

April 2011

# INDIAN ARTS AND CRAFTS

## Size of Market and Extent of Misrepresentation Are Unknown



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## Why GAO Did This Study

In 1935 the Indian Arts and Crafts Act was enacted, establishing the Indian Arts and Crafts Board as an entity within the Department of the Interior. A priority of the Board is to implement and enforce the act's provisions to prevent misrepresentation of unauthentic goods as genuine Indian arts and crafts. As the market for Indian arts and crafts grew and the problem of misrepresentation persisted, the act was amended to, among other things, enhance the penalty provisions and strengthen enforcement.

GAO was asked to examine (1) what information exists regarding the size of the market and the extent to which items are misrepresented and (2) actions that have been taken to curtail the misrepresentation of Indian arts and crafts and what challenges, if any, exist. In addition, this report provides information on some options available to protect Indian traditional knowledge and cultural expressions. GAO analyzed documents and interviewed international, federal, state, and local officials about the arts and crafts market and enforcement of the act.

GAO is making no recommendations in this report. In commenting on a draft of this report, the Departments of Commerce and Homeland Security generally agreed with the contents of the report. The Departments of Commerce, Homeland Security, the Interior, and Justice also provided technical comments which were incorporated into the report as appropriate.

View [GAO-11-432](#) or key components. For more information, contact Anu K. Mittal at (202) 512-3841 or [mittala@gao.gov](mailto:mittala@gao.gov).

# INDIAN ARTS AND CRAFTS

## Size of Market and Extent of Misrepresentation Are Unknown

### What GAO Found

The size of the Indian arts and crafts market and extent of misrepresentation are unknown because existing estimates are outdated, limited in scope, or anecdotal. Also, there are no national data sources containing the information necessary to make reliable estimates. For example, the most often cited national estimates about the size of the market and the extent of misrepresentation come from a 1985 Department of Commerce study. GAO found that not only is this study outdated, but the estimates included in the study are unreliable because they were based on anecdotal information and not systematically collected data. No national database specifically tracks Indian arts and crafts sales or misrepresentation, and GAO found that no other national databases contain information specific or comprehensive enough to be used for developing reliable estimates. Moreover, GAO determined that to conduct a study that could accurately estimate the size of the Indian arts and crafts market and the extent of misrepresentation would be a complex and costly undertaking and may not produce reliable estimates.

Federal and state agencies have relied largely on educational efforts rather than law enforcement actions to curtail misrepresentation of Indian arts and crafts, but these efforts are hampered by a number of challenges, including ignorance of the law and competing law enforcement priorities. From fiscal year 2006 to fiscal year 2010, the Indian Arts and Crafts Board received 649 complaints of alleged violations of the Indian Arts and Crafts Act. The Board determined that 150 of these complaints, or 23 percent, involved an apparent violation of the law, and it referred 117 of the complaints for further investigation by law enforcement officers, but no cases were filed in federal court as a result. According to the Board and law enforcement officials, support from law enforcement personnel and others to prosecute these cases has been sporadic because of higher law enforcement priorities. Therefore, the Board has relied primarily on educational efforts to curtail misrepresentation. For example, in response to complaints, the Board sent educational and warning letters to about 45 percent of alleged violators, and it produced educational brochures and participated in other educational efforts for artists, sellers, consumers, and law enforcement officers. GAO identified one arts organization that has successfully used civil actions to curtail misrepresentation, but this approach can be costly and time-consuming.

U.S. federal and state laws protecting intellectual property do not explicitly include Indian traditional knowledge and cultural expressions—such as ceremonial dances or processes for weaving baskets—and therefore provide little legal protection for them. Some international frameworks offer protection for traditional knowledge and cultural expressions, but the federal government has not yet undertaken steps to implement these frameworks in the United States. Other countries, like Panama and New Zealand, have taken actions—which offer options for consideration—to protect the intellectual property of indigenous groups.

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United States Government Accountability Office  
Washington, DC 20548

April 28, 2011

The Honorable Doc Hastings  
Chairman  
The Honorable Edward J. Markey  
Ranking Member  
Committee on Natural Resources  
House of Representatives

The sale of goods falsely represented as authentic Indian-produced arts and crafts has been a persistent and potentially growing problem in the United States. At least 1.9 million members of federally recognized Indian tribes live in the United States, some of whom are artisans who create pottery, baskets, rugs, and other types of arts and crafts for sale to wholesalers, retailers, or the public directly at Indian art shows and markets. Misrepresentation by sale of unauthentic products created by non-Indians, including imports from foreign countries, is a matter of great concern to Indian artisans, who may have to reduce their prices or lose sales because of competition from lower-priced imitation products. This could have a potentially significant negative economic effect on the Indian arts and crafts market and, consequently, on the individuals and tribes who rely on this market for income.

Furthermore, Indian artisans have voiced concerns that the traditional knowledge of how to create these goods—often passed down from generation to generation within the tribes—will not be carried forward by younger generations if they cannot make a living producing these goods. Likewise, consumers may suffer from misrepresentation if they are fraudulently led to believe that imitation products they purchase are authentic and, upon discovery, may cause them to question the authenticity of genuine goods, further damaging the Indian arts and crafts market at large. These concerns also extend beyond tangible arts and crafts to include other types of traditional knowledge and cultural expression, such as song, dance, and writings, which can be misappropriated by outsiders and used for profit.

To address misrepresentation of arts and crafts, the Indian Arts and Crafts Act was enacted in 1935, establishing the Indian Arts and Crafts Board

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within the Department of the Interior.<sup>1</sup> The Board is responsible for promoting the economic welfare of Indian tribes and Indian individuals through the development of Indian arts and crafts and expansion of the market for products of Indian art and craftsmanship. The act also provided misdemeanor penalties for anyone willfully misrepresenting goods as Indian produced. The Board coordinates education and enforcement efforts to help increase public awareness and compliance with the act.

As the market for Indian arts and crafts has grown and the problem of misrepresentation persisted, the Indian Arts and Crafts Act was significantly amended in 1990, 2000, and 2010 to, among other things, increase penalties and strengthen enforcement. The 1990 amendment added civil remedies and increased the criminal penalties for knowingly misrepresenting Indian products, so that it is a felony rather than a misdemeanor.<sup>2</sup> In addition to civil actions by the Attorney General, the amendments authorized civil suits by an Indian tribe on behalf of itself, an individual Indian who is the member of the tribe, or an Indian arts and crafts organization. The amendments also authorized the Board to refer complaints to the Department of Justice's Federal Bureau of Investigation (FBI) for investigation and then to the Attorney General for prosecution or to recommend that the Secretary of the Interior refer the matter to the Attorney General for civil action. Subsequently, in 2007, Interior entered into a memorandum of understanding with the Department of Justice that delegated authority to Interior to investigate alleged violations of the act. The 2000 amendment to the act also expanded civil enforcement by authorizing Indian arts and crafts organizations, as well as individual Indians, to file civil suits on their own.<sup>3</sup> It also enabled them to file suits against the manufacturers, wholesalers, and others involved in the chain of distribution of the misrepresented product, even if they are not in direct competition with the plaintiff. Most recently—on July 29, 2010—the act was amended again to, among other things, increase penalties and

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<sup>1</sup>Act of August 27, 1935 (Indian Arts and Crafts Act), ch. 748, Pub. L. No. 74-355, 49 Stat. 891 (1935), *codified as amended at* 25 U.S.C. §§ 305-305f.

<sup>2</sup>Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, Title I, 104 Stat. 4662 (1990). The act, as amended, makes it unlawful to offer or display for sale or sell any good in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization resident in the United States, but only subjects violators to criminal penalties for knowingly violating this prohibition.

<sup>3</sup>Indian Arts and Crafts Enforcement Act of 2000, Pub. L. No. 106-497, 114 Stat. 2219 (2000).

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empower all federal law enforcement officers to investigate alleged violations.<sup>4</sup>

Federal customs regulations and trademark laws, as well as state trademark and Indian arts and crafts laws, also address the authenticity of Indian-style arts and crafts and provide some potential deterrence to misrepresentation. For example, since 1990, U.S. Customs and Border Protection regulations have required that imported Native American-style arts and crafts must generally be indelibly marked with the country of origin by cutting, die-sinking, engraving, stamping, or some other equally permanent method.<sup>5</sup> In addition, trademarks used in commerce can be registered with the U.S. Patent and Trademark Office or a state by Indian artists, tribes, or arts and crafts organizations to mark authentic goods, providing a means for the public to identify genuine Indian products. Finally, 12 states—Alaska, Arizona, California, Colorado, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, South Dakota, and Texas—have enacted laws prohibiting the misrepresentation of Indian arts and crafts.

In this context, you asked us to examine (1) what information exists on the size of the arts and crafts market and the extent to which items are misrepresented and (2) actions that have been taken to curtail the misrepresentation of Indian arts and crafts and what challenges, if any, exist. In addition, given your interest in the potential misrepresentation of less tangible forms of Indian expression, you asked us to provide information on some of the options available to protect Indian traditional knowledge and cultural expression.

To determine the size of the market and the extent to which items are misrepresented, we collected and reviewed existing studies and reports from the Departments of Commerce and the Interior and from state agencies that estimate the size of the Indian arts and crafts market or the extent of misrepresentation in the market. We interviewed the authors of these studies to discuss their methodologies and determine the reliability

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<sup>4</sup>Indian Arts and Crafts Amendments Act of 2010, Pub. L. No. 111-211, Title 1, 124 Stat. 2258 (2010).

<sup>5</sup>19 C.F.R. § 134.43(d). The regulations also require that Native American-style jewelry be indelibly marked with the country of origin by cutting, die-sinking, engraving, stamping, or some other permanent method on the clasp, in some other conspicuous location, or on a metal or plastic tag permanently attached to the jewelry, unless an exception applies. 19 C.F.R. § 134.43(c).

