

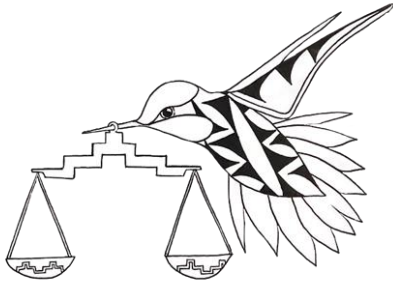
**AILC PLSI Homecoming**  
November 7-8, 2024, at Tamaya Resort



# Indigenizing Intellectual Property

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Presented by Samantha Wauls, Carrie  
Frias, and Sherri Thomas



# Overview



**CONTEXTUALIZING  
INTELLECTUAL PROPERTY  
ISSUES & CHALLENGES  
WITH FEDERAL IP LAW**



**BASICS OF  
INTELLECTUAL  
PROPERTY**



**CASE STUDIES OF  
IP MISUSE**



**SUCCESSFUL  
COLLABORATIONS**



**TRIBAL IP  
LEGISLATION**





***“The theft of culture is part of the one-way transfer of property from indigenous to non-indigenous hands seen in colonies and settler states around the world—it includes not only the taking of land, natural resources, [and] personal property, but even the heritage of indigenous peoples and their identities, plucking them as clean as a Safeway chicken ... Securing adequate intellectual property protections for the cultural rights of Native American artists and tribal governments remain central to the recognition of their human rights within American society without protecting Indigenous cultural rights, the final phase of colonialism will proceed unabated.”***

**- Walter Echohawk**





# Indigenous Intellectual Property

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Communal preservation of cultural and intellectual property

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Intangible property

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Not separated out from other types of property or law

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Connected

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Traditional Cultural Knowledge

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Ceremonies

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Traditional Medicines

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# Federal Law and Examples of Challenges

## USPTO

- Tribal insignia database and Letter of Protest

## Indian Arts and Crafts Act (IACA)

- Unlawful to offer or display for sale, sell any part of craft product in a manner that falsely suggests it is Indian produced, Indian product, or particular Tribe

## Native American Graves Protection and Repatriation Act (NAGPRA)

- Protection, return, and repatriation of remains and artifacts on federal or Tribal lands





# Basics of Intellectual Property



Copyright



Trademarks



Patents



Registering your IP ensures legal ownership and deters/prevents theft.





# What is Copyright?



Copyright - U.S. Constitution, Art. I, § 8, cl. 8:



“To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;”



Copyright Clause Aliases

Copyright and Patent Clause  
Intellectual Property Clause





## For limited time?

- "In general, for works created on or after January 1, 1978, the term of copyright is the life of the author plus seventy years after the author's death. If the work is a joint work with multiple authors, the term lasts for seventy years after the last surviving author's death. For works made for hire and anonymous or pseudonymous works, the duration of copyright is 95 years from publication or 120 years from creation, whichever is shorter." - "Copyright Basics", Circular 1, <https://copyright.gov/circs/circ01.pdf>
- Before that time...It's complicated.



## Works Created Before 1977 and Published Between 1978 and 2002

Publication  
was key.

Author Died in	Copyright Expires in	Explanation
1970 or earlier	2047	E
1971	2047	E
1972	2047	E
1973	2047	E
1974	2047	E
1975	2047	E
1976	2047	E
1977	2047	E
1978	2048	F
1979	2049	F
1980	2050	F
...	[70 Years After Author's Death]	F

Graphs from Textbook: COPYRIGHT: A CONTEMPORARY APPROACH, 2ND ED. (2018) by Robert Brauneis and Roger E. Schecter, pp. 740-744.

Note that these tables do not include duration information for works made for hire, anonymous works, pseudonymous works, and works published outside the United States.



Copyright  
Requirements 17 USC  
§ 102(a) - “copyright  
subsists . . . in  
original works of  
authorship, fixed in a  
tangible medium of  
expression . . . .”

Must be original work

Fixation

Statutory Sections: §§ [101](#) and  
[102\(a\)](#)

Tangible Medium

Ability to perceive, reproduce or  
communicate





# Examples



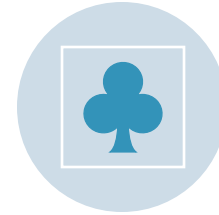
SCULPTURE



PHOTOGRAPHS



PICTURES



GRAPHICS



FABRIC  
DESIGNS/PATTERNS  
BUT NOT CLOTHES



BLOG POSTS





# Social Norms and Piracy







# Common Law and Copyright



Uncodified in statutes:



Infringement Test – “substantial similarity”



Pre-1976 – “Fair Use”



[Restatement on Copyright](#)

Do we really need a Restatement for such a well-defined area of law? Read the article from [Above the Law](#).





