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FOURTH AND LONG: THE TIME IS NOW FOR THE “WASHINGTON REDSKINS” TO PUNT THE NAME

Hammad Rasul*

The controversy surrounding the “Washington Redskins” name has resurfaced again and again in headline news over the past several years.¹ The issue hit a key milestone when the Trademark Trial and Appeal Board recently cancelled the trademark for the Washington Redskins.² There are many that have called on the Washington Redskins owner, Dan Snyder, to change the team’s name.³ However, many others believe Snyder should stand firm and keep the team’s name.⁴ The proponents of changing the name argue that the word “Redskins” has a history of racially motivated violence, referring to the bloodied scalps of Native Americans who were hunted and had their remains sold at trading posts.⁵ Meanwhile, even within the Native

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¹ See Michael Martinez, *A Slur or Term of ‘Honor’? Controversy Heightens About Washington Redskins*, CNN (Oct. 12, 2009, 4:11 PM), <http://www.cnn.com/2013/10/12/us/redskins-controversy/>; See also Obama Open to Name Change for Washington Redskins, FOX NEWS (Oct. 5, 2013), <http://www.foxnews.com/politics/2013/10/05/obama-open-to-name-change-for-washington-redskins/>; *Redskins’ Name Criticized by Minnesota Governor, Minneapolis Mayor*, HUFFINGTON POST (Nov. 7, 2013, 4:29 PM), http://www.huffingtonpost.com/2013/11/07/redskins-name-minnesota-politicians-criticize_n_4235082.html.

² *Blackhorse et al. v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080, 1114 (T.T.A.B. 2014).

³ See Brian Cladoosby, *Would You Call Me a Redsk*n to My Face?*, HUFFINGTON POST (Oct. 31, 2013, 11:45 AM), http://www.huffingtonpost.com/brian-cladoosby/redskins-name-change_b_4181199.html; Rick Reilly, *Have the People Spoken?*, ESPN (Sep. 18, 2013, 6:10 PM), http://espn.go.com/nfl/story/_/id/9689220/redskins-name-change-not-easy-sounds.

⁴ See Mike Florio, *Opponents, Proponents of Redskins Name Are Dug In, With No Middle Ground*, NBC SPORTS (Oct. 8, 2013, 9:57 AM), <http://profootballtalk.nbcsports.com/2013/10/08/opponents-proponents-of-redskins-name-are-dug-in-with-no-middle-ground/>.

⁵ Tansy Hoskins, *Washington Redskins: Do Offensive Team Names Endanger Public Health?*, THE GUARDIAN (Oct. 25, 2013, 10:16 AM), <http://www.theguardian.com/sustainable-business/washington-redskins-native-american-stereotypes-bullying>.

American community there are those who take pride in the name and don't want to see it changed.⁶

This Comment focuses on the psychological harm caused by the name and the logo of the Washington Redskins,⁷ the reasons professional sports teams are reluctant to change their names,⁸ the experiences of high schools and universities that have opted to change their names,⁹ and the ramifications of trademark cancellation that may inevitably lead to the Redskins changing their name.¹⁰

I. HISTORY

In 1932, George Preston Marshall purchased a National Football League (NFL) franchise in Boston and named it the Boston Braves.¹¹ The NFL's Boston Braves initially shared their stadium with Major League Baseball's Boston Braves.¹² In order to avoid confusion with the baseball team, Marshall's football franchise changed its name to the Boston Redskins.¹³ The Redskins name was chosen in part to honor their Native American coach William "Lone Star" Dietz.¹⁴ The "Redskins" relocated to Washington in 1937 to become the Washington Redskins.¹⁵

In 1966, the Washington Redskins filed for trademark protection for "the Redskins," which they were granted in 1967 without opposition from any Native American groups.¹⁶ In 1992, Suzan Harjo and six other Native Americans petitioned to cancel the

⁶ See Reilly, *supra* note 3 ("The word 'Oklahoma' itself is Choctaw for 'red people.' The students here don't want it changed. To them, it seems like it's just people who have no connection with the Native American culture, people out there trying to draw attention to themselves.").

⁷ See *infra* Part II.

⁸ See *infra* Part III.

⁹ See *Id.*

¹⁰ See *infra* Part VI.

¹¹ Mark S. Nagel & Daniel A. Rascher, *Washington "Redskins"—Disparaging Term or Valuable Tradition?: Legal and Economic Issues Concerning Harjo v. Pro-Football, Inc.*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 789, 792 (2007).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (citing *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 104 (D.C.C. 2003)).

¹⁵ Nagel & Rascher, *supra* note 11, at 792.

¹⁶ *Id.* at 792–93.

