



REDSKINS Trademark Registrations Canceled After 8 More Years of Litigation

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In the long-running dispute between representatives of Native Americans and Pro-Football, Inc. AKA the Washington Redskins (“Washington”), the Trademark Trial and Appeal Board of the United States Patent and Trademark Office (“TTAB”) cancelled six of Washington’s registrations for the mark REDSKINS.¹ It was not the first time the TTAB ruled against Washington, finding that the REDSKINS trademark was disparaging and, therefore, not registrable under Section 2(a) of the Federal Trademark Act.² Of course, that has been the nickname of the Washington football team since 1932.

Despite mass media misinterpretation of the implications of this opinion, as the TTAB expressly stated, “This decision concerns only the statutory right to *registration* under Section 2(a). We lack statutory authority to issue rulings concerning the right to *use* trademarks.” (emphasis original). This decision does not require the Washington team to change its name. It does not prevent the team from continuing to use the REDSKINS nickname in marketing. It does not affect the team’s

¹ <http://ttabvue.uspto.gov/ttabvue/v?pno=92046185&pty=CAN&eno=199>.

² The original petition to cancel the REDSKINS trademark registrations was brought on September 10, 1992, and the petitioners prevailed before the TTAB. See *Harjo v. Pro Football, Inc.*, 30 U.S.P.Q.3d 1828 (TTAB 1994). The United States District Court for the District of Columbia reversed the TTAB’s original decision, which was upheld by D.C. Circuit Court of Appeals. However, that ruling relied on the defense of laches because the petitioners had waited too long to bring the petition to cancel after reaching the age of majority — the issue of disparagement on the merits was not resolved.



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ability to license merchandise using the REDSKINS name.³ Furthermore, it does not prevent the team from suing to enforce its rights in the REDSKINS name against others who may try to use it.⁴ It merely prevents the team from enjoying the special protections afforded to an owner of a federal registration.⁵

Ultimately, the TTAB found that the registrations for REDSKINS “were disparaging to Native Americans at the respective times they were registered...” This finding is remarkable because the original registration for THE REDSKINS issued in 1967.

In its analysis, the TTAB first determined that the term “redskins,” although associated with the football team, had not been “stripped” of its ethnic meaning. Second, the TTAB found that a “substantial composite” of Native Americans were disparaged by the mark.⁶ The primary basis for this conclusion was a resolution issued in 1993 by the National Congress of American Indians (“NCAI”), which represented approximately 30 percent of Native Americans during the relevant time. This resolution also was found to be competent evidence of the past views of Native Americans.

The TTAB also revisited Washington’s laches defense, which was discussed in the *Harjo* case. The TTAB rejected the defense because it “does not apply to a disparagement claim where the disparagement pertains to a group of which the individual petitioner or petitioners comprise one or more members.” Laches is an equitable defense and, therefore, the TTAB highlighted that “it is difficult to justify a balancing of equities where a registrant’s financial interest is weighed against human dignity.” Moreover, the TTAB noted that laches is inapplicable in cases presenting a broader public policy concern. Finally, the TTAB stated that, even on the merits, the defense could not stand because there was no showing that the petitioners had unreasonably delayed in bringing the petition after each reached the age of majority or that there was economic prejudice to Washington due to the delay.

Unusually for a TTAB decision, there was a dissent. Lest the dissenting judge be deemed insensitive, the primary criticism levelled at the majority was that the evidence presented by the petitioners was insufficient to prove that “redskins” was a disparaging term in 1967 (and when the subsequent trademark registrations issued). For purposes of the eventual appeal, the dissent has some merit because the evidence relied on by the petitioners was the same as that relied on by the *Harjo* petitioners – and which was deemed insufficient by the D.C. Circuit to support the TTAB’s original decision finding REDSKINS disparaging.

³ Unless a specific license had a requirement that the mark be registered, which the NFL undoubtedly would not have agreed to, given the long pendency of this objection.

⁴ *But see* <http://tushnet.blogspot.com/2014/06/unregistrable-means-unprotectable-by.html>. The decision discussed by Prof. Tushnet here addresses very different facts, but it raises an interesting potential defense to any infringement claims Washington may bring over the REDSKINS mark in the future, if the TTAB decision is upheld on appeal, of course.

⁵ Perhaps of greatest importance in the context of merchandising would be the unavailability of a claim of counterfeiting, for which registration is required.

⁶ Of note, the TTAB stated that a “substantial composite” need not be a majority and ultimately found that “thirty percent is without doubt a substantial composite.”

Despite pressure from the Obama administration, Washington team owner Dan Snyder has refused to change the team's name.⁷ So, stay tuned for the eventual appeal.

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⁷ U.S. Patent and Trademark Office Cancels Redskins Trademark, HUFF. POST (June 18, 2014 at 10:22 A.M), http://www.huffingtonpost.com/2014/06/18/redskins-trademark-canceled_n_5507169.html.