



# Seeing Red

by David Roy Ellis

## Washington Redskins' Trademark Registrations are Cancelled by the U.S. Patent and Trademark Office

Over the past couple of decades, there has been an increasing crescendo of criticism over the use by professional and college sports teams of Native American names and symbols for their nicknames and mascots. In one of the more highly publicized cases, decided in June, the Trademark Trial and Appeal Board (TTAB) of the United States Patent and Trademark Office (PTO) ruled against the Washington Redskins professional football team and cancelled six of its trademark registrations on the ground that its name is disparaging of Native Americans. *Blackhorse v. Pro-Football, Inc.*, Cancellation No. 92046185 (TTAB, June 18, 2014).

The case represents another chapter in a longstanding battle between the NFL team and a group of Native Americans. The case was brought by five Native Americans seeking to cancel six federal registrations for the term *redskins* issued by the PTO between 1967 and 1990 on the ground that the registrations were obtained contrary to Section 2(a) of the U.S. Trademark (Lanham) Act, which prohibits registration of marks that may disparage persons or bring them into contempt or disrepute.

A similar case had been brought in 1992 and was ultimately denied by a federal court on the basis of laches, i.e. that the plaintiffs had waited too long to bring their case - many years, even decades, after the registrations were issued. *Pro-Football, Inc. v. Harjo*, 567 F.Supp.2d 46 (D.D.C. 2008).

This was a new group of plaintiffs, seeking to cancel the registrations on the ground that they should never have been issued in the first place, since they were disparaging even then. The team denied that the term *redskins* was considered disparaging at the time it was registered as early as 1967, regardless of whether changing times may possibly render the term offensive today, and again raised the defense of laches.

The Redskins began their existence as an NFL franchise in 1932 as the Boston Braves, taking their name from the major league baseball team with whom they shared a stadium. After their first season, the football team changed its name to the Redskins, and in 1937, they moved to Washington, where they won a championship. The baseball Braves eventually

moved to Milwaukee and later Atlanta, where they play today.

The Redskins registered their team name and logos with the PTO over a period from 1967 to 1990. They have main-



tained their politically incorrect name throughout, even in the face of criticism from many, especially Native Americans. These critics have been successful over the past several years in persuading many colleges to change their ethnic nicknames to less offensive ones, and have convinced the National Collegiate Athletic Association (NCAA) to issue rulings against the use of names with Native American names and imagery.

After years of trying to convince the Redskins to change their name, seven Native Americans petitioned the TTAB in 1992 to cancel the Redskins' registrations on the grounds that the use of the word "redskins" is "scandalous and disparaging of Native Americans, and may cast them into contempt or disrepute in violation of §2(a) of the Trademark Act. In 1999, the TTAB agreed and cancelled the registrations. The case was then appealed to the federal district court and later to the federal appeals court, then sent back to the district court, which ruled that the plaintiffs were barred by laches.

As a result, a new group of Native Americans petitioned to cancel the Redskins' registrations, and the case was argued primarily on the basis of stipulated evidence that had been presented in the earlier case. The TTAB looked at whether the term *redskins* was considered disparaging at the time of registration, not necessarily whether it is considered offensive today.

The Board reviewed testimony from expert witnesses in the field of lexicogra-

phy to see whether the term was considered disparaging at various times since the first registration in 1967. It also considered the views of several Native Americans and cited the National Congress of American Indians (NCAI), a national intertribal organization, which stated that the term *redskins* "has always been and continues to be a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for Native Americans."

As a result, the Board ruled by a vote of 2-1 that the Redskins registrations should be cancelled because they were disparaging to Native Americans at the times they were registered. A stinging dissent by one of the three trademark judges found the evidence relied upon by the majority very weak, both the lexicographers' evidence and the opinion of the NCAI, which he found was not necessarily representative of a significant number of Native Americans, and thus should be accorded little weight.

The Board ordered the cancellation of the *redskins* registrations, with the prospect, however, that the team can and probably will appeal the decision to the federal courts. In any event, the decision concerns only the Redskins' right to register its trademarks, and does not prevent it from continuing to use them for its team name and the sale of its paraphernalia. For the time being, then, it looks like the Redskins plan to keep their name, unless and until the court of public opinion - or the NFL - prods them into adopting a new one.

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