Redskins' trademarks, arguing that the trademarks disparaged Native Americans and cast Native Americans into contempt and disrepute in violation of the 1946 Lanham Trademark Act.¹⁷

The Lanham Act provides a federal registration system for protecting trademarks.¹⁸ The Lanham Act's purpose was to protect the trademark owner's exclusive right to benefit and to protect the public from confusion.¹⁹ Trademark registration is refused under the Lanham Act if a mark, "[c]onsists of or comprises immoral, deceptive, 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."²⁰ It is section 2(a) of the Lanham Act, specifically, which prohibits the registration of marks which may be scandalous or disparaging.²¹

A. *Prior Litigation in Harjo*

In September of 1992, a group of Native Americans filed a petition for cancellation of the "Redskins" trademark in *Harjo v. Pro-Football, Inc.*²² Pro-Football, Inc. asserted the defenses of laches, arguing that petitioners had known about the registered trademarks for years but did not seek any action until after the Washington Redskins had invested significant time and money towards their trademark.²³ Harjo rebutted the argument by stating that at the time the "Redskins" trademark was granted, the Native Americans had far bigger problems

¹⁷ *Id.* at 793.

¹⁸ The Lanham Act, 15 U.S.C. § 1051 (1946).

¹⁹ Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must A Trademark Be?*, 22 PEPP. L. REV. 7, 18–19 (1994).

²⁰ *Id.* at 22.

²¹ Francine Ward & Stephanie Quick, *Offensive Marks: The Policing of Trademarks in A Diverse World*, 5 LANDSLIDE 52, 52 (2013).

²² *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 104 (D.D.C. 2003), *rev'd*, 415 F.3d 44 (D.C. Cir. 2005).

²³ *Id.* at 100. Other defenses used by the Washington Redskins included: (1) these trademarks do not disparage Native Americans; (2) the trademarks do not bring Native Americans into contempt or disrepute; (3) section 2(a) of the Lanham Act violates the First Amendment because it is a vague, overbroad, and content-based restriction on speech; and (4) section 2(a) is unduly vague in violation of the Fifth Amendment. *Id.*

facing their communities.²⁴ The amicus brief filed in support of Harjo further argued that Native Americans faced a great number of problems during the 1960s, making it highly impractical for the Native American community to focus on seeking legal action to cancel a single football team's trademark.²⁵ Harjo further asserted that the plain language of the statute states that a petition for cancellation of a trademark under the Lanham Act can be filed "at any time."²⁶

The Trademark Trial and Appeal Board (TTAB) ruled that federal trademarks have a presumption of validity.²⁷ Therefore, the petitioners had the burden of proving disparagement.²⁸ TTAB found that the burden was met because the trademark is used with a pictured logo of a Native American.²⁹

In 2003, a district court found that TTAB erred in finding that there was sufficient evidence to conclude that the name "Redskins" was disparaging to Native Americans.³⁰ The court further held that the

²⁴ At that point in time, the United States government "sought to terminate Native Americans' special legal status, dismantle their reservations and tribal governments, and assimilate them into rest of the society by transferring federal responsibility and jurisdiction to state governments and relocating Native Americans from reservations to urban areas." Brief and Addendum of Amici Curiae National Congress of American Indians et al. in Support of Appellants at 30, *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005) (No. 03-7162).

²⁵ *Id.* ("From 1954 to 1962, statutes authorized the termination of 109 Native American tribes, bands, or rancherias. About 12,000 Native Americans lost their tribal affiliations, and 2.5 million acres of Native American land lost protected status during that time.")

²⁶ Pace, *supra* note 19, at 46–47. The equitable defenses of laches and estoppel were allowed in a cancellation proceeding brought under § 2(a) of the Landham Act, which claimed that the trademark falsely suggested a connection with the opposer. See *Treadwell's Drifters Inc. v. Marshak*, 18 U.S.P.Q 2d (BNA) 1318, 1321 (T.T.A.B. 1991).

²⁷ Pace, *supra* note 19, at 46–47.

²⁸ *Id.* at 51. ("If Petitioners can prove that the "Redskins" trademark can reasonably be understood to refer to them as Native Americans and that reasonable Native Americans or a substantial composite of Native Americans could have found the mark disparaging in 1967 when registration was issued, then the "Redskins" trademark should be cancelled.")

