

# Cancellation of the Washington Redskins' Federal Trademark Registrations: Should Sports Team Names, Mascots and Logos Contain Native American Symbolism?

I. INTRODUCTION .....	389
II. CONTROVERSIES OF NATIVE AMERICAN SYMBOLISM IN SPORTS	
TEAM NAMES, MASCOTS AND LOGOS.....	392
A. <i>Professional Sports Arena</i> .....	393
B. <i>Nonprofessional Sports Arena</i> .....	395
III. RECENT COURT ORDER TO CANCEL PRO-FOOTBALL'S	
WASHINGTON REDSKINS' FEDERAL TRADEMARK REGISTRATION ..	398
A. <i>Native American Petitioners' Arguments and Evidence</i>	
<i>Supporting Cancellation</i> .....	399
B. <i>Respondent Pro-Football's Argument and Evidence</i>	
<i>Against Cancellation</i> .....	403
C. <i>TTAB Analysis and Applicable Legal Principles</i> .....	405
1. Matter which may disparage .....	406
a. <i>Determination of the likely meaning of the word</i>	
<i>"redskins"</i> .....	407
b. <i>Whether meaning of "redskins" is disparaging</i> .....	408
c. <i>Conclusion of disparaging analysis</i> .....	411
2. Matter that may bring persons into contempt or	
disrepute .....	411
3. Scandalous Matter.....	411
a. <i>Likely meaning of the word "redskins"</i> .....	412
b. <i>Whether "redskins" is scandalous</i> .....	412
IV. FUTURE IMPLICATION .....	413

## I. INTRODUCTION

Imagine attending a baseball game and hearing this pre-game presentation:

... O'er, the land of the free and the home of the brave ... (cheering and clapping)... Tonight ladies and gentlemen, we will see the Scalp City Squaws take on the Western Reservation Warriors in what promises to be a rancorous fighting match. Last time the Squaws and the Warriors met, Scalp City skinned their opponents in a 29-2 win, leaving Western Reservation with

a shameful retreat back to their teepees. Let's all don our headdresses, touch up the war paint and get out our tomahawks to show pride for our home team. Don't forget that after the game, we will all gather on the field for a powwow and cookout to disparage the Native American culture some more.

While the announcer's pre-game speech is purely fictional, the use of Native American symbolism in sports team names, mascots and logos is an omnipresent reality in both the professional and nonprofessional sports arenas. Heightened attention to Native American culture evoked by such symbolism surfaced in April 1999 when the Trademark Trial and Appeal Board (TTAB) of the United States Patent and Trademark Office (USPTO) granted a petition to cancel seven of Pro-Football, Inc.'s registered trademarks<sup>1</sup> comprising the word "redskin(s)."<sup>2</sup> The petition, submitted by Susan Shown Harjo and six other Native Americans, alleged that the word "redskin(s)" as part of Pro-Football's trademarks, was disparaging, contemptuous and scandalous matter and therefore should be canceled pursuant to Section 2(a) of the Lanham Act.<sup>3</sup> Consequently, the TTAB ordered cancellation of the seven federal trademark registrations, each comprising a form of the word "redskin."<sup>4</sup>

As a result of the TTAB decision, other professional sports teams having Native American team names, mascots and logos may face strong opposition from those who support abolishing such names.<sup>5</sup> Outside of the professional sports arena, more than 600 high school and college teams have dropped Native American team names and mascots.<sup>6</sup> Many more institutions using Native American team names, mascots and logos are under pressure to follow suit as the push to abandon such names gains popularity across the nation.<sup>7</sup>

The elimination of Native American sports team names, mascots and logos would encompass racially discriminatory titles and hostile

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1. Respondent, Pro-Football, Inc. used the marks in question in connection with the Washington Redskins professional football team and entertainment services.

2. See *Harjo v. Pro-Football, Inc.*, 1999 WL 435108, at \*48 (P.T.O. Apr. 2, 1999).

3. See *id.* at \*2; see also 15 U.S.C.A. § 1052(a) (West, WESTLAW, current though P.L. 106-170, approved Dec. 17, 1999). The Lanham Act, Section 2(a), states that no trademark shall be refused registration unless it "consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute. . . ." *Id.*

4. See *Harjo*, 1999 WL 435108, at \*48.

5. See Brooke A. Masters, *Creative Legal Tactics Used Against Teams With Indian-Themed Names*, Hous. Chron., April 11, 1999 at 17, available in 1999 WL 3983597. In this article, Masters discusses different legal methods available to Native Americans to eliminate Native American sports team names in the professional sports arena. See *id.* Masters explores issues related to the Washington Redskins, the Atlanta Braves and the Cleveland Indians. See *id.*

6. See *id.*

7. See *id.*

environments, racial stereotypes and cultural offenses. The sports arena is a most appropriate venue to honor all cultures and individuals. Yet, opponents of the current trend argue that such Native American team names, mascots and logos were never intended to belittle and insult the Native American culture, rather, they were established to respect Native American Indian heritage and culture.<sup>8</sup> Opponents of abandoning Native American names, mascots and logos remain loyal to long-standing team tradition.

This comment examines the recent TTAB cancellation of the Washington Redskins' trademarks as well as the use of sports team names, mascots and logos with Native American connotations. Part II provides an overview of the controversy of Native American symbolism in professional and nonprofessional sports team names, mascots and logos. Part III addresses how Section 2(a) of the Lanham Act was applied to affect cancellation of the Washington Redskins' marks in *Harjo v. Pro-Football, Inc.*<sup>9</sup> Part III will also take an in-depth look at the various arguments, rights and assertions of the Native American petitioners and of those opposing cancellation of the mark. The purpose of the in depth analysis is first, to serve as a case study for future challenges to other Native American professional sports team names and second, to set forth the arguments of the Petitioners and Respondent in *Harjo* to raise cultural awareness regarding use of Native American symbols. Part IV analyzes the future impact of the *Harjo* decision on the Washington Redskins football team and other professional sports franchises having Native American names, mascots and logos.<sup>10</sup> Part IV also explores the future societal impact of the *Harjo* decision and the likelihood that society will now more than ever aim to evoke change to abandon discriminatory names, mascots and logos in both the professional and nonprofessional sports arena.<sup>11</sup> This comment concludes that the application of the Lanham Act, Section 2(a), will force cancellation of the federal trademark registrations of professional sports teams if those marks are shown to be disparaging, contemptuous or scandalous and thus outside the reach of federal trademark protection.<sup>12</sup> A likely result of the cancellation of the Washington Redskins' trademarks will be the promotion of public

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8. See *Redskins Lose Trademark Protection*, DAYTON DAILY NEWS, Apr. 3, 1999, at 1D, available in 1999 WL 3959605. This article discusses the TTAB decision granting the Native American Petitioners' request to cancel the Washington Redskin's federal trademark protection. See *id.*

9. See *Harjo*, 1999 WL 435108; see also 15 U.S.C.A. § 1052(a).

10. See *id.*

11. See *id.*

12. See 15 U.S.C.A. § 1052(a).

sympathy in favor of abandoning discriminatory names, mascots and logos.

## II. CONTROVERSIES OF NATIVE AMERICAN SYMBOLISM IN SPORTS TEAM NAMES, MASCOTS AND LOGOS

Native American Indians and other individuals are fighting to change Native American sports team names, mascots and logos containing references to Native American culture.<sup>13</sup> The proponents of change contend that such Native American team symbols are disparaging, racially discriminatory, create racially hostile environments and perpetuate racial stereotypes.<sup>14</sup> By way of contrast, opponents feel that the team names were initially established out of respect for Native American Indian heritage and tradition and were never intended to insult.<sup>15</sup> Team names and mascots in both professional and nonprofessional sports arenas are involved in this controversy.<sup>16</sup>

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13. See Christine Wolff, *Mascot Debate: Passion and Pride; Anderson Board Hears Both Sides*, THE CINCINNATI ENQUIRER, June 2, 1999, at B03, available in 1999 WL 9443308 [hereinafter Wolff, *Mascot Debate*]. Anderson High School in Cincinnati, Ohio faced a challenge from members of the American Indian Movement (AIM) who requested elimination of the Native American school mascot, the "Redskin." See *id.* Opponents of AIM's request argued that the "redskins" mascot was part of the pride, honor, strength and tradition at Anderson High School. See *id.* See also Sherry Parmet, *School Board To Vote on Indian-Mascot Ban: San Bernadino Campus Taking Action*, PRESS ENTERPRISE (Riverside, Cal.), Nov. 5, 1999, at B01 [hereinafter Parmet, *School Board Vote*] (Arrowview Middle School in San Bernadino, California faced a challenge from a group of American Indians desiring to eliminate the middle school mascot and logos portraying Sioux Indians).

14. See Masters, *supra* note 5; see also Wolff, *Mascot Debate*, *supra* note 13 (member of American Indian tribe challenged an American Indian school mascot and nickname "Redskins"; challenger stated that the mascot and nickname "Redskins" were offensive and made her feel unwelcome). See also Parmet, *School Board Vote*, *supra* note 13 (supporters of Indian mascot ban asserted that the Indian mascot and logo at the middle school were offensive, derogatory and disrespectful).

