

## **A NOTE ON NAVAJO NATION v. URBAN OUTFITTERS, INC.**

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### *Introduction*

Trademarks and the laws protecting them are vital to a functioning marketplace and can provide great value to all actors within the marketplace. For the sellers, trademarks can accumulate goodwill, and this allows sellers to benefit from previous products or services sold under their trademark. For the buyers or consumers, it allows for efficiency in purchasing decisions by enabling them to, for example, avoid brands they have had bad experiences with and seek and purchase from brands they trust without having to inspect and read every aspect of a container or package prior to making a decision simply by looking at a trademark. Under certain conditions, the trademark can convey extensive information about the source of the good and other aspects of it with minimal effort to both the seller and buyer. A world where sellers can copy or colorably imitate another seller's trademarks and confuse consumers or diminish the goodwill accumulated by them, benefits only the corrupt or unmindful. Thus, trademark law is needed to enforce these marks for the benefit of all good-faith actors in the marketplace.

This Note discusses trademark law and its relation to American Indian trademarks. This includes federal efforts to protect these marks and avoid consumer confusion, such as the Indian Arts and Crafts Act, and how federal trademark law and other federal efforts are applied to an American Indian tribe policing a mark on the Principal Register as displayed in *Navajo Nation v. Urban Outfitters, Inc.* Part I provides relevant trademark law framework, including Principal Registration requirements and its effects, infringement and dilution claims, available remedies for multiple causes of action, and relevant defenses asserted by the defendant. Part II examines the case and discusses its holdings. In closing, Part III analyzes the settlement between the parties and its implications. This Note will at times focus on trademark law as it applies to trademarks on the Principal Register and may omit nuances of trademark law that are not directly applicable to the present case.

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### *I. Trademark Law Background*

In 1946, Congress passed the Lanham Act,<sup>1</sup> which was designed in part “to prevent fraud and deception in . . . commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks.”<sup>2</sup> Congress derives its power to regulate trademarks from the Commerce Clause of the Constitution.<sup>3</sup> Since its enactment, the Supreme Court has ruled on a variety of Lanham Act trademark issues,<sup>4</sup> but much has been left to be interpreted by United States district courts.

In general, a trademark serves “to identify the source of one seller’s goods and distinguish that source from other sources.”<sup>5</sup> This source-identifier can come in the form of “any word, name, symbol, or device or any combination of these.”<sup>6</sup> There are two ways in which a trademark may acquire protectable rights in the United States. The first way is to acquire common law rights which arise through use in commerce. The second way is registered rights through a registration process with the United States Patent and Trademark Office.

#### *A. Principal Register*

For a mark to be eligible to be on the Principal Register, the mark must be distinctive,<sup>7</sup> the applicant must *believe they* own the mark, and the mark must be in use in commerce<sup>8</sup> or the applicant must have a bona fide intent to use the mark in commerce.<sup>9</sup> If the application is successful, “[e]ach registration shall remain in force for 10 years . . . .”<sup>10</sup> However, assuming continued use in commerce, payment of fees, and accordance with relevant procedures, a trademark may exist on the Principal Register in perpetuity. There are extensive benefits to registering a trademark on the Principal Register. This includes a legal presumption that the registered mark is valid.<sup>11</sup> For registered marks, “the presumptive validity of the mark is limited to the goods or

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1. 15 U.S.C. §§ 1051-1141n.

2. *Id.* § 1127.

3. U.S. CONST. art. I, § 8, cl. 3.

4. *See, e.g.*, Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205 (2000); Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992).

5. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:1 (5th ed. 2022), Westlaw MCCARTHY § 3:1.

6. 15 U.S.C. § 1127.

7. *Id.* § 1052.

8. *Id.* § 1051(a)(3)(A), (C).

9. *Id.* § 1051(b)(1).

10. *Id.* § 1058.

11. *Id.* § 1057(b).

services specified in the registration, [but] the test of infringement is not so limited.”<sup>12</sup> Additionally, principal registration provides “constructive notice” that the mark is owned by the registrant.<sup>13</sup> Constructive notice provides the owner of the registered trademark with priority in the trademark over anyone in the nation.<sup>14</sup>

In addition to presumed validity and constructive notice, a trademark on the Principal Register also has the potential to become incontestable.<sup>15</sup> In general, a registered trademark is subject to cancellation within its first five years from the point of issuance, but after “continuous use for five consecutive years subsequent to the date of such registration and [if the mark] is still in use in commerce, [the mark] shall be incontestable” if other conditions are met.<sup>16</sup> Incontestable status of a mark limits the types of cancellation challenges that may be brought. Specifically, incontestable trademarks can still be cancelled on the ground that it is a generic mark<sup>17</sup> or it can be cancelled if the trademark has been abandoned,<sup>18</sup> among others.

#### *B. Distinctiveness of Word Marks*

A distinctive mark is one that “distinguish[e]s from the goods of others.”<sup>19</sup> For word marks, a common way to determine distinctiveness is to classify the mark on a spectrum, as famously demonstrated in *Abercrombie & Fitch Co. v. Hunting World, Inc.*<sup>20</sup> On this spectrum of distinctiveness, there are four possible categories for a word mark to fall under: fanciful or arbitrary, suggestive, descriptive, or generic.

Starting with the generic category, a “generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species.”<sup>21</sup> For example, a mark consisting of the word “apples” on a bag of apples would be generic because it is simply describing the genus of the product. A generic mark cannot be protected or registered.<sup>22</sup> A mark may be generic at its inception, like the apples example. Alternatively, a registered mark may become generic through “genericide.” Genericide

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12. 4 MCCARTHY, *supra* note 5, § 23:76, Westlaw MCCARTHY § 23:76.

13. 15 U.S.C. § 1057(c).

14. *Id.*

15. *Id.* § 1065.

16. *Id.*

17. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985).

18. 15 U.S.C. § 1064(3).

19. *Id.* § 1052.

20. 537 F.2d 4 (2d Cir. 1976).

21. *Id.* at 9.

