

NATIVE AMERICAN MASCOTS AND TEAM NAMES: THROW AWAY THE KEY; THE LANHAM ACT IS LOCKED FOR FUTURE TRADEMARK CHALLENGES

*Christian Dennie**

I.	INTRODUCTION	198
II.	TRADEMARK ACTIONS UNDER THE LANHAM ACT	202
	A. Trademark Cancellation Proceedings	203
	B. <i>Harjo v. Pro-Football, Inc.</i> : The Trademark Trial and Appeal Board Holds that “Redskins” is Disparaging	205
	C. <i>Harjo v. Pro-Football, Inc.</i> : the District Court Reinstated the Washington Redskins’ Trademark	207
III.	FUTURE CHALLENGES	209
	A. “Redskins” Anomaly	210
	B. Native American Mascots and Team Names are Overwhelmingly Positive and Non-Disparaging	213
	C. <i>Harjo’s</i> Laches Defense	217
	D. Is Trademark Law the Right Avenue?	217
IV.	CONCLUSION	220

This article explores the evolution of trademark litigation involving the use of Native American mascots and Native American team names. In the 1990’s, Native American activists turned to the Lanham Act¹ to terminate registered sports-related trademarks.² In the aftermath of the decision of the District Court for the District of Columbia in *Pro-Football, Inc. v. Harjo*, however, the burden of proving that a mark was disparaging at the time of its registration became very difficult.³ Today, it is clear that

* University of Oklahoma, J.D.; Sam Houston State University, B.B.A. The author is an associate attorney at Hayes, Berry, White & McMurray L.L.P. in Denton, Texas. This article is dedicated to Jenny Adams for her inspiration and love. The author would also like to thank Ginger Hopkins for her support, love, and patience throughout the preparation and revisions to this article.

1. 15 U.S.C. § 1127 *et. seq.*

2. David Segal, *Lining Up For A Patent Fight Over “Redskins” Name*, WASH. POST, Apr. 20, 1998, at F9 (discussing the validity of the federal patent protection of the term “Redskins”).

3. See *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 119-20 (D.D.C. 2003).

Native Americans seeking to challenge sports teams' trademarks related to Native American culture face nearly insurmountable obstacles.

A recent *Sports Illustrated* poll suggests that many Native Americans do not find the use of Native American mascots or team names disparaging.⁴ Yet, even if a mark was determined to be disparaging,⁵ Native American plaintiffs can no longer rely on the Lanham Act to restrict the use of Native American mascots and team names. By recognizing a laches defense, the district court in *Harjo* effectively slammed the door on these challenges.⁶

Part I of this article will discuss the controversy concerning whether sports teams should be prohibited from using trademarks based on Native American cultural symbols. Part II will analyze the Lanham Act litigation involving the Washington Redskins and the implications of *Pro-Football, Inc. v. Harjo* on the use of Native American team names, mascots, and symbols in sports. Finally, Part III explores how this litigation closed the door on future Lanham Act challenges and discusses the implications for other professional, college, and high school mascots and team names.

I. INTRODUCTION

On a warm fall afternoon, the Washington Redskins battle their nemesis, the Dallas Cowboys, at FedEx Field in Landover, Maryland.⁷ LaVar Arrington,⁸ the Redskins' ferocious and skillful linebacker, slowly approaches the line of scrimmage in an effort to burst through the Dallas

4. S.L. Price, *The Indian Wars*, SPORTS ILLUSTRATED, Mar. 4, 2002, at 66 (discussing a poll of Native Americans that asks whether professional teams should stop using Native American symbols and names).

5. A trademark is disparaging if it would "dishonor by comparison with what is inferior, slight, deprecate, degrade, or affect or injure by unjust comparison." *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1738 (Trademark Tr. & App. Bd. 1999); see also Andrew Harris, *NFL's Redskins Regain Trademarks*, 26 NAT'L L.J. 37 (2003) (discussing a federal district court decision that rejected a challenge to the Washington Redskin's trademark).

6. *Harjo*, 284 F. Supp. 2d at 144-45.

7. FedEx Field is the home of the Washington Redskins. See Stadiums of the NFL, *Stadiums of the NFL: FedEx Field*, at <http://www.stadiumsofnfl.com/nfc/FedExField.htm> (last visited Jan. 31, 2005). It opened September 14, 1997 and cost an estimated \$300 million. FedEx Field has a seating capacity of 91,665. See *id.*

8. LaVar Arrington hails from Pittsburgh, Pennsylvania where he was one of the most sought-after high school football players in the history of the state. Arrington accepted a scholarship to Pennsylvania State where he posted remarkable statistics. In 1999, Arrington earned the Chuck Bednarik Award, as the nation's top defensive player, and the Dick Butkus Award, as the nation's top linebacker. In 2000, Arrington was selected second overall by the Washington Redskins in the NFL Draft. Arrington continues to impress fans in the NFL. He has been named to the NFL Pro Bowl for four consecutive years. See Washington Redskins, *Roster: LaVar Arrington*, at <http://www.redskins.com/team/profile.jsp?id=22> (last visited Jan. 26, 2005).

Cowboy blockers on a linebacker blitz. As the Cowboy center snaps the ball, Arrington bursts through the line of scrimmage, throws a blocker aside, and unleashes a bone-crushing tackle on a befuddled Cowboy running back. Arrington jumps to his feet quickly and pounds on his chest in exultation, while Redskin fans erupt in the Redskins' fight song.⁹ While Arrington pounds his chest, Native Americans surround FedEx Field to protest the franchise's use of a Native American mascot and team name.¹⁰

The Washington Redskins' mascot, team name, and team fight song, as well as the use of other Native American names and mascots in professional, college, and high school sports have been heavily scrutinized over the last decade.¹¹ The Redskins are one of five professional sports franchises that use Native American names: Chicago Blackhawks, Atlanta Braves, Cleveland Indians, and Kansas City Chiefs.¹² Many prominent universities and numerous high schools around the country also have Native American mascots and team names.¹³ In addition, cheerleaders, team mascots, and players mimic Native American songs, dances, and cheers.¹⁴

9. The Redskins' fight song lyrics have been criticized for their racial insensitivity. The lyrics are as follows: "'Hail to the Redskins! Hail to victory! Braves on the Warpath, fight for old D.C.! Run or pass and score—we want a lot more! Beat 'em Swamp 'em Touchdown—let the points soar! Fight on, Fight on—Till you have won, Sons of Washington!'" See Ethan G. Zlotchew, "Scandalous" or "Disparaging"? It Should Make a Difference in Opposition and Cancellation Actions: Views on the Lanham Act's Prohibitions Using the Example of Native American Symbolism in Athletics, 22 COLUM.-VLA J.L. & ARTS 217, 218 n.4 (1998) (quoting *Hail to the Redskins*, WASH. POST, Jan. 20, 1984, at N7).

10. At Super Bowl XXVI in Minneapolis, Minnesota, more than 2,000 protestors gathered to protest the use of Native American mascots and team names, specifically the Washington Redskins. See Paul E. Loving, *Native American Team in Athletics: It's Time to Trade These Marks*, 13 LOY. L.A. ENT. L. REV. 1, 10-11 (1992) (citing Ken Denlinger, *Protest of "Redskins" Draws 2,000 at Stadium*, WASH. POST, Jan. 27, 1992, at C18) (stating that protestors marched around the stadium with banners and shouted slogans).

11. See Brooke A. Masters, *Creative Legal Tactics Used Against Teams With Indian Themed Names*, HOUS. CHRON., Apr. 11, 1999, at 17, available at 1999 WL 3983597 (analyzing the use of trademark law to attack using Native American symbols as mascots). In response to the controversy surrounding the "tomahawk chop," the Atlanta Braves pledged approximately \$1 million for a nation-wide campaign to educate the public about Native American culture. See Ernest Hooper, *NBC Offers Preview of Racing Coverage This Weekend Series: TV/Radio; Fanfare*, ST. PETERSBURG TIMES, Nov. 12, 1999, at 2C, available at 1999 WL 27327968 (discussing television networks' and professional sports teams' responses to the use of Native American symbols as mascots).

12. See Brett Oppgaard, *Rethinking Mascot in a Brave New World*, THE COLUMBIAN, Sept. 12, 1999, at A1, available at 1999 WL 24804808 (highlighting the potentially offensive use of Native American names and icons as mascots for sports teams).

