

INDIAN ARTS AND CRAFTS ACT OF 1990

P.L. 101-644, see page 104 Stat. 4662

DATES OF CONSIDERATION AND PASSAGE

House: September 27, October 27, 1990

Senate: October 25, 27, 1990

House Report (Interior and Insular Affairs Committee)

No. 101-400(I), Feb. 6, 1990

[To accompany H.R. 2006]

House Report (Judiciary Committee) No. 101-400(II),

Sept. 21, 1990

[To accompany H.R. 2006]

Cong. Record Vol. 136 (1990)

No Senate Report was submitted with this legislation.

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The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 2006) to expand the powers of the Indian Arts and Crafts Board, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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PURPOSE

The purpose of H.R. 2006 is to protect Indian artists from unfair competition from counterfeits. The bill would amend the provisions of 25 U.S.C. 305a, which creates and sets forth the powers and duties of the Indian Arts and Craft Board, and the provisions of 18

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U.S.C. 1158 and 1159, which set forth criminal and civil penalties for counterfeiting Indian Arts and Craft Board trademarks and for misrepresenting goods and products as being Indian-produced.

BACKGROUND

Since 1935, the Indian Arts and Crafts Board, as established by the Act of August 27, 1935 (49 Stat. 891; 25 U.S.C. Section 305a), has been responsible for promoting the development of Indian arts and crafts. The Board is responsible, in the field of Indian arts and crafts, for improving the economic status of Native Americans; establishing and expanding the marketing opportunities for Indian people; and assisting Indian tribes to develop a framework to support the preservation and evolution of tribal cultural activities. The Board is also empowered to create a Government trade mark of genuineness; establish standards and regulations for the use of such trademarks; and to register them in the U.S. Patent Office without charge.

In addition, the 1935 Act established criminal penalties for counterfeiting of the Board's trademark and for misrepresentation, for purposes of sale, of Indian-produced goods and products. These provisions, now found in sections 1158 and 1159 of title 18, United States Code, provide for fines not to exceed \$500 and imprisonment not to exceed six months.

Although this law has been in effect for many years, very little has been done to enforce it. There is little information available which documents the effectiveness of the Board in assisting Indian artists to register trademarks or in the enforcement of the law against violations.

Under existing law, the Indian Arts and Crafts Board can only license an artist under a government-owned mark. The registration of a trademark does not guarantee exclusive rights, but rather recognizes the right of the owner to use the mark in commerce and to distinguish his or her goods from those of others. Because the office of the Board is located in Washington, D.C., far-away from where many Indian arts and crafts are sold, registering complaints and enforcing the law has become a cumbersome process. Existing law provides no meaningful deterrent to those who misrepresent imitation Indian arts and crafts. As testimony indicated, there hasn't been a single prosecution in over fifty years, primarily because the current federal law requires "willfulness" and "intent" to prove a violation.

Many states, including Alaska, Arizona, California, Colorado, Minnesota, Montana, Nevada and New Mexico, have reacted to misrepresentation by enacting legislation to regulate the sale of Indian arts and crafts. However, in most states, enforcement of state legislation is weakened by ambiguity of the laws. Again, in most cases the responsibility for enforcement lies with county attorneys who, in the past, have shown little interest in investigating violation of the existing laws.

In recent years, Congress has paid renewed attention to protecting and promoting Indian arts and crafts. In a 1985 report to Congress, the Commerce Department estimated that unmarked import imitations of Indian arts and crafts are siphoning off 10 to 20 per-

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cent of the market for genuine handicrafts produced domestically. This industry's value has been estimated at \$400-\$800 million annually. This means that imitation of Native American handicrafts are siphoning an estimated \$40 to \$80 million from the genuine manufacturers' markets.