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of their estimates. We also interviewed representatives and gathered documentation from national, state, and local Indian arts organizations to obtain information about the Indian arts and crafts market. We reviewed data from the Board's complaint files, and, after interviewing knowledgeable officials and following up to correct obvious or logical errors, we determined that the data were sufficiently reliable for the purpose of this engagement. We also reviewed the U.S. International Trade Commission's import database, and Commerce's Bureau of Economic Analysis consumer spending pattern and retail sales database, to determine if they could be used to estimate the size of the Indian arts and crafts market. We determined that the data from these sources could not be used for that purpose and therefore did not assess their reliability. During our visits to Alaska, Illinois, New Mexico, and Oklahoma, we also interviewed individual Indian artists for their perspectives on the extent of misrepresentation.

To identify actions that have been taken to curtail the misrepresentation of Indian arts and crafts and what challenges, if any, exist, we interviewed law enforcement officials from Interior and its Bureau of Indian Affairs, as well as officials from the Board. We also interviewed officials from the Department of Justice's Executive Office for United States Attorneys and the FBI; the Department of Commerce's U.S. Patent and Trademark Office and U.S. Census Bureau; and the Department of Homeland Security's Bureau of U.S. Customs and Border Protection. To identify enforcement efforts, we reviewed information from the Executive Office for United States Attorneys on federal matters and cases filed under the Indian Arts and Crafts Act. We also interviewed representatives from 8 of the 12 states that have enacted their own Indian arts and craft laws—Alaska, Arizona, Montana, Nevada, New Mexico, Oklahoma, South Dakota, and Texas—to understand how their laws are enforced.<sup>6</sup> To identify the options available to protect Indian traditional knowledge and cultural expressions, we analyzed law review articles, U.S. intellectual property laws, foreign laws and programs, and international legal instruments to protect indigenous traditional knowledge and cultural expressions. We interviewed experts in international indigenous intellectual property law, including an expert from the World Intellectual Property Organization, and representatives from countries that currently have or have previously had laws or programs in place.

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<sup>6</sup>State officials in California, Colorado, Minnesota, and Nebraska did not respond to our inquiries.



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We conducted this performance audit from April 2010 through April 2011, in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

The 1935 Indian Arts and Crafts Act created the Indian Arts and Crafts Board within Interior to promote the economic welfare of Indian tribes and individuals through the development of Indian arts and crafts and through the expansion of the market for the products of Indian art and craftsmanship. In support of this mission, the Board:

- implements the Indian Arts and Crafts Act, as amended;
- increases the participation of Native Americans in the fine arts and crafts business;
- assists emerging artists entering the market; and
- assists Native American cultural leaders in supporting the evolution and preservation of tribal cultural activities.<sup>7</sup>

The Board's policies are determined by its five commissioners—currently including four representatives from American Indian and Alaska Native communities and the Deputy Director of the Federal Trade Commission's Bureau of Consumer Protection—who are appointed by the Secretary of the Interior and serve without compensation. With a fiscal year 2010 budget of about \$1.2 million, the Board currently has three professional and two administrative staff in the Washington, D.C., office to carry out its responsibilities, including a Director with overall responsibility for implementing the Board's policies, and four full-time and one part-time temporary staff to operate three museums.

A priority of the Board is the implementation and enforcement of the act's provisions to prevent misrepresentation. The Indian Arts and Crafts Act is

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<sup>7</sup>The Board also promotes contemporary Indian arts and crafts through the operation of three regional museums: the Sioux Indian Museum in Rapid City, South Dakota; Museum of the Plains Indian in Browning, Montana; and the Southern Plains Indian Museum in Anadarko, Oklahoma.

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essentially a truth-in-advertising law that prohibits misrepresentation in the marketing of Indian arts and crafts products within the United States and provides criminal and civil penalties for marketing products as Indian made when such products are not made by Indians.<sup>8</sup> Under the act, it is unlawful to offer or display for sale or to sell any good in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization resident in the United States. Under the act and its implementing regulations, an Indian is an individual who is a member of an Indian tribe or who is certified by an Indian tribe as a nonmember Indian artisan.<sup>9</sup> Indian tribes include federally recognized tribes, Alaska Native villages, and state-recognized tribes.<sup>10</sup> An Indian arts and crafts organization is any legally established arts and crafts marketing organization composed of members of Indian tribes. The terms “Indian product” and “product of a particular Indian tribe or Indian arts and crafts organization” are defined in two regulations promulgated by the Board. The regulations implementing the Indian Arts and Crafts Act of 1990 that were issued in October 1996 defined in general the nature and origin of Indian products.<sup>11</sup> In June 2003, as directed by the Indian Arts and Crafts Enforcement Act of 2000, the Board promulgated additional regulations that include specific examples of items that may be marketed as Indian products and when non-Indians may make and sell Indian-style arts and crafts, thereby informing the public as to when an individual may be subject to civil or criminal penalties for falsely marketing a good as an Indian product.<sup>12</sup>

The act designated the Board as the primary agency to handle complaints of violations of the act. Individuals who witness market activity they believe may be in violation of the act can contact the Board to report this activity in

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<sup>8</sup>Subsequent references in this report to the Indian Arts and Crafts Act are references to the act as amended.

<sup>9</sup>In order for an individual to be certified by an Indian tribe as a nonmember Indian artisan, the individual must be of Indian lineage of one or more members of such Indian tribe, and the certification must be documented in writing by the tribe’s governing body or a certifying body delegated this function by the tribe’s governing body.

<sup>10</sup>Under the act, “Indian tribe” includes federally recognized tribes and “any Indian group that has been formally recognized as an Indian tribe by a state legislature, a state commission, or similar organization vested with state legislative tribal recognition authority.”

<sup>11</sup>61 Fed. Reg. 54551 (Oct. 21, 1996).

<sup>12</sup>68 Fed. Reg. 35164 (June 12, 2003).

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a number of ways. The Board's Web site provides an online form that can be completed and submitted to the Board's staff for review, which also includes examples of how violations can occur at various venues, such as retail stores, powwows, Internet Web sites, or when an artist and consumer meet in person. The form permits the person submitting the complaint to provide personal contact information or file anonymously, and it requests information on the alleged violator, date, location, and venue of the violation; the type of art or craft involved; how the item was offered for sale and what representations were made about it—such as statements regarding authenticity of the item or the tribal membership of the maker—and any documentation that may help to verify the complaint, such as advertisements or catalogs. Complaints may also be written or faxed directly to the Board's office in Washington, D.C., or may be reported by phone directly to the office or via the Board's toll-free complaint line, (888) ART-FAKE. The Board maintains computerized files of complaints and tracks subsequent follow-up actions by its staff or other federal or state agencies to which it refers complaints for further investigation.

Lacking criminal investigators on its own staff, the Board relies on other law enforcement agencies for assistance in enforcing the Indian Arts and Crafts Act. Since the mid-1990s, the Board has referred complaints to the FBI; Interior's Bureau of Indian Affairs, Office of Inspector General, and National Park Service; and state attorneys general for investigation. The Indian Arts and Crafts Act of 1990 designated the FBI to investigate violations of the act. To bolster its investigative resources, the Board worked with Interior to put in place in 2007 a memorandum of understanding between the Departments of Justice and the Interior to allow all appropriate Interior law enforcement officers to work such cases. The Board now has a memorandum of agreement with National Park Service Investigative Services for a full-time dedicated agent to work on Indian Arts and Crafts Act cases through a reimbursable support agreement. The dedicated National Park Service agent coordinates with fellow National Park Service agents on these investigations and encourages collaborations with other Interior law enforcement officers.<sup>13</sup> The Board also coordinates with offices of state attorneys general on

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<sup>13</sup>In 2007, the National Park Service issued a regulation implementing the requirements of the National Parks Omnibus Management Act of 1998 to encourage the sale of authentic United States Indian, Alaska Native, Native Samoan, and Native Hawaiian handicrafts relating to the cultural, historical, and geographic characteristics of units of the national park system. 72 Fed. Reg. 32188 (June 12, 2007). The regulations are located in 36 C.F.R. Part 51.

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investigations of alleged violations of state Indian arts and crafts laws. After passage of the Indian Arts and Crafts Amendments Act of 2010, any federal law enforcement officer can investigate alleged violations of the act.

To further protect Indian artists, the Board works with the Patent and Trademark Office to promote registration of trademarks for arts and crafts marketing purposes. A trademark is a distinctive sign or indicator—such as a word, name, symbol, design, image, or any combination thereof—used by a person or organization to uniquely identify the source of its products or services and to distinguish them from those of other individuals or entities. Registering trademarks with the Patent and Trademark Office or a state bars others from registering marks likely to cause confusion with previously registered trademarks.<sup>14</sup> Trademarks are part of what is collectively termed “intellectual property,” which includes copyrights, patents, and trade secrets—anything that one might create—as distinguished from more tangible things that might be owned, such as a house or car, or “real property.” A copyright is the exclusive right to reproduce, publish, sell, or distribute, for a certain period of time, original works of authorship fixed in any tangible medium of expression, such as literary, musical, or artistic works.<sup>15</sup> The Board educates Indian artists about intellectual property through on-site meetings with tribal governments and members and distributes a brochure on the subject. The brochure also refers artists needing additional information to the World Intellectual Property Organization—a specialized agency of the United Nations dedicated to developing a balanced and accessible international intellectual property system.<sup>16</sup>

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<sup>14</sup>Trademark rights are developed through use of a mark in connection with goods or services in commerce, although they can be registered with the Patent and Trademark Office or states.

<sup>15</sup>Copyright protection begins from the moment a work is created and does not require registration, although copyrights can be registered with the U.S. Copyright Office.

<sup>16</sup>The World Intellectual Property Organization, headquartered in Geneva, Switzerland, was established in 1967 to promote the protection of intellectual property throughout the world through cooperation among states and in collaboration with other international organizations. It originates from the multilateral conventions that form the core of the international intellectual property system, the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886).

