

THE SAGA CONTINUES: THE REDSKINS, *BLACKHORSE*, AND THE FUTURE OF NATIVE AMERICAN TRADEMARKS IN SPORTS

BY LAURA SIGLER[†]

I. INTRODUCTION	73
II. BACKGROUND	74
III. ANALYSIS.....	83
<i>A. Trademark Disparagement Post-Harjo</i>	83
<i>B. Blackhorse v. Pro. Football, Inc.</i>	84
<i>C. The District Court Appeal</i>	88
<i>D. The Circuit Court Appeal and the Tensions that Remain</i>	91
1. <i>Substantial Composite of the Referenced Group</i>	91
2. <i>The Laches Defense</i>	93
3. <i>The First Amendment Challenge</i>	95
<i>E. If All Else Fails</i>	97
<i>F. The Future of Native American Marks in Sports</i>	102
IV. CONCLUSION.....	104

I. INTRODUCTION

One of the oldest current NFL teams, the Washington Redskins franchise was founded in 1932 as the Boston Braves.¹ After being renamed the Boston Redskins in 1933, the team relocated to Washington D.C. in 1937, where it has remained ever since.² Winners of five league championships,³ the Redskins have become one of the nation's most popular and valuable football franchises.⁴ Despite its popularity and relative success on the field, the team has faced an onslaught of criticism over its choice in nickname, culminating in multiple petitions by Native American groups to cancel the numerous trademark registrations owned

[†] B.A., 2011, University of Michigan; M.A. 2012, University of Michigan; J.D., 2016, Wayne State University Law School.

1. *Washington Redskins*, CBSSPORTS.COM, <http://www.cbssports.com/nfl/teams/history/WAS> (last visited Feb. 21, 2015).

2. *Id.*

3. The Redskins won NFL championships in 1937 and 1942, and Super Bowl championships in 1982, 1987, and 1991. *Id.*

4. FORBES, <http://www.forbes.com/nfl-valuations/> (last visited Jan. 16, 2015).

by the Redskins.⁵ Up until this point, the legal landscape of this area of trademark law has been relatively bare, as there is very little precedent discussing an attempt to cancel a trademark's registration on grounds of disparagement.⁶ The narrative culminated in a June 4, 2014 decision by the United States Patent and Trademark Office to cancel the Redskins' registrations,⁷ followed by an affirmation of the decision by the United States District Court of the Eastern District of Virginia on July 8, 2015.⁸ With the next appeals process unlikely to be decided any time soon, this Note seeks to explore how the Redskins' cases impact this area of trademark law and what the future has in store for this franchise, among others.

First, this Note dissects the court cases that have been decided on the issue thus far. Next, it considers the Washington Redskins' second appeal, the arguments that should be made, and the problems that must be addressed. Third, it looks at what might be next for the Redskins if their appeal is unsuccessful. Finally, this Note examines the future of Native American marks and imagery in sports, and the franchises and collegiate teams that might be at risk of litigation.

II. BACKGROUND

The United States Patent and Trademark Office ("USPTO") defines a trademark as "a word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods of one party from those of others."⁹ The current trademark act (also known as the Lanham Act) dictates that all applications for trademark registration shall be validated unless they fall into one of the few exceptions.¹⁰ At issue in the Washington

5. See generally *Washington's Nickname Controversy*, ESPN OUTSIDE THE LINES, http://espn.go.com/espn/otl/story/_/id/11446278/questions-answers-debate (last updated Sept. 3, 2014).

6. See *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705, 35 (T.T.A.B. 1999), *rev'd*, 284 F. Supp. 2d 96 (D.D.C. 2003). (Note: Page numbers in TTAB cases start at 1, there are no page numbers consistent with the publication).

7. See Theresa Vargas, *U.S. patent office cancels Redskins trademark registration, says name is disparaging*, WASH. POST (June 18, 2014), http://www.washingtonpost.com/local/us-patent-office-cancels-redskins-trademark-registration-says-name-is-disparaging/2014/06/18/e7737bb8-f6ee-11e3-8aa9-dad2ec039789_story.html.

8. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015) (hereinafter "*Blackhorse II*").

9. *Trademark, Patent, or Copyright?*, U.S. PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/trademarks/basics/definitions.jsp> (last visited July 16, 2016).

10. 15 U.S.C.A. § 1052 (West 2014).

Redskins dispute is the first exception, which forbids the registration of a trademark that:

Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 3501(9) of Title 19) enters into force with respect to the United States.¹¹

Pro-Football, Inc. owns six trademarks associated with the Washington Redskins NFL team,¹² the earliest of which was registered in 1967,¹³ and the most recent in 1990.¹⁴ While the propriety of the team nickname has been in question since at least the early 1970s,¹⁵ the legal battle did not begin until *Harjo v. Pro-Football, Inc.* (hereinafter "*Harjo I*") was filed in 1992.¹⁶ In *Harjo I*, seven Native American persons filed a trademark registration cancellation petition with the Trademark Trial and Appeal Board ("TTAB"), alleging that the aforementioned six trademarks violated 15 U.S.C.A. § 1052(a).¹⁷ Their principal arguments were that the term "redskin(s)" was a "pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for a Native American person," and that the trademarks "consist of or comprise matter which disparages Native American persons, and brings them into contempt, ridicule, and disrepute."¹⁸ Thus, petitioners continued, the trademarks were in violation of Section 2(a) of the Trademark Act and the registrations

11. 15 U.S.C.A. § 1052(a) (West 2014).

12. THE WASHINGTON REDSKINS, Registration No. 978,824; REDSKINS, Registration No. 1,085,092; REDSKINETTES, Registration No. 1,606,810; The mark consists of "The Redskins" in stylized form, Registration No. 836,122; The mark consists of "Washington Redskins" surrounding a Native American bust, Registration No. 986,668; The mark consists of "The Redskins" on an arrow, Registration No. 987,127.

13. The mark consists of "The Redskins" in stylized form, Registration No. 836,122.

14. REDSKINETTES, Registration No. 1,606,810.

15. See Dan Steinberg, *The Great Redskins Name Debate of...1972?*, WASH. POST (June 3, 2014), <http://www.washingtonpost.com/blogs/dc-sports-bog/wp/2014/06/03/the-great-redskins-name-debate-of-1972/>.

16. See Catherine Ho, *Legal Battle Over Redskins' Name Continues*, WASH. POST (Sept. 6, 2012), http://www.washingtonpost.com/blogs/capital-business/post/legal-battle-over-redskins-name-continues/2012/09/06/9b80a502-f7ac-11e1-8398-0327ab83ab91_blog.html.

17. *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705, 2 (T.T.A.B. 1999), *rev'd*, 284 F.Supp. 2d 96 (D.D.C. 2003).

18. *Id.*

should be cancelled.¹⁹ The respondent, the corporate owner of the Washington Redskins and owner of the trademarks, responded that:

The marks sought to be canceled herein cannot reasonably be understood to refer to the Petitioners or to any of the groups or organizations to which they belong [as] the marks refer to the Washington Redskins football team which is owned by Respondent and thus cannot be interpreted as disparaging any of the Petitioners or as bringing them into contempt or disrepute.²⁰

Because of the issues raised in the later judicial proceedings of this case, it is important to delineate the evidence provided by each side. The petitioners offered personal testimony from themselves, Harold Gross (director of Indian Legal Information Development Service), a historical expert, a social science expert, a linguistics expert, and a film expert; the results of a petitioner-developed survey; and resolutions by various organizations.²¹ Respondent presented the testimony of John Kent Cooke (executive vice-president of Pro-Football, Inc.), Richard Vaughn (director of communications for the Washington Redskins), two linguistics experts, and a marketing and survey expert.²²

Of particular interest is the testimony of the linguistics experts of both parties. The board notes that under the requirements of Section 2(a), it must consider the meaning of the term "redskins" in "the context of the marks in their entireties, the services identified in the challenged registrations, and the manner of use of the marks in the marketplace."²³ The linguistics expert for the petitioners, Dr. Geoffrey Nunberg, extensively reviewed numerous publications from as early as the 1800's and concluded that in almost every case the term "redskins" was used in a negative context, alluding to savagery, violence, and racial inferiority.²⁴ Dr. Barnhart and Dr. Butters, experts for the respondent, saw things differently. They observed that the negative references to Native Americans were not caused by the term itself, but rather resulted from the context in which the term was used.²⁵ Additionally they noted that in nearly every instance the word "Indian" could be substituted for "redskin" without changing the connotation of the sentence itself.²⁶ It is

19. *Id.*

20. *Id.*

21. *Id.* at 18-23.

22. *Id.* at 23-25.

23. *Id.* at 25.

24. *Id.* at 26.