15. See Wolff, *Mascot Debate*, *supra* note 13. Wolf describes opponents who desired to keep the high school nickname "Redskins" and stated that the nickname was never considered degrading. See *id.* Instead, opponents asserted that the school mascot and nickname were positive symbols that illustrated pride, honor and strength of the school and its students. See *id.*; see also Parmet, *School Board Vote*, *supra* note 13. According to Parmet, opponents of an Indian mascot ban argue that the mascot was chosen to honor Indians. See *id.* A canvas on the walls of the Arrowview school displays a painting of the Sioux Indian mascot with the words "Arrowview and community pride." *Id.*

16. See Brett Oppegaard, *Rethinking Mascots in a Brave New World*, THE COLUMBIAN (Clark County, Wash.) Sept. 12, 1999 at A1, available in 1999 WL 24804808 [hereinafter Oppegaard, *Rethinking Mascots*] (use of Native American Indians as sports team names, mascots, and logos, in high schools, colleges, universities, and professional sports teams face pressure from Indian activists).

### A. Professional Sports Arena

The recent TTAB decision held in favor of Susan Shown Harjo and six other Native American petitioners, and effectively canceled the federal registrations of seven "redskins" trademarks.<sup>17</sup> The TTAB ruled that the trademarks owned by Pro-Football, Inc. (Respondent), comprising the word "redskins" used in connection with the Washington Redskins National Football League franchise violated Section 2(a) of the Lanham Act.<sup>18</sup> Section 2(a) bars registration of "immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons[,] . . . beliefs[,] . . . or bring them into contempt, or disrepute."<sup>19</sup> Accordingly, Petitioners persuaded the TTAB that each of Respondent's seven "redskins" trademarks was disparaging and brought Native Americans into contempt or disrepute.<sup>20</sup> Therefore, the marks in question were statutorily barred from registration.<sup>21</sup>

The Atlanta Braves' team name and fan ritual called the Tomahawk Chop are also examples of using Native American connotations in professional sports.<sup>22</sup> Opponents of the team name and the Tomahawk Chop think that the use of the name and the chopping gesture is racially offensive and perpetuates negative stereotypes.<sup>23</sup> Supporters of the Atlanta

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17. See *Harjo*, 1999 WL 435108, at \*48. Susan Shown Harjo was president and executive director of the Morning Star Institute, a national non-profit Indian rights organization for Native people's traditional and cultural advocacy, arts, promotion and research. See *Outside the Lines: Harjo: Get Educated* (ESPN television broadcast, Nov. 18, 1999). Morning Star Institute, located in Washington D.C. was founded in 1984, and is the sponsoring organization for *Harjo v. Pro-Football*. See *id.*

Harjo is a citizen of the Cheyenne and Arapaho Tribes of Oklahoma. See *id.* She is the great, great granddaughter of a Cheyenne Peace Chief named Chief Bull Bear. See *id.* Chief Bull Bear was a Dog Men Society Chief and a leader of the Cheyenne resistance for the latter half of the 1800s. See *id.* Similar to Chief Bull Bear's involvement with issues integral to Native American culture, Harjo has followed in his footsteps, developing key federal policy and law regarding Native Americans. See *id.*

18. See *Harjo*, 1999 WL 435108, at \*48; see also 15 U.S.C.A. § 1052(a).

19. 15 U.S.C.A. § 1052(a).

20. See *infra* notes 56-81 and accompanying text.

21. See *infra* note 159.

22. See Oppegaard, *Rethinking Mascots*, *supra* note 16 (Atlanta Braves portrayed as a high profile example of using American Indians as a sports team's name, mascot and logo).

The Tomahawk chop or "chop" is a rallying cry performed by Atlanta Braves fans by moving their arms up and down in accordance with a rhythmic chant. See "Indians," "Braves" and "Redskins": A Performative Struggle For Control of an Image, 85 Q. J. OF SPEECH 188 (1999), available in 1999 WL 14863069 [hereinafter "Indians," "Braves" and "Redskins"]. This performance is supposed to emulate swinging a tomahawk. See *id.* Oftentimes, the fans augment the rallying cry with foam tomahawk toys. See *id.*

23. Clyde Bellecourt, a protest leader and executive director of the American Indian Movement (AIM), voiced his primary concern regarding Native American team names, mascots, logos and

Braves' team name and tomahawk chop feel that fan rituals are harmless and that the team name honors Native Americans.<sup>24</sup> To ease the injury claimed by foes of the Native American team name and rituals, the Atlanta Braves pledged approximately \$1 million for a nation-wide campaign to educate the public about Native American culture.<sup>25</sup>

Given the reluctance of professional sports teams to abandon discriminatory names, mascots and logos, the Atlanta Braves campaign towards educating American society about Native American culture appears to be a step towards eliminating degrading Native American symbols associated with the Atlanta Braves professional baseball team.<sup>26</sup> If the campaign transmits a positive image of Native American culture, the public may ultimately support a team name change. A public outcry against the discriminatory aspects of the Atlanta Braves' name and team rituals will likely serve to affect change and ultimately persuade team owners to abandon use of Native American symbols.

The Cleveland Indians' professional baseball team name and "Chief Wahoo" mascot are other examples of the use of Native American symbols in sports team names, mascots and logos. Similar to the protestors of the Washington Redskins and Atlanta Braves, the Native American protestors in this instance strongly oppose the Cleveland Indians' team name and mascot because they are derogatory and perpetuate negative stereotypes.<sup>27</sup> For example, the National Coalition on

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rituals, stating that American Indians are human beings and not mascots. See "*Indians*," "*Braves*" and "*Redskins*," *supra* note 22, at 188. Mr. Bellecourt also expressed his concern about sports fans mocking Native American rituals. See *id.* To prove his point, Mr. Bellecourt asked why not name the team the "Atlanta Bishops" and "handout crucifixes to everyone who entered the stadium." *Id.*

24. Atlanta Braves fans argue that their conduct is part of a celebration. See "*Indians*," "*Braves*" and "*Redskins*," *supra* note 22, at 188. The fans state that their performance is out of respect for the team and feel that the team name honors Native Americans. See *id.* In addition, others who support the Native American symbolism feel that the symbolism in sports is extremely positive as it represents athletes and healthy competition. See *id.*

25. See Ernest Hooper, *NBC Offers Preview of Racing Coverage This Weekend Series: TV/RADIO; FANFARE*, ST. PETERSBURG TIMES, Nov. 12, 1999 at 2C [hereinafter Hooper, *NBC Offers*] (Atlanta Braves pledged to fund the Native American educational campaign in negotiations with individuals representing Time Warner shareholders).

26. It is also possible that this campaign was a means to protect the owners' profitable commercial organization and monetary investment in their Native American team name.

27. Protestors state that the Chief Wahoo mascot is deplorable and has reduced Native Americans to mere caricatures. See *Indian Mascots Trademark Office Rebuke of Washington Redskins Mascot is Victory For Justice*, THE POST STANDARD (Syracuse, N.Y.), Apr. 6, 1999 at A8, available in 1999 WL 4675785.

Anti-Wahoo activists see the Chief Wahoo mascot as an expression of American racist sentiment against Native Americans. See *Review and Outlook: Do You Wahoo?*, WALL ST. J., Apr. 23, 1999, at W11, available in 1999 WL-WSJ 5449799 [hereinafter *Review and Outlook*, WALL ST. J.].

Racism in Sports argues that the use of the Chief Wahoo mascot is racially offensive.<sup>28</sup> Other protestors assert that the Chief Wahoo mascot excludes Native Americans and denies them full use of the team and sports arena.<sup>29</sup> These protestors assert that under the federal public accommodations law, Title II of the Civil Rights Act of 1964, they are entitled to "full and equal enjoyment" of a sports arena or stadium without regard to race, color, religion or national origin.<sup>30</sup> That is to say, it is a violation of Title II when Native American team names, mascots, logos or rituals of a sports team deters a substantial number of Native Americans from attending a sports event.<sup>31</sup>

Supporters of Chief Wahoo as a mascot argue that he is a mere fictional character and is not disrespectful to Native American heritage.<sup>32</sup> The supporters even equated the deplorable Chief Wahoo symbol of the Cleveland Indians with the honorable pinstripe symbol associated with the New York Yankees baseball team.<sup>33</sup>

### B. Nonprofessional Sports Arena

While professional sports teams with Native American team names

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28. See James F. McCarty, *Wahoo Foes Plan New Legal Strategy Lawsuit Will Cite 1964 Rights Law*, PLAIN DEALER (Cleveland), Apr. 9, 1999, at 1B, available in 1999 WL 2357329. The National Coalition on Racism in Sports and Media was founded in 1991 and is composed of racial justice groups. See Roberto Rodriguez, *Psychologists Join War Against Racist Campus Mascots and Symbols*, BLACK ISSUES IN HIGHER EDUCATION (June 11, 1998) <<http://neteze.com/m-kthomas/redsambo.htm>>. The goal of the coalition is to eliminate native American symbols and mascots from professional sports; nonprofessional sports teams at colleges, high schools and middle schools; and wherever else such symbols and mascots appear. See *id.*

29. See McCarty, *supra* note 28; see also Note, *A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports*, 112 HARV. L. REV. 904, 906-07 (1999). This note provides interpretation of Title II of the Civil Rights Act of 1964. See *id.* The note also points out that a Title II challenge against the use of American Indian team names and mascots in professional sports will likely be successful in obtaining an injunction to prohibit the use of such discriminatory names and mascots if an opponent of the discriminatory name, logo or mascot can demonstrate an actual deterrent effect on a substantial number of Native Americans. See *id.* at 906.