13. *Id.*

14. See Leonard Shapiro, *Offensive Penalty Is Called on "Redskins;" Native Americans Protest the Name*, WASH. POST, Nov. 3, 1991, at D1, available at 1991 WL 2109789 (discussing the arguments of opponents and supporters of the use of Native American mascots).

In the 1970's, the use of Native American mascots by colleges and high schools declined due to the advocacy efforts of student organizations and social activists who criticized the use of Native American symbols. The University of Oklahoma, in 1970, was the first major collegiate institution to eliminate a Native American mascot.¹⁵ Subsequently, several other prominent universities discontinued Native American mascots. In 1972, for example, Stanford University and the University of Massachusetts eliminated their Native American mascots citing sensitivity to diverse cultures as a reason to adopt new traditions and team mascots.¹⁶ In 1974, Dartmouth College also eliminated use of a Native American mascot.¹⁷ Recently, in 1995, in response to mounting pressure, St. John's University and Miami University of Ohio changed their mascots and team names.¹⁸ In sum, over the last thirty years more than six hundred high schools and colleges have changed their mascots and team names in response to heightened public scrutiny resulting from advocates' objections.¹⁹

Despite a growing controversy, it took an American President refusing to wear a team hat to inspire a national public debate on this issue in the context of professional sports. On April 4, 1994, President Bill Clinton was invited to throw out the first pitch in the inaugural game at Jacob's Field.²⁰ Due to intense protest and debate over the Cleveland Indians' use of "Chief Wahoo"²¹ as their mascot, President Clinton declined to wear a

15. See American Indian Sports Team Mascots, *Chronology: 30 Years of Effort Addressing the Use of American Indian Related Sports Team Mascots*, at <http://www.aistm.org/1chronologypage.html> (last visited Sept. 25, 2004) [hereinafter *Chronology*] (providing timeline of efforts challenging the use of Native American names and symbols as mascots).

16. See Lyn Riddle, *Sensitivity Training Doesn't Take: N.C. School Keeping Its Mascots*, ATLANTA J. & CONST., May 27, 1998, at A12 (stating that over 100 colleges and universities have replaced Indian team names and mascots).

17. See Oppegaard, *supra* note 12, at A1.

18. See *Chronology*, *supra* note 15.

19. See Masters, *supra* note 11.

20. Jacobs Field became the new home of the Cleveland Indians on April 4, 1994. John B. Rhode, *The Mascot Name Change Controversy: A Lesson In Hypersensitivity*, 5 MARQ. SPORTS L.J. 141, 142 (1994) (discussing the Native American mascot issue at the high school and collegiate levels); see also Cleveland Indians News, *Tribe notes: D'Amico Pitches Well*, at http://cleveland.indians.mlb.com/NASApp/mlb/cle/news/cle_news_jsp (last visited Sept. 28, 2004); see also Ballparks by Munsey & Suppes, *Jacobs Field*, at <http://www.ballparks.com/baseball/american/jacobs.htm> (last visited May 5, 2004).

21. Chief Wahoo is an emblem displayed on the caps worn by the Cleveland Indians. Ellen Staurowsky, *An Act of Honor or Exploitation?: The Cleveland Indians' Use of the Louis Francis Sockalexis Story*, 15 SOC. SPORT J. 299, 314 n.2 (1998) (discussing whether the use of a Native American name as a mascot or team name is disparaging or a compliment). Chief Wahoo is a caricature of an Indian male with a red face, a feather in his hair, and a large grin. See *id.*

cap featuring the controversial mascot.²² Instead, the President wore an alternate cap embroidered with a large “C” rather than the “Chief Wahoo” emblem.²³

Competing arguments frame the debate over whether professional, college, and high school teams should change their mascots and team names. One side supports maintaining registered trademarks that use objects of Native American culture as mascots and team names.²⁴ These so-called traditionalists cite various arguments in an effort to retain Native American mascots and team names in sports. They contend that: (1) the locale is traditionally involved with the Native American community; (2) the original intent behind the selection of a Native American mascot or team name was to honor Native Americans; (3) Native American culture embodies the virtues athletic teams want to emulate; (4) these team names have been in place for thirty years in some cases and no one has complained; and (5) if an athletic team is forced to change its name, this will destroy its ability to market merchandise.²⁵

In addition, traditionalists point to hypersensitivity among some Native Americans as the real source of this controversy.²⁶ Traditionalists note that other sports teams use potentially controversial team names but that the propriety of those names is not seriously debated or challenged. For instance, although the Los Angeles Angels of Anaheim and the New Orleans Saints could potentially offend non-Christians, they have not evoked controversy. Similarly, the Arizona State Sun Devils and the Duke Blue Devils could be offensive to Christians, but have not been the target of opposition.²⁷

On the other side of the debate, some Native Americans argue that their traditions, names and chants are sacred to their communities and thus

22. See Rhode, *supra* note 20, at 141.

23. *Id.* However, the Cleveland Indians continue to wear hats and uniforms branding the “Chief Wahoo” emblem despite numerous demonstrations and public outcry. See *Bellecourt v. City of Cleveland*, 820 N.E.2d 309, 311 (Ohio 2004) (upholding a directed verdict granted by a trial court in favor of the City of Cleveland in an action brought under 42 U.S.C. § 1983 by protesters opposed to the Cleveland Indians baseball team’s continued use of the team name and Chief Wahoo logo, which they perceived “to be disparaging to Native American culture”).

24. David Horn, *What’s in a Name? Huron Controversy Rising Again at Eastern, Other Schools*, MICH. DAILY, Sept. 23, 1999, available at <http://www.pub.umich.edu/daily/1999/sep/09-23-99/sports/sports8.html> (last visited Oct. 6, 2004) (discussing traditionalist view).

25. See Loving, *supra* note 10, at 4-5 (quoting MICHIGAN DEPARTMENT OF CIVIL RIGHTS, MICHIGAN CIVIL RIGHTS COMMISSION REPORT ON USE OF NICKNAME, LOGOS, AND MASCOTS DEPICTING NATIVE AMERICAN PEOPLE IN MICHIGAN EDUCATION INSTITUTIONS 19 (1988)); Shapiro, *supra* note 14, at D1 (stating the Washington Redskins honor Native Americans).

26. Rhode, *supra* note 20, at 159; see also Horn, *supra* note 24.

27. See Rhode, *supra* note 20, at 141.

believe sports teams should not exploit them.²⁸ Therefore, these Native Americans have argued that trademarks employing their names and traditions are disparaging and should be cancelled from the national register.²⁹

II. TRADEMARK ACTIONS UNDER THE LANHAM ACT³⁰

Many of the team names, mascots and symbols in professional sports to which Native Americans object are federally registered trademarks. Intellectual property rights in the United States are based on the notions of free enterprise and profit.³¹ One goal of trademark law, as set forth under the Lanham Act, is to protect consumers by allowing the exclusive use of marks, which indicate the source and quality of products or services.³² That is, trademarked products or services protect consumers' expectations of quality, consistency, and identification.³³

At the same time, trademark law encourages producers to invest in their marks' goodwill and discourages competitors from adopting confusingly similar marks for similar products or services. Indeed, the law affords the holder numerous benefits.³⁴ First, having a trademark

28. See Shapiro, *supra* note 14, at D2.

29. See *Harjo*, 50 U.S.P.Q.2d (BNA) at 1708; Jack Achiezer Guggenheim, *The Indians' Chief Problem: Chief Wahoo as State Sponsored Discrimination and a Disparaging Mark*, 46 CLEV. ST. LAW REV. 211, 212-13 (1998) (arguing, *inter alia*, that the Chief Wahoo mascot is disparaging and, therefore, is invalidly registered).

30. The Lanham Act governs the registration and protection of trademarks under federal law. In applicable part, the Act provides:

The term "trademark" includes any word, name, symbol, or device, or any combination thereof -

(1) used by a person, or

(2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this [chapter], to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

15 U.S.C. § 1127 (2004).

31. See Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111, 115 (1995-1996) (discussing whether the use of intellectual property law can protect Native American tribes from exploitation).

