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See Also

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Note

Blackhorse Down:

Do NFL Teams Need Trademark Protection?*

I. Introduction

On July 8, 2015, the United States District Court for the Eastern District of Virginia affirmed the Trademark Trial and Appeal Board's (TTAB) decision in the case of *Blackhorse v. Pro-Football, Inc.*¹ The decision is the latest development in a long and contentious battle between the Washington Redskins professional football team and the Native Americans who take offense to the team's moniker.² The *Blackhorse* decision is in essence the continuation of an earlier case, *Pro Football, Inc. v. Harjo*.³ While these cases have currently led to federal deregistration of the Redskins' trademarks, this Note will consider, through law and economics, whether that alone will be sufficient to effectuate a change in the team's name. It will argue that federal trademark protection is superfluous to the antitrust protection provided by the team's membership in the National Football League (NFL), and ultimately more will be required to incentivize change.

II. Procedural Background and History

To best understand and evaluate the Board's decision, it is necessary, as is so often the case, to start at the beginning.

A trademark is defined as any "word, name, symbol, or device, or any combination thereof . . . to identify and distinguish his or her goods,

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1. *Pro-Football, Inc. v. Blackhorse*, 112 F.Supp.3d 439, 490 (E.D. Va. 2015).

2. *Id.* at 1529–30.

3. 565 F.3d 880 (D.C. Cir. 2009).

including a unique product, from those manufactured or sold by others.”⁴ The use of trademark dates back to antiquity,⁵ and the right to the exclusive use of a trademark in America was historically recognized by U.S. state statute and common law.⁶ Common law rights in trademark were localized and acquired by use, causing problems for businesses expanding into territories where similar trademarks were already in use by another.⁷ In 1870, Congress attempted to solve this problem by allowing businesses to register their trademarks with the Patent Office, giving them nationally recognized federal trademark rights.⁸ However, the Supreme Court found that trademark regulation didn’t fit under the Constitution’s Copyright Clause and that the act was too broad to fit under Congress’s limited Commerce Clause powers.⁹ Congress passed more limited registration statutes in 1881¹⁰ and 1905¹¹, but it wasn’t until 1946 that Congress finally got their comprehensive federal trademark statute with the enactment of the Lanham Act.¹²

A. *The Lanham Act*

Running alongside common law trademark rights, the Lanham Act allows mark owners to try and register their mark on the federal principal register.¹³ Registering your trademark is optional, and mark owners who forego registration retain their common law protection.¹⁴ However, the Lanham Act offers several advantages to those who register. Some of these benefits include: (1) nationwide priority beyond common law areas of actual use;¹⁵ (2) evidentiary presumptions of validity;¹⁶ (3) enhanced protection

4. 15 U.S.C. § 1127 (2012).

5. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 cmt. b (1995) (commenting on the use of trademarks during Roman times to identify goods for sale).

6. *The Trade-Mark Cases*, 100 U.S. 82, 92 (1879).

7. Shontavia Johnson, *Trademark Territoriality in Cyberspace: An Internet Framework for Common-Law Trademarks*, 29 BERKELEY TECH. L.J. 1253, 1263 (2014).

8. *Trade-Mark Cases*, 100 U.S. at 92.

9. *Id.* at 93–98 (holding the act unconstitutional because Article I, Section 8, Clause 8 only applied to copyright and patents, and because the act didn’t limit regulation to commerce with foreign nations, Indian tribes, or between States).

10. *See* Act of March 3, 1881, 21 Stat. 502.

11. *See* Act of Feb. 20, 1905, 33 Stat. 724.

12. Lanham Act, Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified at 15 U.S.C. § 1501 et seq. (2012)).

13. 15 U.S.C. § 1051(a).

14. *See* *Gen. Healthcare Ltd. v. Qashat*, 364 F.3d 332, 336 n.7 (1st Cir. 2004) (clarifying that “[f]ederal registration is not required to bring a Lanham Act claim . . . but the scope of any common law rights vindicated would be limited to areas where the mark is in use”).

15. 15 U.S.C. § 1072.

16. *Id.* § 1115.

against counterfeiting;¹⁷ and (4) blocking infringing imports at U.S. Customs.¹⁸ These benefits make trademark registration very attractive, especially for larger brands.

While the Lanham Act allows trademark owners to request registration, acceptance is not guaranteed. Section 2(a) requires refusal of a mark that “[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”¹⁹ In *Harjo*, the Native American petitioners argued that the Washington Redskins’ trademarks were wrongfully approved and should have been initially refused because they were both, “offensive” and “scandalous,” and that the marks, “disparage[] Native American persons, and bring[] them into contempt, ridicule, and disrepute.”²⁰ Courts have developed different standards for these two prongs.

1. Immoral or Scandalous.—In order to prove a mark is scandalous, the Patent and Trademark Office (PTO) must “demonstrate that the mark is ‘shocking to the sense of truth, decency, or propriety; disgraceful; offensive; disreputable; . . . giving offense to the conscience or moral feelings; . . . [or] calling out [for] condemnation.’”²¹ A showing that a mark is “vulgar” is sufficient within the meaning of the statute.²² The PTO must consider the mark in the “context of the marketplace as applied to only the goods described in [the] application for registration.”²³ Furthermore, the standard of immorality or scandalous matter is to be ascertained from a “substantial composite of the general public,”²⁴ but “not necessarily a majority,”²⁵ and “in the context of contemporary attitudes.”²⁶ The court in *Harjo* articulated this as a two part test: (1) determining the likely meaning of the matter in question; and (2) determining whether, in view of the likely meaning, the matter is scandalous to a substantial composite of the general public.²⁷

When the PTO receives a request for registration, the examining attorney must make a judgment on the vulgarity of the mark.²⁸ The attorney

17. *Id.* § 1114.

18. *Id.* § 1125(b).

19. *Id.* § 1052(a).

20. *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 1708 (T.T.A.B. 1999).

21. *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994) (citations omitted).

22. *In re Boulevard Entm’t, Inc.*, 334 F.3d 1336, 1340 (Fed. Cir. 2003).

23. *Mavety*, 33 F.3d at 1371.

24. *Id.* (citation omitted).

25. *Id.* (citation omitted).

26. *Id.* (citation omitted).

27. *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705, 1736 (T.T.A.B. 1999).

28. Llewellyn Joseph Gibbons, *Trademarking the Immoral and Scandalous: Section 2(a) of the*

must consult with a supervisor before rejecting a mark as scandalous, but the discretion of the PTO is still evident.²⁹ The examining attorney will look to dictionaries, publications, and the internet to determine the contemporary attitudes surrounding a mark.³⁰ Dictionary evidence alone may be sufficient to establish a mark as scandalous if the word in question has no alternative nonvulgar definition.³¹ For example, the court in *In re Boulevard*³² upheld the rejection of the marks “1-800-JACK-OFF” and “JACK-OFF” for a phone-sex hotline because all four dictionaries that the examining attorney relied on defined the term “jack-off” only as a vulgar reference to masturbation.³³ However, dictionary evidence of a vulgar definition may be insufficient when nonvulgar alternative meanings exist. In *In re Mavety*,³⁴ the court overturned the rejected registration of the mark “BLACK TAIL” for a pornographic magazine because of the ambiguous nature of the word “tail,” being both a vulgar term for a “female sex partner” and a nonvulgar term for “rear end.”³⁵

2. *Disparagement*.—To invalidate or reject a trademark for being disparaging, the courts use a slightly altered version of the *Harjo* scandalous test:

- 1) [W]hat is the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements of the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services; and
- 2) if that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols, whether that meaning may be disparaging to a substantial composite of the referenced group.³⁶

The distinction between disparaging and scandalous marks can be found in the second prong. While the determination of a scandalous mark requires a substantial composite of the *general public*, disparaging marks only require a substantial composite of the *referenced group* to be rejected. The TTAB has stated that, “[i]n determining whether or not a mark is disparaging, the perceptions of the general public are irrelevant. . . . [O]nly the perceptions of

Lanham Act, in 3 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: TRADEMARK AND UNFAIR COMPETITION 113 (Peter K. Yu ed., 2007).