22. 15 U.S.C. § 1065(4).

occurs when a trademarked term becomes generic because the mark is “primarily understood by the consuming public as referring, to a product category.”<sup>23</sup>

Another category on the spectrum is for marks that are merely descriptive. Word marks that are merely descriptive “convey[] an immediate idea of the ingredients, qualities or characteristics of the goods,”<sup>24</sup> “such as its color, odor, function, dimensions, or ingredients.”<sup>25</sup> Geographically descriptive terms also fall in this category. Marks that are descriptive may be protectable, but only upon a showing of secondary meaning, also known as acquired distinctiveness.<sup>26</sup> The same is true for geographically descriptive terms. While each circuit has its own multifactor tests to determine secondary meaning,<sup>27</sup> the Tenth Circuit considers:

- (1) the length and manner of the [mark’s] use; (2) the nature and extent of advertising and promotion of the [mark]; (3) the efforts made in the direction of promoting a conscious connection, in the public’s mind, between the [mark] and a particular product or venture; (4) actual consumer confusion; (5) proof of intentional copying; or (6) evidence of sales volume.<sup>28</sup>

In addition to these factors, “secondary meaning can be established through ‘direct evidence, such as consumer surveys or testimony from consumers.’”<sup>29</sup> Importantly, there is a consensus among a majority of courts that “the [United States Patent and Trademark Office’s] ‘decision to register a mark without requiring proof of secondary meaning creates a rebuttable presumption that the mark is . . . [more than] merely descriptive.’”<sup>30</sup>

The next category encompasses marks that are suggestive. “Suggestive marks ‘suggest[] rather than describe[] a characteristic of the product and

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23. Ralph H. Folsom & Larry L. Teply, *Trademarked Generic Words*, 89 YALE L.J. 1323, 1323 (1980).

24. *Abercrombie & Fitch Co.*, 537 F.2d at 11 (quoting *Stix Prods., Inc. v. United Merchs. & Mfrs.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968)).

25. *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 976 (10th Cir. 2002) (quoting *Beer Nuts, Inc. v. Clover Club Foods Co.*, 711 F.2d 934, 939 (10th Cir. 1983)).

26. *Id.*

27. *Converse, Inc. v. Int’l Trade Comm’n Skecher U.S.A., Inc.*, 909 F.3d 1110, 1119 (Fed. Cir. 2018).

28. *Forney Indus., Inc. v. Daco of Missouri, Inc.*, 835 F.3d 1238, 1253 (10th Cir. 2016) (quoting *Savant Homes, Inc. v. Collins*, 809 F.3d 1113, 1148 (10th Cir. 2016)).

29. *Id.* (quoting *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1218 (10th Cir. 2004)).

30. *Navajo Nation v. Urb. Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1160 (D.N.M. 2013) (quoting *GTE Corp. v. Williams*, 904 F.2d 536, 538 (10th Cir. 1990)).

require[] the consumer to use imagination and perception to determine a product's nature."<sup>31</sup> Marks that are suggestive "are registrable on the Principal Register without proof of secondary meaning."<sup>32</sup> This means that suggestive marks are inherently distinctive and thus protectable without more. The same is true for arbitrary and fanciful marks. Arbitrary marks are common words that, "when used to identify particular goods or services, do not suggest or describe a significant ingredient, quality or characteristic of the goods or services."<sup>33</sup> Fanciful marks consist of terms that are not in common linguistic use, but rather "have been invented for the sole purpose of functioning as a trademark."<sup>34</sup> All three of these categories—suggestive, arbitrary, and fanciful marks—are inherently distinctive and therefore do not require a showing of secondary meaning to be registrable and protectable.

### C. Trademark Infringement

The Lanham Act provides multiple causes of action for those falling within its purview, one of those being trademark infringement.<sup>35</sup> For trademark infringement, any use in commerce of a registrant's mark without the registrant's consent which is "likely to cause confusion, or to cause mistake, or to deceive," is actionable.<sup>36</sup>

In analyzing whether there is a likelihood of confusion, there are many different types of confusion that courts have recognized. The most common of these being point-of-sale confusion, which occurs when a purchaser is confused as to the source of a product they are purchasing.<sup>37</sup> Additionally, consumers may be confused "not only as to source, but also as to affiliation, connection or sponsorship."<sup>38</sup> Confusion as to affiliation, connection or sponsorship relates to consumers thinking that the seller would need approval to use a certain trademark.<sup>39</sup>

A less common type of confusion is initial interest confusion. Initial-interest confusion occurs when a potential purchaser is misled into

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31. *Sally Beauty Co.*, 304 F.3d at 976 (alterations in the original) (quoting *First Sav. Bank, F.S.B. v. First Bank System, Inc.*, 101 F.3d 645, 655 (10th Cir. 1996)).

32. U.S. PATENT & TRADEMARK OFF., TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1209.01(a) (Nov. 2023), <https://tmep.uspto.gov/RDMS/TMEP/current#/current/TMEP-1200d1e7036.html> [<https://perma.cc/3HPS-4NMW>].

33. *Id.*

34. *Id.*

35. 15 U.S.C. § 1114.

36. *Id.* § 1114(1)(a).

37. 4 MCCARTHY, *supra* note 5, § 23:5, Westlaw MCCARTHY § 23:5.

38. *Id.* § 23:8, Westlaw MCCARTHY § 23:8.