The registered trademarks of Native American team names, mascots and logos that comprise disparaging, contemptuous or scandalous marks can be challenged under Section 2(a) of the Lanham Act. See *infra* Part III. However, if the team names, etc., are not disparaging, contemptuous or scandalous they still may be challenged under Title II of the Civil Rights Act of 1964, *supra*.

30. 42 U.S.C. § 2000a (West 1994).

31. See Note, *A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports*, 112 HARV. L. REV. 904, 906-07 (1999).

32. See "Indians," "Braves" and "Redskins," *supra* note 22.

33. A supporter of Chief Wahoo stated that Chief Wahoo was an integral part of the Cleveland Indians baseball club and that "what Chief Wahoo means to the Cleveland Indians baseball club is like what the pin stripes mean to the Yankees." "Indians," "Braves" and "Redskins," *supra* note 22.

and mascots face challenges from Native American protestors, nonprofessional sports teams are pressured by school boards, residents, students, and even the U.S. Justice Department to eliminate racially disrespectful team names and mascots.<sup>34</sup> In 1970, the University of Oklahoma was the first major school to eliminate its mascot, "Big Red," an Indian caricature. Subsequently, Stanford and Dartmouth followed the trend, displaying their sensitivity to diverse cultures by eliminating their Native American sports team names.<sup>35</sup> Currently, the mounting pressure to change team names has caused name changes at St. John's University and Miami University of Ohio.<sup>36</sup> The pressure at some schools has escalated into heated debates; while in another instance, the U.S. Justice Department initiated a federal investigation.<sup>37</sup>

In one instance, residents, students and the school board at a Marquette High School in Michigan have fiercely debated whether to eliminate their sports team names, the "Redmen" and "Redettes," and an accompanying logo of an Indian chief in full headdress.<sup>38</sup> The debate at Marquette High School is complicated by the fact that the logo was retired in 1998 and reinstated in 1999 after a school board election.<sup>39</sup> The mandate to reinstate the logo was binding on the entire school board, leaving dissenting members powerless.<sup>40</sup>

Despite the inaction of the Marquette, Michigan school board, Native American opponents adamantly contend that the name and logo is dehumanizing and puts the Native American in a class with all other mascots such as eagles, donkeys, and pigs.<sup>41</sup> Opponents also feel that the

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34. Approximately 2600 institutions use Native American imagery and 600 high school and college teams have eliminated their Native American names and mascots. See *Outside the Lines: What's in a Name?* (ESPN television broadcast, Nov. 22, 1999).

35. See *Review and Outlook*, WALL ST. J., *supra* note 27. See also Oppegaard, *Rethinking Mascots*, *supra*, note 16. Stanford University changed its team name and mascot from "The Indians" to "The Cardinal." See *id.* Dartmouth changed its name from the "Indians" to the "Big Green." See *id.*

36. See *Review and Outlook*, WALL ST. J., *supra* note 27. St. John's first changed its mascot from an Indian to a student in a red tuxedo. See *id.* Then, St. John's changed its team name from "Redmen" to "Redstorm." See *id.* Miami University of Ohio eliminated the team name, mascot, and logo "Redskins" and added "Red Hawks." See *id.*

37. See Jeff Gammage, *N.C. School Keeps One Indian Name, Drops One*, THE INQUIRER (Philadelphia) (Mar. 6, 1999) <<http://www.phillynews.com/inquirer/99/Mar/06/national/IND106.htm>>.

38. See *Outside the Lines: What's in a Name?*, *supra* note 34. The Marquette High School teams were known as the Redmen and Redettes for approximately seventy years. See *id.*

39. See *Outside the Lines: What's in a Name?*, *supra* note 34. After the school board election, four new board members supported the name and logo and brought them back into existence. See *id.*

40. See *Outside the Lines: What's in a Name?*, *supra* note 34.

41. See *Outside the Lines: What's in a Name?*, *supra* note 34. Jody Potts, a Native American resident and opponent of the Marquette High School name and logo, asks whether Native Americans



mascot demonstrates societal ignorance of the Native American culture and places the Native American in a position inferior to other races.<sup>42</sup> Opponents also argue that the name and logo are morally wrong because mascot caricatures of Native American people deny the Native Americans of dignity and self-respect.<sup>43</sup>

The supporting arguments for the Marquette warrior logo and team name are similar to other assertions in support of Native American team logos and names. For instance, the supporters assert that the warrior sign placed in front of the Marquette school honors the Native American culture and heritage.<sup>44</sup> Proponents also argue that the legacy of the Marquette logo dates back many years, and is alive in the memories of many Marquette athletes.<sup>45</sup> While the debate at Marquette High School continues, some schools have taken a different path to determine whether to eliminate Native American team names and mascots.

In March 1999, the United States Justice Department launched an investigation into whether a North Carolina high school violated the civil rights of American Indian students by creating a "racially hostile environment" by using the Indian names "Warriors" and "Squaws" for its teams.<sup>46</sup> Indian activists had hoped that the federal investigation would end the debate over culture and meaning by removing all Native American

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are sub-human and inferior to whites. *See id.* Ms. Potts also argues that the name and logo are disrespectful. *See id.*

42. *See Outside the Lines: What's in a Name?*, *supra* note 34. Dennis Tibbets, director of Native American studies at Northern Michigan University, opposes the warrior sign and consequently has helped organize a lawsuit to eliminate the Marquette logo. *See id.* Mr. Tibbets's ancestors were Anishanabee and lived in Marquette for many generations. *See id.* Michael Haney, the director of the National Coalition of Racism in Sports, initiated the suit alleging that the logo and nickname created an atmosphere of racial harassment. *See id.* Haney argued that the logos have a collectively damaging effect on the youth resulting in decreased performance, low academic achievement and even suicide. *See id.*

43. *See Outside the Lines: What's in a Name?*, *supra* note 34.

44. *See Outside the Lines: What's in a Name?*, *supra* note 34.

45. Tony Rabitaille, a Native American, does not oppose the warrior logo on the Redmen and Redettes names. *See Outside the Lines: What's in a Name?*, *supra* note 34. He wore the Redman logo when he was a Marquette athlete. *See id.* Mr. Rabitaille wants to keep the logo and name because he believes that if the heritage is eliminated now, it will be gone forever, never to return. *See id.*

46. *World News Tonight: Coverage of Indian Mascot Issue in Buncombe County, N.C. Mascots or Stereotypes?* (ABC television broadcast, Feb. 17, 1999). The justice department gathered facts to determine whether the Erwin High School mascots with Native American themes violated the civil rights of Native Americans. *See id.* The goal of the investigation was to ultimately create a situation that would appease both sides of the controversy and do away with the debates and protests. *See id.* *See also* Jeff Gammage, *N.C. School Keeps One Indian Name, Drops One*, *THE INQUIRER* (Philadelphia) (Mar. 6, 1999) <<http://www.phillynews.com/inquirer/99/Mar/06/national/IND106.htm>>.

symbols and racial stereotypes existing at the school.<sup>47</sup> However, the investigation ended when the school board decided that the boy's athletic team name, the "Warriors," would remain, but the girl's athletic team name, the "Squaws," would be changed.<sup>48</sup> The board reasoned that only the girl's team name would be eliminated because the term "squaw" means prostitute in some Indian languages, while in others, "squaw" is a vulgar term for female genitalia.<sup>49</sup>

While the board's decision in North Carolina eliminated one team name, both the Indian activists opposing the names and the proponents of the Native American names voiced overall displeasure with the controversy. The Indian activists were disappointed that both team names were not canceled and that the federal investigation was terminated with the school board's decision.<sup>50</sup> The supporters of the Indian names, mascots and motif were displeased that "Squaws" was cancelled, but pleased that the "Warriors" name and mascot would not be abandoned because the Indian symbols honored the strength and courage of Native Americans.<sup>51</sup>

### III. RECENT COURT ORDER TO CANCEL PRO-FOOTBALL'S WASHINGTON REDSKINS' FEDERAL TRADEMARK REGISTRATIONS

In April 1999, the Trademark Trial and Appeal Board ordered cancellation of seven Washington Redskins' trademarks under Section 2(a) of the Lanham Act because the marks may disparage Native Americans and may bring them into contempt or disrepute.<sup>52</sup> Section 2(a) of the Lanham Act bars federal trademark registration of marks that contain matter that consists of or comprises immoral, deceptive or scandalous matter.<sup>53</sup> The cancellation was in response to allegations by Native American petitioners that use of the word "redskin(s)" or a form of that word in Pro-Football's Washington Redskins' federally registered trademarks "was and is a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for a Native American person."<sup>54</sup> Therefore, Petitioners asserted that under Section 2(a) of the Lanham Act, the "redskin(s)" mark or forms

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47. See Gammage *supra* note 46.