²⁹ *Id.*

³⁰ *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 104 (D.D.C. 2003) ("The findings do not come close to shedding any light on the legal inquiry. There is no evidence in the record that addresses whether the use of the term "redskin(s)" in the context of a

best time to resolve the case would have been shortly after 1967, when the trademark was initially granted.³¹ Accordingly, the court granted the defense of laches and held that the petitioners lacked standing to challenge the trademark.³²

In 2005, the United States Court of Appeals for the District of Columbia reversed and remanded the case back to the District Court, holding that the defense of laches applied to all but one petitioner, who was only one year old when the trademark was filed, and therefore, was the only petitioner with standing.³³ The Court of Appeals based their holding on the defenses of laches, and not on the central issue of disparagement.³⁴ As a result, in 2006, a new petition was filed involving younger Native American petitioners who had recently reached the age of majority, as determined by the holding of the Court of Appeals.³⁵ The new petitioners testified in front of the TTAB in March of 2013.³⁶

B. TTAB Once Again Cancelled the Trademarks in Blackhorse

At the conclusion of *Harjo*, five new individual petitioners filed a petition to cancel the same registrations for the Washington Redskins trademarks.³⁷ In June of 2014, TTAB once again cancelled the Washington Redskins trademarks, finding that the marks were

football team and related entertainment services would be viewed by a substantial composite of Native Americans, in the relevant time frame, as disparaging.”).

³¹ *Id.* at 142. (“The Court finds that constructive and actual notice on the part of Defendants, widespread use of Pro-Football’s trademarks, and the over twenty-five years that have passed since first notice of the mark, accompanied by an insufficient excuse from Defendants for their delay, requires this Court to find undue delay on the part of Defendants.”).

³² *Id.* at 141–42, n.36.

³³ *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 50 (D.C. Cir. 2005).

³⁴ *Id.* at 49–50.

³⁵ Petition for Cancellation, *Blackhorse et al. v. Pro-Football, Inc.*, No. 92046185 (T.T.A.B. Aug. 11, 2006).

³⁶ See Erik Brady, *New Generation of American Indians Challenges Redskins*, USA TODAY (May 10, 2013, 8:13 AM), <http://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/native-americans-washington-mascot-fight/2148877/> (“No matter how it is decided, appeals are likely, and the case could go on for years, as it did the first time.”).

³⁷ *Blackhorse et al. v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080, 1082 (T.T.A.B. 2014).

disparaging towards the Native American community.³⁸ Among other evidence, the Board relied heavily on a resolution passed by the National Congress of American Indians (NCAI) in finding that the marks were disparaging towards Native Americans.³⁹ The Board reasoned that circumstances surrounding NCAI's resolution painted a fair representation of a substantial composite of the Native American population that found the marks disparaging.⁴⁰

The Board further held that laches does not apply for two reasons.⁴¹ First, laches is an equitable defense, and it is difficult to balance the "equities where a registrant's financial interest is weighed against human dignity."⁴² Second, the Board cited to its own rulings to reason that "where there is a broader public policy concern at issue, the equitable defense of laches does not apply."⁴³ The Board reasoned that the claim is such where the "public interest is made clear by the elements of the claim that the plaintiffs must prove, i.e., that a substantial composite of the referenced group find the term to be disparaging."⁴⁴ Finally, the Board held that the Washington Redskins failed to show that the petitioners unreasonably delayed in bringing the petition to cancel the trademarks.⁴⁵

II. PSYCHOLOGICAL IMPACT ON NATIVE AMERICANS

In a brief filed in 2004, the original petitioners argued that the correlation between demeaning names and mascots and psychological harm to Native American people is clear [as] Indians have the United States' highest rates of alcohol-related deaths and suicide. But these are related issues – suicide and alcoholism speak to the problem of

³⁸ *Id.* at 1111.

³⁹ *Id.* at 1098.

⁴⁰ *Id.* ("[T]he circumstances under which the resolution was passed, i.e., that approximately 150 tribes were represented by NCAI at that time and at least one third of the tribal members were present to pass the resolution.").

⁴¹ *Id.* at 1112.

⁴² *Id.* ("To apply laches to this type of claim contemplates the retention on the register of a mark determined by the Board to be a racial slur, in blatant violation of the Trademark Act's prohibition against registration of such matter, merely because an individual plaintiff 'unreasonably delayed' in filing a petition to cancel.").

⁴³ *Id.*

⁴⁴ *Id.* at 1113.

⁴⁵ *Id.* at 1114. (finding that any undue delay on the part of the petitioners was excusable considering the *Harjo* litigation pending at the time).

poor self-image. And Native American self-esteem is precisely what's at stake when fans prance around in war paint at football games.⁴⁶

At an Oneida Indian Nation symposium, psychologist Dr. Friedman agreed with the petitioners' assertion that epithets, such as the one used by the Washington Redskins, result in real mental health consequences.⁴⁷ Psychologists trace the history of Native American caricatures back to the 1950s, when there was a distinct separation between Native Americans and the rest of American society.⁴⁸ With Native Americans forbidden to leave their reservations, the rest of society was able to disparage Native Americans without facing any political or financial backlash.⁴⁹

Other psychologists argue that promoting such epithets with millions of dollars, as with the Washington Redskins' marketing and advertising, creates an even greater risk to mental health.⁵⁰ Evidence from the study of obese, gay and lesbian, African American, Latino, Asian and female populations suggests that stereotypes and prejudice lead to major psychological disorders such as depression, anxiety, and alcoholism.⁵¹ The impact of prejudice on Native Americans has been found consistent with the impact on the aforementioned groups, as evidenced by Native Americans having the highest suicide rates in the country.⁵² Indeed, the American Psychological Association has acknowledged this harm towards Native Americans, and in 2005, urged the banning of all Native American mascots for sports teams.⁵³

⁴⁶ Amici Curiae for Appellants, *supra* note 24, at 28.