29. *Id.*

30. *Id.* at 115.

31. *In re Boulevard Entm’t, Inc.*, 334 F.3d 1336, 1340–41 (Fed. Cir. 2003).

32. *In re Boulevard Entm’t, Inc.*, 334 F.3d 1336 (Fed. Cir. 2003).

33. *Id.* at 1339–41.

34. *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994).

35. *Id.* at 1374.

36. *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 1217 (T.T.A.B. 2010).

those referred to, identified or implicated in some recognizable manner by the involved mark are relevant to this determination.”³⁷ This of course makes perfect sense. There are many words, particularly racial slurs, which can be targeted at a specific minority group with overwhelmingly offensive effect, but at the same time mean nothing to those not targeted by it. Many minority groups in their entirety don’t constitute a “substantial composite of the general public.” For targeted marks, a lower standard is required to afford protection to these minority groups.

3. *Petition to Cancel Registration.*—Section 14 of the Lanham Act affords anyone who has or will be damaged by the registration of a mark on the principal register to petition the TTAB to cancel the registration under certain circumstances.³⁸ If the petitioner claims that the registration was obtained “fraudulently or contrary to the provisions of . . . subsection (a), (b), or (c) of section 1052 of this title,” they may bring their challenge at any time.³⁹ In cancellation proceedings, the trademark in question could have been registered years or decades beforehand. Because the petitioner is arguing that the registration was *obtained* wrongly, the courts have held that the Board must decide whether the marks were scandalous or disparaging *at the time* of registration.⁴⁰ Whether or not the marks are considered scandalous or disparaging today is inconsequential.

There is little doubt that if the Washington Redskins were registering their trademarks today they would be rejected for disparaging Native Americans. In fact, the PTO has denied federal trademark registration to marks containing the word “redskin” at least twelve times since 1992, including several of the Washington football team’s attempts to register marks such as “Washington Redskins Cheerleaders” and “Redskins Fanatics.”⁴¹ However, the *Harjo* and *Blackhorse* plaintiffs petitioned the cancellation of six preexisting Washington Redskins trademarks: “THE REDSKINS (stylized)” Registration No. 0836122, registered in 1967; “WASHINGTON REDSKINS” Registration No. 0978824, registered in 1974; “WASHINGTON REDSKINS and design” Registration No. 0986668, registered in 1974; “THE REDSKINS and design” Registration No. 0987127, registered in 1974; “REDSKINS” Registration No. 1085092, registered in 1978; and “REDSKINETTES” Registration No. 1606810,

37. *In re Hines*, 31 U.S.P.Q.2d 1685, 1688 (T.T.A.B. 1994).

38. 15 U.S.C. § 1064 (2012).

39. *Id.*

40. *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705, 1735 (T.T.A.B. 1999).

41. 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/> [<https://perma.cc/K4S6-LZEQ>].

registered in 1990.⁴² For each contested mark, the plaintiffs must prove that the PTO erred in approving the registration at the time it was made because the term “redskin” was considered scandalous or disparaging from 1967 to 1990.

B. History of the Washington Redskins Trademarks

The history of the Washington Redskins and their trademarks dates back to July 9, 1932, when the National Football League sold a Boston expansion team to George Preston Marshall and his business partners.⁴³ Not wanting to build a stadium of their own to host the games, the team looked to Boston’s two Major League Baseball (MLB) stadiums, Braves Field and Fenway Park.⁴⁴ The team contracted to play their games at Braves Field, home of the Braves baseball team.⁴⁵ At the time, it was common for NFL teams expanding into cities with existing MLB teams to adopt the baseball team’s name.⁴⁶ Following the lead of NFL teams such as the New York Giants and Cleveland Indians, the new Boston team assumed the name of their MLB cotenants, the Braves.⁴⁷

Building on the Braves theme, Marshall recruited several Native American players and hired William “Lonestar” Dietz, a self-identified Native American, as head football coach.⁴⁸ In 1933, the team failed to renew their lease at Braves Field and moved to Fenway Park, home of baseball’s Red Sox.⁴⁹ On July 8, 1933, Marshall changed the team’s name from the Boston Braves to the Boston Redskins.⁵⁰

Why Marshall picked the name “Redskins” isn’t entirely known. One possibility is, following the NFL–MLB naming tradition, “Redskins” was simply a spin on their new Fenway Park co-tenants the “Red Sox.”⁵¹ Marshall wanted to preserve the Native American association the team had as the Braves, but there had already been an “Indians” NFL team in Cleveland.⁵² Current NFL Commissioner Roger Goodell, in a letter to

42. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080, 1083, 1083 nn. 2–7 (T.T.A.B. 2014).

43. *History by Decades*, WASH. REDSKINS, <http://www.redskins.com/team/history/history-by-decades.html> [https://perma.cc/5R5W-4GDQ].

44. J. Gordon Hylton, *Before the Redskins were the Redskins: The Use of Native American Team Names in the Formative Era of American Sports, 1857–1933*, 86 N.D. L. REV. 879, 888 (2010).

45. *History by Decades*, *supra* note 43.

46. Hylton, *supra* note 44, at 887.

47. *Id.* at 887–88.

48. *Id.* at 888.

49. *Id.* at 889.

50. *History by Decades*, *supra* note 43.

51. Hylton, *supra* note 44, at 889.

52. *Id.*

Congress, stated that “the name was changed to the Redskins—in part to avoid confusion with the Boston baseball team of the same name, but also to honor the team’s then-head coach, William ‘Lone Star’ Dietz.”⁵³ The District Court in *Harjo* agreed, stating that “Mr. Marshall chose to rename his franchise the Redskins in honor of the team’s head coach.”⁵⁴ However, Marshall’s own words dispute this, saying “The fact that we have in our head coach, Lone Star Dietz, an Indian, together with several Indian players, has not, as may be suspected, inspired me to select the name Redskins.”⁵⁵ In fact, Lone Star Dietz was probably not a Native American at all, and during World War I he was put on trial for falsely registering as a “non-citizen Indian of the United States” to avoid the draft.⁵⁶

On the other side, Harjo’s claim that the word *redskin* “had its origins in the practice of presenting bloody red skins and scalps as proof of Indian kill for bounty payments” is likely unfounded as well.⁵⁷ Ives Goddard, a Senior Linguist in the Department of Anthropology with the Smithsonian Institute, refuted that claim and found the actual origin of the word to be “entirely benign and reflect[] more positive aspects of relations between Indians and whites.”⁵⁸

On February 13, 1937, the Boston Redskins relocated to Washington, D.C., where they have played ever since.⁵⁹ While the history of the Redskins term and trademark are uncertain, they nevertheless play an important role in the litigation to determine whether or not the mark was scandalous or disparaging.

C. *Harjo v. Pro-Football, Inc.*

In September 1992, Suzan Shown Harjo and six other Native Americans petitioned the TTAB to cancel six Washington Redskins trademarks under

53. Letter from Roger Goodell, Commissioner, National Football League, to Tom Cole, Co-Chair, Congressional Native American Caucus and Betty McCollum, Co-Chair, Congressional Native American Caucus (June 5, 2013), reprinted in Barry Petchesky, *Read Roger Goodell’s Letter to Congress Defending the Redskins Name*, DEADSPIN (June 12, 2013, 10:45 AM), <http://deadspin.com/read-roger-goodells-letter-to-congress-defending-the-re-512833139> [https://perma.cc/U4UC-TMU8].

