URBAN OUTFITTERS

SEARCH RESULTS FOR *'NAVAJO'*

22 products found

Navajo Sock

$6.99 *(Was $12.00)*

Navajo Bracelet - 2 Pack

$8.00

Lucca Couture Navajo Pullover Sweater

$49.99 *(Was $79.00)*

Online Only

Staring at Stars Strapless Navajo Dress

$69.00

New Colors Available

Title Unknown Techno Navajo Quilt Oversized Crop Tee

$29.00

Red Navajo Plimsoll Sneaker

$20.00

2 for $30

OBEY Navajo Glove

$38.00

OBEY Navajo Scarf

$64.00

Ecote Navajo Surplus Jacket

$89.00

OBEY Navajo Nations Crew Pullover

$58.00

Ecote Navajo Wool Tote Bag

$39.00

Wide Navajo Scarf

$29.00

Navajo Hipster Panty

$8.00

5 for $25

Navajo Feather Earring

$16.99 *(Was $24.00)*

Deter Navajo Tee

$28.00

Navajo Print Fabric Wrapped Flask

$18.00

Jeffrey Campbell Navajo Fringe Crossbody Bag

$169.00

Online Only

OBEY Navajo Painters Jacket

$99.99 *(Was $139.00)*

OBEY Wool Navajo 5-Panel Cap

$34.00

Vintage Men's Woolrich Navajo Jacket

$249.00

Online Only

Categories

Womens (9)

Mens (9)

Apartment (1)

Sale (4)

Size

XSMALL (3)

SMALL (7)

MEDIUM (7)

Price

$5 $355

Color

GREY (6)

BLUE (6)

ASSORTED (4)

Brand

Deter (1)

Ecote (2)

Jeffrey Campbell (1)

Navajo/Urban Outfitters

Stanton, Meridith <meridith_stanton@ios.doi.gov> Mon, Aug 5, 2013 at 4:59 PM
To: Ashley Fry <Ashley_Fry@ios.doi.gov>, Ken <Kenneth_Van_Wey@ios.doi.gov>

http://www.indianz.com/News/2013/010708.asp

–

Meridith Z. Stanton

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Navajo Nation fails to reach settlement with Urban Outfitters

MONDAY, AUGUST 5, 2013
Filed Under: Arts & Entertainment | Law | National
More on: fashion, ipca, navajo, new mexico, trademarks, urban outfitters

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The Navajo Nation failed to reach a settlement with retailer Urban Outfitters over the sale of "Navajo" items.

The tribe asked Urban Outfitters in June 2011 to stop selling items labeled "Navajo" or "Navaho." But the company didn't change the names of the products on its website until Native bloggers publicized the issue later that year.

The tribe, however, says Urban Outfitters continued to offer the same items at physical locations. That led to the filing of a lawsuit in federal court in February 2012.

The parties entered mediation in May. But talks failed to resolve the lawsuit so a trial in federal court is possible in 2015.

Get the Story:
No settlement reached in Navajo Nation, Urban Outfitters suit (kRQE 8/3)
GSK, Urban Outfitters, Craigslist: Intellectual Property: Urban Outfitters, Navajo Nation Say Trademark Mediation Failed [third item] (Bloomberg Law 8/5)

Related Stories:
Navajo Nation looking to resolve case over 'Navajo' products (05/31)
Navajo Nation battles in court over sale of 'Navajo' products (04/02)
Judge won't dismiss Navajo Nation case over 'Navajo' items (3/28)
Judge won't move Navajo Nation case over 'Navajo' products (01/25)

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Jessie Casio - Co-founder at The Denim Vault
Screw navajo nation, trying to cash in on some bs. Whats next, mexicans going after old el paso or burritos if theyre not made by mexicans?
Reply · Like · · August 6, 2013 at 5:25pm

David Snavely - Top Commenter · Loan Officer at Aplus Realty&Mortgage
Suggest you understand the complete situation before opening mouth and letting the entire world know your ignorance.
Reply · Like · · August 7, 2013 at 1:04am

Dan Casio - Top Commenter · CEO & Founder at The Denim Vault
david, you filthy appeasers are ruining this country with your progressive mentality. native americans are disgruntled alcoholics looking for frivolous lawsuits. you can't copyright the

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Gyasi Ross: Bethany Yellowtail carries on tradition with fashion (7/10)
DOI told to investigate alleged violations of NAGPRA in California (7/10)
Police officer aimed rifle at Pueblo artist Mateo Romero in mixup (7/10)
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Big Valley Band invites public to 20th birthday of casino resort (7/10)
Cherokee Nation continues work on new $78.5M gaming facility (7/10)
Delphine Red Shirt: Children remain vital to our survival as nation (7/9)
Audio from Senate Indian Affairs Committee's hearing on five bills (7/9)
Lawmakers introduce bill for adoption tax credit for Indian parents (7/9)
DOI enters Cobell land buy-back agreements with Montana tribes (7/9)
Chuck Sams: Umatilla Tribes sign Cobell land-buy back agreement (7/9)
Peter d'Errico: Native Nations still fighting regimes of domination (7/9)

word navajo just like you can't copyright the word african american or mexican, it's ridiculous to even try! That's why Urban Outfitters told those fuckers to get lost, they didn't give them a DIME! Get a clue because you sound like an ignorant moron yourself for trying to boycott a wholesome fashion company in favor of idiot drunks who have nothing better to do than copyright common words and symbols. The Fair Use trademark law was made to protect us from filth like Navajo Nation

IF you're such a liberal, why don't you donate everything you own to Navajo Nation and other native americans? Oh that's right liberals don't give away their own money, they want to give away everyone else's money!

Reply · Like · · August 7, 2013 at 6:04pm

David Snavely · Top Commenter · Loan Officer at Aplus Realty&Mortgage

Nike has class unlike Urban Outfitters....Some things to consider the next time you're putting together a pair of jaunty athletic leggings, Nike (NKE -1.34%). Make sure you're not co-opting an entire culture's sacred, painful tradition and, if you are, don't make it a blatant part of your marketing and promotion of the offending item

Reply · Like · August 15, 2013 at 5:38pm

David Snavely · Top Commenter · Loan Officer at Aplus Realty&Mortgage

Start a national "boycott campaign" of Urban Outfitters...they only know their pocketbook...and will stall as long as possible...

Reply · Like · August 5, 2013 at 11:54pm

Facebook social plugin

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Elise Patkotak: Alaska Natives deserve to vote in their languages (7/9)

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Reform plan urges billions for Bureau of Indian Education schools (7/9)

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Former leader of Cedarville Rancheria to stand trial for murders (7/9)

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Study finds high rate of dental problems among Navajo children (7/9)

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Umatilla Tribes will spend $1M on non-smoking lounge for casino (7/9)

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Doug George-Kanentiio: Fire lawyers for bad Mohawk land deal (7/8)

Keepseagle attorneys schedule meetings to discuss $380M fund (7/8)

Subcommittee on Indian and Alaska Native Affairs sets hearing (7/8)

Mary Pember: Federal raids slow black market of Indian artifacts (7/8)

Steven Newcomb: Confusion over the right to self-determination (7/8)

MPR: Cancer hits hardest among American Indians in Minnesota (7/8)

BIA approves land-into-trust application for Stillaguamish Tribe (7/8)

Ponca Tribe museum features headdress worn by Standing Bear (7/8)

New eatery features food from Tohono O'odham and Yaqui tribes (7/8)

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RE: Navajo IP Issue

Anthony, Susan <Susan.Anthony@uspto.gov> Fri, Apr 11, 2014 at 6:41 PM
To: "York, George E." <[redacted], "Mehta, Probir J." [redacted],
"Whitlock, Joseph P." [redacted], "Nestor, Shannon"
[redacted], "Graham, Neil" [redacted]
"Kenneth_Van_Wey@ios.doi.gov" <Kenneth_Van_Wey@ios.doi.gov>, Meridith Stanton
<meridith_stanton@ios.doi.gov>
Cc: "Anthony, Susan" <Susan.Anthony@uspto.gov>

Thanks to Meridith, you already have most of what you need, but here is the rest of your request –

(1) Link to Indian Arts and Craft Act - http://www.iacb.doi.gov/act.html

(2) All NAVAJO ARTS & CRAFTS GUILD registered marks developed by the Indian Arts and Crafts Board and transferred to the Navajo are dead, meaning that the federal trademark registrations have not been maintained. (Also, they were not registered as certification marks.) The marks still may be being used, however. Also, in response to another question during our call, there are many federally-registered marks containing "Navajo," for a variety of goods/services.

(3) Materials in the Navajo Nation v. Urban Outfitters case, including the complaint, can be found here: http://turtletalk.wordpress.com/tag/navajo-nation-v-urban-outfitters/. The complaint contains five counts: trademark infringement, trademark dilution, and unfair competition, all under federal law; a violation of the Indian Arts and Crafts Act (IACA); and a violation of New Mexico's unfair practices law. A third amended complaint was filed in November 2013, reflecting the Court's dismissal of the count for violation of NM's unfair practices law, but adding counts for contributory and vicarious liability and a violation of NM's common law. A review of PACER shows that the Navajo Nation is seeking dismissal of UA's counterclaim seeking to invalidate Navajo Nation's federally-registered marks on the ground of genericness and that the parties have completed their briefings on this issue this month.

(4) Background on Clara Pratte: Clara Pratte was appointed in May 2011 as the Executive Director of the Navajo Nation Washington Office. She previously served as the national director of the Small Business Administration's Office of Native American Affairs, from May 2009. She actually has a fairly lengthy resume of work in the federal government predating her work with the SBA; please see http://www.bizjournals.com/albuquerque/stories/2009/05/25/daily46.html.

From: York, George E.
Sent: Friday, April 11, 2014 2:18 PM
To: Anthony, Susan; Mehta, Probir J.; Whitlock, Joseph P.; Nestor, Shannon; Graham, Neil; Kenneth_Van_Wey@ios.doi.gov; Meridith Stanton
Subject: RE: Navajo IP Issue

Here's the call-in information for **today's call at 3:30 pm**. Look forward for talking then, and many thanks for making time on such short notice (on a Friday afternoon).

NUMBER [redacted]

CODE: [redacted]

Thanks,

George

George York

Deputy Assistant USTR for Intellectual Property and Innovation

Office of the United States Trade Representative

Executive Office of the President

600 17th Street, N.W.

Washington, D.C. 20508

Tel: 202.395.3029

Fax: 202.395.3891

-----Original Message-----
From: Anthony, Susan [mailto:Susan.Anthony@USPTO.GOV]
Sent: Friday, April 11, 2014 2:05 PM
To: York, George; Mehta, Probir J.; Whitlock, Joe; Nestor, Shannon; Graham, Neil; Kenneth_Van_Wey@ios.doi.gov; Meridith Stanton
Subject: RE: Navajo IP Issue

Let's plan on it, please - 3:30 it is. We'll wait for the call-in information from you, George.

-----Original Message-----

From: York, George E.

Sent: Friday, April 11, 2014 2:04 PM

To: Anthony, Susan; Mehta, Probir J.; Whitlock, Joseph P.; Nestor, Shannon; Graham, Neil; Kenneth_Van_Wey@ios.doi.gov; Meridith Stanton

Subject: RE: Navajo IP Issue

Can we do 3:30 pm? I understand that works for Joe. Shannon, is that OK for you? I will circulate a call-in number.

Thanks,

George

-----Original Message-----

From: Anthony, Susan [mailto:Susan.Anthony@USPTO.GOV]

Sent: Friday, April 11, 2014 1:55 PM

To: York, George; Mehta, Probir J.; Whitlock, Joe; Nestor, Shannon; Graham, Neil; Kenneth_Van_Wey@ios.doi.gov; Meridith Stanton

Subject: RE: Navajo IP Issue

3 p.m. or thereafter, for me, Ken, and Meridith Stanton. Meridith is the IACB Director and also my long-time compatriot in these matters.

The Indian Arts and Crafts Act is the issue here, at least based on what you have given us thus far.

We'll need a call-in number. Do you want me to set this up and if so, how many lines do you need at your end?

-----Original Message-----

From: Anthony, Susan

Sent: Friday, April 11, 2014 1:28 PM

To: York, George E.; Mehta, Probir J.; Whitlock, Joseph P.; Nestor, Shannon; Graham, Neil; Kenneth_Van_Wey@ios.doi.gov

Subject: RE: Navajo IP Issue

I am available this afternoon, but I also would want Ken Van Wey to join us, in any call. Ken and I have worked together since 2005; he is from Interior's Indian Arts and Crafts Board (IACB).

Ken?

-----Original Message-----

From: York, George E.

Sent: Friday, April 11, 2014 12:55 PM

To: Anthony, Susan; Mehta, Probir J.; Whitlock, Joseph P.; Nestor, Shannon; Graham, Neil

Subject: Navajo IP Issue

Susan,

We have been contacted by stakeholders regarding concerns involving counterfeit Navajo products. See summary below. We understand that you may have some insight into this issue. Could we have a call this afternoon to chat? I'm free all afternoon except between 4-5.

Thanks,

George

SUMMARY

US tribes are facing a big counterfeiting problem with respect to their crafts. Based on GAO study from 20 years ago, it is estimated that 50% of Native American crafts sold are counterfeit, and 100% of merchandise that purports to be Native American craft is counterfeit. Large counterfeiting operations in China and Middle East.

Separately, use of tribal names without permission. E.g., "Navajo-style clothing."

What types of provisions do we have in international agreements?

END SUMMARY

Navajo/UO

Stanton, Meridith <meridith_stanton@ios.doi.gov> Fri, Apr 11, 2014 at 4:04 PM
To: "York, George" [redacted]
Cc: "Anthony, Susan" <Susan.Anthony@uspto.gov>, "Mehta, Probir J." [redacted], "Whitlock, Joe" [redacted], "Nestor, Shannon" [redacted] "Graham, Neil" [redacted] "Kenneth_Van_Wey@ios.doi.gov" <Kenneth_Van_Wey@ios.doi.gov>

If you have not yet seen this information regarding the Navajo Nation's case against Urban Outfitters, you may also be interested in the following links, http://scholar.google.com/scholar_case?case=2383062687748454377&hl=en&as_sdt=6&as_vis=1&oi=scholarrand http://scholar.google.com/scholar_case?case=11163305292853965117&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

Navajo/Urban Outfitters

Stanton, Meridith <meridith_stanton@ios.doi.gov> Mon, Aug 5, 2013 at 4:59 PM
To: Ashley Fry <Ashley_Fry@ios.doi.gov>, Ken <Kenneth_Van_Wey@ios.doi.gov>

http://www.indianz.com/News/2013/010708.asp

--

Meridith Z. Stanton

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Rebecca Tushnet's 43(B)log

False advertising and more

Monday, April 08, 2013

Navajo Nation claims against Urban Outfitters survive

Navajo Nation v. Urban Outfitters, Inc., --- F.Supp.2d ----, 2013 WL 1294670 (D.N.M.)

The court largely refused to dismiss the Navajo Nation's claims against Urban Outfitters for using "Navajo" on some of its items. In this case, the court seemed to treat "identification meaning" the same as "trademark meaning," allowing the Navajo Nation to claim that recognition of the Navajo as a group was recognition of "Navajo" as a mark. I'm dubious about this, but understand why it happened here.

The Navajo Nation "is a sovereign Indian Nation with over 300,000 enrolled members," and "acts through its political subdivision ...; its wholly-owned instrumentalities ...; its officers, employees, and authorized agents; and its members, the Navajo People." (This is one place where I get nervous about applying trademark concepts: if that isn't naked licensing, what is?) It alleged that it *and its members* had been known as "Navajo" since at least 1849, had continuously used the mark in commerce, and had made the mark famous with numerous products, including, among other things, clothing, accessories, blankets, jewelry, foods, tools, decorations, crafts, and retail services. The Navajo Nation has registered 86 trademarks that include NAVAJO for different classes, including clothing, jewelry, housewares, and accessories, and alleged that many had become incontestable. (Urban Outfitters argued that the Nation didn't actually own all 86 marks, and that only 5 were incontestable.) The Nation also alleged substantial investment in promoting the marks, resulting in over $500 million of sales of NAVAJO-branded goods.

Further, it alleged, "NAVAJO" was inherently distinctive, and that it wasn't a generic name for any products, since if you go into a clothing store and ask for a "Navajo" you will be greeted with incomprehension. (What if you go into a grocery store and ask for a "Swiss"?) The Nation alleged that, instead of using descriptive words like "geometric" or "southwestern," Urban Outfitters chose "Navajo" in order "to trade off of the cachet and romanticism associated with the Navajo People, who form the Navajo Nation." Futher, UO allegedly falsely

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► November (36)

► October (37)

► September (48)

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► July (38)

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► May (56)

▼ April (59)

Case against junk

advertised a number of its "Navajo" products as "Vintage" and "Handmade," making an expressly false claim that their goods are made by members of the Navajo Nation.

UO allegedly rolled out a product line of at least 20 items under the "Navajo" and "Navaho" names, echoing Navajo Nation tribal patterns. Further, UO allegedly "used" the mark in its internal search engine to divert consumers, causing initial interest confusion by returning results. (The Amazon watch case might be of relevance here.) The Nation alleged trademark infringement, federal and state dilution, false advertising, violation of the Indian Arts & Crafts Act, and related state-law claims.

On a motion to dismiss, the court refused to consider excerpts from the trademark file histories of some of the marks referenced by the Nation in its complaint. The Nation didn't attach an incomplete document to its complaint, but rather UO was cherry-picking portions of the PTO record to contest the facts. The evidentiary value of the excerpts was subject to reasonable dispute and not suited for judicial notice. "If Defendants' position were correct, the entire trademark file history of each trademark allegedly infringed would nearly always be permissible to consider on a motion to dismiss in any

foreclosure fees survives for no...

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damages expert excluded for failing to discredit c...

failure to adhere to government and industry label...

Consumer Class Actions panel at the ABA

Transformativeness doesn't require commentary on o...

no preemption for ordinary falsity claim about FDA...

Prince v. Cariou

Pictures of fruit support misleadingness claim for...

reading list: FTC

trademark infringement case, an incredibly cumbersome analysis at the early stages of a case." Likewise, the court declined to consider evidence that "Navajo" was used as a generic descriptor of "Indian-styled" prints and designs at this stage of the case.

UO argued that the Nation failed to state a claim because it failed to allege facts showing that UO's use of the term was as a source identifier instead of descriptively; the Nation cropped the content of the sites (presumably so that UO's own marks wouldn't appear). Dismissal for failure to state a claim is appropriate only in the most extreme trademark cases, and this wasn't one.

The Nation argued that because their marks were incontestable and fanciful, arbitrary, or suggestive, descriptive fair use was unavailable as a defense. (I'm pretty sure that the "incontestable" part there doesn't work, inasmuch as §33(b) is in the statute precisely to establish descriptive fair use as a defense as to incontestable marks.) As for the fanciful etc. argument, a number of courts have (correctly) concluded that it's the *defendant's* use that must be descriptive, not the plaintiff's, but the court didn't resolve the issue because UO didn't establish that the defense succeeded as a matter of law.

The Nation alleged sufficient facts to show that UO used "Navajo" as a mark, and that it didn't "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." The Nation alleged use on similar goods to the Nation's own goods, and that the goods compete in many of the same channels of commerce. UO advertised "Navajo Bracelet" and "Navajo Feather Earring" "without clarifying words or images that 'Navajo' did not mean that it was made by a member of the Navajo Nation and was merely descriptive of the style," and other items were advertised similarly. When the products involved are similar, a descriptive fair use defense may fail not because likely confusion makes the use nondescriptive, but because confusion shows that a use is de facto use as a mark. Even as to UO's sub-brand Anthropologie, where the exhibits only showed statements saying, "We're sorry. This Product is no longer available," could count as use; "a factual inference could be made that the product is no longer available because all those particular goods had been sold from the site."

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Copyright bullying, university edition

Hearing from Dodge's lawyers?

Here, "Navajo" has a primary meaning referring to the Navajo tribe and its people. "Navajo" also has a geographic component, but the tribe is the registrant. As for dictionary definitions of "navajo blanket" and "navajo rug" as "a blanket woven by the Navaho in geometric designs of symbolic meaning," this definition "demonstrates that, even when used as an adjective, the term conveys information that the source of the rug or blanket is the Navajo tribe or a member thereof." Thus, even adjectival use could create likely confusion among consumers. Some of the items included another company's brand in the product description, but that wasn't enough to find, as a matter of law, that the use of another brand would eliminate all alleged confusion.

UO argued that the Nation itself acknowledged that "Navajo Style" for goods would be fair use, relying on a license agreement submitted to the PTO in connection with one trademark, but that evidence wouldn't be considered on a motion to dismiss. In addition, UO argued that the Nation failed to show either trademark use or bad faith as to Free People because "Navajo" was a descriptor of "vintage, pre-owned items originally from artisans who identify as Navajo Indians." But UO's affidavit was less than a model of clarity; it averred that the items were "believed to" be made by self-identified Navajo artisans; this again wasn't suitable for resolution on a motion to dismiss. The allegations of use in, for example, "Vintage Handmade Navajo Necklace," were sufficient to state a claim of confusion over origin.

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Trademark Scholars' Roundtable part 2 continued

Trademark Scholars' Roundtable part 2

TM roundtable, continued

5th Annual Trademark Scholars' Roundtable

Q&A on new Canadian copyright law

Navajo Nation claims against Urban Outfitters surv...

CLS and IP part 3

CLS and IP part 2

Critical Legal Studies and Intellectual Property 3...

In addition, UO argued that a user's collection of items she wanted, labeled "Navajo Beauty" and displayed on the Free People site, wasn't trademark use by UO. The Nation acknowledged that its claims didn't encompass acts of UO's customers. The court noted that the Tenth Circuit recognizes claims based on initial interest confusion, "the unauthorized use of trademarks to divert internet traffic, thereby capitalizing on a trademark holder's goodwill." The court found it "unclear" whether UO was responsible for using "Navajo Beauty" to describe a collection, since the page says the collection was created by "indiehippiepixie." However, the Nation sufficiently alleged that UO used "Navajo" to divert internet traffic. Thus, the court didn't decide whether there was infringement based on advertising the "Palmedo Blanket Bag" (part of indiehippiepixie's collection) without "development of the factual record concerning how Defendants allegedly used 'Navajo' in their internal search engines to divert customers to products like the Palmedo Blanket Bag."

Finally, the court couldn't find nominative fair use as a matter of law. And we get a new-to-me reformulation of the doctrine:

Rack and ruin: search queries no aid to Nordstrom

Claims over allegedly inhumanely raised chickens s...

Unusual copyright permission term leads to unsucce...

Support the Organization for Transformative Works

Square pegs on round spots: transformative alterat...

Tom Friedman Op-ed Generator

Lace pattern not infringing, but possibly bait & s...

Court mostly rejects Dole's fruit salad of argumen...

Design patent regime preempts state law claims for...

Timeline of bad facts

Reading list: empirical study of college football ...

Proposition 64 didn't remove standing from competi...

$42 million in damages available for violation of ...

System design alone not enough for copyright liabi...

"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 mark's holder." Assuming the doctrine's validity in the Tenth Circuit, whether "Navajo" was the only word reasonably available to describe the designs of the products at issue was a fact question; the Nation alleged that "geometric" or "southwestern" would also work. The Nation therefore successfully alleged claims of source confusion as well as sponsorship or endorsement confusion.

Of course, the court also rejected UO's contention that Navajo was generic for clothing and accessories, given the pleadings, despite what indiehippiepixie might have thought.

Turning to dilution, the court rejected UO's argument that the Nation failed to allege fame for the relevant goods. The Nation represented to the PTO that its first use of the mark in connection with clothing such as shirts and jackets was in 1995 and 2005; it didn't allege particular facts showing the extent and geographic reach of sales, advertising, and publicity. However, the Nation alleged that it and its people had been known by "Navajo" since 1849; it had continuously used the NAVAJO trademark in commerce; it had marketed and retailed clothing, jewelry, and house wares since 1941; and it had registered the NAVAJO trademark in 1943. This was a significant duration, despite the Nation's failure to allege many non-conclusory facts about geographic reach. It did allege that it had invested "substantial capital in promoting and protecting" the NAVAJO trademark, resulting in more than $500 million in sales of NAVAJO-branded goods, and that the NAVAJO marks were prominently featured on a number of its websites. Moreover, it alleged 86 registrations with a NAVAJO component (despite the factual dispute over how many marks the named plaintiffs actually owned). Combined with general allegations that the mark was broadly recognized by the general public as a mark for Indian-styled and Indian-produced goods, this was enough to survive a motion to dismiss.

In combination with the complaint as a whole, the allegation that UO's use of Navajo in retailing its 23 "Navajo" products and its marketing of its "Navajo Collection" made it likely that consumers would incorrectly believe that the "Navajo" mark is an indistinct term was sufficient to allege dilution by blurring. Evidence that other fashion marketers already do that was not relevant on a motion to dismiss.

The court did agree that plaintiffs failed to allege dilution by tarnishment based on two theories, though a quality-based claim survived. The "Navajo Print Fabric Wrapped Flask" was not sufficiently unwholesome to constitute tarnishment, given that the Fire Rock Navajo Casino registered trademark includes "shot glasses" among its goods. Although the Nation bans the sale and consumption of alcohol within its borders, it admitted that there was an exception for alcohol in dining areas of a Navajo Nation Gaming Enterprise facility and that it had registered the mark for shot glasses. Thus, as a matter of law,

Del Monte trademark, false advertising battle ends...

Green is good?

► March (73)

► February (41)

► January (50)

► 2012 (598)

► 2011 (430)

► 2010 (312)

► 2009 (392)

► 2008 (359)

► 2007 (380)

► 2006 (336)

► 2005 (50)

► 2004 (14)

► 2003 (9)

Labels

230 (43)

acpa (11)

advertising (196)

antitrust (11)

art law (27)

attribution (26)

blogging (18)

california (343)

can-spam (1)

cfaa (5)

cfps (12)

class actions (193)

cmi (4)

comics (32)

commercial speech (108)

use on a flask wasn't sufficiently unwholesome or unsavory to support a tarnishment claim.

In addition, the court rejected the argument that UO's use of "Navaho" was scandalous because the official spelling uses a j. There was no authority that misspelling is scandalous. Indeed, the Nation's own complaint noted that "Navaho" is a long-thought acceptable spelling, and the Nation relied on Webster's dictionary in its briefs, which also used the terms interchangeably.

The Nation did preserve a theory that UO's products were of significantly lower quality than the Nation's own products, diluting the marks. UO argued that these allegations were conclusory and that the complaint itself showed that consumers rated the products highly, with an average rating of 4.5 out of 5 stars. The court wasn't willing to find that the star ratings were conclusive as to quality. While the allegations of lower relative quality were "somewhat conclusory," they were enough to create a factual issue.

The Indian Arts and Crafts Act: The IACA "is a 'truth-in-advertising law designed to prevent products from being marketed as 'Indian made,' when the products are not, in fact, made by Indians as defined in the Act." It creates a cause of action against a defendant who sells a good in a manner that falsely suggests that it's Indian-produced or the product of a particular Indian, Indian group, or Indian tribe. "[T]he question for the trier of fact is what the entire sales package, including advertising, labeling, and place of sale, suggested to the average consumer." An art or craft work is a handcraft—"an object created with the help of only such devices as allow the manual skill of the maker to condition the shape and design of each individual product."

The court refused to dismiss the IACA claims:

> Plaintiffs allege that Defendants have displayed for marketing and retailing items such as "Navajo Bracelet," "Navajo Glove," "Vintage Men's Woolrich Navajo Jacket,"

conferences (543)
consumer protection (363)
contracts (44)
copying (169)
copyright (1009)
counterfeiting (1)
creative commons (12)
cultural property (8)
cybersquatting (1)
damages (79)
dastar (93)
defamation (112)
derivative works (2)
design patent (6)
dilution (170)
disclosures (17)
disparagement (10)
dmca (115)
drm (40)
false advertising (1443)
fan (1)
fan fiction (69)
fanworks (152)
fda (173)
fees (11)
first amendment (212)
ftc (123)
geographic indications (29)
google (67)
insurance (53)
interviews (5)
jurisdiction (5)
libraries (18)
misappropriation (9)
moral rights (12)
music (99)

> and "Navajo Feather Earring." Plaintiffs contend that the products are in a traditional Indian style, and composed of Indian motifs and Indian designs, but are without identifier terms or labels; that the manner of marketing the goods falsely suggests the products are Indian products of the Navajo Nation, when in fact they are not Indian made; and that a consumer may find the products using search terms like "Indian," "Native American," "tribal," or "Navajo."

This was enough to allege a cause of action under the IACA. Clothing and clothing accessories could be arts or crafts within the meaning of the IACA, even if the clothing was contemporary apparel. The regulations specify that both traditional and modern apparel could qualify.

UO argued that the Nation made contrary representations to the PTO in registering "Navajo Jeans" for "clothing, namely, tops, vests, shirts, sport shorts, polo shirts, golf shirts, jackets, T-shirts, sweat shirts." In response to an examiner's refusal to register the mark because registration could violate the IACA, the Nation successfully argued that "[t]he goods offered under the Mark are not art works, crafts, or handcrafts within these definitions contained in the Regulations [for the IACA]." The court wasn't willing to find judicial estoppel based on the limited record before it, and it wasn't clear whether judicial estoppel would apply because the IACA's regulations might have changed after the Nation made its representation to the PTO. Anyway, it wasn't clear whether the Nation's statement about "goods" referred to particular types of clothing, or contemporary clothing generally. (This is an interesting issue, and the Nation does seem to have a problem here. If it wants freedom to make "Navajo"-branded garments anywhere and in any quantities, as a trademark owner normally does, isn't that inconsistent with the IACA's goal of supporting Native American artisans? For what it's worth, I don't think the change in regulation text makes a difference—I read the old and new versions of the regulation and I don't think that the statements about apparel represented a change in the law.)

Given the holdings above, the New Mexico Unfair Practices Act claims also survived, with a certification to the state supreme court. UO argued that the Nation lacked standing because it wasn't a buyer of UO's goods. However, the case law simply suggested that a seller of goods couldn't sue the buyer of its goods under the NMUPA. Here, the Nation alleged that false representations were made to the consuming public, so the lawsuit served the statute's consumer protection goals, albeit indirectly. The statute said that "any person" injured could sue, and many other states with similarly broad language allow business competitor standing, though there's no clear consensus. Given the limited briefing on the issue of whether a competitor would need to allege a public interest component and whether, if there is one, the Nation sufficiently alleged it, the court was inclined to certify the issue to the New Mexico Supreme Court, and so the court stayed its standing ruling until it received supplemental briefing.

my writings (53)
net neutrality (5)
parody (22)
patent (77)
patents (126)
peer production (27)
preemption (155)
presentations (71)
privacy (75)
procedure (115)
property (8)
reading list (191)
remedies (48)
right of publicity (142)
secondary liability (80)
securities (5)
standing (221)
surveys (23)
teaching (20)
tortious interference (43)
trade secrets (34)
trademark (1049)
traditional knowledge (6)
unconscionability (4)
unfairness (35)
warranties (4)

Things I've read

Books from my LibraryT

Creating the Corpc Soul: The Rise of P Relations and Corp Imagery in Americe Business

Endless Novelty by Philip Sc

The state law trademark infringement and dilution claims also survived, though the Nation would have to amend the complaint to allege fame in New Mexico.

Posted by Rebecca Tushnet at 11:37 AM

+1 Recommend this on Google

Labels: art law, dilution, standing, trademark, traditional knowledge

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Tagged: fiction, sf, fanti
The sequel to Morgai barbarian swordsman book The Remains, this one is at least as grimdark—there... (read review)

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Larry Lessig on Free Culture

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History of Animation in Court

Jotwell: Journal of Things We Like Lots

Michigan Telecom & Tech Law Review blog

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Rocket Docket (EDVa IP Litigation)

The Gray Blog (parallel imports)

Wassom.com: law and social media

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04:57 PM ET

Navajo Nation sues Urban Outfitters for alleged trademark infringement

By **Stephanie Siek**, CNN

(CNN) – The Navajo Nation is suing hipster clothing and accessories retailer Urban Outfitters for using the Navajo name and motifs in their products without permission – a practice that they say takes away millions of dollars from the tribe and its members.

The lawsuit alleges that Urban Outfitters' use of the name "Navajo" in its products "deceives and confuses consumers" and "is designed to convey to consumers a false association or affiliation with the Navajo Nation, and to unfairly trade off the fame, reputation, and goodwill of the Navajo Nation's name and trademarks."

One of the laws under which the tribe is seeking redress is the Indian Arts and Crafts Act, a federal law that makes it illegal for non-Indian businesses to misrepresent a product as being made by a Native American tribe or person.

"When Congress amended the Indian Arts and Crafts Act of 1990, it did so after studies showed that 'fake' Indian products were siphoning millions from the market for products created by citizens of federally recognized tribes," said Kristen Carpenter, a professor of law at the University of Colorado who specializes in Native American property rights.

According to a June 2005 report by the Department of the Interior, which houses the Bureau of Indian Affairs, estimated that indigenous artisans lose $400 million to $500 million a year to sales of counterfeit products.

"For some of our Navajo or native artisans, that's what sells their products. Attaching the name Navajo to their item generates income," said Erny Zah, director of communications for the Navajo Nation's Office of the President. "To the larger world, we are Navajo, and we take pride in being Navajo... We don't want our name to be associated with anything that isn't Navajo."

The suit, filed Tuesday, in U.S. District Court in New Mexico, lists a number of products it says are a problem– including silver jewelry, backpacks, shirts, tote bags and underwear. But it calls out Urban Outfitters' marketing of a flask as "Navajo Flask" as especially "derogatory and scandalous," because the Navajo Nation expressly forbids its name to be used in connection with products related

to alcohol and bans the sale, manufacture and consumption of alcohol within its borders. According to the National Survey on Drug Use and Health, American Indians and Alaska Native adults have higher-than-average rates of binge drinking. And according to data provided by the Department of Health and Human Services, Native Americans are five times more likely than whites to die of alcohol-related causes.

A cease-and-desist order filed last fall resulted in Urban Outfitters removing Navajo references in descriptions of some items, but in-store displays in some shops selling its products as well as the online store for the Free People brand continued to label or reference "Navajo" or "Navaho" in describing some items.

"The use of Indian names and imagery without consent of the relevant Indian nation diminishes both critical opportunities for economic development and, as importantly, for tribes to represent themselves consistent with cultural norms and traditions, both ancient and contemporary," said Carpenter. "The Urban Outfitters case is particularly unfortunate in light of the beautiful and high-quality goods produced by Navajo artisans, readily available for purchase by consumers seeking real Navajo products."

The Navajo Nation is asking for monetary damages, a share of the profits made on falsely branded products and an injunction that would forbid Urban Outfitters or any of its subsidiaries from using the name "Navajo" in its products or marketing materials.

Urban Outfitters did not respond to calls seeking comment.

Re: Fw: Daily Times article

Hill, Michele <michele_hill@ios.doi.gov> Fri, Apr 5, 2013 at 10:28 AM
To: Meridith Stanton <meridith_stanton@ios.doi.gov>

I see this from Tuesday on the ABQ site, but I don't see/find anything from today.

Navajo suit against Urban Outfitters moves forward

By Associated Press on Tue, Apr 2, 2013 A federal judge has ruled that the Navajo Nation can move forward with its claims against Urban Outfitters but tossed out a couple of the tribe's legal theories.

POSTED: 5:44 pm

The tribe sued the clothing retailer last year, alleging it violated trademarks on the Navajo name. The tribe is seeking monetary compensation and an order permanently enjoining Urban Outfitters from using the name "Navajo" or variations of it.

U.S. District Judge C. LeRoy Hansen in New Mexico recently rejected a request by Urban Outfitters to dismiss most of the tribe's claims. He has reserved ruling on one, pending additional briefing.

Hansen says the Navajo Nation cannot argue that variations on the spelling of Navajo or that the defendants' use of the Navajo name on products like a flask is scandalous.

—
Michele Hill
Administrative Officer
U.S. Department of the Interior
Indian Arts and Crafts Board
Tel: (202) 208-3286
Main Line: (202) 208-3773
Fax: (202) 208-5196

On Fri, Apr 5, 2013 at 10:16 AM, Meridith Stanton <meridith_stanton@ios.doi.gov> wrote:
Can you get that on line?

— Original Message —
From: Nina Alexander [mailto:nina_c_alexander@ios.doi.gov]
Sent: Friday, April 05, 2013 07:10 AM
To: meridith_stanton@ios.doi.gov <meridith_stanton@ios.doi.gov>

Subject: Daily Times article

There is an article in today's ABQ Journal from this newspaper talking about the Urban Outfitters/Navajo lawsuit and while they've thrown some of the frivolous stuff out, it states that the suit lives on and has validity with trademark issues, false advertising and violations of the Act.

Nina

FYI RE NN v Urban Outfitters

Brian Lewis <blewis@nndoj.org> Fri, Jan 18, 2013 at 12:49 AM

Good evening:

Please see the attachment.

Respectfully yours,

B. L. Lewis

NN v UO Order denying motion to Transfer Venue.pdf
97K

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

THE NAVAJO NATION, a sovereign Indian Nation, DINÉ DEVELOPMENT CORPORATION, a corporation wholly-owned by and formed under the laws of the Navajo Nation, and NAVAJO ARTS AND CRAFTS ENTERPRISE, a wholly-owned instrumentality of the Navajo Nation,

Plaintiffs,

v.

No. Civ. 12-195 LH/WDS

URBAN OUTFITTERS, INC., UO.COM, L.L.C., URBAN OUTFITTERS WHOLESALE, INC., ANTHROPOLOGIE, INC., ANTHROPOLOGIE.COM, L.L.C., and FREE PEOPLE of PA, L.L.C., Pennsylvania Corporations, and FREEPEOPLE.COM, L.L.C., a Delaware Corporation,

Defendants.

