl, an NCAA-sanctioned post-season football game played at the University of New Mexico at Albuquerque, generates positive publicity for the tribe's cultural expressions more generally. Like Southwest, the executive director of the Bowl, Jeff Siembieda, approached the tribe in the early 2000s, asking permission to use the sun symbol on the Bowl's logo. "We felt it was the right thing to do," he told the Associated Press.<sup>184</sup> Tribal leaders gave Siembieda permission to use the symbol, and in return they suggested that the Bowl contribute to the Zia Pueblo scholarship fund and that the Bowl use Zia artwork as trophies.<sup>185</sup>

In 2006, Elizabeth and Marcellus Medina, a husband-and-wife pair of Zia artists, created three trophies for the Bowl, all of which featured "a white base . . . black, angular Zia patterns . . . the Zia sun symbol," and, less traditionally, "football players in actions and logos for the

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<sup>177</sup> BROWN, *supra* note 5, at 91.

<sup>178</sup> In 2005, tribal administrator Peter Pino counted that the tribe had received payments from twenty companies. See Reed Upton, *Zia Pueblo Receiving Money for Use of Sun Symbol*, Dec. 2, 2005, KOBTV.com, [http://www.nathpo.org/News/Legal/News-Legal\\_Issues27.html](http://www.nathpo.org/News/Legal/News-Legal_Issues27.html).

<sup>179</sup> *Id.* (internal quotation marks omitted).

<sup>180</sup> *Id.* (internal quotation marks omitted).

<sup>181</sup> BROWN, *supra* note 5, at 91.

<sup>182</sup> Upton, *supra* note 178 (internal quotation marks omitted); see *supra* note 152.

<sup>183</sup> BROWN, *supra* note 5, at 92.

<sup>184</sup> Tim Korte, *New Mexico Bowl: Bowl Taps Pueblo for Trophies*, ASSOCIATED PRESS, Dec. 21, 2006, <http://www.abqtrib.com/news/2006/dec/21/new-mexico-bowl-bowl-taps-pueblo-trophies/>.

<sup>185</sup> *Id.*

participating teams—the New Mexico Lobos and San Jose State Spartans.”<sup>186</sup> Ralph Aragon, “another Zia Pueblo artist, . . . crafted offensive and defensive Most Valuable Player awards from traditional leather shields.”<sup>187</sup> The tribe has expressed that this “partnership would pay off for all sides,” providing the symbol to the Bowl and positive publicity to artists from the Zia Pueblo.<sup>188</sup> This sort of approach is beyond the scope of current trademark law, and yet it has worked much more smoothly for the tribe than legal measures ever did.

### *B. Negotiations with Governmental Entities*

Michael Brown has suggested that the “Zia Pueblo’s quest to resolve its differences with the state of New Mexico has been less successful than its negotiations with businesses.”<sup>189</sup> In fact, that statement is misleading. It is true that in the fall of 2001, New Mexico House Bill 423, “which would have appropriated \$50,000 to set up a special state commission to undertake negotiations with the pueblo, died in committee.”<sup>190</sup> Similarly, a task force created by Governor Bill Richardson to address the State’s use of the symbol apparently has not made much progress.<sup>191</sup> Despite these setbacks, however, the Zia have found much success negotiating informally with both state and local governments, especially in recent years.

For instance, in 2008, when the state of New Mexico sought to create a new state quarter, it elicited the tribe’s cooperation early on. Like the Southwest and New Mexico Bowl executives, state officials approached the tribe to ask for permission to use the symbol in the design. The tribe “told them it would be okay.”<sup>192</sup> According to Arif Kahn, administrator for the New Mexico Coin Commission, Pueblo leaders had “no problems with something that’s honoring New Mexico and puts us out there to the whole country.”<sup>193</sup> But Peter Pino made clear that the tribe would still be “asking for some kind of monetary settlement” to help with “the healing process.”<sup>194</sup> Just as he suggested at the hearings, Pino indicated that the state, like commercial entities, should compensate the Pueblo for using the symbol.<sup>195</sup> Although it is unclear whether the state has actually provided the Zia with payment in exchange for using the symbol on the state quarter, the very fact that the state asked the tribe for permission marks an important step in the right direction.