48. See Gammage *supra* note 46.

49. See Gammage *supra* note 46.

50. See Gammage *supra* note 46.

51. See Gammage *supra* note 46.

52. See *Harjo*, 1999 WL 435108, at \*48.

53. 15 U.S.C.A. § 1052(a).

54. *Harjo*, 1999 WL 435108, at \*2.

thereof should be cancelled. Both the Petitioners and Respondent provided compelling evidence to support their respective arguments. The TTAB took into consideration evidence and arguments of both parties and applied Section 2(a) of the Lanham Act to analyze the controversy at hand.<sup>55</sup>

*A. Native American Petitioners' Arguments and Evidence Supporting Cancellation*

Petitioners argued that the Washington Redskins' federally registered trademarks were void and that the word "redskins" is and always has been deeply offensive, humiliating and degrading.<sup>56</sup> Specifically, Petitioners contended that the TTAB must consider evidence regarding the historical setting of Euro-American and Native American relationships, the present societal relations of Native American culture with other cultures and the linguistic and written use of the word "redskins."<sup>57</sup>

First, Petitioners argued that the TTAB must examine the use of the term "redskins" in a historical setting.<sup>58</sup> In this instance, Petitioners set forth evidence regarding the history of the relationship between Euro-Americans and Native Americans in the United States.<sup>59</sup> For example, Petitioners provided expert testimony illustrating Native American history beginning with the fundamental inferiority of Native American people in the British colonial period of the Seventeenth and Eighteenth centuries.<sup>60</sup> Evidence demonstrating that sentiment concerning the inferiority of Native American culture and people continued throughout the Nineteenth century period of American Expansion.<sup>61</sup> In response to the prevailing racist

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55. For text of Section 2(a), see *supra* note 3.

56. See *Harjo*, 1999 WL 435108, at \*14.

57. See *id.* at \*14-15.

58. See *id.* at \*14.

59. See *id.* at \*26. Petitioners provided evidence in the form of testimony by their linguistics expert, Dr. Geoffrey Nunberg, regarding usage of the word "redskins" throughout history. See *id.* at \*26. Dr. Nunberg stated that the primary denotation of the term "redskins" was and is Native American people. See *id.* In addition, Dr. Nunberg demonstrated that the term is and has been used, from the first written uses of the word "redskins," with connotations of violence, savagery and oppression. See *id.* Furthermore, Dr. Nunberg testified that the usage suggests power of the whites over the Indians, with the "savage" Indians "in a position of servitude or capture." *Id.* at \*15.

Petitioners also provided evidence in the form of newspaper articles, film excerpts, dictionaries, and encyclopedias. See *id.* at \*26. Dr. Nunberg analyzed the newspaper articles and testified that newspaper writers avoided using the term "redskins" because it is a disparaging term. See *id.* at \*26.

60. See *Harjo*, 1999 WL 435108, at \*21. The policies of the British colonies on the East Coast reflected the commonly held belief that Native Americans were not Christian and were uncivilized. See *id.* at \*21.

61. See *id.* at \*21-22. In the 1900's, as the new American government expanded west across

sentiment, federal Indian policy in the 1930's and 40's sought to overcome racial prejudice thereby placing Native American people and cultures on an equal level with Anglo-Americans in American society.<sup>62</sup> Accordingly, Petitioners provided a historical perspective of the omnipresent power struggle in the Seventeenth century and subsequent evolution of Euro-American/Anglo-American and Native American relationships, throughout the Eighteenth and Nineteenth centuries.

Second, Petitioners contended that present day societal relations of Native Americans with other cultures reflect the discriminatory attitudes that existed in the past.<sup>63</sup> Petitioners presented testimony of two social sciences experts, Teresa LaFromboise and Arlene Hirschfelder, to demonstrate that use of the word "redskins" is a racial slur that perpetuates negative stereotypes and strains societal relations between Native

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the Appalachian Mountains, the government believed that its settlements should be strictly European/Anglo-American. *See id.* Accordingly, the expansion displaced Native American people. *See id.*

Pursuant to the Removal Act of 1830, Native Americans were evicted from land east of the Mississippi and were moved to separate areas in Oklahoma, and later into areas of Nebraska and Kansas, which had clearly defined boundaries for Native American settlement. *See id.* at \*21-22. Forcing the Indian communities out of their own land and into Indian reservations was harmful to the pride and well-being of the Native Americans. *See id.*

62. *See id.* at \*21-22. American scholars and political and religious leaders at the end of the Nineteenth century and into the Twentieth century realized that the strict separation of Anglo-American and Native American settlements was no longer pragmatic. *See id.* Government policies in the 1930's and 40's that recognized the equality of Native American people and their cultures included passage of the Indian Reorganization Act, which ended the process of land allotment. *See id.* The government also acted upon executive orders that made Native American cultural traditions and religious practices an integral part of the curriculum at Indian schools. *See id.* at \*21-22.

63. *See id.* at \*22. Past attitudes treating Indians as a savage, less powerful culture are reflected in the western expansion of the United States. *See id.* at \*21. Presently, the Native Americans have taken action to eliminate these discriminatory attitudes. *See id.* For example, several promoters of the Native American culture have set forth resolutions to eradicate discriminatory attitudes by eliminating use of Native American team names, logos and mascots. *See id.*

In one instance, a 1992 resolution by the Oneida tribe condemned the use of Indian mascots in any form because such mascots were racist and insensitive to the Indian culture. *See id.* at \*19. In addition, in 1992, the Central Conference of American Rabbis (CCAR) passed a resolution entitled "Racism," which called upon the Washington Redskins and the Atlanta Braves to change their names and to cease using all characterizations based on race or ethnic background. *See id.* at \*20.

In another example, an organization known as Unity 94, a coalition of four minority journalists associations, authored the "Mascot Resolution," which called upon news and media organizations to cease using Native American nicknames, logos and mascots in connection with professional college, high school, and amateur sports teams. *See id.* Another resolution entitled "Resolution to Justice Department Investigation of Human Rights Violations" called for elimination of use of all Indian nicknames, mascots and images by sporting industries, colleges, universities and public institutions. *See id.* These resolutions were created to stop exploitation of the Native American Indian lifestyle and the disparaging stereotypical portrayal of Native American culture. *See id.*

Americans and other cultures.<sup>64</sup> Each of the seven Native American petitioners also submitted testimony illustrating present day discriminatory attitudes toward Native Americans.<sup>65</sup> The seven petitioners described incidents in their lives wherein the word "redskins" was directed at them, causing them to feel angry or humiliated.<sup>66</sup>

The seven petitioners also submitted their opinions about the use of the word "redskins" in connection with Respondent's football team and in reference to Native Americans.<sup>67</sup> Petitioners expressed that use of "redskins" in connection with the football team did not honor, but insulted Native American culture.<sup>68</sup> Furthermore, Petitioners asserted that any use of "redskins" is insulting and offensive in any context.<sup>69</sup> Accordingly, based on evidence and testimony submitted by the social science experts and the seven petitioners, the Petitioners established that Native Americans are continually faced with discriminatory attitudes.<sup>70</sup>

Third, Petitioners asserted that the linguistic and written usage of the word "redskins" reflects offensive and disparaging qualities, namely, violence, savagery and oppression.<sup>71</sup> In this regard, Petitioners presented testimony of a linguistics expert regarding denotation and connotation of the word "redskins," usage of the word "redskin(s)," dictionary definitions

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64. See *Harjo*, 1999 WL 435108, at \*22-23. Ms. Hirschfelder, an educator and consultant of Native American studies, testified that stereotyping of Native Americans as savages, violent and war-like in children's literature and educational curricula was harmful to the self-esteem of Native American children. See *id.* Hirschfelder also opined that the word "redskins" was and is offensive, disparaging and insulting. See *id.*

Ms. LaFromboise, an associate professor and chair of Native American studies at Stanford University testified that use of the term "redskins" in connection with a football team portrays Indian people as ferocious, strong and war-like. See *id.* at \*23. This negative ethnic stereotyping in turn creates a detrimental effect on the mental health of the Native Americans, causing low self-esteem and depression. See *id.*

65. See *id.* at \*18.

66. See *id.* Each petitioner described the anger and humiliation they felt during incidents in their lives, beginning with childhood. See *id.*