25. *Id.*

26. *Id.*

important to remember, they concluded, that the modern use of the term “redskins” primarily refers to the Washington Redskins football team, and thus the 18th century and the late-20th century meanings of the word are distinct.²⁷ The linguistics experts of both parties clashed when it came to identifying the dictionary definition of “redskins,” with Dr. Nunberg focusing on the vast number of dictionaries that label the word as offensive or disparaging, and Drs. Barnhart and Butters arguing that these labels were incorrect and insignificant.²⁸

After hearing the testimony presented by the linguistics experts, the board made very few factual conclusions. Primarily, it identified the points of agreement between the experts, including that “redskins” was historically used to denote Native Americans, but that this reference has been usurped by references to the football team in modern times.²⁹ The experts also agreed that historically, Native Americans have been referred to in a derogatory or offensive manner, but they disagreed on the role that “redskins” played in this connotation.³⁰ The board lastly concluded that the differing opinions regarding the dictionary usage labels are of little significance, and thus the board only considered the dictionary definitions themselves.³¹

The final piece of evidence submitted that must be considered is the survey conducted by the petitioners. Dr. Ivan Ross described the survey as designed to “determine the perceptions of a substantial composite of the general population and of Native Americans to the word ‘redskin(s)’ as a reference to Native Americans.”³² 301 Americans and 358 Native Americans were asked by telephone whether they would be offended by the terms “Native American,” “Brave,” “Buck,” “Indian,” “Redskin,” “Injun,” and “Squaw.”³³ Respondent countered with its own expert who had significant criticisms as to the methodology and validity of the survey, eventually concluding it was “completely unscientific.”³⁴ The board was unpersuaded by the respondent’s argument, finding no problem with the methodology and validity of the results.³⁵

After hearing all the testimony, the board presented the issue as follows: “[W]hether, at the times respondent was issued each of its challenged registrations, the respondent’s registered marks consisted of

27. *Id.* at 27.

28. *Id.*

29. *Id.* at 28.

30. *Id.* at 29.

31. *Id.*

32. *Id.* at 30.

33. *Id.*

34. *Id.* at 31–32.

35. *Id.* at 32.

or comprised scandalous matter, or matter which may disparage Native American persons, or matter which may bring Native American persons into contempt or disrepute."³⁶

Precedent has defined "scandalous" as "[g]iving offense to the conscience or moral feelings; exciting reprobation, calling out condemnation . . . Disgraceful to reputation . . . [and] shocking to the sense of truth, decency, or propriety; disgraceful, offensive; disreputable, as *scandalous* conduct."³⁷ While it is clear that disparagement is a separate and distinct grounds for trademark cancellation, there is very little case law or precedent on how it should be analyzed.³⁸ Thus, the board developed its own test for disparagement that parallels the precedent for scandalousness, beginning with considering the ordinary and common meaning of "disparage."³⁹ A two-step process of analysis then ensued, considering first "the likely meaning of the matter in question and, second, whether that meaning may be disparaging."⁴⁰

For the first step, the board looked at "the relationship between the subject matter in question and the other elements that make up the mark in its entirety; the nature of the goods and/or services; and the manner in which the mark is used in the marketplace in connection with the goods and/or services."⁴¹ In the second step, the court does not to consider the perceptions of the public in general.⁴² What mattered was the perceptions of the referenced group claiming to be disparaged and how they interpreted the meaning of the mark.⁴³

After considering the evidence, the board made a number of conclusions in its first-step analysis. First, it stated that "redskin(s)" is a denotative term for Native Americans.⁴⁴ Second, respondent provided extensive evidence that contemporary uses of the term "redskins" primarily refer to the Washington Redskins football team.⁴⁵ However, this evidence did not establish that references to the term in the context of football were completely separate from the allusion of Native American imagery.⁴⁶

36. *Id.* at 33.

37. *Id.* (internal quotation marks omitted) (quoting *In re McGinley*, 660 F.2d 481, 211 U.S.P.Q. 668, 673 (C.C.P.A. 1981)).

38. *Id.* at 35.

39. *Id.*

40. *Id.*

41. *Id.* at 36.

42. *Id.* at 37.

43. *Id.* (citing *In re Hines*, 31 U.S.P.Q.2d 1685, 1688 (T.T.A.B. 1994), *vacated on other grounds*, 32 U.S.P.Q.2d 1376 (T.T.A.B. 1994)).

44. *Id.* at 39.

45. *Id.* at 39-40.

46. *Id.* at 40-41.

Regarding the second step of the disparagement analysis, the board found that the petitioners did meet their evidentiary burden of demonstrating that the marks, as used in their intended contexts, may disparage Native Americans.⁴⁷ The board made the statement that since “we have found that the evidence supports the conclusion that a substantial composite of the general public finds the word ‘redskin(s)’ to be a derogatory term of reference for Native Americans,”⁴⁸ it was appropriate to infer that “a substantial composite of Native Americans would similarly perceive the word.”⁴⁹

The board went on to conclude that since “redskins” did not appear post-1950’s as a synonym for “Native American,” it was because most of the population perceived the term as pejorative or derogatory towards Native Americans.⁵⁰ The board indicated that the petitioners’ survey supported these conclusions, as did evidence of media usage and “respondent’s portrayal of Native Americans in connection with its services.”⁵¹

After completing both steps of the disparagement analysis, the board held that the team’s trademarks were in violation of Section 2(a) of the Trademark Act and that their registration should be cancelled.⁵²

Section 1071 of the United States Code provides parties dissatisfied with the decisions of the TTAB an opportunity to appeal to the federal court system.⁵³ At the time of the *Harjo I* holding, the statute dictated that appeals could be heard in the United States District Court for the District of Columbia.⁵⁴ This court could consider the entire record from *Harjo I*, as well as any new evidence offered by the parties.⁵⁵ Pro-Football, Inc. decided to take this opportunity to appeal, and the ruling of the TTAB was reversed in *Pro-Football Inc. v. Harjo* (hereinafter “*Harjo II*”) in 2003.⁵⁶

In reviewing the TTAB’s decision, the court considered the TTAB’s findings of fact under the “substantial evidence” standard of review,⁵⁷ while findings of law and legal standards were reviewed *de novo*.⁵⁸ The

47. *Id.* at 42.

48. *Id.*

49. *Id.*

50. *Id.* at 44.

51. *Id.* at 45.

52. *Id.* at 48.

53. 15 U.S.C.A. § 1071 (West 2014).

54. 15 U.S.C.A. § 1071(b) (West 2010).

55. *Id.*

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

57. *Id.* at 114 (citing 5 U.S.C.A. § 706 (West 2014)).

58. *Id.* at 116.

court criticized the TTAB for its lack of factual findings, noticing that although the TTAB's decision spent 14 pages detailing the evidence, it made actual factual findings only regarding the linguists' testimony and the petitioners' survey.⁵⁹

Regarding the testimony of the expert linguists, the court stated that the TTAB made five findings of fact,⁶⁰ all of which were supported by substantial evidence.⁶¹ However, the court did not reach the same conclusion on the findings of fact relating to the survey. Of the three TTAB findings identified by the court,⁶² only two of them were supported by substantial evidence.⁶³ The court stated: "[T]o the extent that the TTAB's finding purported to hold that the methodology was proper to extrapolate the survey results to the Native American population at large, the Court must disagree that substantial evidence supports this conclusion."⁶⁴ For one, the TTAB presented no answer or defense to the criticism of the respondent's expert that there was no basis for the TTAB's extrapolation from the views of the survey's participants to those of the Native American population.⁶⁵ The TTAB made inferences that were completely unexplained and offered the mere statement that "no survey is perfect."⁶⁶ Thus, the court held that the third finding of fact was not supported by substantial evidence.⁶⁷

The court then moved on to a discussion of the TTAB's legal analysis and began by stating that the TTAB articulated the correct law to apply to disparagement cases.⁶⁸ Turning to the TTAB's finding of disparagement (a factual conclusion reviewed under the "substantial evidence standard"⁶⁹), the court stated that this conclusion was not supported by substantial evidence, had numerous logical flaws, and was improperly reached through an incorrect legal standard.⁷⁰ First, the court noted that:

Even a cursory review of the TTAB's findings of fact reveals that there is no *direct* evidence in the findings that answers the

59. *Id.* at 119.

60. *See id.* at 107-08 (quoting *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705, 28-29 (T.T.A.B. 1999), *rev'd*, 284 F. Supp. 2d 96 (D.D.C. 2003)).

61. *Id.* at 119.

62. *See id.* at 111-12 (quoting *Harjo I*, 50 U.S.P.Q.2d at 32-33).

63. *Id.* at 119-20.

64. *Id.* at 120.

65. *Id.*

66. *Id.* at 120-21.

67. *Id.* at 121.

68. *Id.* at 121-22.

69. *Id.* at 116.