32. David W. Barnes and Teresa A. Laky, *Classic Fair Use of Trademarks: Confusion About Defenses*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 833, 838 (2004) (proposing a balancing test for classic fair use of trademarks).

33. See Kristine A. Brown, *Native American Team Names and Mascots: Disparaging and Insensitive or Just a Part of the Game?*, 9 SPORTS LAW. J. 115, 125 (2002) (evaluating the nature and impact that *Harjo* had on the use of Native American symbols as mascots and team names).

34. *Id.*; see also Terrance Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 399 (1998) (discussing the jurisprudential and theoretical problems when non-Natives use Native American symbols).

registered under federal law puts others on constructive notice of its existence, thus deterring competitors from using similar marks.³⁵ Second, a trademark is not contestable after the mark “has been in continuous use for five consecutive years subsequent to the date of such registration and is still in use in commerce.”³⁶ Third, registration allows the trademark holder to reregister every ten years, thus continuously protecting the trademark under federal law.³⁷ Trademark holders are, thus, able to prevent the misappropriation of goodwill associated with their products via infringement and opposition actions.³⁸

A. Trademark Cancellation Proceedings

As previously noted, trademark law is designed to foster a reliable connection between goods and services and the producers of such goods and services. To this end, the Lanham Act allows trademark holders to challenge a trademark that falsely implies a connection between goods or services and an entity that is not the producer of the goods or services.³⁹ Section 2(a) of the Lanham Act prohibits registration of any trademark that “[c]onsists 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. . . .”⁴⁰ A petitioner may seek cancellation of a trademark by asserting that the trademark is scandalous or disparaging.⁴¹

If a trademark is found to be scandalous, it will not be afforded federal protection. A trademark is scandalous if it offends a “substantial composite of the general public” in the context of contemporary norms.⁴² Further, the trademark must be “shocking to one’s sense of decency or propriety” and “offensive to the conscience of moral feeling.”⁴³ Trademarks found to be scandalous generally involve marks that are clearly offensive to moral feelings such as: “‘Dickheads’ restaurant

35. See 15 U.S.C. § 1072 (2004).

36. 15 U.S.C. § 1065 (2004).

37. See 15 U.S.C. § 1059(a) (2004).

38. See Brown, *supra* note 33, at 121.

39. *Id.* at 120-21.

40. 15 U.S.C. § 1052(a) (2004).

41. See *id.* (conditioning a mark’s registration on its not being scandalous or disparaging). A mark may also be cancelled if it becomes generic, was fraudulently obtained, has been abandoned, is functional, or misrepresents the source of the goods or services. 15 U.S.C. § 1064(3).

42. *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994) (holding that “tail” is not vulgar due to insufficient evidence of the term’s shock value and noting that courts must be mindful of “ever-changing social attitudes and sensitivities”).

43. *In re Tinseltown, Inc.*, 212 U.S.P.Q. (BNA) 863, 865 (Trademark Tr. & App. Bd. 1981) (refusing to register the term “bullshit” because of its immoral and scandalous effect).

services, 'Bullshit' personal accessories, and 'Bubby Trap' brassieres."⁴⁴

Similarly, if a trademark is found to be disparaging, it will not be afforded federal protection. A trademark is disparaging if it would "dishonor by comparison with what is inferior, slight, deprecate, degrade, or affect or injure by unjust comparison."⁴⁵ Courts evaluate a disparagement claim by considering "only the perceptions of those referred to, identified or implicated in some recognizable manner by the involved mark."⁴⁶ Disparaging trademarks are generally found to dishonor a group of people, such as religious groups or World War I soldiers.⁴⁷ If a party brings a cancellation action alleging that a trademark is disparaging or scandalous, the petitioner has the burden of proving that the mark was disparaging or scandalous at the time of registration.⁴⁸ Where the Trademark Trial and Appeal Board ("TTAB") finds that a petitioner satisfies this burden, the trademark's federal registration will be cancelled by the United States Trademark Office.⁴⁹

In *Greyhound v. Both Worlds, Inc.*, the TTAB held that a petitioner must establish two elements for a trademark to be disparaging.⁵⁰ First, the trademark must be "reasonably understood" to refer to the plaintiff.⁵¹ Second, a "reasonable person of ordinary sensibilities" must consider the trademark offensive or objectionable.⁵² Hence, the second prong of the *Greyhound* Test is an objective standard: a reasonable person in society must find the trademark offensive and objectionable.⁵³

44. See *In re Wilcher Corp.*, 40 U.S.P.Q.2d (BNA) 1928, 1929 (Trademark Tr. & App. Bd. 1996) (holding that "Dickheads" restaurant services was scandalous and could not be afforded federal trademark protection); *In re Tinseltown, Inc.*, 212 U.S.P.Q. (BNA) at 866 (holding that "Bullshit" personal accessories was scandalous and could not be afforded federal trademark protection); *In re Rundsorf*, 171 U.S.P.Q. (BNA) 443, 444 (Trademark Tr. & App. Bd. 1971) (holding that "Bubby Trap" brasseries was scandalous and could not be afforded federal trademark protection).

45. *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1738 (Trademark Tr. & App. Bd. 1999).

46. *In re Hines*, 31 U.S.P.Q.2d (BNA) 1685, 1688 (Trademark Tr. & App. Bd. 1994), *vacated on other grounds*, 32 U.S.P.Q.2d (BNA) 1376 (Trademark Tr. & App. Bd. 1994) (upholding disparaging marks standard but vacating because mark, on review, determined not to be disparaging).

47. *Id.* at 1688; *Doughboy Indus., Inc. v. Reese Chem. Co.*, 88 U.S.P.Q. (BNA) 227, 228 (Trademark Tr. & App. Bd. 1951) (holding that "Doughboy" and a picture of a soldier for an anti-venereal disease medication was disparaging to World War I soldiers).

48. See Jeffery Lefstin, *Does the First Amendment Bar Cancellation of Redskins?* 52 STAN. L. REV. 665, 668 (2000) (discussing First Amendment implication of *Harjo*, 50 U.S.P.Q.2d (BNA) 1705).

49. See MCCARTHY ON TRADEMARKS § 20:72 (4th ed. 2004) [hereinafter MCCARTHY].

50. *Greyhound Corp. v. Both Worlds, Inc.*, 6 U.S.P.Q.2d (BNA) 1635, 1639 (Trademark Tr. & App. Bd. 1988).

51. *Id.*

52. *Id.*

53. *Id.*

In contrast, in *In re Hines* the TTAB held that, in determining whether a trademark is disparaging to a racial group, only the perceptions of a substantial composite of those “referred to, identified or implicated in some recognizable manner by the involved mark” are relevant.⁵⁴ Therefore, demonstrating that a mark is disparaging to a particular racial group, such as Native Americans, in a cancellation proceedings requires a two-part showing.⁵⁵ Under the *In re Hines* standard, plaintiffs must show: (1) that the trademark is reasonably understood to refer to the plaintiffs; and (2) the “substantial composite” associated with the mark find it disparaging or scandalous.⁵⁶ Thus, the “substantial composite” refers to the reasonable member of the relevant racial group, rather than the reasonable person.⁵⁷

B. *Harjo v. Pro-Football, Inc.: The Trademark Trial and Appeal Board Holds that “Redskins” is Disparaging*

In *Harjo v. Pro-Football, Inc.*, a group of Native Americans brought a trademark cancellation proceeding against the Washington Redskins,⁵⁸ alleging that the team’s registered trademarks were disparaging under the Lanham Act.⁵⁹ Petitioners sought cancellation of trademarks containing the term “redskin” or derivations thereof.⁶⁰ Specifically, petitioners

54. *Greyhound Corp.*, 6 U.S.P.Q.2d (BNA) at 1639. To be clear, *Hines* concerned disparaging, not scandalous, marks. The *Hines* decision did mention scandalous marks, however, in order to demonstrate that, while similar to the scandalous provision, the disparagement provision is distinct because it was added to the statute later to fill a gap. *See id.*

55. *In re Hines*, 31 U.S.P.Q.2d (BNA) at 1688.