The Commerce Department also found that most of the counterfeit market is made up of jewelry production that has been underselling genuine Indian jewelry made by the Zuni, Navajo and Hopi by as much as 50 percent. Many of these counterfeits originate from imports in the Philippines and Mexico. Entrepreneurs are now sending supplies and samples to foreign countries where they can be reproduced at a reduced cost. Those samples are then being duplicated and sent back to the United States and passed through Customs with a temporary peel-off tag which indicates the country of origin. Once these imitations reach the market it is very easy to sell them as Indian or American made. Areas where these imports appear to be concentrated are in Denver, Colorado; Albuquerque, New Mexico; and Phoenix, Arizona, all of which are major marketing areas for Indian arts and crafts.

In response to these practices, the Customs Service was directed in the Omnibus Trade Bill, P.L. 100-418, to promulgate regulations to require the permanent marking of country-of-origin on imported Indian-style jewelry. While most of the attention has been concentrated on curbing importation of foreign imitations and consumer education, Congress has begun to shift its attention to problems in the domestic market.

As noted above, sales of Indian arts and crafts total several hundred million dollars annually. Events such as the Santa Fe Indian Market have generated millions of dollars for the local economy. Because many Indians depend on the sale of their arts and crafts as their sole source of income, there have been efforts to expand Indian-owned marketing enterprises to more directly benefit Indian individuals and tribes.

In the last ten years, because of the expanding market for Indian arts and crafts, there has been a greater frequency in the number of fraudulent sales. Particular attention has been focused in New Mexico where there is growing concerns about misrepresentation in the sale of authentic Indian arts and crafts and the misrepresentation of Indian artists by individuals claiming to be members of an Indian tribe.

EXPLANATION

In response to these concerns, Congressman Ben Nighthorse Campbell and Congressman Joy Kyl introduced H.R. 2006, a bill to expand the powers of the Indian Arts and Crafts Board.

The bill, as introduced, amends section 2 of the 1935 Act to expand the power of the Board by authorizing it to recognize and register with the U.S. Patent and Trademark Office trademarks for individual Indians and Indian tribes in addition to the government trademark. It also specifically authorizes the Board to pursue or defend actions in appropriate courts to protect its decisions. In addition, the bill amends the criminal provisions of the Act to clarify and simplify procedures for prosecution and increases the penalties

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from a \$500 fine and six months imprisonment to fines as determined under title 18 and to imprisonment not to exceed two years.

On August 17, 1989, the Interior Committee conducted a field hearing in Santa Fe, New Mexico on H.R. 2006. During that hearing, testimony was received from over twenty witnesses, including testimony from the Indian Arts and Crafts Board, the local U.S. Attorney, and a number of Indian tribes.

The Committee considered the bill on November 15, 1989. At that time, an amendment in the nature of a substitute, based upon testimony received by the Committee and on subsequent consultations with the Administration and other concerned parties, was adopted.

COMMITTEE AMENDMENT

The provisions of the Committee substitute are more fully set out in the section-by-section analysis which follows. The following is a summary of the substantive changes which were included in the substitute.

The Congressional findings and declarations in section 1 of the original bill were deleted and replaced with a short title, "Indian Arts and Crafts Act of 1989". The word "group" which occurs in Section 2 and throughout the bill was replaced with the term "organization". The term "organization" is then defined in Sections 4 and 5 as "any legally established arts and crafts marketing organization composed of members of Indian tribes".

Section 3 of the bill provided that the Secretary of Interior could initiate a civil enforcement action. Based on recommendations made by the Department of Justice, this language was changed to provide for a referral of matters by the Secretary of Interior to the Attorney General for prosecution and enforcement.

The definition of "Indian" occurs in Section 4 of the original bill. The substitute includes an expanded definition in Sections 4 and 5. The new definition defines "Indian" as any individual who is a member of an Indian tribe or any individual who, although not a member of an Indian tribe, is certified by that tribe to be of the tribe's lineage. In addition, both sections also include a severability clause.

Language in Section 4 which allowed the aggrieved party to file civil actions in any court of competent jurisdiction, was stricken and included in a new Section 5 of the substitute. New language was added to clarify the intent of the Committee that enforcement actions may be brought in Federal, Tribal and State courts depending on the facts of a particular case. In addition, two new provisions were added in Section 5, one to pre-empt states from enacting their own laws with respect to misrepresentation of Indian-produced goods and another to provide a severability clause.