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

55. Travis Waldron, *The 81-Year-Old Newspaper Article that Destroys the Redskins’ Justification for Their Name*, THINKPROGRESS (May 30, 2014, 12:05 PM), <http://thinkprogress.org/sports/2014/05/30/3443168/redskins-founder-i-didnt-name-team-to-honor-native-americans/> [https://perma.cc/LU3U-ETAK].

56. Linda M. Waggoner, *On Trial: The Washington R*skins’ Wily Mascot: Coach William “Lone Star” Dietz*, MONT. MAG. W. HIST., Spring 2013, at 24, 25.

57. Ives Goddard, “*I am a Red-Skin*”: *The Adoption of a Native American Expression (1769–1826)*, 19 EUR. REV. NATIVE AM. STUD., no. 2, 2005, at 1, 1.

58. *Id.*

59. *History by Decades*, *supra* note 43.

Section 14 of the Lanham Act.⁶⁰ The petitioners were members of seven different federally recognized Indian tribes.⁶¹ In April 1999, nearly seven years later, the Board found in favor of the plaintiffs and held that, while not scandalous to the general population, the Redskins' trademarks could be disparaging to a substantial composite of Native Americans.⁶²

The Board relied on dictionaries, linguistic experts, historians, social scientists, film experts, testimony of the petitioners, resolutions from the National Congress of American Indians, and a telephone survey of Native Americans to try and decipher the meaning of the word as used at the time of registration.⁶³ The Board found that approximately half of the dictionaries from the relevant time period they referenced contained usage labels demarking the word "redskin" as "often offensive", enough to conclude that a significant number of Americans understood the term to be disparaging at the time.⁶⁴ Pending appeal, the six Redskins trademarks would be canceled.

Now it was the Redskins who would turn to the Lanham Act, which allows for the appeal of an unsatisfactory TTAB decision by either the Federal Circuit Court of Appeals or a civil action in District Court.⁶⁵ In September 2003, the United States District Court for the District of Columbia overturned the Board's decision on a laches defense.⁶⁶

Section 33(b)(9) of the Lanham Act establishes equitable principles, including laches, as applicable defenses to incontestably registered marks.⁶⁷ "The doctrine of laches bars relief to those who delay the assertion of their claims for an unreasonable time."⁶⁸ Typically the laches defense requires (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.⁶⁹ Translated by the court into the context of a cancellations proceeding, the Redskins needed to show, "(1) the Native Americans delayed substantially before commencing their challenge to the 'redskins' trademarks; (2) the Native Americans were aware of the trademarks during the period of delay; and (3) Pro-Football's ongoing development of goodwill during the period of delay engendered a reliance

60. Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96, 99 (D.D.C. 2003).

61. Harjo v. Pro-Football Inc., 50 U.S.P.Q.2d 1705, 1708 (T.T.A.B. 1999).

62. *Id.* at 1748-49.

63. *See generally id.*

64. *Id.* at 1744.

65. 15 U.S.C. § 1071 (2012).

66. Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96, 145 (D.D.C. 2003).

67. 15 U.S.C. § 1115(b)(9).

68. NAACP v. NAACP Legal Def. & Educ. Fund, Inc., 753 F.2d 131, 137 (D.C. Cir. 1985).

69. *Id.*

interest in the preservation of the trademarks.”⁷⁰

1. *Substantial Delay*.—The Plaintiffs filed their cancellation petition on September 10, 1992. The clock for laches begins to run once the petitioner reaches the age of majority, eighteen years old.⁷¹ Suzan Shown Harjo was born in 1945, making her approximately twenty-two years old when the first Redskins trademark was registered in 1967.⁷² She could have challenged the registration immediately upon its issuance, but instead waited twenty-five years to do so. The youngest of the seven plaintiffs, Mateo Romero, turned eighteen years old in 1984 and waited eight years before bringing suit.⁷³ The court even found the two-year delay for the 1990 “REDSKINETTES” mark to be substantial in conjunction with the longer delays for the other five trademarks.⁷⁴

2. *Notice*.—The court found two occasions of constructive notice for each of the six marks. Once when the marks were published in the *Official Gazette*, and again under § 22 of the Lanham Act, which provides constructive notice upon registration.⁷⁵ The court also found actual notice in the defendant’s statement that they “do not dispute that they have long known about and objected to the name of the Washington football franchise.”⁷⁶

3. *Prejudice*.—“[E]conomic prejudice arises from investment in and development of the trademark, and the continued commercial use and economic promotion of a mark over a prolonged period adds weight to the evidence of prejudice.”⁷⁷ There is no question that between 1967, when Harjo could have first challenged the mark, and 1992, when she finally did, the value of the Redskins trademark grew immensely.⁷⁸

Having found the elements of a laches defense, the court granted summary judgment to the Redskins.⁷⁹ The case was appealed, remanded, and appealed again before finally having certiorari denied by the Supreme Court

70. *Harjo*, 284 F. Supp. 2d at 137.

71. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 48 (D.C. Cir. 2005).

72. *Harjo*, 284 F. Supp. 2d at 112.

73. *Id.*

74. *Id.* at 140.

75. *Id.*

76. *Id.* at 141.

77. *Bridgestone/Firestone Research, Inc. v. Auto Club de l’Ouest de la France*, 245 F.3d 1359, 1363 (Fed. Cir. 2001) (citing *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 821 (7th Cir. 1999)).

78. Alongside traditional brand investments, the Washington Redskins also won three Super Bowls during the delay. See *History by the Decades*, *supra* note 43.

79. *Harjo*, 284 F. Supp. 2d at 144, 145.

in 2009.⁸⁰ Having lost on a technicality, canceling the Redskins trademarks would require a new petition with younger plaintiffs.

D. Blackhorse v. Pro-Football, Inc.

On August 11, 2006, a year after the D.C. Circuit remanded the *Harjo* case to determine whether Mateo Romero's claim was barred by laches, six new Native Americans petitioned the TTAB to cancel the same six Redskins trademarks.⁸¹ The proceedings were suspended pending the *Harjo* appeals,⁸² but resumed in March 2010 after the Supreme Court's denial of certiorari finally put the *Harjo* civil action to bed.⁸³ Like the *Harjo* petitioners, the five⁸⁴ *Blackhorse* petitioners were members of various Indian tribes who found the term "redskin" to be disparaging and offensive.⁸⁵ Unlike the *Harjo* petitioners however, the *Blackhorse* five were all considerably younger, a conscious effort to escape the laches defense which had doomed their predecessors. The oldest petitioner, Amanda Blackhorse, turned 18 on February 20, 2000.⁸⁶ The youngest, Courtney Tsofigh, didn't reach the age of majority until August 22, 2005.⁸⁷ Notably, these were all after the Board's initial 1999 finding that the Redskins marks were disparaging. The delay between Tsofigh's eighteenth birthday and the group's filing of the petition was less than a year. Courts have noted that even two years has "rarely, if ever, been held to be a delay of sufficient length to establish laches."⁸⁸

Not only did the young petitioners defeat the substantial-delay element of laches, their age and concurrent *Harjo* litigation disproved Pro-Football's economic-prejudice claim as well. The Board found it clear that the *Harjo* litigation did not deter respondent from investing in the Redskins brand

80. *Harjo v. Pro-Football, Inc.*, 130 S. Ct. 631 (2009).

81. Petition for Cancellation, *Blackhorse v. Pro-Football, Inc.*, Cancellation No. 92046185 (T.T.A.B. Aug. 11, 2006), Dkt. No. 1, <http://ttabvue.uspto.gov/ttabvue/v?pno=92046185&pty=CAN&eno=1> [<https://perma.cc/7AG4-WLR6>].