56. *See id.*

57. *See id.*

58. In 1933, George Preston Marshall purchased a professional football franchise located in Boston, Massachusetts. NFL History Guide, *Washington Redskins History*, at <http://www.nflhistoryguide.com/wr/history.htm> (last visited Oct. 6, 2004). Subsequently, he changed the team’s name from the Braves to the Redskins and moved to Washington D.C. *Id.* The Washington Redskins is one of the most storied franchises in professional sports. *Id.* The franchise has tallied three Super Bowl victories, Super Bowl XVII, Super Bowl XXII, and Super Bowl XXVI, and won the hearts of millions of adoring fans. Washington Redskins, *History: Super Bowl*, at <http://www.redskins.com/team/history-super.jsp> (last visited May 5, 2004).

59. *See Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1708 (Trademark Tr. & App. Bd. 1999). While the TTAB’s decision in *Harjo* did deal with scandalous matter, the Board explained that, unlike the standard for disparaging marks, the standard is not specific to a particular group:

[w]hile not often articulated as such, determining whether matter is scandalous involves, essentially, a two-step process. First, the Court or Board determines the likely meaning of the matter in question and, second, whether, in view of the likely meaning, the matter is scandalous to a substantial composite of the general public.

Id. at 1735.

60. *See id.* at 1708.

asserted that the term "redskin" is a "pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging, and racist designation for a Native American person."⁶¹ Therefore, petitioners maintained, the "registrant's use of the [trademarks] in the identified registrations offends petitioners and other Native Americans."⁶²

To support their claim, petitioners introduced testimony by a linguistic expert that the term "redskins" evokes a negative mental image associated with Native Americans.⁶³ Petitioners contended "the [trademarks] in the identified registrations consist of matter which disparages Native American persons, and brings them into contempt, ridicule, and disrepute" in violation of § 2(a) of the Lanham Act.⁶⁴

Pro-Football, Inc., responded to the petitioners' allegations with their own expert testimony.⁶⁵ Respondent's linguistic expert stated the traditional meaning of "redskin" was "an overwhelmingly neutral, generally benign alternative designator" for Native Americans.⁶⁶ Moreover, respondents asserted that "redskin" is now primarily associated with the Washington-based football team.⁶⁷ This widely recognized secondary association is not discriminating, disparaging, or disrespectful towards Native Americans, but rather, refers to the professional football team.⁶⁸ Therefore, the respondents asserted that the Washington Redskins team name "cannot be understood to refer to the petitioners or to any of the groups or organizations to which they belong."⁶⁹

The TTAB cancelled the "Washington Redskins," "Redskins," and "Redskin-ettes" trademarks and their related symbols.⁷⁰ In so doing, the TTAB followed *In re Hines* and reinforced a broad, liberal test for determining what constitutes a "disparaging" trademark.⁷¹ The TTAB reiterated that the views of the referenced group would determine whether

61. *Id.*

62. *Id.*

63. *Harjo*, 50 U.S.P.Q.2d (BNA) at 1728-29.

64. *Id.* at 1708.

65. *Id.* at 1720, 1727.

66. *Id.* at 1729.

67. *Harjo*, 50 U.S.P.Q.2d (BNA) at 1720.

68. *See id.* at 1708.

69. *See id.*

70. *See id.* at 1749.

71. *Harjo*, 50 U.S.P.Q.2d (BNA) at 1749. The TTAB found inapplicable Greyhound's reasonable person standard, which only affected individuals and commercial entities. *See id.* at 1738. The TTAB explained that *In re Hines* controlled because its standard pertained to racial groups, including Native Americans. *See id.* (citing *In re Hines*, 32 U.S.P.Q.2d (BNA) at 1377). Furthermore, the TTAB noted that the term "disparage," as it appears in § 2(a), refers to an identifiable target such as a person or institution. *See Lefstin, supra* note 48, at 670.

a trademark is disparaging.⁷² Pursuant to this standard, the TTAB concluded that the challenged trademarks were disparaging to the relevant audience, a “substantial composite” of Native Americans, and thus, the marks could no longer be registered under § 2(a).⁷³

C. *Harjo v. Pro-Football, Inc.*:⁷⁴ *the District Court Reinstated the Washington Redskins’ Trademark*

The District Court for the District of Columbia reversed, determining that the TTAB had improperly cancelled the “Redskins” trademarks.⁷⁵ The *Harjo* district court found that the TTAB’s conclusion that the term “redskin” was disparaging to Native Americans was not supported by substantial evidence.⁷⁶ In addition, the district court recognized a laches defense.⁷⁷

First, the *Harjo* court applied the *In re Hines* two-part test.⁷⁸ The district court did not modify the standard employed by the TTAB below for evaluating the Native American plaintiffs’ disparagement claim.⁷⁹ The court reaffirmed that to be deemed disparaging: (1) the Redskins’ trademarks must be reasonably understood to refer to the plaintiff,⁸⁰ and (2) the “substantial composite” of Native Americans must find it

72. *Harjo*, 50 U.S.P.Q.2d (BNA) at 1739 (“it is only logical that, in deciding whether the matter may be disparaging, we look, not to American society as a whole, as determined by a substantial composite of the general population, but to the views of the referenced group . . .”).

73. *Pro Football, Inc. v. Harjo*, 2000 WL 192336, at *2 (D.D.C. 2000) (quoting *In re Hines*, 32 U.S.P.Q.2d (BNA) at 1377); *Harjo*, 50 U.S.P.Q.2d (BNA) at 1749.

74. *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003).

75. *Id.* at 145. On appeal to the District Court for the District of Columbia, petitioners challenged the following trademarks: (1) Registration No. 978,824 for the mark “Washington Redskins,” issued on February 12, 1974; (2) Registration No. 1,085,092 for “Redskins,” issued on February 7, 1978; and (3) Registration No. 1,606,810 for “Redskinettes,” issued on July 17, 1990. *See id.* at 106-07; *see also* U.S. Patent & Trademark Office, Trademark Electronic Search System (Tess), at <http://www.uspto.gov/main/trademarks.htm> (using search term: “Washington Redskin”) (last visited Nov. 23, 2004).

76. *See id.* at 145.

77. *Pro-Football, Inc. v. Harjo*, 57 U.S.P.Q.2d (BNA) 1140, 1144 (D.D.C. 2000).

78. *Harjo*, 284 F. Supp. 2d at 124-25.

79. *Id.* at 124 (“[T]he Court finds no error in the TTAB’s approach.”). Native Americans sought cancellation of the term “redskin(s)” and its associated marks by asserting that the term was both scandalous and disparaging. *See Harjo*, 50 U.S.P.Q. 2d (BNA) at 1749. However, the TTAB and the district court focused on the disparaging standards as articulated in over thirty years of trademark jurisprudence. *See generally Harjo*, 284 F. Supp. 2d at 124 (discussing the objective standards for whether a mark is disparaging or scandalous). On the other hand, a different and distinct sports-related trademark referring to Native Americans may implicate a review under the scandalous standard. *See id.*

80. *See id.* (citing *Harjo*, 50 U.S.P.Q. 2d (BNA) at 1739).

disparaging.⁸¹

While the district court agreed with the TTAB's conclusion that the term "redskins" refers to Native Americans, as well as the Washington Redskins, the *Harjo* court found that the TTAB's findings as to the second prong of the *In re Hines* analysis were unsubstantiated by the record on appeal.⁸² For instance, the TTAB had failed to closely evaluate the survey evidence upon which it largely based its holding, a survey which improperly equated the views of the general public with those of Native Americans.⁸³ Furthermore, plaintiffs' evidence that the media may portray Native Americans "as aggressive savages or buffoons"⁸⁴ did not, noted the court, necessarily relate to whether a substantial number of Native Americans find the term "redskin" disparaging.⁸⁵ The *Harjo* court noted further that finding that such a small amount of questionable evidence sufficient to cancel these trademarks would mean that virtually all professional sports teams with similar marks would have to refrain from activity that could be construed as even mildly insulting or derogatory to Native Americans.⁸⁶ The court concluded that there were no particular instances of disparagement in the record and that, as a result, the TTAB's findings were based solely on the "cumulative effect of the entire record."⁸⁷

Second, the *Harjo* court applied a laches defense, which provided an independent basis to prevent cancellation of these marks.⁸⁸ Laches is traditionally an equitable defense that prevents a trademark holder from suing an alleged infringer after a long delay.⁸⁹ Under this defense, explained the *Harjo* decision, a court may estop a trademark holder who sits on his rights from challenging an alleged infringer who came to rely on their use of the disputed term.⁹⁰ The court made clear that the laches defense will only apply if: (1) plaintiffs delayed substantially before commencing their challenge to the "redskin" trademarks; (2) plaintiffs

81. *Harjo*, 284 F. Supp. 2d at 124 (citing *In re Hines*, 31 U.S.P.Q.2d (BNA) at 1688).