39. *Id.*

considering a purchase because of an apparent affiliation that they may discover to be false upon closer inspection.<sup>40</sup> That purchaser may now be more likely to purchase the product because they have been lured to it under false pretenses.<sup>41</sup> This process occurs because “[the user causing initial-interest confusion gains] credibility during the early stages of a transaction and can possibly bar the senior user from consideration by the consumer once the confusion is dissipated.”<sup>42</sup> The danger of initial-interest confusion is less likely “where the goods [are] non-competitive, expensive and sold to knowledgeable buyers.”<sup>43</sup>

While recognition and application of the initial-interest theory varies among circuits, the Tenth Circuit has endorsed the theory, specifically in the context of the internet.<sup>44</sup> In this context, the Tenth Circuit has found that diversion of internet traffic can lead to a junior user of a trademark “capitalizing on a trademark holder’s goodwill.”<sup>45</sup>

#### *D. Trademark Dilution*

Another cause of action under the Lanham Act is dilution.<sup>46</sup> Dilution by blurring is defined by the Lanham Act as an “association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.”<sup>47</sup> The statutory factors for determining whether a use is likely to cause dilution by blurring are:

- (i) The degree of similarity between the mark or trade name and the famous mark.
- (ii) The degree of inherent or acquired distinctiveness of the famous mark.
- (iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.
- (iv) The degree of recognition of the famous mark.

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40. *Id.* § 23:6, Westlaw MCCARTHY § 23:6.

41. *Id.*

42. *Id.* (quoting *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188 (5th Cir. 1998)).

43. *Id.*

44. *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1239 (10th Cir. 2006).

45. *Id.*

46. 15 U.S.C. § 1125.

47. *Id.* § 1125(e)(2)(B).

(v) Whether the user of the mark or trade name intended to create an association with the famous mark.

(vi) Any actual association between the mark or trade name and the famous mark.<sup>48</sup>

Dilution by tarnishment is defined as an “association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.”<sup>49</sup> The Supreme Court has recognized that a “classic instance of dilution by tarnishing” occurs when a new mark that is likely to make consumers think of the more famous mark is used to sell sex-related products.<sup>50</sup>

Worthy of discussion is the requirement that the owner claiming dilution must own a famous mark. Until 2006, a mark did not need to be famous for a dilution action.<sup>51</sup> The Trademark Dilution Revision Act of 2006 added this fame requirement and altered this cause of action drastically. Under the current formulation, courts evaluate fame by considering all relevant factors, including:

(i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.

(ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.

(iii) The extent of actual recognition of the mark.

(iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.<sup>52</sup>

Prior to this, some courts recognized that dilution actions were available to marks with “niche fame.”<sup>53</sup> However, after the Act in 2006 anti-dilution claims became strictly for marks that had achieved the requisite level of fame and had become a “household name.”<sup>54</sup> Thus, “[i]t is well-established that

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48. *Id.* § 1125(c)(2)(B)(i)-(vi).

49. *Id.* § 1125(c)(2)(C).

50. *Mosely v. V Secret Catalogue, Inc.*, 537 U.S. 418, 427 (2003).

51. Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730.

52. 15 U.S.C. § 1125(c)(2)(A)(i)-(iv).

53. *Coach Serv., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1372 (Fed. Cir. 2012).

54. *Id.* at 1373 (citations omitted).

dilution fame is difficult to prove.”<sup>55</sup> Even evidence showing “that a mark is a top-selling brand,” or providing annual sales reports, without more, is “insufficient to show . . . fame.”<sup>56</sup> For example, a study demonstrating “a high level of brand awareness among women” belonging to a specific age range does not provide much weight to a claim of fame.<sup>57</sup> Further, owning a trademark on the Principal Register “is not *conclusive* evidence of fame,”<sup>58</sup> but the registration status of a mark is a relevant factor that the court may consider in its fame inquiry.<sup>59</sup>

Regarding the statutory fame considerations above, the owner of a trademark trying to establish fame must do so with information available prior to the filing date of the trademark they are opposing.<sup>60</sup> Evidence of sales, advertisements, media attention, or other data occurring after the opposed mark’s filing date is irrelevant to establishing fame for that dilution claim.<sup>61</sup> In sum, widespread recognition of the trademark among the general United States population, prior to the filing of an opposed mark, is required to establish fame sufficient for a claim of dilution.

#### *E. Fair Uses*

Relevant under certain conditions to both trademark infringement and dilution actions is the concept of fair use. While a fair use is viewed as an “exclusion” to dilution claims,<sup>62</sup> fair use regarding trademark infringement speaks more to establishing that there is not a likelihood of confusion. Two relevant types of fair use are mentioned in the Lanham Act: descriptive fair use and nominative fair use.<sup>63</sup> Descriptive fair use applies when a term is used other than as a mark, in a descriptive sense, and in good faith.<sup>64</sup> Nominative fair use relates to using the mark comparatively,<sup>65</sup> but it has been applied differently, or not recognized at all, throughout the circuits.<sup>66</sup>

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55. 4 MCCARTHY, *supra* note 5, § 24:104, Westlaw MCCARTHY § 24:104 (quoting *Coach*, 668 F.3d at 1373).

56. *Coach*, 668 F.3d at 1374 (quoting *Toro Co. v. ToroHead Inc.*, 61 U.S.P.Q. 2d 1164, 1180 (T.T.A.B. 2001)).

57. *Id.* at 1375.

58. *Id.* at 1374.

59. *Id.*

60. *Id.* at 1373 (quoting *Toro*, 61 U.S.P.Q. 2d at 1174).

61. *Id.* at 1375.

62. 15 U.S.C. § 1125(c)(3).

63. *Id.* § 1125(c)(3)(a).

64. *Id.* § 1115(b)(4).

65. *R.G. Smith v. Chanel, Inc.*, 402 F.2d 562, 563-65 (9th Cir. 1989).

66. *See* 4 MCCARTHY, *supra* note 5, § 23:11, Westlaw MCCARTHY § 23:11.



### *F. Lanham Act Remedies*

If a likelihood of confusion is established and a user is found to infringe an owner's trademark, the common outcome is a permanent injunction to stop the infringer from continuing the wrongful activity.<sup>67</sup> This equitable remedy is codified in the Lanham Act and it states that "the courts 'shall have the power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable.'"<sup>68</sup>

The Supreme Court has laid down a four-factor test that a plaintiff must satisfy prior to receiving a permanent injunction. This test aligns with the traditional test for determining whether equitable relief is appropriate.<sup>69</sup> The plaintiff must show:

- (1) that it has suffered an irreparable injury;
- (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
- (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
- (4) that the public interest would not be disserved by a permanent injunction.<sup>70</sup>

Interestingly, proof of actual damage to the plaintiff is not a requirement of a *prima facie* infringement case.<sup>71</sup> When a likelihood of confusion as to source, affiliation, or connection is found by the court, "[t]his probable loss of control over reputation and goodwill is presumed by the law to be an injury . . ."<sup>72</sup> Thus, no definite harm to a business or entity must be shown for an injunction, only a likelihood of confusion.