# Available Remedies in Copyright Law

Actual Damages and Profits

Statutory Damages

Attorney's Fees

Permanent Equitable Remedies and Provisional Relief

Criminal Enforcement



# Copyright Infringement Test

Ownership of a valid copyright

**AND**

Copying of constituent elements of the work that are original (copyright protected).

- Actual, unauthorized copying must be proved AND
- Must prove that the elements are substantially similar to the protected work.

**OR**

“Improper and Unlawful Appropriation”

- Copied elements were protected
- More than “de minimis”
  - Reasonable Person test





# Copyright Infringement vs. Plagiarism

How are they the  
same?

How are they  
different?



# If not the Copyright Clause to Regulate at the Federal Level:

Commerce Clause - U.S. Constitution, Art. I, §  
8, cl. 3:

**“To regulate commerce with  
foreign nations, and among  
the several states, and with  
the Indian tribes;”**

First Amendment:

**Congress shall make no law respecting  
an establishment of religion or  
prohibiting the free exercise thereof; or  
abridging the freedom of speech, or of  
the press; or the right of the people  
peaceably to assemble, and to petition  
the Government for a redress of  
grievances.**







# Copyright

1

Attaches at  
initial fixation

2

Register/record  
your Copyright!

3

Monitor for  
infringement

4

Enforce your  
rights

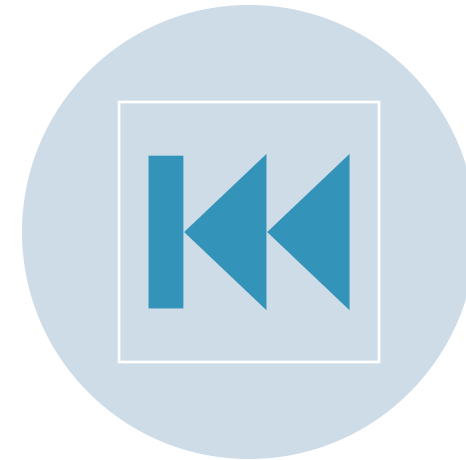




# Copyright



A COPYRIGHT PROTECTS THE ORIGINAL WORK OF AN AUTHOR, INCLUDING LITERARY, MUSICAL, AND ARTISTIC CREATIONS.



USE THE © SYMBOL TO INDICATE OWNERSHIP.





# What is a Trademark?

Typically protects slogans, brand names and logos used on goods and services. Can be a sound, color or smell.

- Legal definition:
  - Any word, slogan, symbol, design or combination of these that:
  - Identifies the source of your goods and services
    - AND
  - Distinguishes them from the goods and services from another party.

Used to tell products and services apart.





# Lanham Act (Trademark Act)



Allows for “any word, name, symbol, or device” to be registered by that mark’s owner

Must have a bonafide right to its use

Intend to use it in commerce.



Violations:

Infringement

Dilution

Unfair competition

False advertising





# Trademark is Different from:

Business Name – Name you operate your business name

Domain Name – Internet address

- Some protection from fakes

Can overlap

- Nike
- Nike.com





# Trademark

1

Register your trademark

2

Monitor for infringement

3

Enforce your rights

4

Use it consistently to protect your brand identity and reputation.





# What is a Patent?

A patent is a property right granted by the Government of the United States of America to an inventor "to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States" for a limited time in exchange for public disclosure of the invention when the patent is granted.

<https://www.uspto.gov/help/patent-help#1930>



# What Can Be Patented: Utility



**New (novel), nonobvious and useful**

Process

Machine

Article of manufacture

- Ornamental design of an article of manufacture can have a separate patent from the article of manufacture

Composition of matter

Improvement of any of the above

**Also:**

Asexually reproduced plant varieties by design and plant patents.

<https://www.uspto.gov/help/patent-help#1902>





# Invention must also be:

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Novel

---

Nonobvious

---

Adequately described or enabled (for one of ordinary skill in the art to make and use the invention)

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Claimed by the inventor in clear and definite terms

<https://www.uspto.gov/help/patent-help#1902>





# What Cannot be Patented

Laws of nature

Physical phenomena

Abstract ideas

Literary, dramatic, musical, and artistic works (protected through Copyright).