82. *Blackhorse v. Pro-Football, Inc.*, Cancellation No. 92046185, slip op. at 2 (Sept. 28, 2006), Dkt. No. 6, <http://ttabvue.uspto.gov/ttabvue/v?pno=92046185&pty=CAN&eno=6> [<https://perma.cc/XZ8T-ZYWX>] (Suspension of Proceedings) ("The Board has determined that a decision by the district court could be dispositive of, or have a bearing on, the issues in this cancellation proceeding. Accordingly, proceedings are suspended pending final disposition of said civil action.")

83. *Blackhorse v. Pro-Football, Inc.*, Cancellation No. 92046185, slip op. at 1 (Mar. 18, 2010), Dkt. No. 23, <http://ttabvue.uspto.gov/ttabvue/v?pno=92046185&pty=CAN&eno=23> [<https://perma.cc/63BA-MHPG>] (Proceedings Resumed).

84. The sixth petitioner, Shquanebin Lone-Bentley, withdrew her petition shortly after proceedings resumed. *See Blackhorse v. Pro-Football, Inc.*, Cancellation No. 92046185 (July 21, 2010), Dkt. No. 24, <http://ttabvue.uspto.gov/ttabvue/v?pno=92046185&pty=CAN&eno=24> [<https://perma.cc/F6HJ-C34C>] (Withdrawal of Petitioner).

85. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080, 1087 (T.T.A.B. 2014).

86. *Id.* at 1114.

87. *Id.*

88. *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 933 (7th Cir. 1984).

between 1999 and 2008.⁸⁹ Because even the oldest petitioner Amanda Blackhorse couldn't have legally brought her suit until 2000 (a year *after* the Board's decision in *Harjo*) Pro-Football couldn't argue they relied on the preservation of their trademark because, in fact, it had already been cancelled.

Having circumvented the laches problem that brought down *Harjo*, the petitioners were able to have the Board redecide the case on the merits. This time however, the petitioners dropped the scandalous claim which the Board had rejected in *Harjo* and instead focused all of their efforts on proving disparagement.⁹⁰

One of the most convincing pieces of evidence to the Board was a resolution passed by the National Congress of American Indians (NCAI) in 1993 called the "Resolution in Support of the Petition for Cancellation of the Registered Services Marks of the Washington Redskins AKA Pro-Football Inc."⁹¹ The resolution rebuffed the Redskins name and stated that the "use of the registered service marks . . . by the Washington Redskins football organization, has always been and continues to be offensive, disparaging, scandalous, and damaging to Native Americans."⁹²

Founded in 1944, NCAI is the oldest and largest American Indian organization serving the "broad interests of tribal governments and communities."⁹³ In 1972, NCAI claimed a membership of between 300,000 and 350,000, approximately 30% of all Native Americans at the time.⁹⁴ That year, NCAI President Leon Cook attended a meeting between Harold Gross, Director of Indian Legal Information Development Service, and Edward Bennett Williams, part-owner and President of the Washington Redskins, regarding the disparaging nature of the team's name.⁹⁵ The court took Mr. Cook's attendance at this meeting as evidence that NCAI—and its 300,000 members by representation—opposed the Redskins name as early as 1972.⁹⁶ NCAI membership alone constituted a substantial composite of Native Americans. This, along with the emergence of "disparaging and offensive" labels in dictionaries and the stark decline of media usage of the term starting in the 1960s, led the Board to find again that all six Redskins trademarks

89. *Blackhorse*, 111 U.S.P.Q.2d at 1114.

90. *Id.* at 1087.

91. Nat'l Congress of Am. Indians, Res. No. Ex. DC-93-11, *Resolution in Support of the Petition for Cancellation of the Registered Services Marks of the Washington Redskins AKA Pro-Football Inc.* (1993).

92. *Id.* at 1.

93. *About NCAI*, NAT'L CONGRESS AM. INDIANS, <http://www.ncai.org/about-ncai> [<https://perma.cc/7NXP-TZ92>].

94. *See Blackhorse*, 111 U.S.P.Q.2d at 1100–01, 1109.

95. *Id.* at 1099–1100.

96. *Id.* at 1111.

were disparaging at the time they were registered.⁹⁷ On June 18, 2014, over fifteen years after its initial decision in *Harjo*, the Board again ordered the cancellation of the marks. The appeals process is currently ongoing. On July 8, 2015, the United States District Court for the Eastern District of Virginia affirmed the TTAB's decision to cancel the marks.⁹⁸ Shortly after their defeat, the Redskins appealed the Virginia ruling to the Fourth Circuit, which is currently pending.⁹⁹

III. What *Blackhorse* Means for the Future of the Redskins Name

To understand the magnitude of the *Blackhorse* decision, one must recognize what is at stake. While the TTAB has canceled its fair share of trademarks in the past for being scandalous or disparaging, the mark in question has typically been a novelty item or dirty magazine.¹⁰⁰ The Washington Redskins trademark is a colossal catch for § 2 of the Lanham Act. Forbes Magazine's most recent valuation clocks the Washington Redskins in at \$2.85 billion, third among NFL franchises.¹⁰¹ Forbes attributes \$234 million of the valuation to the Redskins brand itself.¹⁰² While such a valuable trademark facing cancellation for disparagement is unprecedented under § 2, the Lanham Act allows even the largest brands to be cancelled on another ground, genericism.¹⁰³

A. *Genericism*

Section 14 of the Lanham Act affords petitioners the ability to challenge a registered trademark "at any time if the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered."¹⁰⁴ Genericism is determined by the "primary significance of the

97. *Id.*

98. *Pro-Football, Inc. v. Blackhorse*, 112 F.Supp.3d 439, 490 (E.D. Va. 2015).

99. Bill Donahue, *Washington Redskins Appeal TM Case to 4th Circ.*, LAW360 (Aug. 4, 2015), <http://www.law360.com/articles/687429/washington-redskins-appeal-tm-case-to-4th-circ> [<https://perma.cc/7FVD-ULFG>].

100. *See In re Fox*, 702 F.3d 633, 635, 640 (Fed. Cir. 2012) (upholding the rejection of the COCK SUCKER trademark for rooster-shaped lollipops); *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1375 (Fed. Cir. 1994) (reversing the rejection of the BLACK TAIL trademark for a pornographic magazine featuring African-American women); *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216, 1221 (Mar. 3, 1993) (T.T.A.B. 1993) (reversing the rejection of the OLD GLORY CONDOM CORP trademark for American-flag-colored condoms).

101. *Washington Redskins*, FORBES, <http://www.forbes.com/teams/washington-redskins/> [<https://perma.cc/42WQ-CHKM>] (calculating the total team value of the Washington Redskins in September 2015 to be \$2,850 million).

102. *Id.*

103. 15 U.S.C. § 1064 (2012).

104. *Id.*

registered mark to the relevant public.”¹⁰⁵ The perception of consumers is determinative because trademark protection has traditionally been about fostering informed consumers.¹⁰⁶ By allowing companies to distinguish their products, consumers can more efficiently search for and recognize the brands they prefer. This in turn allows companies to develop and preserve goodwill through their trademarks.

Allowing a generic trademark muddles the line between product and category in the mind of the consumer. Competing brands face obvious marketing problems when they are excluded from using the term consumers expect to represent the category their product belongs to. Imagine a radio advertisement for a sale on trampolines that couldn’t use the word “trampoline.”¹⁰⁷ Marketing barriers lead to heightened search costs and are inconsistent with the information-transmission model of trademark protection.