⁴⁷ Hoskins, *supra* note 5 (“Even a positive image, if it's stereotypical, will lead to psychological distress, lower self-esteem, lower sense of achievement.”).

⁴⁸ *Id.*

⁴⁹ *See id.*

⁵⁰ Michael A. Friedman, *The Harmful Psychological Effects of Washington's Redskins Mascot*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sep. 27, 2013), <http://indiancountrytodaymedianetwork.com/2013/09/27/harmful-psychological-effects-washingtons-redskins-mascot>.

⁵¹ *Id.* (“These health problems are caused not only by the direct biological effect of increased stress on the body, but also worsening self-concept as a result of prejudicial behavior. Harmful prejudicial attitudes underlie systematic discrimination in education, employment and housing that destroys quality of life, health and well-being.”).

⁵² *Id.* (“The rate of suicide among Native Americans has risen 65% in the past decade alone.”).

⁵³ *Id.*

In 1968, NCAI denounced damaging stereotypes toward Native Americans and its current policy condemns the use of sports team mascots that claim to portray Native Americans in a positive light.⁵⁴ Furthermore, NCAI points out, the practice of “honoring” a culture or a group of people by turning them into mascots only happens to Native Americans.⁵⁵

The Society of Indian Psychologists of the Americas (SIPA) also “called for an end to the use of Native American mascots [in sports].”⁵⁶ SIPA asserts that the use of Native Americans as mascots creates a problem of misinformation, which can distract children from learning and can promote stereotypical views towards Native Americans.⁵⁷

For example, even peripheral exposure to a school’s Native American mascot has been shown to correlate with endorsement of stereotypes towards another ethnic group.⁵⁸ Participants in a study at the University of Illinois at Urbana-Champaign were asked to indicate whether they agreed with several stereotypes attributed towards Asian Americans.⁵⁹ Those who received a materials packet with the logo of the school’s Native American mascot endorsed anti-Asian American stereotypes to a greater extent than those in other groups.⁶⁰ Thus, the research suggested that “exposure to one stereotype – however whimsical or benign in its intent – apparently activates [other

⁵⁴ Justin P. Grose, *Time to Bury the Tomahawk Chop: An Attempt to Reconcile the Differing Viewpoints of Native Americans and Sports Fans*, 35 AM. INDIAN L. REV. 695, 698 (2011) (noting that NCAI’s policy contains “powerful words from one of the largest Native American organizations in the United States”).

⁵⁵ *Id.*

⁵⁶ *Id.* at 711.

⁵⁷ *Id.*

⁵⁸ Tom Jacobs, *Chief Wahoo’s Revenge: One Stereotype Begets Another*, PAC. STANDARD (Apr. 22, 2010, 1:22 PM), <http://www.psmag.com/navigation/books-and-culture/chief-wahoos-revenge-one-stereotype-begets-another-14785/> (citing Chu Kim-Prieto et al., *Effect of Exposure to an American Indian Mascot on the Tendency to Stereotype a Different Minority Group*, 40 J. OF APPLIED SOC. PSYCHOL. 534 (2010)).

⁵⁹ *Id.*

⁶⁰ Participants in other groups received their materials in an unmarked folder with Illinois’ other logo with the capital letter “I”. *Id.*

stereotypes].”⁶¹ Another study found that people prejudiced by stereotypes increased their tendency to stereotype people of other groups in return.⁶² Thus, many Native Americans struggle to find their own identity because they continuously see themselves depicted in television, sports, and movies in a way that is entirely inconsistent with their way of life.⁶³

III. HIGH SCHOOLS AND UNIVERSITIES MAKING THE CHANGE

In 2005, the American Psychological Association passed the “APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations.”⁶⁴ The Resolution is significant because it is based on the newer studies and conclusions of the APA and contains previously undocumented information that the TTAB did not have access to at the time of its ruling in *Harjo*.⁶⁵ The Resolution provides credible evidence that the perpetuation of stereotypes by the likes of the Washington Redskins is detrimental to Native Americans.⁶⁶

Later in 2005, the National Collegiate Athletic Association (the “NCAA”) banned universities from using Native American mascots in its postseason tournaments.⁶⁷ The NCAA reasoned that it was unacceptable for teams in the NCAA championship competitions to exhibit “hostile or abusive” mascots.⁶⁸ Despite this ban, however, the NCAA has made an allowance for mascots in circumstances where a

⁶¹ *Id.*

⁶² Grose, *supra* note 54, at 716.