70. *Id.* at 126.

legal question posed by the TTAB. None of the findings of fact made by the TTAB tend to prove or disprove that the marks at issue “may disparage” Native Americans, during the relevant time frame, especially when used in the context of Pro-Football’s entertainment services.⁷¹

The survey results present the views of the participants in 1996, as opposed to the time period during which the marks were registered.⁷²

The court went on to criticize the approach taken by the TTAB:

[T]he Board made findings of fact in only two very specific areas; and many of these findings of fact simply summarized undisputed testimony. As a result, many of the TTAB’s findings of fact never involved weighing conflicting evidence or addressing criticisms of some of the evidence. The TTAB compounded this problem by declining to make specific findings of fact in key areas.⁷³

This led to the board making numerous inferences that were not supported by anything in the record.⁷⁴ For example, the TTAB took the views of the general public and merely inferred that the Native American population would agree with them.⁷⁵ This is not sufficient to prove that a substantial composite of Native Americans believe the term “redskins” is disparaging, nor is the testimony of merely the seven Native American petitioners.⁷⁶ Thus, there is not substantial evidence to support the TTAB’s conclusions.⁷⁷ Moreover, the court found that “[t]here is no evidence to support the conclusion that the drop-off of the use of the term ‘redskin(s)’ as a reference for Native Americans is correlative with a finding that the term is pejorative.”⁷⁸

The TTAB also considered numerous irrelevant aspects of the record in reaching its decision, and the decision contains gaping holes. There was no “analysis of how the use of the trademarks in connection with Pro-Football’s services disparages Native Americans.”⁷⁹ That the TTAB

71. *Id.* at 127.

72. *Id.*

73. *Id.* at 128.

74. *Id.*

75. *Id.* at 129.

76. *Id.*

77. *Id.*

78. *Id.* at 132.

79. *Id.* at 133.

considered the perceptions of the general public was a significant error—this was not legally relevant to the issue.⁸⁰

Finally, the court held that irrespective of the disparagement issue, Pro-Football Inc.'s laches defense precluded a cancellation of the trademarks.⁸¹ Laches is a procedural safeguard designed to encourage petitioners to file a timely lawsuit, and has three affirmative requirements: "(1) a substantial delay by a plaintiff prior to filing suit; (2) a plaintiff's awareness that the disputed trademark was being infringed; and (3) a reliance interest resulting from the defendant's continued development of good-will during this period of delay."⁸²

The court found each of these elements satisfied, noting particularly that this case was filed 25 years after the first trademark was registered.⁸³ That Pro-Football and the Washington Redskins organization had heavily invested economically in these trademarks during this delay also contributed to the court's decision.⁸⁴ The result of the petitioners delay "is that that there is no direct or circumstantial evidence in the record that, at the times the trademarks were registered, the trademarks at issue were disparaging . . ." and the court firmly stated that it would have been far more appropriate for this case to have originated in 1967.⁸⁵ After consideration, the court reversed the decision of the TTAB.⁸⁶

To complete the procedural history of this case, it should be noted that the seven Native American petitioners appealed this ruling, challenging the District Court's laches conclusion. The United States Court of Appeals for the District of Columbia remanded the case back to the District Court for further consideration after articulating a more detailed legal standard for laches.⁸⁷ The District Court applied this new standard and again concluded that the laches defense barred Harjo, et. al.'s claim.⁸⁸ The Court of Appeals affirmed.⁸⁹ It is worth pointing out that the District Court's conclusions regarding the sufficiency of the evidence in the record were never considered or ruled on by the higher courts.

80. *Id.* at 134.

81. *Id.* at 136.

82. *Id.* (quoting *N.A.A.C.P. v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc.*, 753 F.2d 131, 137 (D.C. Cir. 1985)).

83. *Id.* at 139.

84. *Id.* at 143.

85. *Id.* at 136.

86. *Id.* at 145.

87. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 45 (D.C. Cir. 2005).

88. *Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46, 48 (D.D.C. 2008), *aff'd*, *Pro Football, Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir. 2009).

89. *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 881 (D.C. Cir. 2009).

III. ANALYSIS

A. *Trademark Disparagement Post-Harjo*

After the final ruling in the *Harjo* case, there have since been multiple TTAB decisions that shed light on how to address disparagement going forward.⁹⁰ Of greatest significance is *In re Squaw Valley*, which addressed Squaw Valley Development Company's application to register the marks "Squaw" and "Squaw One" for three distinct sets of goods and services: men's and women's clothing and accessories; ski equipment; and retail store services in sporting goods and equipment.⁹¹ The board found that when "Squaw" is considered in the context of the ski equipment, "it is the Squaw Valley ski resort meaning of SQUAW, rather than the meaning of a Native American woman or wife, that will come to the minds of consumers."⁹² Thus it was not necessary to consider the second prong of the disparagement test.⁹³

The board reached the opposite conclusion when considering the marks in the context of men's and women's clothing, as well as retail services, and moved on to address the second prong of the disparagement test.⁹⁴ Petitioners presented substantial amounts of evidence in support of a finding of disparagement, including dictionary and encyclopedia entries,⁹⁵ stories with statements from American Indian groups deeming the term "squaw" to be offensive,⁹⁶ "portions of state statutes . . . showing legislation enacted in five states that rename geographic sites having the term 'squaw' or ban the term 'squaw' from place names in public places,"⁹⁷ and "a concurrent resolution passed by the Oklahoma legislature calling for the renaming of geographic place names in Oklahoma containing the term 'squaw.'"⁹⁸ By accepting this evidence as sufficient to establish a prima facie case of disparagement,⁹⁹ the board effectively communicated what types of evidence future petitions would be wise to submit in their trademark challenges.

90. See, e.g., *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071 (T.T.A.B. 2008); *In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d 1264 (T.T.A.B. 2006).

91. *In re Squaw Valley*, 89 U.S.P.Q.2d at 1.

92. *Id.* at 22.

93. *Id.*

94. See generally *id.* at 15.

95. *Id.* at 13.

96. *Id.* at 10–12.

97. *Id.* at 12.

98. *Id.* at 13.

99. *Id.* at 15.

The board was quick to point out, however, (and challengers must remember), that in an ex parte proceeding such as this, the threshold of evidence needed for the trademarks examiner to establish a prima facie case of disparagement is lower than that necessary in an inter partes proceeding involving an already registered trademark and two parties.¹⁰⁰ Therefore, while this case will be very influential in determining what is considered helpful and acceptable evidence, aiding both the board and the parties, it establishes no precedent on the amount of evidence required in inter partes proceedings.

B. *Blackhorse v. Pro. Football, Inc.*¹⁰¹

In *Blackhorse* (hereinafter "*Blackhorse I*"), five Native American petitioners sought the cancellation of the same six trademark registrations as in the *Harjo* cases.¹⁰² Significantly, it admitted the entire *Harjo* record (with the exception of the testimony of the petitioners in that case) into evidence for this case, along with the current pleadings, deposition testimony, and exhibits.¹⁰³ The board began by confirming that the legal standard applicable in *Blackhorse I* is the same two-prong test for disparagement established in the *Harjo* cases.¹⁰⁴ The board quickly pointed out, however, that this case would litigate only a very narrow issue—namely the second prong of the disparagement test.¹⁰⁵ Both parties agreed to accept the TTAB's prior determination, and the District Court's confirmation, as to the first prong—the meaning of the matter in question.¹⁰⁶

100. *Id.* at 18.

101. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014), *aff'd*, *Pro-Football, Inc. v. Blackhorse*, 112 F.Supp.3d 439 (E.D. Va. July 8, 2015).

102. *Id.* at 1–2.

103. *Id.* at 5.

104. *Id.* at 7.

105. *Id.* at 9.

106. *Id.* at 8–9. The T.T.A.B. found (and the District Court confirmed) that "REDSKINS clearly both refers to respondent's professional football team and carries the allusion to Native Americans inherent in the original definition of the word." *Id.* at 8 (quoting *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705, 2 (T.T.A.B. 1999), *rev'd on other grounds*, 284 F. Supp. 2d 96 (D.D.C. 2003)). The District Court confirmed:

This is not a case where, through usage, the word "redskin(s)" has lost its meaning, in the field of professional football, as a reference to Native Americans in favor of an entirely independent meaning as the name of a professional football team. Rather, when considered in relation to the other matter comprising at least two of the subject marks and used in connection with respondent's services, "Redskins" clearly both refers to respondent's professional football team and carries the allusion to Native Americans inherent in the original definition of that word.

The board took advantage of the new precedent cases that were decided following the conclusion of the *Harjo* cases.¹⁰⁷ It likened this case to the one presented in *Heeb Media*, stating that:

[R]espondent's alleged honorable intent and manner of use of the term do not contribute to the determination of whether a substantial composite of the referenced group found REDSKINS to be a disparaging term in the context of respondent's services during the time period 1967-1990, because the services have not removed the Native American meaning from the term and intent does not affect the second prong. If it is found to be disparaging during the relevant time period, then the Trademark Act mandates removal from the register.¹⁰⁸

To begin its analysis, the TTAB presented an overview of the expert reports from both parties as to the derivation of the word "redskins," the dictionary usage labels for "redskin" entries, and the use of the term in various media.¹⁰⁹ It made it clear that the usage labels that denote a term as offensive that are found in dictionaries is strong evidence to support the conclusion that the term "redskins" is disparaging.¹¹⁰ It also explicitly disagreed with the experts' conclusion that the labeling is "erratic and inconsistent," finding that there is a clear trend labeling "redskins" as offensive beginning in 1966 and continuing until the entries become unanimous in 1986.¹¹¹ Another point that supported the petitioner is that the petitioners' expert data strongly showed a drop-off in the usage of the term "redskins" in the media beginning in the late 1960's.¹¹²

Next, the TTAB considered the National Congress of American Indians (NCAI) resolution passed in 1993 in support of the cancellation of the Washington Redskins' trademarks.¹¹³ Regarding the pertinence of the resolution, the TTAB stated:

Id. (quoting *Pro-Football Inc. v. Harjo*, 284 F. Supp. 2d 96, 127 (D.D.C. 2003)).

107. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080, 9 (T.T.A.B. 2014), *aff'd*, *Pro-Football, Inc. v. Blackhorse*, 112 F.Supp.3d 439 (E.D. Va. July 8, 2015).

108. *Id.* at 10.

109. *Id.* at 10–17.

110. *Id.* at 13.

111. *Id.*

112. *See id.* at 14–16.

113. *Id.* at 17. The resolution states "[t]he term REDSKINS is not and has never been one of honor or respect, but instead, it *has always been* and continues to be a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for Native American's [sic] . . ." *Id.*

Here, we have a claim that the registered marks disparaged Native Americans when registered. We find that a resolution passed by an organization such as NCAI, which throughout the relevant time period represented approximately thirty percent of Native Americans, setting forth the past and ongoing viewpoint of the Native Americans it represents is clearly probative of the views of Native Americans held at the referenced time period.¹¹⁴

The petitioners also submitted nineteen letters of protest against the trademarks that identified Native Americans or family members of Native Americans wrote.¹¹⁵ The TTAB responded to these letters with: "All but one of the letters were written at the end or just after the relevant time period, but do evidence the opinion of individual Native Americans across the United States, providing further corroboration that the viewpoint in the NCAI resolution represents a cross-section of Native Americans."¹¹⁶ Finally, the TTAB acknowledged that the Respondent's evidence of support for the trademarks in the form of various tribal resolutions, letters, and media articles, but did not comment on their relevancy.¹¹⁷

Ultimately, the board made thirty-nine findings of fact regarding a "general analysis of the word 'redskins'" and the "Native American [o]bjection to [u]se of the [w]ord Redskins for [f]ootball [t]eams."¹¹⁸ No findings of fact were made regarding Respondent's evidence of support. The board later stated that most of that evidence was directed at the first prong of the disparagement test, which was not at issue here.¹¹⁹

Turning to the overall question of disparagement, the TTAB stated that the NCAI Resolution does represent the views of a "substantial composite" of Native Americans as required by the Lanham Act.¹²⁰ It pointed to the fact that the NCAI encompasses approximately thirty percent of Native Americans during the relevant time period, and that a "substantial composite" does not require a majority.¹²¹ "The record establishes that, at a minimum, approximately thirty percent of Native Americans found the term REDSKINS used in connection with respondent's services to be disparaging at all times including 1967, 1972,

114. *Id.* at 18.

115. *Id.* at 22.

116. *Id.* at 23.

117. *Id.* at 24-25.

118. *Id.* at 25-28.

119. *Id.* at 28.

120. *Id.*

121. *Id.* at 28-29.

1974, 1978, and 1990.”¹²² Further, the trend in usage labels in dictionaries and the drastic drop-off in the use of the term “redskins” as referring to Native Americans beginning in the 1960s also strongly supported a finding of disparagement.¹²³ Thus, the board concluded that the petitioners demonstrated that a “substantial composite” of Native Americans found “Redskins” to be disparaging when used in context with the respondent’s football team during the relevant time period.¹²⁴ The board ruled that the respondent’s trademarks’ registrations must be cancelled.¹²⁵

Next, the TTAB turned to the laches defense the respondent raised, and it concluded that laches did not apply.¹²⁶ The TTAB reasoned that laches should not apply to disparagement claims where the plaintiffs comprise one or more members of the group being disparaged.¹²⁷ Applying laches in this type of claim, the board stated that laches “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.”¹²⁸

The TTAB’s second argument against laches was that the board and courts have consistently held that laches does not apply in cases where there is a broader public policy issue at stake.¹²⁹ According to the board, “there is an overriding public interest in removing from the register marks that are disparaging to a segment of the population beyond the individual petitioners.”¹³⁰

Of particular interest for a future appeal, the board then considered how it would rule even if laches were to apply.¹³¹

122. *Id.* at 29.

123. *Id.*

124. *Id.*

125. *Id.* at 29.

126. *Id.* at 31.

127. *Id.*

128. *Id.*

129. *Id.* See generally *Ultra-White Co. v. Johnson Chem. Indus., Inc.*, 465 F.2d 891 (C.C.P.A. 1972) (holding that public interest in preventing likelihood of confusion prevails over a laches defense); see also *Bausch & Lomb, Inc. v. Leupold & Stevens Inc.*, 1 U.S.P.Q.2d 1497 (T.T.A.B. 1986) (holding that laches is not available against a claim of descriptiveness or fraud); *Midwest Plastic Fabricators, Inc. v. Underwriters Laboratories, Inc.*, 5 U.S.P.Q.2d 1067 (T.T.A.B. 1987) (holding that laches does not apply against a claim that respondent does not control the use of a certification mark because of the public interest in making sure that certification marks are properly controlled).

130. *Blackhorse*, 111 U.S.P.Q.2d at 32.

131. *Id.*

[R]espondent has *not* shown (1) that any one of the plaintiffs has unreasonably delayed in bringing the petition to cancel, in view of the pending *Harjo* litigation because the pendency of that case in court excused inaction; (2) that the 11 and 15 month delays by plaintiffs Tsotigh and Pappan were inexcusable or unreasonable; or (3) that it has been prejudiced, i.e., that there has been economic prejudice due to the delay.¹³²

None of the plaintiffs had reached the age of majority until 2000 at the earliest, and thus, they were justified in not bringing the suit until this time.¹³³ Additionally, “[t]here [was] nothing in the record to indicate that respondent’s business decisions regarding investment in its brand and marks [had] been influenced in any way by the pendency of this cancellation proceeding.”¹³⁴ Thus, the laches defense failed.¹³⁵

C. *The District Court Appeal*

The Washington Redskins decided to appeal the decision of the TTAB.¹³⁶ In 2011, Congress and President Obama enacted the America Invents Act, which was designed to reform the patent process and move it into the twenty-first century.¹³⁷ This Act changed the venue for TTAB appeals from the U.S. District Court of the District of Columbia (which decided the *Harjo* case) to the U.S. District Court for the Eastern District of Virginia.¹³⁸ Because of this, the court hearing the *Blackhorse I* appeal was not bound by the reasoning from the ultimate *Harjo* resolution. In October of 2014, a federal judge ruled that the organization is permitted to sue the *Blackhorse* petitioners along with asking for a reversal of the TTAB decision.¹³⁹ The petitioners moved to dismiss this lawsuit, but this motion was denied.¹⁴⁰

132. *Id.* at 33.

133. *Id.*

134. *Id.* at 34.

135. *Id.*

136. Erik Brady and Megan Finnerty, *Washington Redskins Appeal Decision to Cancel Trademark*, USA TODAY (Aug. 14, 2014), <http://www.usatoday.com/story/sports/nfl/redskins/2014/08/14/washington-redskins-appeal-federal-trademark-registrations/14066527/>.

137. Press Release, The White House, *President Obama Signs America Invents Act, Overhauling the Patent System to Stimulate Economic Growth, and Announces New Steps to Help Entrepreneurs Create Jobs* (Sept. 16, 2011) (on file with author).

138. 15 U.S.C.A. § 1071(b)(4) (West 2014).

139. Christopher Woody, *Judge Rules Redskins Can Sue Group that Objected to Team Trademarks*, SPORTS ILLUSTRATED (Oct. 31, 2014),

The TTAB in *Blackhorse I* was careful to avoid many of the problems that plagued its *Harjo* counterpart. While the *Harjo I* board made only eight findings of fact, which ultimately led to fatal flaws in its analysis, the *Blackhorse I* board made thirty-nine.¹⁴¹ This enabled the court in *Blackhorse I* to support its legal conclusions in a visible, logical way, instead of resorting to inferences that were not rooted in the evidence as it was forced to do in *Harjo I*. The *Blackhorse I* board also strayed away from the survey evidence the petitioners' presented in *Harjo I*, which was a wise move considering the survey received a substantial amount of criticism from the *Harjo I* district court.¹⁴² The *Blackhorse I* decision has a solid concrete foundation, something that was severely lacking in the *Harjo I* decision.

These foundational enhancements served the TTAB well because the district court upheld the cancellation of the trademark registrations in a lengthy opinion penned by Judge Gerald Bruce Lee (hereinafter "*Blackhorse II*").¹⁴³ The Redskins approached this appeal with a different tactic and argued that the cancellation of their trademarks implicated their First Amendment right to free speech, as did the wording of the Lanham Act itself.¹⁴⁴ Specifically, the team claimed that cancelling the trademarks affected its message in the ongoing debate about the team's name, which it argued was protected by the First Amendment.¹⁴⁵ The Redskins also argued that the wording of Section 2(a) of the Lanham Act drove ideas out of the marketplace, even if it did not explicitly prohibit speech.¹⁴⁶ The court rejected both of these arguments, first because it reasoned that cancelling the registrations did not prohibit speech, nor did it restrict the public debate on this topic, considering that the Redskins would still be allowed to use the mark in commerce.¹⁴⁷ The court then continued that Section 2(a) did not restrict or impose upon any of the core principles and values of the First Amendment, making it constitutional.¹⁴⁸

<http://www.si.com/nfl/2014/10/31/washington-redskins-sue-native-american-group-trademarks>.

