



# PATENT AND TRADEMARK OUTREACH AND INDIGENOUS INTELLECTUAL PROPERTY

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*Providing academic library outreach to indigenous communities creates opportunities for enhancing cultural humility and competence, and the potential to show nation-to-nation respect.*

*Efforts along these lines complement land acknowledgement statements developed at US Universities, providing a means to recognize the violence perpetrated against American Indians over 500 years of expansionism. One form this violence takes is the theft and abrogation of tribal rights concerning their cultural property, intellectual property (IP), and symbology.*

*A literature review confirms that indigenous populations continue to struggle to maintain control over their cultural and intellectual property. While some kinds of US federal IP protections exist for indigenous inventors, business owners and councils, our research reveals few tribes are taking advantage of these programs. For instance, within the Four Corner states (Colorado, Utah, Arizona, and New Mexico) there are 53 federally recognized tribes and only 5 tribes have taken advantage of the United States Patent and Trademark Office's (USPTO) tribal insignia trademark program.*

*The goal of this multi-state, multi-institutional project is to create an educational outreach program about patents and trademarks to these populations. This paper will review our research findings on American Indian IP, our progress to date, and the next steps. Librarians from two public universities—the New Mexico State University and University of Utah—will discuss the relevant literature and review updates to indigenous IP law in the US, as well as from around the world. We will provide case examples of American Indian intellectual property lawsuits or stories to highlight indigenous populations' struggle to obtain protections for inventions, businesses, and tribal imagery through patents and trademarks.*

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*Furthermore, we will discuss the concept of cultural humility and competence and describe steps we are taking to develop a respectful outreach program. We will highlight steps our institutions have taken to develop land acknowledgement statements and relationships with the tribes; moreover, how we have worked within our institutions' initiatives related to relationships with local tribes. Finally, we will describe specifically how libraries can be respectful and helpful to American Indian inventors and entrepreneurs who live in this region.*

## INTRODUCTION

Intellectual property is a distinctly Western concept that originates more than five hundred years ago in Italy, France, and England.<sup>1</sup> Through the enactment of laws and protocols governing the protection of inventions and works of art, intellectual property evolved into a legal framework through which inventors, commercial interests, and corporations would capture value by defending temporary monopolies. Modern intellectual property laws envision a primary inventor or owner of a work, even if that work may be traded or licensed to companies positioned to exploit the invention or symbol for gain. This concept of legally enforceable singular ownership is at odds with the communal ownership model followed by indigenous people in oral traditions.<sup>2</sup>

In the United States, intellectual property includes the domains of inventions (patents), commercial symbols or signs (trademarks), writings, songs, images (copyrights), and protected methods or formulas (trade secrets). For this paper, we will focus primarily on patents and trademarks.

The authors participate in an outreach program through the U.S. Patent and Trademark Office (USPTO) in Alexandria, Virginia, the agency that evaluates inventions and trademarks for publication, and has the authority to create legal protections. Located in more than 80 academic, state, and public libraries, these Patent and Trademark Resource Centers (PTRC) extend USPTO outreach through intellectual property education and research services to members of the public. In New Mexico the only PTRC office is located in the far south portion of the state, at New Mexico State University's Zuhl Library. In Utah, the only PTRC is located at the Marriott Library at the University of Utah, Salt Lake City. Between these two offices, it is our mission to extend IP outreach to a population of more than 5 million individuals. This includes individuals from cities, from the country, and indigenous members of sovereign tribes.

This work corresponds with an international movement in the IP community to provide the basis for repatriation of indigenous works through the establishment of laws, upholding treaties, and protecting traditional knowledge.<sup>3</sup> It follows decades of work to establish more robust protections for Native American tribes, particularly the protection of sacred tribal symbols through the Native American Trademark Insignia Program, established in 1999.

The purpose is to assess the current IP protection amongst the federally recognized Four Corners tribes. The aims are to demonstrate the need for concentrated outreach to protect traditional knowledge and to encourage future participants to seek protection. In the course of our efforts, we also find that there are valuable lessons to be learned about cultural humility and competence and opportunities to show nation-to-nation respect.