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In June 2005, Interior's Office of Inspector General issued a review of counterfeit Indian arts and crafts.<sup>17</sup> The report concluded that the extent of the problem is difficult to quantify because of limited statistics, conflicting perceptions of what makes something counterfeit, and public misconceptions about federal and state laws. The report also concluded that enforcement of the Indian Arts and Crafts Act largely depends on the cooperation of agencies outside of Interior's control and that criminal enforcement actions have had no measurable effect on counterfeit activity. The report suggested actions to mitigate the situation, including (1) amending the act to provide the Board greater enforcement authority and capabilities; (2) collaborating with Customs and Border Protection to revise the country of origin marking regulations to remove exceptions and require that Indian-style jewelry items be indelibly marked; (3) working with Congress or the Department of Commerce, or both, to allow the Board to facilitate trademark registration for Indians, tribes, and arts and crafts organizations; and (4) seeking civil penalties for misrepresentation before seeking criminal penalties.

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## The Size of the Indian Arts and Crafts Market and the Extent of Misrepresentation Are Unknown

The actual size of the Indian arts and crafts market, and extent of misrepresentation that is occurring, are unknown, because existing estimates are outdated, limited in scope, or anecdotal and no national sources contain the data necessary to make reliable estimates. Conducting a comprehensive study to estimate the size of the market and level of misrepresentation would be complex and costly and may not provide reliable results.

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## Existing Estimates of Market Size and Misrepresentation Are Outdated, Limited in Scope, or Anecdotal

Instead of exact information, descriptions of the size of the Indian arts and crafts market and extent of misrepresentation are based largely on estimates prepared by various federal and state entities. However, we found that these estimates are outdated and unreliable. For example, the most recent and relevant national estimates were provided in a 1985 Department of Commerce study. The study estimated gross sales of \$400 million to \$800 million annually for the Indian arts and crafts industry and that 10 to 20 percent of the market is misrepresented.<sup>18</sup> Our analysis of

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<sup>17</sup>Department of the Interior, Office of Inspector General, *Indian Arts and Crafts: A Case of Misrepresentation*, E-EV-OSS-0003-2005 (Washington, D.C.: June 1, 2005).

<sup>18</sup>Department of Commerce, International Trade Administration, *Study of Problems and Possible Remedies Concerning Imported Native American-Style Jewelry and Handicraft* (Washington, D.C.: 1985).

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the methodology used to produce the study, however, found that these estimates are not only outdated but also unreliable. Specifically, a primary contributor to the study told us that the estimates were based on “guesses” from industry experts, not data collected from a survey or other systematic data collection technique and can therefore be considered only as opinions. Nevertheless, these estimates have been referred to repeatedly in other reports and documents on the topic. For example, Interior’s 2005 Inspector General report cites the Department of Commerce estimate of \$400 million to \$800 million in annual gross sales for the industry.<sup>19</sup> In addition, a fact sheet put out by the Board states that the Indian arts and crafts industry has \$1 billion in gross sales annually, which, according to a Board official, is based on the Department of Commerce’s 1985 estimate adjusted for inflation.

Similarly, state and local studies that have described the arts and crafts markets in specific locations are also limited in their scope and methodology, making them unusable for estimating the size of the national Indian arts and crafts market or the extent of misrepresentation. For example, in 2001 the Alaska State Council on the Arts commissioned a private research company to study Alaska’s arts industry.<sup>20</sup> The study estimated that Alaska artists’ income totaled about \$20 million in 2001. Our review of the methodology and discussion with a primary contributor, however, found that the estimate is for the entire Alaska arts market and that no specific data were collected on the Alaska Native arts market. Therefore, in addition to being outdated, this study cannot be used to estimate either the Alaska Native arts market or extrapolated to estimate the national arts and crafts market. Similarly, the University of New Mexico’s Bureau of Business and Economic Research issued a report in 2004 estimating that the arts and cultural industry and cultural tourism in Santa Fe County generated approximately \$1 billion in revenues in 2002.<sup>21</sup> Again, our review of the report’s methodology and discussion with a primary contributor found that the report does not estimate revenue for Indian artists alone—rather, it represents the entire arts and cultural industry and cultural tourism in Santa Fe County—and therefore is not

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<sup>19</sup>Department of the Interior, Office of Inspector General, *Indian Arts and Crafts*.

<sup>20</sup>McDowell Group, *Economics of Alaska’s Arts Industry* (Juneau, Alaska: November 2002) (a report prepared for the Alaska State Council on the Arts).

<sup>21</sup>University of New Mexico, Bureau of Business and Economic Research, *The Economic Importance of the Arts and Cultural Industries in Santa Fe County* (Albuquerque, N. Mex.: 2004).

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useful for characterizing the local or national market for Indian arts and crafts.

Many Indian artists, agency officials, and others with whom we spoke who have knowledge of the national, state, and local Indian arts and crafts markets offered anecdotal estimates of the size of the Indian arts and crafts market and the extent of misrepresentation but generally could not provide reliable support for their estimates. For example, we spoke with Indian artists in Alaska, Illinois, New Mexico, Oklahoma, and Washington who told us that non-Indian artists representing themselves as Indian artists and marketing their goods as such was a widespread problem with a significant value in sales, but this information was based largely on their observations and personal experiences and not corroborated with reliable documentation or other support. Similarly, a New Mexico Assistant Attorney General told us that he thought misrepresentation was a multimillion-dollar problem in New Mexico, but he had no data to support his estimate. An official from the Indian Arts and Crafts Association provided an anecdotal estimate of revenue for select vendors from the association's market event but could not document sales for the entire market or reliably estimate the extent of misrepresentation. While these estimates were informed by personal experiences, the lack of documentary support for the estimates makes it impossible to independently replicate the estimates and verify and validate their reliability.

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### National Data Sources Do Not Track Data on Indian Arts and Crafts That Could Be Used to Determine Market Size or Extent of Misrepresentation

No national database specifically tracks Indian arts and crafts sales or misrepresentation. Consequently, we examined various national data sources to determine if the information they contain could be used to estimate these characteristics. We found that because these data sources were designed for other purposes and not intended to track the size of the Indian arts and crafts market or extent of misrepresentation, the information they contain is not specific or comprehensive enough to be used for that purpose. For example, the Department of Commerce's Bureau of Economic Analysis maintains national data on purchases of various categories of goods. The data include a category for jewelry purchases, but they do not separate out a specific category for Indian-style jewelry or have the level of detail that would help distinguish such jewelry from other types of jewelry. Likewise, the International Trade Commission maintains a database tracking imported goods by various categories. This database includes a category for imported jewelry with semiprecious stones valued at more than \$40 per article but contains no additional detail that could be used to determine which items, if any, are Indian-style. Both

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of these databases also contain information on other categories of goods that may or may not include Indian arts and crafts, but it is not possible to specifically identify those items from the data collected.

We also found that information specifically collected about Indian arts and crafts was not comprehensive or detailed enough to determine the size of the market or extent of misrepresentation. For example, the Board maintains a registry of about 350 Indian-owned and -operated businesses but told us that this list represents only a small number of sellers who choose to register with the Board and excludes other categories of sellers, such as non-Indian wholesalers and non-Indian galleries offering Indian art and craftwork.<sup>22</sup> Similarly, the Indian Arts and Crafts Association maintains a directory of 500 to 600 artists, retailers, and wholesalers, but, again, it is not a comprehensive list of Indian arts and crafts sellers, and it contains only association members who choose to be listed. Moreover, neither of these organizations collects information on the sales of goods by these sellers. Regarding misrepresentation, the Board maintains a database of complaints of alleged violations of the Indian Arts and Crafts Act. Although this database contains information describing individual instances of alleged misrepresentation, it is not a comprehensive listing of all incidents of misrepresentation that have occurred; rather, it represents only instances where an individual recognized a potential violation and made the effort to report it.

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### Conducting a Study to Accurately Estimate the Size of the Market and Extent of Misrepresentation Would Be Challenging

In the absence of reliable estimates or sufficiently detailed national data, accurately estimating the size of the Indian arts and crafts market would require a completely original study. But our analysis and the opinions of experts suggest that such a study would be complex and costly and may not produce reliable estimates. Experts we spoke with who had conducted state and local surveys suggested that such a study should include one or more surveys of individuals and businesses in the Indian arts and crafts market to estimate the size of the market. For example, one survey could request data from Indian artists about their income from the sales of arts and crafts, and another survey could request sales information from businesses and establishments that sell Indian and Indian-style goods. However, these experts agreed that it would take substantial resources to

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<sup>22</sup>Department of the Interior, Indian Arts and Crafts Board, *Source Directory of American Indian and Alaska Native Owned and Operated Arts and Crafts Businesses* (Washington, D.C.): [http://www.doi.gov/iacb/order/source\\_info.html](http://www.doi.gov/iacb/order/source_info.html) (Feb. 3, 2011).



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conduct such surveys and that the usefulness of the results may be limited because of various challenges, such as:

- Artists may not maintain detailed income records and may not be able to reliably estimate, or may not want to provide, their annual income from the sale of their art.
- A store selling Indian-style and other goods may not be able to accurately estimate what proportion of total sales comes from Indian-style goods.
- A comprehensive list of Indian artists and establishments that sell Indian and Indian-style arts and crafts does not exist.
- The meanings of key terms, such as “Indian-style,” are not universally agreed upon, and a survey to identify all of the goods that make up the market using such terms may be flawed. For example, with regard to the term “Indian-style,” one respondent may think they must include all jewelry with turquoise stones, while another respondent may consider only turquoise jewelry with recognizable tribal patterns or markings as being “Indian-style.”
- A study on the extent of misrepresentation in the market would be difficult because it would rely largely on self-reporting of illegal activity by violators of the Indian Arts and Crafts Act.