⁶³ *Id.* at 713.

⁶⁴ *Id.* at 710.

⁶⁵ *Id.* at 711. (“A number of these studies and their findings are documented in a few of the *amicus curiae* briefs filed with the Supreme Court on behalf of the petitioners in *Harjo v. Pro-Football, Inc.*”).

⁶⁶ *Id.*

⁶⁷ NCAA only applied the mascot ban for the postseason, as the organization did not feel it had the authority to ban teams from using the Native American mascots during the regular season. *NCAA American Indian Mascot Ban Will Begin Feb. 1*, ESPN (Aug. 12, 2005, 10:53 AM) [hereinafter *NCAA Mascot Ban*], <http://sports.espn.go.com/ncaa/news/story?id=2125735>.

⁶⁸ *Id.*

specific tribe has endorsed the otherwise “hostile or abusive” Native American mascot or logo.⁶⁹

The Seminole Tribe of Florida is one such tribe that passed a resolution supporting Florida State University’s use of the team name, mascot, and tribal images.⁷⁰ Seminole tribes located in other states, though, have strongly disagreed with the Seminoles in Florida.⁷¹ The Oklahoma Seminoles, for example, oppose Florida State University’s use and portrayal of Chief Osceola as a mascot and logo because Chief Osceola despised the American expansion into Florida.⁷² One could also take exception because Chief Osceola was decapitated by his American captors, with his head used as a trophy signifying victory.⁷³ Nowadays, it is the image of Chief Osceola’s head which is used as a sales and marketing centerpiece by Florida State University.⁷⁴

Some view Florida State University’s portrayal of Chief Osceola as that of a “brave and fierce warrior.”⁷⁵ But even though the mascot gets to charge onto the field before games amid Native American-themed music from the marching band and fans doing the “tomahawk chop,” it is still offensive to many.⁷⁶ This brand of general misinformation as to the Florida and Oklahoma Seminole tribes, as astutely described by one author, is “further evidence that the history of the Native American peoples throughout the country often is either distorted or ignored.”⁷⁷

And even if schools or professional sports teams with Native American mascots effectively manage their imagery on campus, they cannot control how rival schools manipulate those images.⁷⁸ For example, “Indians are often hanged and burned in effigy, painted as

⁶⁹ Grose, *supra* note 54, at 699.

⁷⁰ *NCAA Mascot Ban*, *supra* note 67.

⁷¹ *Id.*

⁷² Grose, *supra* note 54, at 699.

⁷³ *Id.* at 699–700.

⁷⁴ *Id.* at 700.

⁷⁵ Darryl Fears, *Indian Mascots: Matter Of Pride or Prejudice?*, WASH. POST (Aug. 14, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/08/13/AR2005081300448_2.html.

⁷⁶ *Id.*

⁷⁷ Grose, *supra* note 54, at 700.

⁷⁸ Fears, *supra* note 75.

crude demons on shop windows and beheaded in mock scalplings [during campus rallies].”⁷⁹ A simple Google search using the common phrase “Washington Deadskins” reveals several such offensive and crude images. One example portrays the Redskins logo with the title “Deadskins,” an X on the caricature’s eyes signifying death, the Native American bloodied in the forehead, the back of the head, and the mouth, and hit with two arrows.⁸⁰ Another image portrays the Native American in the Redskins logo having his head tilted down and his hand placed on his face, so as to indicate failure or disappointment, with the caption, “Fail to the Deadskins.”⁸¹

Thus, even those claiming to use Native American imagery to “honor” the population likely cause more harm than good, due to the abuse and mockery they elicit from rivals and opponents.⁸² It is for this exact reason that no sports team uses the imagery of African Americans, Jews, Muslims, Asian Americans, or Latinos as mascots or team names to “honor” these groups.⁸³ In this way, Native Americans represent a truly discrete and insular minority. Even when subject to disparaging marks, it seems they do not have the economic or political power to effectively carry out a boycott.⁸⁴ As a result, schools and team owners can simply ignore the pleas of Native Americans without any substantial impact.⁸⁵

Several college teams have taken the initiative to change their mascots, such as in 1972, when Stanford went from the Indians to the Cardinal after protests claiming that the name was racist.⁸⁶ The University of Massachusetts replaced its former Indian mascot with the Minuteman, and Minnesota and Wisconsin have both adopted bans on all Native Americans mascots in public schools.⁸⁷

⁷⁹ *Id.*

⁸⁰ John T. Wills, *The Washington Deadskins – Shame on you!!!*, THOUGHT PROVOKING PERSP. (Dec. 20, 2010), <http://justaseason.blogspot.com/2010/12/washington-deadskins-shame-on-you.html>.