MEMORANDUM OPINION AND ORDER

On September 20, 2012, Defendants Urban Outfitters, Inc.; UO.com, L.L.C.; Urban Outfitters Wholesale, Inc.; Anthropologie, Inc.; Antrhopologie.com, L.L.C.; Free People of PA, L.L.C.; and Freepeople.com, L.L.C. (collectively "Defendants") filed a Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) (Doc. 38). The parties submitted briefs in support of and in opposition to the motion. Additionally, Plaintiffs The Navajo Nation, the Diné Development Corporation ("DDC"), and the Navajo Arts and Crafts Enterprise ("NACE") (collectively, "Plaintiffs" or "The Navajo Nation") filed a Motion for Leave to File Sur-Reply to Defendants'

Motion to Transfer Venue (Doc. 47). This Court, having considered the pleadings, motions, briefs, relevant law, and otherwise being fully advised, concludes that Plaintiff's motion to file a sur-reply will be granted and Defendants' motion to transfer venue will be denied.[1]

I. INTRODUCTION

A. THE PARTIES

The Navajo Nation is a sovereign Indian Nation with over 300,000 enrolled members. Am. Compl. (Doc. 30) ¶ 9. It owns controls, and exercises jurisdiction over a semi-autonomous territory spanning more than 27,000 square miles in northeastern Arizona, the southeastern portion of Utah, and northwestern New Mexico. *Id.* The Navajo Nation Tribal Government's company headquarters are located in Window Rock, Arizona. *See* Def.'s Mot., Ex. 1 (Doc. 39-1) at 1. The Navajo Nation is an institution that acts through its political subdivision, the Division of Economic Development; its wholly-owned instrumentalities, NACE and DDC; its officers, employees, and authorized agents; and its members, the Navajo People. Am. Compl. (Doc. 30) ¶ 9.

Defendant Urban Outfitters, Inc., ("Urban Outfitters") is an international retail company that markets and retails its merchandise in its more than 200 stores located internationally and nationally and on the internet. *See id.* ¶ 13. Defendants UO.com, L.L.C.; Urban Outfitters Wholesale, Inc.; Anthropologie, Inc.; Anthropologie.com, L.L.C.; Free People of PA, L.L.C.; and FreePeople.com, L.L.C. are wholly-owned subsidiaries of Urban Outfitters. *Id.* ¶¶ 14-17. The subsidiaries are not separate autonomous entities, but rather are "brands" of Urban Outfitters. *Id.* ¶ 18. All seven of the Defendants' corporate headquarters are located in Pennsylvania. *See* Def.'s Mot., Ex. 5 (Doc. 39-5) at ¶¶ 3-8.

[1] Defendants requested oral argument on the motion to transfer venue. Defs.' Notice (Doc. 45). Given the thoroughness of the parties' briefs, the Court finds that oral argument is unnecessary and will deny that request.

Defendants sell fashion apparel, accessories, and home goods. Am. Compl. (Doc. 30) ¶ 33. Defendants had sales of approximately $2.5 billion in fiscal year 2012. *Id.* ¶ 34. Defendants purchased merchandise from numerous vendors; in fiscal year 2012, they did business with approximately 3,400 vendors. *Id.* ¶ 35. Urban Outfitters' Free People wholesale division sells the Free People brand worldwide through approximately 1,400 department and specialty stores, as well as through Free People and Urban Outfitters stores. *Id.* ¶ 36. Defendants admit that their goods reach New Mexico. Def.'s Mot. (Doc. 39) at 7. Urban Outfitters operates a store in Albuquerque, New Mexico, and transacts business through the Internet in New Mexico. Am. Compl. (Doc. 30) ¶ 20. Free People does not operate any physical stores in New Mexico, but has four stores in Pennsylvania, among other locations around the nation. *See* Def.'s Mot., Ex. 8 (Doc. 39-8) at 1-3.

B. THE ALLEGATIONS OF THE COMPLAINT

The Navajo Nation alleges that it and its members have been known by the name "Navajo" since at least 1849, have continuously used the NAVAJO trademark in commerce, and have made the NAVAJO name and trademarks famous with numerous products, including, among other things, clothing, accessories, blankets, jewelry, foods, tools, decorations, crafts, and retail services. Am. Compl. (Doc. 30) ¶ 3. Plaintiffs state that they have registered 86 trademarks using the NAVAJO component with the United States Patent and Trademark Office ("USPTO") on the Principal Register for a variety of different classes of goods and services, including clothing, jewelry, house wares, and accessories. *Id.* ¶¶ 3, 27. Plaintiffs allege that the trademark NAVAJO mark is inherently distinctive, and given the incontestable status of its registration, the trademark may not be challenged as merely descriptive. *Id.* ¶ 29. The Navajo Nation asserts that its NAVAJO marks are prominently featured on its and its agents' websites.

Id. ¶ 30. Plaintiffs contend that its famous NAVAJO mark is broadly recognized by purchasers of consumer goods and the general public as a trademark for the Navajo Nation's Indian-styled and Indian-produced goods. *Id.* ¶ 31.

The Navajo Nation asserts that, at least as early as March 16, 2009, Defendants have used "Navajo" and "Navaho" as names and marks in direct competition with NAVAJO-branded goods. *See id.* ¶¶ 5, 37. The Navajo Nation has brought suit against Defendants, claiming trademark infringement, trademark dilution, unfair competition, false advertising, commercial practices laws violations, and violation of the Indian Arts and Crafts Act. Specifically, Plaintiffs allege in Count One that Defendants' use of the "Navajo" and "Navaho" mark in connection with the sale of clothing, jewelry, house ware, footwear, and similar items is likely to cause confusion, mistake, or deception in the market place, and has created actual confusion in the market place, and constitutes trademark infringement in violation of 15 U.S.C. §§ 1114 and 1117 of the Lanham Act.[2] *See id.* ¶¶ 81-91. In Count Two, Plaintiffs assert that Defendants' use of the "Navajo" and "Navaho" names and marks to promote, market, and sell its retail items constitutes willful Trademark Dilution by blurring, and willful Trademark Dilution by tarnishment under § 1125(c) of the Lanham Act. *See id.* ¶¶ 92-96. Plaintiffs contend in Count Three that Defendants' are also liable for Unfair Competition and False Advertising under § 1125(a) of the Lanham Act based on false advertising and infringement of the Navajo Nation's unregistered NAVAJO trademarks. *See id.* ¶¶ 97-101.

In Count Four, Plaintiffs allege that Defendants violated the Indian Arts and Crafts Act, 25 U.S.C. § 305 *et seq.*, ("IACA") 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. *See id.* ¶¶ 102-22. Plaintiffs contend that the

[2] The Lanham Act is found at 15 U.S.C. §§ 1051 *et seq.*

damages suffered include lost sales by members of the Navajo Nation, lost profits through driven-down prices caused by Defendants' imitation products, and loss of goodwill and reputation. *See id.* ¶ 112.

Plaintiffs assert state law claims in the two remaining counts. In Count Five, Plaintiffs contend that Defendants are liable for violation of the New Mexico Unfair Practices Act ("NMUPA"), N.M. Stat. Ann. § 57-12-3, through its sale of goods under the "Navajo" and "Navaho" names and trademarks, as well as its sale of other goods falsely represented as authentic goods, when Defendants knew that their 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. *See id.* ¶¶ 123-28. Finally, Plaintiffs allege in Count Six that Defendants' willfully committed acts and omissions caused dilution and/or tarnishment of the distinctive quality of the Navajo Nation's NAVAJO marks in violation of the New Mexico Trademark Act ("NMTA"), N.M. Stat. Ann. § 57-3B-15. *See id.* ¶¶ 129-33.

II. PROCEDURAL BACKGROUND

On October 12, 2011, the Navajo Nation Department of Justice sent Urban Outfitters a "Cease and Desist" letter, dated June 30, 2011, demanding that Urban Outfitters cease using the "Navajo" name on, and in relation to, their products. *See* Am. Compl., Ex. B (Doc. 30-1) at 39-41 of 41; Def.'s Mot. to Dismiss, Ex. I (Doc. 33-9) at 1, 4 of 6. Within a week of receiving the letter, Urban Outfitters took steps to remove the term "Navajo" from its web pages in order to avoid potential litigation. *See* Def.'s Mot. to Dismiss, Ex. I (Doc. 33-9) at 1 of 6.

On October 19, 2011, the Los Angeles Times reported: "Urban Outfitters appears to have caved to the Navajo Nation. As of Wednesday, the trendy chain store had removed the word 'Navajo' from the description of about 20 items on its website. . . . Urban Outfitters has

replaced the word 'Navajo' with 'printed.'" Deborah Netburn, *Navajo Nation Takes on Urban Outfitters, and Wins*, Los Angeles Times (Oct. 19, 2011, 5:13 PM), http://latimesblogs.latimes.com/nationnow/2011/10/navajo-nation-takes-on-urban-outfitters-wins.html.

On or around October 20, 2011, the Navajo Nation Department of Justice issued the following press release:

> The Navajo Nation Department of Justice is aware of the Urban Outfitters Corporation's recent removal of the Navajo name from its online marketing and retailing of its products. The Urban Outfitters Corporation's recent removal of the Navajo name from its online marketing and retailing are positive actions that are more consistent with the corporation's responsibilities than previously demonstrated. If the company has also ceased using the Navajo name in conjunction with its merchandise in its retail stores and print-media advertising, these are encouraging steps by the company towards amicably resolving this matter. While the Navajo Nation is certainly committed to protecting its distinctive name and trademarks; the Navajo Nation is also committed to avoiding unnecessary controversy and beneficially resolving matters concerning the unprivileged use of the Navajo name. The Navajo Nation appreciates actions such as those recently taken by Urban Outfitters, and encourages other companies to take similarly responsible measures in the future.

See Def.'s Mot. to Dismiss, Ex. I (Doc. 33-9) at 6 of 6.

On February 28, 2012, Plaintiffs filed the current action against Defendants. Compl. (Doc. 1). On April 30, 2012, Defendants filed a Motion to Dismiss the Complaint (Doc. 16). Plaintiffs filed an Amended Complaint (Doc. 30) on May 21, 2012, prompting Defendants to file a Motion to Dismiss the Amended Complaint (Doc. 33) on June 22, 2012.

On August 3, 2012, Mark A. Griffin, counsel for Plaintiffs, sent a letter to defense counsel asking that their clients confirm that, during the pendency of the litigation, they would refrain from using "Navajo" in conjunction with their sale of clothing jewelry and accessories, and notifying them that, if they did not extend such a promise, the Navajo Nation would file a motion for preliminary injunction. Decl. of Mark A. Griffin, Ex. A (Doc. 41-1) at 1 of 14.

Counsel for defendants, H. Jonathan Redway, responded to the letter on August 10, 2012, stating that there was no basis for entry of a preliminary injunction, because each defendant instructed its employees to discontinue use of the term "Navajo," as an accommodation to the Navajo Nation and to avoid potential costs and disruptions "that any litigation, even baseless litigation, causes and not because it was under any legal to do so." *Id.*, Ex. B (Doc. 41-1) at 5 of 14. On August 31, 2012, Plaintiffs' counsel notified defense counsel that based on Defendants' representations the Navajo Nation would not file a preliminary injunction motion at that time. *See id.*, Ex. C (Doc. 41-1) at 7 of 14.

On September 20, 2012, Defendants filed the motion to transfer venue (Doc. 38) at issue here. Subsequently, by letter dated September 21, 2012, Plaintiffs asserted that they had "evidence that an Obey cap and other items were offered for sale in an Urban Outfitters' store in Evanston, Illinois on August 22, 2012 tagged with the word 'Navajo'" and threatened to file a motion for preliminary injunction in the absence of an explanation. *Id.*, Ex. D (Doc. 41-1) at 8-9 of 14. By letter dated October 1, 2012, with the heading "For Settlement Purposes Only Subject to Federal Rule of Evidence 408 Not Admissible for Any Purpose," counsel for Defendants responded, categorically denying any wrongdoing. *Id.*, Ex. E (Doc. 41-1) at 10-12. Defense counsel also provided an explanation regarding the Obey[3] cap in question. *See id.*

On October 9, 2012, Plaintiffs filed a response (Doc. 40) to Defendants' motion to transfer. Plaintiffs attached to their response the aforementioned letters regarding the potential filing of a preliminary injunction. Defendants filed their reply (Doc. 44) in support of their motion to transfer and argued in footnote 3 that the Court should order Plaintiffs "to withdraw its public filing, Dkt. 41-1, pp. 5-6, 10-12, which are letters sent under Fed. R. Evid. 408 in an effort

[3] Obey is an independent company from Defendants that sells clothing and other items. *See* Pl.'s Resp., Ex. E (Doc. 41-1) at 10-11 of 14.

to assist in settlement of this case and which were improperly filed with this Court." Defs.' Reply (Doc. 44) at 5 n.3. The referenced pages refer to Exhibit B, the August 10, 2012 letter from defense counsel explaining why there is no basis for the entry of a preliminary injunction against Defendants, and to Exhibit E, the October 1, 2012 letter from defense counsel further detailing why there is no basis for Plaintiffs to seek a preliminary injunction and offering an explanation concerning the Obey cap that Plaintiffs argued violated their trademark.

Plaintiffs subsequently filed a motion for leave to file a sur-reply (Doc. 47) in order to address the request made in Defendants' reply brief to strike Plaintiffs' Exhibits B and E. Plaintiffs' proposed sur-reply provides a legal argument against striking their exhibits. The Court has considered the motion, as well as the arguments made in Defendants' opposition to Plaintiffs' motion for leave to file the sur-reply, and finds that the arguments presented in the sur-reply are helpful to the Court in resolving the issue concerning whether Exhibits B and E are relevant or should be stricken from the record. The Court will therefore grant Plaintiffs' motion to file the sur-reply.

Regarding Defendants' request to strike from the record Exhibit B (Doc. 41-1 at 5-6 of 14) and Exhibit E (Doc. 41-1 at 10-12 of 14), the Court finds that Plaintiffs offered Exhibits B and E to refute Defendants' argument that Plaintiffs "sandbagged" them into believing this matter had been resolved in order to file their suit in an inconvenient forum. The Court concludes that the purpose for which Plaintiffs attached those exhibits was not to prove the underlying claim or to impeach by a prior inconsistent statement, and thus, Rule 408 does not apply.[4] The Court will therefore deny Defendants' request to strike the exhibits. The Court, however, notes that it had no need to rely on Plaintiffs' Exhibits B and E in resolving the motion

[4] Federal Rule of Evidence 408 provides that "conduct or a statement made during compromise negotiations about the claim" is not admissible "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction."

to change venue, because Defendants did not present sufficient evidence to demonstrate that Plaintiffs' public statements were intended solely to induce Defendants to not file a declaratory judgment action in a different, more convenient forum, such that this Court must disregard the deference given to a plaintiff's choice of forum.[5]

III. STANDARD

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . . ." 28 U.S.C. § 1404(a). As an initial matter, it is not disputed that the Eastern District of Pennsylvania is a district where this case could have initially been brought. Accordingly, the first requirement for transfer is met, and this Court must consider whether convenience to the parties and witnesses and the interests of justice compel transfer.

A district court enjoys greater discretion to transfer a case under § 1404(a) than to dismiss the action based upon forum non conveniens. *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1515 (10th Cir. 1991). A court should decide motions to transfer on an individualized, case-by-case basis. *Id.* at 1516. "The party moving to transfer a case pursuant to § 1404(a) bears the burden of establishing that the existing forum is inconvenient." *Id.* In considering a motion to transfer, the court should consider the following discretionary factors:

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[5] Although the Court finds that there is insufficient evidence to show that Plaintiffs attempted to "sandbag" Defendants through their public representation made on October 14, 2011, the Court also finds insufficient evidence to support Plaintiffs' assertion that Defendants used the term and argument in order to "play[] on historic stereotypes of Native American Indians engaging in surprise attacks and raids on non-Indian wagon-trains and settlers," Pls.' Resp. (Doc. 40) at 3. The origins of the term "sandbag" appear to involve no references to Native Americans. *See* Dictionary.com, http://dictionary.reference.com/browse/sandbag (noting that origin of term "sandbag" is in the poker-playing context, which is perhaps from sandbagger in the sense of a bully or ruffian who uses a sandbag as a weapon to knock his intended victim unconscious). The Court encourages the parties to stick to the facts and refrain from using inflammatory, irrelevant arguments that unnecessarily drive up the costs of litigation, usurp the Court's time, and potentially increase the friction between the parties. At the outset of this litigation, the parties should strive to set the bar higher.

> the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and[ ] all other considerations of a practical nature that make a trial easy, expeditious and economical.

Employers Mut. Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153, 1167 (10th Cir. 2010) (quoting *Chrysler Credit Corp.*, 928 F.2d at 1516). "Merely shifting the inconvenience from one side to the other, however, obviously is not a permissible justification for a change of venue." *Id.* (quoting *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992)). Unless the balance of interests "is strongly in favor of the movant the plaintiff's choice of forum should rarely be disturbed." *Scheidt*, 956 F.2d at 965 (quoting *William A. Smith Contracting Co. v. Travelers Indem. Co.*, 467 F.2d 662, 664 (10th Cir. 1972)).

IV. ANALYSIS

A. Plaintiff's Choice of Forum

Although the plaintiff's choice of forum should rarely be disturbed, courts should give less deference to the plaintiff's choice of forum when the plaintiff does not reside in the district. *Employers Mut. Cas. Co.*, 618 F.3d at 1167-68. "Courts also accord little weight to a plaintiff's choice of forum where the facts giving rise to the lawsuit have no material relation or significant connection to the plaintiff's chosen forum." *Id.* The location of any alleged damage or loss may be significant for purposes of analyzing this factor. *See id.*

Although Plaintiffs allege in their Amended Complaint that they reside in this district, *see* Am. Compl. (Doc. 30) ¶ 23, the parties dispute whether this district is in actuality plaintiff's home forum. The Navajo Nation owns and controls land in Arizona, Utah, and New Mexico.

Defendants argue that the District of New Mexico is not the Nation's home forum because "the overwhelming majority of its territory and tribal members are in fact located outside of New Mexico," and the capitol of the Navajo Nation is located in Window Rock, Navajo Nation, Arizona. Defs.' Reply (Doc. 44) at 2-3. Plaintiffs argue that their own tribal court is their home forum, but that federal courts have held that a tribe's home forum for venue purposes is where the Indian tribe's reservation is located.

Plaintiffs cite *Shawnee Tribe v. United States*, 298 F.Supp.2d 21 (D.D.C. 2002), for this proposition, but Defendants correctly point out that the *Shawnee Tribe* case did not hold that a tribe's home forum is in each state in which the tribe resides. In *Shawnee Tribe*, the tribe filed suit in the District of Columbia, which clearly was not their home forum. *See id.* at 24-25. The court transferred the case back to Kansas, where the property in dispute was located, and where the tribe was located, but the court did not reach the issue of what test to use to determine where a tribe resides when a tribe is located in multiple states. *See id.* at 25-27.

Defendants' reliance on *Wyandotte Nation v. Salazar*, 825 F.Supp.2d 261, 268-69 (D.D.C. 2011), however, also does not resolve the pertinent issue here. The district court there held that the tribe's choice of Washington, D.C., as a forum was entitled to little deference, because the tribe did not reside and had no substantial connections to Washington, D.C. *See id.* at 268. The court noted that the plaintiff maintained its seat of tribal government in Oklahoma and the property subject to the dispute was located in Kansas. *See id.* at 268-69. The court transferred the case to the District of Kansas. *Id.* at 271.

Neither case cited by the parties decided what the home forum test for venue purposes should be for a tribe whose reservation lands span multiple states, as here. Nor has this Court found a case directly on point regarding venue analysis, although there are cases regarding a

tribe's citizenship for purposes of jurisdiction. For jurisdictional purposes, an Indian tribe is not considered to be a citizen of any state and is analogous to a stateless person. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 27 (1st Cir. 2000); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993). A tribe may become a corporation by being chartered under the Indian Reorganization Act, 25 U.S.C. § 477, and would be considered a citizen of the state of its principal place of business for diversity jurisdiction purposes. *Gaines*, 8 F.3d at 729. "A tribe may also charter a corporation pursuant to its own tribal laws, and such a corporation will be considered a citizen of a state for purposes of diversity jurisdiction." *Id.* At least one circuit has held that an Indian corporation, formed under tribal law, is a citizen of the state where it has its principal place of business. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 724 (9th Cir. 2008) ("We hold that, for diversity purposes, a tribal corporation formed under tribal law is not a citizen of a state merely because its incorporation occurred inside that state. ACE is thus only a citizen of Nevada, the location of its principal place of business."). *See also* 28 U.S.C. § 1391(c)(2) ("[A]n entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, . . . if a plaintiff, only in the judicial district in which it maintains its principal place of business.")

For venue purposes, a corporate plaintiff generally is deemed to reside at its principal place of business. *See Waste Distillation Tech., Inc. v. Pan Am. Res., Inc.*, 775 F.Supp. 759, 764 (D. Del. 1991) (examining corporation's principal place of business when determining whether corporate plaintiff brought suit in its home forum). This principal place of business test is particularly appropriate for a corporation organized under tribal laws, rather than state law, as the state of incorporation test would not shed light on the residence issue. Here, the DDC is a corporation owned by the Navajo Nation and formed under the laws of the Navajo Nation. Am.

Compl. (Doc. 30) ¶ 10. The parties do not discuss where the DDC's principal place of business is located, and thus, the Court cannot use DDC's residence to aid in the analysis. NACE is a wholly owned instrumentality of the Navajo Nation. *Id.* ¶ 11. Based on the allegations of the complaint, NACE does not appear to be a corporate entity separate from the Navajo Nation.

In determining Plaintiffs' "home forum," the Court will therefore turn to the policy reason behind placing significance on the "home forum" – that the court may presume that the chosen forum is convenient to the plaintiff. *See Burstein v. Applied Extrusion Techs., Inc.*, 829 F.Supp. 106, 110 (D. Del. 1992) ("The forum chosen by the Plaintiff must reflect rational and legitimate concerns. When the plaintiff has chosen to bring suit in a district that is not his 'home turf' and which has no connection to any of the acts giving rise to the lawsuit, the convenience to the plaintiff is not as great as it would be were [he] litigating at or near [his] principal place of business or at the site of the activities at issue in the lawsuit.") (internal citation and quotations omitted); *Waste Distillation Tech.*, 775 F.Supp. at 764 ("The movant's burden is easier where the plaintiff has not brought suit on its 'home turf' because the interest in litigating in a convenient forum is reduced."). *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981) ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."). Even if a tribe may have only one "home forum," and even if Arizona were to be deemed the Navajo Nation's "home forum," for purposes of this presumption of convenience, the District of New Mexico is certainly also a forum easily deemed convenient for Plaintiffs and is not merely a forum that is largely fortuitous.

It is undisputed that four million of the Navajo Nation's acres of land are located in the

New Mexico portion of the reservation; the eastern edge of the Tohajiilee portion is only 17 miles from downtown Albuquerque; and approximately 112,000 members of the Navajo Nation reside in New Mexico. Furthermore, Defendants also have a connection to this District because they sell their goods in New Mexico through the internet and through two stores in the state.[6] It is undisputed that Plaintiff NACE has two stores in New Mexico and has sold products through several trade shows in New Mexico. *See* Decl. of J.T. Willie (Doc. 43) ¶¶ 5, 7-9. Consequently, some of the alleged injuries and allegedly infringing acts occurred in New Mexico.

Defendants nevertheless argue that this case does not have a significant connection to this forum because they have 10 stores located in the Eastern District of Pennsylvania, they operate nationally and internationally, and they have a national online presence. While this extensive presence outside this state shows that the allegedly infringing acts took place in many locations, including Pennsylvania, it also shows that there is no one forum that can easily be isolated as the location where the majority of operative events took place. The fact that some of the infringing acts occurred in the forum state is a significant enough connection to give the preference to the plaintiff's chosen forum. *See ESPN, Inc. v. Quiksilver, Inc.*, 581 F.Supp.2d 542, 549 (S.D.N.Y. 2008) (finding in trademark infringement case that locus of operative facts was in chosen forum because some of defendant's products were marketed and sold in forum state, even though defendant marketed and sold its products nationally and developed and designed its products in transferee forum). There is thus a sufficiently significant connection between this District and to Plaintiffs and to the events giving rise to the lawsuit that the plaintiff's-choice-of-forum factor weighs in favor of Plaintiff. *Cf. Employers Mut. Cas. Co.*, 618 F.3d at 1157, 1168 (holding that, even though plaintiff was an Iowa corporation that did not reside in forum state of Wyoming for

[6] The Amended Complaint states that Defendants operate a store in Albuquerque, *see* Am. Compl. (Doc. 30) ¶ 20, but there appear to be two Albuquerque stores operated by Defendants, an Urban Outfitters store and an Anthropologie store, *see* Pls.' Resp. (Doc. 40) at 8.

purposes of § 1404(a), plaintiff's choice of forum weighed against transferring declaratory judgment action as to insurer's duty to defend or indemnify defendant sub-contractor, because allegedly negligent roofing work that was at heart of underlying litigation occurred on hotel in Wyoming); *ESPN, Inc.*, 581 F.Supp.2d at 549 ("'In action alleging trademark infringement or unfair competition, courts in this district have held the locus of operative facts to be in the initially chosen forum if acts of infringement, dilution, or unfair competition occur in that forum.' . . . 'Thus, if the allegedly infringing products are sold within the Southern District of New York, even if sold elsewhere, there exists a sufficient connection with this District.'") (quoting *Kiss My Face Corp. v. Bunting*, No. 02CIV2645 (RCC), 2003 WL 22244587, at *3 (S.D.N.Y. Sept. 30, 2003)); *Waste Distillation Tech.*, 775 F.Supp. at 764-65 (denying transfer despite fact that action was not in district where plaintiff resided, because chosen district was one closest to plaintiff's residence in which personal jurisdiction over defendants could be obtained).

As for Defendants' argument that Plaintiffs are merely forum shopping, the Court finds that both parties equally appear to be forum-shopping for convenience. The Court nonetheless finds that the aforementioned connections between Plaintiffs and this District and between the events giving rise to this lawsuit and this District require this Court to give substantial deference to Plaintiffs' chosen forum in the venue transfer analysis.

B. Accessibility of Witnesses and Sources of Proof

"The convenience of witnesses is the most important factor in deciding a motion under § 1404(a)." *Employers Mut. Cas.*, 618 F.3d at 1169 (quotations omitted). The availability and convenience of key witnesses with material testimony may outweigh the convenience to numerous, but less important witnesses. *See id.* To show inconvenience, the movant must identify the witnesses and their locations, (2) indicate the quality or materiality of their

testimony, and (3) show that the witnesses were unwilling to come to trial, that deposition testimony would be unsatisfactory, or that the use of compulsory process would be necessary. *Id.* (quoting *Scheidt*, 956 F.2d at 966). The ability to compel the attendance of witnesses is generally relevant only to third-party witnesses, because employees of the parties, as a practical matter, will be available in any venue by virtue of the employment relationship. *See Glass v. S & M NuTec, LLC*, 456 F.Supp.2d 498, 503-504 (S.D.N.Y. 2006); *Empty Barge Lines II, Inc. v. DREDGE LEONARD FISHER*, 441 F.Supp.2d 786, 793 (E.D.Tex. 2006).

Defendants contend that their pertinent buyers and the pertinent marketing personnel, as well as virtually all of the pertinent documents are located in and around Pennsylvania. They argue it will be less expensive and convenient for the employee witnesses from seven different Pennsylvania companies to participate in litigation in Pennsylvania than in New Mexico. Defendants, however, refer generally to employee witnesses, but have not identified them by name or indicated the quality of each employee's testimony. Even assuming that there are numerous employees who will testify concerning material information, Defendants have not shown that these employees would be unwilling to participate in the litigation here. *See, e.g., Empty Barge Lines II, Inc.*, 441 F.Supp.2d at 793 ("Where the key witnesses are employees of the party seeking a transfer, their convenience is entitled to less weight because the party is able to compel their attendance.").

Defendants further assert that important third-party witnesses will be beyond the reach of the subpoena power of this Court, but within the subpoena power of the Eastern District of Pennsylvania. Defendants refer to the following third-party suppliers and witnesses: Dukes supplied the "Magical Feather Bag," and Defendants' point of contact with Dukes is located in New York City, New York, Def.'s Mot., Ex. 2 (Doc. 39-2) ¶ 3; Pendleton Woolen Mills, Inc.,

which provides the "Navajo Weekender Bag," has a branch location in Pennsylvania, *id.*, Ex. 3 (Doc. 39-3) ¶ 3; Lucca Cuture ("Lucca") supplies the "Lucca Couture Navajo Pullover Sweater," and Urban Outfitters, Inc.'s point of contact with Lucca is located in New York City, New York, *id.*, Ex 3 (Doc. 39-3) ¶ 4; and Woolrich, Inc., which provides the "Vintage Men's Woolrich Navajo Jacket," is located in Pennsylvania, *id.*, (Ex. 3 (Doc. 39-3) ¶ 5. Defendants contend that the testimony of these third-party suppliers will establish that the suppliers are responsible for the accused clothing and that the items were marked with "Navajo," not to identify the source of the products, but rather to identify the type of design, which is recognized by the consuming public as a generic term for a fashion trend. Furthermore, Defendants assert that they believe that a number of the vintage items depicted in Exhibit A to the Amended Complaint and sold by Free People are one-of-a-kind items made by individuals who self-identify as Navajo Indian or who are otherwise enrolled in the Navajo Indian tribe, and these items are typically purchased from a vendor believed to be located in New Jersey, approximately 50 miles from Philadelphia. *See* Def.'s Mot., Ex. 4 (Doc. 39-4) ¶¶ 3-6.[7]

Plaintiffs counter that Pendleton is headquartered in Portland, Oregon, and Lucca is headquartered in Los Angeles, California, both of which are closer to Albuquerque than Philadelphia.[8] Only half the third-party companies noted by Defendants are located closer to the proposed transferee court. Moreover, Defendants have not identified who within those companies would testify and where those persons work or reside. With regard to convenience and cost, Defendants have thus not shown that the location of third-party witnesses compel transfer of this case. Although Defendants have asserted why employees of these third-party

[7] Defendants also point out that all the attorneys in this case are located outside of New Mexico. The convenience of counsel, however, is not a factor this Court will consider. *See In re Horseshoe Entertainment*, 337 F.3d 429, 434 (5th Cir. 2003); *Solomon v. Continental Am. Life Ins. Co.*, 472 F.2d 1043, 1047 (3d Cir. 1973).

[8] Plaintiffs cite to internet source pages to support their assertion. Defendants, however, do not dispute these facts.

suppliers may have material testimony, they have not provided any evidence regarding the third prong of the "inconvenience" test -- that the proposed witnesses from these third-party suppliers would not voluntarily come to trial, or that deposition testimony is insufficient, or that compulsory process would be required. *See Employers Mut. Cas.*, 618 F.3d at 1169. The Court will not presume that these out-of-state third-party suppliers will not voluntarily come to trial, especially given that these suppliers have a business relationship with Defendants, which could create the necessary incentive to participate in the litigation.

Regarding the proposed testimony that vintage items may have been made by individuals who self-identify as Navajos, Defendants only mention an un-identified vendor "believed" to be located in New Jersey. Defendants do not identify the proposed witness, indicate whether the witness would have admissible testimony regarding the tribal affiliation of the manufacturers of the vintage items, or demonstrate that the witness would be unwilling to participate in the litigation.

Finally, Plaintiffs, in turn, identify a number of artisans who will testify that they are enrolled Navajo Nation members, they sell their goods across the United States under the NAVAJO trademark, and they sell similar products in similar marketing channels as Defendants. Plaintiffs contend that their evidence is important in the likelihood-of-confusion analysis. Plaintiffs argue that these necessary third-party witnesses reside in New Mexico and would refuse to travel to the Eastern District of Pennsylvania to testify at trial.[9] There thus does not appear to be one venue that enjoys absolute subpoena power for both depositions and trial over all the witnesses in this case.

In sum, Defendants have not shown that the majority of key witnesses are unwilling to

[9] Plaintiffs, however, only provided evidence that two of the named artisans would be unable to travel to Pennsylvania due to the distance and expense. *See* Decl. of Mark A. Griffin (Doc. 41) ¶ 9 & Ex. F (Doc. 41-1).

come to trial, that deposition testimony would be unsatisfactory, or that the use of compulsory process would be necessary. Both parties have witnesses located in their respective districts. Merely shifting the inconvenience from one side to the other is not a permissible justification to change the venue. *Employers Mut. Cas. Co.*, 618 F.3d at 1167. Defendants have thus not met their burden of proving that the accessibility of witnesses and proof factor weighs in favor of transfer. *Cf. id.* at 1169 (holding that accessibility of witnesses factor weighed against transfer because movant merely alleged that majority of potential witnesses were non-forum state residents and subject to compulsory process without identifying those witnesses with specificity or indicating subject matter of testimony).

As for the location of relevant documents, in this digital age, the costs of producing documents long distances have been dramatically reduced, and this factor is entitled to considerably less weight. *See ESPN, Inc.*, 581 F.Supp.2d at 548 ("In an era of electronic documents, easy copying and overnight shipping, this factor assumes much less importance than it did formerly."). Defendants have offered no evidence as to why the documents or other tangible evidence in this case would be difficult to produce in this forum, and thus the accessibility of sources of proof factor is neutral. *See id.* at 549 ("In the absence of more information about why it would be so difficult to transport documents to New York from California, this factor is at best neutral.").

C. Cost of Making Necessary Proof

Defendants argue that their costs for litigating this matter weigh in favor of transfer. Given that they constitute seven separate corporate entities, they assert that a large number of corporate representatives and employees will have to travel to attend trial in New Mexico, resulting in a great monetary cost to them. On the other hand, Plaintiffs argue that the cost of

litigation factor weighs against transfer because the difference in economic means between Defendants and Plaintiffs is great, as Defendants are multi-billion dollar corporations that are far more able to bear the cost of litigating in a less convenient forum.

A court may consider the relative means of the parties when deciding a motion to transfer venue. *See Dwyer v. General Motors Corp.*, 853 F.Supp. 690, 693 (S.D.N.Y. 1994). In this case, the relative means of the parties is not clear cut. Plaintiffs refer the Court to census data showing that a large portion of the members of the Navajo Nation have incomes below the poverty level and are unemployed. Defendants, however, point out that the Plaintiffs in this case, the Navajo Nation itself and its corporate entity, have significantly greater assets than its individual members. *See AEC One Stop Group, Inc. v. CD Listening Bar, Inc.*, 326 F.SUpp.2d 525, 531 (S.D.N.Y. 2004) (noting that the factor of the disparate means of the parties is entitled to less weight when both parties are corporations). Although the Court will not rely on the relative means of the parties, given the deficient record as to the means of the Navajo Nation, the means of Defendants is nonetheless relevant. The costs to Defendants of trying suit in this District will likely be greater than if the case were transferred to the Eastern District of Pennsylvania. Urban Outfitters, however, had sales of approximately $2.5 billion in fiscal year 2012, and Defendants operate nationally and internationally. Defendants thus have the ability to bear the travel costs of litigation. Consequently, the cost-of-litigation factor only weighs slightly in favor of Defendants.

D. Difficulties that May Arise from Congested Dockets

The most relevant statistics when evaluating the administrative difficulties of court congestion "are the median time from filing to disposition, median time from filing to trial, pending cases per judge, and average weighted filings per judge." *Employers Mut. Cas. Co.*, 618

F.3d at 1169 (citing Administrative Office of the United States Courts, Federal Court Management Statistics, *available at* http://www.uscourts.gov/cgi-bin/cmsd2008. pl (2008)). A comparison of the 2011 Federal Court Management Statistics regarding judicial caseloads favors transfer. *See* Administrative Office of the United States Courts, Federal Court Management Statistics, *available at* http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/DistrictCourtsDec2011.aspx.[10]

For civil cases in the Eastern District of Pennsylvania in 2011, the median time frame from the filing of a civil case to disposition is 1.5 months and from filing to trial is 20.5 months. The pending cases per judge in the Eastern District of Pennsylvania are 916, and the weighted filings per judge are 405.[11] By contrast, the same statistics for the District of New Mexico are as follows: median time from filing of civil case to disposition is 8.7 months; median time from filing of civil case to trial is 24.0 months; pending cases per judge are 336, and weighted filings per judge are 512.[12] Based on these statistics, the Eastern District of Pennsylvania generally resolves civil cases faster than this District. Although the Eastern District has a more congested docket in terms of pending cases per judge, when weighted filings statistics are considered, this District has a higher number of weighted filings per judge. Consequently, this data indicates that this District has a more congested docket and, generally, does not resolve civil cases as quickly as the Eastern District of Pennsylvania. This public interest factor thus weighs in favor of transfer.

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[10] This Court has used the most recent Judicial Caseload Profile ending December 31, 2011, while the parties used the profile ending September 30, 2011, which accounts for the slight variation in the statistics.

[11] Weighted filings statistics account for the different amounts of time judges require to resolve various types of cases. Cases are weighted such that more time-consuming cases are given higher weights than cases demanding little time. *See* Administrative Office of the United States Courts, Federal Court Management Statistics, "2011 Explanation of Selected Terms", *available at* http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/DistrictCourtsDec2011.aspx.

[12] The far greater majority of cases in this district are criminal felony cases.