Furthermore, the tribe has negotiated with governmental entities in exchange for political sway. In 2007, the citizens of the city of Santa Fe voted on designs for the official logo of a

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> See Exec. Order No. 2003-31, *available at* [http://www.governor.state.nm.us/orders/2003/EO\\_2003\\_031.pdf](http://www.governor.state.nm.us/orders/2003/EO_2003_031.pdf); Brown, *supra* note 27. (“Gov. Bill Richardson has been supportive of the pueblo’s request for compensation . . . and began a task force on the issue during his first term. But the task force hasn’t met for more than a year . . . [T]here are no current negotiations. . .”).

<sup>192</sup> Raitz, *supra* note 33 (internal quotation marks omitted).

<sup>193</sup> Sue Major Holmes, *Ceremony To Mark Release of State’s Quarter*, SANTA FE NEW MEXICAN, Mar. 25, 2008, <http://www.santafenewmexican.com/Local%20News/Ceremony-to-mark-release-of-state-s-quarter> (internal quotation marks omitted).

<sup>194</sup> Raitz, *supra* note 33 (internal quotation marks omitted).

<sup>195</sup> See *supra* Section III.C.



three-year commemoration for the city's 400th anniversary.<sup>196</sup> They voted on a design containing the Zia sun symbol. After the vote, the anniversary committee chairman, Maurice Bonal, approached the tribe to ask their permission to use the symbol. Although Bonal expressed to the *Albuquerque Journal* that he understood he had no legal obligation to get the tribe's permission, he asked out of "respect for the Pueblo Indians."<sup>197</sup> He made clear, moreover, that the committee would change the logo if the tribe disapproved.<sup>198</sup> The committee had already negotiated with the tribe in planning the event.<sup>199</sup> Pueblo representatives asked that the commemoration include "historic accounts that represent [the tribe's] perspectives, and for a generally dignified, respectful approach" and requested that the city sponsor a race from Tesuque to Santa Fe commemorating the Pueblo Revolt of 1680.<sup>200</sup>

In response to Bonal's inquiry about the commemoration logo, the tribe agreed once again. But this time they asked for "some political help in return."<sup>201</sup> In exchange for allowing the city to use the symbol, the tribe "request[ed] that the city of Santa Fe assist the pueblo in dealings with the state regarding the sun symbol."<sup>202</sup> Although Pino said that the tribe did not have specific dealings in mind, it is likely that the tribe still hopes to get reparations from the state for using the symbol in the New Mexico flag. Given the successful negotiations discussed in this Part, it certainly seems possible that the tribe will one day obtain the reparations from the state that it seeks.<sup>203</sup>

### C. *The Power of Non-Legal Measures*

The Zia essentially have set up an informal licensing system whereby commercial and governmental entities seek the tribe's permission to use the symbol, and the tribe benefits in return. This non-legal system was made possible by the tribe's earlier non-legal efforts, and it addresses the harms incurred by the tribe in ways that trademark law never could. Through its negotiations, the tribe gets a say in who uses its sacred symbol and in how the symbol is used, giving the tribe an important sense of control over the meanings imparted by outsiders' cultural appropriation. When entities ask the tribe for permission, they acknowledge that it is the tribe—and not the state, nor any other entity—that created and thus has the fundamental rights to the symbol. The tribe also obtains various other benefits—including donations to its scholarship fund, positive publicity, and political sway—which trademark law never could yield.

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<sup>196</sup> David Collins, *Zia Favored for City's 400th-Year Logo Design*, SANTA FE NEW MEXICAN, Dec. 16, 2007, [http://www.santafenewmexican.com/Local%20News/Zia\\_favored\\_for\\_city\\_s\\_400th\\_year\\_logo\\_design](http://www.santafenewmexican.com/Local%20News/Zia_favored_for_city_s_400th_year_logo_design). The city collected a vote by asking Santa Fe utility customers to pick one of four designs, which the committee had winnowed down from 71 entries. *See id.*

<sup>197</sup> Dan Boyd, *City Gets Permission To Use Zia Symbol*, ALBUQUERQUE J., Feb. 20, 2008, [http://www.abqjournal.com/north/286739north\\_news02-20-08.htm](http://www.abqjournal.com/north/286739north_news02-20-08.htm) (internal quotation marks omitted) ("Though the city wasn't required to request permission, Maurice Bonal, chairman of the city's 400th anniversary committee, said Santa Feans would have been asked to choose a different logo if Zia Pueblo leaders had denied the city's request.").