## METHODS

After conducting a comprehensive literature review, the authors then proceeded to map the USPTO-protected intellectual property across these tribes and pueblos in the Four Corners region. The Four Corners region refers to the states of New Mexico, Utah, Arizona, and Colorado, which intersect at a single quadripoint in the American Southwest. This area has been inhabited for thousands of years and contains the remnants of 19th century trade routes such as the Old Spanish Trail. There are 50 Federally Recognized Tribes in the four states. A complete list of the tribes was obtained through the Bureau of Indian Affairs, Department of the Interior. This list was added to a Google Drive Sheet, along with the columns for state, tribal insignia serial number, number of trademarks, number of patents, and number of patent applications.

Search strategies were discussed and formulated to identify all trademarks and patents held by the tribes and subsidiary organizations. The authors discovered that the full names of the Federally Recognized Tribes are

not always suitable as keywords, due the inclusion of special symbols, name variations, or because of length. An example is the Federally Recognized Tribe name: “Skull Valley Band of Goshute Indians of Utah.” We found that shortening the search query to “*Skull Valley Band*” or (*Goshute AND Utah*) yielded better results due to discrepancies in how the patent or trademark records were constructed.

In the case of trademarks, we used a USPTO database called the Trademark Electronic Search System (TESS). To review tribal insignia we also used the TESS database, but searched for a specific term in the notes field, which is “Native American Tribal Insignia,” and then cross checked the output list with the list of tribes in the Four Corners region. For locating patents, we used the USPTO database called Patent Full-Text Database (PatFT). For patent applications we used the USPTO database called Application Full-Text Database (AppFT). Two librarians recorded their searches, tracking the progress, and results in this shared Google Sheet in August-September 2019. The searches were rerun on January 26, 2021 with minimal changes.

## RESULTS

Five tribes in the Four Corner states have registered their tribal insignia with the USPTO. Within the Four Corner states there are 370 live trademarks affiliated with the federally recognized tribes. There are two patents and 1 patent application for this region. Table 1 illustrates the federal IP protection. It is worth noting that these tribes are sometimes mentioned within the patents, but are not the inventor, assignee, or applicant, so those patents were not included.

TABLE 1					
Federal intellectual property protection amongst federally recognized tribes in the Four Corner states					
State	Arizona	Colorado	New Mexico	Utah	Multiple Four Corner States
Federally Recognized Tribes	20	1	21	5	3
Tribal Insignias	3	0	1	1	0
Trademarks (Live)	199	1	39	0	131
Patents (PatFT)	0	2	0	0	0
Patent Applications (AppFT)	0	1	0	0	0

## DISCUSSION

### *IP Protections and Concerns*

Our IP analysis reveals that the majority of Four Corners tribes have not sought federal IP protection through the USPTO. According to a United States Patent and Trademark Office and Department of Commerce report, IP protection is related to economic well-being.<sup>4</sup> Our literature review provides some context around this question of why Native American tribes and members have shown reluctance when applying for federal protection of intellectual assets. First, the history of Western expansionism and abrogation of treaties is well documented (Tanana 2020). The US Federal Government engaged American Indians through evolving doctrines, which included the doctrine of discovery starting in 1492, the Indian removal era in the 19th century, the allotment and assimilation era of the early 20th century, and the Indian self-determination policy era that persists today.<sup>5</sup>

One form of exploitation indigenous Americans have faced involves the theft and appropriation of cultural artifacts, creations, sacred symbols and art. In the early 20th century, the State of New Mexico, which attained statehood in 1912, hosted a contest to determine the design of the new state flag. The winning entry featured a yellow flag emblazoned with a red symbol that consisted of a central circle that radiates four red lines in four directions. The symbol was provided by an archaeologist who had seen the symbol on a 19th century pot created by the pot makers of the Zia Pueblo.

The Zia Sun Symbol had been used as a sacred symbol for more than 700 years by the tribe. Today, the symbol appears on every New Mexico flag, on every New Mexico license plate, on official documentation from the state. It has been emblazoned on all manner of merchandise, from T-shirts, to coffee mugs, to hats. Businesses have used the symbol and the tribal name to sell services and goods.