E. Advantage of Having Local Court Determine Questions of Local Law

"When the merits of an action are unique to a particular locale, courts favor adjudication by a court sitting in that locale." *Employers Mut. Cas. Co.*, 618 F.3d at 1170. Plaintiffs argue that this factor weighs against transfer because they have brought New Mexico state law claims under the NMUPA and NMTA. Defendants, however, have filed a motion to dismiss these state law claims and thus contend that this factor does not weigh in favor of Plaintiffs. This Court has not yet addressed the merits of the state law claims, and without considering those substantive issues now, finds that this factor does not weigh in favor of either party. Although generally there is an advantage of having local law decided by a local court, the Eastern District of Pennsylvania is well-versed in federal intellectual property law matters and the parties have not indicated that there is a substantial difference between the federal and local law such that the there is any disadvantage to the parties in having the Eastern District consider those claims. In a similar vein, despite the fact that more intellectual property cases are filed in the Eastern District than here, that fact does not compel the Court to transfer, as all federal courts are presumed to be equally competent in federal question cases. *See Cargill Inc. v. Prudential Ins. Co. of America*, 920 F.Supp. 144, 148 (D. Colo. 1996).

F. Remaining Factors

The remaining factors are either neutral or irrelevant. Defendant has not indicated that there are any questions regarding the enforceability of a judgment against it, that there exist conflict-of-law questions, that there are any obstacles to a fair trial here, or that any other considerations would make a trial easier or more expeditious or economical in the Eastern District of Pennsylvania than here in New Mexico.

V. CONCLUSION

Having considered all the relevant factors under 28 U.S.C. § 1404(a), the Court concludes that the balance of factors weighs against transfer. Defendants have not shown that critical witnesses would not be willing to participate in litigation in this District. Although some of the factors weigh in Defendants' favor, transferring this case ultimately would do little more than shift the balance of inconvenience from Defendants to Plaintiffs. Defendants have not met their burden of proving sufficient inconvenience to justify disturbing Plaintiffs' choice of forum.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Leave to File Sur-Reply to Defendants' Motion to Transfer Venue (**Doc. 47**) is **GRANTED**; and Defendants' Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) (**Doc. 38**) is **DENIED**.

SENIOR UNITED STATES DISTRICT JUDGE

Re: Fw: FYI RE NN v Urban Outfitters

VanWey, Kenneth <kenneth_van_wey@ios.doi.gov> Fri, Jan 18, 2013 at 9:36 AM
To: Meridith Stanton <meridith_stanton@ios.doi.gov>

From text of order:

Furthermore, Defendants assert that they believe that a number of the vintage items depicted in Exhibit A to the Amended Complaint and sold by Free People are one-of-a-kind items made by individuals who self-identify as Navajo Indian or who are otherwise enrolled in the Navajo Indian tribe, and these items are typically purchased from a
vendor believed to be located in New Jersey, approximately 50 miles from Philadelphia.

On Fri, Jan 18, 2013 at 9:18 AM, Meridith Stanton <meridith_stanton@ios.doi.gov> wrote:

FYI

From: Brian Lewis [mailto:blewis@nndoj.org]
Sent: Thursday, January 17, 2013 10:49 PM
To: Undisclosed recipients: <Undisclosed recipients:>
Subject: FYI RE NN v Urban Outfitters

Good evening:

Please see the attachment.

Respectfully yours,

B. L. Lewis

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

THE NAVAJO NATION, a sovereign Indian Nation, DINÉ DEVELOPMENT CORPORATION, a corporation wholly-owned by and formed under the laws of the Navajo Nation, and NAVAJO ARTS AND CRAFTS ENTERPRISE, a wholly-owned instrumentality of the Navajo Nation,

Plaintiffs,

v.

No. Civ. 12-195 LH/WDS

URBAN OUTFITTERS, INC., UO.COM, L.L.C., URBAN OUTFITTERS WHOLESALE, INC., ANTHROPOLOGIE, INC., ANTHROPOLOGIE.COM, L.L.C., and FREE PEOPLE of PA, L.L.C., Pennsylvania Corporations, and FREEPEOPLE.COM, L.L.C., a Delaware Corporation,

Defendants.

MEMORANDUM OPINION AND ORDER

On September 20, 2012, Defendants Urban Outfitters, Inc.; UO.com, L.L.C.; Urban Outfitters Wholesale, Inc.; Anthropologie, Inc.; Antrhopologie.com, L.L.C.; Free People of PA, L.L.C.; and Freepeople.com, L.L.C. (collectively "Defendants") filed a Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) (Doc. 38). The parties submitted briefs in support of and in opposition to the motion. Additionally, Plaintiffs The Navajo Nation, the Diné Development Corporation ("DDC"), and the Navajo Arts and Crafts Enterprise ("NACE") (collectively, "Plaintiffs" or "The Navajo Nation") filed a Motion for Leave to File Sur-Reply to Defendants'

Motion to Transfer Venue (Doc. 47). This Court, having considered the pleadings, motions, briefs, relevant law, and otherwise being fully advised, concludes that Plaintiff's motion to file a sur-reply will be granted and Defendants' motion to transfer venue will be denied.[1]

I. INTRODUCTION

A. THE PARTIES

The Navajo Nation is a sovereign Indian Nation with over 300,000 enrolled members. Am. Compl. (Doc. 30) ¶ 9. It owns controls, and exercises jurisdiction over a semi-autonomous territory spanning more than 27,000 square miles in northeastern Arizona, the southeastern portion of Utah, and northwestern New Mexico. *Id.* The Navajo Nation Tribal Government's company headquarters are located in Window Rock, Arizona. *See* Def.'s Mot., Ex. 1 (Doc. 39-1) at 1. The Navajo Nation is an institution that acts through its political subdivision, the Division of Economic Development; its wholly-owned instrumentalities, NACE and DDC; its officers, employees, and authorized agents; and its members, the Navajo People. Am. Compl. (Doc. 30) ¶ 9.

Defendant Urban Outfitters, Inc., ("Urban Outfitters") is an international retail company that markets and retails its merchandise in its more than 200 stores located internationally and nationally and on the internet. *See id.* ¶ 13. Defendants UO.com, L.L.C.; Urban Outfitters Wholesale, Inc.; Anthropologie, Inc.; Anthropologie.com, L.L.C.; Free People of PA, L.L.C.; and FreePeople.com, L.L.C. are wholly-owned subsidiaries of Urban Outfitters. *Id.* ¶¶ 14-17. The subsidiaries are not separate autonomous entities, but rather are "brands" of Urban Outfitters. *Id.* ¶ 18. All seven of the Defendants' corporate headquarters are located in Pennsylvania. *See* Def.'s Mot., Ex. 5 (Doc. 39-5) at ¶¶ 3-8.

[1] Defendants requested oral argument on the motion to transfer venue. Defs.' Notice (Doc. 45). Given the thoroughness of the parties' briefs, the Court finds that oral argument is unnecessary and will deny that request.

Defendants sell fashion apparel, accessories, and home goods. Am. Compl. (Doc. 30) ¶ 33. Defendants had sales of approximately $2.5 billion in fiscal year 2012. *Id.* ¶ 34. Defendants purchased merchandise from numerous vendors; in fiscal year 2012, they did business with approximately 3,400 vendors. *Id.* ¶ 35. Urban Outfitters' Free People wholesale division sells the Free People brand worldwide through approximately 1,400 department and specialty stores, as well as through Free People and Urban Outfitters stores. *Id.* ¶ 36. Defendants admit that their goods reach New Mexico. Def.'s Mot. (Doc. 39) at 7. Urban Outfitters operates a store in Albuquerque, New Mexico, and transacts business through the Internet in New Mexico. Am. Compl. (Doc. 30) ¶ 20. Free People does not operate any physical stores in New Mexico, but has four stores in Pennsylvania, among other locations around the nation. *See* Def.'s Mot., Ex. 8 (Doc. 39-8) at 1-3.

B. THE ALLEGATIONS OF THE COMPLAINT

The Navajo Nation alleges that it and its members have been known by the name "Navajo" since at least 1849, have continuously used the NAVAJO trademark in commerce, and have made the NAVAJO name and trademarks famous with numerous products, including, among other things, clothing, accessories, blankets, jewelry, foods, tools, decorations, crafts, and retail services. Am. Compl. (Doc. 30) ¶ 3. Plaintiffs state that they have registered 86 trademarks using the NAVAJO component with the United States Patent and Trademark Office ("USPTO") on the Principal Register for a variety of different classes of goods and services, including clothing, jewelry, house wares, and accessories. *Id.* ¶¶ 3, 27. Plaintiffs allege that the trademark NAVAJO mark is inherently distinctive, and given the incontestable status of its registration, the trademark may not be challenged as merely descriptive. *Id.* ¶ 29. The Navajo Nation asserts that its NAVAJO marks are prominently featured on its and its agents' websites.

Id. ¶ 30. Plaintiffs contend that its famous NAVAJO mark is broadly recognized by purchasers of consumer goods and the general public as a trademark for the Navajo Nation's Indian-styled and Indian-produced goods. *Id.* ¶ 31.

The Navajo Nation asserts that, at least as early as March 16, 2009, Defendants have used "Navajo" and "Navaho" as names and marks in direct competition with NAVAJO-branded goods. *See id.* ¶¶ 5, 37. The Navajo Nation has brought suit against Defendants, claiming trademark infringement, trademark dilution, unfair competition, false advertising, commercial practices laws violations, and violation of the Indian Arts and Crafts Act. Specifically, Plaintiffs allege in Count One that Defendants' use of the "Navajo" and "Navaho" mark in connection with the sale of clothing, jewelry, house ware, footwear, and similar items is likely to cause confusion, mistake, or deception in the market place, and has created actual confusion in the market place, and constitutes trademark infringement in violation of 15 U.S.C. §§ 1114 and 1117 of the Lanham Act.[2] *See id.* ¶¶ 81-91. In Count Two, Plaintiffs assert that Defendants' use of the "Navajo" and "Navaho" names and marks to promote, market, and sell its retail items constitutes willful Trademark Dilution by blurring, and willful Trademark Dilution by tarnishment under § 1125(c) of the Lanham Act. *See id.* ¶¶ 92-96. Plaintiffs contend in Count Three that Defendants' are also liable for Unfair Competition and False Advertising under § 1125(a) of the Lanham Act based on false advertising and infringement of the Navajo Nation's unregistered NAVAJO trademarks. *See id.* ¶¶ 97-101.

In Count Four, Plaintiffs allege that Defendants violated the Indian Arts and Crafts Act, 25 U.S.C. § 305 *et seq.*, ("IACA") 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. *See id.* ¶¶ 102-22. Plaintiffs contend that the

[2] The Lanham Act is found at 15 U.S.C. §§ 1051 *et seq.*

damages suffered include lost sales by members of the Navajo Nation, lost profits through driven-down prices caused by Defendants' imitation products, and loss of goodwill and reputation. *See id.* ¶ 112.

Plaintiffs assert state law claims in the two remaining counts. In Count Five, Plaintiffs contend that Defendants are liable for violation of the New Mexico Unfair Practices Act ("NMUPA"), N.M. Stat. Ann. § 57-12-3, through its sale of goods under the "Navajo" and "Navaho" names and trademarks, as well as its sale of other goods falsely represented as authentic goods, when Defendants knew that their 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. *See id.* ¶¶ 123-28. Finally, Plaintiffs allege in Count Six that Defendants' willfully committed acts and omissions caused dilution and/or tarnishment of the distinctive quality of the Navajo Nation's NAVAJO marks in violation of the New Mexico Trademark Act ("NMTA"), N.M. Stat. Ann. § 57-3B-15. *See id.* ¶¶ 129-33.

II. PROCEDURAL BACKGROUND

On October 12, 2011, the Navajo Nation Department of Justice sent Urban Outfitters a "Cease and Desist" letter, dated June 30, 2011, demanding that Urban Outfitters cease using the "Navajo" name on, and in relation to, their products. *See* Am. Compl., Ex. B (Doc. 30-1) at 39-41 of 41; Def.'s Mot. to Dismiss, Ex. I (Doc. 33-9) at 1, 4 of 6. Within a week of receiving the letter, Urban Outfitters took steps to remove the term "Navajo" from its web pages in order to avoid potential litigation. *See* Def.'s Mot. to Dismiss, Ex. I (Doc. 33-9) at 1 of 6.

On October 19, 2011, the Los Angeles Times reported: "Urban Outfitters appears to have caved to the Navajo Nation. As of Wednesday, the trendy chain store had removed the word 'Navajo' from the description of about 20 items on its website. . . . Urban Outfitters has

replaced the word 'Navajo' with 'printed.'" Deborah Netburn, *Navajo Nation Takes on Urban Outfitters, and Wins*, Los Angeles Times (Oct. 19, 2011, 5:13 PM), http://latimesblogs.latimes.com/nationnow/2011/10/navajo-nation-takes-on-urban-outfitters-wins.html.

On or around October 20, 2011, the Navajo Nation Department of Justice issued the following press release:

> The Navajo Nation Department of Justice is aware of the Urban Outfitters Corporation's recent removal of the Navajo name from its online marketing and retailing of its products. The Urban Outfitters Corporation's recent removal of the Navajo name from its online marketing and retailing are positive actions that are more consistent with the corporation's responsibilities than previously demonstrated. If the company has also ceased using the Navajo name in conjunction with its merchandise in its retail stores and print-media advertising, these are encouraging steps by the company towards amicably resolving this matter. While the Navajo Nation is certainly committed to protecting its distinctive name and trademarks; the Navajo Nation is also committed to avoiding unnecessary controversy and beneficially resolving matters concerning the unprivileged use of the Navajo name. The Navajo Nation appreciates actions such as those recently taken by Urban Outfitters, and encourages other companies to take similarly responsible measures in the future.

See Def.'s Mot. to Dismiss, Ex. I (Doc. 33-9) at 6 of 6.

On February 28, 2012, Plaintiffs filed the current action against Defendants. Compl. (Doc. 1). On April 30, 2012, Defendants filed a Motion to Dismiss the Complaint (Doc. 16). Plaintiffs filed an Amended Complaint (Doc. 30) on May 21, 2012, prompting Defendants to file a Motion to Dismiss the Amended Complaint (Doc. 33) on June 22, 2012.

On August 3, 2012, Mark A. Griffin, counsel for Plaintiffs, sent a letter to defense counsel asking that their clients confirm that, during the pendency of the litigation, they would refrain from using "Navajo" in conjunction with their sale of clothing jewelry and accessories, and notifying them that, if they did not extend such a promise, the Navajo Nation would file a motion for preliminary injunction. Decl. of Mark A. Griffin, Ex. A (Doc. 41-1) at 1 of 14.

Counsel for defendants, H. Jonathan Redway, responded to the letter on August 10, 2012, stating that there was no basis for entry of a preliminary injunction, because each defendant instructed its employees to discontinue use of the term "Navajo," as an accommodation to the Navajo Nation and to avoid potential costs and disruptions "that any litigation, even baseless litigation, causes and not because it was under any legal to do so." *Id.*, Ex. B (Doc. 41-1) at 5 of 14. On August 31, 2012, Plaintiffs' counsel notified defense counsel that based on Defendants' representations the Navajo Nation would not file a preliminary injunction motion at that time. *See id.*, Ex. C (Doc. 41-1) at 7 of 14.

On September 20, 2012, Defendants filed the motion to transfer venue (Doc. 38) at issue here. Subsequently, by letter dated September 21, 2012, Plaintiffs asserted that they had "evidence that an Obey cap and other items were offered for sale in an Urban Outfitters' store in Evanston, Illinois on August 22, 2012 tagged with the word 'Navajo'" and threatened to file a motion for preliminary injunction in the absence of an explanation. *Id.*, Ex. D (Doc. 41-1) at 8-9 of 14. By letter dated October 1, 2012, with the heading "For Settlement Purposes Only Subject to Federal Rule of Evidence 408 Not Admissible for Any Purpose," counsel for Defendants responded, categorically denying any wrongdoing. *Id.*, Ex. E (Doc. 41-1) at 10-12. Defense counsel also provided an explanation regarding the Obey[3] cap in question. *See id.*

On October 9, 2012, Plaintiffs filed a response (Doc. 40) to Defendants' motion to transfer. Plaintiffs attached to their response the aforementioned letters regarding the potential filing of a preliminary injunction. Defendants filed their reply (Doc. 44) in support of their motion to transfer and argued in footnote 3 that the Court should order Plaintiffs "to withdraw its public filing, Dkt. 41-1, pp. 5-6, 10-12, which are letters sent under Fed. R. Evid. 408 in an effort

[3] Obey is an independent company from Defendants that sells clothing and other items. *See* Pl.'s Resp., Ex. E (Doc. 41-1) at 10-11 of 14.

to assist in settlement of this case and which were improperly filed with this Court." Defs.' Reply (Doc. 44) at 5 n.3. The referenced pages refer to Exhibit B, the August 10, 2012 letter from defense counsel explaining why there is no basis for the entry of a preliminary injunction against Defendants, and to Exhibit E, the October 1, 2012 letter from defense counsel further detailing why there is no basis for Plaintiffs to seek a preliminary injunction and offering an explanation concerning the Obey cap that Plaintiffs argued violated their trademark.

Plaintiffs subsequently filed a motion for leave to file a sur-reply (Doc. 47) in order to address the request made in Defendants' reply brief to strike Plaintiffs' Exhibits B and E. Plaintiffs' proposed sur-reply provides a legal argument against striking their exhibits. The Court has considered the motion, as well as the arguments made in Defendants' opposition to Plaintiffs' motion for leave to file the sur-reply, and finds that the arguments presented in the sur-reply are helpful to the Court in resolving the issue concerning whether Exhibits B and E are relevant or should be stricken from the record. The Court will therefore grant Plaintiffs' motion to file the sur-reply.

Regarding Defendants' request to strike from the record Exhibit B (Doc. 41-1 at 5-6 of 14) and Exhibit E (Doc. 41-1 at 10-12 of 14), the Court finds that Plaintiffs offered Exhibits B and E to refute Defendants' argument that Plaintiffs "sandbagged" them into believing this matter had been resolved in order to file their suit in an inconvenient forum. The Court concludes that the purpose for which Plaintiffs attached those exhibits was not to prove the underlying claim or to impeach by a prior inconsistent statement, and thus, Rule 408 does not apply.[4] The Court will therefore deny Defendants' request to strike the exhibits. The Court, however, notes that it had no need to rely on Plaintiffs' Exhibits B and E in resolving the motion

[4] Federal Rule of Evidence 408 provides that "conduct or a statement made during compromise negotiations about the claim" is not admissible "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction."

to change venue, because Defendants did not present sufficient evidence to demonstrate that Plaintiffs' public statements were intended solely to induce Defendants to not file a declaratory judgment action in a different, more convenient forum, such that this Court must disregard the deference given to a plaintiff's choice of forum.[5]

III. STANDARD

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . . ." 28 U.S.C. § 1404(a). As an initial matter, it is not disputed that the Eastern District of Pennsylvania is a district where this case could have initially been brought. Accordingly, the first requirement for transfer is met, and this Court must consider whether convenience to the parties and witnesses and the interests of justice compel transfer.

A district court enjoys greater discretion to transfer a case under § 1404(a) than to dismiss the action based upon forum non conveniens. *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1515 (10th Cir. 1991). A court should decide motions to transfer on an individualized, case-by-case basis. *Id.* at 1516. "The party moving to transfer a case pursuant to § 1404(a) bears the burden of establishing that the existing forum is inconvenient." *Id.* In considering a motion to transfer, the court should consider the following discretionary factors:

[5] Although the Court finds that there is insufficient evidence to show that Plaintiffs attempted to "sandbag" Defendants through their public representation made on October 14, 2011, the Court also finds insufficient evidence to support Plaintiffs' assertion that Defendants used the term and argument in order to "play[] on historic stereotypes of Native American Indians engaging in surprise attacks and raids on non-Indian wagon-trains and settlers," Pls.' Resp. (Doc. 40) at 3. The origins of the term "sandbag" appear to involve no references to Native Americans. *See* Dictionary.com, http://dictionary.reference.com/browse/sandbag (noting that origin of term "sandbag" is in the poker-playing context, which is perhaps from sandbagger in the sense of a bully or ruffian who uses a sandbag as a weapon to knock his intended victim unconscious). The Court encourages the parties to stick to the facts and refrain from using inflammatory, irrelevant arguments that unnecessarily drive up the costs of litigation, usurp the Court's time, and potentially increase the friction between the parties. At the outset of this litigation, the parties should strive to set the bar higher.

> the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and[ ] all other considerations of a practical nature that make a trial easy, expeditious and economical.

Employers Mut. Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153, 1167 (10th Cir. 2010) (quoting *Chrysler Credit Corp.*, 928 F.2d at 1516). "Merely shifting the inconvenience from one side to the other, however, obviously is not a permissible justification for a change of venue." *Id.* (quoting *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992)). Unless the balance of interests "is strongly in favor of the movant the plaintiff's choice of forum should rarely be disturbed." *Scheidt*, 956 F.2d at 965 (quoting *William A. Smith Contracting Co. v. Travelers Indem. Co.*, 467 F.2d 662, 664 (10th Cir. 1972)).

IV. ANALYSIS

A. Plaintiff's Choice of Forum

Although the plaintiff's choice of forum should rarely be disturbed, courts should give less deference to the plaintiff's choice of forum when the plaintiff does not reside in the district. *Employers Mut. Cas. Co.*, 618 F.3d at 1167-68. "Courts also accord little weight to a plaintiff's choice of forum where the facts giving rise to the lawsuit have no material relation or significant connection to the plaintiff's chosen forum." *Id.* The location of any alleged damage or loss may be significant for purposes of analyzing this factor. *See id.*

Although Plaintiffs allege in their Amended Complaint that they reside in this district, *see* Am. Compl. (Doc. 30) ¶ 23, the parties dispute whether this district is in actuality plaintiff's home forum. The Navajo Nation owns and controls land in Arizona, Utah, and New Mexico.

Defendants argue that the District of New Mexico is not the Nation's home forum because "the overwhelming majority of its territory and tribal members are in fact located outside of New Mexico," and the capitol of the Navajo Nation is located in Window Rock, Navajo Nation, Arizona. Defs.' Reply (Doc. 44) at 2-3. Plaintiffs argue that their own tribal court is their home forum, but that federal courts have held that a tribe's home forum for venue purposes is where the Indian tribe's reservation is located.

Plaintiffs cite *Shawnee Tribe v. United States*, 298 F.Supp.2d 21 (D.D.C. 2002), for this proposition, but Defendants correctly point out that the *Shawnee Tribe* case did not hold that a tribe's home forum is in each state in which the tribe resides. In *Shawnee Tribe*, the tribe filed suit in the District of Columbia, which clearly was not their home forum. *See id.* at 24-25. The court transferred the case back to Kansas, where the property in dispute was located, and where the tribe was located, but the court did not reach the issue of what test to use to determine where a tribe resides when a tribe is located in multiple states. *See id.* at 25-27.

Defendants' reliance on *Wyandotte Nation v. Salazar*, 825 F.Supp.2d 261, 268-69 (D.D.C. 2011), however, also does not resolve the pertinent issue here. The district court there held that the tribe's choice of Washington, D.C., as a forum was entitled to little deference, because the tribe did not reside and had no substantial connections to Washington, D.C. *See id.* at 268. The court noted that the plaintiff maintained its seat of tribal government in Oklahoma and the property subject to the dispute was located in Kansas. *See id.* at 268-69. The court transferred the case to the District of Kansas. *Id.* at 271.

Neither case cited by the parties decided what the home forum test for venue purposes should be for a tribe whose reservation lands span multiple states, as here. Nor has this Court found a case directly on point regarding venue analysis, although there are cases regarding a

tribe's citizenship for purposes of jurisdiction. For jurisdictional purposes, an Indian tribe is not considered to be a citizen of any state and is analogous to a stateless person. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 27 (1st Cir. 2000); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993). A tribe may become a corporation by being chartered under the Indian Reorganization Act, 25 U.S.C. § 477, and would be considered a citizen of the state of its principal place of business for diversity jurisdiction purposes. *Gaines*, 8 F.3d at 729. "A tribe may also charter a corporation pursuant to its own tribal laws, and such a corporation will be considered a citizen of a state for purposes of diversity jurisdiction." *Id.* At least one circuit has held that an Indian corporation, formed under tribal law, is a citizen of the state where it has its principal place of business. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 724 (9th Cir. 2008) ("We hold that, for diversity purposes, a tribal corporation formed under tribal law is not a citizen of a state merely because its incorporation occurred inside that state. ACE is thus only a citizen of Nevada, the location of its principal place of business."). *See also* 28 U.S.C. § 1391(c)(2) ("[A]n entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, . . . if a plaintiff, only in the judicial district in which it maintains its principal place of business.")

For venue purposes, a corporate plaintiff generally is deemed to reside at its principal place of business. *See Waste Distillation Tech., Inc. v. Pan Am. Res., Inc.*, 775 F.Supp. 759, 764 (D. Del. 1991) (examining corporation's principal place of business when determining whether corporate plaintiff brought suit in its home forum). This principal place of business test is particularly appropriate for a corporation organized under tribal laws, rather than state law, as the state of incorporation test would not shed light on the residence issue. Here, the DDC is a corporation owned by the Navajo Nation and formed under the laws of the Navajo Nation. Am.

Compl. (Doc. 30) ¶ 10. The parties do not discuss where the DDC's principal place of business is located, and thus, the Court cannot use DDC's residence to aid in the analysis. NACE is a wholly owned instrumentality of the Navajo Nation. *Id.* ¶ 11. Based on the allegations of the complaint, NACE does not appear to be a corporate entity separate from the Navajo Nation.

In determining Plaintiffs' "home forum," the Court will therefore turn to the policy reason behind placing significance on the "home forum" – that the court may presume that the chosen forum is convenient to the plaintiff. *See Burstein v. Applied Extrusion Techs., Inc.*, 829 F.Supp. 106, 110 (D. Del. 1992) ("The forum chosen by the Plaintiff must reflect rational and legitimate concerns. When the plaintiff has chosen to bring suit in a district that is not his 'home turf' and which has no connection to any of the acts giving rise to the lawsuit, the convenience to the plaintiff is not as great as it would be were [he] litigating at or near [his] principal place of business or at the site of the activities at issue in the lawsuit.") (internal citation and quotations omitted); *Waste Distillation Tech.*, 775 F.Supp. at 764 ("The movant's burden is easier where the plaintiff has not brought suit on its 'home turf' because the interest in litigating in a convenient forum is reduced."). *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981) ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."). Even if a tribe may have only one "home forum," and even if Arizona were to be deemed the Navajo Nation's "home forum," for purposes of this presumption of convenience, the District of New Mexico is certainly also a forum easily deemed convenient for Plaintiffs and is not merely a forum that is largely fortuitous.

It is undisputed that four million of the Navajo Nation's acres of land are located in the

New Mexico portion of the reservation; the eastern edge of the Tohajiilee portion is only 17 miles from downtown Albuquerque; and approximately 112,000 members of the Navajo Nation reside in New Mexico. Furthermore, Defendants also have a connection to this District because they sell their goods in New Mexico through the internet and through two stores in the state.[6] It is undisputed that Plaintiff NACE has two stores in New Mexico and has sold products through several trade shows in New Mexico. *See* Decl. of J.T. Willie (Doc. 43) ¶¶ 5, 7-9. Consequently, some of the alleged injuries and allegedly infringing acts occurred in New Mexico.

Defendants nevertheless argue that this case does not have a significant connection to this forum because they have 10 stores located in the Eastern District of Pennsylvania, they operate nationally and internationally, and they have a national online presence. While this extensive presence outside this state shows that the allegedly infringing acts took place in many locations, including Pennsylvania, it also shows that there is no one forum that can easily be isolated as the location where the majority of operative events took place. The fact that some of the infringing acts occurred in the forum state is a significant enough connection to give the preference to the plaintiff's chosen forum. *See ESPN, Inc. v. Quiksilver, Inc.*, 581 F.Supp.2d 542, 549 (S.D.N.Y. 2008) (finding in trademark infringement case that locus of operative facts was in chosen forum because some of defendant's products were marketed and sold in forum state, even though defendant marketed and sold its products nationally and developed and designed its products in transferee forum). There is thus a sufficiently significant connection between this District and to Plaintiffs and to the events giving rise to the lawsuit that the plaintiff's-choice-of-forum factor weighs in favor of Plaintiff. *Cf. Employers Mut. Cas. Co.*, 618 F.3d at 1157, 1168 (holding that, even though plaintiff was an Iowa corporation that did not reside in forum state of Wyoming for

[6] The Amended Complaint states that Defendants operate a store in Albuquerque, *see* Am. Compl. (Doc. 30) ¶ 20, but there appear to be two Albuquerque stores operated by Defendants, an Urban Outfitters store and an Anthropologie store, *see* Pls.' Resp. (Doc. 40) at 8.

purposes of § 1404(a), plaintiff's choice of forum weighed against transferring declaratory judgment action as to insurer's duty to defend or indemnify defendant sub-contractor, because allegedly negligent roofing work that was at heart of underlying litigation occurred on hotel in Wyoming); *ESPN, Inc.*, 581 F.Supp.2d at 549 ("'In action alleging trademark infringement or unfair competition, courts in this district have held the locus of operative facts to be in the initially chosen forum if acts of infringement, dilution, or unfair competition occur in that forum.' . . . 'Thus, if the allegedly infringing products are sold within the Southern District of New York, even if sold elsewhere, there exists a sufficient connection with this District.'") (quoting *Kiss My Face Corp. v. Bunting*, No. 02CIV2645 (RCC), 2003 WL 22244587, at *3 (S.D.N.Y. Sept. 30, 2003)); *Waste Distillation Tech.*, 775 F.Supp. at 764-65 (denying transfer despite fact that action was not in district where plaintiff resided, because chosen district was one closest to plaintiff's residence in which personal jurisdiction over defendants could be obtained).

As for Defendants' argument that Plaintiffs are merely forum shopping, the Court finds that both parties equally appear to be forum-shopping for convenience. The Court nonetheless finds that the aforementioned connections between Plaintiffs and this District and between the events giving rise to this lawsuit and this District require this Court to give substantial deference to Plaintiffs' chosen forum in the venue transfer analysis.

B. Accessibility of Witnesses and Sources of Proof

"The convenience of witnesses is the most important factor in deciding a motion under § 1404(a)." *Employers Mut. Cas.*, 618 F.3d at 1169 (quotations omitted). The availability and convenience of key witnesses with material testimony may outweigh the convenience to numerous, but less important witnesses. *See id.* To show inconvenience, the movant must identify the witnesses and their locations, (2) indicate the quality or materiality of their

testimony, and (3) show that the witnesses were unwilling to come to trial, that deposition testimony would be unsatisfactory, or that the use of compulsory process would be necessary. *Id.* (quoting *Scheidt*, 956 F.2d at 966). The ability to compel the attendance of witnesses is generally relevant only to third-party witnesses, because employees of the parties, as a practical matter, will be available in any venue by virtue of the employment relationship. *See Glass v. S & M NuTec, LLC*, 456 F.Supp.2d 498, 503-504 (S.D.N.Y. 2006); *Empty Barge Lines II, Inc. v. DREDGE LEONARD FISHER*, 441 F.Supp.2d 786, 793 (E.D.Tex. 2006).

Defendants contend that their pertinent buyers and the pertinent marketing personnel, as well as virtually all of the pertinent documents are located in and around Pennsylvania. They argue it will be less expensive and convenient for the employee witnesses from seven different Pennsylvania companies to participate in litigation in Pennsylvania than in New Mexico. Defendants, however, refer generally to employee witnesses, but have not identified them by name or indicated the quality of each employee's testimony. Even assuming that there are numerous employees who will testify concerning material information, Defendants have not shown that these employees would be unwilling to participate in the litigation here. *See, e.g., Empty Barge Lines II, Inc.*, 441 F.Supp.2d at 793 ("Where the key witnesses are employees of the party seeking a transfer, their convenience is entitled to less weight because the party is able to compel their attendance.").

Defendants further assert that important third-party witnesses will be beyond the reach of the subpoena power of this Court, but within the subpoena power of the Eastern District of Pennsylvania. Defendants refer to the following third-party suppliers and witnesses: Dukes supplied the "Magical Feather Bag," and Defendants' point of contact with Dukes is located in New York City, New York, Def.'s Mot., Ex. 2 (Doc. 39-2) ¶ 3; Pendleton Woolen Mills, Inc.,

which provides the "Navajo Weekender Bag," has a branch location in Pennsylvania, *id.*, Ex. 3 (Doc. 39-3) ¶ 3; Lucca Cuture ("Lucca") supplies the "Lucca Couture Navajo Pullover Sweater," and Urban Outfitters, Inc.'s point of contact with Lucca is located in New York City, New York, *id.*, Ex 3 (Doc. 39-3) ¶ 4; and Woolrich, Inc., which provides the "Vintage Men's Woolrich Navajo Jacket," is located in Pennsylvania, *id.*, (Ex. 3 (Doc. 39-3) ¶ 5. Defendants contend that the testimony of these third-party suppliers will establish that the suppliers are responsible for the accused clothing and that the items were marked with "Navajo," not to identify the source of the products, but rather to identify the type of design, which is recognized by the consuming public as a generic term for a fashion trend. Furthermore, Defendants assert that they believe that a number of the vintage items depicted in Exhibit A to the Amended Complaint and sold by Free People are one-of-a-kind items made by individuals who self-identify as Navajo Indian or who are otherwise enrolled in the Navajo Indian tribe, and these items are typically purchased from a vendor believed to be located in New Jersey, approximately 50 miles from Philadelphia. *See* Def.'s Mot., Ex. 4 (Doc. 39-4) ¶¶ 3-6.[7]

Plaintiffs counter that Pendleton is headquartered in Portland, Oregon, and Lucca is headquartered in Los Angeles, California, both of which are closer to Albuquerque than Philadelphia.[8] Only half the third-party companies noted by Defendants are located closer to the proposed transferee court. Moreover, Defendants have not identified who within those companies would testify and where those persons work or reside. With regard to convenience and cost, Defendants have thus not shown that the location of third-party witnesses compel transfer of this case. Although Defendants have asserted why employees of these third-party

[7] Defendants also point out that all the attorneys in this case are located outside of New Mexico. The convenience of counsel, however, is not a factor this Court will consider. *See In re Horseshoe Entertainment*, 337 F.3d 429, 434 (5th Cir. 2003); *Solomon v. Continental Am. Life Ins. Co.*, 472 F.2d 1043, 1047 (3d Cir. 1973).

[8] Plaintiffs cite to internet source pages to support their assertion. Defendants, however, do not dispute these facts.

suppliers may have material testimony, they have not provided any evidence regarding the third prong of the "inconvenience" test -- that the proposed witnesses from these third-party suppliers would not voluntarily come to trial, or that deposition testimony is insufficient, or that compulsory process would be required. *See Employers Mut. Cas.*, 618 F.3d at 1169. The Court will not presume that these out-of-state third-party suppliers will not voluntarily come to trial, especially given that these suppliers have a business relationship with Defendants, which could create the necessary incentive to participate in the litigation.

Regarding the proposed testimony that vintage items may have been made by individuals who self-identify as Navajos, Defendants only mention an un-identified vendor "believed" to be located in New Jersey. Defendants do not identify the proposed witness, indicate whether the witness would have admissible testimony regarding the tribal affiliation of the manufacturers of the vintage items, or demonstrate that the witness would be unwilling to participate in the litigation.

Finally, Plaintiffs, in turn, identify a number of artisans who will testify that they are enrolled Navajo Nation members, they sell their goods across the United States under the NAVAJO trademark, and they sell similar products in similar marketing channels as Defendants. Plaintiffs contend that their evidence is important in the likelihood-of-confusion analysis. Plaintiffs argue that these necessary third-party witnesses reside in New Mexico and would refuse to travel to the Eastern District of Pennsylvania to testify at trial.[9] There thus does not appear to be one venue that enjoys absolute subpoena power for both depositions and trial over all the witnesses in this case.

In sum, Defendants have not shown that the majority of key witnesses are unwilling to

[9] Plaintiffs, however, only provided evidence that two of the named artisans would be unable to travel to Pennsylvania due to the distance and expense. *See* Decl. of Mark A. Griffin (Doc. 41) ¶ 9 & Ex. F (Doc. 41-1).

come to trial, that deposition testimony would be unsatisfactory, or that the use of compulsory process would be necessary. Both parties have witnesses located in their respective districts. Merely shifting the inconvenience from one side to the other is not a permissible justification to change the venue. *Employers Mut. Cas. Co.*, 618 F.3d at 1167. Defendants have thus not met their burden of proving that the accessibility of witnesses and proof factor weighs in favor of transfer. *Cf. id.* at 1169 (holding that accessibility of witnesses factor weighed against transfer because movant merely alleged that majority of potential witnesses were non-forum state residents and subject to compulsory process without identifying those witnesses with specificity or indicating subject matter of testimony).

As for the location of relevant documents, in this digital age, the costs of producing documents long distances have been dramatically reduced, and this factor is entitled to considerably less weight. *See ESPN, Inc.*, 581 F.Supp.2d at 548 ("In an era of electronic documents, easy copying and overnight shipping, this factor assumes much less importance than it did formerly."). Defendants have offered no evidence as to why the documents or other tangible evidence in this case would be difficult to produce in this forum, and thus the accessibility of sources of proof factor is neutral. *See id.* at 549 ("In the absence of more information about why it would be so difficult to transport documents to New York from California, this factor is at best neutral.").

C. Cost of Making Necessary Proof

Defendants argue that their costs for litigating this matter weigh in favor of transfer. Given that they constitute seven separate corporate entities, they assert that a large number of corporate representatives and employees will have to travel to attend trial in New Mexico, resulting in a great monetary cost to them. On the other hand, Plaintiffs argue that the cost of

litigation factor weighs against transfer because the difference in economic means between Defendants and Plaintiffs is great, as Defendants are multi-billion dollar corporations that are far more able to bear the cost of litigating in a less convenient forum.

