

(1) THE DEFINITION OF “OFFICIAL INSIGNIA”

For example, how should the PTO define “official insignia” of a federally or state recognized Native American Tribe?

RESPONSE: A DATE CERTAIN SHOULD BE SET BY WHICH “OFFICIAL INSIGNIA” SHOULD BE SUBMITTED TO A RECOGNIZED NEUTRAL AUTHORITY. THIS AUTHORITY SHOULD THEN DETERMINE WHETHER THE INSIGNIA IS OFFICIAL. THE TRADEMARK OFFICE COULD BE THIS AUTHORITY. ANOTHER OPTION WOULD BE TO DEFER THIS TASK TO A RECOGNIZED MUSEUM ON INDIAN HISTORY. A FEE COULD BE ASSESSED TO THE TRIBE FOR THIS LISTING TO COVER THE ACTUAL COST TO THE GOVERNMENT OF THE PROCESS.

(2) ESTABLISHING AND MAINTAINING A LIST OF OFFICIAL INSIGNIA

For example, how might the PTO establish a list of the official insignia of federally and/or state recognized Native American Tribes? How might the PTO maintain such a list?

RESPONSE: COMMISSION A RECOGNIZED MUSEUM OR UNIVERSITY TO PREPARE SUCH A LIST. FOR EXAMPLE THE BUFFALO BILL HISTORICAL CENTER IN CODY WYOMING COMES TO MIND. THE SMITHSONIAN INSTITUTE ALSO COMES TO MIND.

(3) IMPACT OF CHANGES IN CURRENT LAW OR POLICY

For example, how might any change in law or policy with respect to prohibiting the Federal registration of trademarks identical to the official insignia of Native American Tribes, or of prohibiting any new use of the official insignia of Native American Tribes, affect Native American Tribes? How might such changes affect trademark owners? How might such changes affect the Patent and Trademark Office? How would such changes affect any other interested party? What impact might any such changes have on the international legal obligations of the United States?

RESPONSE: IT WOULD ASSIST TRIBES AND HARM THOSE WHO ARE PROHIBITED FROM FURTHER USE OF INSIGNIA THEY ARE ALREADY USING. THIS IS TO BE EXPECTED. THE EFFECT ON INTERNATIONAL LEGAL OBLIGATIONS WOULD BE MINOR, I THINK, IN VIEW OF THE SIMILAR PROTECTION OF NATIVE INSIGNIAS BY OTHER COUNTRIES. IF LONGSTANDING USES WERE GRANDFATHERED TO CONTINUE, THE CONFLICTS WITH EXISTING OBLIGATIONS SHOULD BE MINIMAL.

(4) IMPACT OF PROHIBITION ON FEDERAL REGISTRATION AND NEW USES OF

Official Insignia

For example, how might prohibiting Federal registration of trademarks identical to the official insignia of Native American Tribes affect any/all of the above-mentioned entities? How might prohibiting any new use of the official insignia of Native American Tribes affect any/all of the above-mentioned entities? What effect might such prohibitions have on the international legal obligations of the United States? What defenses, including fair use, might be raised against any claims of infringement?

RESPONSE: PROVIDED THE PROHIBITIONS ARE SUBSTANTIALLY CURRENT IN NATURE

AND NOT RETROACTIVE, THE EFFECTS SHOULD BE SLIGHT

(5) ADMINISTRATIVE FEASIBILITY

For example, what might be the administrative feasibility, including the cost, of changing the current law or policy to prohibit the registration? What might be the administrative feasibility, including the cost, of prohibiting any new uses of the official insignia of State or federally recognized Native American Tribes? What might be the administrative feasibility, including the cost, of otherwise providing additional protection to the official insignia of federally and State recognized Native American Tribes?

RESPONSE: THIS IS AN INTERNAL MATTER FOR THE USPTO TO DETERMINE. THE COST WOULD SEEM TO BE PRIMARILY THAT OF ESTABLISHING THE INITIAL LIST AND THEN MAINTAINING THE LIST OF OFFICIAL INSIGNIA. THAT SHOULD BE A MINOR EXPENSE INVOLVING ONE OR TWO EMPLOYEES OF THE USPTO AT MOST.

(6) TIMING OF CHANGES IN PROTECTION

For example, should changes in the scope of protection for official tribal insignia be offered prospectively? Retrospectively? What might be the impact of such protection (e.g., the cost to business and the public if applied retroactively)?

RESPONSE: YES.

(7) STATUTORY CHANGES

What statutory changes might be necessary in order to provide such protection?

RESPONSE: JUST A SIMPLE ADDITIONAL TO THE GROUNDS FOR REJECTION OF A TRADEMARK APPLICATION AND A SPECIFIC ADDITION TO SECTION

43 OF THE ACT TO MAKE USE OF AN OFFICIAL INSIGNIA A FALSE DESIGNATION.

(8) OTHER RELEVANT FACTORS

What other factors, not mentioned above, might be relevant to this issue?

RESPONSE: THIS IS A CHANGE WHICH IS OVERDUE. THE TRIBES SHOULD BE ABLE TO PRESERVE THEIR INSIGNIAS FOR THEIR OWN EXCLUSIVE USE. THERE SHOULD BE LITTLE PROBLEM FOR GRAPHIC ARTISTS TO COME UP WITH ALTERNATIVE INSIGNIA THAT ARE NOT OFFICIAL.

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