Non-utilitarian inventions

Any inventions that are offensive to public morality

<https://www.uspto.gov/help/patent-help#1902>





# Patent

1

Create your  
utilitarian design

2

Search for  
similar  
designs/make  
the differences  
clear

3

Apply for patent

4

Monitor and  
enforce your  
rights





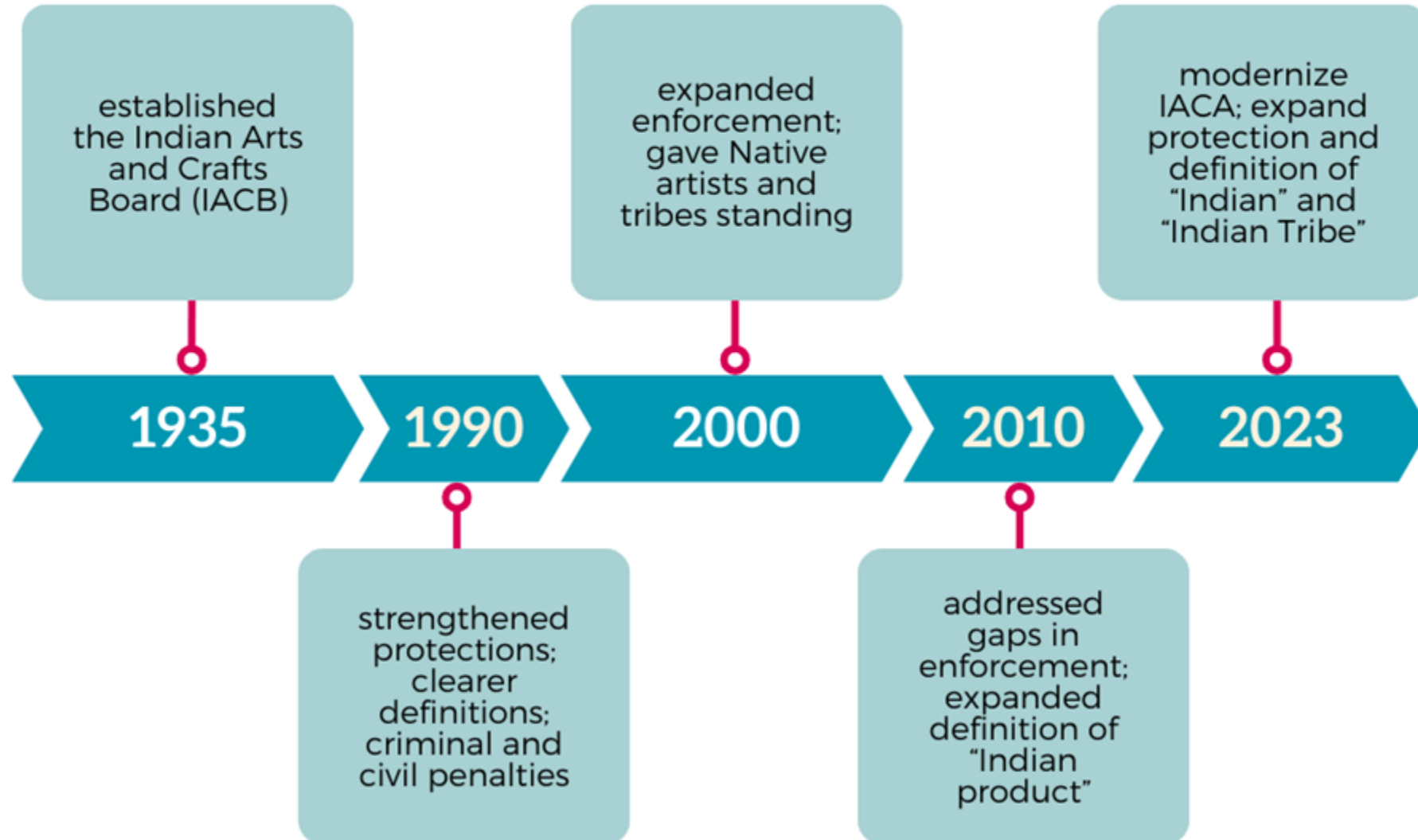
Disney



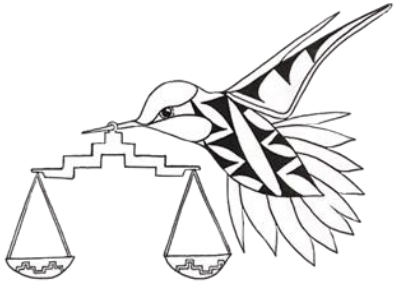


# Indian Arts & Crafts Act

a truth-in-marketing law that prohibits misrepresentation in the marketing of Indian art and craftwork within the United States