140. *Pro-Football, Inc. v. Blackhorse*, 62 F. Supp. 3d 498 (E.D. Va. 2014) (holding that it did have statutory jurisdiction, and thus, dismissal was improper).

141. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080, 32 (T.T.A.B. 2014), *aff'd*, *Pro-Football, Inc. v. Blackhorse*, 112 F.Supp.3d 439 (E.D. Va. July 8, 2015).

142. *Id.*

143. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015).

144. *Id.* at 455–57.

145. *Id.* at 456.

146. *Id.*

147. *Id.*

148. *Id.* at 456–57.

The court next spent a significant amount of time addressing the second step of the traditional test for disparagement—whether the marks “may disparage” a substantial composite of Native Americans during the relevant time period.¹⁴⁹ The court prefaced its analysis by outlining the three categories of evidence acceptable to use to establish disparagement: dictionary definitions; scholarly, literary, and media references; and statements of individuals or group leaders of the referenced group.¹⁵⁰ Most of this section of the opinion was spent discussing the dictionary evidence. The court cited *In re Boulevard Entertainment, Inc.* to state that when unanimous throughout dictionaries, a usage label as “disparaging” next to the definition of the term in question is sufficient to establish disparaging status.¹⁵¹ The *Blackhorse* petitioners presented the court with definitions from eleven different dictionaries, all of which had a usage label designating “redskin” as offensive in some form.¹⁵² The court took this evidence to be highly persuasive, especially when combined with all of the media references and statements of Native Americans that had been submitted throughout the case’s history.¹⁵³ Thus, the district court agreed with the reasoning and arguments the TTAB presented and found the marks to be disparaging.¹⁵⁴

It is also of note that the court rejected the laches defense as well, although it spent very little time discussing the issue.¹⁵⁵ Importantly, the court emphasized the public interest factor, which weighed heavily against the application of laches.¹⁵⁶ The court strongly agreed with the TTAB’s finding that “there is an overriding public interest in removing from the register marks that are disparaging to a segment of the population beyond the individual petitioners.”¹⁵⁷

149. *Id.* at 472–88.

150. *Id.* at 472 (citing *e.g.*, *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571 (1st Cir. 2015) (dictionaries), *In re Geller*, 751 F.3d 1355 (Fed. Cir. 2014) (dictionaries and news reports/articles), and *In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d 1264 (T.T.A.B. 2006)).

151. *Id.* at 468–69 (citing *In re Boulevard Ent., Inc.*, 334 F.3d 1336, 1340–41 (Fed. Cir. 2003)).

152. *Id.* at 473.

153. *Id.* at 472–88.

154. *Id.* at 486–87.

155. *Id.* at 488–89.

156. *Id.* at 489 (citing *Resorts of Pinehurst, Inc. v. Pinehurst Nat’l Corp.*, 148 F.3d 417, 423 (4th Cir. 1998)) (internal quotation marks omitted).

157. *Id.* at 489 (citing *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080, 32 (T.T.A.B. 2014), *aff’d*, *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015)).

D. *The Circuit Court Appeal and the Tensions that Remain*

Dissatisfied again with the court's ruling, the Washington Redskins have filed an appeal with the United States Court of Appeals for the Fourth Circuit.¹⁵⁸ While the TTAB was successful in drafting an opinion that withstood the district court's scrutiny, there are still numerous holes in the decisions that the Redskins would be wise to exploit in their pursuit of a reversal. The definitive characterization of what constitutes a "substantial composite" and the applicability of the laches defense are two central problems that still exist in today's disparagement analysis—although scholars disagree on which is the most determinative.¹⁵⁹ Additionally, recent successful challenges to the constitutionality of Section 2(a) of the Lanham Act offer a glimmer of hope for the Washington Redskins and the potential for a landmark change in trademark law.¹⁶⁰ All of these issues need to be addressed in the *Blackhorse II* appeal if the Washington Redskins have any hope of ending this conflict.

1. *Substantial Composite of the Referenced Group*

As it stands, there is no congressional or judicial determination as to what is considered a "substantial composite" of the referenced group necessary for a finding of disparagement. Until there is, nothing would prevent any petitioner from bringing a suit and offering evidence as to why their disparaged group is large enough to be considered a "substantial composite" of the affected population. This is not fair to the Washington Redskins, or any other target of trademark cancellation, since they must expend much money and energy to defend their mark over and over until the petitioners get the result that they desire.

158. See Ian Shapira, *'Take Yo Panties Off' Defense: Redskins Cite Other Protected Products in Trademark Appeal*, WASH. POST (Nov. 3, 2015), https://www.washingtonpost.com/local/take-yo-panties-off-defense-redskins-cite-other-protected-products-in-trademark-appeal/2015/11/03/d6501692-81b8-11e5-8ba6-cec48b74b2a7_story.html.

159. See, e.g., Christian Dennie, *Native American Mascots and Team Names: Throw Away the Key; the Lanham Act is Locked for Future Trademark Challenges*, 15 SETON HALL J. OF SPORTS & ENT. L. 197, 198 (2005) (arguing that the laches defense is the most determinative issue); Joshua R. Ernst & Daniel C. Lumm, *Does Budda Beachwear Actually Fit? An Analysis of Federal Registration for Allegedly Disparaging Trademarks in the Non-Corporate Context*, 10 WAKE FOREST INTELL. PROP. L.J. 177, 205 (2010) (arguing that the threshold for finding a "substantial composite" of the referenced group is the most determinative issue).

160. See *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015).

One of the biggest weaknesses of the *Blackhorse I* decision is the board's primary focus on the NCAI Resolution to support the conclusion that a "substantial composite" of Native Americans find the mark disparaging. The board found that the NCAI represents thirty percent of Native Americans, and thus, the fact that they passed a resolution disclaiming the marks as disparaging means that thirty percent of Native Americans do as well, which is clearly a "substantial composite."¹⁶¹ First, if the threshold for "substantial composite" were known, the court might be able to throw out the resolution without any need to examine it in detail. If the threshold is higher than thirty percent, then the resolution is not sufficient, and the petitioners' claim fails. However, the district court did nothing to clarify a threshold, and thus, this issue must be explored further.

Nowhere in the *Blackhorse I* decision does the court mention exactly how many members of the NCAI actually support the resolution. It is stated that NCAI members represent approximately thirty percent of Native Americans,¹⁶² one third of the tribal members were present when the resolution was passed,¹⁶³ and "member tribes vote on resolutions by voice vote which are *usually* unanimous."¹⁶⁴ In concluding from these facts that *at minimum* thirty percent of Native Americans find the term disparaging, the board makes a tremendous leap. This conclusion would only be supported if every single member of the NCAI was in favor of the resolution. Nowhere in the decision is this stated. If only one third of tribal members were present, that equates to only ten percent of all Native Americans. Perhaps, that is enough for a "substantial composite." Perhaps not. The judiciary has given us no answer. But, this is a significant flaw in the decision that the Washington Redskins must exploit.

The *Blackhorse II* court's "substantial composite" analysis focused heavily on the weight of the dictionary definition evidence.¹⁶⁵ This focus also brings its share of complications. When discussing the legal precedent of using dictionary definitions to determine whether a phrase disparages a substantial composite, the district court cites *ex parte* opinions.¹⁶⁶ As mentioned earlier, *ex parte* opinions can serve as precedent, but the amount of evidence necessary to establish disparagement is lower in an *ex parte* proceeding as opposed to an inter

161. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080, 28–29 (T.T.A.B. 2014), *aff'd*, *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015).

162. *Id.* at 28.

163. *Id.* at 17.

164. *Id.* at 26.

165. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 468–75 (E.D. Va. 2015).

166. *Id.* at 468–69.

partes proceeding like we have here.¹⁶⁷ Thus, while dictionary definitions were sufficient evidence to establish disparagement to a “substantial composite” in an ex parte proceeding, it does not follow automatically that this evidence would be sufficient to establish disparagement in an inter partes proceeding. Nowhere does the district court acknowledge this differing evidence standard. As a result, the Washington Redskins now have a way to attack both the TTAB’s emphasis on the NCAI Resolution as well as the district court’s emphasis on dictionary definitions.

Sooner or later, a definitive answer as to what constitutes a “substantial composite” is needed, or these problems will continue to arise.