A court may consider the relative means of the parties when deciding a motion to transfer venue. *See Dwyer v. General Motors Corp.*, 853 F.Supp. 690, 693 (S.D.N.Y. 1994). In this case, the relative means of the parties is not clear cut. Plaintiffs refer the Court to census data showing that a large portion of the members of the Navajo Nation have incomes below the poverty level and are unemployed. Defendants, however, point out that the Plaintiffs in this case, the Navajo Nation itself and its corporate entity, have significantly greater assets than its individual members. *See AEC One Stop Group, Inc. v. CD Listening Bar, Inc.*, 326 F.SUpp.2d 525, 531 (S.D.N.Y. 2004) (noting that the factor of the disparate means of the parties is entitled to less weight when both parties are corporations). Although the Court will not rely on the relative means of the parties, given the deficient record as to the means of the Navajo Nation, the means of Defendants is nonetheless relevant. The costs to Defendants of trying suit in this District will likely be greater than if the case were transferred to the Eastern District of Pennsylvania. Urban Outfitters, however, had sales of approximately $2.5 billion in fiscal year 2012, and Defendants operate nationally and internationally. Defendants thus have the ability to bear the travel costs of litigation. Consequently, the cost-of-litigation factor only weighs slightly in favor of Defendants.

D. Difficulties that May Arise from Congested Dockets

The most relevant statistics when evaluating the administrative difficulties of court congestion "are the median time from filing to disposition, median time from filing to trial, pending cases per judge, and average weighted filings per judge." *Employers Mut. Cas. Co.*, 618

F.3d at 1169 (citing Administrative Office of the United States Courts, Federal Court Management Statistics, *available at* http://www.uscourts.gov/cgi-bin/cmsd2008. pl (2008)). A comparison of the 2011 Federal Court Management Statistics regarding judicial caseloads favors transfer. *See* Administrative Office of the United States Courts, Federal Court Management Statistics, *available at* http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/DistrictCourtsDec2011.aspx.[10]

For civil cases in the Eastern District of Pennsylvania in 2011, the median time frame from the filing of a civil case to disposition is 1.5 months and from filing to trial is 20.5 months. The pending cases per judge in the Eastern District of Pennsylvania are 916, and the weighted filings per judge are 405.[11] By contrast, the same statistics for the District of New Mexico are as follows: median time from filing of civil case to disposition is 8.7 months; median time from filing of civil case to trial is 24.0 months; pending cases per judge are 336, and weighted filings per judge are 512.[12] Based on these statistics, the Eastern District of Pennsylvania generally resolves civil cases faster than this District. Although the Eastern District has a more congested docket in terms of pending cases per judge, when weighted filings statistics are considered, this District has a higher number of weighted filings per judge. Consequently, this data indicates that this District has a more congested docket and, generally, does not resolve civil cases as quickly as the Eastern District of Pennsylvania. This public interest factor thus weighs in favor of transfer.

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[10] This Court has used the most recent Judicial Caseload Profile ending December 31, 2011, while the parties used the profile ending September 30, 2011, which accounts for the slight variation in the statistics.

[11] Weighted filings statistics account for the different amounts of time judges require to resolve various types of cases. Cases are weighted such that more time-consuming cases are given higher weights than cases demanding little time. *See* Administrative Office of the United States Courts, Federal Court Management Statistics, "2011 Explanation of Selected Terms", *available at* http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/DistrictCourtsDec2011.aspx.

[12] The far greater majority of cases in this district are criminal felony cases.

E. Advantage of Having Local Court Determine Questions of Local Law

"When the merits of an action are unique to a particular locale, courts favor adjudication by a court sitting in that locale." *Employers Mut. Cas. Co.*, 618 F.3d at 1170. Plaintiffs argue that this factor weighs against transfer because they have brought New Mexico state law claims under the NMUPA and NMTA. Defendants, however, have filed a motion to dismiss these state law claims and thus contend that this factor does not weigh in favor of Plaintiffs. This Court has not yet addressed the merits of the state law claims, and without considering those substantive issues now, finds that this factor does not weigh in favor of either party. Although generally there is an advantage of having local law decided by a local court, the Eastern District of Pennsylvania is well-versed in federal intellectual property law matters and the parties have not indicated that there is a substantial difference between the federal and local law such that the there is any disadvantage to the parties in having the Eastern District consider those claims. In a similar vein, despite the fact that more intellectual property cases are filed in the Eastern District than here, that fact does not compel the Court to transfer, as all federal courts are presumed to be equally competent in federal question cases. *See Cargill Inc. v. Prudential Ins. Co. of America*, 920 F.Supp. 144, 148 (D. Colo. 1996).

F. Remaining Factors

The remaining factors are either neutral or irrelevant. Defendant has not indicated that there are any questions regarding the enforceability of a judgment against it, that there exist conflict-of-law questions, that there are any obstacles to a fair trial here, or that any other considerations would make a trial easier or more expeditious or economical in the Eastern District of Pennsylvania than here in New Mexico.

V. CONCLUSION

Having considered all the relevant factors under 28 U.S.C. § 1404(a), the Court concludes that the balance of factors weighs against transfer. Defendants have not shown that critical witnesses would not be willing to participate in litigation in this District. Although some of the factors weigh in Defendants' favor, transferring this case ultimately would do little more than shift the balance of inconvenience from Defendants to Plaintiffs. Defendants have not met their burden of proving sufficient inconvenience to justify disturbing Plaintiffs' choice of forum.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Leave to File Sur-Reply to Defendants' Motion to Transfer Venue (**Doc. 47**) is **GRANTED**; and Defendants' Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) (**Doc. 38**) is **DENIED**.

SENIOR UNITED STATES DISTRICT JUDGE

Navajo Nation, et al. v. Urban Outfitters, et al. Filing

Brian Lewis <blewis@nndoj.org> Wed, Oct 10, 2012 at 10:15 AM
To: Brian Lewis <blewis@nndoj.org>

The attachment was filed last evening in the case referenced in the subject line. I have also attached the Defendants' motion and memorandum in support for reference.

Respectfully yours,

Brian L. Lewis, Attorney

Navajo Nation Office of the Attorney General

2 attachments

NN Resp. Opp. Pls. Mot. Transf. Ven. & Decls. REV..pdf
247K

NN v. UOs - Ds' Mot. to Tfr Ven & Memo Supp..pdf
394K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE NAVAJO NATION, *et al.* Plaintiffs, v. URBAN OUTFITTERS, INC., *et al.*, Defendants.	CIVIL ACTION NO: No. 1:12-cv-00195-LH-WDS

THE NAVAJO NATION'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(A)

I. INTRODUCTION

On February 28, 2012, the Navajo Nation, the Diné Development Corporation, and Navajo Arts and Crafts Enterprise (collectively, the "Nation" or "Plaintiffs") filed this action in the District of New Mexico to protect their intellectual property rights against the seven interrelated Defendants: Urban Outfitters, Inc., UrbanOutfitters.com, L.P., Urban Outfitters Wholesale, Inc., Anthropologie, Inc., Anthropologie.com, L.L.P., Free People of PA, L.L.C. and FreePeople.com, L.L.C. (collectively, "Defendants"). Defendants have been using the trademark "Navajo," which is owned by the Nation, to sell their goods, without the Nation's consent. Seven months later, having already submitted to this Court's jurisdiction by filing responsive pleadings, and requesting that this Court enter two stipulated scheduling orders, Defendants now request that this Court transfer the case to the Eastern District of Pennsylvania. Defendants allege that it is inconvenient for them to litigate the case in New Mexico, which justifies transfer of venue.

Defendants do not, however, claim that the Nation's choice of venue—the District of New Mexico—is improper. Indeed, Defendants operate two stores in New Mexico, have a national online presence that extends to New Mexico, and ship goods into New Mexico. And the injury to the Nation is occurring, in part, in New Mexico. Moreover, the District of New Mexico is a home forum for the Nation, since the Nation shares territory with New Mexico.

Instead, Defendants primarily argue that Defendants and their witnesses would be inconvenienced by traveling to New Mexico for trial. Defendants' motion is a thinly veiled attempt to shift the inconvenience of litigating this matter from Defendants to Plaintiffs in order to give Defendants the strategic edge. Such litigation tactics should not be countenanced. The parties here are of disparate means: Defendants are divisions of a billion-dollar corporate conglomerate, whereas the Nation comprises one of the two poorest jurisdictions within the United States. Considering the Parties' disparate means, as this Court must; in terms of costs, the Nation would be more severely impacted by transferring this case to the Eastern District of Pennsylvania than Defendants would be by continuing to litigate this case in the District of New Mexico. Thus, pursuant to the applicable legal authorities, Defendants' Motion fails to show that the Nation's choice of forum should be disrupted, and this Court's denial of Defendants' Motion is appropriate.

II. BACKGROUND

Defendants' mischaracterization of the Nation bringing this action and seeking relief to enforce its legal rights as "sandbagging" is defective. Defs.' Mem. Support Mot. Transf. Venue,

ECF No. 39 at 12.[1] Furthermore, Defendants' mischaracterization plays on historic stereotypes of Native American Indians engaging in surprise attacks and raids on non-Indian wagon-trains and settlers.[2] Defendants' surprise is contrived, and their mischaracterization is uncalled for. The Nation brought this action to protect its intellectual property rights, as the Nation is entitled to do pursuant to the law. Bringing suit against those who are violating one's rights should not be a surprise to anyone. Nor can such feigning serve as a basis to support Defendants.

The Nation's actions are fully justified. As late as August 22, 2012, six months *after* filing this action, Plaintiffs learned that Defendants were *still* selling goods using the "Navajo" trademark. Matthew P. Griffin Decl. at Ex. A. This is despite the fact that Defendants represented to the Nation that they had stopped such conduct. On August 3, 2012, the Nation sent Defendants a letter asking them to confirm that they had discontinued using the "Navajo" trademark in conjunction with their sale of goods in their stores and websites. Mark A. Griffin Decl. at ¶¶ 2-4. On August 10, 2012, Defendants stated that "each defendant in this action instructed its employees to discontinue use of the term Navajo . . . ." *Id.* at Ex. B. On August 31, 2012, the Nation sent a follow up letter to confirm that Defendants had discontinued their infringing use of the "Navajo" trademark. Defendants refused to respond. *Id.* at Ex. C.

On September 18, 2012, the Nation (through one of its attorneys) discovered Defendants were *still* selling goods in their store using the trademark "Navajo." *Id.* at ¶ 5. The Nation

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[1] Hereinafter, Defendants' Motion to Transfer Venue, ECF No. 38 and Memorandum in Support, ECF No. 39 are collectively referred to as "Defendants' Brief" or "Defs.' Br."

[2] "...simplistic movies, television programs, books, and other forms of modern-day communications still keep alive such Indian stereotypes as that of the skulking savage who tomahawked and raped defenseless White women, scalped innocent farmers, and bashed babies brains against a rock, all for the orgiastic thrill of it. Those images still feed age-old prejudices and animosities." NOW THAT THE BUFFALO'S GONE: A STUDY OF TODAY'S AMERICAN INDIANS 74 (Univ. Okla. Press 1984).

promptly asked the Defendants for an explanation, and requested a declaration attesting to each Defendant's discontinuance of use of the term "Navajo" in connection with the sale of Defendants' products. *Id.* at Ex. D. On October 1, 2012, Defendants responded, and admitted to selling another vendor's items in their store using "Navajo" on the hangtags, but failed to submit a declaration. In their letter, Defendants stated that they instructed their supplier to stop shipping items to Defendants that use the term "Navajo." *Id.* at Ex. E.

Once again, Defendants stated in their letter that they were unaware that they were continuing to use the trademark "Navajo" to sell their goods. *Id.* Defendants' counsel did not explain to the Nation the steps that Defendants took to comply with counsel's advice. Defendants, through their attorneys, have now represented to the Nation four times that they have stopped using the term "Navajo."[3] One may very well conclude that Defendants are not following their counsel's advice because the term "Navajo" is too valuable a trademark for their business to stop using.

Despite Defendants' continued trademark violations, in their Motion, they claim that they were "sandbagged" by the Nation's filing a lawsuit. Defs.' Br. 4, 12. The Nation's filing a lawsuit to protect its intellectual property rights is completely justified in light of the circumstances. Though not required under the law, the Nation first asked Defendants to stop infringing on their trademark in a June 30, 2011 letter that Defendants admit receiving on or around October 16, 2011. ECF No. 16 at 5.

[3] In addition to the two letters (Exs. B and E to the Decl. of Mark A. Griffin), Defendants have twice represented to the Nation and to the Court in their pleadings that they have stopped using the term "Navajo." ECF Nos. 16 at 5 and 33 at 7.

Contrary to customary practice, Defendants chose not to respond directly to the Nation, nor did they try to resolve the problem. Instead, in a statement provided to the press, they defended their use of the trademark "Navajo." Defendants' spokesman, Ed Looram, reportedly stated:

> Like many other fashion brands, we interpret trends and will continue to do so for years to come. The Native American-inspired trend and specifically the term "Navajo" have been cycling through fashion, fine art and design for the last few years.[4]

It was also reported that Defendants removed their offending use of the Nation's trademarks. The *Los Angeles Times* reported that

> Urban Outfitters appears to have caved to the Navajo Nation. As of Wednesday, the trendy chain store had removed the word "Navajo" from the description of about 20 items on its website, including "Navajo flask" and "Navajo Hipster Panty." Other items that bore the Navajo moniker include a pair of "Navajo" socks, a "Navajo" print tunic, and "Navajo" feathered earrings. Urban Outfitters has replaced the word "Navajo" with "printed."[5]

On that same date, in response to the news report, the Nation publicly commended Defendants for these seemingly positive actions. In so responding, the Nation assumed the reported removal of the infringing trademark was accurate.

However, the Nation's responses were conditioned on verification that Defendants had completely ceased their unlawful acivities. Furthermore, the Nation did not state Defendants were not liable for having violated its rights. The Nation merely stated that Defendants' representations of removal of the "Navajo" mark, if true, were encouraging.

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[4] http://latimesblogs.latimes.com/nationnow/2011/10/navajo-nation-takes-on-urban-outfitters-wins.html.

[5] http://latimesblogs.latimes.com/nationnow/2011/10/navajo-nation-takes-on-urban-outfitters-wins.html; http://navajotimes.com/news/2011/1011/102411panties.php;

But the reported removal was a ruse. In fact, Defendants did not stop using the Nation's "Navajo" trademark in October, 2011. Nor did they stop as of August 22, 2012—almost six (6) months after the Nation filed this lawsuit. Matthew P. Griffin Decl. at Ex. A. While Defendants removed the "Navajo" trademark from the Urbanoutfitters.com website at the time of filing the lawsuit on February 28, 2012, Defendants continued to sell their goods under the trademark "Navajo" on their Freepeople.com and Anthropologie.com websites, and in their physical stores. Am. Compl. ¶ 52; ECF Nos. 30-1 at 25-37, 30-2 at 17-29. Indeed, Defendants' most recent actions show their steadfast unwillingness to abide by their own promises. Based on Defendants' own actions, their cry of a "surprise attack" by the Nation for filing a lawsuit in its home forum is baseless. Accordingly, Defendants' attempting to hinder and impede the Nation's litigating this matter by moving the case to a distant forum should be properly denied.

III. ARGUMENT

The Tenth Circuit has set forth a multi-factor test for district courts to decide motions to transfer venue pursuant to 28 U.S.C. § 1404(a). The factors are:

> [T]he plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and[]all other considerations of a practical nature that make a trial easy, expeditious and economical.

Emp'rs Mut. Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153, 1167 (10th Cir. 2010). The party moving to transfer a case bears the burden of establishing that the existing forum is inconvenient. *Id.* (citing *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992)). Where, as here, Defendants'

arguments amount to merely shifting the inconvenience from one side to the other, courts have held that such "inconvenience shifting is not a permissible justification for a change of venue." *Id.* at 1167; *see also Reed Elsevier, Inc. v. Innovator Corp.*, 105 F. Supp. 2d 816, 821 (S.D. Ohio 2000) ("The venue transfer provisions of Section 1404(a) are not meant to merely shift the inconvenience to the plaintiff"). Applying this test here, the factors weigh heavily against transferring this case to the Eastern District of Pennsylvania.

A. The Nation's Choice of New Mexico is Properly Given "Considerable Weight."

The Tenth Circuit has held that "[u]nless the balance is strongly in favor of the movant, the plaintiff's choice of forum should rarely be disturbed." *Scheidt*, 956 F.2d at 965 (citing *William A. Smith Contracting Co. v. Travelers Indem. Co.*, 467 F.2d 662, 664 (10th Cir. 1972); *see also Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 567 (10th Cir. 1978) ("Plaintiff's choice [of forum] is also given considerable weight.").

Defendants claim that the Nation has engaged in forum-shopping by filing this case in the District of New Mexico; and therefore, that the Nation's choice of forum should be accorded no weight. Defs.' Br. 12-13. Defendants' claim of forum shopping is without merit when one considers that, under the law, the Nation's true home forum is its own Navajo Nation courts. *See Navajo Nation v. Peabody Holding Co., Inc.*, 209 F. Supp. 2d 269, 280 (D.D.C. 2002) ("Although defendants argue that plaintiffs' 'home forum' is the District of Arizona, the home forum of the Hopi Tribe and the Navajo Nation are, of course, their respective tribal courts"). The Nation chose not to file this case in the courts of the Navajo Nation, though it could have. If this Court is inclined to transfer this case, the Nation respectfully requests that it transfer this

case to the Navajo Nation Judicial District Court for Tohajiilee (which is also within New Mexico).

Despite the fact that the Nation's tribal court is its true home forum, federal courts have held that a Native American Indian tribe's home forum for purposes of venue in the United States federal district court system is where the Indian tribe's reservation is located. *See, e.g., Shawnee Tribe v. United States*, 298 F. Supp. 2d 21, 27 (D.D.C. 2002) (transferring venue to Kansas, because Shawnee reservation located there). Here, the Navajo Reservation is located, in part, in the District of New Mexico. The Navajo Reservation shares territory with the District of New Mexico, District of Arizona, and the District of Utah. The Nation occupies four (4) million acres of land in the New Mexico portion of the Reservation. Approximately 112,000 members of the Nation reside in New Mexico.[6] The eastern edge of the Tohajiilee portion of the Navajo Reservation is seventeen (17) miles from downtown Albuquerque. Accordingly, the District of New Mexico is a home forum for the Nation.

Moreover, the Nation and Defendants both sell their goods in New Mexico, and the facts giving rise to this action occurred in this District. Urban Outfitters and Anthropologie have stores in Albuquerque, and Defendants' online stores send goods into New Mexico. Defs.' Br. 7; *see also* http://www.anthropologie.com/anthro/help/store_locator.jsp. Moreover, as alleged in the Complaint, at least as early as 1941, the Nation began using the NAVAJO trademark to market and retail goods through Navajo Arts and Crafts Enterprise ("NACE"). Am. Compl. ¶ 25, ECF No. 30. NACE has two stores located in New Mexico, one in Shiprock, New Mexico, and another in Alamo, New Mexico. Shiprock is approximately 230 miles northwest of Albuquerque.

[6] http://www.uscensus2010data.com/35-new-mexico-census-2010-data

Alamo is about 80 miles southwest of Albuquerque. J.T. Willie Decl. at ¶ 5. NACE has also sold products through several trade shows in New Mexico. *Id.* at ¶¶ 7, 9, 10. Defendants do not dispute that the infringing acts occurred, in part, in New Mexico. The Nation was, therefore, injured in New Mexico. Accordingly, New Mexico is a home forum to the Nation, and giving this factor "great deference" is appropriate, because "[a] plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum." *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

The case law cited by Defendants is inapplicable here. For example, in *Gore v. Stryker Corp.*, No. 09-2987, 2010 WL 3069653, at *3-4 (E.D. Pa. Aug. 4, 2010), the plaintiff, a resident of the Southern District of Indiana, filed a lawsuit in the Eastern District of Pennsylvania. The court held that the plaintiff would not be inconvienced by transferring the lawsuit *back to the plaintiff's home forum of Indiana*. *Gore* demonstrates that the plaintiff's choice of forum should be accorded great deference; and in this case, the Nation's choice of forum in one of its home forums, the District of New Mexico, weighs in favor of keeping this case here.

B. Defendants Fail To Identify, Quantify, or Demonstrate Inconvenience to Defendants' Third-Party Witnesses.

Defendants fail to meet their burden of proof to support their argument that this case should be transferred due to their witnesses being inconvenienced by proceeding to trial in New Mexico. To demonstrate inconvenience of third-party witnesses, the movant must: (1) identify the witnesses and their locations; (2) "indicate the quality or materiality of the[ir] testimony;" and (3) "show[] that any such witnesses were unwilling to come to trial ... [,] that deposition testimony would be unsatisfactory[,] or that the use of compulsory process would be necessary." *Scheidt*, 956 F.2d at 966 (brackets omitted); *see also* 15 CHARLES A. WRIGHT, ARTHUR R.

MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3851, at 227-28 (3d ed. 2007) ("If the moving party merely has made a general allegation that necessary witnesses are located in the transferee forum, ... the application for transferring the case should be denied...."); 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 111.13[f][v](3d ed.2010) ("The materiality of the prospective witnesses [sic] testimony, and not merely the number of prospective witnesses, will determine the extent to which their convenience will be weighed") (citation omitted).

However, Defendants cite alleged inconvenience to themselves, rather than to their third-party witnesses, to support this argument. Their argument that the seven (7) interrelated Defendants and their marketing personnel are headquartered in Pennsylvania is not a relevant consideration. Defs.' Br. 7. "The accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses." *Emp'rs Mut. Cas. Co.*, 618 F.3d at 1167. The reach of compulsory process is not a factor where the witnesses are employees of a defendant, whose attendance can otherwise be compelled. *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 925 F. Supp. 36, 38 (D. Me. 1996) ("[A] motion to transfer may be denied under section 1404(a) when the witnesses are employees of the defendant and their presence can be obtained by the party"). Moreover, Defendants' argument that this case should be transferred to the city in which Defendants are headquartered is not a valid consideration either. "Merely shifting the inconvenience from one side to the other, however, obviously is not a permissible justification for a change of venue." *Emp'rs Mut. Cas. Co.*, 618 F.3d at 1167 (citing *Scheidt.*, 956 F.2d at 965). Accordingly, this argument is also defective.

Defendants' argument that the Nation's government legal counsel are located in Arizona, and outside counsel are located in Seattle, Washington, not New Mexico, Defs.' Br. 8, is also not a relevant consideration here. "The convenience of counsel is not a factor to be considered." *Solomon v. Cont'l Am. Life Ins. Co.*, 472 F.2d 1043, 1047 (3d Cir. 1973); *see also In re Horsehoe Entm't*, 337 F.3d 429, 434 (5th Cir. 2003) (holding same).

With regard to third-party witnesses, Defendants claim that "important third-party witnesses are located in or within the subpoena power of Pennsylvania." Defs.' Br. 8. However, this assertion is unsupported. First, some of Defendants' identified witnesses are headquartered outside of Philadelphia. Defendants state that Pendleton has a branch location in Pennsylvania. Kessler Decl. at ¶ 3, ECF No. 39-3. However, Pendleton is headquartered in Portland, Oregon, which is closer to Albuquerque than it is to Philadelphia. http://www.pendletonusa.com/custserv/custserv.jsp?pageName=CompanyFactSheet&parentName=AboutUs. There is no indication that the testifying witness from Pendleton is located in Pennsylvania rather than in Oregon. Similarly, Defendants identify Lucca Couture as a third-party supplier located in New York. But apparently, Lucca's headquarters is located in Los Angeles, which is also closer to Albuquerque than to Philadelphia. http://www.linkedin.com/company/lucca-couture;http://www.luccacouture.com/pages/wholesale.

Ari Reich, a "Vintage Buyer" for Free People, declared that they buy items from a vendor in Lambertville City, New Jersey. However, Defendants do not identify the "vendor," nor do they explain or qualify what testimony this vendor will provide. None of the witnesses identified by Defendants have submitted their own declarations, and no one has testified that they are

unwilling to attend trial in New Mexico, or that use of the compulsory process would be necessary here.

Moreover, Defendants fail to provide the quality or materiality of their asserted third-party witnesses' testimony; which could have been done, for example, by explaining the substance or relevance of each witness' testimony. Instead, Defendants claim that:

> [s]ome [witnesses] are expected to testify at trial regarding goods central to the Plaintiffs' allegations were marketed as 'Vintage Navajo' because they were, in fact, items made and sold by certified Navajo artisans.

Defs.' Br. 8-9. While Defendants identify Pendleton, Woolrich, Dukes, and Lucca Couture to support this argument; none of these declarations actually support this assertion. Indeed, the declarations are not from Pendleton, Woolrich, Dukes, and Lucca Couture. Rather, they are declarations of Defendants' employees, which do not provide the topics upon which the third-party witnesses are expected to testify. Harrington Decl., ECF No. 39-2; Kessler Decl., ECF No. 39-3.

Ari Reich states that some goods "are believed to have been made by individual who self-identify as Navajo Indian or who are otherwise enrolled in the Navajo Indian tribe," Reich Decl. at ¶ 4. However, he does not state that the unknown vendor in New Jersey will provide such testimony. Reich Decl. ECF 39-4. The Defendants' declarations submitted in support of their motion simply do not support their claim that third-party witnesses will provide testimony that the goods were in fact made and sold by certified Navajo artisans. Defendants' declarations also do not state that third-party witnesses (who are not their employees) will be inconvenienced by this case being litigated in the District of New Mexico. Accordingly, Defendants' declarations are defective.

In sum, Defendants' arguments regarding accessibility and inconvenience of third-party witnesses are centered on the impermissible consideration of their own convenience. Defendants fail to sufficiently identify the witnesses, explain specifically the topics on which they will testify, or demonstrate that any of them are actually unwilling to attend trial in New Mexico. Defendants, therefore, fail to make the necessary showing that the accessibility of their third-party witnesses weighs in favor of transfer to the Eastern District of Pennsylvania.

C. The Nation and its Third-Party Witnesses and Evidentiary Sources are Located in New Mexico, and Would be Inconvenienced if Trial Were in Pennsylvania.

Defendants claim that "Plaintiffs' complaint is devoid of any suggestion that necessary witnesses or evidentiary sources are located in New Mexico." Defs.' Br. 9. The Complaint alleges that the Nation has been using the NAVAJO mark to sell its goods through NACE since 1941. Am. Compl. ¶ 25. NACE is located in New Mexico. It has two stores located in New Mexico. One store is in Shiprock, and another is in Alamo. Shiprock is approximately 230 miles northwest of Albuquerque. Alamo is approximately 80 miles southwest of Albuquerque. NACE has also sold its products at trade shows in New Mexico. J.T. Willie Decl. ¶¶ 7, 9, 10.

Moreover, the Complaint refers to the www.gonavajo.com website through which NACE sells its products using the NAVAJO trademark. Am. Compl. ¶ 30. Two of the Navajo silversmiths identified on that website, Ronald Coan and Howard Begay, reside in New Mexico. J.T. Willie Decl. ¶ 3. NACE also sells its products using the NAVAJO trademark through the website www.temeinc.com. The three Navajo Indian silversmiths identified on that website, Jimmy Brown, Jerry Cowboy, and Christopher Tom, also reside in New Mexico. Two other enrolled members of the Navajo Nation who will testify about their use of the NAVAJO trademark in connection with their clothing and jewelry sales also reside in New Mexico. Mark

A. Griffin Decl. ¶¶ 8, 9, Ex. F. These witnesses are unwilling to voluntarily appear to testify in Pennsylvania. *Id.* One of these witnesses has testified at the time of this filing that "the distance and expense of traveling there will prevent me from being willing to appear and testify." *Id* at Ex. F. Accordingly, the Nation's third-party witnesses, who are not its employees, would be inconvenienced if this case were moved to Pennsylvania.

The Nation's third-party witnesses are located primarily in New Mexico, and are almost all in the Southwestern geographic region. These artisans will testify that they are enrolled members of the Navajo Nation, that they sell their goods across the United States (including New Mexico) under the NAVAJO trademark, and that they sell similar products, in similar marketing channels as Defendants. Specifically, these five Navajo Indian silversmiths who reside in New Mexico sell their products through the NACE websites. J.T. Willie Decl. ¶¶ 3-4.

Moreover, evidentiary sources of the Nation's goods are also located in New Mexico. Specifically, NACE has two stores in New Mexico that sell clothing, accessories, and jewelry, with which Defendants' products sold under the "Navajo" mark are confusingly similar. Photographs of examples of these confusingly similar clothing, accessory, and jewelry products are attached hereto as Exhibits A through X of the Declaration of J.T. Willie. This third-party witness testimony and evidence is material, because the Nation will provide it at trial to show that Plaintiffs sold similar products and engaged in the same manner of marketing as Defendants pursuant to the likelihood of confusion analysis to prove trademark infringement. *See, Sally Beauty Co., Inc. v. Beautyco, Inc.*, 304 F.3d 964, 972 (10th Cir. 2002) (listing elements of trademark infringement, including similar products and manners of marketing). Thus, the Nation's witnesses and other sources of proof are located in New Mexico, some would be unable

to attend a trial in the Eastern District of Pennsylvania, and the use of compulsory process would be necessary here.

D. The Cost of Making the Necessary Proof Weighs in the Nation's Favor.

Defendants argue that the costs of producing documents would be reduced if this case were transferred to the Eastern District of Pennsylvania, because pertinent documents are located there. Defs.' Br. 3. However, the location of documents in this digital age carries no weight. "With respect to the location of documents, in this digital age of easy and instantaneous electronic transfer of data, the Court does not find that the 'ease of access to sources of proof' factor carries any weight in the transfer analysis." *Wyandotte Nation v. Salazar*, 825 F. Supp. 2d 261, 271 (D. D.C. 2011) ("[T]echnological advances have significantly reduced the weight of the ease-of-access-to-proof factor"). Thus, Defendants' assertion in support of transfer is deficient.

Defendants' evidentiary proofs, in terms of products, are also located in New Mexico. Urban Outfitters and Anthropologie have stores located in New Mexico. Defs.' Br. 7; *see also* http://www.anthropologie.com/anthro/help/store_locator.jsp. Defendants do not dispute that the infringing acts occurred, in part, in New Mexico. The Nation was injured in New Mexico.

The Nation would also be more severely impacted in terms of costs by transferring this case to the Eastern District of Pennsylvania than Defendants would be by continuing to litigate this case in the District of New Mexico. The relative means of the parties may be considered in the analysis of whether to transfer venue. *Dwyer v. General Motors Corp.*, 853 F. Supp. 690, 693 (S.D.N.Y. 1994). Where a plaintiff is a private individual and defendant is a large corporation, a defendant's assertions regarding monetary expense and difficulty in litigating in a distant forum are properly disregarded. *Miracle v. NYP Holdings, Inc.* 87 F. Supp. 2d 1060, 1073-74 (D. Haw.

2000). According to Urban Outfitters' 2011 10-K, Urban Outfitters had a gross profit of $890 million in its fiscal year ending January, 2012. *See* http://www.sec.gov/Archives/edgar/data/912615/000119312512146029/d276682d10k.htm.

Conversely, the Nation is one of the two poorest areas geographically within the United States, with an unemployment rate that has increased from 42.16% in 2001 to 50.52% in 2007. *See* Comprehensive Econ. Dev. Strategy, 20 (2010), available at http://www.navajobusiness.com/fastFacts/index.htm. The average annual Navajo Nation household income is well-below the national average, and is between only about $20,000 and $32,000. *Id.* The United States Census Bureau's American Community Survey found that thirty-three percent (33%) of all people in the Nation had incomes below poverty level. *See* American Community Survey, available at http://quickfacts.census.gov/qfd/index.html. The Nation would incur substantial additional costs having to travel to Pennsylvania, and hire local counsel in the Eastern District of Pennsylvania. The difference in economic means between Defendants and the Nation is great, and this weighs against transfer of this case to the Eastern District of Pennsylvania. Accordingly, the cost of making necessary proofs weighs in favor of keeping the case in the District of New Mexico.

E. This Court Has an Advantage Deciding New Mexico Law.

Another factor to consider, which is not listed by Defendants in their brief, is "the advantage of having a local court determine questions of local law." *Emp'rs Mut. Cas. Co.*, 618 F.3d at 1167. The Nation has brought New Mexico State law claims pursuant to the New Mexico Trademark Act, N.M. STAT. ANN. § 57-3B-15 (2012), and the New Mexico Unfair Practices Act, N.M. STAT. ANN. § 57-12-3 (2012). Familiarity with governing state law weighs against a

transfer. *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964). Thus, this Court's advantage here weighs against the requested transfer of venue.

While the Court's ability to determine local law should be considered, and weighs in favor of keeping the case in New Mexico; Defendants' argument that the case should be transferred because "the Eastern District of Pennsylvania is particularly well-versed in intellectual property matters," is not a valid consideration. Defs.' Br. 11. Courts generally will not consider arguments—such as Defendants' arguments—that another district court is more familiar with a particular area of federal law, and thus, supposedly a more appropriate forum for the litigation. *Cargill Inc. v. Prudential Ins. Co. of Am.*, 920 F. Supp. 144, 148 (D. Colo. 1996) (concluding all federal judges are presumed to be equally competent in federal question cases). This Court is well-versed in trademark matters. *See, e.g., Creative Gifts, Inc. v. UFO,* 235 F.3d 540 (10th Cir. 2000) (affirming J. Hansen's judgment rendered after a bench trial on trademark infringement claims). Accordingly, Defendants' argument that this Court is less-versed in trademark law than the Eastern District of Pennsylvania, and therefore, that transfer to that venue is appropriate, is deficient.

F. The District of New Mexico's Docket is Not More Congested than the Eastern District of Pennsylvania's Docket.

Defendants' claim that this case will proceed faster if it is transferred to the Eastern District of Pennsylvania fails, because it is speculative. According to Defendants, the median time from filing an action to trial for civil cases is 28.7 months in New Mexico and 20.4 months in the Eastern District of Pennsylvania. Defs.' Br. 11. The respective six (6) year averages for the median time from filing to trial in the two districts, however, is only a difference of two months. The six (6) year average for the time from filing to trial in the Eastern District of Pennsylvania is

21 months; while the six (6) year average in the District of New Mexico is 23.1 months. ECF No. 39-6. Morever, even if Defendants were correct about this factor—which they are not—speed of disposition is the "most speculative" factor here, and cannot outweigh other relevant factors by itself. *In re Genetech, Inc.*, 566 F.3d 1338, 1347 (Fed. Cir. 2009); *Agilent Technologies, Inc. v. Micromuse, Inc.*, 316 F. Supp. 2d 322, 329 (E.D. Va. 2004) (concluding same). Thus, this argument also fails.

In fact, the Eastern District of Pennsylvania, not the District of New Mexico, has a more congested docket in terms of total filing and pending cases per judgeship. The Federal Judicial Profile, cited by Defendants, shows that in the twelve (12) month period ending September 30, 2011, (not December 31, 2011, as represented by Defendants on their Exhibit 6 Cover Sheet), the Eastern District of Pennsylvania had 936 pending cases per judgeship. The District of New Mexico, however, had 350 pending cases per judgeship. Thus, the District of New Mexico has roughly one-third the number of pending cases per judgeship than the Eastern District of Pennsylvania.

Defendants attempt to obfuscate the caseload per judge here by only citing to the criminal filings. Defs.' Br. 11. The Federal Judicial Profile shows that the number of *total* filings per judgeship (civil and criminal) in the Eastern District of Pennsylvania is 2,170 filings per judgeship. However, the total number of filings per judgeship in the District of New Mexico is significantly less: only 680 filings per judgeship. Thus, the District of New Mexico has roughly one-third the number of total filings per judgeship that are filed in the Eastern District of Pennsylvania. While it is undisputed that the District of New Mexico has a busy criminal docket, which Defendants argue is a reason to transfer this case; in considering the *total* caseload per

judgeship, which is arguably a more relevant analysis, the District of New Mexico's docket is less congested than the Eastern District of Pennsylvania. Like the other factors here, this factor also weighs against a transfer to the Eastern District of Pennsylvania.

IV. CONCLUSION

In sum, all the factors that this Court may consider in deciding Defendants' motion weigh in the Nation's favor, and the Nation requests that this Court deny Defendants' motion to transfer this matter to the Eastern District of Pennsylvania.

RESPECTFULLY SUBMITTED this 9th day of October, 2012.

NAVAJO NATION DEPARTMENT OF JUSTICE
HARRISON TSOSIE, ATTORNEY GENERAL

/s/ B. L. Lewis
Brian L. Lewis, Attorney
BIA Club Building
Post Office Box 2010
Window Rock, Navajo Nation (Arizona) 86515
Telephone: 928/871-6933 / Fax: 928/871-6200
blewis@nndoj.org

KELLER ROHRBACK, L.L.P.

/s/ Karin B. Swope
Mark A. Griffin (pro hac vice)
Karin B. Swope (pro hac vice)
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
Telephone: 206/428-0561 / Fax: 206/623-3384
mgriffin@kellerrohrback.com
kswope@kellerrohrback.com
Attorneys for the Navajo Nation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT NEW MEXICO

THE NAVAJO NATION, et al.,

Plaintiffs,

v.

URBAN OUTFITTERS INC., et al.,

Defendants.

