

Calendar No. 898

106TH CONGRESS }
2d Session }

SENATE

{ REPORT
106-452

TO IMPROVE THE CAUSE OF ACTION FOR MISREPRESENTATION OF INDIAN ARTS AND CRAFTS

OCTOBER 2 (legislative day, SEPTEMBER 22), 2000.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs,
submitted the following

REPORT

[To accompany S. 2872]

The Committee on Indian Affairs, to which was referred the bill (S. 2872) to provide for amendments to the Indian Arts and Crafts Act of 1990 (IACA, or “the Act”), P.L. 101-644 (25 U.S.C. 305e), having considered the same, reports favorably thereon with a bill and recommends that the bill do pass.

PURPOSE

The purpose of S. 2872 is to provide technical amendments to improve the enforcement of the IACA for the protection of the economic and cultural integrity of authentic Indian arts and crafts, and for other purposes.

BACKGROUND

Today’s market for Indian-made goods currently exceeds \$1 billion in revenue, but it is estimated that \$400 to \$500 million of that demand is being satisfied from non-Indian, and largely, non-U.S. sources.¹ This growing influx of inauthentic Indian arts and crafts has dramatically affected the Indian arts and crafts market by driving down prices, and tainting consumer confidence in and the cultural integrity of the market. With Native communities plagued by unemployment and stagnant economies, the flood of fake Indian arts and crafts is decimating one of the few forms of

¹ John Shiffman, \$1 billion Industry Reeling as Faux Crafts Flood Market, USA Today, April 8, 1998 at 2A; James Brooke, American Indian Crafts Lose Native Edge As Foreign Fakes Flourish, International Herald Tribune, August 4, 1997 at 11.

entrepreneurship and economic development on Indian reservations.²

Imitation Indian arts and crafts are generally mass-produced, and thus, manufactured at a substantially reduced cost, generally around ten percent the cost of the original, authentic good. To compete, traditional Indian artisans are required to reduce their prices and reduce their profit margin. As a result, many traditional Indian artisans have retired from their professions because of this weakening of the market.³

Another result of the rapid rise in imitation Indian arts and crafts is that consumer confidence in this market is declining. Lack of consumer confidence will reduce the demand for Indian arts and crafts as consumers shift their preference to goods with greater consumer protections.

The flood of inauthentic Indian arts and crafts also damages traditional Indian heritage and culture. Indian arts and crafts are created through time-honored cultural practices and traditions. Inter-generated continuity of these cultural practices is threatened when young people are deterred from becoming artisans because of the changing market that results from the surge of cheaply made, imitation Indian arts and crafts. The following statement illustrates the spiritual nature of traditional Indian artistry.

The intangible thing that separates Native Art from the generic terminology “arts and crafts” is the fact that the art produced by Indian nations is an extension of their heart and soul. A Native artist cannot, for the most part, go out to the local store and purchase raw materials to make their art or craft. The process for obtaining the raw materials is an invested effort of harvesting either animals, plants, or other natural materials that first need to be processed to a usable form. Even this is premised by a prayer ceremony to the Creator, before taking from the land * * * It remains a very spiritual act in creating an art or craft; and many still practice the ‘old Ho Chunk teaching’ in that a flaw is inconspicuously made in the art price in respect to the Creator, knowing that He is the only Perfect Creator.⁴

THE 1935 ACT AND THE 1990 AMENDMENTS TO THE ACT

The Indian Arts and Crafts Act of 1935 (“the organic Act”) P.L. 74–355, 25 U.S.C. 305e was enacted to promote American Indian and Alaskan Native economic development through the expansion of the Indian arts and crafts market. The organic Act established the Indian Arts and Crafts Board (IACB) to promote the development of Indian arts and crafts. As a result, the IACB focused on

²At the Zuni Pueblo, approximately eighty-five percent of the population relies on Indian arts and crafts sales as either a primary or secondary source of income. Due to the importation of inauthentic Indian arts and crafts, these artisans have noticed that it is more difficult to sell their work and that their work sells at a reduced price from that of ten years ago. Implementation of the Indian Arts and Crafts Act of 1990: Oversight Hearing Before the Senate Committee on Indian Affairs, 106th Congress (2000) (statement of Tony Eriacho, Jr., Board Member, Indian Arts and Crafts Association).

³The Isleta Pueblo’s full-time artisan population has reduced from 150 to 30 individuals over the past ten years. *Implementation of the Indian Arts and Crafts Act of 1990: Oversight Hearing Before the Senate Committee on Indian Affairs*, 106th Congress (2000) (statement of Andy Abeita, President, Council for Indigenous Art and Culture).