2. *The Laches Defense*

In what is likely the most controversial section of the decision, the TTAB held that the petitioners’ suit was not barred by laches,¹⁶⁸ so by upholding that opinion, the district court directly contradicted the federal courts in *Harjo*. The board’s first argument was that laches should not apply in these types of cases, where allowing the defense would prevent the cancellation of something so blatantly against the Lanham Act,¹⁶⁹ and where there is a broader public policy concern at issue.¹⁷⁰ The district court agreed, stating that the public policy interest in removing marks that disparage from the register was too strong.¹⁷¹ One could come up with numerous arguments to support the opposite conclusion. The courts devised the doctrine of laches for a purpose; it is founded on the notion that “equity aids the vigilant and not those who slumber on their rights.”¹⁷² The doctrine encourages plaintiffs to file claims while the evidence is still fresh—as time passes, evidence becomes lost, buried under years of other events and conflicts.¹⁷³ In most cases, evidence becomes circumstantial. This is especially true in disparagement trademark cases, where the claim specifically requires petitioners to present evidence from the time the trademark was originally registered. If too much time passes, it becomes exceedingly difficult to prove how the referenced group felt during the relevant time period. This speaks

167. See *In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d 1264, 18 (T.T.A.B. 2006).

168. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080, 34 (T.T.A.B. 2014), *aff’d*, *Pro-Football, Inc. v. Blackhorse*, 112 F.Supp.3d 439 (E.D. Va. July 8, 2015).

169. *Id.* at 31.

170. *Id.* at 31–32.

171. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 488–89 (E.D. Va. 2015).

172. *N.A.A.C.P. v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc.*, 753 F.2d 131, 137 (D.C. Cir. 1985).

173. *Id.*

directly to the purpose of laches, and if it does not apply here then the entire doctrine becomes undermined. Also, what makes the public interest in protecting against disparaging marks any greater than the public interest in upholding any law? Should not there be a public interest in upholding laws in general? This would make laches inapplicable anywhere, again undermining the entire doctrine. What makes this branch of trademark law so important? The court gives us no answers.

Second, the TTAB held that even if laches did apply in this situation, the respondent did not prove that the petitioner's delayed unreasonably in filing their claim,¹⁷⁴ and the district court agreed.¹⁷⁵ By focusing on the ages of the petitioners, the board decided this case on the basis of biological characteristics of five people. This illustrates the tension between laches as the board applied it and what should be the central emphasis of this case: the views of the entire Native American population. More simply, the board said that since the petitioner just turned 18, the respondent's trademarks should be cancelled. If the petitioner were 45, the respondent would be able to keep the trademarks. If this decision is affirmed, every single team's trademarks become at risk indefinitely. The only thing a group of petitioners has to do is wait until someone turns 18, and then they will get their shot at presenting evidence to prove a mark is disparaging. If they fail, the class regroups, waits until someone else turns 18, and then presents an altered argument. Laches has effectively become useless, as evidence will only get more and more circumstantial.

It is worth remembering that whether a trademark is disparaging to a "substantial composite" of the reference group at the time of registration never changes. Either the group felt disparaged, or they did not. No amount of time can alter this. Additionally, there were hundreds of thousands of Native Americans that knew about the trademarks when they were registered and nothing stopped them from bringing a suit then, which would have been the proper time. It is not fair to punish the Washington Redskins because no one decided to challenge their trademark until thirty to forty years later.

The TTAB is heading down a slippery slope with its holding regarding laches. With this interpretation, there is a severe risk of seeing suit after suit after suit challenging the same trademark. At what point is the line drawn? There is clearly a disconnect between the purpose of laches and how the board desires to apply it. This needs to be addressed

174. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080, 32-33 (T.T.A.B. 2014), *aff'd*, *Pro-Football, Inc. v. Blackhorse*, 112 F.Supp.3d 439 (E.D. Va. July 8, 2015).

175. *Id.*

before another team gets roped into what could be an expensive and time-consuming litigation process.

One potential solution is to limit the number of times a mark's registration can be challenged as disparaging by a particular referenced group. This allows for the reconciliation of laches and the timing requirements of the disparagement analysis. Since the issue of whether a mark was disparaging at its registration never changes, allowing the referenced group only one chance at bringing a suit does not significantly disadvantage them. The evidence will be the same no matter when the suit is brought. While perceptions on what constitutes disparaging might change over time, that argument carries no weight in this situation. Changing perceptions reflect a changing attitude of the current population, something that is completely irrelevant in determining whether a registration should be cancelled. One might feel differently about the term "redskins" now than they did when the mark was registered, but it is only the latter opinion that matters.

This solution would encourage potential plaintiffs to assemble the strongest case possible at the beginning instead of filing a string of suits over time, allowing the defendant to only have to litigate the claim once. The courts would then be able to properly consider applying a laches defense and ultimately put a definitive end to the challenge. After all, there is only one answer to this problem: either the mark was disparaging at the time of registration or it was not.

3. *The First Amendment Challenge*

Originally considered to be a likely dead end, the recent decision of *In re Simon Shiao Tam* brings the constitutionality challenge of Section 2(a) of the Lanham Act back in play. In this case, the petitioners appealed the TTAB's refusal to register the mark "The Slants" for a musical group on the ground that it disparaged those of Asian descent.¹⁷⁶ The Court of Appeals for the Federal Circuit ruled that Section 2(a) of the Lanham Act unequivocally discriminates on the basis of content and the topic of the speech.¹⁷⁷ The court continued that:

[T]he test for disparagement—whether a substantial composite of the referenced group would find the mark disparaging—makes clear that it is the nature of the message conveyed by the speech which is being regulated. If the mark is found disparaging by the

176. *In re Tam*, 808 F.3d 1321, 1335 (Fed. Cir. 2015).

177. *Id.*

referenced group, it is denied registration. 'Listeners' reaction to speech is not a content-neutral basis for regulation.'¹⁷⁸

When an examining attorney refuses to register a mark under Section 2(a), she does so because of the message conveyed by the mark.¹⁷⁹ Since the Lanham Act's inception, the court pointed out that "the government has argued that the prohibited marks ought not to be registered because of the messages the marks convey. When the government discriminates against speech because it disapproves of the message conveyed by the speech, it discriminates on the basis of viewpoint."¹⁸⁰ Overall, the court holds that Section 2(a) could not survive strict scrutiny and thus must be deemed unconstitutional under the First Amendment's protection of free speech.¹⁸¹

Since this decision was handed down in the Court of Appeals of the Federal Circuit and not the Fourth Circuit, the *Blackhorse* court will not be bound to follow the line of reasoning articulated above. However, this case gives monumental support to the Redskins' free speech argument, turning it from somewhat of a shot in the dark attempt at victory into a validated theory of unconstitutionality. Even if the Fourth Circuit is not persuaded, *In re Tam* offers hope for the Redskins even beyond the circuit court level. An affirmation of the *Blackhorse II* ruling, and thus, an effective dismissal of the free speech argument, would result in an explicit circuit split between the Fourth and the federal circuit courts. This would force the United States Supreme Court to take note of the issue and possibly grant cert to resolve the conflict, determining the constitutionality of Section 2(a) once and for all. As Jane Shay Wald, partner emeritus at Irell & Manella in Los Angeles stated, "[t]he Supreme Court's job, among others, is to determine constitutional questions and try to promote harmony among the different parts of the United States."¹⁸² In sum, the Redskins' can claim that their First Amendment rights have been violated when the board cancelled their trademark registrations. The Redskins' argument could be completely rejuvenated in light of the result of *In re Tam*, and their journey might not have to end at the circuit court level.

178. *Id.* (citing *Forsyth City v. Nationalist Movement*, 505 U.S. 123, 134 (1992)).

179. *Id.*

180. *Id.* at 1336 (citing *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2664 (2011)).

181. *Id.* at 1357.

182. Richard Sandomir, *Ruling Could Help Washington Redskins in Trademark Case*, N.Y. TIMES (Dec. 22, 2015), <http://www.nytimes.com/2015/12/23/sports/football/washington-redskins-trademark-nickname-offensive-court-ruling.html>.

E. If All Else Fails...

If, after exhausting all legal avenues, the team fails to obtain a favorable ruling, the Washington Redskins are somewhat caught between a rock and a hard place. A cancellation of the registration does not mean that the team is not allowed to keep using the mark.¹⁸³ The primary effect of the registration is that it serves as prima facie evidence of the validity of the mark and of “the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate.”¹⁸⁴ Without the registration, they will no longer have exclusive licensing rights and will have to compete with other unlicensed vendors for merchandise sales and other royalties.¹⁸⁵ The team would then essentially have two choices: continue using the name “Redskins” without the added protections trademark registration offers, or change the team name. As of August 2014, Forbes has the Redskins franchise valued at \$2.4 billion,¹⁸⁶ which is the third highest out of all 32 NFL teams.¹⁸⁷ The NFL maintains a profit-sharing system, where the profits from TV rights agreements, merchandise sales, and ticket sales are split evenly between 31 of the NFL teams.¹⁸⁸ This means that whatever path the Redskins choose, the resulting rise or fall in merchandise sales will be dispersed between the other teams.