Companies, of course, want desperately for their products to become household names. Google spends an estimated \$1 billion per year on advertising worldwide.¹⁰⁸ Ironically, however, Google has to simultaneously try and temper the connection between their brand and general web searching in order to preserve their trademark from becoming generic. To this end, Google issues rules for the proper usage of their trademark, including to “[u]se the trademark only as an adjective, never as a noun or verb, and never in the plural or possessive form” and to “[u]se the generic term for the product following the trademark, for example: GOOGLE search engine, Google search, GOOGLE web search.”¹⁰⁹ While Google attempts to curtail public usage of its trademark to avoid genericide, the cancellation petitions have already begun. In September 2014, the District Court ruled in favor of Google on a petitioner’s claim that the Google mark had become a generic verb for internet searching.¹¹⁰ Survey evidence showed that while 51% of the public understood the generic verb meaning of the term, over 90%

105. *Id.*

106. See Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 70 (2012).

107. Trampolines were originally a product name in the category of “rebound tumbler” before becoming the generic term and losing its trademark. Mary Beth Quirk, *15 Product Trademarks That Have Become Victims of Genericization*, CONSUMERIST (July 19, 2014), <http://consumerist.com/2014/07/19/15-product-trademarks-that-have-become-victims-of-genericization/> [https://perma.cc/E2JS-DLBD].

108. Christina Austin, *THE BILLIONAIRES’ CLUB: Only 36 Companies Have \$1,000 Million-Plus Ad Budgets*, BUS. INSIDER (Nov. 11 2012), <http://www.businessinsider.com.au/the-35-companies-that-spent-1-billion-on-ads-in-2011-2012-11#nos-36-31-apple-joins-the-club-1> [https://perma.cc/2N9N-VX5T].

109. *Rules for Proper Usage*, GOOGLE PERMISSIONS, <http://www.google.com/permissions/trademark/rules.html> [https://perma.cc/G4RX-UVTC].

110. *Elliot v. Google Inc.*, 45 F. Supp. 3d 1156, 1175 (D. Ariz. 2014).

understood the specific product meaning.¹¹¹ The primary significance of the term to the relevant public continues to refer to the Google search engine specifically, and therefore the marks were not found to be generic.¹¹² In time the balance of public perception may change, and Google must continue to be vigilant in protecting their mark. Companies that are closer to the public-opinion cliff, like Xerox and Kleenex, have even gone so far as to run advertisements urging the public to stop using their name as a verb or noun.¹¹³ Whatever it takes not to go the way of aspirin,¹¹⁴ linoleum,¹¹⁵ or the escalator.¹¹⁶

So if other billion-dollar companies fear trademark cancelation so mightily, surely the *Blackhorse* decision, should it survive the appeals process, means catastrophe for the Washington Redskins, right? Not exactly.

B. *Natural Monopolistic Protection*

The Washington Redskins are uniquely insulated from trademark cancelation in ways that companies like Google and Kleenex are not. If the courts should ever find that “Kleenex” has become the generic term for facial tissue, every one of their competitors will be free to use the term in their own branding. Kleenex would lose the exclusive use of their own trademark. The existence of a powerful trademark with significant market share is a substantial barrier to entry for new companies. A facial tissue is a facial tissue, but Kleenex demands over 45% of the market share because of the goodwill their brand has generated over nearly ninety years.¹¹⁷ Without federal trademark protection, competitors can piggyback on that goodwill by calling their products Kleenex as well, confusing consumers into purchasing their product by mistake. The loss of this significant advantage over their competitors is why companies fight genericide so fiercely.

The Washington Redskins, however, do not need their trademarks’ goodwill to serve as a barrier of entry. They have a much more powerful barrier called the National Football League. The Supreme Court has

111. *Id.* at 1174.

112. *Id.*

113. Sarah Mui, *Xerox Enlisting Hollywood in Fight Against ‘Genericide’ with Ad*, ABA J. (Mar. 11, 2010), http://www.abajournal.com/news/article/xerox_enlisting_hollywood_in_fight_against_genericide_with_ad/ [https://perma.cc/3CPV-NETZ]; Mark Skoultchi, *Kleenex Fights Being Generic*, CATCHWORD (June 25, 2008), <http://catchwordbranding.com/catchthis/brand-naming/kleenex-fights-being-generic/> [https://perma.cc/9W3H-K4VK].

114. *Bayer Co. v. United Drug Co.*, 272 F. 505, 514–15 (S.D.N.Y. 1921).

115. *See Quirk*, *supra* note 107.

116. *Id.*

117. Andrew Adam Newman, *For Kleenex, a Song and Dance to Sneeze To*, N.Y. TIMES (June 27, 2012), http://www.nytimes.com/2012/06/28/business/media/for-kleenex-a-song-and-dance-to-sneeze-to.html?_r=0 [https://perma.cc/P3BA-5VMP].

described the NFL as a “cartel” composed of the thirty-two individual franchises.¹¹⁸ The NFL is the preeminent professional outdoor football league in the world, and that hasn’t been challenged in America since the NFL merged with the American Football League in 1970.¹¹⁹ Recent attempts at competing leagues have crashed and burned. The World Football League began its inaugural season in 1974 and folded halfway through its second season a year later.¹²⁰ The United States Football League made it three seasons between 1983 and 1985.¹²¹ The XFL, founded by World Wrestling Federation owner Vince McMahon, lasted only a single season in 2001.¹²² There is simply no alternative for NFL football.

While Kleenex may worry about a competitor impersonating their brand if they lose trademark protection, the Washington Redskins simply have no competitors. Even if they lose exclusive use of the Redskins trademark, you aren’t going to see eleven strangers in knock-off uniforms line up against the Dallas Cowboys on NBC’s Sunday Night Football. Between the NFL and its billion dollar television rights, hundred-million dollar stadiums filled with nearly a hundred-thousand screaming fans, and games played by only NFL teams, there is simply nothing that could be convincingly passed off as Washington Redskins football, even with free use of their trademark. The service the Redskins provide, playing NFL football games for viewer’s entertainment, is adequately protected by forces beyond trademark.

So what would cancellation truly mean for the Redskins? First, the team would still be able to use the name if they wanted to. As we saw before, trademark registration is optional and simply builds upon common law rights. Cancellation from the federal register deprives the mark holder of the benefits registration provides, but the “common law rights in the . . . mark as used in commerce will remain unaffected without regard to deletion or disclaimer . . . or to the procurement of a federal registration.”¹²³

So what is really at risk are the protections offered by the Lanham Act. These benefits, such as barring infringing imports at Customs and enhanced remedies against counterfeiters, work to prevent others from profiting off

118. *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 201–02 (2010).

119. *The AFL-NFL Merger*, PRO FOOTBALL HIST., <http://professionalfootballhistory.blogspot.com/2012/04/afl-nfl-merger.html> [<https://perma.cc/NQ2R-E8UL>].

120. Lane Strauss, *The Brief, Influential Life (and Sudden Death) of the World Football League*, MENTAL FLOSS (Sept. 4, 2014), <http://mentalfloss.com/article/58167/brief-influential-life-and-sudden-death-world-football-league> [<https://perma.cc/L4YP-QDFB>].

121. *About the USFL*, USFL.INFO, <http://www.usfl.info/about.html> [<https://perma.cc/4YTQ-ZE3E>].

122. Matt Crossman, *A Beautiful Corpse: An Oral History of the Fast Life and Quick Death of the XFL*, SBNATION (May 7, 2014), <http://www.sbnation.com/longform/2014/5/7/5683742/xfl-oral-history> [<https://perma.cc/RK5M-S67M>].

123. *In re Franklin Press, Inc.*, 597 F.2d 270, 273 (C.C.P.A 1979).

your mark. Allowing others to piggyback off the goodwill the Redskins brand has accumulated over eighty years with knock-off t-shirts and hats. While the game-day service the Washington Redskins provide is protected by the NFL's excessive cost of entry, the goods they sell are not. Simply put, the *Blackhorse* decision targets merchandising. Unfortunately for the petitioners, the Redskins are insulated on this front as well.