## *II. Indian Arts and Crafts Act*

### *A. Indian Arts and Crafts Act Background*

The Indian Arts and Crafts Act (IACA) was first enacted in 1935 "[t]o promote the development of Indian arts and crafts and to create a board to

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67. 5 *id.* § 30:1, Westlaw MCCARTHY § 30:1.

68. *Id.* (quoting Lanham Act, 15 U.S.C. § 1116).

69. *Id.* (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

70. *Id.*

71. *Id.* § 30:2.50, Westlaw MCCARTHY § 30:2.50.

72. *Id.*

assist therein.”<sup>73</sup> The IACA is “a truth-in-advertising law designed to prevent products from being marketed as ‘Indian made,’ when the products are not.”<sup>74</sup> The IACA was later amended in 1990<sup>75</sup> and 2010.<sup>76</sup> The IACA makes the offer or display for sale of any good “in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe” unlawful.<sup>77</sup> Under the IACA, “Indian” is defined as “any individual who is a member of an Indian tribe,” or a certified “Indian artisan.”<sup>78</sup> “Indian tribe” is defined as “any Indian tribe, band, nation, or other organized group or community”<sup>79</sup> that has been formally recognized by a state legislature, state commissioner, or “another similar organization vested with State legislative tribal recognition authority.”<sup>80</sup>

### *B. Indian Arts and Crafts Act Remedies*

The IACA was not an immediately popular cause of action for tribes. The first reported appellate case occurred in 2005 and there were zero prosecutions prior to this.<sup>81</sup> Both civil and criminal penalties are available under the IACA, as well as, injunctions and other equitable relief.<sup>82</sup> Further, the aggrieved party may recover “treble damages; or . . . in the case of each aggrieved individual Indian, Indian tribe, or Indian arts and crafts organization, not less than \$1,000 for each day on which the offer or display for sale or sale continues.”<sup>83</sup> Criminally, first time violators are subject to a fine up to \$250,000 or five years imprisonment, if an individual, and a fine up to \$1,000,000 when the violator is a person other than an individual,<sup>84</sup> such as a corporation.<sup>85</sup>

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73. Act of Aug. 27, 1935, ch. 748, title, 49 Stat. 891, 891.

74. *Native American Arts, Inc. v. Bundy-Howard, Inc.*, 168 F. Supp. 2d 905, 916-17 (N.D. Ill. 2001).

75. Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4663.

76. 18 U.S.C. § 1159.

77. *Id.* § 1159(a).

78. *Id.* § 1159(c)(1).

79. 25 U.S.C. § 5304(e).

80. 18 U.S.C. § 1159(c)(3)(B)(iii).

81. *Native Am. Arts, Inc. v. Waldron Corp.*, 399 F.3d 871, 873 (7th Cir. 2005).

82. 18 U.S.C. § 1159(b).

83. 25 U.S.C. § 305e(b)(2)(A)-(B).

84. 18 U.S.C. § 1159(b)(1)(A)(i)-(ii).

85. See, e.g., Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 865 (2007) (citing *Santa Clara Cnty. v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886)).

### III. Navajo Nation v. Urban Outfitters, Inc.

#### A. Facts of the Case

The parties to this case are the Navajo Nation, Diné Development Corporation, and Navajo Arts and Crafts, as plaintiffs, and Urban Outfitters, Inc., UO.com L.L.C., Urban Outfitters Wholesale, Inc., Anthropology, Inc., Anthropologie.com, L.L.C., Free People of PA, L.L.C., and Freepeople.com, L.L.C., as defendants. The Navajo Nation is “a sovereign Indian Nation with over 300,000 enrolled members,”<sup>86</sup> that acts through its wholly-owned subsidiaries, Navajo Arts and Crafts Enterprise (NACE) and Diné Development Corporation (DDC), its political subdivision, “its officers, employees, and authorized agents and its members.”<sup>87</sup> Urban Outfitters, Inc. (Urban Outfitters) has several brands that operate underneath it in the form of wholly-owned subsidiaries, which do not act as “separate autonomous entities.”<sup>88</sup> Thus, all of the other named defendants are brands run by Urban Outfitters, an international retail company that conducts its business both in stores and on the internet.

The Navajo Nation’s territory “span[s] more than 27,000 square miles in northeastern Arizona, the southeastern portion of Utah, and northwestern New Mexico.”<sup>89</sup> Urban Outfitters has over 200 stores across the globe and on the internet.<sup>90</sup> Notably, Urban Outfitters acknowledges that their products do reach the state of New Mexico.<sup>91</sup> With regard to certain goods sold by Urban Outfitters, the Navajo Nation contends that Urban Outfitters “used ‘Navajo’ and ‘Navaho’ as names and marks” for their goods beginning approximately on March 16, 2009.<sup>92</sup> “Navajo” has been in use by the Navajo Nation as early as 1849.<sup>93</sup> Not only has the Tribe been known by this name for over 150 years, but it has also been continuously used in commerce in relation to various products, “including, among other things, clothing, accessories, blankets, jewelry, foods, tools, decorations, crafts, and retail services.”<sup>94</sup> Moreover, the Navajo Nation has registered eighty-six trademarks on the Principal Register with the United States Patent and Trademark office “using

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86. Navajo Nation v. Urb. Outfitters, Inc., 918 F. Supp. 2d 1245, 1248 (D.N.M. 2013).

87. *Id.* at 1249.

88. *Id.*

89. *Id.* at 1248.