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## To Curtail Misrepresentation of Indian Arts and Crafts, Agencies Have Relied on Educational Efforts over Law Enforcement Actions, but Fundamental Challenges Exist

Federal and state agencies have relied on educational efforts more than law enforcement actions to curtail misrepresentation of Indian arts and crafts, but these efforts are hampered by fundamental challenges, such as ignorance of the law, competing law enforcement priorities, the high cost of pursuing legal actions, and limitations on the enforcement of customs regulations.

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## Interior Prefers to Seek Voluntary Compliance with the Indian Arts and Crafts Act over Law Enforcement Actions

The Board maintains a computerized database of the complaints it receives of alleged violations of the act and tracks subsequent actions by its staff or by law enforcement agencies to resolve complaints. According to the database, from fiscal year 2006 through fiscal year 2010, the Board received 649 complaints of alleged violations.<sup>23</sup> The Board's investigation of these 649 complaints identified apparent violations of federal or state laws in 23 percent of the complaints—148 violations of the Indian Arts and Crafts Act and 2 of state law, but for 61 percent of the complaints—395 of the 649—the Board, upon investigation, identified no violation of the federal law or could not make a determination; for example, according to Board officials, anonymous complaints sometimes do not provide sufficient information to identify a violation.<sup>24</sup> Most of the allegations during these 5 years—49 percent—involved retail store sales, followed by Internet sales, which made up 33 percent. The remaining 18 percent involved an assortment of venues such as powwows, art markets, and individual sellers (see app. I).

According to its Director, the Board's preferred approach to investigating an apparent violation of the act is to send an educational or warning letter to the alleged offender to obtain voluntary compliance. Our analysis of information from the Board's complaint files from fiscal year 2006 through fiscal year 2010 found that 102 educational and 188 warning letters were sent to potential offenders in response to 290 of 649 complaints, or about 45 percent. Educational letters are generalized to businesses that sell Indian arts and crafts, outlining the act's requirements for the sale of Indian arts and crafts, defining penalties, and identifying sources for additional information on the act. Warning letters that are sent to sellers regarding specific items they are offering for sale as Indian products include information on the act's requirements and penalties, advise the sellers to cease any representations that potentially violate the act, and suggest alternative descriptive wording that the sellers could use to avoid violating the act. The Director told us that this approach is practical, given the Board's limited staff and resources, and also effective, often resulting in the seller's agreeing to comply or seeking additional information on the act.

As indicated in its database, after the Board completed its own investigation of the complaints, from fiscal year 2006 through fiscal year

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<sup>23</sup>This total includes multiple complaints about the same persons or businesses.

<sup>24</sup>As of February 2011, investigation continued into 101 of the 649 complaints, and the status of 4 complaints referred to states for investigation is unknown.

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2010, it referred 117 complaints of apparent violations to law enforcement agencies for further investigation. According to the Board's Director, however, limited investigative resources and turnover of investigators hampered these efforts. For example, while the 1990 act directed the Board to refer complaints to the FBI for investigation, the FBI generally declined referrals because of other priorities. Consequently, in August 2007, Interior entered into a memorandum of understanding with the Department of Justice, which delegated authority to Interior to investigate alleged violations of the act. The Board entered into a reimbursable agreement with the Bureau of Indian Affairs for the services of an investigator in September 2007, but the detail lasted only until February 2008. Between June 2008 and January 2010, the Board received investigative assistance on specific complaints or on a part-time basis from three different National Park Service law enforcement personnel. The National Park Service subsequently hired one of the investigators to work full-time for the Board in January 2010, but that investigator suddenly passed away in March 2010. Effective May 2010, the Board had a reimbursable support agreement with the National Park Service for a full-time agent dedicated to investigating Indian Arts and Crafts Act cases in collaboration with Board staff. According to the Director, the Board has been successful in obtaining cooperation from other agencies to investigate complaints, but the lack of continuity and resources for law enforcement investigative assistance has been a significant challenge to developing complaints into criminal cases for prosecution. Consequently, following the 2010 act amendments allowing any federal law enforcement officer to investigate alleged violations, the Board is currently awaiting Interior's approval to hire an investigator as a Board employee for greater program continuity and success.

Although the Board referred 117 complaints for further investigation from fiscal year 2006 through fiscal year 2010, none of these referrals led to a case being filed under the act. According to Department of Justice data from fiscal year 2006 through fiscal year 2010, no federal prosecutions were initiated under the act.<sup>25</sup> More broadly, since 1990, only five federal cases have been filed under the act (see app. II), the first in 1999 and the last in 2005. For the case filed in 2005, an FBI special agent investigated a 2004 complaint referred by the Board regarding an individual in New Mexico selling imported weavings as Navajo made. With assistance

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<sup>25</sup>According to the Department of Justice, the number of complaints that were fully investigated and actually referred to federal prosecutors is unknown.

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from Board staff, a National Park Service agent, and another FBI agent, the case was prosecuted in federal court, resulting in a guilty plea and sentencing of the defendant in December 2007 to 5 years probation and an order to pay the victims restitution totaling more than \$30,000.<sup>26</sup>

To increase investigation and prosecution of complaints—whether under the act or under state laws—the Board has partnered with some of the 12 states that have their own Indian arts and crafts laws to share complaint information and provide other assistance. According to the Board’s complaint database, 248 of the 649 complaints—about 38 percent—from fiscal year 2006 through fiscal year 2010 came from states that have their own state Indian arts and crafts laws. According to the Director, the Board has contacted many of these states’ offices of attorneys general to offer information, assistance, and coordination on any investigations or prosecutions of misrepresentation cases. In recent years, the Board has had the most success collaborating with New Mexico’s Attorney General, beginning with a 2004 investigation initiated by the Board, which was subsequently handed off for successful prosecution under the state law prohibiting fraud, resulting in a guilty verdict, sentence of probation, and an order to pay a fine and restitution.<sup>27</sup> A subsequent 2007 meeting in New Mexico—including the Board’s Director, the State Attorney General and staff, the U.S. Attorney for the District of New Mexico, an FBI agent, and representatives from four Interior law enforcement offices—led to further collaboration, with the Board providing support and assistance to obtain consent decrees in 2009—agreements to not misrepresent merchandise and to pay restitution and a civil penalty—under the state Indian Arts and Crafts Sales law for misrepresenting Indian jewelry in two stores in Santa Fe, New Mexico.<sup>28</sup> The New Mexico Assistant Attorney General who prosecuted these cases told us that the Board’s support, particularly in assisting sting operations at the stores, was instrumental in the investigations’ success. While

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<sup>26</sup>United States v. Rose Morris, No. 1:05-CR-01378 (D. N.M. Dec. 5, 2007).

<sup>27</sup>State of New Mexico v. Amro A. Al-Assi, No. D-1113-CR-200600208 (McKinley County D. Ct. Dec. 26, 2007). Mr. Al-Assi’s sentence was deferred for 1 year and 6 months, during which time he was on probation. Upon successful completion of the deferment period, the criminal charges against him would be dismissed.

<sup>28</sup>State of New Mexico v. Mohammed Sulieman, Jamal Sulieman, and Golden Bear Trading, Inc., No. D-0101-CV-200802466 (Santa Fe County D. Ct. July 29, 2009); State of New Mexico v. Yousef Nassar, d/b/a Santa Fe Indian Jewelry, No. D-0101-CV-200802467 (Santa Fe County D. Ct. Aug. 27, 2009). New Mexico is now also pursuing a case against the manufacturer who supplied Mr. Nassar.

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New Mexico has pursued cases under its law, the offices of attorney general in seven other states that we contacted with Indian arts and crafts laws could not provide any information on cases investigated or prosecuted under those laws in recent years.

Besides the limited federal and state efforts to enforce the Indian Arts and Crafts Act and related state laws, we also identified one arts and crafts organization that has brought numerous civil lawsuits under the act. This organization—Native American Arts, Inc.—is owned and operated by an Indian tribal member and sells authentic Indian arts and crafts through a retail store and the Internet. Finding it difficult to compete with stores that were misrepresenting unauthentic goods as real Indian arts and crafts, Native American Arts, Inc., began filing lawsuits in 1998 for violations of the act and since then, according to the attorney for the organization, has filed about 80 lawsuits in total. The attorney told us that the lawsuits have been highly successful, obtaining injunctions in almost every case to prevent the defendants from violating the act and requiring them to include a disclaimer on imitation products or in their advertising, stating that their products are not made by Indians and are not Indian products under the act. Furthermore, the attorney stated that the defendants have generally complied with the injunctions and that in only two cases follow-up action was needed to obtain compliance.

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### Board’s Educational Efforts Help Promote Awareness and Understanding of the Act

As mentioned earlier, the Board and its federal, state, and industry partners have emphasized educational activities for buyers and sellers to increase awareness of the act and help reduce apparent violations and complaints. For example, educational activities undertaken by the Board have included the following:

- *Publishing brochures to educate sellers and buyers* on the act and to help buyers identify authentic Indian arts and crafts, such as “How to Buy Genuine American Indian Arts and Crafts,” produced in collaboration with the Federal Trade Commission. The Board has also collaboratively produced brochures tailored for specific states that have state arts and crafts laws, including Alaska, Arizona, New Mexico, and South Dakota, and specifically for items made of turquoise.
- *Collaborating with the Federal Trade Commission and six states* to survey Web sites that market art or craftwork potentially covered under the act and sending operators educational materials on compliance with

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both the Indian Arts and Crafts Act and the Federal Trade Commission Act, as amended.<sup>29</sup> In addition, the Board worked with a prominent online sales and auction Web site to compose an educational message to educate online Indian art sellers about the act's requirements.