SECTION-BY-SECTION ANALYSIS

There follows a section-by-section analysis of H.R. 2006 as reported.

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SECTION 1

Section 1 cites this act as the "Indian Arts and Crafts Act of 1989".

SECTION 2

Section 2 of the Act amends clause (g) of the 1935 Act by expanding the powers of the Indian Arts and Crafts Board to include registration of trademarks on behalf of an Indian individual, Indian tribe or group. The Board may now establish standards and regulations for the use of Government-owned trademarks and register such trademarks with the United States Patent and Trademark Office without charge. In addition, the Board can now pursue or defend violations in the appropriate court.

SECTION 3

Section 3 adds a new section 5 to the 1935 Act establishing the Arts and Crafts Board. Subsection (a) of this new section authorizes the Board to receive complaints of violations of section 1159 of title 18 and to refer such complaints to the FBI for investigation. It further authorizes the Board, on the basis of such investigation, to recommend to the Attorney General that criminal proceedings under that section be instituted.

Subsection (b) of the new section also authorizes the Board to recommend that the Secretary of the Interior refer the matter to the Attorney General for civil action under section 6 of the Act.

SECTION 4

Subsection (a) amends section 1159 of title 18, U.S.C., which establishes existing penalties for criminal misrepresentation of any item as an Indian product when that product is not Indian made.

Subsection (a) of Section 1159, as amended merely restates existing law making it a crime to misrepresent a product as Indian-produced.

Subsection (b) expands the criminal penalties by providing that, in cases of a first violation, a person may be fined and imprisoned for up to one year and, for repeat violations, the sentence may be increased to not more than two years.

Subsection (c) defines the terms "Indian", "Indian product", "Indian tribe" and "tribal organization" for purposes of the section.

Subsection (d) adds a severability clause.

Subsection (b) of section 4 is a conforming amendment to the table of sections for chapter 53 of title 18.

SECTION 5

Section 5 adds a new section 6 to the 1934 Act, establishing the Indian Arts and Crafts Board, as follows:

Subsection (a) of the new section 6 adds new civil penalties for misrepresentation that may be sought by an aggrieved party to obtain injunctive or other equitable relief and damages including treble damages.

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Subsection (b) of the new section provides that, in addition to the relief as defined in subsection (a), the aggrieved party may be awarded punitive damages and the cost of the suit as well as reasonable attorney's fees.

Subsection (c)(1) establishes that a civil action may be commenced under subsection (a) in the following situations: (1) by the Attorney General of the United States upon the request of the Secretary of the Interior on behalf of an Indian tribe or tribal organization; (2) by the Attorney General of the state in which the violation occurred; or (3) by an Indian tribe or group on behalf of its members.

Subsection (c)(2) provides that in such case any amount recovered pursuant this section shall be paid to the aggrieved party after the cost of the suit and attorney's fee is reimbursed to the Attorney General. In cases where the amount recovered for the costs of the suit and attorney's fees do not concern an individual Indian, Indian tribe or tribal organization, then the entire award may be retained by the State. Finally in cases where the Indian tribe files on behalf of itself, the amount recovered for the costs of the suit and attorney's fees may be deducted from the total amount awarded under subsection (a)(2)(c). Subsection (d)(1) defines the term "Indian" to be any individual who is a member of an Indian tribe; or any individual who is certified by that tribe to be of that tribe's lineage.

Subsection (d)(2) defines the term "Indian product" and "product of a particular Indian tribe or tribal organization".

Subsection (d)(3) defines the term "Indian tribe" to mean any Indian tribe, band, nation, Alaska Native village, or other organized group or community which are recognized as eligible for special services because of their status as Indians.

Subsection (d)(4) defines the term "tribal organization".

Subsection (e) pre-empts states from enacting their own laws or regulations which penalize any person or provides civil action based upon misrepresentation of Indian produce goods or products.