⁸¹ *Fail to the Deadskins*, REDSKINS JUNKIE, <http://www.redskinsjunkie.com> (last visited Jan. 17, 2015).

⁸² See Fears, *supra* note 75.

⁸³ See Grose, *supra* note 54, at 720.

⁸⁴ Pace, *supra* note 19, at 16.

⁸⁵ *Id.*

⁸⁶ *Id.* at 12.

⁸⁷ *Id.*

In 1970, the University of Oklahoma was the first major school to abandon its Native American mascot, named “Big Red.”⁸⁸ Eastern Michigan, Syracuse, and Dartmouth likewise all abandoned their Native American-related mascots soon after.⁸⁹ St. John’s University and the University of Miami of Ohio are some of the more recent schools to have dropped their Native American marks.⁹⁰ Most universities have either garnered sufficient Native American support to keep their affiliation, such as Florida State University, the University of Utah, and Central Michigan University, or have removed the Native American affiliations all together.⁹¹

There has been no professional sports team, however, that has changed its name in response to the efforts of Native American groups.⁹² Suzan Harjo memorably explained this contrast between professional teams and schools as follows: “educational sports has been willing to change, and pro sports has not been willing to change, because one is about education and one is about money, period.”⁹³

IV. HISTORY OF DISPARAGING TRADEMARKS

Section 2(a) of the Lanham Act serves to prevent the registration of offensive and disparaging trademarks, such as the word “nigger,” as it would serve only to insult, provoke, and disparage African Americans.⁹⁴ Even though there is no registered trademark today that contains the word “nigger,” this was not always the case. In the past, companies were able to register trademarks such as “Nigger Head Brand” for canned vegetables and “Niggerhair Tobacco”.⁹⁵ While these trademarks were acceptable in the early part of the

⁸⁸ Greg Garber, *What’s in a Name?*, ESPN (Jun. 3, 1999), <http://espn.go.com/otl/americans/mascots.html>.

⁸⁹ Pace, *supra* note 19, at 12.

⁹⁰ Garber, *supra* note 88.

⁹¹ Nagel & Rascher, *supra* note 11, at 790.

⁹² Pace, *supra* note 19, at 12.

⁹³ Nagel & Rascher, *supra* note 11, at 795.

⁹⁴ Pace, *supra* note 19, at 9.

⁹⁵ *Id.* at 8.

twentieth century, due to tremendous political and social change within the last century they have no place in today's society.⁹⁶

The TTAB has previously refused registration over other marks, such as a mark for cigarettes seeking the name "Senussi" because the Senussi-sect of the Islamic faith forbids smoking.⁹⁷ The TTAB provided its reasoning for refusing the trademark by holding that, "[t]he application of the name of any religious order or sect to a product whose use is forbidden to the followers or adherents of such sect or order is an affront to such persons and tends to disparage their beliefs."⁹⁸

In 1993, the TTAB held that the trademark for "Black Tail," a magazine featuring pictures of naked African-Americans, was scandalous because it degraded women and was generally offensive.⁹⁹ However, the Federal Circuit later vacated the TTAB's holding because it found that there was not sufficient evidence showing that a substantial composite of the general public would find the mark scandalous.¹⁰⁰

In 2010, the TTAB cancelled a trademark sought by the Lebanese Arak Corporation when it sought to trademark KHORAN.¹⁰¹ The Board found the term disparaging because the alcoholic product to be trademarked could be perceived as a misspelling of the Muslim holy book, Koran.¹⁰² The Board further found that the general public would take the trademark to mean the sacred book of Islam, rather than the Armenian term to mean "altar."¹⁰³ The Board reasoned that even if it accepted the Armenian term, the radio advertisements would

⁹⁶ See *id.* at 8–9. The Washington Redskins name also came into existence in the 1930s, a time when marks that would otherwise be considered extremely offensive today also came into existence. See also, *supra* Part II.

⁹⁷ *Id.* at 28 (citing *In re Reemtsma Cigarettenfabriken*, 122 U.S.P.Q. (BNA) 339 (T.T.A.B. 1959)).

⁹⁸ *Id.* at 29.

⁹⁹ *Id.* at 32 (citing *In re Mavety Media Group Ltd.*, 1993 TTAB LEXIS 25, *15 (May 5, 1993), *vacated*, 33 F.3d 1367, 1369 (Fed. Cir. 1994).

¹⁰⁰ *Id.* (citing *In re Mavety Media Group Ltd.*, 1993 TTAB LEXIS 25, at *14).

¹⁰¹ *In Re Lebanese Arak Corp.*, 94 U.S.P.Q.2d (BNA) 1215, 1221 (T.T.A.B. 2010).