- *Sending reminder letters to business owners* in the Board's *Source Directory of American Indian and Alaska Native Owned and Operated Arts and Crafts Businesses* about compliance with the act. The Board also produces and distributes wall calendars and shop posters to display information about the act where Indian goods are sold.
- *Operating informational booths* at Indian conventions and arts and crafts shows. For example, from 2005 through 2009, the Board hosted a booth with the Federal Trade Commission and the Alaska State Attorney General's Consumer Protection Unit at the annual Alaska Federation of Natives Convention.
- *Placing educational advertisements* in Indian art, state tourism, and airline in-flight magazines.

State and local programs also help to increase awareness of authentic Indian arts and crafts on a local or regional level and, to a certain extent, help "self-police" the market. Examples include the following:

- *The Alaska State Council on the Arts' Silver Hand Permit Program* has a mission to promote authentic Alaska Native art made in the state exclusively by individual Alaska Native artists. Participating artists must be (1) residents of Alaska, (2) Alaska Natives who can verify Alaska Native tribal enrollment, (3) 18 years of age or older, and (4) producing art exclusively in the state. Participating artists receive tags or stickers with the Silver Hand seal of authenticity for marking arts and crafts that are authentic Alaska Native-made arts and crafts. According to the Director of the Silver Hand program, about one-third of Alaska Native artists are enrolled in the program.
- *New Mexico's Portal Program at the Palace of the Governors* in Santa Fe is a self-policing Indian arts and crafts group that provides free space for the sale of handmade Indian goods in front of the Palace of Governors.<sup>30</sup>

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<sup>29</sup> Act of Sept. 26, 1914 (Federal Trade Commission Act), ch. 311, 38 Stat. 717 (1914). Section 5 of the Federal Trade Commission Act, codified at 15 U.S.C. § 45, prohibits, in part, "unfair or deceptive acts or practices in commerce."

<sup>30</sup> A Portal program also operates in Old Town Albuquerque, New Mexico.

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The Portal program participants we spoke with told us that it has about 4,000 total members, with about 500 who participate actively on a regular basis. Governed by a 10-person committee elected annually from among program participants, the program requires Indian artists to adhere to traditional materials and processes, display registration cards that clearly show their individual trademark(s), and use their trademark(s) on all wares. According to committee members, these standards are strictly enforced and are among the most stringent of any Indian arts and crafts organization. The committee monitors Portal sellers, spot-checks goods for sale, and terminates membership of any artist found to be in violation of Portal rules and regulations.

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### A Variety of Challenges Exist to Curtailing Misrepresentation

Even with its partnerships and educational and other outreach efforts, the Board acknowledges that a number of challenges exist to curtailing misrepresentation of Indian arts and crafts. Specifically, ignorance of the Indian Arts and Crafts Act remains one of the most significant challenges. According to the Board's Director, the continuous education of sellers, consumers, and law enforcement officials is key to curtailing misrepresentation and improving compliance with the act. With sellers, noncompliance can be caused by a lack of awareness of the act, and the Board has learned from sending out educational and warning letters that sellers are often willing to comply after they are better informed about the act. In addition, some sellers may be aware of the act but unaware of the Board's role. For example, one seller we met with knew about the act but said she was unfamiliar with the Board until we pointed out that the brochures about the act that she had on hand were produced by the Board. Consequently, while sellers may be aware of the act, they may not be aware that the Board is available to respond to complaints of violations or to help clarify the act and offer other support.

With regard to consumers, the Board's brochures include information on how consumers can identify genuine arts and crafts and avoid imitations—for example, by asking specific questions about the artist and how the good was made—but ignorance of the act can cause consumers to unwittingly support the market for imitation and potentially misrepresented Indian-style arts and crafts. For example, Indian artists in Santa Fe's Portal program with whom we spoke told us that while members of the program must adhere to strict authenticity criteria, buyers are drawn across the street to the town square, where sellers do not adhere to those same criteria and may imply that their imitation goods are Indian products while significantly undercutting the prices of authentic goods. Portal members told us that, if consumers were better informed

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about cultural significance and quality, they might feel a greater obligation to buy authentic arts and crafts—even if they cost a bit more—and avoid buying imitations. Other Indian artists mentioned examples of what they consider to be deliberate confusion of consumers by sellers, such as galleries labeling art created by non-Indians that is clearly inspired by Northwest Indian art as “Northwestern Art”; such labeling avoids explicit misrepresentation but fails to inform a buyer that the art was not created by an Indian artist. Indian artists also mentioned that non-Indian artists will take on Indian-sounding names to create the illusion of authenticity. Better-informed consumers could ask the questions necessary to avoid such ploys.

With regard to increasing awareness of the act within the law enforcement community, the Board has provided training in recent years via numerous conferences and workshops including U.S. Attorneys and Interior, FBI, tribal, and state law enforcement personnel, and it is planning future training for federal law enforcement officers. Nevertheless, an Interior law enforcement official told us that, although such exposure to the act may be helpful, most Interior law enforcement personnel are trained and focused on specific issues affecting the land units they are assigned to and are unlikely to pursue violations of the act, particularly if they involve investigation outside the borders of that unit.

According to the Board’s Director, in addition to ignorance of the Indian Arts and Crafts Act, another significant challenge to curtailing misrepresentation is that other crimes have higher law enforcement priority. After the 1990 amendments charged the FBI with investigative duties, the Board learned through experience that enforcing the act was not high among the FBI’s competing priorities. An FBI official confirmed that the FBI’s involvement in the investigation of act violations has always been infrequent, and no change to this situation is foreseen, given the FBI’s primary focus on violent crimes. According to the Board’s Director, the delegation of investigatory authority from the FBI and reliance on law enforcement officers from other Interior agencies have posed additional challenges for the Board. The Board has had to make requests through other agencies within Interior for support to enforce the act, and, although a National Park Service investigator now works full-time for the Board, support from Interior law enforcement has been sporadic over time. Furthermore, according to an Interior law enforcement official, it is challenging to have only one dedicated investigator conducting multiple investigations at once, or even a single broad or complex investigation. Under National Park Service policies and procedures, the investigator can be assisted by investigators in other geographic areas for interviews or



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investigative work if needed. But the ideal enforcement scenario, according to the Interior law enforcement official, would be a critical mass of 8 to 10 investigators working with the Board and dedicated to investigating potential violations of the act. It is difficult, however, to devote additional resources to enforcing the act within Interior because of the many priorities already competing within each of Interior's seven law enforcement groups.<sup>31</sup> According to the Director, the Board's planned hiring of an investigator as an employee will allow the Board to recruit and employ an individual with uniquely suited talents and retain that individual to gain experience and skills specifically related to enforcing the Indian Arts and Crafts Act.

Another challenge to prosecuting violations of the act that have been investigated is the capacity of U.S. Attorneys' Offices to adjudicate the alleged violations of the act. According to an Interior law enforcement official, after the investigator gathers evidence, the case must be presented to the appropriate U.S. Attorneys to determine if prosecution or further investigation should be pursued. The official told us that the U.S. Attorneys' Offices are overwhelmed with cases, and those involving violations of the act tend to receive low priority for federal prosecution. A Bureau of Indian Affairs agent also told us that because so few Indian Arts and Crafts Act cases have gone through the courts, little case history exists for the U.S. Attorneys' Offices to look at for guidance on how to put together a winning case. In addition, U.S. Attorneys generally require that the case be "large scale," meaning involving either a large dollar amount or a network of shops implicated in misrepresentation; putting together such a large-scale case is both resource and time intensive.

The owner and attorney for Native American Arts, Inc., told us that in their opinion civil action under the act is more effective than criminal prosecution to curtail misrepresentation. The act provides uniformity under the law, and the statutory and triple damages provisions are effective deterrents. They have observed that, in part because of their successful lawsuits, companies they have not yet sued have preemptively placed disclaimers on their products to prevent a lawsuit. Nevertheless, neither of them was aware of any other Indian arts organizations, tribes, or

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<sup>31</sup>According to a department official, Interior has seven law enforcement groups within five bureaus: the Bureau of Indian Affairs, Bureau of Land Management, National Park Service (with two law enforcement groups, Park Rangers and Park Police), U.S. Fish and Wildlife Service (with two law enforcement groups, Uniformed Refuge Officers and Special Agents), and Bureau of Reclamation.

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individuals bringing such suits. The challenges to bringing suits are that they are costly and time-consuming—investigating cases and developing the evidence to meet legal requirements for civil cases, in their experience, make for an expensive and lengthy process. The cases can also take a long time to resolve if they are defended vigorously, and because this area of law is little developed, appeals may be required to get a positive outcome. In their opinion, most Indian artists do not have the resources or attorney access needed to be successful with this approach.

As reported by Interior’s Office of Inspector General in 2005 and confirmed in our discussions with the Board’s Director, other federal and state officials, and Indian artists, it is generally agreed that a significant challenge to curtailing misrepresentation is the limited enforcement of Customs and Border Protection regulations for imported Native American-style goods.<sup>32</sup> The regulations require that Native American-style jewelry be indelibly marked with the country of origin by cutting, die-sinking, engraving, stamping, or some other permanent method on the clasp, in some other conspicuous location, or on a metal or plastic tag permanently attached to the jewelry, unless an exception applies.<sup>33</sup> The Inspector General report noted, however, that the exceptions may allow importers to use adhesive labels, string tags, or to simply mark a jewelry container instead of the jewelry itself, thus allowing unmarked goods to be misrepresented at the point of sale. According to Customs and Border Protection officials, if an exception had been requested for Native American-style imports, a ruling would appear for that request in the Customs Ruling Online Search System.<sup>34</sup> Customs and Border Protection officials identified two rulings—one about Native American-style jewelry and another about Native American-style arts and crafts—written in response to a request from importers regarding the country of origin

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<sup>32</sup>Department of the Interior, Office of Inspector General, *Indian Arts and Crafts*.