<sup>198</sup> *Id.* ("I have a lot of respect for the Pueblo Indians," Bonal said. "If (the granting of permission) wouldn't have happened, we would have gone down the line.")

<sup>199</sup> Collins, *supra* note 196.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *See supra* notes 117-120 and accompanying text for a discussion of the tribe's earlier attempts to get reparations from the state.

Likewise, commercial entities and the state benefit from partaking in these negotiations. Each deal that the tribe negotiates creates important symbolic precedent. When a commercial entity sees that others have successfully earned the tribe's permission to use the symbol, that entity is more likely to ask for permission to use the symbol as well. If it chooses not to ask, the company risks appearing disrespectful, which might negatively affect its reputation. On the other hand, asking for permission shows that the company respects Native American cultural rights, which could create positive publicity for the company. The tribe's dealings with Coulston International and American Frontier, discussed earlier in this Article,<sup>204</sup> indicate that commercial entities are indeed highly susceptible to this sort of social and political pressure. Moreover, state leaders in New Mexico certainly have reputational incentives to cooperate with the tribe. New Mexico is home to many Native American tribes, and by cooperating with the Zia, the state thereby shows its respect for many of its residents.<sup>205</sup>

This result—that both the Zia and outside entities benefit from working together informally—is made even more robust by the tribe's educational outreach efforts. In the past decade, the tribe has set out to educate the public on the history and meaning of its sacred symbol. For example, in 2007, assistant tribal administrator Ken Lucero presented a lecture at the University of New Mexico.<sup>206</sup> He told attendees that outsiders' uses of the Zia sun symbol would be equivalent to, for example, a commercial entity using pictures of Our Lady Guadalupe, a symbol of Catholicism.<sup>207</sup> "It's respectful to ask before you use it," he explained.<sup>208</sup> His presentation also included a showing of an educational film produced by the Pueblo, *The Pueblo of Zia: Home of the Sun Symbol*.<sup>209</sup>

These educational efforts serve several important functions. By educating the public, the Zia continue to inform outsiders that they should ask for permission before using the symbol. The Zia also are able to impart their version of the history and meaning of the symbol, which in turn gives the tribe a sense of control over the meanings that attach to displays of the symbol even when outsiders use it. Finally, the Zia reinforce the social and political pressure created by their earlier efforts, making commercial entities and the state even more likely to seek cooperation with the tribe before using the symbol.

It is important to note that the deals described in this Part involve particularly cooperative parties. The companies and governmental entities described herein undoubtedly respect the Zia people and seek to use their logo for honorable purposes. It is entirely possible that some entities would choose not to follow this path and approach the tribe in this way; indeed, they are under no legal obligation to do so. Moreover, even if certain kinds of companies asked for permission,

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<sup>204</sup> See *supra* Sections II.B and III.A.

<sup>205</sup> For a complete list, see *Native American Indian Tribes: Federally Recognized Tribes*, <http://www.healing-arts.org/tribes.htm> (last visited Jan. 23, 2012).

<sup>206</sup> Brown, *supra* note 27.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* (internal quotation marks omitted).

<sup>209</sup> *Id.*

the tribe might simply reply “no.”<sup>210</sup> In that case, the company could still go ahead and use the symbol, and the Zia would have no recourse.<sup>211</sup> At this point, it is hard to say just how often parties seek the tribe’s permission versus how often they use the symbol. Nevertheless, the informal system described in this Part represents a promising development for the Zia and other indigenous groups.<sup>212</sup>

## Conclusion

This Article has shown that the fight to protect sacred symbols is complicated. Over the past twenty years, members of the Zia tribe have seen both successes and failures in their fight to protect their sacred sun symbol. What is most striking about the Zia story is that non-legal measures—including political lobbying, educational initiatives, and informal negotiations—have proven far more effective than have the tools provided by trademark law.