# Key Provisions of the Act

18 USC § 1159. Misrepresentation of Indian produced goods and products

25 USC § 305d. Criminal proceedings; civil actions

25 USC § 305e. Cause of action for misrepresentation of Indian produced goods

25 CFR 309 - Protection of Indian Arts and Crafts Products



**Amendments  
to Respect  
Traditional  
Indigenous  
Skill and  
Talent Act  
(ARTIST) of  
2023**

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Expands protections and enforcement

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Provide protection for Native Hawaiian artisans

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Disposes arts and crafts determined to be in violation of IACA

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Create a forfeiture fund



# **Amendments to Respect Traditional Indigenous Skill and Talent Act (ARTIST) of 2023**

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Requires permanent country of origin labeling for all non-Native products

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Updates the definitions section (replaces Indian with Native/Native American throughout)

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Expands the duties of the IACB (annual reports and feasibility study)



**Indian Arts  
and Crafts  
Board  
Regulations  
Consultation  
Draft - 25  
C.F.R. Chapter  
II (2023)**

Expands the definition of  
“Indian,” “Indian Product,”  
and “Indian tribe”

Allows for non-Indian labor to  
work on Indian Products in  
certain situations

Uses a new certification  
trademark to certify that an  
item is an Indian Product



The Zia Symbol

# Important Cases



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<https://www.ziapueblo.org/>

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<https://www.ip-watch.org/2018/12/11/indigenous-knowledge-misappropriation-case-zia-sun-symbol-explained-wipo/>

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<https://www.ziapueblo.co/pages/history-of-the-zia-sun-symbol>





# Important Cases

Navajo v. Urban Outfitters



Title Unknown Techno Navajo  
Quilt Oversized Crop Tee  
\$29.00

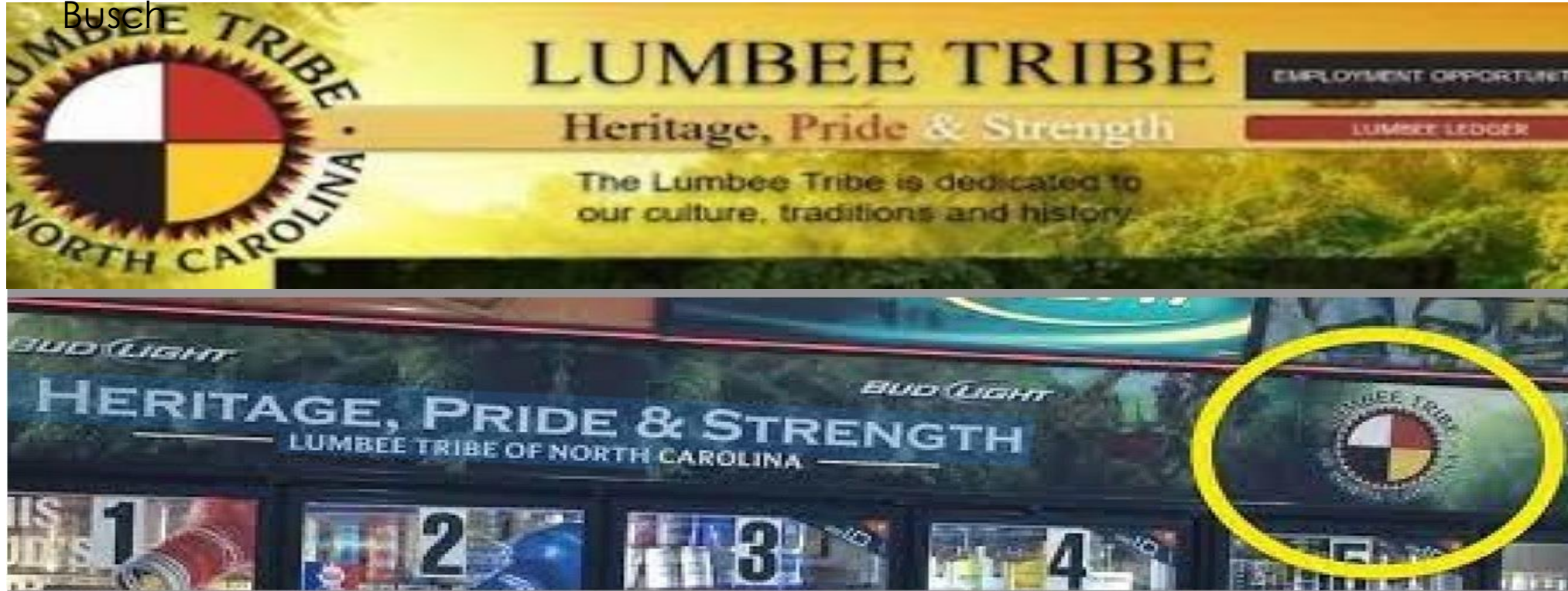
Navajo  
Flask  
\$18.00







Lumbee Tribe of North Carolina v. Anheuser-Busch





Pro Football v. Harjo (2005); Blackhorse v. Pro Football (2015); Matel v. Tam (2017-Supreme Court)