⁴Id.

establishing and expanding an Indian arts and crafts market. In addition, the organic Act had two enforcement mechanisms: (1) the IACB was authorized to establish a government trademark of genuineness; and (2) the Act established criminal penalties for the counterfeiting of the IACB trademark and the misrepresentation of the authentic Indian arts and crafts. Although the organic Act contained these enforcement provisions, the promotion of Indian arts and crafts was the primary focus of the IACB throughout the 1935–1990 period.

In 1990, the Act was amended to provide stronger enforcement through enhanced civil and criminal sanctions.⁵ Even with these strengthened enforcement provisions, to date there has yet to be a civil or criminal conviction under this Act. In addition, the Department of Interior has yet to issue trademark regulations regarding the trademark provisions pursuant to the organic Act and the 1990 amendments to the organic Act.

Under the 1990 amendments, the criminal penalties for individuals who violate the statute range from a fine of \$250,000 to \$1,000,000 and/or a prison sentence ranging from five to fifteen years, depending on whether the defendant is a repeat offender. In addition, a corporation is liable for a sum of \$1,000,000 on its first offense and up to \$5,000,000 on subsequent offenses. Civil sanctions include injunctive and other equitable relief, monetary damages, punitive damages and attorneys fees.

In criminal cases, only the Attorney General of the United States (“Attorney General”) has standing to prosecute possible violations of the Act. The IACB’s role in a criminal case is to receive a complaint, recommend that the Federal Bureau of Investigation (FBI) investigate the merit of the complaint, and then the IACB may recommend that the Attorney General proceed with a criminal action. The 1990 amendments designate only the Attorney General and an Indian tribe⁶ as having standing to bring civil suit under the Act. The IACB’s role in a civil case is to receive a complaint, recommend that the FBI investigate the merit of the complaint, and then recommend that the Secretary of the Interior refer the matter to the Attorney General for civil prosecution.

SECTION-BY-SECTION ANALYSIS

Sec. 1. Short Title.

The title of this act is the Indian Arts and Crafts Enforcement Act of 2000.

Sec. 2.

Amendments to Civil Action Provisions. All amendments will be made to Section 6 of the IACA.

Section 6(a). To enhance the ability of the plaintiff to assess and calculate damages, the phrase “directly or indirectly” will be added after the phrase “against a person who.” This provision clarifies that suit may be brought against a manufacturer and/or supplier when the plaintiff is not in direct competition with the manufacturer or supplier. For example, this language would authorize an

⁵P.L. 101–644 § 104–105.

⁶An Indian tribe may bring a civil cause of action for either itself, an individual Indian, or an Indian arts and crafts association.

Indian tribe to bring civil suit against wholesalers and others involved in the chain of distribution, although these defendants may not be the final retailer who sells the violative product.

Section 6(a)(2)(B). This section is amended to clarify how treble damages can be assessed. Plaintiffs who bring suit under the IACA, like other consumer protection cases, have difficulty in proving and quantifying damages. For example, lost or diminished sales attributable to the complained behavior, are difficult or impossible to prove. With this amendment, plaintiffs may use the defendant's profits from selling the violative product as a basis for assessing damages. This approach is similar to how the Lanham Act assesses damages.⁷

Section 6(c)(1)(B). Under Section 305e(c), only the Attorney General or an Indian tribe may bring civil suit for alleged violations of the IACA. This amendment authorizes both Indian arts and crafts organizations and individual Indians to bring suit for alleged violations of the Act.

To date, there has not been a successful prosecution under the IACA. One of obstacles in enforcing the IACA has been the lack of suits initiated by either the Attorney General and individual Indian tribes. Often these entities are not aggressive in bringing suits on behalf of individual artisans and/or artisan organizations because the Attorney General or an Indian tribe suffer no direct injury. Individual Indian artisans and artisan organizations suffer both financial and cultural injury from inauthentic Indian arts and crafts entering the market. By broadening standing under the statute, the Committee's intent is to encourage greater enforcement of the Act.

Section 6(c). This section is amended to authorize the Attorney General to allocate a portion of the damages collected in a successful prosecution to reimburse the IACB for its costs in investigating and bringing about the successful prosecution of the suit.

Section 6(d)(2). This section is amended to make the definition of Indian products more precise throughout the regulatory process. This amendment requires the IACB to promulgate regulations which include specific examples of Indian products to provide guidance to the artisans, as well as purveyors and consumers, of Indian arts and crafts.