90. *Id.* at 1249.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

the NAVAJO component . . . for a variety of different classes of goods and services.”<sup>95</sup>

On Urban Outfitters’ website, items such as “Wide Navajo Scarf,” “Navajo Hipster Panty,” “Navajo Feather Earing,” and “Navajo Print Fabric Wrapped Flask,” among others, were all advertised for sale.<sup>96</sup> In defense of this usage, an Urban Outfitters spokesperson said the company was merely interpreting fashion trends and that the word “Navajo,” along with other “Native American-inspired trend[s],” were popular in recent years.<sup>97</sup> However, shortly after receiving a cease-and-desist from the Navajo Nation, Urban Outfitters replaced the word “Navajo” with “Printed,” but only on their website and continued to use the “Navajo” in stores and on sales receipts.<sup>98</sup>

### *B. Issues Presented*

The Navajo Nation raised six claims in its complaint against Urban Outfitters. In Count One, Navajo Nation contends that Urban Outfitters was likely to cause confusion and had caused actual confusion regarding “use of the ‘Navajo’ and ‘Navaho’ mark in connection with the sale of clothing, jewelry, house ware, footwear, and similar items . . . .”<sup>99</sup> Count Two relates to the use of “Navajo” and “Navaho” by Urban Outfitters “to promote, market, and sell its retail items.”<sup>100</sup> Navajo Nation contends that this is a violation of the Lanham Act and amounts to willful Trademark Dilution by both blurring and tarnishment.<sup>101</sup> In Count Three, Navajo Nation contends that Urban Outfitters also violated another provision of the Lanham Act. This claim is “based on false advertising and infringement of the Navajo Nation’s unregistered NAVAJO trademarks.”<sup>102</sup> In Count Four, Navajo Nation contends that Urban Outfitters violated the Indian Arts and Crafts Act “by offering, advertising, marketing, displaying for sale, and selling goods that falsely suggest Defendants’ products are products of an Indian Tribe, when in fact they are not products of any Indian Tribe.”<sup>103</sup> Counts Five and Six are

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95. *Id.*

96. *Navajo Nation v. Urb. Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1154 (D.N.M. 2013).

97. Deborah Netburn, *Navajo Nation Takes on Urban Outfitters, and Wins*, L.A. TIMES (Oct. 19, 2011, 5:13 PM), <https://www.latimes.com/archives/blogs/nation-now/story/2011-10-19/navajo-nation-takes-on-urban-outfitters-and-wins>.

98. *Navajo Nation*, 935 F. Supp. 2d at 1155.

99. *Navajo Nation*, 918 F. Supp. 2d at 1250.

100. *Id.*

101. *Id.* (referencing 15 U.S.C. § 1125(c)).

102. *Id.* (referencing 15 U.S.C. § 1125(a)).

103. *Id.*

both state law claims. Count Five consists of an alleged violation of the New Mexico Unfair Practices Act (NMUPA) for Urban Outfitters' "sale of goods under the 'Navajo' and 'Navaho' names and trademarks, as well as its sale of other goods falsely represented as authentic goods,"<sup>104</sup> when Urban Outfitters knew that the "goods were not made by, in connection, or in any way associated with the Navajo Nation, another Indian Tribe, nor any other Indian organization or person."<sup>105</sup> In Count Six, Navajo Nation asserts that Urban Outfitters violated the New Mexico Trademark Act by "caus[ing] dilution and/or tarnishment of the distinctive quality of the Navajo Nation's NAVAJO marks."<sup>106</sup>

Because of the Navajo mark's incontestable status—as it has been in continuous use for five consecutive years following registration—defendants first challenge the term as being generic and not protectable. "Navajo" is a noun defined as "a member of an Indigenous people of northern New Mexico and Arizona and southern Utah."<sup>107</sup> The term does not denote any genus of products and it has not come to be understood as such—as required for the assertion that a mark is generic. Plaintiffs correctly assert that "[c]ustomers do not go into an Urban Outfitters store, and ask for 'a Navajo.'"<sup>108</sup> Rather, Navajo Nation claims that the Navajo mark is inherently distinctive.<sup>109</sup> Thus, Navajo Nation is claiming the trademark is either a suggestive, arbitrary, or fanciful mark. While an incontestable trademark cannot be challenged for cancellation as merely descriptive, its classification and overall distinctiveness may play a role in aspects of the infringement analysis the trademark's scope of protection.

### *C. Motion to Dismiss*

#### *1. Standard*

Following an unsuccessful motion by Urban Outfitters to transfer venue, Urban Outfitters moved to dismiss the various Navajo Nation claims. The standard relevant to a motion to dismiss is "failure to state a claim upon which relief can be granted."<sup>110</sup> To survive a motion to dismiss, Navajo Nation must present facts sufficient to "raise a right to relief above the

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104. *Id.*

105. *Id.* (citing N.M. STAT. ANN. § 57-12-3).

106. *Id.* (citing N.M. STAT. ANN. § 57-3B-15).

107. *Navajo*, MERIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/Navajo> (last updated Feb. 15, 2024).

108. *Navajo Nation*, 935 F. Supp. 2d at 1153.

109. *Id.*

110. FED. R. CIV. P. 12(b)(6).

speculative level.”<sup>111</sup> In other words, the facts pleaded in the complaint must show that the alleged misconduct is plausible and display “more than a sheer possibility that a defendant has acted unlawfully.”<sup>112</sup>

## 2. Lanham Act Claims (Claims One, Two, and Three)

Regarding the Lanham Act claims, the district court found that the Navajo Nation had satisfied this standard.<sup>113</sup> The court noted that the Navajo mark is not generic, and the facts pleaded showed that the mark had secondary meaning.<sup>114</sup> Secondary meaning was determined primarily because the Navajo Nation had a significant duration of use, including marketing and “retailed clothing, housewares, and jewelry using the NAVAJO name and marks since 1941,” as well as successful advertising “resulting in more than \$500 million in sales of NAVAJO-branded goods.”<sup>115</sup> The district court declined to go further in classifying the Navajo mark at this stage, but did recognize that the mark was registered with the USPTO without being required to show proof of secondary meaning, and a majority of courts find that this may “[create] a rebuttable presumption that the mark is suggestive, arbitrary, or fanciful rather than merely descriptive.”<sup>116</sup> Further, the court found that the Navajo mark was not a “purely geographic” mark regardless of its geographic component, and instead it has a “primary meaning that refers to the Navajo tribe, and its people.”<sup>117</sup>