C. *NFL Collective Bargaining Agreement*

On September 30, 1961, Congress passed the Sports Broadcast Act which granted an antitrust exemption to

any joint agreement by or among persons engaging in or conducting the organized professional team sports of football . . . by which any league of clubs participating in professional football . . . sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football.¹²⁴

This exemption allowed the NFL to negotiate television deals as a single unit and offer a national package of games.¹²⁵ By pooling the television rights and sharing revenue evenly, the teams embraced a "League Think" philosophy that focused on the growth of the league as a whole.¹²⁶ In 1962, the NFL entered into an exclusive league-wide television agreement with CBS worth \$4.65 million per year.¹²⁷ In 1964, they renewed their contract for \$14.1 million per year.¹²⁸ In 2014 the NFL earned over \$5.5 billion from television contracts with CBS, Fox, NBC, ESPN, and DirecTV.¹²⁹ The League Think philosophy has led to surging popularity for the league and profits for the owners.

As the league continued to grow, the revenue sharing plan expanded beyond television rights.¹³⁰ How the NFL owners divide revenue is crucial to understand what incentives a single team like the Washington Redskins may face.

1. What Revenue is Shared Today.—Currently, the thirty-two NFL teams evenly share revenue generated from the sale of television

124. 15 U.S.C. § 1291 (2012).

125. Clay Moorhead, *Revenue Sharing and the Salary Cap in the NFL: Perfecting the Balance Between NFL Socialism and Unrestrained Free-Trade*, 8 VAND. J. ENT. & TECH. L. 641, 647 (2006).

126. *Id.*

127. *Id.* at 648.

128. *Id.*

129. Meg James, *TV Networks Going Far Down the Financial Field With the NFL*, L.A. TIMES (Sept. 6, 2014), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-tv-networks-nfl-20140906-story.html> [<https://perma.cc/47JM-4X58>].

130. *See Moorhead, supra* note 125, at 651.

broadcasting rights,¹³¹ on field NFL sponsorships agreements,¹³² and 34 percent of gross gate receipts.¹³³ League merchandise sales are split thirty-one ways, as the Dallas Cowboys manufacture their own merchandise and are exempted under the Collective Bargaining Agreement (CBA).¹³⁴ Television revenue and gate receipts account for the vast majority of the shared revenue.¹³⁵

2. *What Revenue is not Shared Today.*—While the NFL exclusively negotiates for on-field sponsorships, Dallas Cowboys owner Jerry Jones won a settlement with the NFL in 1996 that allowed teams to negotiate unshared local sponsorship deals, including stadium naming rights.¹³⁶ And while the owners share revenue generated from League merchandise sales, local team stores generate unshared revenue.¹³⁷ Non-ticket luxury box, suite, and club seating revenue, as well as 66 percent of gross home-game gate receipts are also unshared.¹³⁸

The Green Bay Packers, the NFL's only publically owned team, reported \$226.4 million in shared national revenue from the 2014–15 season.¹³⁹ Multiplied thirty-two times, the NFL shared over \$7.2 billion in revenue that year. Approximately \$158 million of each team's shared revenue came from television contracts alone that season, a number that will increase to at least \$181 million by 2016.¹⁴⁰ In the 2014–15 season, the Washington Redskins had \$439 million of revenue, \$226.4 million coming from shared national sources and \$212.6 million from unshared sources.¹⁴¹

131. *See id.* at 656.

132. On-field sponsors include Nike uniforms for players, Bose headsets for coaches, and Pepsi's Gatorade sports drink. *See* Callum Borchers, *Framingham's Bose to Sponsor NFL Headsets*, BOS. GLOBE (Aug. 16, 2014), <http://www.bostonglobe.com/business/2014/08/15/nfl-bose-sign-sponsorship-deal-for-headsets/SynDFU2RXLdJG8dwZuPwKM/story.html> [<https://perma.cc/R2J9-WG98>]; Moorhead, *supra* note 125, at 652.

133. *Id.* at 657–58.

134. NAT'L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT § 1(a)(ii)(1)(B) (2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/ER99-DY28>].

135. Moorhead, *supra* note 125, at 659.

136. *Id.* at 652–53.

137. *Id.* at 653.

138. *Id.* at 657–58.

139. Bob McGinn, *Packers Report Net Income of \$29.2 Million on Record Revenue*, MILWAUKEE WIS. J. SENTINEL (July 20, 2015), <http://www.jsonline.com/sports/packers/packers-report-net-income-of-292-million-on-record-revenue-b99540850z1-317608791.html> [<https://perma.cc/RB4Y-XD87>].

140. Anthony Schoettle, *New TV Deals to Provide Huge Cash Infusion for Indianapolis Colts*, IND. ECON. DIGEST (Aug. 5, 2014), <http://indianaeconomicdigest.com/Main.asp?SectionID=31&SubSectionID=135&ArticleID=75792> [<https://perma.cc/2X7C-N7FJ>].

141. *Washington Redskins*, *supra* note 101.

The Redskins have faced political and public pressure to change their name for decades to no avail. In 2013, team owner Daniel Snyder assured reporters that “We’ll never change the name, it’s that simple. NEVER – you can use caps.”¹⁴² Snyder, however, is firstly a businessman. He was once the youngest CEO on the New York Stock Exchange.¹⁴³ In the end, the team’s name will change when and only when the cost of not doing so outweighs the cost of rebranding.

D. *Incentivizing Change*

Herein lies the problem with *Blackhorse* and the cancelation of the Redskins trademarks. The League Think revenue-sharing philosophy insulates the Redskins in the only place the TTAB can hit them financially: merchandising. Besides the fact that merchandising represents an increasingly small portion of revenue dominated by television rights and ticket sales, the CBA makes both keeping the name less damaging, and changing the name less profitable. For example, if people stop purchasing NFL-licensed Redskins merchandise in favor of knock-offs, that loss is split thirty-one ways.¹⁴⁴ The Washington Redskins, along with every team besides the Cowboys, would take only a 3% hit in shared merchandising revenue. Even if the Redskins didn’t sell any merchandise at all, they would still get equal shares from thirty other teams. This mitigates the cost of keeping an unprofitable name.

Revenue sharing also acts as a disincentive by mitigating the benefits of rebranding. The biggest cost of a new trademark would be “applying it to all the points of touch that a brand like the Redskins exists on: merchandise, signage, training facilities and the stadium.”¹⁴⁵ The way to recoup these transitional costs comes from a boom in merchandise sales. Fans will quickly purchase hats and jerseys bearing the new name and logo to show continued support of the team. In 2014, the NBA’s Charlotte Bobcats officially changed their name to the Charlotte Hornets and saw a 77% rise in merchandise sales.¹⁴⁶ Due to revenue sharing of league merchandise,

142. *Owner: Redskins will ‘Never’ Change*, ESPN (May 10, 2013), http://espn.go.com/nfl/story/_/id/9259866/daniel-snyder-says-washington-redskins-never-change-team-name [https://perma.cc/PAL3-2NTV].

143. *Dan Snyder: Owner*, WASH. REDSKINS, <http://www.redskins.com/team/staff/daniel-snyder/fd1d5d4f-cae1-43b7-ac59-dac8c1e6db89> [https://perma.cc/KU9C-97AV].

144. While a drop in sales from Redskins retail stores would be more damaging because that revenue is unshared, this is likely small compared to shared league sales.

145. Howard Bloom, *Cost of Change: Financial Impact of Dropping Washington Redskins Nickname*, SPORTING NEWS (Aug. 26, 2014), <http://www.sportingnews.com/nfl/story/2014-08-26/washington-redskins-nickname-change-cost-economics-branding-marketing-financial-impact> [https://perma.cc/MFX2-5R2B].

146. Andrew Adam Newman, *An Emotional Response to Charlotte Hornets’ Name Change*,

however, the Redskins would only pocket 1/31 of similarly expected sales while bearing the entire cost of rebranding.