<sup>33</sup>19 C.F.R. § 134.43(c). The regulations also require that unless an exception applies, imported Native American-style arts and crafts must be indelibly marked with the country of origin by cutting, die-sinking, engraving, stamping, or some other equally permanent method. 19 C.F.R. § 134.43(d). Exceptions to these country of origin marking requirements for both Native American-style jewelry and arts and crafts include, but are not limited to, when it is not technically or commercially feasible to mark the items in the manner specified.

<sup>34</sup>The marking regulations can also be applied at the port level, in which case a ruling would not likely be issued nor recorded in the Customs Ruling Online Search System.

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marking of their products.<sup>35</sup> The regulation could be amended to remove any exceptions, but removal would not likely increase enforcement, according to Customs and Border Protection officials. Customs and Border Protection also does not visit stores to determine if country of origin stickers or tags are being removed from imported goods,<sup>36</sup> but it does have a Web form for “e-allegations,” which could be used by concerned artists or consumers to report such violations for follow-up by an enforcement team.

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## Some Potential Options for Protecting Indian Traditional Knowledge and Cultural Expression Exist

U.S. federal and state laws protecting intellectual property do not explicitly include Indian traditional knowledge and cultural expression and therefore do not provide adequate protection from misappropriation or distortion. Some international frameworks or guiding principles exist for protecting traditional knowledge and cultural expressions, but these rely on individual countries taking steps to implement them. To date, the United States has not taken any such steps. Other countries have taken actions to explicitly protect the intangible intellectual property of their indigenous groups, and these efforts provide options for the United States to consider.

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## Existing U.S. Laws Provide Little Protection for Traditional Knowledge and Cultural Expressions

Traditional knowledge and cultural expressions may be vulnerable to misappropriation and distortion because existing U.S. federal and state laws do not explicitly protect Indian traditional knowledge and cultural expressions.<sup>37</sup> For example, Indian traditional knowledge and cultural expressions that have been handed down for generations are not generally

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<sup>35</sup>In these rulings, Customs and Border Protection officials found that metal tags securely attached to imported jewelry satisfied the marking requirements and that marking imported totem poles with a sticker did not satisfy the requirements because it was not equally permanent in comparison to die-sinking, engraving, or stamping.

<sup>36</sup>In commenting on the report, the Department of Homeland Security noted that U.S. Immigration and Customs Enforcement generally engages to a greater extent than Customs and Border Protection in “interior” enforcement matters, but that conducting routine inspections of goods is not a part of its mission area.

<sup>37</sup>We were unable to quantify the extent of misrepresentation or misappropriation of Indian traditional knowledge and cultural expressions for many of the same reasons that we were unable to quantify the extent of misrepresentation under the Indian Arts and Crafts Act. In addition, since no federal law similar to the Indian Arts and Crafts Act defines what a prohibited activity would be with regard to the misrepresentation or misappropriation of Indian traditional knowledge and cultural expressions, no clear criteria exist for what would qualify.

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eligible for copyright protection because they are not original and usually not fixed in any tangible medium of expression. U.S. copyright law protects original works of authorship fixed in any tangible medium of expression.<sup>38</sup> When such a work is copyrighted, the creator receives the exclusive right to reproduce, publish, sell, or distribute the work for a certain period of time. Indian traditional knowledge and many cultural expressions, such as songs, dance, and origin stories, are passed orally from generation to generation and are not fixed in any tangible medium. Moreover, much of Indian traditional knowledge and cultural expression is not original because it is a product of shared cultural understanding spanning thousands of years. For example, the traditional dances and songs that a tribe has performed for generations cannot be copyrighted because they are not original. Therefore, the tribe cannot sue for copyright infringement when others representing themselves as tribal members perform the traditional dances and songs. Similarly, many tribes have an origin story that has been part of their cultural heritage for thousands of years but has only been transmitted orally. If the tribe has not published the story, it is not copyrighted, and the tribe cannot sue for copyright infringement when someone else publishes the story.

U.S. trademark law can provide some protection for Indian traditional knowledge and cultural expression, but its applicability is limited. A trademark is a distinctive sign or indicator—such as a word, name, symbol, design, image, or any combination thereof—used by a person or organization to uniquely identify the source of its products or services and to distinguish them from those of other individuals or entities. Because trademarks are used to protect manufacturers, merchants, and consumers, traditional knowledge and cultural expressions not used in commercial transactions are still vulnerable to misappropriation or misrepresentation. For example, the sun symbol—a crimson circle with lines extending outward in each cardinal direction—is a religious symbol for the Zia Pueblo, but to pursue a trademark infringement case against those who use it without authorization, the Pueblo would have to use the symbol in commercial transactions.

The establishment of the Patent and Trademark Office tribal insignia database in 2001 provides tribes with an opportunity to prevent merchants or manufacturers from registering marks that would falsely suggest a connection with the tribe. But inclusion of an insignia in the database does

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<sup>38</sup>17 U.S.C. § 102(a).

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not provide the tribe with the benefit of trademark registration. Instead, tribes submit their flag, coat of arms, or other emblem or device adopted by tribal resolution for inclusion in the database so that the Patent and Trademark Office can use it when examining applications for trademark registration.<sup>39</sup> If a mark that an applicant wishes to register as a trademark resembles the insignia of an Indian tribe, the Patent and Trademark Office might conclude that the mark would suggest a false connection with the tribe and reject the application. For example, the Port Gamble Indian Community in the state of Washington submitted its tribal insignia—an orca whale depicted in the traditional colors, shapes, and designs of Northwest Coast Indian art—for inclusion in the tribal insignia database. If a company submitted a trademark application for its logo that depicted such an orca whale, the Patent and Trademark Office might conclude that the logo falsely suggested a connection to the tribe and deny the company's trademark application.

According to Patent and Trademark Office officials, various federal and state laws—including invasion-of-privacy and trade secrets laws—protect the moral rights of artists and performers that are recognized in two international treaties.<sup>40</sup> Specifically, the Berne Convention for the Protection of Literary and Artistic Works, which includes productions in literary and artistic domains, whatever the mode or form of its expression, and the World Intellectual Property Organization Performances and Phonograms Treaty, which applies to performers of literary or artistic works or expressions of folklore and producers of sound recordings of those performances, grant moral rights to artists, performers, and producers. As articulated in these treaties, moral rights are the right of attribution (the right to claim authorship of the work or performance) and

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<sup>39</sup>Patent and Trademark Office officials noted that the database included 33 tribal insignias as of February 2011. A Patent and Trademark Office official told us that the office does not track the number of trademark applications that are denied for suggesting a false connection with an Indian tribe.

<sup>40</sup>“Moral rights” allow the creator of a work to prevent others from, among other things, modifying, distorting, or otherwise interfering with the integrity of that work, even if the creator transfers ownership of the physical object in which the work is embodied and its copyright. *See* Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C.L. Rev. 1 (1997). The federal Visual Artists Rights Act of 1990 also grants authors of a work of visual art moral rights, specifically, paintings, drawings, prints, sculptures, and still photographic images produced for exhibition that are produced in limited editions, consecutively numbered, and bear the author's signature or other identifying mark. In addition, several states have laws protecting the moral rights of artists who create fine art, which invariably includes only tangible art.

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the right of integrity (the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work or performance) that would be prejudicial to the artist or performer's honor or reputation.

Most states allow lawsuits to be brought for invasion of the right of privacy when publicity unreasonably places an individual in a false light before the public. For example, in the mid-1980s the Pueblo of Santo Domingo sued a newspaper for invasion of privacy because the newspaper published photographs of a ceremonial dance that were taken despite a tribal ban on photography. However, some legal experts have expressed skepticism about using lawsuits for invasion of privacy in response to misrepresentation or misappropriation of traditional knowledge and cultural expressions. The skepticism arises in part because the tribe would have to show how a nontribal member performing traditional tribal dances or using copies of traditional masks and performing traditional ceremonies is unreasonable and highly objectionable publicity that attributes to the tribe false characteristics, conduct, or beliefs and thereby places the tribe in a false position before the public.<sup>41</sup>

Finally, according to Patent and Trademark Office officials, state trade secrets laws would apply equally to Indian traditional knowledge and cultural expressions if they were kept secret and had some economic value. State trade secrets laws provide a means for redress when information that (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy, is misappropriated. However, Patent and Trademark Office officials also noted that they were not aware of any cases alleging that misappropriation of traditional knowledge and cultural expressions violated state trade secrets laws. Some legal experts are also skeptical about the use of trade

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<sup>41</sup>We also heard concerns about authors, musicians, and other performers that, in the view of some tribes, publicly misrepresent themselves as Indians or tribal members when they are not enrolled as a member of a federally recognized tribe. Tribal officials referred to these individuals as "fake Indians." Some of these officials suggested that the misrepresentation provisions in the Indian Arts and Crafts Act be expanded to make it illegal for an individual to publicly claim that he or she is an Indian if he or she is not a member of a federally recognized tribe.

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secrets law to prevent misappropriation of traditional knowledge and cultural expressions.

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**International Frameworks Exist or Are Under Development to Provide Guidance for Nations Interested in Protecting the Intellectual Property of Indigenous Peoples**

Existing international frameworks offer protections for traditional knowledge, but the United States has not implemented them to date. A Patent and Trademark Office official told us that rather than using U.S. intellectual property laws to protect traditional knowledge and cultural expressions, other actions should be taken to safeguard them. For example, the United Nations Educational, Scientific and Cultural Organization’s Convention for the Safeguarding of Intangible Cultural Heritage requires parties to ensure that intangible cultural heritage is safeguarded, including its protection and promotion, through identification, inventory, and other measures. However, the United States is not a party to this convention, although the collections of the American Folklife Center of the Library of Congress—which maintains an archive of creative works and records representing or illustrating some aspect of American folklife—include Native American songs and dances. Implementing this international convention could help safeguard traditional knowledge and cultural expressions, according to an expert on traditional knowledge and intellectual property law, but safeguarding would not provide the legal protection that can only be afforded by intellectual property law.