As this Article demonstrated, the Zia attempted to control outsiders’ uses of their symbol twice during the 1990s by using Section 2(a) of the Lanham Act. In both cases, the Zia succeeded at stopping commercial entities from obtaining registered trademarks containing the symbol. However, they did not succeed thanks to trademark law; rather, they succeeded by exerting social and political pressure. Those attempts were symbolically important, but also costly, and they resulted in no helpful legal precedent. The Albuquerque Hearings further revealed that trademark law as it stands can at most provide an incomplete solution for the harms incurred by tribes like the Zia. Even an improved version of trademark law would not provide the Zia with complete control over their symbol, nor would it provide them with monetary benefits from outsiders’ uses of their symbol.

This is not to say that our current trademark regime is entirely ineffective. To the contrary, for indigenous groups that can afford to use the legal system, it may indeed be one useful option. The Zia story shows, moreover, that indigenous groups can use legal processes in order to publicize their cause and to attract political allies, which in turn may help these groups find solutions outside of the legal arena. In addition, it is entirely possible that a more complete legal solution exists for the harms incurred by groups like the Zia. Amending Section 2(a) of the Lanham Act to include tribal insignia represents one possibility, though it may not be the best or only one.<sup>213</sup> Certainly, the federal government should continue to consider modifying trademark law and other intellectual property laws in order to protect more fully sacred symbols and Native American cultural rights more generally.

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<sup>210</sup> For instance, if a portable toilet company were to approach the tribe, it seems unlikely that the tribe would give that company permission. The tribe repeatedly has used the portable toilet company as an example of a particularly offensive and disparaging use of the sun symbol. *See generally* Albuquerque Hearings, *supra* note 17.

<sup>211</sup> If the company tried to register a trademark containing the symbol, the tribe could attempt to block registration. *See supra* Section II.C.

<sup>212</sup> Of course, many tribes might not be comfortable with negotiating these sorts of arrangements for a variety of reasons. This Article does not mean to suggest that this exact system would work well for all indigenous groups; it simply points out the option of taking creative, non-legal approaches that are appropriate for a given tribe’s individual scenario.

<sup>213</sup> *See supra* Section III.C for some of the problems with this potential solution. For scholars advocating for other amendments to intellectual property laws, see *supra* note 8.

Even as trademark law is an imperfect solution, the case of the Zia demonstrates that non-legal measures can fill the gaps left by the law and play a significant role in protecting sacred symbols. The Zia repeatedly have turned to non-legal approaches over the past twenty years: they have educated the USPTO, demanded reparations from the state of New Mexico, attracted political allies, and pressed the federal government to fashion a new legal remedy. The Zia have not always achieved the results they sought, but their efforts did lay the foundation for the creative and effective system that the tribe uses today. By negotiating informally with commercial and governmental entities, the tribe attains benefits—including donations to its scholarship fund, positive publicity, and political sway—that it never could find through trademark law.

The case of the Zia undoubtedly is unique and cannot speak to the needs of every indigenous group. Still, it strongly suggests that, in the current climate, indigenous groups should take similar approaches in the fight to protect their cultural resources. Indeed, these groups can go even further than the Zia have in employing non-legal tools. The possibilities are endless: “protests, lobbying for legislation, and other methods of political pressure” are just a few.<sup>214</sup> This lesson might prove most helpful for tribes facing situations like that of the Zia—that is, for those seeking specifically to protect their sacred symbols. But those whose claims might fall within the scope of trademark law at all—for example, groups seeking to protect their tribal names—should heed this lesson as well. More generally, indigenous groups who might turn to other intellectual property laws, including copyright and patent, to protect their cultural property should consider looking to non-legal approaches in addition or instead. For ultimately, the case of the Zia demonstrates that non-legal measures may be the most effective tools of all.

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<sup>214</sup> Hughey, *supra* note 10, at 366.