Ironically, the Washington Redskins were one of only three teams that voted against the revenue sharing of sponsorships and merchandizing.¹⁴⁷ Snyder may have a change of heart, however, if *Blackhorse* survives appeal and revenue sharing helps absorb over 96% of potential losses from national merchandise sales.

Under the current CBA, it seems likely that trademark cancellation alone won't have the economic impact required to convince the Redskins to voluntarily change their name. Future courses of action should target the team's unshared sources of revenue, or the CBA itself.

IV. Alternative Sources of Pressure

Assuming Daniel Snyder remains steadfast in his refusal to change the Redskins' name voluntarily, we must look to external sources of influence. If judicial pressure like *Blackhorse* is ultimately ineffective, alternative forces may provide the incentives necessary to elicit change. Three potential alternatives are consumers, the NFL itself, and Congress. Each source of pressure has its own challenges and likelihood of success, and we can evaluate each in turn.

A. Consumer Pressure

As we have seen, the NFL's CBA insulates the Redskins from the consumer's biggest voice: swings in the market for merchandise.¹⁴⁸ Consumers' displeasure will be more greatly felt if targeted at revenue streams outside the CBA.¹⁴⁹ Putting pressure on the team's local sponsors such as FedEx—who spent \$205 million in 1998 for the rights to name the team's stadium “FedEx Field”—may prove more persuasive than direct pressure on the Redskins.¹⁵⁰ Local sponsors live in a much more competitive world than the Redskins do, and negative attention can be considerably more threatening to them. Geography plays a significant role in determining allegiances for sports fans.¹⁵¹ While football fans in D.C. and Virginia may

N.Y. TIMES (Nov. 3, 2014), <http://www.nytimes.com/2014/11/04/business/media/an-emotional-response-to-charlotte-hornets-name-change.html> [<https://perma.cc/EGQ3-HY7K>].

147. Moorhead, *supra* note 125, at 654.

148. See *supra* notes 144–46 and accompanying text.

149. See *supra* notes 136–38 and accompanying text.

150. Emily Mekinc, *FedEx Field Naming Rights Deal Still One of Biggest in Sports*, WASH. BUS. J. (Sept. 21, 2011), <http://www.bizjournals.com/washington/news/2011/09/21/fedex-field-naming-rights-deal-still.html> [<https://perma.cc/D52A-GV2E>].

151. Robinson Meyer, *The Geography of NFL Fandom*, ATLANTIC (Sept. 5, 2014), <http://www.theatlantic.com/technology/archive/2014/09/the-geography-of-nfl-fandom/379729/> [<https://perma.cc/9DSH-G2DN>].

have a hard time adopting a more distant team in protest of the Redskins' name, customers of FedEx or Bank of America won't be so conflicted in taking their business to UPS or Capital One. Because local sponsorship deals are unshared revenue, the economic impact of a dropped sponsor would be felt by the Redskins in its entirety.

Sponsorships are the lifeblood of professional sports, and losing sponsors can force action where laxity has otherwise prevailed. Take for example, Donald Sterling, the disgraced ex-owner of the NBA's Los Angeles Clippers. Since becoming an NBA owner in 1981, Sterling was sued several times for sexual harassment and racial discrimination.¹⁵² As a landlord he was accused of housing discrimination against minorities which resulted in a record-setting settlement with the Department of Justice.¹⁵³ The league never fined or suspended Sterling for these "well-documented rumors," and seemed content to not involve themselves in the dealings of their owners.¹⁵⁴ However, an audio recording of Sterling making racist remarks became public in 2014 and quickly garnered national attention.¹⁵⁵ Unlike Sterling's previous racial and sexual impropriety, sponsors reacted strongly with a mass exodus from the team. CarMax, State Farm, Mercedes-Benz, and Virgin America all severed their association with Sterling and the Clippers.¹⁵⁶ Immediately afterward, the NBA banned Donald Sterling for life, fined him \$2.5 million, and worked to force the team's sale to a different owner.¹⁵⁷ Financial pressure from sponsors triggered stronger league action within days than thirty years of federal discrimination trials and sexual harassment allegations ever did.

However, consumers have a long way to go toward convincing the Redskins' sponsors to cut ties. A 2014 Oneida Indian Tribe proposal for FedEx to "drop or distance" its ties to the Washington Redskins was defeated in a shareholder vote, 228.6 million shares against 203,521.¹⁵⁸ While the

152. Mike Fish, *OTL: NBA Lax in Sterling Oversight*, ESPN (June 1, 2014), http://espn.go.com/espn/otl/story/_/id/11003074/otl-nba-investigate-prior-donald-sterling-incidents [<https://perma.cc/H229-BVF6>].

153. *Id.*

154. *Id.*

155. *Alleged Sterling Talk Being Probed*, ESPN (Apr. 27, 2014), http://espn.go.com/los-angeles/nba/story/_/id/10843525/nba-investigating-offensive-audio-recording-allegedly-los-angeles-clippers-owner-donald-sterling [<https://perma.cc/7BJS-DYPX>].

156. David Leon Moore, *Sponsors Pulling Support of Los Angeles Clippers*, USA TODAY (Apr. 29, 2014), <http://www.usatoday.com/story/sports/nba/clippers/2014/04/28/clippers-sterling-state-farm-carmax-withdraw-sponsorship/8413967/> [<https://perma.cc/X73B-6DTN>].

157. *Donald Sterling Receives Lifetime Ban*, ESPN (Apr. 30, 2014), http://espn.go.com/los-angeles/nba/story/_/id/10857580/donald-sterling-los-angeles-clippers-owner-receives-life-ban-nba [<https://perma.cc/28GG-P5TB>].

158. Eric Goldschein, *FedEx Votes Down Proposal to Drop Sponsorship of 'Redskins' Stadium, Citing Some B.S.*, SPORTS GRID (Oct. 13, 2014), <http://www.sportsgrid.com/nfl/fedex-votes-down->

sponsors could certainly influence the team, the challenge will come from consumers influencing the sponsors. The large sponsors like FedEx simply make too much money off their ties with the Redskins to be swayed. To be effective, protests need to first target the team's smallest corporate sponsors, who will feel the negative effects of association more heavily. If those sponsors begin cutting ties, the momentum and negative press could force out larger sponsors, creating a chain reaction that could eventually be sufficient to influence change.

B. *NFL Pressure*

While the bargaining power of consumers may be limited to indirect economic pressure, the NFL itself stands in a much stronger position to effectuate change. The league has responded to social issues in the past by imposing internal sanctions on offending cities. In 1990, the NFL pulled Super Bowl XXVII from Arizona in response to a failed voter referendum to adopt Martin Luther King Day as an official state holiday.¹⁵⁹ When Arizona finally recognized the holiday in 1992, the NFL rewarded them with Super Bowl XXX.¹⁶⁰ Recent "religious freedom" bills in Arizona and Indiana have had commentators wondering if the league could take similar action again.¹⁶¹

The NFL could use such a tactic with the Redskins. While cold weather cities like Washington D.C. have typically been precluded from hosting the Super Bowl, the NFL seems to be moving away from that trend in awarding Super Bowl XLVIII to New Jersey's MetLife Stadium.¹⁶² Dan Snyder has already voiced his desire to host the event, saying "I think Washington should get one, no matter what."¹⁶³ The 2013 Super Bowl brought an estimated \$480 million of additional spending to the New Orleans economy.¹⁶⁴ Tourism may have even been stifled due to the game falling

proposal-to-drop-sponsorship-of-redskins-stadium-citing-some-b-s/ [https://perma.cc/V2N5-EVLJ].

159. Cindy Boren, *Why the NFL Moved the Super Bowl from Arizona in 1990*, WASH. POST (Feb. 26, 2014), <http://www.washingtonpost.com/blogs/early-lead/wp/2014/02/26/why-the-nfl-moved-the-super-bowl-from-arizona-in-1990/> [https://perma.cc/85T2-2JKQ].