Subsection (f) adds a severability clause.

SECTION 6

Section 6 expands the existing criminal penalties for counterfeiting an Indian Arts and Crafts Board trademark as established under Section 1158 of title 18, United State Code, by raising the existing penalties of \$500 or imprisonment for up to six months to a fine as established under this title and imprisonment for up to one year for the first violation, and a fine and imprisonment for up to 2 years or both for subsequent violations.

COST AND BUDGET ACT COMPLIANCE

The cost analysis prepared by the Congressional Budget Office is set forth below:

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U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, January 9, 1990.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 2006, the Indian Arts and Crafts Act of 1989, as ordered reported by the House Committee on Interior and Insular Affairs, November 15, 1989. CBO estimates that enactment of this bill would result in costs of less than \$100,000 per year to the federal government and in no cost to state and local governments.

H.R. 2006 would expand the powers of the Indian Arts and Crafts Board, giving it the authority to register trademarks on behalf of Indians, to receive complaints about trademark violations and to recommend criminal or civil action to the Attorney General. As well, the bill would amend existing civil penalties for misrepresenting Indian products, increasing fines and maximum prison terms.

The Arts and Crafts Board would probably require additional staff to meet its expanded responsibilities under the act. CBO estimates that the cost of this staff would be less than \$100,000 per year. To the extent that the Attorney General pursues cases under the legislation, there could also be some prosecution and court costs; however, CBO anticipates that these costs would not be significant.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marta Morgan, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 2006 is not expected to have any inflationary impact.

OVERSIGHT STATEMENT

No specific oversight activities were undertaken but the committee conducted hearings related to the effectiveness of existing laws in relation to its consideration of this legislation. No recommendations were submitted to the committee pursuant to rule X, clause 2(b)2.

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs, by voice vote, approved the bill, as amended, and recommends its enactment by the House.

DEPARTMENTAL REPORT

The report of the Department of Justice on HR 2006 follows:

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U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, August 15, 1989.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This provides the views of the Justice Department on H.R. 2006, a bill to promote and protect the development of Indian arts and crafts. This bill would amend the provisions of 25 U.S.C. 305a, which creates and sets forth the powers and duties of the Indian Arts and Crafts Board ("Board"), and the provisions of 18 U.S.C. 1158 and 1159, which set forth criminal and civil penalties for counterfeiting Indian Arts and Crafts Board trademarks and for misrepresenting goods and products as being Indian produced. The Justice Department has no objection to enactment of this legislation if amended as follows.

Section 3 of the bill would authorize the Board to receive complaints of the violation of Indian trademark protections and to "recommend that the Secretary of the Interior institute a civil action under section 1159(c) of the 18, United States Code, which shall be commenced in appropriate cases." The quoted provision should be amended (with brackets showing deletions and italic showing insertions) to provide that the Board may "recommend that the Secretary of the Interior *refer the matter to the Attorney General* for civil action under 1159(c) of title 18, United States Code [.] [which shall be commenced in appropriate cases.]" The added language is necessary since it is the Justice Department, not the Interior Department, which possesses authority to institute litigation. The final clause should be deleted: if it merely seeks to recognize the Justice Department's existing prosecutorial discretion, it is redundant and therefore unnecessary; if it seeks to limit that discretion, it is unwarranted and objectionable.

Section 4 of the bill would amend section 1159 of title 18, United States Code, which provides for civil and criminal penalties for the misrepresentation of a product as Indian produced. Section 1159(a), as amended, would make unlawful the "offer or display for sale of any good, with or without any Government trademark, as Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or group, resident within the United States, when such good is not Indian produced, an Indian product, or the product of the particular Indian or Indian tribe or group." The intent of this provision seems clear—to prevent the passing off of non-Indian produced goods as Indian produced. However, because it does not require that there be a likelihood of confusion of false designation of origin resulting from the display of a non-Indian good as "an Indian product," this provision might be found sufficiently overbroad to give a defendant a plausible defense, or even result in invalidation of the statute. There are instances where the word "Indian" has become a generic designation for a style of clothing or other article, for example, an Indian headdress. The act of offering such an item for sale under circumstances which do not give rise to any likelihood of confusion or false designation of origin—for example, in a children's toy store—could be interpreted to fall within