82. *See id.* at 134.

83. *See id.*

84. *Id.*

85. *See Harjo*, 284 F. Supp. 2d at 134.

86. *See id.*

87. *Id.* at 127-28. The petitioners offered survey evidence from a telephone survey, which randomly selected Native American adults to vote as to whether certain Native American related names were offensive. The statistics stated the term "Injun" was offensive to 49.5% of those responding; "Redskin" 46.2%, "Squaw" 36.2%; "Buck" 36.5%; "Brave" 10.0%; "Indian" 2.7%; and "Native American" 2.0%. *See Harjo*, 50 U.S.P.Q.2d (BNA) at 1733.

88. *See id.* at 139.

89. *See MCCARTHY*, *supra* note 49, at § 17:17.

90. *Id.* To be clear, the laches defense may be applied despite evidence demonstrating that the mark is disparaging. *Id.*

were aware of the trademarks during the period of delay; and (3) defendant's ongoing development of goodwill during the period of delay engendered a reliance interest in preservation of the Redskins' trademarks.⁹¹

The *Harjo* court proceeded to find the laches defense applicable.⁹² According to the court, plaintiffs had actual and constructive notice of the trademarks, as well as defendants' widespread use of the marks.⁹³ Moreover, the court found it significant that plaintiffs proffered no explanation for their delay in bringing the cancellation action.⁹⁴ The Redskins' trademarks were registered between 1967 and 1990; however, the plaintiffs did not file a complaint against Pro-Football until 1992.⁹⁵ More than twenty-five years elapsed before plaintiffs filed their complaint.⁹⁶ According to the court, the issues brought forth by the plaintiffs should have been resolved in 1967 or shortly thereafter.⁹⁷

The court also found that canceling the mark would subject Pro-Football to undue economic prejudice as a result of the delay.⁹⁸ Also, the court found that if it failed to recognize a laches defense future plaintiffs could theoretically delay bringing a cancellation proceeding indefinitely.⁹⁹ The court, therefore, rejected plaintiffs' claims that defendants' trademarks were disparaging and also recognized defendants' laches defense.¹⁰⁰

III. FUTURE CHALLENGES

In the 1990s, the term "redskin" evoked controversy, due to the allegedly disparaging and offensive nature of the term. Yet, following the *Harjo* district court decision, similar mascots and team names will likely be protected from future challenges by Native Americans.¹⁰¹ Indeed, if the

91. See *Harjo*, 284 F. Supp. 2d at 136-37. The court seems to state that a Native American who is aware of a trademark must bring suit against a trademark holder the year in which the trademark was registered or a reasonable time thereafter. See *id.* at 139-40. The Court did not define what a reasonable time would be for such a challenge. See *id.*

92. *Id.* at 140-41.

93. *Id.*

94. *Id.* at 141-42 ("[I]gnorance of ones legal rights is not a reasonable excuse in a laches case.").

95. See *Harjo*, 284 F. Supp. 2d at 139-40.

96. *Id.* at 139.

97. See *id.* at 136-37. The court seems to state a Native American who is aware of a trademark must bring suit against a trademark holder the year in which the trademark was registered or a reasonable time thereafter. See *id.* at 136. The Court did not define what a reasonable time would be for a challenge brought by a Native American. See *Harjo*, 284 F. Supp. 2d at 139-40, 143.

98. *Id.* at 144.

99. *Id.* at 138.

100. See *id.* at 144.

101. See *Harjo*, 284 F. Supp. 2d at 133-36.

Redskins' trademarks cannot be deemed disparaging to a "substantial composite" of Native Americans, it is unlikely that other less offensive marks derived from Native American culture will be successfully challenged.¹⁰² This is especially true given that most sports teams have adopted Native American team names and mascots for overwhelmingly positive reasons.¹⁰³ If, however, the laches defense is inapplicable, a name or symbol adopted by a team that is proven "disparaging" or "scandalous" could be barred under the Lanham Act.¹⁰⁴ Because the laches defense is likely to be widely applicable to other sports teams, future challenges under the Lanham Act are unlikely to result in the cancellation of trademarks derived from Native American culture even if they are found to be scandalous or disparaging.¹⁰⁵

A. "Redskins" Anomaly

As discussed in Part.II.C. *supra*, in *Harjo*, the TTAB clarified that for the Native American plaintiffs to satisfy the second prong of the *In re Hines* test they must present evidence that the trademark is offensive and objectionable to a Native American with reasonable and ordinary sensibilities.¹⁰⁶ The district court did not alter this standard, but instead reversed because it found plaintiffs' statistical evidence to be flawed and that the evidence failed to address whether the term "redskin(s)," was disparaging at the time of registration.¹⁰⁷

Hence, after *Harjo*, a plaintiff must amass factual support for the offensive nature of a given trademark to persuade a court that a trademark is offensive and objectionable to a substantial composite of the Native American community pursuant to the second prong of the *Harjo* two-part test.¹⁰⁸ Courts must consider whether the trademark is pejorative or derogatory on its face, such as a racial slur or a mark that dishonors a religious group.¹⁰⁹ If the trademark is pejorative or derogatory, its Lanham Act protection will be terminated.¹¹⁰

If the court were to find that Native American claimants were *not*

102. See discussion *infra* Part.III.A.

103. See discussion *infra* Part.III.B.

104. See discussion *infra* Part.II.C; see 15 U.S.C. § 1064(3).

105. See discussion *infra* Part.III.C.

106. See *Harjo*, 284 F. Supp. 2d at 129.

107. *Id.* at 144-45.

108. A factor test would only be applicable in the event that a lawsuit is brought within a reasonable period of time, thereby rendering a laches defense inapplicable.

109. See *In re Hines*, 31 U.S.P.Q.2d (BNA) at 1688 (Trademark Tr. & App. Bd. 1994), *vacated*, 32 U.S.P.Q.2d 1376 (Trademark Tr. & App. Bd. 1994).

110. See 15 U.S.C § 1052(a).

barred by the laches defense, Native Americans could succeed on a disparagement action if the evidence presented was more compelling.¹¹¹ Other professional and college teams could still potentially be challenged. However, the generic trademarks used by most other teams are not nearly as offensive as the term “redskin.” Therefore, it is likely the petitioners will be unable to present sufficient evidence of disparagement in future cases.

Some terms, however, while clearly related to the Native Americans historically, have become commonly recognized by the public and are now part of American culture. As a term becomes more integrated with American culture, its distance from Native American history, and its disassociation with Native Americans, grows. For example, the terms “arrowheads”¹¹² or “chiefs”¹¹³ are unlikely to be found disparaging to Native Americans because they no longer have a close association with Native Americans alone.

“Redskins,” however, is an anomaly. It is wholly distinguishable from other Native American names and symbols currently used by sports teams. The term “redskins” was used in the nineteenth and twentieth centuries in “contexts of savagery, violence, and racial inferiority.”¹¹⁴ Historically, some claim the term “redskin” referred to scalps and the skin removed from the backs and legs of Native Americans.¹¹⁵ The skins were used for belts, reins, and purses.¹¹⁶ Similarly, some state that Native American genitalia were used for souvenir tobacco pouches and hatbands.¹¹⁷

Arguably, no other mascots, team names, symbols, or emblems are as disparaging to the reasonable Native American; therefore, it is likely no other mascot or team name will be stricken by the Lanham Act. In finding that the *Harjo* plaintiffs failed to provide sufficient evidence of disparagement, the *Harjo* district court recognized that there is even

111. See *Harjo*, 284 F. Supp. 2d at 145 (“This is undoubtedly a ‘test case’ that seeks to use federal trademark litigation to obtain social goals. The problem, however, with this case is evidentiary.”).