67. See *Harjo*, 1999 WL 435108, at \*18-19.

68. See *id.*

69. See *id.* at \*18. One of the Native American petitioners, Mr. Apodaca, described that he has never felt honored by use of the term "redskins." See *id.* at \*19. He also argued that the term "redskins" has always been, and continues to be, "pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist." *Id.*

Another Native American petitioner, Mr. Harold Gross, expressed his opinion that use of the word "redskins" in connection with a football team promulgates a stereotypical view of Native Americans. See *id.* Mr. Gross also asserted that "redskins" was a racial slur used to describe Native Americans. See *id.* In addition, he stated that the word "redskins" was a derogatory, denigrating epithet. See *id.*

70. See *id.*

71. See *Harjo*, 1999 WL 435108, at \*15.

of "redskins" and use of "redskins" in a modern context.<sup>72</sup>

Dr. Nunberg, the linguistics expert, testified that "redskins" has a negative connotation that evokes a negative mental image and association with American Indians.<sup>73</sup> The term "redskins" in reference to Native Americans was always used in Nineteenth and Twentieth century news accounts in contexts of savagery, violence and racial inferiority.<sup>74</sup> Additionally, Dr. Nunberg focused on the dictionary definition and usage of "redskins" demonstrating that the term is offensive or disparaging.<sup>75</sup>

Dr. Nunberg also asserted that the term "redskins" is synonymous with savagery and ferociousness.<sup>76</sup> The original association of "redskins" with savages and ferocity was relied upon to depict a tough football team. In this regard, "redskins," as part of the Washington Redskins' team name, was intended to create a sense of an implacable foe or ferocious enemy.<sup>77</sup> Accordingly, use of the term "redskins" in the team name to create an impression of fear in the hearts of the opponents illustrated that the underlying connotation of the term "redskins" in this instance referred to Native Americans.<sup>78</sup>

Petitioners also supplied testimony of a film expert, Susan Courtney, to demonstrate negative connotations of the word "redskins."<sup>79</sup> In viewing twenty western genre films, Ms. Courtney testified that the word "redskins," in referring to Native American people, was almost always

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72. See *id.* at \*25. Dr. Geoffrey Nunberg was Petitioners' linguistics expert. See *id.* Linguistics is the study of language and its uses. See *id.* Dr. Nunberg, in his capacity as a linguistics expert, analyzes language generally and specifically within particular cultures historical contexts. See *id.*

73. See *id.* Dr. Nunberg drew conclusions regarding negative connotations of the word "redskins" based on citations of the word in historical documents such as newspapers, books, encyclopedias, contemporary citations located in the newspaper and other publications, movies and dictionaries. See *id.* at \*25-28.

74. See *id.* at \*26.

75. See *Harjo*, 1999 WL 435108, at \*27. Dr. Nunberg highlighted instances wherein several dictionaries designated usage labels of the word "redskins" as offensive or disparaging. See *id.* In dictionaries that lacked a notation of usage for the word "redskin," Dr. Nunberg concluded that dictionaries often do not have usage labels for offensive words. See *id.* Dr. Nunberg also admitted that dictionaries may not include usage labels because of lack of printing space. See *id.*

76. See *id.* at \*27-28. Dr. Nunberg concluded that "redskins" conveys savagery and ferocity based on a linguistic concept called "transfer function." See *id.* Transfer function occurs where one sense of a word is intended to form another denotation. See *id.* at \*28.

77. See *id.* at \*15.

78. See *id.* at \*28. Dr. Nunberg concluded that the team name exploits the use of the original meaning of the word "redskins" based upon the linguistic concept of "transfer function." See *id.*

79. See *Harjo*, 1999 WL 435108, at \*29-30. To analyze the word "redskins," Ms. Courtney procured a bibliography of fifty-one western genre films produced until the 1970's. See *id.* at \*29-30. Ms. Courtney viewed twenty of these films and analyzed the scenes wherein the word "redskins" was used. See *id.*

used in connection with words such as “dirty” and “lying.” Based on the evidence, Petitioners established that “redskins” was almost always used in the context of violence, savagery or dishonesty.<sup>80</sup> Petitioners also demonstrated that the linguistic and written use of the term “redskins” was almost always offensive and derogatory.<sup>81</sup>

### *B. Respondent Pro-Football’s Argument and Evidence Against Cancellation*

Respondent opposed Petitioners’ argument that the term “redskins” was disparaging, offensive and derogatory. Respondent contended that the initial use of the term “redskin,” the modern context of the term, and the spoken and written use of the term, in connection with a sports team name, were neutral designations that honored Native Americans.<sup>82</sup>

Respondent argued that the initial use of the term “redskins” in connection with a sports team was intended to reflect the positive attributes of Native Americans.<sup>83</sup> In this instance, Respondent set forth testimony of John Kent Cooke<sup>84</sup> and Richard Vaughn<sup>85</sup> to demonstrate that the Washington Redskins’ team name and logo<sup>86</sup> were named after and associated with Native Americans to reflect the dedication, courage, and pride of that culture.<sup>87</sup> Cooke explained that the team was renamed the “Washington Redskins” in 1937 to designate the team playing in the National Football League that represented the Nation’s capitol.<sup>88</sup> In addition, Mr. Vaughn testified that Native Americans have always been depicted favorably by the team and that the team is proud of its tradition.<sup>89</sup>

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80. *See id.* at \*30. Ms. Courtney viewed no scenes in which the word “redskins” was used in a positive manner. *See id.*

81. *See id.* at \*27-29.

82. *See id.*

83. *See Harjo*, 1999 WL 435108, at \*24-25.

84. John Kent Cooke was the executive vice president of Respondent, Pro-Football, Inc., and offered testimony on Respondent’s behalf. *See id.* at \*23-24. Mr. Cooke was also a director in Respondent’s holding company, Jack Kent Cooke, Inc. *See id.* Mr. Cooke recognized that the Redskins’ logo depicts a Native American wearing feathers, however, he contended that the term “redskins” means “Washington Redskins football team” and nothing else. *See id.*

85. Mr. Richard Vaughn was the director of communications for the Washington Redskins football team. *See id.* at \*23, \*25.

86. The Washington Redskins’ logo is a picture of a Native American Indian in a full headdress.

87. *See Harjo*, 1999 WL 435108, at \*23-25.

88. *See id.* at \*23. The football team was originally located in Boston and called the “Boston Braves.” *See id.* Subsequently, in 1933, the team was renamed the “Boston Redskins.” *See id.* Then, the team moved to Washington, D.C. in 1937, and renamed the “Washington Redskins.” *See id.*

89. *See id.* at \*25.

Respondent also submitted evidence of linguistic experts, Dr. Ronald Butters and Dr. David Barnhart, to demonstrate the traditional meaning of "redskins."<sup>90</sup> Dr. Butters argued that the traditional meaning of the term "redskins" was a neutral and benign designation of the Native American Indian.<sup>91</sup>

Respondent argued that the present use of the term "redskins" in connection with the Washington Redskins football team did not rise to the level of crudeness or disparagement that Petitioners contended.<sup>92</sup> Cooke expressed that Respondent had been increasingly sensitive to the Washington Redskins' fans.<sup>93</sup> For example, Respondent changed the lyrics to the song, "Hail to the Redskins," played at Washington Redskins' games since 1938.<sup>94</sup> Cooke also testified that the phrase "Braves on the warpath" in the "Hail to the Redskins" song does not refer to Native Americans. Instead, the phrase refers to the football team marching down the field to score.<sup>95</sup>

Mr. Vaughn testified that the team name, Washington Redskins, means the football team and does not refer to Native Americans.<sup>96</sup> For this reason, Mr. Vaughn contended that various newspaper cartoons that depicted the football team as Native Americans were not disrespectful because they were about football and they reflected the team's history and tradition.<sup>97</sup> Mr. Vaughn expressed that the cartoons did not refer to Native American culture.<sup>98</sup>

Respondent also submitted evidence of linguistics experts, Dr. Butters and Dr. Barnhart, to demonstrate the neutral, present day use of the term "redskins" in connection with the Washington Redskins football team.<sup>99</sup> Dr. Butters testified that the context in which the term "redskins" appeared determined whether "redskins" was disparaging to Native Americans.<sup>100</sup> Dr. Butters also stated that presently, the term "redskins" used in connection with the Washington Redskins professional football team gave

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90. *See id.* Dr. Butters and Dr. Barnhart are established linguistic experts. *See id.* at \*25.

91. *See Harjo*, 1999 WL 435108, at \*27.

92. *See id.* at \*24.

93. *See id.*

94. *See id.*

95. *See Harjo*, 1999 WL 435108, at \*25.

96. *See id.* Mr. Vaughn testified that he heard the term "redskins" used to refer to Native Americans in movies in a context that was not disparaging or scandalous. *See id.*

97. *See id.*

98. *See id.*

99. *See Harjo*, 1999 WL 435108, at \*26.