Similarly, the U.N. Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly on September 13, 2007, includes provisions on protecting traditional knowledge and cultural expressions. The declaration proclaims several standards of achievement for countries to pursue, including that indigenous people have the right to maintain, control, protect, and develop their intellectual property over their cultural heritage, traditional knowledge, and traditional cultural expression, and that countries should take effective measures to recognize and protect the exercise of these rights.<sup>42</sup> The United States originally voted against the resolution but later expressed its support for the declaration on December 16, 2010. At this time, it is not clear what policy actions, if any, the federal government will undertake to implement the Declaration on the Rights of Indigenous Peoples’ standards of achievement in the United States.

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<sup>42</sup>G.A. Res. 295, U.N. GAOR, 61st Sess., U.N. Doc. A/Res/61/295 (2007).

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Currently, negotiations are under way at the World Intellectual Property Organization on an instrument that, once implemented by countries, would help protect the intangible intellectual property of indigenous peoples. In response to the perceived and growing concern by indigenous people worldwide that misappropriation and unfair misuse of traditional knowledge and cultural heritage are increasing, the World Intellectual Property Organization in 2000 established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The Intergovernmental Committee's mandate calls on member states to reach agreement on one or more international legal instrument(s), which will ensure the protection of (1) traditional knowledge, (2) traditional cultural expressions and expressions of folklore, and (3) genetic resources. Expert working group discussions are being conducted for each of the three topic areas. Of these three areas, the most work has been done on an instrument to protect traditional cultural expressions and folklore, but, according to Patent and Trademark Office officials, member states are still far from reaching agreement on a final text. In addition, member states also have not reached agreement on whether the instrument will be a declaration, a model law for member states, or a binding international treaty. After agreement is reached on the text and type of instrument, each member state will have to take actions to implement the instrument. According to Patent and Trademark Office officials, it is not clear that the United States will be able to agree to any instrument because protection of folklore raises significant concerns for the public domain and for stakeholders such as libraries and the motion picture industry.

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### Other Countries Have Undertaken Protection Actions That Provide Options for Consideration

Options for protecting traditional knowledge and cultural expressions are also found in the experiences of other countries that have established or attempted to establish laws and programs to address the issue. For example, in Australia, state and federal Cultural Affairs Ministers asked a nongovernmental organization to work on developing resources to address the needs of the indigenous arts community. In response, the Arts Law Centre of Australia developed an indigenous intellectual property "toolkit" to promote closer links between business and indigenous communities; raise awareness among indigenous communities, consumers, and commercial operators; and enhance coordination of existing networks of indigenous and nonindigenous organizations in relation to intellectual property matters. As part of the toolkit, the center launched a Web site with information on various intellectual property issues, including contracts, copyright, licensing, and moral rights for artists; recorded short messages in indigenous languages about various



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intellectual property issues, to air on the radio; and provided information for consumers and commercial operators. In addition, according to an Arts Law Centre official, until 2010, the center also provided direct legal services to indigenous artists who needed assistance with intellectual property, among other issues, but it stopped providing such services because it lacked funding for these time-consuming efforts.

Even with the 2010 launch of the intellectual property toolkit, the Arts Law Centre official acknowledged that intellectual property and moral rights laws may not sufficiently protect indigenous traditional knowledge and cultural expressions. For example, when an art gallery erected a sculpture of Wandijina, the creation spirit sacred to three aboriginal groups in Australia, the groups were unable to use intellectual property laws to prevent the display of the sculpture, because it was inspired by the idea of the creation spirit, rather than copied from a tangible image. According to an official from the Arts Law Centre, the Australian government may, in the future, consider either amending the intellectual property laws or creating unique laws to address such issues.

In contrast to Australia's education and outreach approach, Panama, Nigeria, and New Zealand have provided specific protections for traditional knowledge and cultural expressions in their national laws. In 2000, Panama passed a law specifically to protect the collective rights of indigenous communities' traditional knowledge and cultural expressions.<sup>43</sup> The law protects the collective intellectual property rights and traditional knowledge of indigenous peoples in their creations by allowing traditional indigenous authorities or the congressional bodies that rule indigenous autonomous territories to register their collective rights with a government office and prohibiting unauthorized third parties from holding exclusive rights in indigenous traditional knowledge and cultural expressions. But the law does not address scenarios where a member of the indigenous group, as opposed to a third party, violates a registered collective right. According to a legal expert, as of 2005, only one of the seven indigenous groups in Panama had registered collective rights; the extent to which others will do so is unknown.

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<sup>43</sup>The law defines these as customs; traditions; beliefs; spirituality; religion; worldview; expressions of folklore; artistic expressions, including musical instruments, music, dances or performances; and oral and written expressions.

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In Nigeria, when expressions of folklore are made either for commercial purposes or outside their traditional or customary context, the country's copyright act protects them against (1) reproduction; (2) communication to the public by performance, broadcasting, distribution by cable or other means; and (3) adaptations, translations, and other transformations.<sup>44</sup> The right to authorize the reproduction, communication, and adaptation of these expressions of folklore is vested in the Nigerian Copyright Commission. A traditional knowledge and intellectual property law expert we spoke with, however, does not believe that the law has ever been used. Furthermore, the Nigerian Copyright Commission states on its Web site that it is seeking financial sponsorship for a project to document Nigerian indigenous folklore. According to the commission's Web site, this project is a prelude to effective administration and enforcement of the provision listed in the copyright act.

New Zealand has also taken steps to protect the intangible intellectual property of its indigenous groups. Specifically, the Trade Marks Act of 2002 prohibits the Commissioner of Trade Marks from registering a trademark when its use or registration would, "in the opinion of the Commissioner, be likely to offend a significant section of the community," including New Zealand's indigenous population. The law also requires the Commissioner to establish a committee comprising those knowledgeable about indigenous matters to advise the Commissioner on whether the proposed use or registration of a trademark that is, or appears to be, derivative of an indigenous sign, text, or image is, or is likely to be, offensive to indigenous groups. In addition, the country's Ministry of Economic Development is examining the relationship between intellectual property rights and traditional knowledge. After examining the relationship, the ministry will develop options to address any problems identified, hold consultations on those options, and then make policy recommendations to the government.

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<sup>44</sup>The law defines folklore as group-oriented and tradition-based creations of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means including: (1) folk poetry and folk riddles; (2) folk songs and instrumental folk music; (3) folk dances and folk plays; and (4) productions of folk arts, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, handicrafts, costumes, and indigenous textiles.

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## Agency Comments

We provided a copy of our draft report to the Departments of Commerce, Homeland Security, the Interior, and Justice for review and comment. In their written responses, the Department of Commerce's U.S. Patent and Trademark Office and the Department of Homeland Security generally agreed with the contents of the report and also provided technical comments, which we incorporated into the report as appropriate. Commerce's and Homeland Security's comments are presented in appendices III and IV, respectively. The Departments of the Interior and Justice provided technical comments, which we incorporated into the report as appropriate.

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We are sending copies of this report to the appropriate congressional committees; the Secretaries of Commerce, Homeland Security, and the Interior; the Attorney General of the United States; and other interested parties. In addition, this report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff members have any questions about this report, please contact me at (202) 512-3841 or [mittala@gao.gov](mailto:mittala@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix V.



Anu K. Mittal  
Director, Natural Resources  
and Environment

# Appendix I: Misrepresentation Complaints Received by the Indian Arts and Crafts Board

As shown in table 1, the majority of complaints received by the Indian Arts and Crafts Board involved retail establishments and online sales.

**Table 1: Number of Complaints by Sales Venue, Fiscal Years 2006 to 2010**

Sales venue	Number of complaints	Percentage
Retail	318	49.0
Online <sup>a</sup>	215	33.1
Powwow <sup>b</sup>	33	5.1
Unrelated to the Indian Arts and Crafts Act <sup>c</sup>	26	4.0
Other <sup>d</sup>	23	3.5
Market, fair, festival <sup>e</sup>	22	3.4
Wholesale	9	1.4
Unknown	3	.5
<b>Total</b>	<b>649</b>	<b>100.0</b>

Source: Indian Arts and Crafts Board.

<sup>a</sup>Includes complaints involving online retail and auction Web sites.

<sup>b</sup>Includes complaints from powwows and military base powwows.

<sup>c</sup>Involving items or actions not covered under the Indian Arts and Crafts Act.

<sup>d</sup>Includes complaints involving correctional facilities, catalogs, military bases, auction houses, universities, amusement parks, auction sites, gun shows, libraries, museums, and other less common venues.

<sup>e</sup>Includes complaints involving art markets, flea market, retail art markets, musical festivals, and state fairs.

As shown in table 2, complaints were reported for a variety of arts and craft types, with the majority of complaints involving flutes, a mixture of arts and crafts, and jewelry. The number of flute complaints may not represent the relative scale of flute misrepresentation: two individuals submitted most of these complaints.

**Appendix I: Misrepresentation Complaints  
Received by the Indian Arts and Crafts Board**

**Table 2: Number of Complaints by Art or Craft Type, Fiscal Years 2006 to 2010**

<b>Art or craft type</b>	<b>Number of complaints</b>	<b>Percentage</b>
Flutes	139	21.4
Mixture of items	123	19.0
Jewelry	106	16.3
Other <sup>a</sup>	92	14.2
Textiles	51	7.9
Unrelated to the Indian Arts and Crafts Act <sup>b</sup>	26	4.0
Baskets	23	3.5
Fine art <sup>c</sup>	20	3.1
Pottery	20	3.1
Beadwork	19	2.9
Carvings <sup>d</sup>	19	2.9
None <sup>e</sup>	5	0.8
Unknown	5	0.8
Kachina	1	0.2
<b>Total</b>	<b>649</b>	<b>100.0</b>

Source: Indian Arts and Crafts Board.

<sup>a</sup>Includes items such as dolls, drums, and medicine bags.

<sup>b</sup>Involving items or actions not covered under the act.