No. 1:12-cv-00195-LH-WDS

DELCARATION OF MATTHEW P. GRIFFIN

Pursuant to 28 U.S.C. § 1746, I, Matthew P. Griffin, declare as follows:

1. I make this Declaration based on personal knowledge and am competent to testify to the matters set forth herein.

2. On August 22, 2012, I went shopping at the Urban Outfitters store located at 921 Church Street in Evanston, Illinois. I noticed at least four items that were being sold with the word "Navajo" on the label. Attached hereto as Exhibit A is a true and correct copy of a photograph that I took of one of the items being sold at that store.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

EXECUTED this 19th day of September, 2012 at Seattle, Washington.

Matthew P. Griffin

UNITED STATES DISTRICT COURT
FOR THE DISTRICT NEW MEXICO

THE NAVAJO NATION, et al.,

Plaintiffs,

v.

URBAN OUTFITTERS INC., et al.,

Defendants.

No. 1:12-cv-00195-LH-WDS

DECLARATION OF MARK A. GRIFFIN

Pursuant to 28 U.S.C. § 1746, I, Mark A. Griffin, declare as follows:

1. I make this Declaration based on personal knowledge and am competent to testify to the matters set forth herein. I am one of the attorneys representing Plaintiffs in this matter.

2. On August 3, 2012, I sent a letter to defense counsel asking that their clients agree to refrain from using the NAVAJO trademark during the pendency of this litigation. The letter details Plaintiffs' legal and factual basis for seeking a preliminary injunction against Defendants. A true and correct copy of this letter is attached hereto as Exhibit A.

3. On August 10, 2012, H. Jonathan Redway, one of the attorneys representing Defendants in this matter, sent me a letter responding to my August 3, 2012 letter. A true and correct copy of that letter is attached as Exhibit B.

4. On August 31, 2012, I sent Mr. Redway a letter confirming that all of his clients had discontinued use of the NAVAJO trademark "in connection with the sale of all of their products in all of their retail stores, catalogues and websites." A true and correct copy of that letter is attached as Exhibit C.

5. On September 18, 2012, my son, Matthew P. Griffin, told me that he went shopping at an Urban Outfitters store in Evanston, Illinois and noticed several items being sold using the word Navajo. Shortly thereafter, I asked him to sign a declaration to that effect.

6. On September 21, 2012, Karin Swope, another attorney representing Plaintiffs in this matter, sent defense counsel a letter informing them of the evidence provided to me by my son about "Urban Outfitter's continued trademark violations." A true and correct copy of that letter is attached as Exhibit D.

7. On October 1, 2012, in response to the letter about the sales in Evanston, Mr. Redway sent me a letter attempting to explain his client's conduct. A true and correct copy of this letter is attached as Exhibit E.

8. Attached as Exhibit F is a true and correct copy of the Declaration of Virginia Ballenger.

9. Artie Yellowhorse is an enrolled member of the Navajo Nation who resides in Albuquerque, New Mexico. Attached as Exhibit G is an example of Ms. Yellowhorse's efforts to market her products. If trial of this matter takes place in Philadelphia, Pennsylvania, Ms. Yellowhorse is unwilling to voluntarily appear to testify.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

EXECUTED this 5th day of October, 2012 at Seattle, Washington.

Mark A. Griffin

UNITED STATES DISTRICT COURT
FOR THE DISTRICT NEW MEXICO

THE NAVAJO NATION, et al.,

Plaintiffs,

v.

URBAN OUTFITTERS INC., et al.,

Defendants.

No. 1:12-cv-00195-LH-WDS

DELCARATION OF J. T. WILLIE

Pursuant to 28 U.S.C. § 1746, I, J. T. Willie, declare as follows:

1. I make this Declaration based on personal knowledge and am competent to testify to the matters set forth herein. I am Marketing Director for the Navajo Arts and Crafts Enterprise, a wholly-owned instrumentality of the Navajo Nation.

2. This declaration is being prepared in response to Defendants' Motion to Transfer Venue Purausnt to 28 U.S.C. § 1404(A) ("Motion"). On page 9 of Defendants' memorandum in support of their Motion, it is asserted that "Plaintiffs' complaint is devoid of any suggestion that necessary witnesses or evidentiary sources are located in New Mexico."

3. In fact, paragraph 30 of the Amended Complaint for Injunctive Relief and Damages ("Am. Complaint") refers to the www.gonavajo.com website through which Plaintiff Navajo Arts and Crafts Enterprise ("NACE") sells its products using the NAVAJO trademark. Two of the Navajo silversmiths identified on that website, Ronald Coan and Howard Begay, reside in New Mexico.

4. NACE also sells its products using the NAVAJO trademark through the website:

temeinc.com. The three Navajo silversmiths identified on that webite, Jimmy Brown, Jerry Cowboy, and Christopher Tom, also reside in New Mexico.

5. NACE has two stores located in New Mexico, one in Shiprock and another in Alamo. Shiprock is approximately 230 miles northwest of Albuquerque. Alamo is approximately 80 miles southwest of Albuquerque.

6. Attached to this declaration as Exhibits A through X are photographs of examples of products sold at the two New Mexico NACE stores and the five other NACE stores that are located in Arizona. Each of these Exhibits includes a photograph of a confusingly similar product sold by Defendants using the identical trademark "Navajo." The photographs of Defendants' products were previously filed as exhibits to the Am. Complaint.

7. NACE sold its products using the NAVAJO trademark at the Oasis Jewelry Show in Albuquerque, New Mexico on March 21 and 22, 2012.

8. NACE sold its products using the NAVAJO trademark at the Indian Arts & Crafts Association Show in Albuquerque, New Mexico on May 4 and 5, 2012.

9. NACE sold its products using the NAVAJO trademark at the Santa Fe Indian Market in Santa Fe, New Mexico from August 16, 2012 through August 19, 2012.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

EXECUTED this 5th day of October, 2012 at Navajo Arts & Crafts Enterprise Window Rock, Arizona.

J. T. Willie

Congratulations!

Stanton, Meridith <Meridith_Stanton@ios.doi.gov> Fri, May 11, 2012 at 5:16 PM
To: "Anderson, Kent (USATNE)" <Kent.Anderson@usdoj.gov>

Kent,

Congratulations! Anything we can do to assist, such as sending Indian Arts and Crafts Act hand outs, Act give aways and other Act promotional items, or other assistance with training, please let us know.

Best Regards,

Meridith

From: Anderson, Kent (USATNE) [mailto:Kent.Anderson@usdoj.gov]
Sent: Friday, May 11, 2012 4:42 PM
To: Stanton, Meridith
Subject: RE: Emailing: Navajo sues Urban Outfitters over product names ajc.com

Just wanted to let you know that I will be on detail to the NAC for a year beginning June 15, 2012. I will be the AD for Civil Programs. Hope to see you in Columbia!

M. Kent Anderson

Assistant U.S. Attorney

1110 Market St. Ste. 301

Chattanooga, TN 37402

Direct Dial 423.385.1345

423.752.5140 fax 423.752.5171

From: Stanton, Meridith [mailto:Meridith_Stanton@ios.doi.gov]
Sent: Wednesday, February 29, 2012 4:46 PM

To: Anderson, Kent (USATNE)
Subject: Emailing: Navajo sues Urban Outfitters over product names ajc.com

Hi Kent,

Thought you might find this of interest.

Best Regards,

Meridith

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- Close

Navajo sues Urban Outfitters over product names

By FELICIA FONSECA

The Associated Press

3:31 p.m. Wednesday, February 29, 2012

FLAGSTAFF, Ariz. — The Navajo Nation has sued Urban Outfitters Inc. months after the tribe sent a cease and desist letter to the clothing retailer demanding it pull the "Navajo" name from its products.

The lawsuit filed late Tuesday in U.S. District Court in New Mexico alleges trademark violations and violations of the federal Indian Arts and Crafts Act, which makes it illegal to sell arts or crafts in a way to falsely suggest they're made by American Indians when they're not.

The tribe has about 10 registered trademarks on the Navajo name that cover clothing, footwear, online retail sales, household products and textiles. Tribal justice officials said they're intent on protecting what they believe are among the tribe's most valuable assets.

"The fame or reputation of the Navajo name and marks is such that, when defendant uses the 'Navajo'

and 'Navaho' marks with its goods and services, a connection with the Navajo Nation is falsely presumed," the lawsuit states.

Urban Outfitters set off a firestorm of criticism last year with its line of Navajo-branded clothing and accessories — particularly underwear and a liquor flask, which the tribe said was "derogatory and scandalous," considering the sale and consumption of alcohol is banned on the reservation that spans parts of northeast Arizona, southeast Utah and northwest New Mexico. The company removed the product names from its website after acknowledging receipt of the cease and desist letter.

But the Navajo Nation wrote in its lawsuit that products with the Navajo name still are sold through other company brands, like Free People, in catalogs and retail stores.

The clothing boutique's website features several pieces of jewelry labeled vintage Navajo with turquoise stones and silver. A description for a handmade cuff says it originally was sold at a trading post, and has etched arrow detailing with a "sterling" stamp on the back.

There was no sign of the word "Navajo" on any products at an Urban Outfitters in downtown Tempe late last week.

The Philadelphia-based company did not immediately respond to messages seeking comment Wednesday.

Company spokesman Ed Looram said in an email last October that Urban Outfitters had no plans to alter its products.

"Like many other fashion brands, we interpret trends and will continue to do so for years to come," he said. "The Native American-inspired trend and specifically the term 'Navajo' have been cycling thru fashion, fine art and design for the last few years."

He later declined further comment, saying the matter was in the hands of legal counsel.

Susan Scafidi, who directs the Fashion Law Institute at Fordham University's law school in New York, said Urban Outfitters could point out the name changes in certain items in response to the tribe's original objections. The "Navajo Hipster Panty" and the "Navajo Print Fabric Wrapped Flask," for example, later appeared on the company's website as "printed" instead of "Navajo."

Other defenses include claiming no likelihood of consumer confusion between an authorized Navajo clothing item and the panty, using alternate spellings of "Navajo" and arguing that the contested product isn't a handicraft, she said.

But she and New York-based fashion lawyer Joseph F. Murphy Jr., agree the trademark infringement is clear. Both pointed to a history in which the Navajo Nation lost real property and now is fighting to protect intellectual property.

"That's what disgusts me about this situation," Murphy said. "I, like many people, thought it would have been resolved. But apparently Urban Outfitters declined to write the big apology and may have to write the big check."

The Navajo Nation's objections to traditionally styled beaded earrings or a hacienda bag that don't carry the tribe's name are much less likely to succeed, Scafidi said. But she said it shows a pattern that could influence a jury, which the tribe has requested in its lawsuit.

"Imagine all of those products piled on a table in the courtroom, looking like Santa Fe meets New York's notorious Canal Street or Beijing's Silk Market," she wrote in an email.

Tuesday's action isn't the first time the Navajo Nation has asserted its trademarks. The tribe successfully forced the cancellation of a "Navaho" trademark last year that was used by a French

company doing business in the United States. The tribe argued the name was phonetically identical and infringed on its trademark.

The tribe licenses its name to other businesses in exchange for a share of their profits, and it has identified about two dozen companies it believes are violating the Navajo trademark.

The lawsuit seeks monetary compensation and an order permanently enjoining Urban Outfitters from using the name "Navajo" or variations of it on its products.

February 29, 2012 03:31 PM EST

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VanWey, Kenneth J <Kenneth_Van_Wey@ios.doi.gov>

From VanWey, Kenneth J **Date** 4/23/2012 9:36:00 AM

To Stanton, Meridith; Fry, Ashley

Cc

Subject more urban outfitters

http://gothamist.com/2012/04/20/urban_outfitters_offends_jewish_lea.php

Indianz.Com. In Print.
http://www.indianz.com/News/2012/005211.asp

NPR: Navajo Nation sues Urban Outfitters over trademarks
FRIDAY, APRIL 6, 2012
Filed Under: Law | National
More on: fashion, navajo, trademarks, urban outfitters

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"MICHEL MARTIN, HOST:

The Navajo Nation is one of this country's largest Native American tribes, so you might not be surprised to know that many people associate the word Navajo with a distinctive aesthetic associated with the Southwest. But how far is too far when it comes to appropriating that aesthetic? That is the question at the heart of a lawsuit filed by the Navajo Nation against Urban Outfitters. That's a clothing company with stores in 35 states.

That company had come out with a line of products all labeled Navajo. Many people have objected to that. Not just Native Americans, but others.

We wanted to learn more about this, so we've called upon Bill Donovan. He's a contributor to the Navajo Times. He's been covering the Navajo Nation for more than 30 years and has reported on this.

Bill, thanks so much for joining us.

BILL DONOVAN: My pleasure.

MARTIN: Now, as I understand it, the controversy started with a letter to Urban Outfitters written by Sasha Houston Brown, who is a member of the Santee Sioux Nation, but she said she saw these products at Urban Outfitters and was offended. Tell us more.

DONOVAN: Well, what happened was - they've been selling these products for about a year now and on Columbus Day she put her letter online and her letter went viral. Everybody saw it and at that point it became a public controversy. And it got a lot of coverage because she said that she was embarrassed by some of the products that the company was selling with the Navajo name on it, products like Navajo Hipster Panties and a Navajo Liquor Flask."

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Navajo Nation Sues Urban Outfitters Over Trademark (NPR 4/5)

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Blog: 'Native' trend in fashion ticks off real Native Americans (12/07)
Native Sun News: Navajo Nation stands up for its trademarks (11/17)
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Sasha Houston Brown: Corporations rip off tribal property (10/18)
Navajo Nation sent trademark letter to Urban Outfitters in June (10/17)
Opinion: Urban Outfitters is obsessed with 'Navajo' fashions (10/11)
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Navajo Nation Sues Urban Outfitters Over Trademark

April 5, 2012

text size A A A

The Navajo Nation is accusing the retailer of trademark infringement. Members say Urban Outfitters sold goods that used the Navajo name and symbols without permission. Host Michel Martin talks with *Navajo Times* contributor Bill Donovan about the case, and why some Native Americans find certain uses of the Navajo name offensive.

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MICHEL MARTIN, HOST:

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BILL DONOVAN: My pleasure.

MARTIN: Now, as I understand it, the controversy started with a letter to Urban Outfitters written by Sasha Houston Brown, who is a member of the Santee Sioux Nation, but she said she saw these products at Urban Outfitters and was offended. Tell us more.

DONOVAN: Well, what happened was - they've been selling these products for about a year now and on Columbus Day she put her letter online and her letter went viral. Everybody saw it and at that point it became a public controversy. And it got a lot of coverage because she said that she was embarrassed by some of the products that the company was selling with the Navajo name on it, products like Navajo Hipster Panties and a Navajo Liquor Flask.

And she said this was really insensitive to the Navajo people and she wanted it stopped.

MARTIN: So she had been trying to draw attention to this for a while and apparently it got online.

DONOVAN: The smart thing she did was she put it online on Columbus Day and a lot of newspapers were looking for some kind of story to go along with Columbus Day and that worked perfectly.

MARTIN: Did Urban Outfitters ever respond to her or to you or to the people who were covering this?

And what did they say?

DONOVAN: I called Urban Outfitters and I talked to their attorney, who admitted that they were doing it, but they said they weren't doing anything wrong. They had a right to use that name and they were not insensitive to the Navajo Nation.

At that point they said the Navajo Nation had taken no action against them, but we learned later that there had been a letter (unintelligible) from the tribe to cease and desist and they just refused to go along with it.

MARTIN: So there are two issues here. One - they're saying what? That the Navajo - the word Navajo is in such common usage that nobody can kind of claim to be in charge of it, and then they're saying secondly - so what. You know - so what. Is that pretty much the point?

DONOVAN: Well, back in 1975 or '76, the Navajo Nation actually tried to copyright the word Navajo, but they were told that it was such a common name, they couldn't do it.

Now, what they did here was they went and sued them on the basis of the Indian Arts and Crafts Act, which says it's illegal to produce a product that says it's Indian made when it's not Indian made. So the Navajo Nation is saying that the products that the company is producing makes it appear that Navajos had some part in the production of these products and therefore that's against the law.

MARTIN: But this isn't the first time that the name has been used to sell a product not produced by Navajo people. For example, remember there was that - the Navajo SUV from Mazda? Is that viewed differently by the tribe?

DONOVAN: Very much so. That's about 15 years ago. Mazda came to the Navajo Nation and asked permission to use the word Navajo, and it promised that it would do so with dignity, and it gave one of the cars to the Navajo Nation to use in its government offices. And then there have been a couple of Navajo clothing lines, which also got endorsement from the Navajo tribe, so the Navajos have endorsed products.

MARTIN: Well, in fact, Sasha, in her letter - Sasha Houston Brown, in her letter, says that there's nothing honorable or historically appreciative in selling items such as the Navajo Print Fabric-Wrapped Flask, Peace Treaty Feather Necklace, Staring at Stars Skull Native Headdress, or the Navajo Hipster Panties. So I think part of the point that you're making here is it's some of the products themselves that many people found tacky and kind of insulting. Is that it?

DONOVAN: That's right. Tacky is a good word. The Navajo Nation has been very sensitive about people using their name to promote tacky products. I remember back in 1982 or 1983, Penthouse magazine wanted to come in on the reservation and do a pictorial using the Monument Valley area. The Navajo tribe went ballistic and said no, you can't do that. That's just too tacky and insensitive to us. You cannot come on the reservation and do that.

MARTIN: If you're just joining us, you're listening to TELL ME MORE from NPR News. We're talking about why the Navajo Nation is suing clothing chain Urban Outfitters. I'm joined by Bill Donovan. He's a contributor to the Navajo Times and he's been covering this story.

You've been covering this, as I said, for a while now. What do you think? As I understand it - that some of the products that Urban Outfitters was producing have been removed from their website, but are they still selling them elsewhere?

DONOVAN: They're still selling them through their subsidiaries. The products are still being sold by Urban Outfitters, but they have different names on them now. They've taken the word Navajo off of them, but they still use Navajo designs, and the tribe can't do anything about that. They have not copyrighted the designs.

But, again, if they're using Navajo designs and it gives the impression that these were made by Navajos, that's against the law.

MARTIN: What about the argument, though, that culture is essentially owned by everybody these days? I mean it used to be that, like, the big fashion designers would not allow their designs to be photographed, you know, in advance of a show so that they could be the first people to present them, and that now people just sort of accept it. You know, everybody copies everybody. What do people say about that? What do tribal leaders say about that?

DONOVAN: Well, for the past 25 years the Navajo Nation has passed a number of laws trying to protect this culture from non-Navajos. Now if you want to do a study on Navajos, you have to get the Navajo tribe's permission. If you are a commercial operation, you want to go on the reservation to take pictures, you've got to get the tribe's permission. And they're very careful about who they let do that, so the tribe is taking over more and more control over its culture and over its image.

MARTIN: But what about the idea, more broadly, that you can't really own culture any more, like dance steps or something like that, that nobody really owns that? What about that idea?

DONOVAN: For the most part, the Navajo Nation does not mind the use of its culture if it's done in a sensitive way.

MARTIN: Bill Donovan is a contributor to the Navajo Times. He's been covering the Navajo Nation for more than 30 years. He's been writing about this controversy involving Urban Outfitters and he was kind enough to join us from Gallup, New Mexico.

Bill Donovan, thank you so much for joining us.

DONOVAN: And thank you.

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Brian Lewis <blewis@nndoj.org> Mon, Apr 2, 2012 at 3:49 PM
To: "Stanton, Meridith" <Meridith_Stanton@ios.doi.gov>

Thank you, Meridith.

From: Stanton, Meridith [mailto:Meridith_Stanton@ios.doi.gov]
Sent: Friday, March 30, 2012 4:06 PM
To: Brian Lewis
Subject: Urban Outfitters in the Post yesterday

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http://www.washingtonpost.com/blogs/arts-post/post/urban-outfitters-all-its-recent-controversies-explained/2012/03/29/gIQAP2IDjS_blog.html

Best Regards,

Meridith

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Posted at 01:36 PM ET, 03/29/2012

Urban Outfitters: All its recent controversies, explained

By Maura Judkis

Urban Outfitters: Purveyor of neon ombre pants, purveyor of controversies. It seems like every few weeks, the retailer is in the news or friend's Facebook feeds for some new kerfuffle. What has Urban Outfitters done lately to make people mad? A primer follows.

Urban Outfitters along Atlantic Ave. in Brooklyn. (Haleyne Seidman - FOR THE WASHINGTON POST)

What is Urban Outfitters? If your mall doesn't have one, it's a store geared towards teens and young adults that carries hipstery clothing that safely pushes the boundaries of fashion — and occasionally, taste. You'll see plenty of neon accessories, graphic tees (we'll get to those later) and novelty books about frat-boy humor topics, like a cookbook for "Stoner Snacks." The company also owns Anthropologie, a store full of upscale girlie housewares and attire, and Free People, which has a hippie, bohemian vibe.

Seems OK to me. So why are people constantly upset about this company? UO has a history of selling provocative products — or pulling products that relate to gay causes from its shelves. Some of the products have offended women's groups and ethnicities. It has also been accused of ripping off designers from the DIY marketplace Web site Etsy.

Here's a quick rundown of groups that have complained to UO about products recently:

The transgendered community: Objected to a "humorous" card in stores this month (now sold out) that uses the word "Tranny."

The gay community: This week, it's a shirt featuring an image from Robert Mapplethorpe, artist and gay icon, that was yanked from stores but still available online, according to Animal New York. In 2008, UO pulled a shirt that said "I support same-sex marriage." UO critics claim these shirts disappeared from stores because of the conservative political stance of the president and sounder of the company, Richard Hayne (more on him below).

Items from Urban Outfitters' Navajo line. (Matt York - AP)

The Navajo Nation: The Navajo Nation recently sued the company for trademark infringement after UO

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sold items labeled as "Navajo," including panties and a flask. The federal Indian Arts and Crafts Act makes it illegal to falsely suggest that merchandise is made by American Indians when it is not.

Irish and Irish-Americans: Offended by St. Patrick's Day graphic t-shirts that depict negative stereotypes of Irish people as binge-drinkers.

Independent designers: Last May, one Etsy jewelry designer saw designs on the UO Web site that she thought looked suspiciously like hers. She fought back via Twitter, and the company pulled the jewelry from stores.

Women's health advocates and bloggers: They were upset about a UO shirt that said "Eat Less," which was pulled from the company's Web site for promoting eating disorders and negative body image.

Jewish people: In 2004, UO was forced to discontinue a shirt that said "Everyone Loves a Jewish Girl," surrounded by dollar signs, after a complaint from the Anti-Defamation League that it perpetuated a negative stereotype of Jews. In 2007, the company was also blasted by Jewish bloggers for selling kaffiyehs, scarves with chain-link patterns and tassels, as "anti-war scarves." Bloggers posted photos of terrorists wearing the scarves, and UO apologized.

Residents of Mexico: The Anti-Defamation League again got involved in 2005, when the store issued a shirt that said "New Mexico: cleaner than regular Mexico."

Protest at Urban Outfitters in response to the "New Mexico" t-shirt. (Zach Klein - courtesy Zach Klein, Flickr)

How does the company respond to these complaints? Depends on the complaint. It ignored the Irish American complaint, for example, but apologized for the kaffiyehs.

Why are people sharing a photo of Urban Outfitters president Richard Hayne in my Facebook feed this week? Though the fashions and attitudes that his stores sell are geared towards young urban-dwelling hipsters — which tend to be a pretty liberal demographic — Hayne is a conservative, and he and his wife donate money to conservative causes. Bloggers allege that Hayne's political beliefs have led to the store's offensive merchandising decisions.

This isn't a new revelation — it's been noted in profiles of Hayne for almost a decade. Federal Election Commission records show that Hayne and his wife have donated $14,150 to Rick Santorum, though most of those contributions were in the '90s. He's also donated to Republican candidates for Pennsylvania races, according to OpenSecrets records. As Santorum's campaign continues, and after the most recent merchandise that the LGBTQ community found offensive, an image of Hayne is circulating on Facebook, with information about his political views (like this snippet on Snopes).

Do any of these controversies have any effect on Urban Outfitters' bottom line? Not really. A Change.org petition that asks Hayne to stop supporting anti-gay rights politicians has not garnered many signatures so far. The company's stock price recently declined, but that was after it reported lagging fourth-quarter earnings. Boycotts from aggrieved groups have resulted in negative PR and the removal of items from stores, but not not much else. The controversies may even increase the company's appeal for some.

By Maura Judkis | 01:30 PM ET, 03/26/2012

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Navajo Siouxs Urban Outfitters

By Gelan Wendi Williams March 30, 2012

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THE THING ABOUT SKINS

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I find it ironic the Navajo Nation is suing Urban Outfitters for copyright infringement on a pair of underwear.

First off, I pledge total support toward the Navajo effort and anticipate the case will set precedent for future legal action by Tribes with regard to misappropriation. The American Indian Arts and Crafts Act is a weapon Tribes have yet to fully wield on the legal battlefield.

The irony is, the Navajo might themselves be guilty of infringement. My evidence is as follows:

A few months back I attended a large formal doings where the featured artist was famed Navajo flutist R. Carlos Nakai. The emcee informed the crowd that Mr. Nakai has sold over three (3) million albums worldwide. (That's like triple-platinum in Indian country.) Mr. Nakai wore his hair parted down the middle, with braids tucked behind each ear. His evening attire included a fully beaded vest featuring geometric Plains-style designs.

As Mr. Nakai entertained the crowd, my uncle leaned over and quietly asked me, "When did Navajos start dressing like us and playing flutes?"

A few days ago, I repeated the question to a Navajo colleague; he told me he wondered the same thing when he first saw a Navajo playing the flute in the movie Windtalkers. The question sparked

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conversation on Navajo infringement.

Let me first present the icon of Pan-Indianism: Frybread. I'm not an expert on Frybread, but it seems in nearly every Skin community there is a Champion Frybreader. The thing about Skins is that we are a lot like Frybread; we come in various shapes, sizes, and shades of brown depending on the ingredients and region. Generally in most communities, the delicacy is known generically as Frybread. The exception is the Navajo, who specialize in "Navajo Frybread".

Frybread is the essential component to another icon of Pan-Indian culture: the Indian Taco. Again, generally this term is accepted by most Skins, except for the Navajo, who claim the "Navajo Taco" as their own.

One can find Frybread and Indian Tacos at a Powwow. Powwow itself has evolved into a Pan-Indian event, but the origins of the different song and dance styles are tribally or regionally specific. For example, the Jingle Dress is known to be Ojibwe in origin. Another example is the Grass Dance. And while the original societies often traded, bought and/or sold songs, style of dress, and customs, among fellow grassland Tribes, to my knowledge, prairie grass is not native to the desert.

Many Tribes have made unique contributions to the powwow arena. The southern plains spawned distinctive Traditional styles as well as the instantly popular Fancy War Bustle. In addition, the Omaha style of dress, Sioux style, Crow style, Woodlands style, the Chicken dance, and the Round Bustle have all been exclusive contributions by various Tribes throughout the powwow circuit. Other notables include the Smoke Dance of the Six Nations; the Cree style Round Dance, the Eastern Blanket dance, and the Short Fringe Dress of the Plateau tribes. But to date, Navajo people have not created a dance style that is found throughout powwow circles.

When I first started attending powwows in the Southwest, I noticed that while the competition was strong, the style was almost entirely borrowed. Our singers joked that it was like the Flea Market of powwows, and that everything looked authentic from a distance, but upon closer inspection it was mostly imitation and knockoff. It seemed to us that almost every champion dancer from the Dakotas, Montana, the Midwest or Canada had a "Bootleg Navajo" version. (HILARIOUS)

The infringement became most apparent at the World's Largest Powwow: The Gathering of Navajos... Ah, I mean Nations. While the event attracts attendees from all over Indian Country, the majority of attendees are Navajo. Even the Gathering of Nations theme song is performed in Navajo. But to their credit, a good number of dancers have been brought into the arena in a proper manner, and the Navajo Nation continues to produce World Champion singers and dancers season after season.

Another thing about Skins is we really like to tease. In fact, the practice is considered formal etiquette among respected relatives. We tease as a playful sign of admiration, respect, and to reassure our relatives of their place within our circle.

So before anyone's feathers get too ruffled, remember that Powwow is supposed to be fun. We clown to entertain, and to educate in a manner meant to heal, because laughter is good medicine. Too often the politics, the egos, the gossip, the money, and the competition shade the true nature and spirit of the circle. My favorite part of the powwow is the InterTribal, a time when everyone is welcome in to the arena. One doesn't need an outfit, a category, or even a tribe, only the rhythm in their heartbeat, and a good song.

The importance of the Navajo case against Urban Outfitters is that if major corporations are making money using our names, designs, imagery, and culture, then Tribes could too. Of course certain aspects MUST NEVER be considered or valued as capital, and it is critical we protect those resources.

For Crazy Horse said, "One does not sell land upon which people walk," but he didn't mention anything about their underwear. (As a boy I would have loved Sioux-per Man Under-Rees made by Utes of the Loom.)

Albums on iTunes sell for about $9.99 each. I wonder of the three (3) million albums sold by R. Carlos Nakai, how much of the profit was kept by his publisher Canyon Records? $30 million dollars could be the change that sparks economic development in Tribal communities who remain in poverty despite revenue from gaming enterprise. This includes the urban Skin community.

Should the Navajo Nation be successful in gaining monetary compensation from Urban Outfitters illegal infringement, the resources should be used to strengthen the educational infrastructure that supports a growing number of Skin fashionistas. We must look to the successful endeavors of artisans like Bunky Echo-Hawk, Bethany Yellowtail, Sho Esquiro or Wahaocoonkwe Cameron, and seek collaborative efforts with world-class corporations if we are to be taken seriously in the marketplace. We must no longer accept silk-screen printed t-shirts, and Native Pride hats, as the pinnacles of mainstream product design and marketability. Using the term Native in a product's name can no longer be a free pass for authentication, nor can it be an endorsement of subpar quality. Including fashion, redefining our professionalism must extend to other forms of multimedia including art, music, film, and branding.

Given the uniqueness and diversity of the Made in Native America "brand", and the history of the marketability of our art, culture, and image, even if we are currently just a pop culture fad, I highly doubt that being Skin will ever fade from being "In".

In the process of decolonization, the reclamation of our images, designs, and names, are the avenues to the rediscovery and restoration of our identity. Ultimately our identity is deeply

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connected to the places to which we are Native. When our land was infringed upon, so too was our identity; first by Hollywood, then by sports franchises, and today the process continues in the form of corporate exploitation.

Tribal communities must follow the lead of the Navajo Nation, and challenge those who seek to exploit our natural, cultural, and human resources. It is important and to the benefit of our future generations that we protect our identity, our sovereignty, and our land from any further infringement. This includes, of course, any infringement upon our underwear, no matter how ironic.

Cetan Wanbli Williams is a member of the Flandreau Santee Sioux Tribe. He is a regular contributor to The Thing About Skins and his email is cetanwanbli@gmail.com.

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yazziegirl April 1, 2012

This article's argument completely collapses on itself in that it goes from criticizing Navajo peoples for "infringement," to stating at the end, "[t]ribal communities must follow the lead of the Navajo Nation, and challenge those who seek to exploit our natural, etc." Of course the origins of Native traditions and cultures are important, but seeing as this article points a finger at a certain tribe for participating and embracing all cultures is appalling. We should all be able to embrace each others cultures and traditions not criticize each other for participating. Our histories show that we have all shared/traded/exchanged each others crafts, foods, etc. There shouldn't be any animosity toward each other. Don't we all say that "we're all related"? Maybe we should practice that more and maybe our communities would be able to tackle various issues affecting our peoples. I've read ICTMN's articles that were far more appropriate and scholarly but this publication is disappointing.

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The Navajo Nation's recent lawsuit reminds companies that unauthorized use of American Indian tribal names might be considered infringement and might also violate the federal Indian Arts & Crafts Act.

The Navajo Nation recently filed a lawsuit in federal court in New Mexico against popular clothing retailer Urban Outfitters, Inc. and its affiliates Anthropologie and Free People.[1] The lawsuit, based on the defendants' unauthorized use of the terms "Navajo" and "Navaho," alleges trademark infringement, trademark dilution, and violation of the federal Indian Arts & Crafts Act (25 U.S.C. Section 305 *et seq.)*. By obtaining multiple federal trademark registrations for the word "Navajo" and policing its marks as part of a planned enforcement strategy, the Navajo Nation positioned itself well to assert its intellectual property rights in federal court.

Navajo Nation's Trademark Claims Against Urban Outfitters

In its Complaint, the Navajo Nation alleges that Urban Outfitters and its affiliates used, without the per¬mission of the Navajo Nation, the terms "Navajo" and "Navaho" in connection with the sale of clothing, jewelry, footwear, handbags and other items. Some such items allegedly "evoke the Navajo Indian Tribe's tribal patterns, including geometric prints and designs fashioned to mimic and resemble Navajo Indian and Tribal patterns, prints, and designs." Other items, such as the defendants' alleged use of "Navajo" on underwear and liquor flasks, are described as "derogatory and scandalous."

The Navajo Nation has asserted claims of intentional federal trademark infringement and dilution, as well as related claims of unfair competition under state and federal laws on the basis that the items allegedly compete directly with the Navajo Nation's own retail goods. The crux of those claims is that (i) the defend¬ants' sale of the unauthorized items causes a likelihood of consumer confusion about whether the Navajo Nation is associated with or has approved the sale of such items, and (ii) the unauthorized use of "Navajo" and "Navaho" dilutes the strength and distinctive, source-identifying nature of the Navajo Nation's "Navajo" trademarks.

In regard to the scandalous and derogatory items, the Navajo Nation again asserts trademark dilution–specifically a claim of dilution by tarnishment. For example, the Complaint alleges that the use of "Navajo" on liquor flasks harms the Navajo Nation's reputation and the goodwill associated with its "Navajo" trade¬marks, because the Navajo Nation has "long banned the sale, manufacture, possession, transport, delivery, and consumption of alcohol within [the Navajo Nation's] borders."

Navajo Nation's Claims Under the Indian Arts & Crafts Act

The Navajo Nation's Complaint also alleges violations of the federal Indian Arts and Crafts Act (25 U.S.C. § 305 *et seq.)*, which prohibits the direct or indirect offer, sale or display for sale of a good 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" (25 U.S.C. § 305e).

That Act, which allows for both criminal and civil liability, was adopted in part to "promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship." 25 U.S.C. § 305a. When a tribal name is used to falsely suggest that a product is of Indian origin, the Act permits a successful plaintiff to obtain injunctive relief (e.g., a court order immediately barring a defendant from selling the unauthorized products), monetary relief (including the greater of treble damages or not less than $1,000 per day that the violation continues), punitive damages, and reimbursement for costs of the lawsuit and reasonable attorneys' fees.

Benefits of Trademark Registration, Enforcement, and Licensing

Even for those not entitled to the protections afforded via the Indian Arts and Crafts Act, many of the steps that the Navajo Nation took years ago to protect its trademark rights serve as a good model to follow.

Federally registering one's trademarks can be extremely helpful in protecting and asserting those trademark rights, and, like many other tribes within the United States, the Navajo Nation has prioritized the protection of its identity and intellectual property by pursuing such registrations. Through tribe-owned corporations, the Navajo Nation has registered more than 80 trademarks with the U.S. Patent and Trademark Office, including approximately 10 registrations of the mark "Navajo" for clothing, footwear, other household products, and online retail sales.

The Navajo Nation has also spent significant time and money to promote and preserve its trademarks. Under U.S. trademark law principles, an owner may be deemed to have abandoned its trademark rights if it does not use the trademarks in commerce and take action to halt others' infringement or dilution. Failure to stop an infringing use can also make it more difficult to later halt a different infringing use. To protect its trademark rights, in addition to pursuing the latest lawsuit filed against Urban Outfitters and its affiliates, the Navajo Nation has initiated several trademark protests at the U.S. Patent and Trademark Office and claims to regularly send cease-and-desist letters to halt the unauthorized use of its trademarks.

The Navajo Nation has also reportedly expanded the authorized use of its trademarks by licensing to others the right to use "Navajo." Trademark license agreements—if drafted and performed correctly—enhance rather than dilute the licensor's trademark rights and can generate substantial revenue through royalties.

Cautionary Tale

Before adopting new names, designs or slogans for one's products or services, it is important to "clear" such proposed trademarks to reduce the potential for conflict with others' registered and unregistered trademarks. It is also important to consider whether the terms (or associated designs) used to describe a product or service are already used as the trademarks of others and/or falsely suggest an association with another entity, including a Native American tribe.

Furthermore, many tribes have successfully registered their marks with the U.S. Patent & Trademark Office, and a proper search of the U.S. Patent & Trademark Office's records should uncover such

registrations. The Office also maintains a searchable "Native American Tribal Insignia Database" (see http://www.uspto.gov/trademarks/law/tribal/index.jsp) on which federally and state-recognized Native American tribes can record their official insignia even if the insignia does not technically meet the legal definition of a "trademark." In the United States, however, where "common law" trademark rights arise through use of a trademark in commerce regardless of registration, a simple search of the U.S. Patent & Trademark Office's records, though helpful, may not be sufficient to clear a proposed trademark for use, and a full U.S. trademark search covering both registered and unregistered trademarks is generally recommended.

Lastly, it is important to note that the federal trademark registration process in the United States generally takes at least one year (and potentially two years or more) to complete, and that a federal trademark application can be filed before the trademark is used (so long as the applicant has a bona fide intent to use the mark). Therefore, Native American Indian tribes and others should begin the trademark registration process as soon as possible, rather than in response to or anticipation of a particular litigation.

Tags USA, Litigation, Trademarks, Pillsbury Winthrop Shaw Pittman LLP

If you are interested in submitting an article to Lexology, please contact Andrew Teague at ateague@lexology.com.