100. *See id.* Dr. Butters argued that the words, "Native American," "Indian" and "redskin," on their own, are all acceptable. *See id.* Furthermore, he contended that "redskins" is the least formal of all three words and is a variant of the words, "American Indian." *See id.*



the term a new, contemporary meaning.<sup>101</sup> Moreover, the term referred to the football team, and absent a negative connotation, was merely an informal designation of the word "Indian."<sup>102</sup>

Respondent contended that the term "redskins" used in connection with professional football is distinct from the core, ethnic meaning of the word "redskins."<sup>103</sup> In this regard, football was not derogatory or offensive to American Indian culture or religion; thus, extensive use of the term in connection with Washington Redskins football team did not have a negative effect on the culture.<sup>104</sup> Furthermore, team names such as "Redskins" were initially established out of respect for American Indian heritage and tradition to reflect the positive attributes of Native Americans such as dedication, courage and pride, and were never intended to belittle or insult.<sup>105</sup> For this reason, the experts stated that the word "redskins" had taken on an important and positive new meaning when used in connection with the Washington Redskins professional football team.<sup>106</sup>

### C. TTAB Analysis and Applicable Legal Principles

The TTAB analysis in *Harjo* was based on a petition to cancel several federal trademark registrations owned by Respondent, Pro-Football, Inc.<sup>107</sup> Petitioners alleged that pursuant to Section 2(a) of the Lanham Act, the Washington Redskins' federally registered trademarks (marks) should be cancelled because the trademarks were scandalous, disparaging,

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101. See *id.* at \*26.

102. See *id.* Dr. Barnhart also supported this argument. See *id.* at \*27.

103. See *Harjo*, 1999 WL 435108, at \*16.

104. See *id.*

105. See *id.* at \*24.

106. See *id.* at \*26-27. While the arguments of Petitioners' and Respondent's linguists were primarily the opinions of the respective experts, the parties' assertions and disagreements aided the court in drawing a conclusion regarding the petition to cancel Respondent's "redskins" general trademark registrations. See *id.* at \*16, \*24, \*33.

107. See *Harjo*, 1999 WL 435108, at \*1-2. Petitioners challenged seven of Respondent's trademark registrations. See *id.* These registrations were 1) Registration No. 1,606,810 for the mark "REDSKINETTES," issued July 17, 1990; 2) Registration No. 1,343,442 for the mark "SKINS," issued June 18, 1985; 3) Registration No. 1,085,092 for the mark "REDSKINS," issued Feb. 7, 1978; 4) Registration No. 987,127 for the mark "REDSKINS AND DESIGN," issued June 25, 1974 (the design included a stylized depiction of the profile of a Native American Indian along with a spear); 5) Registration No. 986,668 for "WASHINGTON REDSKINS AND DESIGN," issued June 18, 1974 (the design depicted a stylized picture of a Native American Indian with a spear); 6) Registration No. 978,824 for the mark "WASHINGTON REDSKINS," issued Feb. 12, 1974; and 7) Registration No. 836,122 for the mark "THE REDSKINS" in stylized letters, issued on Sept. 26, 1967. See *Harjo* v. Pro-Football, Inc., 30 U.S.P.Q.2d 1828 (1994), also available at 1994 WL 100241, \*1 (P.T.O. Mar. 11, 1994); see also U.S. Patent & Trademark Office Trademark Text and Image Database (visited Mar. 18, 2000) <<http://trademarks.uspto.gov>> ("WASHINGTON REDSKINS AND DESIGN" depicted in U.S.P.T.O. Trademark Text and Image Database).

contemptuous and disreputable.<sup>108</sup>

In analyzing whether the “redskins” marks were scandalous, disparaging, contemptuous and disreputable in violation of Section 2(a), the TTAB dissected the issue in the context of the time period in which each of the respective marks was registered.<sup>109</sup> The TTAB first determined whether the marks were disparaging.<sup>110</sup> Then, the TTAB ascertained whether the trademark matter may bring Native Americans into contempt or disrepute.<sup>111</sup> Last, the TTAB decided whether the trademark matter was scandalous.<sup>112</sup>

### 1. Matter which may disparage

Pursuant to Section 2(a) of the Lanham Act, the TTAB analyzed whether Respondent’s marks comprised “matter which *may* disparage.”<sup>113</sup> The addition of the word “may” in the statutory language before the word “disparage” was interpreted by the TTAB to mean that intent to disparage is not necessary to prove because it would be extremely difficult to show.<sup>114</sup> Consequently, the TTAB focused on whether the marks at issue *may* be perceived as disparaging.<sup>115</sup>

The TTAB first considered the “ordinary and common meaning” of the term “disparage.”<sup>116</sup> The ordinary and common meaning of “disparage” was determined by referring to its dictionary definition in 1947, contemporaneous with the 1947 Lanham Act.<sup>117</sup> In 1947, Webster’s dictionary defined “disparage” as to dishonor, to speak slightly of, to

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108. See *Harjo*, 1999 WL 435108 at \*14; see also 15 U.S.C.A. § 1052(a).

109. See *Harjo*, 30 U.S.P.Q.2d at 1832, also available at 1994 WL 100241, at \*5 (P.T.O.). The dates at issue in this case were 1967 to 1990, the issue dates of Respondent’s registrations. See *id.* Therefore, the TTAB analyzed whether the Respondent’s marks, at the time the “redskins” trademark registrations were granted, were scandalous or disparaging. See *id.*

110. See *Harjo*, 1999 WL 435108, at \*36.

111. See *id.* at \*47.

112. See *id.*

113. 15 U.S.C.A. § 1052(a) (emphasis added).

114. See *Harjo*, 1999 WL 435108, at \*36.

115. See *id.*; see also *Dough Boy Indus., Inc. v. The Reese Chem. Co.*, 8 U.S.P.Q. 227, 228 (C.C.P.A. 1951). In *Dough Boy*, the Court of Customs and Patent Appeals, in interpreting Section 2(a) of the Lanham Act, stated that it was not necessary that a mark be disparaging *per se* but was properly determined by questioning whether the use of a mark on particular goods or services may be considered to be disparaging. See *Dough Boy*, 8 U.S.P.Q. at 228. The examiner in *Dough Boy* rejected the trademark application for “DOUGH BOY” for use in connection with a prophylactic protection from venereal diseases because the packaging represented matter which may disparage. See *id.*

116. See *Harjo*, 1999 WL 435108, at \*35.

117. See *id.*

deprecate, to degrade or to lower.<sup>118</sup> Additionally, the New “Standard” Dictionary of English Language defined “disparage” as to regard or speak slightly of, to affect or injure by unjust comparison, to degrade or lower.<sup>119</sup>

After considering the ordinary and common meaning of disparage, the TTAB applied a two-part analysis, asking (1) what was the likely meaning of the matter in question; and (2) whether that meaning was disparaging.<sup>120</sup> The TTAB noted that in determining the first part, the TTAB looked not to American society as a whole but instead to the views of the Native Americans, the group referenced by the matter in question.<sup>121</sup> The TTAB looked to the views of the Native Americans because, pursuant to Section 2(a) of the Lanham Act, a trademark shall not be registered if it comprises “matter which may disparage or falsely suggest a connection with persons, living or dead, institutions or national symbols.”<sup>122</sup>

*a. Determination of the likely meaning of the word “redskins”*

To determine the likely meaning of the matter in question, the TTAB first referred to dictionary definitions of the term “redskins.”<sup>123</sup> The TTAB concluded that based upon the evidence submitted by Petitioner and Respondent, the dictionary denotation of the term “redskins” was Native American persons.<sup>124</sup> Then, the TTAB considered the relationship between the term “redskins” and other elements that made up Respondent’s marks.<sup>125</sup> The TTAB concluded that Respondent marks used in connection with stylized American Indian designs carried an allusion to Native Americans inherent in the meaning of the term “redskin.”<sup>126</sup>

Next, the TTAB considered the relationship between the term “redskins” used in connection with professional football games and entertainment services.<sup>127</sup> Respondent submitted a substantial amount of evidence that the term “redskins” had become denotative of the professional football team and thus was a distinct, separate word from the

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118. See *id.* (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1947)).

119. See *id.* (citing NEW “STANDARD” DICTIONARY OF ENGLISH LANGUAGE (1947)).

120. See *Harjo*, 1999 WL 435108, at \*38.

121. See *id.* at \*41.

122. 15 U.S.C.A. § 1052(a).