112. See, e.g., Arrowhead Spring Water, at <http://www.arrowheadwater.com/> (last visited Mar. 25, 2005).

113. See, e.g., Kansas City Chiefs, at <http://www.kcchiefs.com> (last visited Mar. 25, 2005).

114. See *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1729 (Trademark Tr. & App. Bd. 1999).

115. See Richard Leiby, *Bury My Heart at RFK: How the Redskins Got Their Name, and Why Just Maybe It Should Be Changed*, WASH. POST, Nov. 6, 1994, at F8, available at 1994 WL 2449600 (discussing the *Harjo v. Pro-Football, Inc.* petitioners’ use of the Lanham Act to protect against the use of Native American symbols).

116. *Id.* at F1.

117. Ward Churchill, Remarks at Book Release for *Perversions of Justice: Indigenous Peoples and Angloamerican Law* (Feb. 22, 2003), available at <http://www.ratical.org/ratville/CAH/WC022203.html> (last visited Feb. 22, 2003).

disagreement among Native Americans about whether the Redskins' marks are disparaging.¹¹⁸

Some studies of popular culture recognize that "in popular film and literature, the word 'redskin' has been associated with such adjectives as 'savage,' 'bloodthirsty,' 'heathen,' 'thieving,' 'dirty,' 'drunken,' etc."¹¹⁹ When Europeans infiltrated America the term "redskin" referred to a Native American's scalp.¹²⁰ Europeans were given a "cash bounty" as proof of killing a Native American.¹²¹ Further, Native American communities across the United States have debated, protested, written, and voiced their disapproval of the Washington Redskins' use of the term "redskin."¹²² According to such information, therefore, the term "redskin" may be offensive to the Native American community.

Other recent studies, however, suggest that it is tribal leaders, not other Native Americans, who tend to find the Washington Redskins' use of the term "redskins" offensive. One survey, taken of 425 Native American tribal leaders concerning the Washington Redskins' use of the term "redskin," found 72.24% of the leaders were opposed to the use of the term.¹²³ In contrast, another survey conducted by Sports Illustrated found 83% of Native Americans who do not live on reservations approved of the use of Native American mascots and team names.¹²⁴ In addition, 67% of Native Americans polled who live on reservations approved of the use of Native American mascots and team names, while only 32% were opposed.¹²⁵

The survey also evidences that a significant number of Native Americans polled did not find "redskins" offensive in the context of the professional football team. Therefore, it is highly unlikely that a court

118. *Pro-Football v. Harjo*, 284 F. Supp. 2d 96, 130 (D.D.C. 2003).

119. Leiby, *supra* note 115, at F1.

120. Eugene Tapahe, *Indian Mascots Affect More than Sports*, Maynard Inst. for Journalism Educ., available at http://www.maynardije.org/columns/guests/020625_tapahe (last visited Nov. 23, 2004).

121. *See id.*

122. *See* Phyllis Raybin Emert, *Native American Mascots: Racial Slur or Cherished Tradition*, N.J. State Bar Ass'n, available at <http://www.njsbf.com/njsbf/student/respect/winter03-1.cfm> (last visited Nov. 23, 2004); *see also, e.g.*, Native Languages of the Americas, *Information on Native Americans: American Indian FAQs for Kids*, at <http://www.native-languages.org/kidfaq.htm> (last visited Nov. 23, 2004) (requesting that Native Americans not be referred to as 'savages,' 'primitives' or 'redskins' because "[t]hose are always rude words").

123. *McBride v. Motor Vehicle Div. of Utah State Tax Comm'n*, 977 P.2d 467, 468 (Utah 1999); *but see* Price, *supra* note 4, at 68 (stating 75% of Native Americans living off of reservations polled by Sports Illustrated were not offended by the name "Redskins," and those Native Americans living on reservations 62% were not offended by the name "Redskins").

124. Price, *supra* note 4, at 66.

125. *Id.*

would find that other less offensive team names and mascots are disparaging under the *Harjo* test. The term “redskin” was found to be the second most offensive term, with 46.2% of Native Americans indicating they opposed the use of this term.¹²⁶ Nevertheless, only 29% of all Native Americans and 40% of Native Americans living on reservations polled indicated that the Washington Redskins ownership¹²⁷ should change the team name.¹²⁸

Using the reasonableness test applied in *Harjo*,¹²⁹ statistical information shows that there is no consensus that Native Americans do not find the use of Native American mascots and team names disparaging.¹³⁰ Indeed, the statistical information indicates that the use of Native American mascots and team names is generally acceptable to Native Americans.

In sum, no other mascot or team name is arguably as offensive to a minority group as “redskins” because other mascots and team names do not carry with it the stigma of a racial epithet.¹³¹ It seems unlikely any other franchise or institution will be subject to similar legal scrutiny. Based on the holding of *Harjo*, it appears that most mascots and team names will continue to be protected under the Lanham Act.¹³²

B. Native American Mascots and Team Names are Overwhelmingly Positive and Non-Disparaging

Professional and college sports teams typically adopted Native

126. See *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1733 (Trademark Tr. & App. Bd. 1999). The survey conducted in *Harjo* revealed “injun,” not “redskin,” was the most offensive term used in reference to a Native American. See *id.* Slightly less than one-half of the Native Americans polled found the term “Injun” offensive. See *id.*

127. Daniel Synder purchased the Washington Redskins in 1999 for an estimated \$800 million. See Washington Redskins, *History: History By Decades*, at <http://www.redskins.com/team/history-history.jsp#1990> (last visited Dec. 8, 2004). Synder was named NFL “Owner of the Year” in 1999. See Pub. Broad. Serv. (PBS), *CEO Exchange: Major League Entrepreneurs*, at http://www.pbs.org/wttw/ceoexchange/episode_108/ceo_2.html (last visited Dec. 8, 2004).

128. Price, *supra* note 4, at 66.

129. *Harjo*, 50 U.S.P.Q.2d (BNA) 1705 (“If, in determining the meaning of the matter in question, such matter is found to refer to an identifiable ‘[person or] persons, living or dead, institutions, beliefs, or national symbols,’ it is only logical that, in deciding whether the matter may be disparaging, we look, not to American society as a whole, as determined by a substantial composite of the general population, but to the views of the referenced group.”); see also *In re Hines*, 31 U.S.P.Q.2d (BNA) 1685, 1688 (Trademark Tr. & App. Bd. 1994) (“As these decisions make clear, in Section 2(a) cases involving a religious nexus, the focus will vary depending on which religious group is brought to mind or identified by the mark in question.”).

130. See *Harjo*, 50 U.S.P.Q.2d (BNA) at 1740.

131. RICHARD KING & CHARLES FRUEHLING SPRINGWOOD, *TEAM SPIRITS: THE NATIVE AMERICAN MASCOTS CONTROVERSY* 189-207 (2001).

132. See *id.*

American names and symbols, not to offend, but rather, to emulate the historic bravery and athleticism of Native American culture.¹³³ These teams want to be respected and admired. Arguably, team owners, university presidents, and school boards choose Native American mascots and team names to promote “courage, strength, boldness, and resourcefulness.”¹³⁴ Thus, teams honor Native Americans because teams often associate Native Americans with qualities and virtues to which they aspire. Furthermore, sport has a close connection to war and the field of battle. The virtues embodied in Native American culture, such as resourcefulness and calculated precision, are traits necessary to build a champion on the field of battle and the athletic field. This correlation honors the battles and struggles Native Americans have faced throughout history.

Native Americans, however, still find some mascots ridiculous, disparaging, and discriminatory. For example, the “Chief Wahoo” mascot used by the Cleveland Indians is one of the most contested mascots in professional sports.¹³⁵ The Cleveland Indians used a handful of team names at the turn of the twentieth century.¹³⁶ However, in 1915 Cleveland took the name “Indians,” which revived a name used by the team in the late 1800’s.¹³⁷ The team adopted the name “Indians” in honor of Louis Sockalexis, the first Native American to play professional baseball, who was regarded as “a marvel” by his teammates and coaches.¹³⁸ Therefore, the “Indians” name was adopted in honor of a former star player associated with the Cleveland franchise.¹³⁹

133. See John J. Miller, *Fighting Sue: The Unsavory War Against Indian Symbols*, 1 VA. SPORTS & ENT. L.J. 291, 292 (2002) (explaining that the Cleveland Indians were named “to honor Louis Sockalexis, the first American Indian to play in the major leagues”); Roger Clegg, *American Indian Nicknames and Mascots for Team Sports: Law, Policy, and Attitude*, 1 VA. SPORTS & ENT. L.J. 274, 278 (2002) (discussing legal, policy and social issues behind the movement to remove Native American team names and mascots).