Assume owner Daniel Snyder decides to maintain the name “Redskins.” Because of the NFL’s profit-sharing scheme, some scholars suggest that any resulting loss of merchandise revenue from unlicensed competitors will have very little effect on the profits each team receives.¹⁸⁹ Others suggest that the loss of protection could cause significant financial detriment to the franchise.¹⁹⁰ According to a 2005

183. 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, 362 (2004).

184. 15 U.S.C.A. § 1057(b) (West 2014).

185. Hughey, *supra* note 183, at 362.

186. FORBES, <http://www.forbes.com/teams/washington-redskins/> (last visited Jan. 16, 2015).

187. FORBES, <http://www.forbes.com/nfl-valuations/> (last visited Jan. 16, 2015).

188. Howard Bloom, *NFL Revenue-Sharing Model Good For Business*, SPORTING NEWS, <http://www.sportingnews.com/nfl/story/2014-09-05/nfl-revenue-sharing-television-contracts-2014-season-business-model-nba-nhl-mlb-comparison-salary-cap> (last updated Sept. 5, 2014, 1:09 PM) (note that the Dallas Cowboys retain their own merchandise revenue).

189. See, e.g., Ernst, *supra* note 159, at 202–03; Hughey, *supra* note 183, at 362.

190. See, e.g., Karlyn Barker, *Redskins Name Can be Challenged*, WASH. POST (July 16, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/15/AR2005071501700.html>; Michelle FlorCruz, *Redskins Name Trademark Canceled: The Whole NFL Could Lose Millions*, INT’L BUS. TIMES

article in the Washington Post, the exclusive rights to use the Redskins name and logo on merchandise was valued at about \$5 million.¹⁹¹ The article further speculates that cancellation could affect millions of dollars in sales, and severely limit the team's ability to take legal action against other vendors.¹⁹² Others point out that because of the Redskins' large market and ranking among the highest NFL teams in terms of value, any loss in revenue will have an even more profound effect on the entire league.¹⁹³ Hundreds of new places could utilize the mark and images, effectively eliminating the value in exclusiveness the team and league hold.¹⁹⁴

One potential avenue for the Redskins to explore is common law trademark protection. Even if "Redskins" is not protected under federal registration, the team might have a cause of action against infringers under traditional common law.¹⁹⁵ The true right to a remedy in unfair competition cases arises because a distinctive mark "has come to indicate that the goods in connection with which it is used are the goods manufactured by" its owner.¹⁹⁶ "When a name is endowed with this quality, it becomes a mark, entitled to protection."¹⁹⁷ To prevail on a standard case of trademark infringement, a plaintiff must demonstrate that it has "a valid, protectable trademark" and that the defendant's use of the mark is "likely to cause confusion among consumers."¹⁹⁸

Potential trademarks are generally divided into four categories: generic, descriptive, suggestive, or arbitrary/fanciful.¹⁹⁹ A generic term is the name of a specific class of which an individual service or product is but a member, and these terms can never be protectable.²⁰⁰ A descriptive term "describes" a particular feature or quality of a product and cannot

(June 18, 2014), <http://www.ibtimes.com/redskins-name-trademark-canceled-whole-nfl-could-lose-millions-1605022>.

191. Barker, *supra* note 190.

192. *Id.*

193. FlorCruz, *supra* note 190.

194. *Id.*

195. See Dennie, *supra* note 159 at 218–19; Erik Brady, *How Will Pending Trademark Ruling Impact Redskins Name?*, USA TODAY (May 28, 2014), <http://www.usatoday.com/story/sports/nfl/redskins/2014/05/28/washington-redskins-mascot-controversy-trademark-daniel-snyder/9680563/>.

196. *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 336 (U.S. 1938).

197. *Id.*

198. *Swatch, S.A. v. Beehive Wholesale, L.L.C.*, 888 F. Supp. 2d 738, 746 (E.D. Va. 2012), *aff'd sub nom. Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150 (4th Cir. 2014).

199. *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 790 (5th Cir. 1983).

200. *Id.*

be protectable without attaining secondary meaning.²⁰¹ To demonstrate secondary meaning, a plaintiff “must show that the primary significance of the term in the minds of the consuming public is not the product but the producer.”²⁰² A suggestive term “suggests,” as opposed to describes, a feature or quality of the product or service but requires one to use imagination to draw the connection.²⁰³ An arbitrary or fanciful term has no relationship to the product or service it marks.²⁰⁴ Suggestive and arbitrary or fanciful marks are protectable regardless of whether they have attained secondary meaning.²⁰⁵

In trying to establish a valid trademark, the franchise would likely argue that their marks are suggestive, arbitrary, or fanciful, as a consumer would need to use imagination to connect the terms with the football team. A potential infringer would argue that “redskins” is descriptive, as it describes Native American imagery, and thus not eligible for protection unless secondary meaning is established. Either way, the Redskins would have a strong argument for validity, as it would not be a stretch to say that consumers primarily associate the team’s marks with its producer, the franchise itself, thus establishing secondary meaning.

If the Redskins can prove its marks are eligible for protection, it would then have to demonstrate that the defendant’s infringing products are likely to cause confusion as to the source of the product. For example, if an unlicensed clothing company manufactures shirts with the Redskins’ logo, the Redskins would argue that the purchaser would be confused as to whether the shirt was produced by the franchise or by an unlicensed third party. To prove a likelihood of confusion, the Eastern District of Virginia has delineated the following factors for the court to consider:

- (1) [T]he strength or distinctiveness of the plaintiff’s mark as actually used in the marketplace;
- (2) the similarity of the two marks to consumers;
- (3) the similarity of the goods or services that the marks identify;
- (4) the similarity of the facilities used by the markholders;
- (5) the similarity of advertising used by the markholders;
- (6) the defendant’s intent;
- (7) actual confusion;
- (8)

201. *Id.*

202. *Id.* at 791 (citing *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 118 (1938)).

203. *Id.*

204. *Id.*

205. *Id.*

the quality of the defendant's product; and (9) the sophistication of the consuming public.²⁰⁶

These factors are not an exhaustive list and the court is free to weight them however it chooses.²⁰⁷

Taking the shirt example, if the defendant clothing company directly copied the logo on to the shirt, a finding of likelihood of confusion would be almost guaranteed. The marks used would be identical and the product the marks are on would be highly similar. The Redskins marks are clearly quite strong, as demonstrated throughout the history of the *Harjo* and *Blackhorse* cases. The Redskins would then try to determine the intent of the defendant, perhaps by investigating whether the products come with a disclaimer that they are not produced or licensed by the franchise itself. It could also conduct consumer surveys to identify cases of actual confusion where a customer purchased a product from the defendant thinking that it was official. By focusing on these factors, the Redskins could present a formidable argument for establishing a likelihood of confusion.

In theory, proving that it has a valid mark and that the potential infringer's products are likely to confuse consumers would entitle the Redskins to common law trademark protection. However, the viability of a potential claim and its potential success are purely speculative. There is no evidence that anyone has even attempted to sue for infringement based on a common law theory after the federally registered trademark has been cancelled for disparagement.²⁰⁸ It is also unclear whether a court would even be willing to rule in favor of a party who had a federal trademark cancelled for this reason.²⁰⁹ It is certainly possible, although probably unlikely, that an unfavorable ruling in the *Blackhorse II* appeal could permanently prejudice a court against the Redskins in any further attempts at litigation.

The other alternative would be for the franchise to change its nickname and completely rebrand its image. There is a significant difference in opinion as to the effect this would have on the future of the team. Many argue that getting rid of the name "Redskins" and moving on to something less controversial would be highly beneficial, and even

206. *Swatch, S.A. v. Beehive Wholesale, L.L.C.*, 888 F. Supp. 2d 738, 746 (E.D. Va. 2012), *aff'd sub nom. Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150 (4th Cir. 2014).

207. *Id.*

208. Brady, *supra* note 195.

209. *Id.* Although the court has held that a claim remains under § 43(a) of the Lanham Act, even when the registration has been canceled for fraud. *Orient Exp. Trading Co. v. Federated Dep't Stores, Inc.*, 842 F.2d 650, 654 (2d Cir. 1988).

necessary, for the franchise.²¹⁰ A new name means new styles of merchandise for fans to buy,²¹¹ as most would not want to be that fan who shows up with the old team's name on their back. The team would also be able to capitalize on a new market—those who viewed “Redskins” as disparaging or offensive would now be more willing to buy merchandise.²¹² Marketing analysts estimate that if the team were to rebrand and rebuild its image, capitalizing on their large market and already substantial value, the team could earn an additional \$10 to \$15 million per year.²¹³

On the other hand, many believe that the costs of changing the nickname would significantly outweigh the benefits.²¹⁴ Michael Jordan, owner of the NBA's (then) Charlotte Bobcats, estimated that a nickname change for an NBA team would cost up to \$10 million, leading analysts to speculate that the cost would be millions more for an NFL franchise the size of Washington's.²¹⁵ Some say that this cost could approach \$20 million, as money would have to be spent on hiring consultants and lawyers as well as buying new uniforms, and changing everything from stadium signs to stationary to the Madden NFL video game. Absolutely everything with the old name or logo would have to be replaced.²¹⁶ It is also possible that many Redskins fans might hate the idea of a name

210. See, e.g., Mark S. Nagel & Daniel A. Rascher, *Sports Law Forum: 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, 797; Tim Devaney, *What's in a name? Dumping ‘Redskins’ could have a major financial impact*, WASH. TIMES (Oct. 17, 2013), <http://www.washingtontimes.com/news/2013/oct/17/renaming-the-redskins-could-have-a-major-financial/?page=all> (statements of sports branding consultants Matt Levine and Anthony Fernandez); Peter Keating, *Washington has everything to lose*, ESPN, http://espn.go.com/nfl/story/_/id/11419303/washington-redskins-losing-money-keeping-name (last updated Sept. 2, 2014).