123. See *Harjo*, 1999 WL 435108, at \*39.

124. See *id.*

125. See *id.* at \*36. The marks in question must be considered in their entirety in order to ascertain the meaning of the matter in question. See *id.*

126. See *id.* at \*41. That is to say, the marks comprised of the word, “redskins” and the portrait of a Native American and a spear carry a direct allusion to Native Americans. See *id.*

127. See *Harjo*, 1999 WL 435108, at \*39.

term "redskins" and the meaning as a Native American person.<sup>128</sup> However, the TTAB concluded that the word "redskin" had not lost its original meaning merely through use in connection with a professional football team.<sup>129</sup> For this reason, the TTAB determined that upon considering "redskins" in connection with entertainment services, the term clearly referred to *both* the football team and Native Americans.<sup>130</sup>

Last, the TTAB ascertained the manner in which Respondent's "redskins" marks were used in the marketplace in connection with the football team and entertainment services.<sup>131</sup> The TTAB looked to evidence submitted by Petitioners that depicted a Native American theme in Respondent's logos, mascots, nicknames, uniforms and other promotional paraphernalia.<sup>132</sup> The TTAB also considered the predominant Native American imagery that was manifest in activities and writings of the media and the fans.<sup>133</sup> Based upon the extensive evidence of Native American imagery, allusion to Native Americans, and metaphorical connection of Respondent's football team to Native Americans, the TTAB refuted Respondent's argument that the term "redskin," through use by Respondent in connection with the football team and entertainment services, had acquired new meaning.<sup>134</sup> Accordingly, the TTAB concluded that the term "redskins" meant Respondent's football team *and* maintained the allusion to Native Americans.<sup>135</sup>

*b. Whether meaning of "redskins" is disparaging*

In analyzing the second prong, the TTAB determined whether the likely meaning of "redskins" was disparaging from the perspective of Native Americans.<sup>136</sup> The TTAB concluded that the evidence adequately

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128. *See id.*

129. *See id.* at \*41. The word "redskins" had not lost its original meaning, a Native American person, when used to describe the football team, because the football team used the word in connection with a stylized design depicting a Native American and a Native American spear. *See id.*

130. *See id.* at \*42.

131. *See Harjo*, 1999 WL 435108, at \*39.

132. *See id.* Graphics in two of Respondent's registered marks contained a portrait of a Native American individual and a spear. *See id.* at \*40. This design appeared on several of Respondent's promotional paraphernalia. *See id.*

133. *See id.* at \*39-40. An example of Native American imagery in writings of the media was a headline to a newspaper article entitled, "Skins Scalp Giants." *See id.* at \*40.

134. *See id.* at \*41.

135. *See Harjo*, 1999 WL 435108, at \*41.

136. *See id.* *See also In re Hines*, 31 U.S.P.Q.2d 1685, 1688 (TTAB 1994) (In *Hines*, the TTAB found the mark "BUDDA BEACHWEAR AND DESIGN" for casual clothing items disparaging in view of the depiction of the Buddha therein) *vacated on other grounds*, 32 U.S.P.Q.2d 1376 (TTAB 1994). *See also In re Waughtel*, 138 U.S.P.Q. 594, 595 (TTAB 1963); *In re Anti-Communist World*

demonstrated that the “redskins” marks as of the dates they were issued, were disparaging to Native Americans.<sup>137</sup>

First, the TTAB examined evidence establishing that the word “redskins” had “been a term of disparagement of and to Native Americans.”<sup>138</sup> For example, dictionaries from 1967 to 1990 set forth usage definitions for the term “redskins” as informal or offensive slang.<sup>139</sup> Then, the TTAB considered evidence that illustrated the disparaging connotation of the word “redskin,” both throughout history and in connection with entertainment services.<sup>140</sup>

Evidence on the record illustrated the negative, pejorative and derogatory use of the word “redskins” throughout history.<sup>141</sup> For example, based on historical documents and analytic testimony of Petitioners’ linguistics expert, Dr. Nunberg, the TTAB found that the evidence established that the word “redskins” in reference to Native Americans is, and always has been, a pejorative term.<sup>142</sup> In addition, writings from the late 1800’s to the early 1900’s, such as newspapers, encyclopedias, books and dictionaries portrayed Native Americans in a derogatory or negative manner.<sup>143</sup> Evidence submitted of writings from the 1930’s to the 1940’s was slightly less insulting than earlier works.<sup>144</sup> From the 1950’s to the 1990’s, there were significantly less uses of the word “redskins” as a

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Freedom Congress, Inc., 161 U.S.P.Q. 304, 305 (TTAB 1969). The views of the targeted group are determined on a case by case basis. *See Harjo* 1999 WL 435108, at \*41. For example, if the alleged disparagement is of an academic institution, the target group may be students, faculty, administration and alumni. *See id.*

137. *See Harjo*, 1999 WL 435108, at \*42.

138. *See id.*

139. *See id.* In a Random House dictionary published in 1966, the term “redskins” was labeled “often offensive.” *See id.* In another instance, American Heritage dictionary represented the term “redskins” as “informal” in the 1976 and 1981 dictionary editions. *See id.* In the 1992 and 1996 editions of the American Heritage dictionary, the usage definition labeled “redskins” as “offensive slang.” *See id.*

140. *See id.* at \*45-46.

141. *See Harjo*, 1999 WL 435108, at \*25-28.

142. *See supra* notes 71-78 and accompanying text.

143. *See Harjo*, 1999 WL 435108, at \*43. Petitioners submitted newspapers from the late 1800’s that referred to Native Americans as the “savage enemy.” *See id.* Encyclopedia Britannica, (11th ed., 1910), referred to Native American Indians as “primitive” and “uncivilized” or “wild and indolent.” *See Harjo*, 1999 WL 435108, at \*43. In addition, a book published in 1910 entitled, *Making the Movies* by Ernest Dench, had a chapter title, “The Dangers of Employing Redskins as Movie Actors.” *See id.* The content of the chapter depicted Native Americans as “Red Indians” who were able to “live their savage days over again” working as actors. *Id.* at \*43.

144. *See Harjo*, 1999 WL 435108, at \*43. A 1939 Newsweek article was entitled “Redskin Revival-High Birthrate Gives Congress a New Overproduction Headache.” *See id.* While the article recognized that the inequality between Native Americans and the Anglo-Americans resulted from poor government policy, the Native Americans were still thought of as an administrative burden. *See id.* at \*43.

reference to Native Americans.<sup>145</sup> The TTAB concluded that the decrease in the use of the word “redskins” reflected a general societal awareness that “redskins” was a pejorative term for Native Americans.<sup>146</sup> Accordingly, the evidence on the record tracing the historical progression of the use of the word “redskins” established that the term was, and still is, a negative, insulting and derogatory term.<sup>147</sup>

The TTAB also analyzed the word “redskins” as used in Respondent’s marks in connection with the professional football team and entertainment services.<sup>148</sup> The TTAB found that Respondent’s use of its marks from the 1940’s to the present mimicked the various societal sentiments regarding the word “redskins” that existed during this time period.<sup>149</sup> For example, evidence from the late 1940’s to early 1950’s confirmed that Respondent’s game program covers, promotional activities, marching band costumes and antics, as well as Redskinnettes cheerleaders costumes and choreography, depicted Native Americans as savage aggressors or buffoons.<sup>150</sup> In the late 1950’s and early 1960’s, Respondent reflected the overall societal sentiment of increased respect for Native Americans.<sup>151</sup> For example, Respondent included life-like portraits of Native Americans on the game program covers.<sup>152</sup> Next, from the late 1960’s forward, Respondent gradually portrayed Native Americans more favorably.<sup>153</sup> For instance, Respondent utilized more football imagery instead of Native American imagery.<sup>154</sup> Respondent also modified the lyrics to its theme song, “Hail to the Redskins” and cheerleader uniforms.<sup>155</sup> While Respondent had gradually decreased the use of Native American imagery, the media continued to use negative, disrespectful statements in headlines, news articles and videos.<sup>156</sup> Accordingly, the TTAB concluded that the word “redskins” retained its derogatory nature when used in Respondent’s

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145. *See id.* at \*44.

146. *See id.* at \*44-45.

147. *See Harjo*, 1999 WL 435108, at \*45.

148. *See id.* at \*45-46.

149. *See id.* at \*45.

150. *See id.*

151. *See Harjo*, 1999 WL 435108, at \*45.

152. *See id.*

153. *See id.*

154. *See id.*

155. *See Harjo*, 1999 WL 435108, at \*45. The songs and uniforms were modified to set forth a respectful portrayal of the Native American culture. *See id.*

156. *See id.* at \*45-46. For example, the media published headlines referring to the Washington Redskins’ team players or managers as “on the warpath,” holding “pow wows” and even “scalping” opponents. *See id.* at \*46. Video excerpts of Washington Redskins’ football games revealed Redskins fans dressed in Native American costumes and engaging in rituals and idiotic acts that portrayed Native Americans as savages and buffoons. *See id.*

marks in connection with the football team and entertainment services.<sup>157</sup>

*c. Conclusion of disparaging analysis*

Based on this two-part analysis, the TTAB concluded that (1) the word "redskins" was a derogatory connotation of Native Americans and (2) the derogatory meaning of "redskins" was disparaging of Native Americans.<sup>158</sup> For the above reasons, the TTAB held that the word "redskins" as a part of Respondent's marks was derogatory and thus not entitled to federal trademark protection pursuant to Section 2(a) of the Lanham Act.<sup>159</sup>

2. Matter that may bring persons into contempt or disrepute

In addition to the two part analysis for whether the marks were disparaging, the TTAB examined whether Respondent's marks facilitated contempt for Native Americans.<sup>160</sup> Using the same interpretation of the evidence and conclusions reached in the "matter which may disparage" analysis, above, the TTAB examined the nature of the word "redskins" in Respondent's marks.<sup>161</sup> Under this analysis, the TTAB determined that each of Respondent's marks was comprised of matter likely to bring Native Americans into contempt or disrepute.<sup>162</sup>

3. Scandalous Matter

Furthermore, to complete a full analysis of Petitioners' claims pursuant to Section 2(a) of the Lanham Act, the TTAB analyzed whether Respondent's marks comprised scandalous matter.<sup>163</sup> To determine whether the term "redskins" is scandalous, the TTAB applied a two-part test.<sup>164</sup> First, the TTAB examined the likely meaning of the term "redskins," and second, whether in view of the likely meaning, it was

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157. *See id.* at \*46.