¹⁰² *Id.* at 2 ("[T]he Koran is the sacred text of Islam [and] the Koran forbids consumption of alcoholic beverages, including wine; and therefore that the use of KHORAN for wine is disparaging to the beliefs of Muslims.").

¹⁰³ *Id.* at 6.

pronounce the alcoholic beverage “Koran,” which would disparage a substantial composite of the Muslim population.¹⁰⁴

Finally, even where a trademark may be self-disparaging, it will still not receive trademark protection if it offends a substantial composite of the subgroup being disparaged.¹⁰⁵ One such example is of the African American comedian Damon Wayans, to whom TTAB denied a trademark on the word “Nigga” for his entertainment services.¹⁰⁶

V. EFFECTS OF CANCELLING A TRADEMARK

The most effective legal avenue for Native Americans to force Washington Redskins owner Dan Snyder to change the team’s name is through trademark law.¹⁰⁷ However, a trademark cancellation, by itself, does not guarantee that the team will change its name.¹⁰⁸ A cancellation alone may not trigger enough financial loss to cause ownership to change a name, particularly in the NFL, because all NFL teams take part in profit sharing.¹⁰⁹ Therefore, the adverse effect of any trademark cancellation will be diluted by the 32 teams in the league that are sharing profits amongst each other.¹¹⁰ A trademark cancellation also does not prevent Dan Snyder from continuing to use the Redskins name.¹¹¹ It merely eliminates the Washington Redskins’ exclusive right to sell merchandise with that mark, thereby allowing other companies or individuals to profit off of the team brand.¹¹²

¹⁰⁴ *Id.*

¹⁰⁵ *See* Ward & Quick, *supra* note 21, at 53.

¹⁰⁶ *See id.*

¹⁰⁷ *See* Rachel Clark Hughey, *The Impact of Pro-Football, Inc. v. Harjo on Trademark Protection of Other Marks*, 14 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 327, 365–66 (2004).

¹⁰⁸ *Id.* at 365.

¹⁰⁹ *Id.* at 362; *See also id.* at 332–33 (“To discourage any one team from gaining a significant financial advantage over other teams based solely on its logo, many professional leagues engage in profit-sharing. For example, [NFL] grants licenses on the trademarked names, and profits are shared evenly between all of the franchises.”).

¹¹⁰ *Id.* at 362.

¹¹¹ *Pace, supra* note 19, at 15.

¹¹² *Id.* at 15–16.

Unlike teams in the NFL, collegiate teams do not engage in profit sharing; therefore, a trademark cancellation is likely to cause more harm to a university than it is to a professional franchise, which further explains why collegiate teams have been more willing to remove their Native American affiliations.¹¹³ A school such as the University of Illinois owns several trademarks, “including the trademark ‘Fighting Illini’ and a trademark on the symbol of the head of a Native American wearing a large, circular, feather headdress.”¹¹⁴ The University relies on these trademarks to generate revenues.¹¹⁵ Therefore, a trademark cancellation is likely to harm the University of Illinois far more than the Washington Redskins.¹¹⁶

In contrast, Florida State University earns up to \$1.8 million per year selling merchandise with its trademark.¹¹⁷ Yet the school does not own any trademarks on the word “Seminoles.”¹¹⁸ Rather, the profits earned are from trademarks of the University’s name, and not from any Native American name or imagery.¹¹⁹ Florida State is in a strong position then, as a denial of any future petition to file a trademark on the “Seminoles” name will not adversely affect the school enough to want to change their name.¹²⁰

Still, though the cancellation of a disparaging trademark may not result in a team changing its name, it does send a clear message that the mark is offensive.¹²¹ With sufficient awareness, an insular and discrete group such as Native Americans can generate the public support and momentum to organize boycotts and force change.¹²² For example, after the TTAB’s decision on the “Redskins” trademark in *Harjo*, several national newspapers ran the headline, *Redskins Is Offensive, Team Loses Trademark*.¹²³ Under a profit-sharing scheme,

¹¹³ Hughey, *supra* note 107, at 364.

¹¹⁴ *Id.* at 364.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 364–65.

¹²⁰ *See id.*

¹²¹ *Id.* at 366.

¹²² *See id.* at 365–66.