160. *Id.*

161. See Mark Alesia, *NFL, Big Ten Reviewing Implications of Indiana Religious Freedom Bill*, INDY STAR (Apr. 3, 2015), <http://www.indystar.com/story/news/2015/03/27/indiana-religious-freedom-rfra-nfl-indianapolis-colts/70543984/> [https://perma.cc/UP34-GKBT]; Mike Florio, *NFL Won't Rule Out a Move of Super Bowl XLIX*, NBC SPORTS (Feb. 25, 2014), <http://profootballtalk.nbcsports.com/2014/02/25/nfl-wont-rule-out-a-move-of-super-bowl-xlIX/> [https://perma.cc/93XT-LZYW].

162. Tarik El-Bashir, *Could a Super Bowl Come to DC?*, CSN (Feb. 2, 2014), <http://www.csnwashington.com/football-washington-redskins/talk/could-super-bowl-come-dc> [https://perma.cc/7A48-959J].

163. *Id.*

164. Mark Waller, *Super Bowl 2013 Drove \$480 Million in Spending in New Orleans, Beating Expectations, Economic Study Concludes*, NOLA (Apr. 18, 2013), http://www.nola.com/business/index.ssf/2013/04/super_bowl_2013_drove_480_mill.html [https://perma.cc/F4NN-K3GU].

only nine days before Mardi Gras, already one of the most expensive times to visit New Orleans.¹⁶⁵ In contrast, February is typically one of the slowest tourism months for Washington, D.C., leaving room for an even larger economic boost from the Super Bowl.¹⁶⁶ The NFL could leverage a D.C. Super Bowl against Snyder directly, but they could also apply pressure indirectly by making the team's name a liability to local businesses and sponsors.

The National Collegiate Athletic Association (NCAA) took a similar approach in 2005 by prohibiting universities with "hostile or abusive" mascots, including depictions of Native Americans, from hosting postseason bowl games.¹⁶⁷ Every offending university has since either changed their name entirely, kept the name but dropped any reference to Native Americans, or received endorsement from local Native American tribes to preserve the name.¹⁶⁸ While the NFL's postseason structure is more rigid than the NCAA's, similar drastic action could be taken if necessary.

The NFL could also incentivize change by removing some of the barriers we've identified. For instance, the CBA could be amended to require teams participating in profit sharing to maintain federal trademark protection. This would force the Redskins to feel the full economic force of any downturn in merchandise sales. The other owners would likely support such an amendment, as they currently stand to absorb over 96% of lost revenue.

C. *Legislative Pressure*

The third source of influence comes from Congress, who can put pressure on the NFL to take the above-mentioned actions against the Redskins. In 2014, fifty Democratic senators sent a letter to Commissioner Goodell in the wake of the Donald Sterling affair, urging the NFL to take as drastic an action against the Redskins as the NBA did against Sterling.¹⁶⁹

165. Stacey Plaisance, *Super Bowl and Mardi Gras? New Orleans Calls it 'Super Gras'*, HUFFINGTON POST (Jan. 17, 2013), http://www.huffingtonpost.com/2013/01/18/super-bowl-plus-mardi-gra_n_2496810.html [https://perma.cc/8YUS-MXWD].

166. DESTINATION DC, WASHINGTON, DC: 2013 VISITOR STATISTICS (2013) http://washington.org/sites/default/files/2013_Visitor_Statistics_v2_1.pdf [https://perma.cc/9PXQ-4X4F].

167. Press Release, Nat'l Collegiate Athletic Ass'n, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (Aug. 5, 2005), <http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/NCAA%2BExecutive%2BCommittee%2BIssues%2BGuidelines%2Bfor%2BUse%2Bof%2BNative%2BAmerican%2BMascots%2Bat%2BChampionship%2BEvents.html> [https://perma.cc/3WST-KC49].

168. Hayley Munguia, *The 2,128 Native American Mascots People Aren't Talking About*, FIVETHIRTYEIGHT (Sept. 5, 2014), <http://fivethirtyeight.com/features/the-2128-native-american-mascots-people-arent-talking-about/> [https://perma.cc/QAR3-4DUH].

169. Erik Brady, *50 Senators Sign Letter Urging Redskins to Change Team Name*, USA TODAY (May 22, 2014), <http://www.usatoday.com/story/sports/nfl/redskins/2014/05/22/washington->

They asked, “What message does it send to punish slurs against African Americans while endorsing slurs against Native Americans?”¹⁷⁰ The NFL’s response continued to present the Redskins name in a positive light.¹⁷¹

Congress doesn’t have to play so nice with the NFL. Congress holds significant leverage over the NFL with the league’s antitrust exemption and the Sports Broadcast Act.¹⁷² In December 2014, Congress threatened to restrict the antitrust exemption if the NFL didn’t remove a “blackout” rule which prevented games from being aired on local television if the stadium hadn’t sold out.¹⁷³ By March 2015, the NFL had voted to suspend the rule for the upcoming season.¹⁷⁴ The NFL’s nonprofit status has also been a source of leverage, but in April 2015 the league decided to pre-empt Congress’ efforts by voluntarily dropping their tax-exempt standing.¹⁷⁵ The antitrust exemption won’t be so easy to drop, however, and with it Congress could force the NFL to come down hard on Snyder and the Redskins.

V. Conclusion

While the TTAB’s decision in *Blackhorse* may threaten the Redskins’ trademarks, the anticompetitive nature of the NFL and its collective bargaining agreement provide sufficient economic protection to prevent the decision from forcing real change. The lack of competitors to leech goodwill off the unregistered mark, combined with the double disincentive of splitting lost revenue from Redskins merchandise and gained revenue from re-branded merchandise leaves the *Blackhorse* decision toothless. Any effectual change will have to go either around the CBA, by targeting unshared revenue such as sponsors; or through it, by forcing the NFL to amend the profit-sharing system or take direct action against the team.

On December 22, 2015, the Federal Circuit Court of Appeals struck down the disparagement provision of the Lanham Act as an unconstitutional violation of the First Amendment.¹⁷⁶ Regardless of the Fourth Circuit’s

redskins-senate-nickname-american-indians-daniel-snyder/9439613/ [https://perma.cc/CHG8-RQWR].

170. *Id.*

171. *Id.*

172. *See supra* note 124.

173. *Senators to NFL: Drop the ‘Blackout Rule’ or We Might*, CBS (Dec. 4, 2014), <http://newyork.cbslocal.com/2014/12/04/congress-to-nfl-drop-the-blackout-rule-or-we-might/> [https://perma.cc/UBB9-AYXU].

174. Maury Brown, *NFL to Drop TV Blackout Policy for 2015–16 Season*, FORBES (Mar. 23, 2015), <http://www.forbes.com/sites/maurybrown/2015/03/23/nfl-to-drop-tv-blackout-policy-for-2015-16-season/> [https://perma.cc/WF4Z-LWZK].

175. Richard Rubin, *NFL Will End its Tax-Exempt Status, Goodell Tells Owners*, BLOOMBERG (Apr. 28, 2015), <http://www.bloomberg.com/politics/articles/2015-04-28/nfl-will-end-its-tax-exempt-status-goodell-tells-team-owners> [https://perma.cc/B947-VGM5].

176. *In re Simon Shiao Tam*, 808 F.3d 1321, 1357–58 (Fed. Cir. 2015).

decision in the upcoming *Blackhorse* appeal, it seems that this issue is destined for argument before the Supreme Court.

While not the finish line, the TTAB's decision and District Court's affirmation is a milestone along the way. Persuading sponsors or Congress to take up this cause requires a larger voice than the Native American community possesses alone. By putting this controversy even further into the public's eye, the decision can act as a rallying call for likeminded people to increase financial and societal pressure on the Redskins and the NFL.

—*William T. Mason*