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the literal wording of section 1159(a), and thus potentially form the basis of an overbreadth defense. This possibility could be avoided by modifying the first sentence of 1159(a) as follows (with italic showing insertions):

It is unlawful to offer or display for sale of any good, with or without any Government trademark, *in a manner that falsely suggests it* as Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or group, resident within the United States, when such good is not Indian produced, an Indian product, or the product of the particular Indian or Indian tribe or group.

The added language would also cause 1159(a) to essentially parallel the analogous provision of the general trademark law, the false designation provision of the Lanham Act, 15 U.S.C. 1125.

Section 4 would also amend section 1159 to empower the Attorney General, upon the request of the Secretary of the Interior, to bring a civil action against the alleged violator of an Indian trademark, and then to deduct from any amount recovered in such an action the costs of suit and reasonable attorney's fees, to be credited to the Interior Department. See proposed section 1159(d). Since it is the Justice Department that would incur the actual expense of litigation, any sums so deducted should go not to the Interior Department, but instead to the Treasury. These funds would then be available for appropriation to the Department of Justice, to be used, if necessary, to hire additional attorneys to handle cases referred to it by the Secretary under this section.

Section 4 would amend section 1159 to provide for imprisonment of not more than one year for a first time violator of section 1159's misrepresentation prohibition, and not more than "one year and six months" for a repeat violator. See proposed section 1159 (b). Section 5 would amend 18 U.S.C. 1159 to provide for imprisonment of not more than "one year and six months" for counterfeiting an Indian Arts and Crafts Board trademark, making no distinction between first and repeat offenders. The Justice Department sees no reason for the quite unusual "one year and six" month sentence provided for under these two sections. Accordingly, we suggest that the sentence for a repeat offender under proposed section 1159 be instead for not more than two years, and that the sentence for counterfeiting under section 1158 be either for not more than one year or not more than two years, or that it be modified to parallel section 1159's two-tiered approach, differentiating between first time and repeat offenders.

Provided that the above discussed amendments are made, the Justice Department has no objection to enactment of this legislation. The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

CAROL T. CRAWFORD,
Assistant Attorney General

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The Committee on the Judiciary, to whom was referred the bill (H.R. 2006) to expand the powers of the Indian Arts and Crafts Board, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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EXPLANATION OF AMENDMENT

Inasmuch as H.R. 2006 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

SUMMARY AND PURPOSE

The purpose of H.R. 2006 is to protect Indian artists from unfair competition from counterfeits. The bill would amend the provisions of 25 U.S.C. 305a, which creates and sets forth the powers and duties of the Indian Arts and Crafts Board, and the provisions of 18 U.S.C. 1158 and 1159, which set forth criminal and civil penalties for counterfeiting Indian Arts and Crafts Board trademarks and for misrepresenting goods and products as being Indian-produced.

STATEMENT OF LEGISLATIVE HISTORY

H.R. 2006 was introduced on April 17, 1989, and was jointly referred to the Committee on Interior and Insular Affairs and the Committee on the Judiciary. The Committee on the Judiciary, in turn, referred the bill to the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, chaired by Robert W. Kastenmeier.

On August 17, 1989, the Interior Committee conducted a field hearing in Santa Fe, New Mexico on H.R. 2006. During that hearing, testimony was received from over twenty witnesses, including testimony from the Indian Arts and Crafts Board, the local U.S. Attorney, and a number of Indian tribes.

The Interior Committee considered the bill on November 15, 1989. At that time, an amendment in the nature of a substitute was adopted in light of testimony received by the Committee and on subsequent consultations with the Administration and other concerned parties. The Committee on Interior and Insular Affairs reported the bill on February 6, 1990.