Additionally, Urban Outfitters’ use was found to be the basis of a plausible claim because of the similarity between the goods that Navajo Nation markets and sells and the ones Urban Outfitters marketed and sold, “e.g., clothing, jewelry, and other accessories,” and because “the goods compete in many of the same channels of commerce.”<sup>118</sup> Further, the district court found that Urban Outfitters did use the Navajo term in a trademark sense and “did not sufficiently accompany ‘Navajo’ with such distinguishing marks that a buyer exercising ordinary care would not be deceived into believing they were purchasing an item produced by the Navajo Nation.”<sup>119</sup>

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111. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

112. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

113. *Navajo Nation*, 935 F. Supp. 2d at 1166.

114. *Id.*

115. *Id.*

116. *Id.* at 1160.

117. *Id.* at 1163.

118. *Id.*

119. *Id.* at 1162-63.

Urban Outfitters' fair use defenses were unsuccessful in negating the likelihood of confusion. Urban Outfitters alleged first that they used the mark in a descriptive sense and in good faith.<sup>120</sup> Urban Outfitters claims that "'Navajo' is fairly used as a descriptor for 'Indian-styled' prints and designs that may include 'geometric prints.'"<sup>121</sup> However, when a term has acquired secondary meaning, the junior user of the mark must avoid confusing or deceiving purchasers by sufficiently "accompany[ing] the term with . . . distinguishing marks."<sup>122</sup> Whether a use satisfies these requirements must be viewed in the context that consumers encounter the issue. Here, much of the use occurs online and many consumers would encounter this through the internet. This online setting is where the Tenth Circuit has endorsed initial interest confusion, and the danger is not lessened because the goods are competitive with one another and are relatively inexpensive so consumers may not exercise extreme care in their purchasing decisions.<sup>123</sup> Some of Urban Outfitters' uses include other brands accompanying the Navajo mark, such as "OBEY Navajo glove," but this is not the case for all uses.<sup>124</sup> As matter of law, the district court did not find that the inclusion of the OBEY brand name along with the Navajo mark eliminated confusion.<sup>125</sup>

Nor did the district court find that the nominative fair use defense warranted dismissal of any of the Navajo Nation's claim.<sup>126</sup> Even assuming that the Tenth Circuit would endorse the theory, Urban Outfitters' use did not appear to satisfy the Ninth Circuit's test. The test is "whether (1) the product [is] readily identifiable without use of the mark; (2) defendant used more of the mark than necessary; or (3) defendant falsely suggested he was sponsored or endorsed by the trademark holder."<sup>127</sup> With respect to the first prong, the district court noted that there may be alternative ways to identify the product, such as "geometric" or "southwestern", but did not decide resolve the nominative fair use argument entirely at this stage.<sup>128</sup> The court found that Navajo Nation had satisfied the standard relevant to the motion to dismiss with regard to "likelihood of confusion, not only as to source, but also as to

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120. *Id.* at 1161.

121. *Id.*

122. *Id.* at 1162 (citing *Hygrade Food Products Corp. v. H.D. Lee Mercantile Co.*, 46 F.2d 771, 772 (10th Cir. 1931)).

123. *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1238-39 (10th Cir. 2006).

124. *Navajo Nation*, 935 F. Supp. 2d at 1164.

125. *Id.*

126. *Id.* at 1165.

127. *Toyota Motor Sales, U.S.A., Inc., v. Tabari*, 610 F.3d 1171, 1175-76 (9th Cir. 2010).

128. *Navajo Nation*, 935 F. Supp. 2d at 1166.

sponsorship or endorsement.”<sup>129</sup> Thus, these Lanham Act claims pleaded by Navajo Nation remained in the case.

Claim Two, consisting of dilution by blurring and dilution by tarnishment, mostly survived the motion to dismiss, but the tarnishment claim was limited to that “based on the relative quality of the parties’ goods.”<sup>130</sup> Consequently, the court rejected Navajo Nation’s argument that the use of “Navajo” in connection with a flask was sufficiently unwholesome to constitute dilution by tarnishment.<sup>131</sup> While Navajo Nation generally does not allow “sale or consumption of alcohol within its borders,” the district court pointed to Fire Rock Navajo Casino’s use of a registered Navajo mark on shot glasses.<sup>132</sup> Navajo Nation also argued that the use of “Navaho” constituted tarnishment, but the Court dismissed this argument as no authority was provided, and because this spelling is shown to be interchangeable in the same dictionary that Navajo Nation cites in its brief.<sup>133</sup> While the dilution claim as a whole survived the motion to dismiss, the threshold fame requirement to bring these claims will be discussed at length at the motion for summary judgement stage.

### *3. Indian Arts and Crafts Act Claim (Claim Four)*

The district court’s analysis of the Indian Arts and Crafts Act claim, Claim Four, appeared to show that this was one of the stronger claims brought by the Navajo Nation. The Navajo Nation clearly meets the definition of Indian tribe in order to bring suit under this cause of action, so the pertinent question is “whether [Urban Outfitters] falsely suggested that it was selling Indian products . . . .”<sup>134</sup> In answering this question, the court looks to “what the entire sale package, including advertising, labeling, and place of sale, suggested to the average consumer.”<sup>135</sup> Here, the sales package includes products labeled as “Navajo Glove,” “Navajo Bracelet,” and “Vintage Men’s Woolrich Navajo” that were advertised and sold on the internet.<sup>136</sup> In the words of the Navajo Nation, these items “are in a traditional Indian style, and composed of Indian motifs and Indian designs, but are without identifier

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129. *Id.*

130. *Id.* at 1169.