<sup>c</sup>Includes paintings and sculptures.

<sup>d</sup>Includes pipes and masks.

<sup>e</sup>Includes complaints that involve no sale of arts or crafts.

As shown in table 3, the majority of alleged violations of the Indian Arts and Crafts Act occurred in states located in the western and southwestern United States.

**Appendix I: Misrepresentation Complaints  
Received by the Indian Arts and Crafts Board**

**Table 3: Number of Complaints by Region, Fiscal Years 2006 to 2010**

<b>Region</b>	<b>Number of complaints</b>	<b>Percentage</b>
West <sup>a</sup>	186	28.7
Southwest <sup>b</sup>	131	20.2
Southeast <sup>c</sup>	92	14.2
Northeast <sup>d</sup>	80	12.3
Midwest <sup>e</sup>	71	10.9
International <sup>f</sup>	15	2.3
Unknown	73	11.2
Various	1	0.2
<b>Total</b>	<b>649</b>	<b>100.0</b>

Source: Indian Arts and Crafts Board.

<sup>a</sup>Alaska, California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, and Washington.

<sup>b</sup>Arizona, New Mexico, Oklahoma, and Texas.

<sup>c</sup>Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia.

<sup>d</sup>Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Vermont.

<sup>e</sup>Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Ohio, South Dakota, and Wisconsin.

<sup>f</sup>Australia, Canada, Czech Republic, England, Germany, Nigeria, Philippines, Switzerland, and Thailand.

As shown in table 4, of the 12 states with laws regarding Indian arts and crafts, Nebraska is the only one where no complaints were reported to the Board during fiscal years 2006 to 2010.

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**Appendix I: Misrepresentation Complaints  
Received by the Indian Arts and Crafts Board**

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**Table 4: Number of Complaints by State for States with Indian Arts and Crafts Laws,  
Fiscal Years 2006 to 2010**

<b>State</b>	<b>Number of complaints</b>	<b>Percentage</b>
California	60	24.2
Arizona	49	19.8
New Mexico	45	18.1
Texas	25	10.1
Alaska	19	7.7
Colorado	17	6.9
Oklahoma	12	4.8
Minnesota	6	2.4
South Dakota	6	2.4
Montana	5	2.0
Nevada	4	1.6
Nebraska	0	0
<b>Total</b>	<b>248</b>	<b>100.0</b>

Source: Indian Arts and Crafts Board.

# Appendix II: Criminal Cases Brought under the Indian Arts and Crafts Act and Their Dispositions, Fiscal Years 1990 through 2010

State	Case citation	Charges filed against defendant	Disposition <sup>a</sup>
South Dakota	United States v. Wayne Eagleboy, No. 5:98-MJ-00031 (D. S.D. May 3, 2000)	Two counts of misrepresenting Indian-produced goods and products One count of violating the Migratory Bird Treaty Act One count of violating the Bald and Golden Eagle Protection Act	The defendant pleaded guilty to violating the Bald and Golden Eagle Protection Act and the other charges were dismissed without prejudice. <sup>b</sup> The defendant was sentenced to 1 year probation.
Michigan	United States v. Jerry Lee Boose, No. 1:01-CR-20017 (E.D. Mich. Mar. 19, 2002)	Two counts of misrepresenting Indian-produced goods and products One count of embezzlement and theft from a tribal organization One count of mail fraud	The defendant pleaded guilty to the mail fraud charge and was sentenced to 13 months jail time. The rest of the charges were dismissed with prejudice. <sup>c</sup>
Utah	United States v. Nader Pourhassan, No. 2:00-CR-00229 (D. Utah Dec. 31, 2001)	Two counts of misrepresenting Indian-produced goods and products	The charges were dismissed with prejudice. <sup>c</sup>
Alaska	United States v. Richard Tescher, No. 3:01CR0168 (D. Alaska Jan. 1, 2005)	Two counts of misrepresenting Indian-produced goods and products One count of wire fraud.	The charges were dismissed without prejudice. <sup>b</sup>
New Mexico	United States v. Rose Morris, No. 1:05-CR-01378 (D. N.M. Dec. 5, 2007)	Two counts of misrepresenting Indian produced goods and products	The defendant pleaded guilty and was sentenced to 5 years probation.

Source: GAO analysis of data from the Department of Justice's Legal Information Office Network System.

<sup>a</sup>This table does not include fines, penalties, or restitution orders that may have been imposed on the defendant.

<sup>b</sup>"Without prejudice" means the federal government can charge the defendant again for the crimes.

<sup>c</sup>"With prejudice" means the federal government cannot charge the defendant again.



# Appendix III: Comments from the Department of Commerce



## UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF THE CHIEF FINANCIAL OFFICER

April 11, 2011

Ms. Anu K. Mittal  
Director, Natural Resources and Environment  
General Accountability Office  
441 G. Street, N.W.  
Washington, DC 20548

Dear Ms. Mittal:

Thank you for the opportunity to provide a response to your draft report to Indian Arts and Crafts Act review. We appreciate the effort your staff made in assessing the misrepresentation of Indian arts and crafts as it pertains to intellectual property policies at the United States Patent and Trademark Office.

We have reviewed your report carefully and agree with its contents. We have provided some minor editorial and technical comments, which are enclosed as a separate addendum.

Again, we thank the Government Accountability Office for the report. We will gratefully accept any suggestions to ensure that the Indian Arts and Craft Act provisions are performed appropriately by the United States Patent and Trademark Office.

Sincerely,

A handwritten signature in cursive script that reads "Anthony P. Scardino".

Anthony P. Scardino  
Chief Financial Officer

Enclosure

P.O. Box 1450, Alexandria, Virginia 22313-1450 - [www.USPTO.gov](http://www.USPTO.gov)

# Appendix IV: Comments from the Department of Homeland Security

U.S. Department of Homeland Security  
Washington, DC 20528



**Homeland  
Security**

April 15, 2011

Anu Mittal  
Director, Natural Resources and Environment  
U.S. Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Re: Draft Report GAO-11-432: "INDIAN ARTS AND CRAFTS: Size of Market and Extent of Misrepresentation Are Unknown"

Dear Ms. Mittal:

The Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE) appreciate the opportunity to review and provide comments on this draft report.

DHS is firmly committed to enforcing regulations for imported Indian-style goods. For this reason, we are providing additional contextual information concerning the report's discussion of "circumvention" of marking rules for Indian-style goods, efforts to enforce marking rules pertaining to these goods, as well as the means and scope of CBP's enforcement efforts. In particular, for the reasons explained below, we believe that "exceptions" in the marking regulations and use of intelligence-based targeting rules as opposed to physical inspections, cannot be characterized as a "lack of enforcement."

The draft report correctly references two rulings that provided additional guidance, at the request of importers, on the regulatory requirement to ensure that imported Indian-style goods are indelibly marked with the country of origin as required by 19 C.F.R. § 134.43. In one of these rulings, CBP held that a totem pole figure could not be marked with a sticker, because such a method of marking was not "equally permanent" in comparison to cutting, die-sinking, engraving, or stamping. This ruling is an example of the Agency's efforts to rigorously uphold applicable marking regulations.

The draft report also correctly notes that CBP regulations outline exceptions to the regulatory requirement for indelible marking but also suggests that use of these exceptions represents "circumvention" of marking regulations. Because these exceptions are an inherent and integral

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**Appendix IV: Comments from the Department  
of Homeland Security**

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part of marking regulations, appropriate use of these exceptions cannot be considered to be circumvention of these same regulations. CBP enforces the totality of marking regulations for Indian-style goods. Likewise, because exceptions are specified in CBP regulations, allowing legitimate use of these exceptions does not reflect a “lack of enforcement of CBP regulations for imported Indian-style goods” as suggested by the draft report.

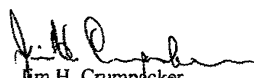
Reflecting our commitment to enforce marking regulations, CBP uses intelligence-based targeting rules to interdict dangerous and non-compliant shipments. CBP screens all incoming shipments for risk in terms of security, safety, and compliance with applicable import regulations. Physical inspection of incoming shipments, as referenced in the draft report, is but one element of a multi-layered approach for ensuring the security and compliance of incoming shipments. As part of CBP’s trade enforcement efforts, citizens can also report alleged trade law violations via the *e-Allegations* link on CBP.gov as noted in the draft report. CBP reviews all submitted *e-Allegations* for enforcement action as appropriate.

The report further notes that CBP “does not visit stores to determine if country-of-origin stickers or tags are being removed from imported goods...” While ICE generally engages to a greater extent than CBP in “interior” enforcement matters, conducting routine inspections of goods is not a part of ICE’s mission area. If ICE were to initiate an investigation to substantiate allegations of a business removing country-of-origin markings in furtherance of a fraud scheme against the U.S. government (e.g., to avoid the proper payment of duties or a violation of trade agreements), the investigation would very likely involve a visit to a business or store. We also note that the draft report does not recognize the potentially significant increase in Federal spending that would result if DHS were to establish a specific program dedicated to conducting routine, recurring visits of this nature.

DHS concurs with the overall substance and findings of the draft report. Technical and sensitivity comments on the draft have been provided under separate cover.

Thank you for the opportunity to comment on this draft report. We look forward to working with you on future Homeland Security issues.

Sincerely,



Jim H. Crumpacker  
Director  
Departmental GAO/OIG Liaison Office

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# Appendix V: GAO Contact and Staff Acknowledgments

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## GAO Contact

Anu K. Mittal (202) 512-3841 or [mittala@gao.gov](mailto:mittala@gao.gov)

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## Staff Acknowledgments

In addition to the contact named above, Jeffery D. Malcolm, Assistant Director; Pedro A. Almoguera; Paola Bobadilla; Mark A. Braza; Ellen W. Chu; Brad C. Dobbins; Jeanette M. Soares; and Michelle Loutoo Wilson made key contributions to this report.

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