134. Clegg, *supra* note 133, at 278.

135. See Staurowsky, *supra* note 21, at 299.

136. See Wikipedia, *Cleveland Indians*, at http://en.wikipedia.org/wiki/Cleveland_Indians (last visited Sept. 25, 2004) (listing all the names from the team’s history).

137. See Cleveland Indians, *History: Indians Timeline*, at http://cleveland.indians.mlb.com/NASApp/mlb/cle/history/cle_history_timeline.jsp (last visited May 5, 2004).

138. Louis Sockalexis, grandson of a Penobscot chief, was the first Native American to play professional baseball. See BRIAN McDONALD, *INDIAN SUMMER: THE FORGOTTEN STORY OF LOUIS SOCKALEXIS, THE FIRST NATIVE AMERICAN IN MAJOR LEAGUE BASEBALL* 87-115 (2003) (telling the story of Louis Sockalexis, the first Native American to play major league baseball). Sockalexis endured a firestorm of publicity and disparate racial treatment while blazing a path for future sports heroes such as Jackie Robinson and Jim Thorpe. See *id.* In the late 1800’s, Sockalexis was a star outfielder for the Cleveland Spiders. See *id.* Sockalexis was well regarded throughout professional baseball for his exceptional throwing arm, outstanding speed, and powerful bat. See *id.*

139. See McDONALD, *supra* note 138, at 87-115.

If Native American plaintiffs sought to challenge the Chief Wahoo trademark, they would have to show that the mark was disparaging at the time of registration.¹⁴⁰ Even if this were possible, a party challenging the “Chief Wahoo” mascot would have difficulty overcoming a laches defense due to the long delay in bringing suit.¹⁴¹ In the case of the Cleveland Indians, the team name was chosen in honor of the first professional Native American baseball player, which suggests the name was not disparaging at the time of registration.¹⁴² The Cleveland Indians, moreover, have used trademarks associated with Native Americans, or derivations thereof, since 1976.¹⁴³ Therefore, the laches defense would likely bar a claim challenging the Cleveland Indians’ use of “Chief Wahoo.”

The statistics discussed above suggest that many Native Americans actually support the use of Native American mascots and team names. Thus, the reasonable Native American with ordinary sensibilities might not find such mascots and team names disparaging. In addition, many high school, college, and professional teams have exhibited substantial goodwill towards the Native American community, which further satisfies the third prong of the *Harjo* laches defense.¹⁴⁴

For example, ten years ago, in response to the public outcry against the use of Indian team names and mascots, the regents of Eastern Michigan University voted to change their team name from the Hurons to the Eagles.¹⁴⁵ However, Eastern Michigan University did so without consulting the Huron tribe.¹⁴⁶ The Huron-Wyandotte Association of Southern Michigan complained vociferously and reiterated that its

140. See 15 U.S.C. § 1052(a).

141. See *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 144-45 (D.D.C. 2003).

142. See *Wikipedia*, *supra* note 136.

143. The Cleveland Indians own the following trademarks: (1) Registration No. 1,031,410 issued on January 27, 1976, which is the head of a Native American male with a big nose and a single feather in his hair; (2) Registration No. 1,259,795 issued on December 6, 1983, which is a Native American male with a large smile, big nose, and single feather in his hair; (3) Registration No. 1,543,339 for “Indians” issued on June 13, 1989; (4) Registration No. 1,568,426 issued on November 28, 1989, which is the profile of a Native American male with headdress; (5) Registration No. 1,509,703 issued on April 10, 1990, which is the head of Native American male with a single feather in his hair; (6) Registration No. 1,711,810 issued on September 1, 1992, which is head of Native American male with a single feather in his hair and a small braid; (7) Registration No. 1,719,618 issued on September 22, 1992, which is a Native American male wearing an “Indians” jersey with a baseball bat; and (8) Registration No. 2,569,766 issued on May 14, 2002, which is the head of a Native American male with a single feather in his hair. See U.S. Patent & Trademark Office, Trademark Electronic Search System (Tess), at <http://www.uspto.gov/main/trademarks.htm> (using search terms “Cleveland Indians”) (last visited Nov. 23, 2004).

144. See discussion *supra* Part.II.C.

145. Miller, *supra* note 133, at 292.

146. *Id.*

members were very proud of the honor of being the team name of Eastern Michigan University.¹⁴⁷ Chiefs from the tribe's Oklahoma and Canada delegations visited the campus in hopes of returning the team name to the Hurons.¹⁴⁸

The Florida State University Seminoles' team name and fan rituals have been surrounded by controversy for the last twenty years. However, Florida State University has a strong relationship with the native Florida Seminole tribe.¹⁴⁹ Chief Osceola is the team mascot.¹⁵⁰ The Seminole Tribe helped design the mascot's costume, and he is named for an actual figure unique to the Seminole tribe.¹⁵¹ Seminole Chief James Billie has severely criticized other tribal leaders in the Native American community for being offended by the practices of Florida State University.¹⁵² James Billie maintains a good relationship with the university and may be the team's biggest supporter.¹⁵³

High school students have derived educational benefits from their school's use of Native American mascots and team names. Arapahoe High School not only references the tribe in its football team name, but also teaches its students about authentic Arapahoe traditions.¹⁵⁴ The high school reached a compromise with Arapahoe tribal leaders and promised to prevent the use of the "tomahawk chop" at games and to remove the warrior symbol from their logo.¹⁵⁵ Each year, the students learn about the Arapahoe tribe and celebrate "Arapahoe Day."¹⁵⁶ Arcadia High School, outside of Los Angeles, has a similar exchange with the Apache tribe of Arizona.¹⁵⁷

The use of Native American mascots and team names has served as an educational tool for high school students across the country.¹⁵⁸ As a result, many Native Americans support the use of Native American mascots and

147. *Id.*

148. *Id.* The tribal leaders were unsuccessful in restoring the Huron name at Eastern Michigan. Miller, *supra* note 133, at 292.

149. *Id.*

150. *Id.*

151. *Id.* The Seminole tribe does not gain any economic benefit from Florida State University's use of their tribe's name. Miller, *supra* note 133, at 292. However, the relationship the Seminole tribe shares with Florida State University allows most Americans to pinpoint the Seminole tribe geographically on a map. *Id.*

152. *Id.*

153. *See id.*

154. Miller, *supra* note 133, at 292.

155. *See id.*

156. *Id.*

157. *Id.*

158. *See id.*

team names.¹⁵⁹ This further indicates that should other mascots and team names be the subject of a trademark cancellation proceeding, they are likely to withstand disparagement scrutiny and remain federally registered under the Lanham Act.

C. *Harjo's Laches Defense*

Even if a trademark is found to be scandalous, disparaging, pejorative or derogatory, sports teams can likely invoke the laches defense.¹⁶⁰ In *Harjo*, the plaintiffs' challenges to the Washington Redskins' trademarks were substantially delayed, which provided a strong laches defense.¹⁶¹ The question remains whether the holding of *Harjo* will apply to other professional, college, and high school teams that use Native American mascots, team names, symbols, and emblems. The laches defense appears to be very strong and likely covers most, if not all, sports teams.

First, most professional sports teams have held their trademark(s) for nearly twenty years, which was found to be a substantial delay by the district court in *Harjo*.¹⁶² Second, most Native Americans are well aware of the use of Native American mascots, team names, and symbols. Professional sports teams appear on television, in newspapers, and in magazines daily. Thus, Native Americans are exposed to the trademarks associated with professional sports teams through visible media outlets.¹⁶³ Third, many professional sports teams promote goodwill and association with the Native American community, which raises a reliance interest in the preservation of a trademark pursuant to the third prong of the *Harjo* laches defense.¹⁶⁴ For example, the Atlanta Braves pledged over \$1 million in 1999 to raise awareness of Native American culture.¹⁶⁵ Therefore, after *Harjo*, the laches defense amounts to an insurmountable hurdle for Native American plaintiffs who seek to challenge a registered trademark.¹⁶⁶

D. *Is Trademark Law the Right Avenue?*

After *Harjo*, it is clear that Native Americans cannot rely on the

159. See Price, *supra* note 4, at 66.

160. See Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96, 136-37 (D.D.C. 2003).

161. *Id.*

162. See *id.* at 139-40.

163. See *id.* at 141.

164. See *Harjo*, 284 F. Supp. 2d at 136.

165. See Hooper, *supra* note 11, at 2C.

166. See *Harjo*, 284 F. Supp. 2d at 136-37 (stating trademarks registered in 1967 should have been challenged in 1967 or shortly thereafter).