131. *Id.*

132. *Id.* at 1168-69.

133. *Id.* at 1169.

134. *Id.* at 1170.

135. *Id.* (citing *Native American Arts, Inc. v. Waldron Corp.*, 399 F.3d 871, 875 (7th Cir. 2005)).

136. *Id.*



terms or labels.”<sup>137</sup> In addition, consumers could find these products by using search terms such as “‘Indian,’ ‘Native American,’ ‘tribal,’ or ‘Navajo.’”<sup>138</sup> For instance, a consumer who goes to Urban Outfitters’ website and searches “Navajo” would likely be brought to items such as the “Navajo Feather Earing” that has no other brands or identifiers. Because of the manner of advertising and the context in which they come across this issue, this consumer would likely be led to believe that the item was produced by or affiliated with the Tribe when this is not the case. For these reasons, the IACA claim survived the motion to dismiss and has a strong prospect of being successful on the merits.

#### *4. New Mexico State Law Claims (Claims Five and Six)*

The final claims, the New Mexico state law claims, also survived Urban Outfitters’ motion to dismiss. As to Count Five, the New Mexico Unfair Practices Act claim, Navajo Nation must prove:

- (1) that [Urban Outfitters] made an oral or written statement, visual description, or other representation that was either false or misleading;
- (2) that the false or misleading representation was knowingly made in connection with the sale of goods or services;
- (3) the conduct complained of occurred in the regular course of [Urban Outfitters’] trade or commerce; and
- (4) the representation is of the type that may, tends to or does, deceive or mislead any person.<sup>139</sup>

The elements seem to be satisfied by the facts presented. Urban Outfitters made a representation that appears false or misleading as to the nature of the products because it represented that they were, at least, connected to or affiliated with the Navajo Nation when they were not. They knew that this representation was made in connection with the sale of goods because they were advertising and selling the items on their websites and in stores. The conduct occurred in Urban Outfitters’ regular course of business, retail clothing and goods. Finally, the representation may deceive or mislead any person because some consumers may be misled into thinking that the items were produced or sponsored by the Navajo Nation after seeing a registered trademark attached to the item, many without any other identifiers. Even though the elements are likely to be satisfied, the issue regarding this claim

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137. *Id.*

138. *Id.*

139. *Id.* at 1172-73 (citing *Stevenson v. Louis Dreyfus Corp.*, 112 N.M. 97, 100, 811 P.2d 1308 (1991)).

comes from whether Navajo Nation has proper standing. Firstly, the court looked to the “plain language of the act and the underlying policies” in determining that a “commercial transaction between a claimant and a defendant need not be alleged” to have standing.<sup>140</sup> The court was unable to resolve the rest of the standing issue here because there was an outstanding question of whether business competitor was able to bring suit under the NMUPA.<sup>141</sup>

The Sixth Claim, brought under the New Mexico Trademark Act, alleges dilution of the Navajo mark. The issue to be resolved regarding this claim was whether the Navajo mark was famous in New Mexico.<sup>142</sup> Here, Navajo Nation only ever asserted that their mark is famous in the United States and never provided evidence that their products were famous in the state.<sup>143</sup> Because of the Navajo’s geographic relation to the state of New Mexico, it is likely they would be able to present evidence to support a finding of fame here, but information relating to advertising, publicity, and sales would need to be offered, which the Navajo Nation did not do. They only provided information regarding all sales and advertising since 1941, but nothing specific to New Mexico. The court allowed the Navajo Nation to amend their complaint to show fame in New Mexico and did not dismiss the claim.<sup>144</sup>

#### *D. Motion for Summary Judgement*

The motion for summary judgement stage is where certain Navajo Nation claims began to fall. A motion for summary judgement will be granted where there is “no genuine dispute as to any material fact . . . .”<sup>145</sup> If there is evidence supporting both parties’ propositions such “that a rational trier of fact could resolve the issue either way” then there is a genuine issue as to a material fact.<sup>146</sup> Further, “a fact is material ‘if under substantive law it is essential to the proper disposition of the claim.’”<sup>147</sup>

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140. *Id.* at 1176.

141. *Id.* at 1177.

142. *Id.* at 1177-78.

143. *Id.* at 1178.

144. *Id.*

145. FED. R. CIV. P. 56(a).

146. *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)).

147. *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1212 (10th Cir. 2014) (quoting *Becker*, 709 F.3d at 1022).

Initially, Urban Outfitters moved for partial summary judgment as to the Navajo Nation's federal dilution claims.<sup>148</sup> Urban Outfitters argued that the Navajo mark is not famous as required by the Trademark Dilution Revision Act of 2006.<sup>149</sup> The Navajo Nation's failure to establish fame would result in a successful motion for summary judgement against both Claim Two, the federal dilution claim, and Claim Six, the New Mexico state law dilution claim. Regarding the Navajo Nation's assertion of fame, the Tribe presented evidence of their annual sales and advertising expenditures, but the court found this was not sufficient.<sup>150</sup> This speaks to the difficulty of establishing nationwide fame and the importance of survey evidence in trademark law. Just as annual sales of \$3.5 billion and \$30-60 million in advertising was insufficient to establish Coach's nationwide fame,<sup>151</sup> Navajo Nation's \$500 million sales and \$3.8 million spent in advertising, without more, clearly fails to meet the high bar that the TDRA sets. Coach even provided more evidence than the Navajo Nation, including a survey—though with an improper universe of participants and incorrect timing—and unsolicited publicity, among other evidence, and this was still found to be insufficient.<sup>152</sup>

Additionally, the Navajo Nation never provided state specific evidence for the New Mexico state law dilution claim and instead relied upon the assertion of nationwide fame to prove this.<sup>153</sup> Since nationwide fame was not found, more evidence was needed to support the state law claim and it was not provided.<sup>154</sup> Thus, when looking at previous decisions related to establishing fame and the household name standard, the court properly granted partial summary judgment in favor of Urban Outfitters regarding the dilution claims as the Navajo Nation did not provide sufficient evidence.