158. *See id.* at \*47.

159. *See Harjo*, 1999 WL 435108, at \*48; *see also* 15 U.S.C.A. § 1052(a).

160. *See Harjo*, 1999 WL 435108, at \*47. When a mark comprises matter likely to bring "persons, living or dead, institutions, beliefs, or national symbols. . . into contempt, or disrepute," the mark may not receive the protection of federal trademark registration. *Id.* (citing 15 U.S.C.A. § 1052(a)).

161. *See id.* at \*47. For analysis interpreting evidence and conclusions drawn with respect to disparagement, *see supra* notes 107-159 and accompanying text.

162. *See Harjo*, 1999 WL 435108, at \*47 (citing 15 U.S.C.A. § 1052(a)).

163. *See id.* Pursuant to Section 2(a) of the Lanham Act, marks that comprise scandalous matter may not receive federal trademark protection. *See id.* (citing 15 U.S.C.A. § 1052(a)).

164. *See id.* at \*47. The two-part analysis was established for the TTAB by the U. S. Court of Appeals for the Federal Circuit in *In re Mavety Media Group, Ltd.* *See In re Mavety Media Group, Ltd.*, 31 U.S.P.Q.2d 1923, 1925 (1944).

scandalous to a substantial composite of the general public.<sup>165</sup>

*a. Likely meaning of the word "redskins"*

To determine the likely meaning of the term "redskin," the TTAB considered (1) dictionary definitions; (2) the relationship between "redskins" and other elements that made up the mark; (3) the goods and services associated with the marks; and (4) the manner in which the mark was used in the marketplace in connection with those services.<sup>166</sup> To determine the likely meaning of "redskins" the TTAB incorporated by reference the analysis and conclusions reached with respect to disparagement.

*b. Whether "redskins" is scandalous*

The TTAB concluded that based upon an analysis of the evidence, Petitioners did not establish that the term "redskins" was scandalous to a substantial composite of the general public.<sup>167</sup> While the term "redskins" in Respondent's marks was found to be a disparaging connotation of Native Americans, the marks did not rise to the level of "shocking to the sense of truth," the standard set forth by the Federal Circuit.<sup>168</sup> Accordingly, the TTAB concluded that Respondent's marks did not comprise scandalous matter.<sup>169</sup> For the foregoing reason, the TTAB denied the petition to cancel Respondent's marks on the ground of

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165. See *In re Mavety Media Group, Ltd.*, 31 U.S.P.Q.2d at 1927. The TTAB noted that these guidelines for determining whether the mark was scandalous were vague and highly subjective. See *Harjo*, 1999 WL 435108, at \*47; see also *In re Hershey*, 6 U.S.P.Q.2d 1470, 1471 (TTAB 1988). The Federal Circuit Court of Appeals in *In re Mavety* established additional considerations to determine scandalousness. See *In re Mavety*, 31 U.S.P.Q.2d at 1925. For example, the court established that an analysis of scandalousness should consider the mark in the context of the marketplace as applied to the goods described in the application for trademark registration. See *id.* at 1925. In addition, the court stated that analyzing whether the mark comprises scandalous matter should be ascertained (1) "from the 'standpoint of . . . a substantial composite of the general public'" and (2) "in the context of contemporary attitudes." *Id.* at 1925-26 (citation omitted).

166. See *Harjo*, 1999 WL 435108, at \*38.

167. See *id.* at \*47-48; see also 15 U.S.C.A. § 1052(a). For a term to be "scandalous" to a substantial composite of the general public, it must be "shocking to the sense of truth, decency, or propriety" or cause "offense to the conscience or moral feelings." *Mavety*, 31 U.S.P.Q.2d at 1925.

168. *Harjo*, 1999 WL 435108, at \*48 (quoting *Mavety*, 31 U.S.P.Q.2d at 1925). In *Mavety*, the mark BLACK TAIL conveyed an idea that was offensive, disreputable or disgraceful to the reputation of a substantial composite of the general public. See *In re Mavety*, 31 U.S.P.Q.2d at 1926. In *Harjo*, Petitioners failed to provide evidence that would tend to "give offense, excite reprobation or call out for condemnation." *Harjo*, 1999 WL 435108 at \*48. (citing *In re Mavety*, 31 U.S.P.Q.2d at 1925).

169. See *Harjo*, 1999 WL 435108, at \*48.



scandalousness.<sup>170</sup>

In summary, the TTAB held that Respondent's "redskins" trademarks would be canceled pursuant to Section 2(a) of the Lanham Act because the marks were comprised of matter that was disparaging and may bring Native Americans into contempt or disrepute.<sup>171</sup> The petition to cancel the marks on the ground that the marks comprised scandalous matter was denied.<sup>172</sup>

#### IV. FUTURE IMPLICATIONS

As a result of the TTAB decision, it is likely that the Washington Redskins professional football team will continue to use the team name in connection with the football team and entertainment services. However, a loss of federal rights to protect the trademarks distinguishing the Washington Redskins football team means that the team may only seek to enforce rights in its name under state common law.<sup>173</sup> In addition, the football team loses the ability to license the use of the team name to enterprises that produce and sell sports paraphernalia.<sup>174</sup> Consequently, it is possible that the football team will lose a large sum of money from royalties that they would have otherwise obtained if the marks were licensed.

The TTAB decision pursuant to Section 2(a) of the Lanham Act may be detrimental to other professional sports franchises having Native American names, mascots and logos. Claimants challenging the federal trademarks of the Atlanta Braves and Cleveland Indians under Section 2(a) of the Lanham Act will be successful upon demonstrating that the terms "Braves" and "Indians" are scandalous, disparaging or likely to bring Native Americans into contempt or disrepute. It is also possible that professional teams with Native American names, mascots, and logos will face alternative legal challenges promoting elimination of Native American symbolism. For example, Native American organizations may try to eliminate a team's Native American symbolism under the federal public accommodations law, Title II of the 1964 Civil Rights Act.<sup>175</sup>

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170. *See id.*; *see also* 15 U.S.C.A. § 1052(a).

171. *See Harjo*, 1999 WL 435108, at \*48.

172. *See id.*

173. *See Masters*, *supra* note 5. Masters explains that the Redskins could challenge counterfeit merchandise in state or federal courts by alleging long term and well known use of its marks in the state. *See id.* However, the TTAB cancellation of the Redskins' trademarks would be a significant defense that could destroy the Redskins' claims.

174. *See Masters*, *supra* note 5.

175. *See supra* note 29 and accompanying text.

The TTAB decision to cancel the Washington Redskins' marks will likely persuade nonprofessional sports teams with Native American names, mascots and logos to do away with their Native American symbolism. Widespread change in the nonprofessional sports arena will reflect the cultural and societal displeasure demonstrated in *Harjo* of Native American symbolism in sports.<sup>176</sup> Changing Native American team names, mascots, and logos will not harm team spirit and athleticism. Instead, the change may serve to promote feelings of respect for Native American culture by teaching that Native Americans are humans and not simply the savage or ferocious mascots implied by team names.

Abolishing Native American names, mascots and logos will also serve to teach the qualities inherent in student athletic programs, such as team pride, honor and integrity. To instill these qualities in student athletes and fans, the university, high school and grade school athletic teams must promote and respect the rights of individuals from every race and culture. Accordingly, it is highly probable that the TTAB order to cancel Native American trademarks of a professional sports team, reflecting societal displeasure with such Native American team names, mascots and logos, will serve to affect change on a nonprofessional level.

A nationwide movement to abolish racially discriminatory team symbols will help both professional and nonprofessional sports to promote team players, positive attitudes, team talent and athletic ability. That is to say, changing a team name, mascot or logo will not be detrimental to the good will of the team but instead will serve to promote feelings of respect for team members and fans comprised of many different cultures. Abolishing culturally offensive team names, mascots and logos will also demonstrate that such team symbols do not have to be ferocious or relate to a specific race or culture for the team to be successful. Success emanates from overall team attitude and ability.

*Kristin E. Behrendt*

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176. See generally *Harjo*, 1999 WL 435108.