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From VanWey, Kenneth J **Date** 3/30/2012 10:01:00 AM

To Stanton, Meridith

Cc Fry, Ashley

Subject Urban Outfitters in the Post yesterday

http://www.washingtonpost.com/blogs/arts-post/post/urban-outfitters-all-its-recent-controversies-explained/2012/03/29/gIQAP2lDjS_blog.html

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Posted at 01:36 PM ET, 03/29/2012

Urban Outfitters: All its recent controversies, explained

By Maura Judkis

Urban Outfitters: Purveyor of neon ombre pants, purveyor of controversies. It seems like every few weeks, the retailer is in the news or friend's Facebook feeds for some new kerfuffle. What has Urban Outfitters done lately to make people mad? A primer follows.

Urban Outfitters along Atlantic Ave. in Brooklyn. (Haleyne Seidman - FOR THE WASHINGTON POST)

What is Urban Outfitters? If your mall doesn't have one, it's a store geared towards teens and young adults that carries hipstery clothing that safely pushes the boundaries of fashion — and occasionally, taste. You'll see plenty of neon accessories, graphic tees (we'll get to those later) and novelty books about frat-boy humor topics, like a cookbook for "Stoner Snacks." The company also owns Anthropologie, a store full of upscale girlie housewares and attire, and Free People, which has a hippie, bohemian vibe.

Seems OK to me. So why are people constantly upset about this company? UO has a history of selling provocative products — or pulling products that relate to gay causes from its shelves. Some of the products have offended women's groups and ethnicities. It has also been accused of ripping off designers from the DIY marketplace Web site Etsy.

Here's a quick rundown of groups that have complained to UO about products recently:

The transgendered community: Objected to a "humorous" card in stores this month (now sold out) that uses the word "Tranny."

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The gay community: This week, it's a shirt featuring an image from Robert Mapplethorpe, artist and gay icon, that was yanked from stores but still available online, according to Animal New York. In 2008, UO pulled a shirt that said ,"I support same-sex marriage." UO critics claim these shirts disappeared from stores because of the conservative political stance of the president and sounder of the company, Richard Hayne (more on him below).

Items from Urban Outfitters' Navajo line. (Matt York - AP)

The Navajo Nation: The Navajo Nation recently sued the company for trademark infringement after UO sold items labeled as "Navajo," including panties and a flask. The federal Indian Arts and Crafts Act makes it illegal to falsely suggest that merchandise is made by American Indians when it is not.

Irish and Irish-Americans: Offended by St. Patrick's Day graphic t-shirts that depict negative stereotypes of Irish people as binge-drinkers.

Independent designers: Last May, one Etsy jewelry designer saw designs on the UO Web site that she thought looked suspiciously like hers. She fought back via Twitter, and the company pulled the jewelry from stores.

Women's health advocates and bloggers: They were upset about a UO shirt that said "Eat Less," which was pulled from the company's Web site for promoting eating disorders and negative body image.

Jewish people: In 2004, UO was forced to discontinue a shirt that said "Everyone Loves a Jewish Girl," surrounded by dollar signs, after a complaint from the Anti-Defamation League that it perpetuated a negative stereotype of Jews. In 2007, the company was also blasted by Jewish bloggers for selling kaffiyehs, scarves with chain-link patterns and tassels, as "anti-war scarves." Bloggers posted photos of terrorists wearing the scarves, and UO apologized.

Protest at Urban Outfitters in response to the "New Mexico" t-shirt. (Zach Klein - courtesy Zach Klein, Flickr)

Residents of Mexico: The Anti-Defamation League again got involved in 2005, when the store issued a shirt that said "New Mexico, cleaner than regular Mexico."

How does the company respond to these complaints? Depends on the complaint. It ignored the Irish American complaint, for example, but spologized for the kaffiyehs.

Why are people sharing a photo of Urban Outfitters president Richard Hayne in my Facebook feed this week? Though the fashions and attitudes that his stores sell are geared towards young urban-dwelling hipsters — which tend to be a pretty liberal demographic — Hayne is a conservative, and he and his wife donate money to conservative causes. Bloggers allege that Hayne's political beliefs have led to the store's offensive merchandising decisions.

This isn't a new revelation — it's been noted in profiles of Hayne for almost a decade. Federal Election Commission records show that Hayne and his wife have donated $14,150 to Rick Santorum, though most of those contributions were in the '90s. He's also donated to Republican candidates for Pennsylvania races, according to OpenSecrets records. As Santorum's campaign continues, and after the most recent merchandise that the LGBTQ community found offensive, an image of Hayne is circulating on Facebook, with information about his political views (like this snippet on Snopes).

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Do any of these controversies have any effect on Urban Outfitters' bottom line? Not really. A Change.org petition that asks Hayne to stop supporting anti-gay rights politicians has not garnered many signatures so far. The company's stock price recently declined, but that was after it reported lagging fourth-quarter earnings. Boycotts from aggrieved groups have resulted in negative PR and the removal of items from stores, but not not much else. The controversies may even increase the company's appeal for some.

By Maura Judkis | 01:36 PM ET, 03/29/2012

Tags: fashion

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March 14, 2012

An Uneasy Cultural Exchange

By GUY TREBAY

CHINLE, Ariz.

LESBIAN chic, Goth chic, rocker chic, Masai chic, androgynous chic, biker chic, punk chic, minimalist chic: fashion is culture's Godzilla, devouring everything in its path. Half the time, the monster doesn't know what it ate.

Most recently it gobbled up the complex Navajo tribal culture, which then, semidigested, turned up on runways, in stores, online and finally in the news, as last week the people who unwittingly provided inspiration for Navajo chic took legal issue with a process of cultural appropriation that American Indians know perhaps too well.

"We are very proud of our name, Navajo," said Ben Shelly, Navajo Nation president, referring to a civil legal action begun in late February by the country's largest Indian tribe to stop Urban Outfitters and its subsidiaries from misappropriating the Navajo trademark and name.

"To be used in this kind of fashion, I'm very unhappy with it," Mr. Shelly said in a public statement, referring to 20 or so items — some by now renamed or removed from circulation by the mass market retailer — apparently inspired by one of the more unpredictable fashion trends of recent years.

It started, by all accounts, with Proenza Schouler's spring 2012 ready-to-wear collection shown last fall, which shrewdly reworked as stylish and urban the muted earth colors and stylized geometries characteristic of much Southwestern design.

Apparently triggered by a vacation trip the designers Jack McCollough and Lazaro Hernandez made to Santa Fe, N.M., land of the broomstick skirt, the jackalope and the howling blue coyote, the collection either inspired a raft of imitators or blundered into a stealth trend.

Anna Sui got on board, and so did Mathew Williamson, Etro and Levi's Workwear. Nike introduced some anomalous sneaker-style moccasins.

The French designer Isabel Marant produced a spring collection that draws on the stylized motifs of Navajo sand paintings and the arts of the Southwestern Pueblo tribes. In cities like Los Angeles, Ms. Marant's skinny jeans ornamented with Navajo-style patterns quickly went celebrity-viral, if that term can be used for material goods. To judge from the catalogs of high-end retailers like Bergdorf Goodman, New York is due for an Indian spring.

On either coast, the cliché references have been dusted off: squash blossom necklaces, beadwork, feathers, turquoise jewelry, Minnetonka moccasins, Pendleton-blanket jackets, clunky silver, fringed anything. Trend-establishing shops like Rene Holguin's RTH on La Cienega Boulevard in West Hollywood, Calif., have lately begun looking like satellites of some Wild West trading post.

It was probably inevitable that mass merchandisers would seize on a trend that requires little beyond bowdlerized graphics and ornamental doodads to telegraph cultural reference, and just as likely that items like Urban Outfitter's Navajo Printed Hipster Panty would also turn up soon enough to inflame Native American sensibilities.

In its complaint last October, the Navajo Nation singled out the panties as "derogatory and scandalous," along with a Navajo Print Wrapped Fabric Flask, an association the group considered particularly objectionable, given that the sale and consumption of alcohol is banned on the 25,000-square-mile reservation.

Though the company eventually withdrew certain Navajo inspired products from its Web site, others continued to appear in catalogs and Web sites for brands like Free People, which Urban Outfitters controls.

The lawsuit, filed in February in United States District Court in New Mexico, alleged violations

of trademark law and the federal Indian Arts and Crafts Act, which makes it illegal to suggest that goods are of authentic Indian manufacture when they are not.

"The fame or reputation of the Navajo name and marks is such that, when defendant uses the 'Navajo' and 'Navaho' marks with its goods and services, a connection with the Navajo Nation is falsely presumed," the suit alleged. The Navajo Nation holds 10 registered trademarks covering a variety of household and apparel goods bearing the Navajo name. (Urban Outfitters did not respond to repeated requests for comment.)

Of course, what was partly lost in all this is that the Navajo Nation is hardly walled off from American pop culture. At the sartorial and possibly other levels, as well, the Navajos evoked by Navajo chic may be a dwindling few. While the traditional folkways of the country's most populous tribe remain vital to an aging population, you won't find many young Navajos in the trappings of Navajo chic.

Bashas' supermarket in the Tseyi' Shopping Center serves the town of Chinle, just outside the sacred Navajo site and national monument at Canyon de Chelly. As the only major supermarket for miles around, Bashas' offers a fairly representative cross section of the population on the reservation.

And, whether there or at the nearby Pic-n-Run or the local franchise of Church's Chicken or at Wildcats games at Chinle High School, the majority of those not old enough for Social Security appear to favor the uniform most other Americans do: hoodies, T-shirts and baggy jeans.

Elderly couples can still be seen at Bashas', having driven long distances from farmsteads dotted throughout the vast reservation. Their pickups are often piled high with cordwood or potable water. Women wear long flounced skirts, velveteen blouses, Pendleton jackets and the weighty turquoise jewelry that represents portable wealth in a culture with historically limited access to banks.

Like most of the old, they favor sensible shoes over flimsy moccasins. The men, with their typical barrel chests encased in Carhartt jackets, narrow hips snug in Wranglers and black felt Stetsons with upturned brims, epitomize an equally endangered form of classic cowboy style.

"Nowadays we don't wear it anymore," said Alex Mitchell, an associate at the museum of Dine College, a two-year tribal college in Tsaile, Ariz., referring to traditional Navajo clothing. "In their 20s and 30s, everyone wears jeans and maybe miniskirts and so on." Teenagers in Navajo country dress as teenagers do everywhere: the same lip rings, A & F logos and Crazy Color streaks. "That Navajo style, it's probably the last generation that will do it," Mr. Mitchell said, noting with a hint of optimism that graduation season is coming.

Ceremonial occasions are a remaining stronghold of Navajo style in Navajo land. Whether for tribal gatherings, powwows or any event involving a diploma, even the young still make their way to cities like Gallup, N.M., to buy traditional moccasins, cowboy shirts with pearly snap buttons, blanket dresses and the hunks of silver and turquoise that are a Navajo version of a graduation-day watch.

What's In a Name, Urban Outfitters?

By Chelsea Vowel

March 6, 2012
RSS

Although the specific legal principles involved may differ, use of the terms Icewine, Roquefort and Navajo all have something in common. They tell you something about what you are buying, and right now, the Navajo Nation wants to ensure that consumers are not associating the term "Navajo" with "random south-west inspired hipster fashion."

You may have heard of the recent lawsuit launched by the Navajo Nation against clothing giant Urban Outfitters. I'd like to provide some more legal context. Please bear with me.

Icewine is pressed from grapes that freeze on the vine, and is an incredibly sweet and expensive dessert wine. Canada is the largest producer of authentic Icewine in the world. A 375ml bottle will cost you about $45 Canadian here, but can go up to a couple of hundred smackaroonеys on foreign markets.

Fake icewine started popping up fairly early both here in Canada and abroad. To deal with this, B.C., Ontario and Nova Scotia set up special provincial legislation under the Vintners Quality Alliance (VQA) to regulate the production and quality of Icewines produced in those regions.

The VQA is a wine appellation system, meaning that certain terms applied to wines can only be used if the product meets specific criteria. It is illegal to use those terms otherwise.

Appellation laws have existed in many countries for centuries. Champagne originally enjoyed widespread legal appellation protection under the Treaty of Madrid (1891), which stated that only sparkling wines produced in a specific area of France could be called "champagne." This has been affirmed in various treaties and laws since.

Alcoholic beverages are not the only products to enjoy such legal protections. Cheeses are another fine example, using something called a Geographical Indication (GI) to describe where the product comes from, guaranteeing everything from quality to specific production methods.

In Europe, these kinds of labels have to do more with where the product is made. Thus when you buy Roquefort cheese, you know it comes from a specific region in France.

The United States takes a different approach to some of these issues, where certain terms or names are considered a form of intellectual property, specifically a trademark.

Brian Lewis, an attorney with the Navajo Nation Department of Justice, says the group wants Urban Outfitters to stop misappropriating the "Navajo" name and trademark.

That's right. The Navajo Nation has trademark ownership of the name 'Navajo', just like Urban Outfitters owns the trademark to its name. The Navajo Nation has the legal right to stop people from using its trademark to describe products that have not been approved.

Urban Outfitters responded with this back in October:

"Like many other fashion brands, we interpret trends and will continue to do so for years to come," he said. "The Native American-inspired trend and specifically the term 'Navajo' have been cycling thru fashion, fine art and design for the last few years."

This is true, but won't save Urban Outfitters from being held accountable for their trademark infringement. "Everyone else does it" is not a legal defence.

But it could become one if the Navajo Nation does not enforce its rights.

In trademark law, there is a concept called genericisation, where once a trademark becomes overused, it can expire. A famous example involves the company, Xerox. Its trademark was threatened when people began to use the term "xerox" in the place of "photocopy." Only an aggressive ad campaign saved Xerox from joining the ranks of trademarks lost to colloquial use.

There is also a statute in the United States called the Indian Arts and Crafts Act of 1990. There is no such equivalent in Canada. This law states that no person who is not an enrolled member of a federally or state recognised tribe can produce items labelled "Native American" or "Indian." In addition, members of one tribe cannot pass their items off as coming from a different tribe, so if your goods are labeled "Hopi," you'd better be a member or a certified artisan of the Hopi.

If you think that this case is frivolous or interferes with "freedom of expression" and so forth, please ensure that you are not singling out indigenous peoples with this criticism. If you take issue with intellectual property law, with appellation statutes, or geographical indication laws, then your concerns are not limited to us and need not focus on this case.

If however you just want to be able to call your stuff "Native American" or "Navajo" with no consequences, I'm afraid you've got some explaining to do.

Chelsea Vowel is Métis from the Plains Cree speaking community of Lac Ste. Anne, Alberta. She lives in Montreal. Her passions are: education, aboriginal law, the Cree language and Roller Derby. A version of this article was published on the author's blog, âpihtawikosisân.

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āpihtawikosisān
Law, language, life: A Plains Cree speaking Métis woman in Montreal

Ripping off native artists: it's the new black!

Posted on December 5, 2011

I am quite upset to learn that a fellow going by the name Grey Owl (and I kid thee not, the irony of course being quite rich) is stealing the work of the phenomenal Métis artist, Christi Belcourt. His real name is actually Jack Walter Lamb, a gun-loving Tea Party supporter who also also loves floral beadwork and lives in Las Vegas. He's had her stuff up for sale since March of this year.

On his "Ojibwae Crafts" website (no longer available now that bandwidth has been exceeded, thank you folks!) this fraud had the nerve to claim:

> *We are Native American Craftsmen of the Minnesota Chippewa Tribe. We provide Certificates of Authenticity with tribal ID numbers, spiritual guidance and meanings with each of our pieces.*

Hmm. What Certificates of Authenticity, spiritual guidance and meanings can you provide for these pieces you have stolen from Christi Belcourt's webpage?

He was offering a print of a picture he called Tree of Life (happily not viewable anymore for a while). Huh. It's actually called "Resilience of the Flower Beadwork People".

Oh but that isn't all he's trying to peddle. Here he's got one of Christi's works printed on a 'Chippewa iPhone skin'. Here you've got essentially the same thing, but now it's an 'Ojibway Blackberry case'. Here are some beautiful copyright violations in the form of shoes.

I wonder how much money this...*entrepreneur* has made off the brilliance and hard work of a native artist? I wonder what the Minnesota Chippewa Tribe thinks about this fellow not only violating copyright, but also claiming affiliation to give his theft legitimacy and possibly violating the Indian Arts and Crafts Act of 1990?

Even if this fellow is a member of the Minnesota Chippewa tribe, the law nonetheless states, "It is illegal to market an art or craft item using the name of a tribe if a member, or certified Indian artisan, of that tribe did not actually create the art or craft item...products advertised as "Hopi Jewelry" would be in violation of the Act if they were produced by someone who is not a member, or certified Indian artisan, of the Hopi tribe."

This law does not just apply to non-natives passing their work off as native art, but also attempts to prevent native artists from claiming their work (or work they have stolen as in this case) is from an aboriginal culture other than their own.

Except this really isn't about Mr. Grey Owl. This is about a native artist, coming across her work on an online store and seeing it being passed off as someone else's. It's about a native artist spending an entire day trying to get that online store (zazzle.ca) to take the products down, and getting nowhere because they refuse to accept responsibility for what their users do s (if you're not suspicious yet about the other 'Native American artwork' up

there, you should be). It's about the time and effort she is going to have to expend to protect her work, and the worry she is going to have about this happening again in the future.

Christi is pursuing legal action through CARFAC (Canadian Artists Representation/ Le Front des Artistes Canadiens), but other native artists have been sharing their horror stories of copyright infringement as well, and it's clear this is not an isolated incident. I realise this happens to artists of all backgrounds, but the way in which these pieces are passed off as belonging to different aboriginal groups (all at the same time), along with made-up 'spiritual guidance' under the guise of being "Real Authentic Indian Stuff!" is particularly offensive to me. It is misleading, and it is exploitative. Not only of the artist herself, but also of consumers who understandably would be delighted with the images she has created, but who would be led to believe that they belonged to someone else, meant something else, came from somewhere else.

I feature a piece of one of her works on this page because she is a person of singular and important talent. She has done so much to revitalise our traditions, to learn our medicines and to pass along her knowledge. This kind of theft undoes the education she is engaged in.

I urge people to be very, very careful about 'real authentic Indian stuff'. Please, find out where it is made, and who the artist is. Dig deeper than a printed 'Certificate of Authenticity' or a web-page assurance.

A few months ago, I bought a Cree tamarack decoy when I was staying at a hotel in Val d'Or. They are beautiful, they smell great, and I liked that they represent a different tradition from the Cree back home. To me, they are a symbol of our diversity. I made a point of tracking down the craftsman, finding out his name and the community he is from, before I purchased it.

Please do the same before you buy something that is supposedly a native craft. It would help greatly in stopping people like this whose only talent appears to be theft and lies.

For the native artists out there...this may be a good lesson for you. (I realised after that this seems like I'm wagging my finger at you like you did something wrong...not my intent!) It would be great to have a discussion about what you can do to protect yourself from this sort of theft.

Sending a Take-Down notice

I've had a friend who is a graphic designer explain that if the offending website is based in the US, you can send a DMCA (Digital Millenium Copyright Act) take-down notice. This website explains how you can do this yourself. The site is required to take the content down until the person implicated can prove it is theirs.

You shouldn't have to incur attorney fees just to protect your intellectual property. This step can at least give you some direct power over protecting your work. As more information becomes available, I'll update:)

ay-ay mistahi.

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About âpihtawikosisân

Métis from Lac Ste. Anne, Alberta. Currently living in Montreal, Quebec. Passions: education, Aboriginal law, the Cree language, and roller derby. Education: BEd, LLB, working on a BCL.

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This entry was posted in Injustice and tagged Christi Belcourt, Christi Belcourt art stolen, copyright infringement native art, Jack Lamb Las Vegas, stealing native art, zazzle.ca and stolen art. Bookmark the permalink.

10 Responses to *Ripping off native artists: it's the new black!*

Tony Belcourt *says:*

December 8, 2011 at 10:26 pm

Thank you for this very reasoned post. I'm fighting mad about this. I've seen the illegal and misused appropriation of our art, music, images, and stories for far too long. Perhaps this is the catlysit for us to do something about this once and for all. Our art, our customs, our history, our stories, our images our songs our traditions, our values – they belong to us and nobody else has the right to copy them or use them or exploit them for their purposes without our consent. I feel violated whenever this happens to any of us. It must stop. We must make that happen. Meegwetch, Marci, E'ksoi for doing what you are doing. Tony

Reply

âpihtawikosisân *says:*

December 9, 2011 at 8:46 am

This incident brings up a problem I have had for a long time with Canadian intellectual property law.

I think what also bothers me so much about this is that I feel that Christi's work has become a part of our cultural heritage now, and is very much representative of Métis peoples (and I generalise here because the evolution of this style of beadwork is not limited to one specific geographic region, just as we were not).

There is a very personal component involved, an individual component, because Christi is the artist who has applied her talent and dedication to producing these amazing works. Canadian intellectual property law protects this individual component.

What about the wider cultural component, the collective component? Works like these also embody important teachings. Having them passed of as "Chippewa" or "Ojibwae" or however he spelled that, or perhaps passed off elsewhere are Coast Salish or perhaps even Maori (who knows?) denies the specific cultural context drawn upon. The Indian Arts and Craft Act in the US does deal with that issue somewhat, but I haven't found a good equivalent here in Canada. I can't say definitively that it does not exist, but I haven't found it yet

Anyway, just some Friday morning thoughts:)

Reply

Sharon Jackson *says:*

December 8, 2011 at 10:32 pm

This has been happening for ages where white people go to a sweat lodge and suddenly decide to share the teachings with other white people at high priced weekend workshops. In the 80's there was that horrible book, "Mutant Message from Downunder" by Marlo Morgan in which she apparently went Walkabout with the "Real People" that turned out to be completely false. Mary Summer Rain, who is a white woman in Idaho with her ancient indigenous woman spirit guide who talks like Tonto, and worst of all, Lynn Andrews who wrote several books about the Hopi, the Cree, the Aborigine women and perpetrated "a multi million dollar hoax," all by ripping off indigenous spiritual practices.

Reply

http://matube.magnify.net/messages/view/FRNS8MOV7K8V9BMG

This is spiritual and cultural colonialism at its worst.

Zazzle does have a policy about plagiarized art work

Item C of Zazzle's User Conduct under their Terms of Use says:

In using this Site, you agree to not:
c. upload, download, post, email or otherwise transmit any Content that may infringe any patent, trademark, trade secret, copyright or other intellectual or proprietary right of any party. As a guideline, you may contribute only original work that you have created yourself from original elements. This means you can't use images of celebrities or corporate products, **nor images, text, or designs that you've copied from a website without written permission from the owner. You cannot create a "new" image using elements from images other people have created.** You cannot contribute a quote or a slogan that is substantially the same as something already written by someone else. By uploading any Content, you represent and warrant that you have the lawful right to reproduce and distribute such Content and that the Content complies with all applicable federal, state and local laws, regulations and ordinances;

She should be able to make them take his account down based on that.

Reply

âpihtawikosisân *says:*
December 9, 2011 at 8:37 am

You would certainly hope they'd live up to their Terms of Service, but the pieces are still up despite the mass of emails and complaints that they've received (some from yours truly!) over the past day or so. Sloppy work on their part. Apparently they require a court order as well before they will release information on how much this fellow has sold using her images.

I hear you on the issue of plastic shamans and other fraudsters. It absolutely drives me nuts. One thing I really love about dealing with 'real natives' (trademarked, line up for your stamps people! lol, kidding...) is that it is much more common for people to say, "This is how we do it where I'm from, and since I'm from that place, I'm going to do it this way." You don't have Cree folks passing off as super knowledgeable about Mohawk traditions etc...and if they DO know something about another people's traditions you know what they do? They name the people they learned these things from. They name the people and say where they met them, and what community specifically those people are from etc. Someone in the room is probably going to recognise the names, and boom....that's how you know the person isn't blowing smoke.

Where do the fraudsters get their information from? "Spirit guides" and "Elders" with no names, or made up names, and they are hazy on the communities, and they change their stories. Uck.

It would be more sad than anger-inducing if these fakes weren't making so much money off selling ceremonies (sometimes literally putting people's lives in danger), and books and speaking engagements and workshops and the like.

Grrr. Anyway there is a webstie called New Age Frauds and Plastic Shamans: http://newagefraud.org/

Some good information there on that first page, also some good articles on the subject, and even a forum where suspected and known fraudsters are discussed. Identifying who is a fraud is not always easy and some cases are really borderline. It's worth nosing around and reading up on.

Of course this group has some people who really hate them, or who feel they are too negative etc, but I've found it to be a good resource when coming across some new group or person claiming legitimacy etc...if friends and family haven't heard of these people at all, I go to NAFPS to read what others have found out.

Reply

Reply

Yannick *says:*
December 8, 2011 at 11:40 pm

That's terrible! At least the guy got found out!

Reply

DJ NDN *says:*
December 8, 2011 at 11:59 pm

You're KILLING IT with this blog. Please keep up the great work!!!!

Reply

Daryl *says:*
December 9, 2011 at 1:29 am

I hope "Grey Owl" ...* ends up having to pay not only penalties but also any money that he robbed from Christi, as well as penalties for defamation and dilution of her brandname.

*Edited out unacceptable language

Reply

Collin *says:*
December 9, 2011 at 1:48 am

This is just disgusting. I have enough trouble with people ripping off my photos, and I have a day job! To be an artist who depends on their art to make a living, and to have an anonymous Internet nobody making profit off your back... Ugh. Glad to see this guy's website is offline, think I'll send a nice letter to his host to suggest it stays that way.

Reply

daniemarie *says:*
December 9, 2011 at 5:03 am

That is so unfortunate. Her work is so amazing!

Reply

Audrey Mayes *says:*
December 9, 2011 at 9:53 am

I think it's time that we push for similar law here in Canada, this is more than disgusting. We know this has been happening in many aspects to our indigenous cultures, ceremonies and traditions for decades. We've been having these types of conversations in various indigenous circles about what we can do to address our stolen Art and Crafts. We may not be able to stop it entirely, but at least look at compensation and a legal mechanism that can deter the thieves. Next time you travel, all you need to do is look at any tourist shops in airports, where you will see stolen BC art on smoked salmon boxes, photos in

calendars, greeting cards, Indian dolls made in China, dream-catchers, arrowheads etc. I could imagine that no words can even begin to describe the violation incredible artists like Christi Belcourt feel at this point, we know how hard they work on their pieces, and what it means to all those that support them in their journey as artists. I think that this is one united battle worth taking on for all indigenous people in Canada!

USA legislation is a good place to start, but think that we could take it further. Legal minds may want to bring together some ideas for a private members bill or develop our own indigenous laws, or perhaps maybe both. We need something.

USA -Indian Arts and Crafts Act of 1990
http://www.gpo.gov/fdsys/pkg/BILLS-111hr725enr/pdf/BILLS-111hr725enr.pdf

Particularly SEC. 103. MISREPRESENTATION OF INDIAN PRODUCED GOODS AND PRODUCTS.

Reply

Stanton, Meridith

To: [redacted] Fry, Ashley; VanWey, Kenneth J
Subject: Why the 'Native' Fashion Trend Is Pissing Off Real Native Americans Collectors Weekly

Collectors Weekly

Why the 'Native' Fashion Trend Is Pissing Off Real Native Americans

December 1st, 2011

By Lisa Hix

Tis the season for buying presents. As you peruse your local mall, you might find yourself drawn to beautiful geometric patterns in vibrant colors,Â long associated withÂ Navajo rugs, Pendleton "Indian trade"Â blankets, and SouthwestÂ Native American pottery.Â They'll be everywhere you look, onÂ sneakers, priceyÂ handbags, home decor, and high-fashionÂ skirts,Â coats, andÂ jackets.

But many Native Americans are less than thrilled that this so-called â€œnative lookâ€□ is trendy right now. The company that's stirred up the most controversy so far isÂ Urban Outfitters, which offered a â€œNavajoâ€□ line this fall (items included the â€œNavajo Hipster Pantyâ€□ and â€œNavajo Print

Fabric Wrapped Flaskâ€□) before the Navajo Nation sent the company a cease and desist orderÂ that forced it to rename its products. Forever 21 and designer Isabel Marant also missed the memo that the tribe has a trademark on its name; thanks to the Federal Indian Arts and Crafts act of 1990,Â itâ€™s illegal to claim a product is made by a Native American when it is not.

Chief Joseph wears a Pendleton blanket in 1901. He is famous for leading a long-standing resistance to the U.S. government, which had ordered the Nez Perce to move to an Idaho reservation. Photo by Major Lee Morehouse, courtesy of Bob Kapoun, via "Language of the Robe."

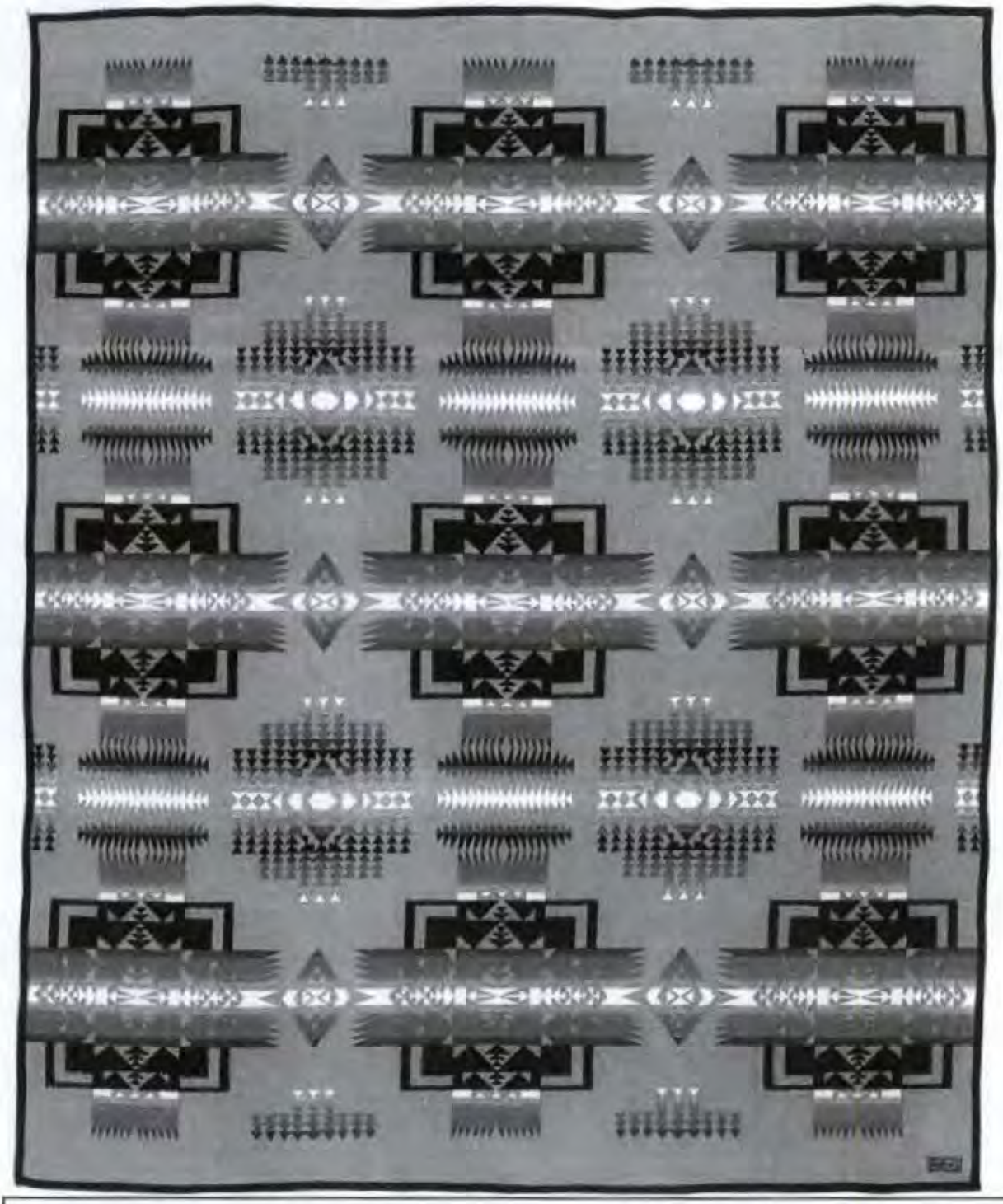
"The problem," says Jessica R. Metcalfe, a Turtle Mountain Chippewa and doctor of Native American studies who teaches at Arizona State University and blogs about Native American fashion designers atÂ Beyond Buckskin, "is that they're putting it out there as 'This is the native,' or 'This is native-inspired'. So now you have non-native people representing us in mainstream culture. That, of course, gets tiring, because this has been happening since the good old days of the HollywoodÂ Western in the 1930s and '40s, where they hired non-native actors and dressed them up essentially in redface.

"The issue now is not only who gets to represent Native Americans," Metcalfe says, "but also who gets to profit."

"Our land, our moccasins, our headdresses, and our religions werenâ€™t enough? You gotta go and take Pendleton designs, too?"

Of course, this is not the first timeÂ Western fashion has appropriated imagery in the name of aesthetics, as fashion historian Lizzie Bramlett points out in her blog, The Vintage Traveler. For example, the pattern we think of as "paisley"â€"now most commonly seen onÂ tiesâ€"was once a holy symbol of the Zoroastrians in Persia. And throughout fashion history, designers have been swiping motifs from other culturesâ€"from China and Japan inÂ VictorianÂ times, Egypt in theÂ 1920s, and West Africa and Latin America in theÂ '60s.

But Native Americans have a unique place in the history of the United States. Today, many Native American communities are still reeling from the impact of colonization, which started when white Europeans first invaded their homelands and continued as the colonists established a new order and repeatedlyÂ attempted to dismantle the native cultures. That this dismantling should continue at the mall can be especially disheartening.



This nine-element robe, named after the esteemed Chief Joseph, was first introduced as an Indian trade blanket by Pendleton in the 1920s. Via "Language of the Robe."

EvenÂ Pendleton, which has fostered warm relationships with various Native American communities since it began producing woolÂ Indian tradeÂ blankets more than a century ago, has raised a bit of ire with its new fashion-forward collaborations and collections designed to appeal to a broad, if well-heeled, audience.

Pendletonâ€™s latest foray into young, urban fashion is its fall 2011 Portland Collection, first available in September. For the line, the patterns and fabrics used in the companyâ€™s 100-year-old Indian trade blankets were incorporated into high-end cocktail dresses, nerd-chic cardigans, and big blanket-like Tobaggan coats covering the white models like sophisticated Snuggies (models wearing the coats are pictured at top).

This Pendleton travel bag sells for $180 at Urban Outfitters, a clothing retailer that has recently caused controversy with its own "Navajo" line, since renamed.

While these things are trendy and â€œin the now,â€□ Pendleton blankets have a much more permanent place in Native American culture. In the 1992 book, â€œLanguage of the Robe,â€□ Rain Parrish, a Navajo anthropologist, writer, artist, and former curatorÂ at Santa Feâ€™s Wheelwright Museum of the American Indian, explains that her family and friends always come to Navajo ceremonies and dances wrapped in their Pendleton blankets.

A look from Pendleton's 2009 collaboration with Manhattan brand Opening Ceremony.

â€œAs the light from the fire illuminated the moving bodies and blankets, the swirling shapes, lines, patterns, and colors sprang to life. I no longer saw blankets, but rather the familiar designs of the Holy People coming to life from the sand paintings. I saw moving clouds, glowing sunsets, varicolored streaks of lightning, rainbow goddesses, sacred mountains, horned toads, and images like desert miragesâ€"all dancing before my eyes.

â€œColorful blankets are often the chosen gift," Parrish continues. "We welcome our children with a handmade quiltÂ or a small Pendleton blanket as we wrap them in our prayers. For our young men and women, we celebrate the transformation into adulthood, by discipline, values, acknowledgement, and gifts. As they lie on a thick bed of Pendleton blankets, we massage their bodies for good health. For a coupleâ€™s marriage, â€¦ the womanâ€™s body is draped with a Pendleton shawl, the manâ€™s with a Pendleton robe. As we move into old age, we pay tribute to the spirit world with ceremony, prayers, and gifts. Often we bury our people with their special possessions and beautiful Pendleton blankets.â€□

Does that make the hip, couture Portland Collection the same sort of exploitation of Native American culture as the Urban Outfitter â€œNavajoâ€□ line? Here's where it gets tricky: Pendleton blankets, while marketed to and adopted by tribes across the United States, were not originally designed or manufactured by Native Americans. So to understand the debate about the place of what we assume is Native American iconography in contemporary fashion, you have to look at the history of the Indian trade blanket.

These limited-edition shoes, created by Japanese designer Taka Hayashi for Vans Vault in 2010, incorporate Pendleton wool weaves and now sell for hundreds on eBay.

Deep in the Southwest, as early as 1050, the Pueblo people had developedÂ hand-weaving techniquesÂ on vertical looms. But the Spanish conquistadors, who invaded the Pueblos in the 1500s, had made their mark on the native weaving craft by the 1600s, seen in the use of wool and indigo dyes, as well as the simple stripe patterns. By 1650, the Pueblo Indians had taught their trade to the Navajo, who eventually developed their ownÂ distinct weaving style. They took inspiration from the land, and created geometric shapes to represent the things they saw, like mountains, clouds, owls, and turtles.

"We know that the blankets, especially the Navajo blankets, were inspired by the world around them," Metcalfe says, explaining that these blankets had a story. "Sometimes, there were references to the geography, but they were abstracted."

Four young women wrapped in blankets, circa 1890. From "Language of the Robe," courtesy of Western History Collections, University of Oklahoma library.

Tribes in the Northeast at the time relied on animal hides to keep warm. Thatâ€™s why, in the late 1700s, insulating and water-repellentÂ European felted wool blanketsÂ became the most coveted barter items for the local tribespeople trading with the Hudson Bay Company in present-day Canada. The most popular of these was Hudson Bayâ€™s off-white, pointed â€œchiefâ€™s blanket,â€□ striped with bands of cobalt, gold, red, and green on either end.