Following the completion of action by the Committee on Interior and Insular Affairs, a number of concerns were addressed to the Committee on the Judiciary by the Department of Commerce, the Department of the Interior, the Department of Justice, and several Members of Congress. In response to those concerns, the Subcommittee on Courts, Intellectual Property, and the Administration of Justice prepared an amendment in the nature of a substitute, which was reported favorably by the Subcommittee on September 14, 1990.

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COMMITTEE ACTION AND VOTE

H.R. 2006 was ordered favorably reported by the Committee on September 18, 1990, by voice vote, a quorum being present.

DISCUSSION

Since 1935, the Indian Arts and Crafts Board, as established by the Act of August 27, 1935 (49 Stat. 891; 25 U.S.C. Section 305a), has been responsible for promoting the development of Indian arts and crafts. The Board is responsible, in the field of Indian arts and

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crafts, for improving the economic status of Native Americans; establishing and expanding the marketing opportunities for Indian people; and assisting Indian tribes to develop a framework to support the preservation and evolution of tribal cultural activities. The Board is also empowered to create a Government trade mark of genuineness; establish standards and regulations for the use of such trademarks; and to register them in the U.S. Patent Office without charge.

In addition, the 1935 Act established criminal penalties for counterfeiting of the Board's trademark and for misrepresentation, for purposes of sale, of Indian-produced goods and products. These provisions, now found in sections 1158 and 1159 of title 18, United States Code, provide for fines not to exceed \$500 and imprisonment not to exceed six months.

Although this law has been in effect for many years, very little has been done to enforce it. There is little information available which documents the effectiveness of the Board in assisting Indian artists to register trademarks or in the enforcement of the law against violations.

Under existing law, the Indian Arts and Crafts Board can only license an artist under a government-owned mark. The registration of a trademark does not guarantee exclusive rights, but rather recognizes the right of the owner to use the mark in commerce and to distinguish his or her goods from those of others. Because the office of the Board is located in Washington, D.C., far away from where many Indian Arts and Crafts are sold, registering complaints and enforcing the law has become a cumbersome process. Existing law provides no meaningful deterrent to those who misrepresent imitation Indian arts and crafts. As testimony indicated, there has not been a single prosecution in over fifty years, primarily because the current federal law requires "willfulness" and "intent" to prove a violation.

Many states, including Alaska, Arizona, California, Colorado, Minnesota, Montana, Nevada and New Mexico, have reacted to misrepresentation by enacting legislation to regulate the sale of Indian arts and crafts. However, in most states, enforcement of state legislation is weakened by ambiguity of the laws. Again, in most cases the responsibility for enforcement lies with county attorneys who, in the past, have shown little interest in investigating violation of the existing laws.

In recent years, Congress has paid renewed attention to protecting and promoting Indian arts and crafts. In a 1985 report to Con-

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gress, the Commerce Department estimated that unmarked import imitations of Indian arts and crafts are siphoning off 10 to 20 percent of the market for genuine handicrafts produced domestically. This industry's value has been estimated at \$400-\$800 million annually. This means that imitation of Native American handicrafts are siphoning an estimated \$40 to \$80 million from the genuine manufacturers markets.

The Commerce Department also found that most of the counterfeit market is made up of jewelry production that has been underselling genuine Indian jewelry made by the Zuni, Navajo and Hopi by as much as 50 percent. Many of these counterfeits originate from imports in the Philippines and Mexico. Entrepreneurs are

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now sending supplies and samples to foreign countries where they can be reproduced at a reduced cost. Those samples are then being duplicated and sent back to the United States and passed through Customs with a temporary peel-off tag which indicates the country of origin. Once these imitations reach the market it is very easy to sell them as Indian or American made. Areas where these imports appear to be concentrated are in Denver, Colorado; Albuquerque, New Mexico; and Phoenix, Arizona; all of which are major marketing areas for Indian arts and crafts.

In response to these practices, the Customs Service was directed in the Omnibus Trade Bill, Public Law 100-418, to promulgate regulations to require the permanent marking of country-of-origin on imported Indian-style jewelry. While most of the attention has been concentrated on curbing importation of foreign imitations and consumer education, Congress has begun to shift its attention to problems in the domestic market.