### *E. Settlement*

While the Navajo Nation still had several claims remaining in the case—Claims One, Three, Four, and Five—with many appearing to have considerable merit, the Tribe decided not to pursue them further. It was reported that the parties reached a settlement, for an undisclosed amount, and

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148. *Navajo Nation v. Urb. Outfitters, Inc.*, Civ. No. 12-195, 2016 WL 3475342, at \*1 (D.N.M. May 13, 2016).

149. *Id.* at \*2.

150. *Id.* at \*4.

151. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1361, 1374 (Fed. Cir. 2012) (“We agree with the Board that this limited evidence of sales and advertising is insufficient to show fame.”).

152. *Id.* at 1367, 1374-75.

153. *Navajo Nation*, 2016 WL 3475342, at \*4-5.

154. *Id.* at \*5.

even “signed a ‘supply and license agreement’.”<sup>155</sup> The goal of the agreement being a collaboration between Navajo Nation and Urban Outfitter “on authentic American Indian jewelry in future years.”<sup>156</sup>

*F. Implications of the Settlement and Conclusion*

While the case ended in settlement, the Navajo Nation’s pursuit of claims and survival of a motion to dismiss “send[s] a strong message to ‘outsiders’ that native culture is not freely available for appropriation.”<sup>157</sup> Importantly, the case and the court’s holdings provides precedent “that might discourage other commercial entities” which is not always the case when an indigenous tribe brings trademark challenges or claims.<sup>158</sup> Now, similarly situated tribes have case law that they can rely on to bolster their trademark claims. Specifically, the holding that the Navajo name was not generic when used in connection with certain goods and thus protectable under federal trademark law, as well as the perceived merit of the Tribe’s IACA claim may prevent commercial entities from using American Indian tribal names. Had the classification of the Navajo name gone the other way—finding that the tribe name was generic—this may have signaled to companies that they can use tribal names, even registered ones, in connection with goods.

On the other hand, the ability of commercial entities to afford settlements and continue usage looms large as is displayed in the present case. A somewhat similar illustration is the Indian Motorcycle Company. In a complaint filed by the Cow Creek Band of Umpqua Tribe, it was asserted that Indian Motorcycle Company “attempted to play off on traditional American Indian imagery and heritage to promote the sale of its ‘Indian’ motorcycle” which “misled the public by falsely suggesting a connection between Indian Motorcycle and American Indians that did not exist.”<sup>159</sup> The

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155. David Schwartz, *Navajo Nation Settles Trademark Suit Against Urban Outfitters*, REUTERS (Nov. 18, 2016, 5:15 PM), <https://www.reuters.com/article/us-navajo-urbanoutfitters/navajo-nation-settles-trademark-suit-against-urban-outfitters-idUSKBN13D2QA> [<https://perma.cc/ZG6D-EYJF>].

156. *Id.*

157. Olivia J. Greer, *Using Intellectual Property Laws to Protect Indigenous Cultural Property*, BRIGHT IDEAS (Intell. Prop. L. Section, N.Y. State Bar Ass’n, Albany, N.Y.), Winter 2013, at 27, 29, <https://nysba.org/NYSBA/Publications/Section%20Publications/Intellectual/PastIssues/Winter%202013/IPNewsWinter13.pdf>.

158. *See id.* at 29-30.

159. David J. Stephenson, Jr., *The Nexus Between Intellectual Property Piracy, International Law, the Internet, and Cultural Values*, 14 ST. THOMAS. L. REV. 315, 330-31 (2001).

Tribe's claims were settled and never made it to trial.<sup>160</sup> Indian Motorcycle continues to operate and is expected to generate \$29.10 million in revenue in 2023<sup>161</sup> which may "prevent[] American Indians from successfully entering this potentially lucrative market in such a way as to benefit the social, economic, and, ultimately, political, vitality of American Indian tribes."<sup>162</sup> In addition, this continued use by outsiders can disparage the cultural significance and tradition that are deeply imbedded within these words and other marks. Because of this, some commentators feel that "compensation is not an adequate remedy."<sup>163</sup>

In the context of trademark law, the constant policing required by trademark holders makes the area difficult for tribes to assert their rights. If tribes were to pursue every use of a tribal trademark, this would require extensive time and resources that may be better used elsewhere for the benefit of the tribe and its members. Thus, tribes must be selective in which claims to pursue because "[t]he Native American-inspired trend . . . cycling through fashion, fine art and design"<sup>164</sup> would likely make complete protection impossible. Overall, the IACA likely provides the greatest defense to tribes confronting issues such as those presented in the instant case. While trademark infringement was viewed favorably by the court, dilution was not. The heightened fame requirement of the TDRA makes this the likely outcome for tribes across the nation. As the Navajo Nation is one of the largest tribes in the United States<sup>165</sup> and was unsuccessful in meeting the threshold fame requirement, it would similarly be difficult for other American Indian tribes to establish nationwide fame. Therefore, the causes of action available to tribes under the Lanham Act would be limited and likely result in injunctive relief. The IACA may prove to be a more useful deterrent because of the monetary penalties and accessibility to tribes.

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160. *Id.* at 330.

161. *Indian (Motorcycles) – Worldwide*, STATISTA, <https://www.statista.com/outlook/mmo/motorcycles/indian/worldwide> (last visited Apr. 8, 2023).

162. Stephenson, *supra* note 159, at 331.

163. *See* Greer, *supra* note 157, at 27.

164. Deborah Netburn, *Navajo Nation Takes on Urban Outfitters, and Wins*, L.A. TIMES (Oct. 19, 2011), <https://www.latimes.com/archives/blogs/nation-now/story/2011-10-19/navajo-nation-takes-on-urban-outfitters-and-wins>.

165. *25 Largest Tribal Groupings Among American Indians and Alaska Natives*, U.S. CENSUS BUREAU, [https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2014/cb14-ff26\\_aian\\_graphic.pdf](https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2014/cb14-ff26_aian_graphic.pdf) (last visited Feb. 4, 2024).