¹²³ *Id.* at 366.

this type of pressure could be particularly influential, as peer owners may compel a name change lest the profits of all be put at risk.¹²⁴

VI. THE CHILLING EFFECT OF A TRADEMARK CANCELLATION

If the Washington Redskins trademarks were to be cancelled, some fear that it may lead to a deluge of trademark cancellation petitions being filed with the TTAB.¹²⁵ Such a scenario is unlikely, though, because only a member of a group or substantial composite of a group has standing to bring such a suit.¹²⁶

Furthermore, suggesting that cancellation of the Washington Redskins trademark may lead to an increase in petitions for trademark cancellations assumes that the “Redskins” trademark may be nothing more than mildly offensive itself. On the contrary, the movement for the Redskins trademark cancellation continues to gain widespread support.¹²⁷ In October 2013, President Obama indicated support, stating, “I don’t know whether our attachment to a particular name should override the real legitimate concerns that people have about these things.”¹²⁸ Senator Harry Reid said that the time has come for the Washington Redskins to change the name.¹²⁹ Additionally, Congressman Tom Cole from Oklahoma also strongly urged the Washington Redskins to change their name.¹³⁰ One of only two Native members of Congress, Congressman Cole stated “[i]t is very, very, very offensive. This isn’t like warriors or chiefs. It’s not a term of

¹²⁴ *Id.* at 365–66.

¹²⁵ Pace, *supra* note 19, at 52.

¹²⁶ *See id.* at 53.

¹²⁷ *See supra* note 1.

¹²⁸ *President Obama Open to Washington Redskins Name Change*, NFL (Oct. 5, 2013, 12:44 PM), <http://www.nfl.com/news/story/0ap2000000256458/article/president-obama-open-to-washington-redskins-name-change>.

¹²⁹ Paige Lavender, *Harry Reid: Redskins Should Change Their Name*, HUFFINGTON POST (Dec. 19, 2013, 3:39 PM), http://www.huffingtonpost.com/2013/12/19/harry-reid-redskins_n_4472753.html (“We live in a society where you can’t denigrate a race of people . . . [a]nd that’s what that is. I mean you can’t have the Washington Blackskins. I think it’s so short-sighted.”).

¹³⁰ Daniel Newhauser, *Cole: Change ‘Offensive’ Redskins Moniker*, ROLL CALL (Jan. 17, 2013, 3:18 PM), http://www.rollcall.com/news/tom_cole_change_offensive_redskins_moniker-220851-1.html.

respect, and it's needlessly offensive to a large part of our population. They just don't happen to live around Washington, D.C.”¹³¹

Journalists and broadcasters across the country have taken strong stands against the use of the Redskins name as well.¹³² On national television, NBC Sunday Night Football broadcaster Bob Costas condemned the Washington Redskins name, stating “Redskins’ can’t possibly honor a heritage or noble character trait, nor can it possibly be considered a neutral term. It’s an insult, a slur, no matter how benign the present day intent.”¹³³ Sports Illustrated columnist Peter King, meanwhile, is one of a growing list of journalists and media outlets to stop using the name “Redskins” when referring to the team in columns and articles.¹³⁴ Therefore, there is sufficient public outcry to conclude that the name is more than merely mildly offensive.

VII. CONCLUSION

TTAB’s decision on the trademark with regard to younger petitioners is imminent and like its predecessor in *Harjo*, the TTAB may cancel the “Redskins” trademark, once again leaving it up to the courts.¹³⁵ The facts have shifted from the *Harjo* case, though, as there is now more substantial evidence in support of changing the Washington Redskins name, such as the APA’s resolution in 2005 underscoring the psychological effects on Native Americans.¹³⁶

Meanwhile, whether mandated by the NCAA or by their own initiative, many universities have opted to remove Native American affiliations. Even if the original intent was to honor Native Americans, schools cannot control the behavior of opposing fans who, through the

¹³¹ *Id.*

¹³² See Monica Anderson, *Media Take Sides on ‘Redskins’ Name*, PEW RES. CENTER (Oct. 30, 2013), <http://www.pewresearch.org/fact-tank/2013/10/30/media-take-sides-on-redskins-name/>.

¹³³ Sarah Kogod, *Bob Costas on Redskins Name: ‘It’s an Insult, a Slur’*, WASH. POST (Oct. 13, 2013), <http://www.washingtonpost.com/blogs/dc-sports-bog/wp/2013/10/13/bob-costas-on-redskins-name-its-an-insult-a-slur/>.

¹³⁴ Mike Florio, *King Drops Use of “Redskins” Name*, NBC SPORTS (Sep. 7, 2013, 2:24 PM), <http://profootballtalk.nbcsports.com/2013/09/07/king-drops-use-of-redskins-name/>.

¹³⁵ See *supra* Part I.A.

¹³⁶ See *supra* Part II.

fanaticism of sports, degrade and insult the imagery of Native Americans.¹³⁷

Trademark cancellation alone may not be enough of a financial hit to the Washington Redskins.¹³⁸ But increasing public pressure, led by momentum among politicians and the media, may be enough to incentivize the NFL or Dan Snyder to change the team's name.¹³⁹ Indeed, changing the Washington Redskins name is the overdue next step to truly honoring Native Americans.

¹³⁷ *See supra* Part III.

¹³⁸ *See supra* Part V.

¹³⁹ *See supra* Part VI.