As noted above, sales of Indian arts and crafts total several hundred million dollars annually. Events such as the Santa Fe Indian Market have generated millions of dollars for the local economy. Because many Indians depend on the sale of their arts and crafts as their sole source of income, efforts have been made to expand Indian-owned marketing enterprises to more directly benefit Indian individuals and tribes.

In the last ten years, because of the expanding market of Indian arts and crafts, the number of fraudulent sales has increased. Particular attention has been focused in New Mexico where there is growing concerns about misrepresentation in the sale of authentic Indian arts and crafts and the misrepresentation of Indian artists by individuals claiming to be members of an Indian tribe.

In response to these concerns, Congressman Ben Nighthorse Campbell and Congressman Jon Kyl introduced H.R. 2006, a bill to expand the powers of the Indian Arts and Crafts Board. The bill, as introduced, amended section 2 of the 1985 Act to expand the power of the Board by authorizing it to recognize and register with the U.S. Patent and Trademark Office trademarks for individual Indians and Indian tribes in addition to the government trademark. It also specifically authorized the Board to pursue or defend actions in appropriate courts to protect its decisions. In addition, the bill amended the criminal provisions of the Act to clarify and simplify

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procedures for prosecution and to increase penalties for counterfeiting and misrepresentation.

SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 cites this act as the "Indian Arts and Crafts Act of 1989."

Section 2

Section 2 of the Act amends clause (g) of the 1935 Act by expanding the powers of the Indian Arts and Crafts Board to include registration of trademarks by the Government without charge, and to assign them to individual Indians or tribes, again without charge. As introduced, the bill would have permitted the Board to register

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trademarks on behalf of an Indian individual, Indian tribe or group. The Department of Commerce, however, objected that this provision deviated unjustifiably from the longstanding practice of registrants registering trademarks in their own names. Such concerns were deemed meritorious, and the provision was amended accordingly in a substitute amendment offered by Mr. Kastenmeier.

Section 3

Section 3 adds a new section 5 to the 1935 Act establishing the Arts and Crafts Board. Subsection (a) of this new section authorizes the Board to refer complaints to the FBI for investigation. It further authorizes the Board, on the basis of such investigation, to recommend to the Attorney General that criminal proceedings under that section be instituted.

Subsection (b) of the new section also authorizes the Board to recommend that the Secretary of the Interior refer the matter to the Attorney General for civil action under section 6 of the Act.

Section 4

Subsection (a) of section 4 amends section 1159 of title 18, U.S.C., which establishes existing penalties for criminal misrepresentation of any item as an Indian product when that product is not Indian made. Section 1159, as amended, includes Four subsections.

Subsection (a) of Section 1159, as amended, merely restates existing law making it a crime to misrepresent a product as Indian-produced.

Subsection (b) of Section 1159, as amended, expands the criminal penalties by increasing the fines and prison terms for first and subsequent violations. Pursuant to a suggestion from the Department of Commerce, the criminal penalties provided for in the bill as introduced, were increased by the subcommittee amendment to make them more consistent with penalties for comparable offenses under existing law.

Subsection (c) of Section 1159, as amended, defines the terms "Indian", "Indian product", "Indian tribe" and "tribal organization" for purposes of the section. Several members of Congress, who have state but not federally recognized Indian Tribes in their

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districts, objected to the definition of Indian Tribe, on the grounds that it did not include state recognized tribes. Because such tribes were not "Indian tribes" within the meaning of the bill, artisans in those tribes who represented their goods as Indian made would arguably be in violation of the Act. To avoid this problem, the definition of Indian tribe was revised to include state recognized tribes.

Subsection (d) of Section 1159, as amended, adds a severability clause.

Subsection (b) of Section 4, is a conforming amendment to the table of sections for chapter 53 of title 18.