In the late 1880s, when the railroad finally opened the Southwest and the rest of the 1803 Louisiana Purchase to East Coast tourists, white Americans were enchanted with the beautiful geometric patterns used in Navajo blankets. The Victorians would take these blankets back to their overstuffed homes and use them as conversation-piece rugs. Traders, sensing an economic opportunity, encouraged the Navajo to weave these throws with stronger materials and more muted colors suitable for the floor.

A vintage Hudson Bay Trading Company Four-Point "chief's blanket."

Then, in 1895, a woolen mill opened in the Oregon town of Pendleton to sell blankets and robes to nearby Native American tribes. The mill went out of business, but in 1909, brothersÂ Clarence, Roy, and Chauncey Bishop, who came from a family of weavers and entrepreneurs, reopened the facility as Pendleton Woolen Mills.

"The issue now is not only who gets to represent Native Americans, but also who gets to profit."

Employing the Jacquard loom technology first imported to the U.S. in the 1830s, Pendleton and other new U.S. mills were able to make felted blankets with stunning colors and patterns. Naturally, all the these wool companies looked at the Native American populations, who had at this point adapted wool blankets, often striped or plaid, as a part of their ceremonies and rites of passage, and saw an opportunity.

To Pendletonâ€™s credit, its loom artisan Joe Rawnsley spent a lot of quality time with the local tribes, such as the Nez Perce, to learn what colors and patterns would appeal to them most. As a side note, the Nez Perce most associated with the brand,Â Chief Joseph, who heroically stood up against the U.S. government for years, had very little involvement with the company. HeÂ was photographed by Major Lee Morehouse wearing Pendleton blankets in 1901, but according to Robert J. Christnacht, manager of Pendleton's home division, that was "the extent of Chief Joseph's relationship with Pendleton."

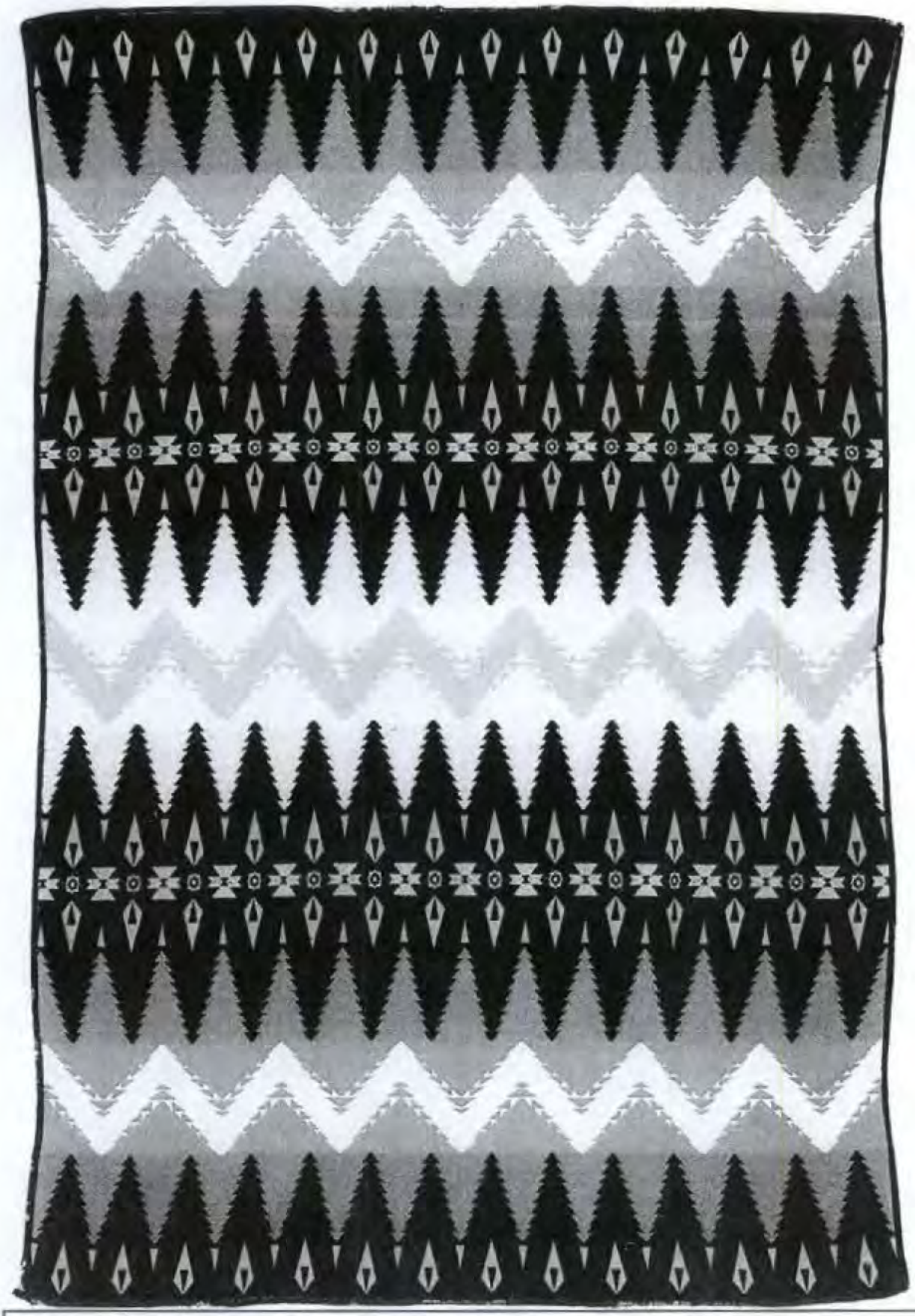
A Pendleton striped shawl from 1910-1915, labeled as pure fleece wool. Via "Language of the Robe."

Rawnsley's early blankets were well-received by the nearby Nez Perce, so the company sent him on a six-month tour of the Southwest, where he lived with Navajo, Zuni, and Hopi to find out what blanket designs those tribes would prefer. He returned with hundreds of ideas. "Baskets, pottery, weavings, and regalia all inspired Joe," Christnacht says. "Pendleton blanket designs were a blending of the images and colors Joe saw with his own design aesthetic."

"It's a crazy cross-cultural mix any way you look at it."

Some might say that Rawnsley was simply inspired by the beauty of Native American arts and crafts, and he hoped to use his Jacquard skills to make beautiful blankets the tribespeople would love. And in that, he succeeded. Others might argue that this was an early and sly version of cultural thievery. It's a slippery slope.

"From the beginning Pendleton marketed the blankets to various native communities, but the designs themselves are not authentic," saysÂ Bramlett, a founding member of theÂ Vintage Fashion Guild. "WhatâC™s ironic is that the Navajo were making blankets for the white tourist trade, and Pendleton was making blankets to sell to the native communities. That's kind of a weird twist, but thatâC™s the way it was.



Pendleton banded robe, first featured in the the 1904 catalog and also in the 1910 catalog. Via "Language of the Robe."

"And the Navajo designs were not even traditional designs," she continues. "A lot of the motifs that they used were Mexican inspired. Or when traders came to them withÂ oriental rugs, they'd use them as inspiration. So there are oriental motifs in some Navajo weavings, too. It's just a crazy cross-cultural mix any way you look at it. You've got the Pendleton blankets which are a mixture of native and non-native colors and motifs. Then youâ€™ve got the Navajo blankets, which are the same way."

What we do know is that Pendleton blankets were a hit, and quickly became a staple of life for Native Americans all over the country. They were used at powwows and rites of passage, as treasured gifts, as a means of non-verbal communication.

"Personally, when I think about that history, I think it's a really cool, the fact that the entire companyâ€"and it wasn't just Pendleton, there were other woolen mills as wellâ€"developed because the market for this item was so strong in native communities," Metcalfe says. "These blankets were integrated right away into our ceremonies.Â Pendleton also realized that different communities and different tribes had different preferences for designs or colors. And then they created blankets that different communities would like."

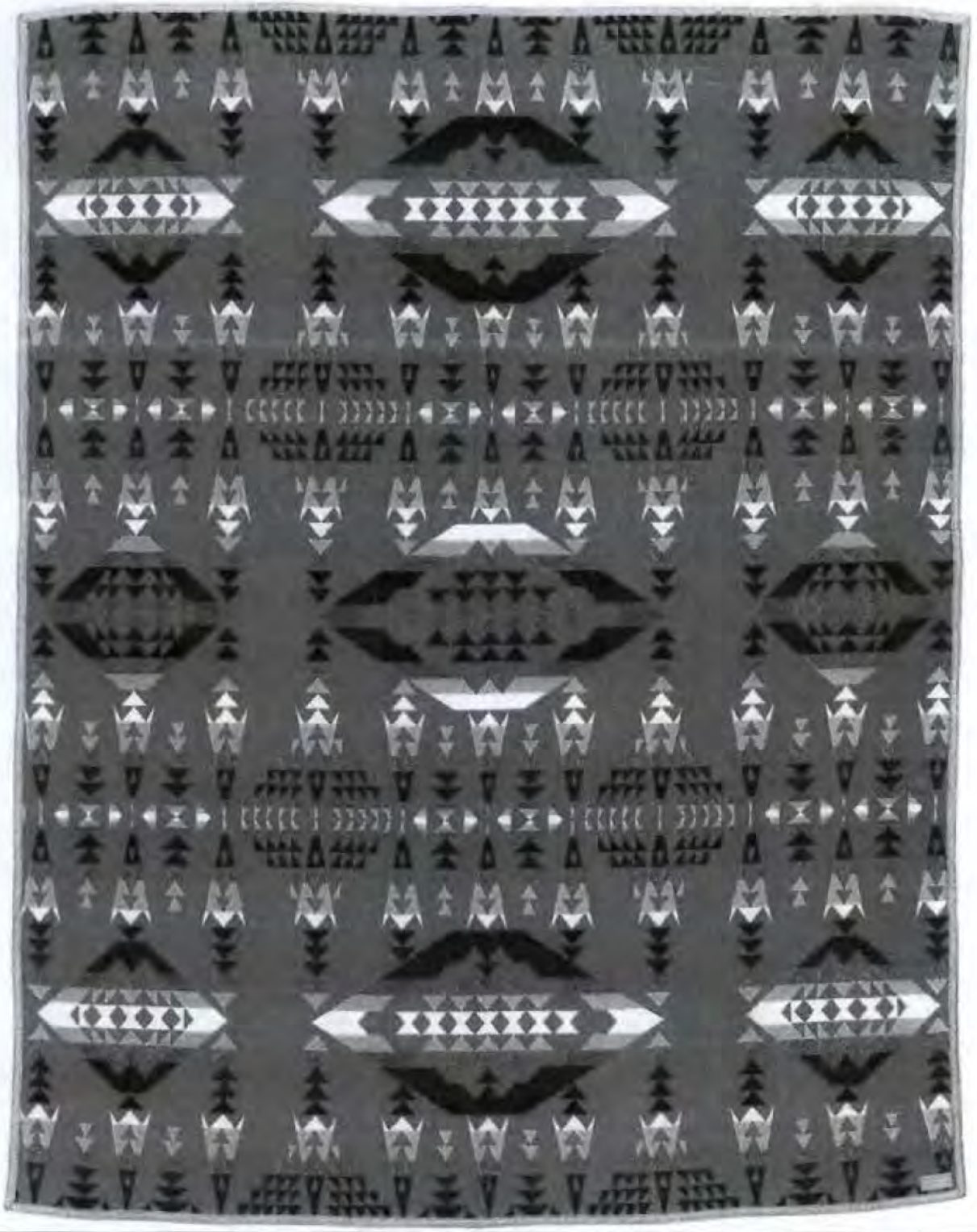
Patricio Calabaza, left, wears a Navajo blanket, and Rafael Lobato, right, wears a Pendleton blanket, at the Santo Domingo Pueblo, circa 1930. Photo by Witter Bynner, courtesy of Museum of New Mexico, via "Language of the Robe."

At the same time, Pendleton also sold the blankets to white people as exotic items for their homes.

"If you look back at the advertising of the day, itâ€™s vague," Bramlett says. "They didnâ€™t come right out and say, 'This is an authentic Navajo design,' but they could lead you to believe that. They realized

there was a market for non-native people to use these in their homes. Heck, they were in business to sell blankets. They didnâ€™t care who bought them."

All of this to say, itâ€™s very hard to parse out the proper credit for these â€œnativeâ€□ textile patterns popularized by Pendleton and othersâ€"let alone when this appropriation first happened. In the early 20th century, Pendleton blankets seemed perfect complements to the rustic, spare style of the Arts and Crafts movement, and by the early 1910s, Christnacht says the company was expanding these patterns to couch covers, rugs, and robes. Later, they were adopted by cowboys and competitive horse riders as saddle blankets.



A Pendleton center point blanket from 1921. Via "Language of the Robe."

"The time when Pendleton came into existence, the 1900s, was the all-time low for native communities," Metcalfe says. "This is at the height of the reservation era, when we were confined, we were essentially prisoners on these small plots of land. But in that same breath, while our cultures were under threat from this outside force, that's when we turned internally to protect what we had, and we also get some of the most beautiful beadwork and most beautifulÂ jewelryÃ coming out of that period of great stress.

"Connected with that great assimilation movement was the height of collecting. The late 1800s was when a lot of our stuff left our communities. On the one hand, you have this push for trying to absorb or get rid of 'The Indian Problem.' Then, they were taking all of the items that embody that culture, to collect them and put them in museums and claim ownership on them."

This Tomi Girl dress was made by Lakota designer Mildred High Elk Carpenter, out of a Pendleton blanket, for her MILDJ Native Fashion line. It's worn by N8tv Dyme's top model Katrina Drust. Photo by Tiara Carpenter, Native Doll Photography, Bellingham, Wa.

In the 1970s and '80s, top American designer Ralph Lauren became enamored withÂ Navajo rugs, Plains beadwork, and ApacheÃ pottery. He launched his Santa Fe line of clothing featuring conchaÂ belts, petticoatÂ skirts, "Indian patterned"Â sweaters, and blanketÂ jacketsÂ in 1981 as another defining aspect of American culture.Â In the 1990s, the Pendleton and other Native American-inspired designs swelled in popularity again with the return of â€œSouthwestâ€□ style and rise of "newÂ country" music.

In recent years, Pendleton has been going to town with collaborations using the iconic Indian trade blanket patterns. It had sold these patterns to Vans, famous for making skateboarder shoes; produced high-fashion lines with Manhattan couture company Opening Ceremony;Ã and it is even offering products through Urban Outfitters. With Levi's, Pendleton launched a line of jean jackets and cowboy shirts called Navajo Cowboys, hiring Navajo rodeo champions like Monica YazzieÃ as models.

Jessica Simpson and fiance Eric Johnson sport the "native look." Via UpscaleHype.com

"The reason why Pendleton was able to maintain themselvesâ€"and they're the only woolen mill that survivedâ€"is because of their dedication to the native communities and realizing the native people were their main market," Metcalfe says. "The blanket for us has become associated with idea of native pride, associated with achievement, community, and community service.

"Now Pendleton's entering the mainstream fashion scene, doing these collaborations, and it is probably a smart move for them, as a business. But we feel like we have some ownership with this company, and we do question whether they're stepping away from their relationship with us."

For some, like Cherokee writer and Ph.D. candidate Adrienne K., who blogs atÂ Native Appropriations, itâ€™s confusing and saddening to seeÂ her beloved Pendleton selling stylized productsÂ to wealthy young Manhattanites who are as removed from the native way of life as any American could be.

â€œSeeing hipsters march down the street in Pendleton clothes, seeing these bloggers ooh and ahh over how â€˜cuteâ€™ these designs are, and seeing non-Native models all wrapped up in Pendleton blankets makes me upset,â€□ she writes. â€œItâ€™s a complicated feeling, because I feel ownership over these designs as a Native person, but on a rational level I realize that they arenâ€™t necessarily ours to claim. To me, it just feels like one more thing non-Natives can take from usâ€"like our land, our moccasins, our headdresses, our beading, our religions, our names, our cultures werenâ€™t enough? You gotta go and take Pendleton designs, too?"

Monica Yazzie, a 19-year-old Navajo barrel racer from La Plata, New Mexico, models the Levi's Workwear by Pendleton woolen poncho.

Metcalfe says she's observed, to her amusement, that the Vans collaboration has been a big hit with Native American communities, but the Opening Ceremony line is dismissed as ridiculous.Â For Adrienne K., the stratospheric prices of the haute-couture Pendleton items just adds injury to insult.

"Thereâ€™s the whole economic stratification issue of it,â€□ she writes. â€œThese designs are expensive. The new Portland Collection ranges from $48 for a tie to over $700 for a coat. The Opening Ceremony collection was equally, if not more, costly. It almost feels like rubbing salt in the wound, when poverty is rampant in many Native communities, to say â€˜Oh, we designed this collection based on your culture, but you canâ€™t even afford it!â€™â€□

This screen grab from the Opening Ceremony web site shows a model in three different Pendleton sweaters, all over $500.

On the other hand, Native American designers, too, likeÂ Sho Sho Esquiro, of Kaska Dene and Cree descent, andÂ Mildred High Elk Carpenter, a MinucoujouÂ Lakota living Montanna, have also taken inspiration from the Pendleton blankets, sewing them into to modern fashion items likeÂ skirts,Â jackets,Â dresses, and even hoodies.

"It's really cool to see how they reinterpret the blanket," Metcalfe says. "For Sho Sho, she's using very vibrant colors and the bold graphics of the Pendleton blanket and giving it this hip-hop vibe, by making these hoodies for men and women. She's made the wearing blanket something cool for Native Americans to wear again."

A Pendleton six-element shawl from 1921. Via "Language of the Robe."

Bramlett says she's glad Adrienne K. and other bloggers are speaking up, because it's bringing up all the ways Native Americans have been exploited and misrepresented in mainstream culture. Having grown up in the '60s, Bramlett remembers a time not so long ago when it was considered acceptable to portray "Indians" as violent enemies inÂ movies,Â television, andÂ children's booksÂ and cartoons.

Even though the cultural tides are turning, a Cherokee-run company in North Carolina still makes knockoffs of ceremonial Sioux headdresses for children to play "cowboys and Indians" with. And Ke$ha and other young scenesters seem to think there's nothing wrong with donning copies of sacred headgear forÂ partying at summer rock festivalsÂ like Coachella.

"When you see pictures of some of these festivals where young white women are all dressed up in Indian regalia, you wonder, 'What the heck are they thinking?'" Bramlett says. "What adult is going to do this? Do you not realize you just look dumb?"

The Story of the Wild Indian's Overcoat

The Historic Chief Joseph of the Nez Perces

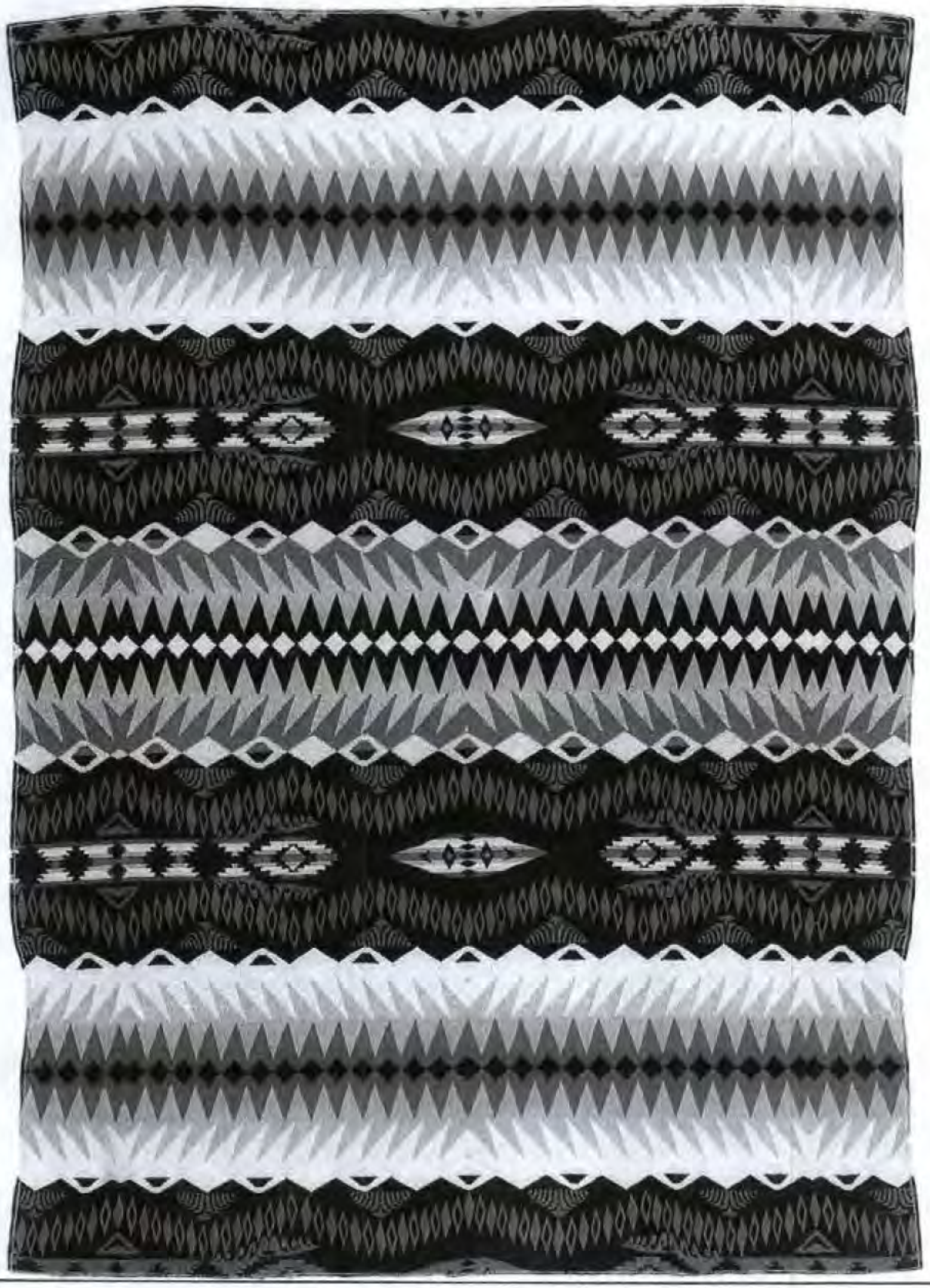
Arrayed in a Pendleton Indian Robe

The cover of the Pendleton catalog, circa 1901. This 24-page catalog offered blankets and photographs of the Plateau Indians by Major Lee Morehouse. Image via "Language of the Robe."

And even though she finds fashionistas wearing the high-endÂ clothingÂ made out of PendletonÂ fabricsÂ much less egregious than concert-goers wearing headdresses, Bramlett says it still can look like children playing dress up. "If itâ€™s something thatâ€™s that strong a design that is so strongly associated with one culture, it makes you look like youâ€™re trying to be something youâ€™re not."

Still, Pendleton, who is also known for folksy Americana plaids (inspired by Scottish tartans) and The Dudeâ€™sÂ sweaterÂ in â€œThe Big Lebowski,â€□ Â has to find a way to stay viable in todayâ€™s brutal international market,Â Bramlett says, or it goes out of businessâ€"and its beautiful blankets go with it. Christnacht says that 100 percent of the blankets are woven and manufactured in the United States, and half of those, which go for about a couple hundred dollars a piece, are sold to Native Americans.Â In 2009, Pendleton, which employed about 900 people nationwide, had toÂ lay off 43 workersÂ and consolidate operations in response to slow sales during the recession.

"To stay in business, they have got to appeal to younger consumers," Bramlett says. "They just have to. And so if they want to collaborate with Leviâ€™s or Vans or whoever else theyâ€™ve been in bed with, thatâ€™s fine and good. If that industry were to collapse, it would be gone. Iâ€™ve seen this a dozen times. Once itâ€™s gone, itâ€™s gone and itâ€™s very soon forgotten."



A 1910 Pendleton banded robe, also offered in the 1904 catalog as a round corner blanket. Via "Language of the Robe."

Metcalfe says you'll never get a consensus from the Native American community on what Pendleton should or shouldn't do, but ultimately there is a great love of Pendleton, which has often produced

blankets to give back to the community, like the one designed by Osage artist Wendy Ponca that benefitted the American Indian College Fund. It's justâ€"like you do in any long-term relationshipâ€"they get a little annoyed with the company sometimes.

"I think ultimately the collaborations are a good thing because they're opening a door to greater understanding," Metcalfe says. "Hopefully, those people wearing these clothes will learn a little more about Pendleton's history and why we have respect for Pendleton. It is because their sense of service to native communities."

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More in Fashion

Vintage Swimwear Expert Pam Fierro Explains How Bathing Suits Got Skimpy Carole Tanenbaum on Costume Jewelry's 'Wow' FactorBe a Bombshell at the Beach, Go Vintage

33 comments so far

1. December 1st, 2011 at 1:49 pm *Marianne Dow Says:*

Lisa — great article! Love the mix of vintage and new pix. The Pendleton robes are gorgeous. The conflicting views made for a good read. How can anyone "own" these artistic ideas, when they are a mix of many culture's influences? But emotions aren't logical. We need to try to be more sensitive, which apparently some of the businesses claiming "authenticity" aren't. Hopefully your article will raise some awareness.

2. December 1st, 2011 at 6:55 pm *Mac Bishop Says:*

Incredible article! Thank you. I religiously read Jessica's blog and the Native designers she features do amazing work.

Instead of the forever21 made-in-china 'tribal tees', etc that I see plastered all over the blogosphere, it'd be nice to see some Native designers receive more publicity and attention in the mainstream market. This article is a good start. Who's next?

3. December 2nd, 2011 at 9:05 am *jkg Says:*

About as balanced a take on the issue as I could have hoped to expect. Nicely done.

4. December 2nd, 2011 at 9:40 am *WmBlackstone Says:*

Pretty much what we consider Native American "design" is an amalgam. The earliest "symbols" can be traced back to paleo-Indians (pre-modern tribal designation). Then you have — from the 1500s onward — items fashioned from "trade goods" from Europeans. Finally there are the "made for sale" items such as the blankets that were instituted by Fred Harvey and others to sell as souvenirs at their railroad site venues. "Authenticity" is difficult to say the least to define. According to my mitochondrial DNA, I descend partly from"paleo-Indian" stock. Does that make me any less a Native American? What if I do crafts based on Native American symbols and styles? Are they authentically "Native American"?

5. December 2nd, 2011 at 11:15 am *M Says:*

Great article. Waaaaaay too many links though. Took me two hours to read it!

6. December 2nd, 2011 at 2:03 pm *anishinaabekwe Says:*

I really appreciate this article. Good work, my girl!! There are so many issues at hand in regard to cultural appropriation vs. cultural appreciation... The main one being nicely handled here: The historic trauma that Native peoples have endured is still an unresolved wound. THIS is what makes some Native peoples pissed off about the fashion trend. If and until the trauma of genocide is adequately healed, issues such as this continue. Someone from AIM recently said, and I paraphrase: "We know most of the members of "white society" today are not directly to blame for the genocide which began 500 years ago, so we don't blame "them"... BUT today's dominant society still reaps the benefits from that genocide while today's Native peoples still suffer the aftermath." This fashion trend is symptomatic of that hard truth.

7. December 2nd, 2011 at 5:32 pm *Lisa Trujillo Says:*

The Hispanic and Mexican weaving traditions that were such a huge influence on Navajo weaving continues to this day as Chimayo weaving. You disregard this living tradition. I'm not sure how happy I'd be if I really thought the fashion world was stealing from us, but we

certainly work with a very closely related design vocabulary to what is pictured here. Only we're doing it all as handwoven products.

8. December 2nd, 2011 at 9:19 pm *Simone Says:*

Despite the fact that I look Caucasian (my father was English/French with American roots to the first colony), I am also Yupik/Cherokee born from a mother who is part of the "lost generation" of Native Americans due to being displaced from Tribal Affiliation and Heritage in the government inspired "re-education" in early part of the 1900's. My point is that there is an ongoing "lost generation" as we inter-breed and the lines of Ancestry in America are no longer clearly drawn. For those of us raised in the vacuum of Western Civilization without a defined heritage, and rejected by the Native Americans around us, because our blood is not "pure" enough, sometimes our only way to honor our Ancestors is by dressing up and pretending. This could be one explanation for this trend. I respect the American Natives for wanting to preserve the integrity of their culture, and that I can always look to the pure Yupik or Cherokee Nation for authenticity; however, we are also all part of a World Tribe in which creativity, and the use of old ideas in a new way is appreciated, and also Honor's our Ancestors.

9. December 3rd, 2011 at 2:08 pm *ChrystalWolf Says:*

Great article BUT,it leaves me wondering...I am full blood (Creek, Cherokee and Comanche), I married a "white man" and we have three children. And while all three have Indian features...one son has dark hair, brown eyes and olive skin. One son has red hair, green eyes and reddish/olive skin, and our daughter has blond hair, blue eyes and light skin like her dad. So if my daughter wears "Indian" patterns and styles she is going to be looked down upon by my own people because she doesn't fit into what Indians think an American Indian should look like?? My daughter is just as much an Indian as any "full-blood". While I agree that "Indian Made" should mean just that...to judge people because they don't look Indian enough or "white" is hypocritically racist.

10. December 3rd, 2011 at 2:48 pm *Yvonne Swan Says:*

I'm sorry, sisters and brothers, but in the 1970s I made a wish that everything in our (Indian) country would be Indianized. I did this so that the world would know they are in Indian country. Knowing this wish, and seeing clothing, jewelry, and other designs doesn't bother me. Money isn't going to last anyway. This was told to us in the 1970s. I now live in cluster housing

right where I, as a child, wished there would be cluster housing. If you want me to wish it all away, I would have to think very hard about doing so.

11. December 4th, 2011 at 6:25 am ***rex butler Says:***

It is always dissapointing when vulgar language goes mainstream. It's not even in the body of the article where it is buffered by a paragraph or two. It is glaring in the title where it boasts, "yeah, I said that!" I am used to a higher standard from CW not the lowest common denominater used by most media. Just my opinion...

12. December 4th, 2011 at 9:52 pm ***Shadow Says:***

I get mad every time i see a white person wearing native american design

13. December 4th, 2011 at 10:41 pm ***Jay Red Eagle Says:***

Cherokee Apparel is a name licensed to any company who wants to use it. The parent company is based in the U.K., and it should be illegal to sell clothing using the tribe's name in America under the Indian Arts and Craft act, but Target and other stores still sell the line.

14. December 5th, 2011 at 8:50 am ***monap Says:***

BUY INDIAN – ACT NOW! One thing is for sure, when you buy from the Indigenous artisan you know you are getting "one of a kind". They will even custom make a coat, bracelet, dress, shawl, etc. for you! And they make pennies compared to those mass produced. I am thankful that our people who are gifted to have the vision to create works of art have not given up. Unfortunately, many would be "buyers" walk past these fine works and go straight to the shops to spend mega bucks on a "coach" product. Thus, contributing to the "others" economy! Thanks for the article.

15. December 5th, 2011 at 5:07 pm ***Don CA Says:***

" So now you have non-native people representing us in mainstream culture. That, of course, gets tiring, because this has been happening since the good old days of the

HollywoodÂ Western in the 1930s and â€™40s, where they hired non-native actors and dressed them up essentially in redface."
I disagree with the quoted. The difference now is that people aren't dressing up as Native Americans and making claims about them, or "representing them". People are recognizing a beautiful pattern they have affinity for and are probably aware of the fact that they themselves are native-inspired. What does that mean? It means that people relate to the values that they see indigenous people stand for. Care for nature, community, ancestral roots, ceremonialism, and a spirituality not limited by western dogma. Does everyone think about it this way, even as they wear native inspired patterns? probably not. Some just think its cool and are following the crowd. But Native American patterns aren't the only ones hitting the mainstream. African, Egyptian, and many more are becoming popularized. Why? Because Westerners crave the concept of Tribe. All our ancestors at one point were tribespeople. And the aesthetics of disparate cultures from the reindeer herders of Northern Sweden to the Tibetans have remarkably similar fashion tastes. Maybe we are all reclaiming our indigenous us. That includes what we wear, what we eat, who we relate to, and how we honor all of the above. The next step is education. not just pretty patterns, but where did this come from and what does it signify. Perhaps in the future we will all wear patterns designed by us but derived from all historical and cultural symbols that we hold dear and feel define us. As for now, I think wearing a native design is as close as we can come on this day and age to saying "proud to be an American". I don't think the Stars and Stripes satisfy anymore.

16. December 5th, 2011 at 5:15 pm *Chibcha Says:*

does someone of south american Mestizo descent have the right to wear North American native clothing?

17. December 5th, 2011 at 7:05 pm *nathan Says:*

Does this mean i can get away with wearing my breech cloth to the mall? Hopefully this doesn't drive up prices on Pendleton Blankets. At least in a couple years, there will be a ton of this stuff in thrift stores and on ebay, and these goofballs will move on to the next trend. Maybe everyone will start growing beards and wearing neon rayban knock-offs. Oh, wait.....

18. December 6th, 2011 at 12:25 am *Deb Woody Says:*

I've heard many stories from my grandmother about how our people were given choices. With this information of how Pendleton became inspired by the designs the Dine people (aka

Navajo) and other tribes we should embrace what they have done. We have been acknowledged and it was their idea of mass production of these blankets. Though weaving is a soon to be lost art to our tribes, we must understand that the original designs are what we have come to know as a symbol of life. Out of respect to the elders we should not be fighting over who did it first, it should be expected that we grow to learn that we have to survive in ways unexpected. We should not take what is not ours to begin with. It just so happens we have inspired this idea. There are far more important things to worry about than rights to a design. Such as, giving back to the people who helped these successful businesses by supplying the very products they produce to communities that need it most. It should not always be about money but I am so glad that we have the trademark to protect now.

I'm pleased with this article, I did not know the full history of Pendleton or it's inspiration.

What I'd like to know is how it is that so many restaurants offer Navajo tacos, when the business is not owned by Navajo descendants.

19. December 6th, 2011 at 8:30 am *inzi Says:*

my personal belief is that squabbling over money and ownership is not what art is about. Making something first is also not the most important thing. This is all the aftermath of human ego getting in the way of larger questions about reality. Yes people have been abused in history, all over the world, and yes those harmful betrayals should be rectified (as best they can be) because many things are not reversible, but art and fashion and free speech and expression are ultimately untied to history. Symbolism is a figment of our imagination. victims and aggressors have equal rights to symbols, aesthetics, and elements. Ownership by individuals or so called 'groups' is a problematic capitalist concept to begin with. How is a design mine? How is a pattern mine? How, or better yet, why do i need to assert my dominion over those colors and shapes. Is it so i can profit as much as i can while I'm alive to reap the benefits? In the long run, the long run of universal time, not the thwarted sense of time that we get stuck in, these questions of appropriation, theft, copying, mimicking, buying and selling, really don't matter. What matters is how we treat one another. How we let go of the past. How we share what we have. Generosity of spirit goes both ways, from one tribe to another, regardless of transgressions, and as Bob Marley once said... 'Every little thing, is gonna be alright"

20. December 6th, 2011 at 9:49 am *Jordan Says:*

This is a great article. Thank you for your time putting this together. Really well done.

21. December 6th, 2011 at 3:20 pm *Debbie W Says:*

This is a great article because it demonstrates all the contradictory ideas and practices. I recently discovered Pendleton blanket designs when I was offered a blanket as a wedding gift. I was very intrigued when reading about the history and Pendleton's historic relationship to Native Americans. I realized there was and is exploitation of ideas and of peoples, but at the same time, as an American, I'm proud that the mills still exist. My 80 year old family members have great respect for the brand, as I do, for the long lasting quality. I can't afford to purchase it new, I look for used Pendleton. When I wear a coat with Native American designs, it is with pride for the many cultures that exist in my country, respect for their art and culture and appreciation of their beauty. I am very aware of the suffering (past and present) of Native Americans and always made a point of teaching it to my English students when I lived abroad. I was glad to see that Pendleton makes some effort to give back to the Native American community. Although I am of European descent, I would hope Native Americans could see some trends as a celebration of their culture and an opportunity to instruct the general population and raise awareness about the needs of their communities. Certainly I understand the irritation caused by a vendor representing something as authentic Native American design or trivializing their culture, but perhaps the popularity of Native American inspired designs could help bring attention to Native American culture maybe even increase donations to the needy in the community and incite young people to learn more about Native American history.

22. December 6th, 2011 at 9:26 pm *Hurna Says:*

Native Americans have sold their crafts and garments to non-Native people for a good many years now. They also wear White-man clothes. So why do they have any reason to be upset over what someone wears regardless if it resembles a Native print or not? That's just silly! Are they upset if someone is wearing a style from some other culture; Hawaiian shirts, Wooden shoes, Peruvian jackets, Chinese style shirts, what-ever. Probably not. Grow up and let it go!!

23. December 6th, 2011 at 11:18 pm *Hiro Says:*

–I get mad every time i see a white person wearing native american design–

Why? As long as they are not pretending to be native american, why should it bother you? I'm Japanese-American and I don't get upset when people wear yukata or clothing with Japanese designs. They simply appreciate the designs for what they are.

I do think that associating a product with a particular group is bad, but being inspired by the designs themselves is just silly.

24. December 7th, 2011 at 6:23 am *Danny Kellermeyer Says:*

I can honestly understand why they'd be upset that their name was being used to hawk wares like dream catchers, but to get indignant over your cultural patterns being used for handbags, sheesh. I imagine there are plenty of Scotch-Irish that would be plenty pissed if they saw all the plaids in my closet.

