

ALERT

Trademark Office Cancels Redskins Trademarks

June 18, 2014

In an 81 page precedential decision issued earlier today, a two judge majority of a panel of the Trademark Trial and Appeal Board canceled six trademark registrations consisting in whole or in part of the term REDSKINS for professional football-related services, finding them "disparaging to Native Americans at the respective times they were registered, in violation of Section 2(a) of the Trademark Act of 1946, 15 U.S.C. § 1052(a)." *Blackhorse et al. v. Pro-Football, Inc.*, Can. No. 92046185 (June 18, 2014). This is the second time the Board has cancelled the marks on the same basis, *Harjo v. Pro Football, Inc.*, 50 USPQ2d 1705, 1710 (TTAB 1999).

The question presented to the Board was whether the evidence made of record established that the term "redskins" was disparaging to a substantial composite of Native Americans at the time each of the challenged registrations issued. The Board engaged in a lengthy analysis of the evidence, much of which was submitted in the *Harjo* litigation. Ultimately, it found that, "petitioners have shown by a preponderance of the evidence that a substantial composite of Native Americans found the term REDSKINS to be disparaging in connection with respondent's services during the relevant time frame of 1967-1990. Accordingly, the six registrations must be cancelled as required under Sections 2(a) and 14(3) of the Trademark Act." Op. at 72. In determining that a "substantial composite" of the referenced group viewed the term as disparaging, the Board focused largely on the evidence of opposition to the registrations by the National Congress of American Indians (NCAI), which the petitioners claimed represented approximately 30 percent of Native Americans during the relevant time period.

Authors

Christopher Kelly
Partner
202.719.7115
ckelly@wiley.law

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The *Harjo* case ended (after denial of a petition for certiorari by the Supreme Court), in a D.C. Circuit decision that the doctrine of laches barred the plaintiffs from bringing their claim—the D.C. Circuit resolved the case solely on the issue of laches, never addressing the Board’s finding of disparagement on the merits. In the present case, the Board held that, “laches does not apply to a disparagement claim where the disparagement pertains to a group of which the individual plaintiff or plaintiffs simply comprise one or more members.” Op. at 74-75.

Judge Bergsman dissented from the majority opinion—an unusual measure for the Board—on the basis that, “the dictionary evidence relied upon by the majority is inconclusive and there is no reliable evidence to corroborate the membership of National Council of American Indians... One need look no further than gyrations the majority employed to establish the membership of the National Council of American Indians. It is astounding that the petitioners did not submit any evidence regarding the Native American population during the relevant time frame, nor did they introduce any evidence or argument as to what comprises a substantial composite of that population thereby leaving it to the majority to make petitioners’ case have some semblance of meaning.” Dissent at 81, 84.

It is almost a certainty that the Redskins will appeal the decision—either to a district court as it did in *Harjo*, or to the Court of Appeals for the Federal Circuit. This decision, however, does not affect the team’s right to use the marks, because the statutory authority of the Board is limited to questions of registration.