The tribe has pushed back against its usage in various ways, particularly starting in the 1980s when it filed lawsuits against companies using its symbol and name. Those efforts had some success in court, but ultimately the tribe had more success by establishing licensing agreements for use of the symbol.<sup>6</sup> As explained by Turner, the tribe recruited then U.S. Senator Jeff Bingaman in a legislative effort to establish greater federal protection over its symbols, an effort that ultimately compelled the USPTO to establish the Native American Tribal Insignia (NATI) program, which aims to protect sacred symbols from unwanted commercial use. An effort to provide more robust protections failed in Congress.

The Native American Tribal Insignia program allows tribes to submit tribal insignia to the USPTO for registration in the trademark database. While it does not provide any new powers for tribes to object to commercial use, the trademark examiners can judge the novelty of new trademark applications against the insignia that exist in the database. This was seen as an inadequate half-measure by many tribes, and today less than 10 percent of the Federally Recognized Tribes in the United States have submitted insignia to the database. In the Four Corners region, just five tribes have submitted insignia. Bernholz noted that some tribes, such as the Mashantucket Pequot Tribal Nation in Connecticut, do not use NATI because they want more financial protection by using trademarks instead.<sup>7</sup>

Various authors have theorized that the lack of participation reflects the lack of trust between the tribes and the US Government.<sup>8</sup> Interestingly, despite Zia being instrumental in the establishment of NATI at the turn of the century, it did not submit an application to include the Zia symbol in the trademark database until 2018. Other examples of tribal insignia being appropriated by commercial interests include Nike's female leggings with designs similar to male Samoan tattoos, other clothing prints using indigenous designs, and Urban Outfitters' and others various "Navajo" clothing and retail lines.<sup>9</sup>

## Four Corner States Outreach

In April 2019, members of the Laguna Pueblo, located about 45 miles west of Albuquerque, travelled three hours south to receive assistance at the PTRC located at NMSU. This initial consultation lasted several hours and led to more meetings in the following weeks as they created a patent application to the USPTO. In the four years that the NMSU PTRC has operated, this is the only known instance in which members of a Federally Recognized Tribe sought this kind of assistance with us, which raises the question: Why don't more Native American inventors and business owners seek this research assistance?

When our research group examined the Four Corners region, we found that there was a lack of utilization of USPTO services throughout dozens of Federally Recognized Tribes within our service areas. These findings suggested a need for concentrated outreach through a joint-PTRC educational program and training. The central assumption of this effort is that there are members of sovereign tribes, who have developed IP in the form of inventions or trademarkable brands, but who don't know that libraries in the region offer resources to assist them to gain legal protections. Thus, we are primarily concerned with providing educational opportunities about intellectual property for members of tribes and pueblos. The central assumption of such a program is that more individuals would seek intellectual property protections if there were more awareness of the resources freely available through the PTRCs and the USPTO. This assumption should be tested.

Creating an interstate program of such magnitude will require cooperation and coordination with various entities, including: Business incubators, Small Business Development Centers, PTRCs at other libraries, our academic institutions and libraries, the USPTO and its regional offices (in Dallas, Denver, and Silicon Valley), and the leadership of the tribes. To this end, we have been building a coalition within our respective states to achieve this goal.

After consulting with tribal members and leaders at our respective campuses, we decided that the first step should be sending a formal and respectful letter, on behalf of our library leadership, to each tribal leader. We

drafted the letter in consultation with our campus partners and were preparing to send it out in spring 2020. This effort was paused once the COVID-19 pandemic began to ravage communities and tribal nations in the Four Corners area.