25. December 7th, 2011 at 7:35 am *seouldout Says:*

â€"I get mad every time i see a white person wearing native american designâ€"

And on the flip side do you likewise choose to be angered when you see Native Americans wearing white design?

26. December 7th, 2011 at 8:42 am *8mph Ansible Says:*

Immensely awesome article, too bad same can't be said for a number of the commentsu that come off as ignorant or whitesplaining in how I should feel about my culture, itsappropriation, misrepresentationand theft.

27. December 7th, 2011 at 5:02 pm *Larry Bob Says:*

Three points:

1.

I'm not going to pretend to know too much about it, but as I understand it, Navajo rugs get their serrated, diamond patterns from the Mexican, Saltillo serape which probably has a Mexican-native origin that I'm not aware of. Those diamond shapes are not really part of the Dinetah landscape.

2.

I think restriction and ownership are impossible in this post-modern market, but the issue seems to be understanding and respect, in the words of traditional pueblo weaver that I wont quote by name "When I weave I pray so that the garment protects the owner" that's a kinda

heavy thing to pretend to. One should know what the designs represent and where they come from, it's not about how much native blood you have (although it seems to be for some people right now) its about knowing enough to honor it by wearing it, which isn't as easy as it first appears.
3. as well written as your article was, by the end the whole thing felt like a pendelton love-fest. My thoughts, pardon my ignorance ahead of time.

28. December 7th, 2011 at 5:55 pm *Cleveland Says:*

–whitesplaining–

And that racist remark says all we need to know about you...

Should there be a policing agency responsible for "clothing licenses"? Who draws up the rules about what clothes each of us can wear? Can any member of a culture decide for the rest of humanity exactly what is acceptable? I'm an eighth Choctaw, so do I get approval for a wallet with a native design, but not a shirt? Or only if it's a Choctaw design and not a Sioux one? Could an Indian ban English shops from carrying saris?

The Navajo have every right to complain about their NAME being used for marketing, but that's about the extent of it.

And I'm not white, since that's probably a big thing for you.

29. December 7th, 2011 at 7:19 pm *James Carver Says:*

Declaring a contrary view to be "whitesplaining" is a way to simply shut down any real discussion. It's also racist. How would you like to hear your view called "blacksplaining" or "indiansplaining".

These are patterns made by a company from myriad sources, including Navajo, Mexican, and Asian design. If you don't like that some people like them, too bad....I'm sure some Scots hate the plaids people so casually wear...but then they are white, so their views don't matter to you anyway.

I DO agree that they should not be calling it Navajo. The people are not a brand. Call it "Western" call it "Tribal", call it "Desert".

30. December 7th, 2011 at 11:01 pm *Michael DeSantis Says:*

"It's a cross-cultural mix any way you look at it"? Bullshit! What is the mix exaclty, our ancient, sacred, cherished designs with the super trendy, played out hipster look and lame culture that just won't go away? Who gets paid for our artwork? Not us. Non-natives have been making money off of us since they stepped first foot on our beach. It would be one thing of they donated a respectable amount of this easy money to our people to maybe help us out of the horrid mess we're in right now, but probably not. What is up with this "hiptser" culture anyway? Looking at them through my eyes being low-income, Native American public housing resident born and raised in Seattle, they bug in many of ways, they're mostly a bunch of spoiled, snobby, shallow little jerks that rape their way into cultured, soulful, colorful, diverse, neighborhoods and completely destroy them by having the rent raised forcing minority families, businesses, and sense of community right from under us, and now they're grabbing our artwork. Why is it all of our artwork is for sale everywhere, authentic even, but yet so hard to sell? Why does it take a non-native to sell it? That isn't fair. We as native people teach that we need to give back from which we take, so should you. I vote NO on the theft of our culture, you already have our land.

31. December 7th, 2011 at 10:05 pm *DineSAM Says:*

First, I would like to address the "Get over it comments." Those moments in history have a strong impact on our lives as Natives Americans (politically, socially and emotionally). Just the same way the Bombing of Pearl Harbor has on all of our grandparents or the events of 9/11 have on our lives. Native Americans have a strong tie to our ancestors, we honor their struggles and bravery. To get over it means to forget about our ancestors. We honor our past and I am sorry but we will never get over over what happened in the past. However, I am a strong believer in tolerance and we all, Native Americans included, need to tolerate each others culture, history and now even apparel choices. I am a Native American that wears White clothing. I gave my best friend, who is White American, a pendleton blanket, pottery and a turquoise necklace. I have seen many Non-Native Americans wear Native American or inspired clothing and I see other cultures wearing White clothing. Maybe some White people are trying to dress like Native Americans which is great but I also see many Native Americans trying to dress like rich White Americans. Both groups don't fit the biological makeup but they both have the right to dress however, they like. Products not made by Native Americans should not have the right to claim "Authentic Native American Artwork". There is greater value when anyone and I mean anyone buys handmade artwork whether it is clothing, jewelry or pottery from a Native American Artist. The artist can tell you more about the design and the meaning than a store retail clerk can. This being said support Native American Artists whenever you can.

32. December 8th, 2011 at 4:13 am *8mph Ansible Says:*

Like too add, anyone using the argument of us wearing "white clothing" as a counterpoint is full of it and fails in understanding history or even the dynamics of power from history as too why we, or any culture that's isn't white, wears such clothing. Here's a hint: it's wasn'talways because we wanted to.

33. December 8th, 2011 at 5:27 pm *justin4432 Says:*

I will no longer buy anything with any hint of Native American influence or design. Even if I buy it from a Native American designer or maker, it is still likely to offend someone because I am white and do not have the cultural connection required to wear it. They have no way of knowing that you are aware of the destruction of the Native American culture...they will likely see you as unjustly appropriating it (see comment 12 above).

Native American fashion and design is for the exclusive use of Native Americans and no one else. Buying these goods, from whatever source is an unwarranted trivializing of the struggles faced by Native American people.

Thanks for the heads-up and the consciousness-raising.

Stanton, Meridith

From: Brian Lewis [blewis@nndoj.org]
Sent: Monday, November 28, 2011 10:27 PM
To: Stanton, Meridith
Subject: RE: Bloomberg News

Thank you, Meridith. I will be in contact soon to discuss recent developments in this matter.

Respectfully yours,

Brian L. Lewis

From: Stanton, Meridith [mailto:Meridith_Stanton@ios.doi.gov]
Sent: Friday, November 18, 2011 2:13 PM
To: Brian Lewis
Subject: Bloomberg News

Good Afternoon Brian,

Thought I would send this along in the event you have not yet seen this latest article mentioning Navajo.

Best Regards,

Meridith

Meridith Z. Stanton
Director
Indian Arts and Crafts Board
Office of the Secretary
MS 2528-MIB
U.S. Department of the Interior
Washington, D.C. 20240
202-208-3773 (main)
202-208-3889 (direct)
1-888-Art-Fake (toll free)
202-208-4382 (fax)

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Urban Outfitters Losing Fans With Failing Fashions

By Ashley Lutz - Nov 18, 2011

Urban Outfitters was Louis Redondo's favorite store for fashionable hats and T-shirts five years ago. Today, he says he'd be embarrassed to wear its bright, striped sweaters and flared velvet pants for anything except a Halloween costume.

"I used to walk out of there with my bags stuffed full of clothing," said Redondo, a 30-year-old technical writer from Jersey City, New Jersey, who now shops at Hennes & Mauritz AB stores. "It was definitely my primary source. Today I'd just look comical if I shopped there -- I'd be laughed at."

"Bizarre" and "lackluster" fashions at its namesake stores may be why Philadelphia-based Urban, which also operates Anthropologie and Free People, is losing investors' confidence, said Pamela Quintiliano, a New York-based analyst at Oppenheimer & Co. The shares have slid 27 percent this year, the biggest drop among U.S. specialty apparel retailers except for Aeropostale Inc. (ARO)

"This is a fashion issue, plain and simple," Chief Executive Officer Glen Senk said on a conference call to discuss earnings Nov. 14. "We need more compelling product."

The missteps come on top of accusations of style plagiarism and cultural insensitivity that have alienated some customers this year. The lowest consumer confidence since March 2009 is making it harder for retailers to get shoppers into their stores at all.

Senk, long considered an excellent judge of fashionable merchandise assortments, is shaking up his management team to reverse declining earnings.

Slow-Moving Inventory

Net income has dropped for the past four quarters and the chain has boosted discounts to clear slow-moving inventory. Comparable retail segment net sales at the Urban Outfitters brand, which accounted for 46 percent of revenue last year, were flat in the third quarter after gains of 1 percent in the first two quarters of the year. Total inventories jumped 27 percent.

Urban's shares dropped 0.1 percent to $26.15 at 12:28 p.m. in New York.

"The fashions, once their greatest strength, are simply off, and their reputation as the trendiest place to go is sliding," Quintiliano said in a telephone interview. "Urban is just throwing stuff at a wall and seeing what sticks with consumers."

Urban's earlier successes may have made the chain too bold in choosing fashions that have gotten ahead of shoppers' tastes, offering bell-bottom pants while consumers still are seeking skinny styles, said Christine Chen, a San Francisco-based analyst at Needham & Co.

Style Resistance

"There will always be some resistance to new styles and most people don't overhaul their wardrobes overnight," Chen said in a telephone interview. "Most likely people will transition and adopt a boot-cut pant before they are comfortable enough to try a bolder style."

Urban also has offered baggy tops, like tunics, which are better suited for skinny jeans, alongside loose bell bottoms, Chen said.

Many aspects of Urban Outfitters are "confusing," such as the range of products and prices, said Vincent Quan, an associate professor at New York's Fashion Institute of Technology who also consults retail chains on merchandising. At a recent trip to an Urban store, Quan saw a $150 dress displayed alongside a $59 one, he said.

Faux Pas

"This is a faux pas in today's retail market," Quan said. "Customers have come to expect that similarly priced items will be grouped together and that they won't have to dig around to find out a cost."

Adding to the earnings woes is a spate of bad publicity, triggering a backlash from many of its target shoppers in their teens and 20s.

In May, jewelry designer Stevie Koerner accused Urban Outfitters on her website of copying her "The World of Love Series," which featured U.S. states cast in silver with cut- outs of hearts.

Users on Twitter, including singer Miley Cyrus, accused Urban of stealing and tried to start a boycott. Urban responded on its website that it would continue to sell the jewelry, saying that the idea of state-shaped necklaces wasn't unique to Koerner and that several sellers on the craft website Etsy sold similar designs.

Navajo Nation

In June, the Navajo nation sent Urban a letter demanding that the company pull the Navajo name from a line of purses, t- shirts and underwear meant to evoke American Indian culture, and a petition on the website change.org asking the retailer to remove the clothing gathered more than 16,000 signatures.

A search of the word "Navajo" on the retailer's website returns no items, and pieces previously in the collection are now simply labeled as "printed."

The company said earlier this month that David McCreight, a former Under Armour Inc. executive, was appointed CEO of Anthropologie Group, and Charles Kessler, formerly of Coach Inc. and Abercrombie & Fitch Co., would be chief merchandising officer for the namesake brand. Stephen Murray, former global president of Urban Outfitters, left his post in April after a year on the job.

A spokeswoman, Sara Goodstein, said the company declined to comment.

Urban's problems are more about the "headwinds" working against them, such as an overcrowded apparel market and a sluggish economy, than the company's actions, said Linda Tsai, a senior analyst at ITG Investment Research. The chain's net income has increased every year since its fiscal 2007.

"Fashion missteps happen to everyone sometimes," Tsai said in a telephone interview. "While apparel has sometimes struggled, we've seen success in their accessories, outerwear and shoes."

Needham's Chen said Urban has "some of the best merchants" and is likely to rebound.

"They've had some mishaps, but this is not a turnaround situation," Chen said.

To contact the reporter on this story: Ashley Lutz in New York at alutz8@bloomberg.net

To contact the editor responsible for this story: Robin Ajello at rajello@bloomberg.net

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From: Brian Lewis [mailto:blewis@nndoj.org]
Sent: Wednesday, October 26, 2011 2:46 PM
To: Stanton, Meridith
Subject: RE: Navajo print dress, etc.

Hello, Ms. Stanton:

Thank you for coming to Window Rock and the Navajo Nation Department of Justice. I appreciate the information and the additional materials. The NNDOJ is currently in the process of analyzing this matter and determining the next steps; both pursuant to the IACA and the Lanham Act. I will contact you when the NNDOJ has a definite action plan. Please feel free to contact me at any time with anything related to this matter. Thank you again.

Respectfully yours,

Brian L. Lewis, Attorney
Navajo Nation Department of Justice

From: Stanton, Meridith [mailto:Meridith_Stanton@ios.doi.gov]
Sent: Tuesday, October 25, 2011 1:21 PM
To: Brian Lewis
Subject: Navajo print dress, etc.

Hi Brian,

My thanks to you and Navajo Attorney General Harrison Tsosie for meeting with [redacted] and me last week.

To follow up on our meeting, I have attached a PDF of a page from the October 2011 Conte Nast Traveler, featuring a "Navajo print dress" by L.A.M.B., selling for $650, and a page from the current Vogue featuring a "Navajo Blanket *inspired* cocktail dress" for $3,750 by IKRAM.

If we can be of any assistance with Indian Arts and Crafts Act matters, please do not hesitate to let us know.

Best Regards,

Meridith

Meridith Z. Stanton
Director
Indian Arts and Crafts Board
Office of the Secretary
MS 2528-MIB
U.S. Department of the Interior
Washington, D.C. 20240
202-208-3773 (main)
202-208-3889 (direct)
1-888-Art-Fake (toll free)
202-208-4382 (fax)

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Stanton, Meridith

From: Stanton, Meridith
Sent: Tuesday, October 25, 2011 3:21 PM
To: 'blewis@nndoj.org'
Subject: Navajo print dress, etc.
Attachments: Magazine Scan October 2011.pdf

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VIEW

America by Night

of these places, too, when I design."

So it's these redwood forests, these Gulf Stream waters that make our evening ensembles so free and easy? Michael Kors, whose very name evokes a kind of effortless American dressing, says that although "some people do still look to Europe, there are people like me—even though I'm a New Yorker, a lot of my attitude comes from the West Coast, from Florida, and Aspen." He concurs that no matter how glamorous an evening ensemble may be, "it has to be rooted in something undone and not so precious. People want clothes, even for night, that are based on action and movement—that's what's sexy now."

But sometimes even the coolest designers are stopped short by the daring of the American women who wear their frocks. Proenza Schouler's Lazaro Hernandez is still astonished at the way Chloë Sevigny transformed a laser cut–lace mid-calf dress. "Chloë doesn't do long," he says. "She has the best legs in New York City! She chopped that dress to mid-thigh. We had put it with spindly shoes because we saw it as something refined, but Chloë wore it with thick-heeled booties. It wasn't at all the way we saw that dress," he reflects, impressed if just a bit taken aback by Sevigny's audacious scissor-wielding. "But it looked great." □

SOUTHWESTERN EXPOSURE
PROENZA SCHOULER'S NAVAJO BLANKET–INSPIRED COCKTAIL DRESS, $3,750; IKRAM, CHICAGO.

LOOK

So Santa Fe!

TREND Southwestern prints and turquoise beads were integral to the fall collections of everyone from Paris's up-and-coming Isabel Marant to musician turned designer Owen Stefani. The latter paired this vibrant Navajo-print dress with a Rasta-style hat at her L.A.M.B. fall show. "It's not about the individual pieces but how the layers blend together," Stefani says. **DESTINATION** Designer Tom Ford (Santa Fe Prep class of '79) has been spending more time in his old stomping ground—and the fashion set has followed, hunting for turquoise bling and vintage dresses at the weekend **Santa Fe Flea at the Downs;** in November, the market moves indoors to the Rail Yard hood (santafetraditionalflea.com). Come evening, these tastemakers can likely be found toasting New Mexico's over-the-top car culture at the lowrider-themed **Low 'n' Slow** bar in the Hotel Chimayó de Santa Fe, others go wherever arts collective **Meow Wolf** is hosting a no-holds-barred performance art meets music event (meowwolf.com).

1. Lace dress by Isabel Marant, $1,255 (Isabel Marant, N.Y.C.). 2. Vintage turquoise necklace by Vicki Turbeville, $2,200 (southwesternjewelry.net). 3. Handbag by Ralph Lauren Collection, $1,950 (select Ralph Lauren stores). 4. Turquoise and leather belt also by Vicki Turbeville, $1,800. 5. Navajo print dress by L.A.M.B., $650 (917-463-3553). 6. Boots by Isabel Marant, $1,630 (Isabel Marant, N.Y.C.).

PLUS

Santa Fe's Hot New Tables

SUPPER CLUB AT REAL FOOD NATION Chef Kim Muller gives classic shrimp and grits a New Mexican lineage with earthy blue-corn mush, spicy chorizo and padron peppers from her one-acre farm (628 Old Las Vegas Hwy., 505-466-2440, entrees, $18–$32).

TULES ON PALACE Celebrated Taos chef Joseph Wrede has finally made the move south and opened up in Santa Fe. Most ordered, seared foie gras topped with crispy shallots in a piñon mole (142 W. Palace St., 505-428-0690, entrees, $15–$30).

AZUR Chef Xavier Grenet Fraud and matches from around the Mediterranean. For instance, Moroccan-spiced trout stuffed with caleman and chard is served on wild rice with dried Persian lines (428 Agua Fria St., 505-992-2897, entrees, $19–$23).

PHOTOGRAPH BY JENS MORTENSEN

Stanton, Meridith

To: Dupris, Cheryl (USASD); Nemeroff, Patrick G. (CIV)
Subject: Arizona Republic editorial about Navajos and Urban Outfitters

Importance: High

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Opinions

If it's made in China, it's not Navajo

Oct. 22, 2011 12:00 AM
The Arizona Republic

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A bigger legal concern, though, was the use of "Navajo" to describe woven bracelets and feather earrings - jewelry that casual shoppers could easily mistake for authentic products. The confusion was obvious on the website, where 10 users tagged the bracelets as "Native American." They clearly didn't notice that the product description identified the bracelets as imported.

Cheap imports labeled as Native American goods and phony domestic ones have been a problem for decades. Congress has repeatedly tightened the law to stop the mislabeling and misrepresentation that eat into tribal income.

This is an important issue for Arizona, which benefits when local products are sold and the money circulates through the state economy.

After a cease-and-desist letter from the Navajo Nation, heavy criticism from bloggers and the publicity of news reports, Urban Outfitters quietly removed the term.

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Obviously, it must be particularly vigilant about defending the Navajo name in its licensed product lines.

Native American styles are hot designs now. Retailers and designers should look to the source. They should offer their customers Navajo products that are made by Navajos.

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URBAN OUTFITTERS

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COLORLINES
NEWS FOR ACTION

Urban Outfitters' 'Indian Chic' Prompts Sadly Familiar Outrage

by Jamilah King
Friday, October 21 2011, 10:03 AM EST

It doesn't take more than the ubiquitous Che Guevara t-shirt to know that corporate America loves to pimp other people's culture [http://colorlines.com/archives/2011/05/rebranded_revolutionary_icons.html] for profits.

So it wasn't all that surprising when Urban Outfitters released 21 products as part of its new "Navajo" fashion line. The new garments included the "Navajo Flask" and the "Navajo Hipster Panty."

But the Navajo Nation, which owns the trademark to the name "Navajo," didn't make it easy for the company to sell its products. And in the complicated legal battle that's ensued, the familiar theme of how and if companies should be able to profit off of the cultural symbols of communities of color has once again taken center stage.

Recently, the Navajo Nation sent Urban Outfitters a cease-and-desist letter in an effort to stop the company from using the trademarked name. "When products that have absolutely no connection to the Navajo Nation, its entities, its people, and their products are marketed and retailed under the guise that they are Navajo in origin, the Navajo Nation does not regard this as benign or trivial," the tribe's attorney Brian Lewis told the Washington Post [http://www.washingtonpost.com/lifestyle/navajo-nation-alleges-trademark-violations-in-urban-outfitters-clothing-accessories-branding/2011/10/17/gIQAkuSlqL_story.html] last week.

Neither the Navajo Nation nor Urban Outfitters responded to requests for comments from Colorlines.com this week. But it seems that the Navajo Nation got its demands met. This week Jenna Sauers at Jezebel [http://jezebel.com/5851441/urban-outfitters-gets-rid-of-all-its-navajo-products] noticed that the company had simply re-named the products. For instance, the "Navajo Hipster Panty" is now just the "Printed Hipster Panty."

But for some, there's a larger ethical question of whether any mainstream company can and should profit off of Native culture.

Sasha Houston Brown is a 24-year-old Native American woman who lives in Minneapolis. On Columbus Day, she published a seething open letter on Racialicious [http://www.racialicious.com/2011/10/10/an-open-letter-to-urban-outfitters-on-columbus-day/] addressed directly to Glen T. Senk, CEO of Urban Outfitters, Inc. In it, she describes her visceral reaction to seeing the products at a local Urban Outfitters store. Brown described the collection as "distasteful and racially demeaning" and criticized the company for what she called its "perverted cultural appropriation."

The letter apparently got the company's attention. A user logged into the Disqus comment system as "Glenn T. Senk" [http://disqus.com/Glen_T_Senk/] responded, saying that the company is "deeply sorry this issue has triggered an offended reaction" and posting the company's Philadelphia phone number to discuss the matter. Brown followed up, but has not yet received a response.

On Thursday afternoon, Brown spoke to Colorlines.com about why she wrote the letter. "My issue was never about a specific company," Brown said by phone. "They shouldn't have the right to profit off of our culture."

She continued: "It's not just about a pair of underwear or a flask, it's about how we are viewed by corporate America and dominant society."

Brown said she had become increasingly disturbed by what she called "Indian chic," which she described as the recurring trend in mainstream fashion and jewelry to mimic Native prints. She noted that it was particularly disturbing because Native artists who create fashion and jewelry are seldom recognized for their work. "We're in a culture where Native people are invisible in the mainstream," she said. "It really plays into the culture. Here you have a dominant corporation interpreting what they believe to be Native fashion or art, ripping it off, and making a profit."

So should mainstream fashion designers stay away from pieces that are inspired by indigenous art? Not exactly, according to Brown. "If it's done in the appropriate manner, it could be a really great segue for designers to have real conversations with tribes about the art's history and where it comes from."

But, Brown warned, it's a thin and often dangerous line to walk.

"There's no real recognition of the history of this nation, in terms of how we were robbed of our land and culture," she says. "We've fought so hard to protect what little we have today."

Read this online at **http://colorlines.com/archives/2011/10/navajo_nation_urban_outfitters.html**

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From Stanton, Meridith **Date** 12/9/2011 6:29:00 PM
To [redacted] Fry, Ashley; VanWey, Kenneth J
Cc
Subject Arizona Republic editorial about Navajos and Urban Outfitters
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Opinions

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From Alexander, Nina C. **Date** 10/20/2011 1:03:50 PM

To Stanton, Meridith; VanWey, Kenneth J; Hill, Michele K

Cc

Subject Navajo Complaint about Urban Outfitters

image001.jpg (2 KB HTML)

This is getting bigger and bigger. Navajo attorneys are stating that Urban Outfitters has violated the Indian Arts and Crafts Act and I have had calls from several artists asking what we are doing. I believe it's a trademark issue, not an Act issue but there is a fine line on this one and I understand that the Navajo Nation was going to the Indian Affairs Committee so you might get some questions.

Also, there is a Native American reporter at KOAT and I may get a call from her but will refer them to your office. There is a lot on Facebook about this but here's some links and information I have gathered from various sources for your review.

There is an article out today that states Urban took the words Navajo off the website but they have had no comment during the entire issue.

Urban Outfitters hasn't a clue what Navajo means

Add a comment

Elizabeth Rose

, Native American Jewelry and Art Examiner
October 16, 2011 - Like this? Subscribe to get instant updates.

Apparently the retailer, Urban Outfitters, has launched a line of "Indian type" items and has chosen to label the items with the moniker "Navajo." Now these items, neither made by or endorsed by Navajo people, are getting them in hot water. And rightfully so!

An excellent article, written by Allison Berry and published on Time Newsfeed, explains how important authenticity is when it comes to Native American products. She points out the range of products offered on the Urban Outfitters website and we then have to consider if Navajo can be used as a descriptive term.

Personally, I think not!

After spending a week serving the Navajo traditional elders on the Navajo Reservation, I know Navajo when I see it and Urban Outfitters hasn't a clue!

Indian Country Article

Here's a submission we received from a concerned member of the Santee Sioux nation; it's a letter addressed to the CEO of Urban Outfitters that raises some compelling moral and, interestingly, legal issues with some of the store's native themed clothing and accessories:

Dear Glen T. Senk, CEO Urban Outfitters Inc.:

This past weekend, I had the unfortunate experience of visiting a local Urban Outfitters store in Minneapolis. It appeared as though the recording "artist" Ke$ha had violently exploded in the store, leaving behind a cheap, vulgar and culturally offensive retail collection. Plastic dreamcatchers wrapped in pleather hung next to an indistinguishable mass of artificial feather jewelry and hyper sexualized clothing featuring an abundance of suede, fringe and inauthentic tribal patterns.

In all seriousness, as a Native American woman, I am deeply distressed by your company's mass marketed collection of distasteful and racially demeaning apparel and décor. I take personal offense to the blatant racism and perverted cultural appropriation your store features this season as "fashion."

All too often industries, sports teams and ignorant individuals legitimize racism under the guise of cultural "appreciation". There is nothing honorable or historically appreciative in selling items such as the Navajo Print Fabric Wrapped Flask, Peace Treaty Feather Necklace, Staring at Stars Skull Native Headdress T-shirt or the Navajo Hipster Panty. These and the dozens of other tacky products you are currently selling referencing Native America make a mockery of our identity and unique cultures.

Your corporate website claims to "offer a lifestyle-specific shopping experience for the educated, urban-minded individual". If this is the case, then clearly you have missed the mark on your target demographic. There is simply nothing educated about your collection, which on the contrary professes extreme ignorance and bigotry.

ABC NEWS

Go to www.abcnews.go.com and search on Urban Outfitters and you'll see all the articles.

Nina C. Alexander
U.S. Department of the Interior
Office of the Special Trustee for American Indians
4400 Masthead Street, NE
Albuquerque, NM 87109
(505) 816-1324 (desk)
(505) 350-6908 (mobile)
(505) 816-1139 (fax)

From Chaney, Christopher (USAEO) **Date** 10/20/2011 8:11:40 AM

To Stanton, Meridith

Cc

Subject Urban Outfitters

Hi Meridith,

FYI: http://www.washingtonpost.com/business/industries/urban-outfitters-pulls-navajo-name-from-products-on-website-in-wake-of-criticism/2011/10/19/gIQAyEu9xL_story.html

Chris

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Urban Outfitters Pulls Navajo Name from Collection; Heard Museum Weighs In on Native-Inspired Fashion That *Should* Be Produced

By Lauren Gilger

published: Wed., Oct. 19 2011 @ 1:04PM

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Way to go, **Urban Outfitters**. Last week, the clothing store caused a nationwide stir in Native American communities with its collection of "Navajo-inspired" items. Community members signed petitions, open letters were sent, and the Arizona-based Navajo Nation ordered a cease and desist on the word "Navajo" (to which it owns the trademark). A heated debate about the cultural insensitivity -- and legality -- of the clothing store's collection quickly followed.

Until **Wednesday morning**, the collection included the Navajo Print Fabric Wrapped Flask, the OBEY Wool Navajo 5-Panel Cap, and the Navajo Hipster Panty. But a search on the Urban Outfitters website for "Navajo" now returns no results. Looks like **Urban Outfitters removed the word from every item's name** (e.g. the Navajo Hipster Panty is now the Printed Hipster Panty).

We decided to take the issue to the experts at the Heard Museum in downtown Phoenix, who were more than happy to weigh in and show a few artistic and cultural inspirations Urban Outfitters skipped out on.

"There's so many other things that [Urban Outfitters] could have done that would have been so much more interesting," says Andrea Hanley, director of the Berlin Gallery at the Heard.

She shows us some of the pieces going into the newest exhibition at the gallery, including Steven J. Yazzie's painting (seen above, next to the Navajo Hipster panty) and a vibrant print from Normal Akers (below).

Lauren Gilger

Native artists are doing diverse, interesting, and innovative work all over the country, Hanley tells us. "Why do you have to go to this cheap kind of version?" she asks. "Why wouldn't we be able to collaborate with really great, contemporary Indian artists?"

Lauren Gilger

The patterns that Urban Outfitters is selling as "Navajo" are likely inspired by traditional Navajo rugs, Hanley says as she sorts through the piles of hand-woven rugs in the Heard's gift shop. Each one has an attached meaning, time and place in its culture.

"They're different time periods and they're different styles," she says. "And they're from different areas within the Navajo reservation."

The Heard Museum's Larissa Curtis agrees. "And to just slap it on a shirt, it gets to be a little bit offensive," she says, "because they don't know what they're doing."

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Showing 1 comment

TEKDIVERAZ 3 hours ago

I would not call the old honkys at the Heard to be the "experts". They think they are, yes, but that is about where it ends. Talk to a Navajo instead. instead. They would care less about this hoopla.. This silly stuff is just that, silly.

The Washington Post

Back to previous page

Urban Outfitters pulls 'Navajo' name from products on website in wake of criticism

By Associated Press, Published: October 19

FLAGSTAFF, Ariz. — Urban Outfitters has removed the word "Navajo" from product names on its website in the wake of criticism from the Navajo Nation government, bloggers and others, who viewed the usage as disrespectful and a trademark violation.

As recently as last week, the trendy clothing chain used "Navajo" in more than 20 product names online, including jackets, earrings and sneakers. Two items in particular sparked controversy: the "Navajo Hipster Panty" and the "Navajo Print Fabric Wrapped Flask."

The products now appear on the company's website as "printed" instead of "Navajo."

It's unclear whether the change has extended to any of Urban Outfitters' stores across the U.S. and in eight other countries. There was no sign of the word "Navajo" on any products at an Urban Outfitters in downtown Tempe on Wednesday.

The company received a cease-and-desist letter from the Navajo tribe a week ago, demanding the Navajo name be pulled from its products, Urban Outfitters spokesman Ed Looram said Wednesday. He declined to comment further, saying the matter is in the hands of the company's legal department.

Urban Outfitters last week told The Associated Press it had no plans to alter its products. The online name changes were first reported by Indian Country Today.

The Navajo Nation Department of Justice said Wednesday the changes were "positive" and "more consistent with the corporation's responsibilities than previously demonstrated."

"If the company has also ceased using the Navajo name in conjunction with its merchandise in its retail stores and print-media advertising, these are encouraging steps by the company towards amicably resolving this matter," the department said in a release.

The tribe holds at least 10 trademarks on the Navajo name that cover clothing, footwear, online retail sales, household products and textiles, and said it was intent on protecting those trademarks.

It's not the first time the Navajo Nation has taken action to assert its trademarks. The tribe licenses its name to other businesses in exchange for a share of their profits, and has identified about two dozen companies it believes are violating the Navajo trademark.

Earlier this year, the tribe successfully forced the cancellation of a "Navaho" trademark used by a French company doing business in the United States. The tribe argued the name was phonetically identical and infringed on its trademark.

"The corporation acted responsibly and adhered to its commitment to adopt a different trademark," tribal attorney Brian Lewis told the AP. "In doing so the company confirmed its respect for the (Navajo) Nation and its principles. This is the preferred resolution of these kinds of matters."

Urban Outfitters' use of "Navajo" sparked a flurry of criticism online, with tribal members and bloggers calling the product names offensive and telling the company to knock it off.

Shane Hendren, who heads the Albuquerque, N.M.-based Indian Arts and Crafts Association Education Fund, said the company's decision to pull the name from its site appeared to be a direct response to the backlash. If the clothing chain or any other company wants to showcase the Navajo name, they should go directly to the source, he said.

"There's a great many Navajo designers out there who would be more than willing to work for a firm and design garments for them," said Hendren, of Tohatchi, N.M. "And

having the cultural background, be able to not only give you an authentic design but stay within their cultural parameters."

Native American fashion blogger Jessica Metcalfe also sees an opportunity for collaboration. The appropriation of Native cultures isn't likely to stop. But large corporations could benefit from working with Native artists who draw from the legacy of their ancestors, she said.

"I'm happy to see that Native people are standing up and saying that this profiting off what is ours is wrong," said Metcalfe, a Turtle Mountain Chippewa.

Jaclyn Roessel, of the Navajo town of Kayenta, said Urban Outfitters' approach to Native-inspired designs was callous and irresponsible.

Alcoholism is one of the reservation's most prevalent social ills, so having a flask branded as Navajo didn't sit well with her or others — nor did the Navajo-branded underwear in a culture that preaches modesty.

"I think it's up to these mass retailers to start advocating for more responsible production of good when working with sensitive things," said Roessel, who educates others on American Indian culture at the Heard Museum in Phoenix.

"I'm curious to see what the ripple effects of this are," she added. "And I hope they're positive."

Associated Press writer Michelle Price in Phoenix contributed to this report.

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National

Navajo calls out Urban Outfitters for its products

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By FELICIA FONSECA
Associated Press

FLAGSTAFF, Ariz. (AP) - Urban Outfitters' line of Navajo-branded clothing and accessories has set off a firestorm online and within the Navajo Nation government, with allegations of trademark violations and criticism of the products _ particularly underwear and a liquor flask _ that many tribal members consider disrespectful.

Native American-inspired prints have shown up on runways for years, and it's common for designers to borrow from other cultures.

But the Navajo government's issue with Urban Outfitters is the clothing chain's use of the name "Navajo" on its products and in marketing. The tribe holds at least 10 trademarks on the name that cover clothing, footwear, online retail sales, household products and textiles.

The tribe's Department of Justice sent Urban Outfitters CEO Glen Senk a cease-and-desist letter in June, demanding that the company pull the Navajo name from its products. The tribe has received no response but says it remains "cautiously optimistic" it can persuade Urban Outfitters to adopt another name and trademark.

"When products that have absolutely no connection to the Navajo Nation, its entities, its people, and their products are marketed and retailed under the guise that they are Navajo in origin, the Navajo Nation does not regard this as benign or trivial," said Brian Lewis, an attorney for the tribe. "It takes appropriate action to maintain distinctiveness and clarity of valid name association in the market and society."

Urban Outfitters, which has stores across the country and overseas, said it has not heard from the Navajo Nation and has no plans to alter its products.

"Like many other fashion brands, we interpret trends and will continue to do so for years to come," company spokesman Ed Looram said. "The Native American-inspired trend and specifically the term 'Navajo' have been cycling through fashion, fine art and design for the last few years."

While the Navajo Nation has not threatened legal action, law professor Bill Hennessey thinks it has a strong case. He said the tribe could argue the products cause confusion among customers about who manufactured them.

Pedestrians walks past Urban Outfitters Friday, Oct. 14, 2011 in Tempe, Ariz. Urban Outfitters' line of Navajo-branded clothing and accessories has set off a firestorm online and within the Navajo Nation government, with allegations of trademark violations and criticism of the products _ particularly underwear and a flask _ that some tribal members see as tasteless and disrespectful. (AP Photo/Matt York)

Hennessey points specifically to a trademark governing textiles that was registered to a Navajo Nation enterprise in 2008.

"If you're going to maintain control over your mark, the more quickly you bring an action against the infringer, the more likely the federal court is going to grant an injunction order prohibiting Urban Outfitters from continuing to use the word 'Navajo,'" said Hennessey, who teaches at the University of New Hampshire School of Law.

Urban Outfitters labels more than 20 products on its website with the word "Navajo," including jackets, earrings, scarves and sneakers. But the two items that have sparked possibly the most controversy online are the "Navajo Hipster Panty," and the "Navajo Print Fabric Wrapped Flask." Both have geometric designs common in Navajo arts and crafts.

Dwayne Clauschee, a designer from the Navajo town of Chinle in Arizona, said Urban Outfitters and other clothing companies are trying to cash in on a trend he believes has been done more respectfully and tastefully in higher-end fashion.

A "Navajo" flask is "extremely insensitive" considering the long history of alcohol abuse among Native tribes, many of which ban the sale and consumption of alcohol on their reservations, he said. The Navajo Nation is among them. And branding underwear as "Navajo" goes against the tribe's spiritual beliefs of modesty and avoidance of indecency, Clauschee said.

Jessica Metcalfe, a Turtle Mountain Chippewa from North Dakota who writes a Native American fashion blog, tells Urban Outfitters to knock it off. "Don't claim Navajo, unless it's Navajo, and you ain't Navajo."

Sasha Houston Brown of the Santee Sioux Nation posted a letter online to the company saying it "has taken indigenous life ways and artistic expressions and trivialized and sexualized them for the sake of corporate profit."

Urban Outfitters isn't alone in its Navajo-branding.

Fermin Navar and his business partner, Phil Brader, signed a 75-year licensing agreement with the Navajo Nation in 2007 that allows them to sell skin care products and clothing under the Navajo name in exchange for a share of the profits. Navar said they've come up with a list of nearly two dozen companies the believe are violating the trademark.

The name appealed to Navar because the tribe is well-known for its huge reservation that spans 27,000 square miles in Arizona, New Mexico and Utah, its membership that ranks among the top two for American Indian tribes, and its cultural beliefs that tie beauty to harmony. Navajos also are known more broadly for using their language to develop a code that confounded the Japanese and helped win World War II.

"The design doesn't matter; it's the use of the name Navajo," said Navar of Austin, Texas. "They can say it looks like this, but if it has the name Navajo _ it's being branded and sold as Navajo _ it's a violation."

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Navajo Nation alleges trademark violations in Urban Outfitters' clothing, accessories branding

By Associated Press, Published: October 17

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