<https://www.uspto.gov/trademarks/laws/native-american-tribal-insignia>

# Tribal Insignia Database

An official website of the United States government [Here's how you know](#) ▾

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[Home](#) > [Trademarks](#) > [Laws](#) > Native American tribal insignia

## Laws & Regulations

[Fastener Quality Act \(FQA\)](#)

**[Native American Tribal Insignia](#)**

[Rule Making](#)

## Native American tribal insignia

Tribal insignias represent a long and cherished history of spiritual and cultural beliefs within American Indian and Alaska Native tribes (Native American). Our database aims to protect these cultural properties by helping us determine if trademarks in pending applications falsely suggest connections to the tribal insignia of Native American tribes.

The tribal insignia database is a component of the trademark database maintained by the United States Patent and Trademark Office (USPTO).






153 results for nonRegistration:"Native American Tribal Insignia"

Grid, List, and Equal icons

Export ▾

Wordmark [GREAT SEAL OF THE TOLOWA DEE-NI' NATION](#)

Serial 89003036 Status **LIVE** PENDING Class 001 002 003 004 005  
006 007 008 009 010 011  
012 013 014 015 016 017  
018 019 020 021 022 023  
024 025 026 027 028  
029 030 031 032 033  
034 035 036 037 038  
039 040 041 042 043  
044 045 200 A B



Goods & services


Owners Tolowa Dee-ni' Nation (FEDERALLY RECOGNIZED NATIVE AMERICAN TRIBE; USA)


Feedback


Wordmark [NORTHERN ARAPAHO TRIBE](#)

Serial 89001052 Status **LIVE** PENDING

Class 001 002 003 004 005  
006 007 008 009 010 011  
024 025 026 027 028



 Need help? Ask the  
USPTO [Virtual Assistant!](#)





# Collaborations



## NEW THUNDERBIRD "ANIMIKII" SLIPPERS

An Iconic Combo Designed by Anishinaabe Artist Lucie Skjeffe

SHOP NOW



# Tribal Codes

Northern Arapaho

- Protects ability to participate in traditional ceremonies

Pueblo of Tesuque

- Prohibitions against disclosure of sacred and secret cultural practices

Sisseton-Wahpeton Oyate's  
Cultural Resource Protection Act

- Detailed set of guidelines and restrictions to promote and protect the intangible knowledge of the tribe

Menominee

- Collective vs. Individual Knowledge

Pascua Yaqui

- Definition of Traditional Indigenous Intellectual Property





# IP Protections Can be Used Individually or Together



Trademark

Brand for goods and services – If used, can keep forever



Patent

Protects inventions – Limited in time



Copyright

Protects artistic and literary works – Limited in time, length depends on when created



# International Movements in IP and Indigenous People



Involvement of North American Indigenous People and Impact on Indigenous People Internationally

Declaration of Indigenous Peoples Rights -

<https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples>

World Intellectual Property Organization – Traditional Knowledge -

<https://www.wipo.int/tk/en/>

National Native American Bar Association – Committee on Intellectual and Cultural Property - <https://www.nativeamericanbar.org/icpcommittee/>







Remember to  
use your  
resources!



United States Copyright  
Office -

<https://www.copyright.gov/>



United States Patent  
and Trademark Office -

<https://www.uspto.gov/>



ARTIST Act Listening  
Session

<https://www.indian.senate.gov/hearings/listening-session-artist-act-updating-indian-arts-and-crafts-act/>



Kawerak Comment  
Letter -

<https://kawerak.org/kawerak-comments-regarding-the-artist-act-of-2023-and-proposed-amendments-to-the-indian-arts-and-crafts-board-regulations/>



Article -

<https://hyperallergic.com/844713/native-artists-fear-proposed-changes-to-indian-arts-and-crafts-act/>



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CLE materials and information at



[Ailc-inc.org/events/homecoming/](https://ailc-inc.org/events/homecoming/)