## COVID-19 Impact and Future Directions

COVID-19 has exasperated existing disparities, especially in American Indian communities. Our team decided to pause our initial contact with the leaders, since they were responding to a more urgent crisis. According to the Navajo Department of Health, the impact of COVID-19 on the Four Corners region has been documented and described as devastating.<sup>10</sup> Positivity rates in some of these areas topped 40 percent in late spring, far above the national and state average. Back in early May, the New Mexico Governor invoked the Riot Control Act to prevent all traffic from entering or leaving Gallup. While we believe intellectual property development is crucial for economic recovery, it is simply not the right time to try to make headway in a region that has faced such difficult hardship and death. We are hoping to reach out later this year as leaders shift their focus from COVID-19 vaccinations to economy recovery. We hope our educational outreach idea can be one component to their redevelopment plans.

## Cultural Humility and Competence

The importance of approaching this project from a perspective of nation-to-nation respect cannot be overstated. Hundreds of years of expansionary and exploitative doctrines have caused deep wounds and persistent mistrust. Indeed, it has been shown that mistreatment of indigenous peoples over several centuries has led to worse health outcomes, poverty, and puts them at higher risk from the ravages of this pandemic.<sup>11</sup> In step with a national movement to acknowledge this exploitation, each of our Universities has drafted land acknowledgement statements that seek to show respect to those who lived on these lands before our institutions were founded:

*New Mexico State University honors Native American knowledges and world-views based on intimate relationships to the natural world. The genesis of the Southwest Indigenous Peoples, including the Pueblo, Navajo, and Apache, established their guardianship of the lands now occupied by New Mexico State University. As the state's Land-Grant University, we acknowledge and respect the sovereign Indian Nations and Indigenous Peoples. We pledge to have a meaningful and respectful relationship with the sovereign Indian Nations, Indigenous communities, and Native American Peoples within the institution.\**

*The University of Utah has both historical and contemporary relationships with Indigenous peoples. Given that the Salt Lake Valley has always been a gathering place for Indigenous peoples, we acknowledge that this land, which is named for the Ute Tribe, is the traditional and ancestral homelands of the Shoshone, Paiute, Goshute, and Ute Tribes and is a crossroad for Indigenous peoples. The University of Utah recognizes the enduring relationships between many Indigenous peoples and their traditional homelands. We are grateful for the territory upon which we gather today; we respect Utah's Indigenous peoples, the original stewards of this land; and we value the sovereign relationships that exist between tribal governments, state governments, and the federal government. Today, approximately 60,000 American Indian and Alaskan Native peoples live in Utah. As a state institution, the University of Utah is committed to serving Native communities throughout Utah in partnership with Native Nations and our Urban Indian communities through research, education, and community outreach activities.*

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\* NMSU's statement as drafted by and passed in the faculty senate.

The first step of constructing an educational program is to provide a basis for equality and a cultivation of cultural humility and competence. On a personal level, this means the self-reflection and examination of how we have benefited from the exploitative relationship. It also means being aware of the white savior complex and making sure that no action is taken in the spirit that we, as academic librarians, should act—even in beneficial ways—from a position of power. The better ethos for our project, we believe, is the sharing of knowledge in respect.

## CONCLUSION

Evidence points to lack of utilization of USPTO resources and federal IP protection among Native American Tribes. The PTRCs at New Mexico State University and The University of Utah are well positioned to provide educational outreach to indigenous inventors and business owners in the Four Corners region. Such a multi-state cooperative program will require the coordination between local, state, and national agencies. A collaborative network is being built, including PTRCs in Colorado and Arizona, tribal libraries, SBDCs, and with examiners in the USPTO. While the lack of USPTO utilization is concerning, we believe it is explainable by a long history of mistrust between the US Government and Native American tribes. If we are to succeed in providing this kind of outreach, it will be in the spirit of nation-to-nation respect, without obscuring or ignoring the damage done by past doctrines.

The COVID-19 pandemic revealed yet more evidence that Indigenous people in the United States continue to face adversity due to these historical harms. When APM Research Lab looked specifically at mortality rates by ethnicity, it was shown that indigenous people had suffered the largest numbers of deaths by population of any group, with one in every 475 Native Americans dying.<sup>12</sup> COVID-19 pandemic has caused tremendous suffering and pain in the communities we wish to serve for this educational outreach. Since IP development and ownership is a major component of regional economic health, we believe our program may assist Native American Tribes in the post-Covid-19 pandemic world.

## NOTES

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