211. Patrick Hruby, *The Price of Right*, SPORTS ON EARTH, <http://www.sportsonearth.com/article/42640844/> (last updated Mar. 13, 2013) (“some have speculated that a revised name and logo could boost merchandise sales for Snyder's team -- first by transforming remaining old-school Redskins items into fly-off-the-shelves collectibles; next by introducing shiny new gear for fans to buy.”).

212. Nagel, *supra* note 210, at 797. However, it is worth noting that according to one poll, only 17% of Native Americans believe that professional sports teams should stop using Native American nicknames. Hughey, *supra* note 183, at 359–60. As a result, that new market might be relatively small.

213. Keating, *supra* note 210.

214. See, e.g., FlorCruz, *supra* note 190; Hruby, *supra* note 211 (discussing the cost of a nickname change for a “significant NFL team”).

215. FlorCruz, *supra* note 190.

216. Hruby, *supra* note 211.

change and stop following the team altogether, leading to a decrease in revenue in more than just merchandise sales.²¹⁷

While arguments can be made for both sides, it is worth noting that even more significant to increasing overall profits is a team's winning percentage.²¹⁸ From 2000 to 2013, the Washington Redskins went 94-130, which is the sixth worst record over that span.²¹⁹ Regardless of the name, if the franchise does not start putting out a better football team, profits in all areas are going to decline.

F. The Future of Native American Marks in Sports

After the *Harjo* cases, it was thought that the federal court's ruling would make it virtually impossible for Native Americans to use the Lanham Act to cancel trademark registrations held by sports teams.²²⁰ One scholar opines that "the laches defense amounts to an insurmountable hurdle for Native American plaintiffs who seek to challenge a registered trademark."²²¹ The court essentially told prospective plaintiffs that it does not matter what evidence they offer—the suit will always be too late. The TTAB in *Blackhorse I*, however, completely changed the scene. By shooting down the laches defense, the TTAB has set a (potentially temporary) precedent that their decisions will be made on the basis of the evidence in front of them. No longer will teams be able to use laches as a fallback; they will have to concentrate on refuting the evidence of the plaintiffs. Thus, with one decision, the entire landscape of trademark challenges in sports shifted. Again.

With the focus squarely placed on evidence, other professional and collegiate sports teams have one distinct advantage that Washington did not. The term "redskins" is widely considered the most demeaning and offensive word for Native Americans,²²² meaning that other teams will have an easier time with the second prong of the disparagement

217. Nagel, *supra* note 210, at 797.

218. *See id.* at 801.

219. Evan Pickering, *The 10 Worst NFL Teams This Millennium*, THE RICHEST, <http://www.therichest.com/sports/football-sports/the-10-worst-nfl-teams-this-millennium/5/> (last updated March 21, 2014).

220. *See generally* Dennie, *supra* note 159.

221. *Id.* at 218.

222. *See id.* at 211 ("‘Redskins,’ however, is an anomaly . . . The term ‘redskins’ was used in the nineteenth and twentieth centuries in ‘contexts of savagery, violence, and racial inferiority.’"); Hughey, *supra* note 183, at 359 (" . . . arguably the most demeaning term for Native Americans . . . "); Nagel, *supra* note 210, at 791 ("[Redskins] is considered ‘the most derogatory thing Native Peoples can be called in the English language.’").

analysis.²²³ Because of the affiliation of their nicknames with Native Americans, professional teams now at risk of becoming the next target for cancellation include the NHL's Chicago Blackhawks, the MLB's Atlanta Braves and Cleveland Indians, and the NFL's Kansas City Chiefs.²²⁴ Collegiate teams include the Florida State University Seminoles, the University of Illinois Fighting Illini, and the University of North Dakota Fighting Sioux.²²⁵ None of these nicknames have the same negative historical connotation that "redskins" does,²²⁶ and most teams and schools, especially Florida State, have a strong positive relationship with the Native American groups they are named after.²²⁷

While most of the nicknames should survive cancellation petitions, there is still much uncertainty surrounding the status of team images and logos that are associated with Native Americans.²²⁸ In 2005, the National Collegiate Athletic Association ("NCAA") took action against Native American mascots and logos, banning any school with a "nickname or logo considered racially or ethnically 'hostile' or 'abusive'" from using them in the postseason, and forcing the mascots to be retired permanently.²²⁹ Illinois' Chief Illiniwek fell victim to the ban, and he was officially retired in 2007.²³⁰ Thus far, professional teams' mascots have avoided any legal repercussions, but the *Blackhorse* decisions could tempt potential challengers into taking action. In fact, data indicates that Native Americans find the stereotypical imagery and portrayal of Native Americans more offensive than terminology,²³¹ providing more support for the theory that mascots may be the next target.²³² Perhaps first on the list is the Cleveland Indians' Chief Wahoo.²³³ Activists refer to Chief Wahoo, a "grinning Indian face caricature with a feather and bright red

223. See Dennie, *supra* note 159, at 211 ("It is likely the petitioners will be unable to present sufficient evidence of disparagement in future cases.").

224. *Id.* at 200.

225. Hughey, *supra* note 183, at 355.

226. *Id.* at 360.

227. See, e.g., Dennie, *supra* note 159, at 215–17.

228. See, e.g., Hughey, *supra* note 183, at 360 ("The Use of Native American Images Might Be Derogatory").

229. Jill Preschel, *NCAA Takes Aim at Indian Mascots*, CBSNEWS, <http://www.cbsnews.com/news/ncaa-takes-aim-at-indian-mascots/> (last updated Aug. 5, 2005).

230. James Klattell, *Fighting Illini Say Goodbye to the Chief*, CBSNEWS, <http://www.cbsnews.com/news/fighting-illini-say-goodbye-to-the-chief/> (last updated Feb. 16, 2007).

231. Ernst, *supra* note 159, at 206 (citing Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 CARDOZO J. INT'L & COMP. L. 393, 399 (2002)).

232. *Id.*

233. *Id.*

face,”²³⁴ as “the most offensive racial icon in the country.”²³⁵ The Indians own trademarks on numerous other Native American-esque caricatures, as do the Atlanta Braves,²³⁶ and thus these teams (among others) are more susceptible to litigation because of *Blackhorse*.

IV. CONCLUSION

While some might find the impact of the Washington Redskins cases to be relatively minor in the grand scheme of trademark law (it does concern merely one small section of the Lanham Act), the outcome of the *Blackhorse II* appeal will be critical for the future of many sports franchises. An unfavorable ruling will force teams to make many tough decisions. For the Redskins, it will mean the choice between retaining the nickname and moving forward without the added protections of federal trademark registration, while also dealing with the continued negative scrutiny of outside groups, or changing the nickname and rebuilding the image of the team from the ground up. For other teams utilizing Native American themes or marks, they must choose between maintaining the status quo and preparing for future litigation, or proactively rebranding themselves to avoid the risk.

Regarding the Lanham Act, the affected portions might be small, but the implications on future disparagement challenges are quite significant. The Circuit Court’s opinions regarding what constitutes a substantial composite will dictate the strategy taken by every potential plaintiff group seeking a cancellation. It will determine what sort of evidence they will need to collect, and how strong or sufficient it must be. The court’s holding on the laches defense will be similarly influential, affecting everything from how quickly plaintiffs need to bring suit to how long defendants have to worry about possibly defending their mark in court. Of ultimate significance, however, is the circuit court’s opinion on the free speech issue, as this could potentially lead us down the path of striking out an entire portion of the federal code.

The vast majority of court cases in this country take place with little fanfare, outside of the public eye. That is not true here. The NFL plays a dominant role in American culture;²³⁷ very rarely does news involving it

234. *Id.*

235. *Id.* (citing David Briggs, *Chief Wahoo Should Go*, CLEVELAND PLAIN DEALER, Apr. 5, 2008, http://blog.cleveland.com/lifestyles/2008/04/chief_wahoo_should_go.html (last visited Jan. 18, 2015) (quoting founding board member of the National Coalition on Racism in Sports and the Media, Charlene Teters)).

236. Hughey, *supra* note 183, at 361.

237. The 2015 Super Bowl was the most watched program in United States television history. Kevin Patra, *Super Bowl XLIX is most-watched show in U.S. history*, NFL.COM,

go unnoticed. The Washington Redskins controversy has drawn attention to trademark law like never before—most people do not realize the prominent role that trademarks play in our everyday life activities. They will, however, when they do not even recognize the team on the field come Sunday.