LEGISLATIVE HISTORY

A hearing on the implementation of the Act was held on May 17, 2000 and the Indian Arts and Crafts Enforcement Act of 2000 (S. 2872) was introduced on July 14, 2000, by Senator Campbell, for himself, and for Senators Bingaman, Kyl, Domenici, and Johnson. S. 2872 was referred to the Committee on Indian Affairs on July 14, 2000. On July 26, 2000, the Committee on Indian Affairs convened a business meeting to consider S. 2872 and other measures that had been referred to it, and on that date, the Committee ordered S. 2872 reported favorably without an amendment.

⁷ 15 U.S.C. at § 1117 (1946).

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On July 26, 2000, the Committee on Indian Affairs, in an open business session adopted S. 2872 by voice vote and ordered the bill reported favorably to the full Senate.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 2872 as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 7, 2000.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2872, the Indian Arts and Crafts Enforcement Act of 2000.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lanette J. Keith.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 2872—Indian Arts and Crafts Enforcement Act of 2000

CBO estimates that implementing S. 2872 would have no significant impact on the federal budget. Because enactment of S. 2872 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill. S. 2872 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

S. 2872 would allow Indian arts and crafts organizations to seek damages in the federal courts from persons misrepresenting arts and crafts as having been produced by Indians. Based on information from the Administrative Office of the United States Courts, CBO expects that any increase in federal costs for court proceedings would not be significant because of the small number of cases likely to be involved. Any additional costs to implement the bill would be subject to the availability of appropriated funds.

The CBO staff contact for this estimate is Lanette J. Keith. The estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory paperwork impact that would be incurred in implementing the legislation. The committee has concluded that enactment of S. 2872 will create only *de minimis* regulatory or paperwork burdens.

EXECUTIVE COMMUNICATIONS

The Committee has received no official communication from the Administration on the provisions of the bill.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill are required to be set out in the accompanying Committee report. The Committee finds that enactment of S. 2872 will result in the following changes to 25 U.S.C. § 305(e), with existing language which is to be deleted in bold brackets and new language to be added in italic:

25 U.S.C. 205e(a)

(a) INJUNCTIVE OR EQUITABLE RELIEF; DAMAGES.—

A person specified in subsection (c) of this section may, in a civil action in a court of competent jurisdiction, bring an action against a person who, *directly or indirectly*, offers or displays for sale or sells, a good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States, to—

- (1) obtain injunctive or other equitable relief; and
- (2) recover the greater of—

(A) treble damages; or

(B) in the case of each aggrieved individual Indian, Indian tribe, or Indian arts and crafts organization, not less than \$1,000 for each day on which the offer or display for sale or sale continues.

For purposes of paragraph (2)(A), damages shall include any and all gross profits accrued by the defendant as a result of the activities found to violate this subsection.

25 U.S.C. 305e(c)

(c) PERSONS WHO MAY INITIATE CIVIL ACTIONS.—

- (1) A civil action under subsection (a) of this section may be commenced—

(A) by the Attorney General of the United States upon request of the Secretary of the Interior on behalf of an Indian who is a member of an Indian tribe or on behalf of an Indian tribe or Indian arts and crafts organization; **[or]**

(B) by an Indian tribe on behalf of itself, an Indian who is a member of the tribe, or on behalf of an Indian arts and crafts organization**[.]**. *or*

(C) by an Indian arts and crafts organization on behalf of itself, or by an Indian on behalf of himself or herself.

- (2) Any amount recovered pursuant to this section shall be paid to the individual Indian, Indian tribe, or Indian arts and crafts organization, except that—

(A) in the case of paragraph (1)(A), the Attorney General may direct from **[the amount recovered the amount]** *the amount recovered*—

(I) the amount for the costs of suit and reasonable attorney's fees awarded pursuant to subsection (b) of this section and deposit the amount of such costs and fees as a reimbursement credited to appropriations currently available to the Attorney General at the time of receipt of the amount recovered; and

(ii) the amount for the costs of investigation awarded pursuant to subsection (b) and reimburse the Board the amount of such costs incurred as a direct result of Board activities in the suit; and

(B) in the case of paragraph (1)(B), the amount recovered for the costs of suit and reasonable attorney's fees pursuant to subsection (b) of this section may be deducted from the total amount awarded under subsection (a)(2) of this section

25 U.S.C. 305e(d)(2)

(2) *subject to subsection (f)*, the terms "Indian product" and "product of a particular Indian tribe or Indian arts and crafts organization" has the meaning given such term in regulations which may be promulgated by the Secretary of the Interior;

25 U.S.C. 305e(f)

(f) Not later than 180 days after the date of enactment of the Indian Arts and Crafts Enforcement Act of 2000, the Board shall promulgate regulations to include in the definition of the term 'Indian product' specific examples of such product to provide guidance to Indian artisans as well as to purveyors and consumers of Indian arts and crafts, as defined under this Act.