Section 5

Section 5 adds a new section 6 to the 1934 Act, establishing the Indians Arts and Crafts Board, as follows:

Subsection (a) of the new section 6 adds new civil penalties for misrepresentation that may be sought by an aggrieved party to

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obtain injunctive or other equitable relief and damages including treble damages.

Subsection (b) of the new section provides that, in addition to the relief as defined in subsection (a), the aggrieved party may be awarded punitive damages and the cost of the suit as well as reasonable attorney's fees.

Subsection (c)(1) establishes that a civil action may be commenced under subsection (a) in the following situations: (1) by the Attorney General of the United States upon the request of the Secretary of the Interior on behalf of an Indian tribe or tribal organization; (2) by an Indian tribe or group on behalf of its members; or (3) by any person aggrieved by the prohibited conduct. Originally, the bill also permitted suits to be brought by state attorneys general. The Department of Justice, however, argued that it would be inappropriate for state officials to enforce federal statutes and the Committee agrees.

Subsection (c)(2) provides that in such cases any amount recovered pursuant to this section shall be paid to the aggrieved party after the cost of the suit and attorney's fees are reimbursed to the Attorney General. In cases where the Indian tribe files on behalf of itself, the amount recovered for the costs of the suit and attorney's fees may be deducted from the total amount awarded under subsection (a)(2)(c). Subsection (d)(1) defines the term "Indian" to be any individual who is a member of an Indian tribe; or any individual who is certified by the tribe as an Indian artisan.

Subsection (d)(2) defines the term "Indian product" and "product of a particular Indian tribe or tribal organization."

Subsection (d)(3) defines the term "Indian tribe" to mean any Indian tribe, band, nation, Alaska Native village, or other organized group or community which is recognized by state or federal governments as eligible for special services because of their status of its members as Indians. Changes in the definition of "Indian Tribe" previously discussed in connection with section 4, were made here as well.

Subsection (d)(4) defines the term "tribal organization."

**LEGISLATIVE HISTORY
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Subsection (e) adds a severability clause. The bill previously contained a preemption clause. Upon further consideration, however, it was concluded that states should be permitted to protect their own Indian arts and crafts, provided that they do not interfere with federal law, and the preemption clause was therefore deleted.

Section 6

Section 6 expands the existing criminal penalties for counterfeiting an Indian Arts and Crafts Board trademark as established under Section 1158 of title 18, United States Code, by raising the maximum fines and term of imprisonment for first and subsequent violations.

Section 7

Section 7 was added by the Subcommittee on Courts, Intellectual Property and the Administration of Justice, at the suggestion of Congressmen Kyl and Campbell. It authorizes Indian tribes, as defined by the Act, to certify individuals as Indian artisans who would not otherwise qualify as members of the tribe.

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COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT OPERATIONS OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Operations were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives the Committee sets forth, with respect to the bill H.R. 2006, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 408 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 20, 1990.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, DC.

INDIAN ARTS AND CRAFTS ACT

P.L. 101-644

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 2006, the Indian Arts and Crafts Act of 1990, as ordered reported by the House Committee on the Judiciary on September 17, 1990. CBO estimates that enactment of this bill would result in costs of less than \$100,000 per year to the federal government and in no cost to state and local governments.

H.R. 2006 would expand the powers of the Indian Arts and Crafts Board, giving it the authority to register trademarks on behalf of Indians, to receive complaints about trademark violations, and to recommend criminal or civil action to the Attorney General. As well, the bill would amend existing civil penalties for misrepresenting Indian products, increasing fines, and maximum prison terms.

The Arts and Crafts Board would probably require additional staff to meet its expanded responsibilities under the act. CBO estimates that the cost of this staff would be less than \$100,000 per year. To the extent that the Attorney General pursues cases under the legislation, there also could be some prosecution and court costs; however, CBO anticipates that these costs would not be significant.

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If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martha Morgan, who can be reached at 226-2860.

Sincerely,

ROBERT F. HALE
(For Robert D. Reischauer).

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 2006 will have no significant inflationary impact on prices and costs in the national economy.