Lanham Act to effectively discourage the use of Native American mascots and team names.¹⁶⁷ In any case, trademark law may not be the right avenue for Native Americans seeking to stop sports teams' use of Native American team names and mascots in the aftermath of the *Harjo* decision.

First, trademark cancellation does not affect immediate cessation of the mark's use. When a trademark is stripped of federal protection, the federal government no longer restricts infringers from using the trademark for economic benefits.¹⁶⁸ Also, in the event a sports team's trademarks are revoked, a team would still have protection under the Lanham Act until all appeals of the case are resolved.¹⁶⁹ Thus, the National Football League, Major League Baseball, the National Hockey League, and the National Collegiate Athletic Association will continue to collect revenue from the sale of licensed products until all avenues of appeal are exhausted.¹⁷⁰

Second, even if a trademark's federal registration is cancelled, a trademark holder may remain protected under common law theories. Common law protection arises from the simple adoption and use of an identifying mark, even absent any form of registration, and creates an enforceable right of exclusivity in the mark's geographic area of use.¹⁷¹ Common law trademark rights can arise prior to federal registration, and can exist after federal registration expires or is cancelled.¹⁷² A trademark holder may still bring suit against an infringer pursuant to a common law cause of action, and therefore, trademark holders continue to have rights

167. *Id.*

168. See Guest, *supra* note 31, at 115-16, 126.

169. Justin Blankenship, *The Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words That Offend?*, 72 U. COLO. L. REV. 415, 453 (2001) (discussing the offensive nature of Native American team names, specifically "Redskins," and further arguing the appropriateness of the Trademark Trial and Appeal Board decision in *Harjo*).

170. See *id.* at 453-54. Moreover, a sports franchise would not bear the burden of losing a trademark alone due to profit-sharing schemes instituted by the leagues. See Jaime Beckett, *NFL's Big Merchandising Play*, S.F. CHRON., Sept. 10, 1990, at C1 (stating NFL Properties governs the licensing and merchandising of NFL teams); Don Walker, *Baseball Making Pick Move: It Wants Vendors to Fake Merchandise Out at All-Star Plate*, MILWAUKEE J. SENTINEL, June 25, 2002, at 1C (stating Major League Baseball receives a percentage of all merchandise for which it licenses to use team and league trademarks); Boston Prof'l Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc., 360 F. Supp. 459 (N.D. Tex. 1973) (stating the National Hockey League uses National Hockey League Services, Inc. to license trademarks).

171. See generally *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916) (discussing the grant of a temporary injunction preventing the infringement of the "Tea Rose" trademark); *Avakoff v. Southern Pac. Co.*, 765 F.2d 1097 (Fed. Cir. 1985) (discussing the "use in commerce" element of trademark protection).

172. See *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 541 (2d Cir. 1956); *United States Jaycees v. San Francisco Junior Chamber of Commerce*, 354 F. Supp. 61 (N.D. Cal. 1972); *Phoenix Mfg. Co. v. Plymouth Mfg. Co.*, 286 F. Supp. 324, 328 (D. Mass. 1968); see *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 336 (1938); *Nat'l Trailways Bus Sys. v. Trailway Van Lines, Inc.*, 269 F. Supp. 352, 357 (E.D.N.Y. 1965).

despite a lack of federal protection.¹⁷³ These rights include the right to enforce the trademark through an action for infringement.¹⁷⁴ A trademark holder's mark, therefore, may remain protected from potential infringers even when it is stripped of federal protection.

Hence, Native Americans ought to explore alternatives to trademark litigation. After *Harjo*, Native American activists' most encouraging strategy for curbing the use of allegedly disparaging marks is to lobby for change through non-legal avenues such as protests, lobbying for legislation and exerting political pressure on elected officials.¹⁷⁵ For instance, Native Americans could continue to urge the front offices of sports franchises, boards of regents and school boards to voluntarily adopt new team names and symbols.¹⁷⁶ Similarly, they could encourage state legislatures to pursue policies aimed at preventing teams from adopting names that could be offensive.¹⁷⁷ Advocates could bolster their efforts by presenting petitions to board of regents, petitions to school boards, and professional sports league administrators and team owners. While historically this approach has proven not completely effective in achieving the changes sought by Native American advocates,¹⁷⁸ perhaps renewed efforts coupled with media outreach would be more successful.

Furthermore, Native Americans can continue to voice their concerns in literature, presentations, exhibitions, and any other means by which the public can grasp and become aware of what they view as the offensive nature of mascots and team names associated with Native American culture. Finally, Native Americans may also consider the value of filing future trademark actions to raise public awareness of this issue, even though they are unlikely to succeed in court.

173. *See id.*

174. *See, e.g.,* *Sterling Drug, Inc. v. Lincoln Lab, Inc.*, 322 F.2d 968 (7th Cir. 1963) (granting injunctive relief where proposed product name found likely to cause confusion).

175. Native Americans will be met with opposition. NFL Commissioner, Paul Tagliabue, stated the NFL is "sensitive" to Native Americans' concerns about the use of Native American mascots and team names, but Tagliabue stated the mascots and team names are not "demeaning." *See* Mike Freeman, *NFL Deadline for Plan B Slips to Mar. 1, NFLPA Says Move Is Political*, WASH. POST, Jan. 25, 1992, at D7.

176. Leiby, *supra* note 115, at F1.

177. *Id.*; *see also* Am. Indian Sports Team Mascots, *Schwarzenegger OKs Ethnic Slur: Public Schools Rejoice*, at <http://www.aistm.org/schwarzenegger.htm> (last visited Nov. 23, 2004) (stating Governor Schwarzenegger refused to sign a bill, which would have precluded educational institutions from using Native American mascots, team names, and emblems).

178. *See id.*; *see generally* *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003); *but see* Richard E. Lapchick, *Hank Aaron Steps Up to the Plate on the Use of Native American Names and Mascots in Sport*, Northeastern Univ. Center for the Study of Sport in Soc'y, available at <http://www.sportinsociety.org/rel-article10.html> (last visited Nov. 23, 2004) (stating Hank Aaron believes that if the name "Braves" is hurtful to Native Americans it should be changed).

Lastly, it bears noting that viewing the debate over the use of Native American team names and symbols in a wider context could provide activists some solace. Although “redskins” is an exceptionally offensive term, the vast majority of Native American team names and mascots were adopted for positive reasons. Thus, while the *Harjo* decision refused to withdraw federal trademark protection for a very offensive team name, the vast majority of Native American-based names and symbols are not offensive and, indeed, carry positive connotations of Native American culture.

IV. CONCLUSION

The district court in *Harjo* most likely slammed the door on future challenges to sports related mascots and team names under the Lanham Act. The two-part *Harjo* decision found that (1) plaintiffs’ disparagement claims were not supported by substantial evidence, and that, in any case, (2) defendant raised a credible laches defense.¹⁷⁹ Because no other mascot or team name is as disparaging as the term “redskins,” it is unlikely future plaintiffs will be able to make the requisite evidentiary showing to prevail on a disparagement claim. Furthermore, the laches defense articulated by the *Harjo* court is likely to frustrate future challenges to Native American mascots and team names in Lanham Act cancellation actions.

Also, while Native Americans’ attempts to bring about change through non-legal means have proven ineffective, shaping the public debate on this issue appears likely to be the most promising tool for Native American advocates to bring about change. In any case, advocates may find solace in the fact that Native American team names and mascots are chosen for generally positive reasons. Indeed, professional and school sports teams adopted these names precisely because they signify characteristics they want their teams to embrace. In most cases, these teams do little to discriminate against minority groups and have nothing but the best intentions in regards to Native American names, chants, and traditions.

179. See *Harjo*, 284 F. Supp. 2d at 133-44.