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**\*115 NATIVE AMERICAN TEAM NAMES AND MASCOTS: DISPARAGING AND INSENSITIVE OR  
JUST A PART OF THE GAME?**

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I. INTRODUCTION

The Washington Redskins. The Cleveland Indians. The Atlanta Braves. The Kansas City Chiefs. Are these names offensive? Maybe, but consider such names as the Miami 'Spics, the New York WASPS, the Mississippi Sambos, or the Los Angeles Gooks. [\[FN1\]](#) Most people would agree that these names are patently offensive. What is the difference between the former group and the latter? The difference here is that, while the 'Spics, WASPS, Sambos, and Gooks are wholly fictitious, the Redskins, Indians, Braves, and Chiefs are not. They are successful professional sports enterprises that, in the view of the group to whose ethnicity they refer, exploit and disparage their forgotten community.

The use of Native American names and mascots is pervasive throughout many levels of athletic programs, both amateur and **\*116** professional. Nearly one hundred colleges and universities, as well as a multitude of primary and secondary schools, have team names that relate to Native Americans. [\[FN2\]](#) The purpose of this Article is to evaluate the use of Native American

names, symbols, and rituals as team names and mascots. While issues surrounding such use are present from elementary schools to the collegiate level, the scope of this Article is confined to the use of Native American names and symbols solely by professional sports teams. The focus is on the nature and impact of these monikers and the potential challenges to their use as disparaging trademarks under the trademark component of intellectual property law.

Part I of this Article serves as an introduction to the nature of this issue. Part II details the prevalence of Native American names and symbols in professional sports. Part III examines the potential challenges to the use of Native American names and symbols under trademark law, as well as the application of trademark law in recent cases. Part IV offers an analysis of alternative methods for providing protection to Native Americans and the possible economic considerations that factor into the use of related names by professional sports organizations. Finally, Part V summarizes the implications of intellectual property law protection for professional team names and mascots.

## II. THE PREVALENCE OF NATIVE AMERICAN NAMES AND SYMBOLS IN THE PROFESSIONAL SPORTS ARENA

The use of Native American tribal names, imagery, and symbols permeates our society. Unfortunately, this imagery is occasionally used to misrepresent the Native American community as primitive savages. [FN3] There are currently five professional sports teams using Native American names and mascots: the Atlanta Braves, Chicago Blackhawks, Cleveland Indians, Kansas City Chiefs, and Washington Redskins. [FN4] Some feel that not only is the use of Native American names offensive, but so too are the associated mascots and fan rituals that are part and parcel of the teams employing them. [FN5] Some suggest that the use of "sham rituals" such as war chants and the "tomahawk chop," as well as the prolific use \*117 of team paraphernalia bearing logos, manifest blatant racism against the Native American community. [FN6]

This "marketing of 'Indianness'" [FN7] appears in many facets of modern popular culture--from team advertising, billboards, and brochures to concessions, clothing, and promotions. Many have questioned why the use of Native American names is considered offensive or inappropriate. To answer this question, one must examine the use of such names and symbols in light of the history of Native Americans in this country. [FN8] Generally, the picture of the "typical" Native American falls into two categories: the "good Indian" and the "bad Indian." [FN9] On the one hand, Native Americans are perceived as noble people of strength and wisdom while on the other hand, there is the "Old West" view that Native Americans are savage warriors, waiting to scalp anyone at a moment's notice.

In an attempt to contextualize and effectively educate the public of the inherent destructive effects stemming from the use of Native American names and related rituals, Native Americans and their supporters have advanced several common themes for why this use is inappropriate. "Native American team names and mascots can be viewed as a source of parody and satire and as a preservation of stereotypes as opposed to a celebration of positive attributes." [FN10] The Native American community asserts that these names and logos portray Native Americans in a racist and degrading manner that dehumanizes them as members of society. [FN11] In doing so, the abysmal treatment and troubling history of Native Americans in the United States is essentially trivialized. Furthermore, in allowing such degradation by using Native American names and rituals as trivial sports rallying cries, the social blindness to Native American interests is further enforced.

In recent years, however, many activists have sought to legitimize these concerns and effectively address such social ills. Government agencies, legislators, and the media have taken notice of the problem and \*118 have attempted to bring it to the forefront of modern debate. [FN12] For example, in 1988, the Michigan State Civil Rights Commission (Commission) investigated and compiled a comprehensive report on the use of Native American names as sports team names within the state. [FN13] The Commission recognized that "one of the most pervasive examples of the way in which we have misunderstood and misrepresented Indian peoples lies in the use of athletic team symbols and names." [FN14]

The foundation of the Commission's study was the perceived negative impact that the continued use of Native American stereotypical images had in an educational environment. [FN15] Such negative effects included lowered self esteem among Native American students and impediments to all students' (both Native American and non-Native American) education on the history, culture, and diversity of Native American peoples. [FN16] The Commission noted that the proliferation of negative imagery of Native Americans "indicated that there is a generally low level of sensitivity to Indian images which exist in this society, and a generally high level of racism toward Native American people." [FN17]

Based on these premises, the Commission conducted a study based on the results of surveys sent to educational institutions

using Native American related nicknames, mascots, or logos, as well as surveys sent to various Native American tribes and organizations regarding the use of such symbols. [\[FN18\]](#) Additionally, researchers conducted a comparative analysis of the Native American related items, mascots, and logos to "general standards for stereotyping and for historical accuracy." [\[FN19\]](#)

Based on the findings of the survey and evaluation of the team names, mascots, and logos, the Commission concluded that "the use of Indian images is stereotypic, racist and discriminatory" and that the perpetration of such images was due, at least in part, to a media-created caricature commonly accepted by the general public. [\[FN20\]](#) Furthermore, the Commission noted that the "use of [Indian related] mascots is particularly demeaning and encourages behavior based on the Hollywood \*119 image of Indians dancing, giving 'war whoops' or as a grunting savage. This use is particularly susceptible to misuse based on general public images of Indians." [\[FN21\]](#) On the basis of these and other conclusions, the Commission recommended that schools in Michigan discontinue the use of Indian mascots, logos, and names, incorporate information on Native American culture into educational curricula, and encourage public information and discussion of this issue among community, education and Native American organization leaders. [\[FN22\]](#)

Other attempts at eradicating the use of these symbols have included trademark litigation, [\[FN23\]](#) Title VI hostile environment claims, [\[FN24\]](#) tribal court actions, [\[FN25\]](#) and First Amendment challenges with respect to suits brought under intellectual property statutes. [\[FN26\]](#) In addition to these legal mechanisms, Native American groups have also staged protests surrounding major sporting events, [\[FN27\]](#) spoken out in the media, [\[FN28\]](#) and pursued state administrative remedies. [\[FN29\]](#)

On the opposing side of the argument, there are those who assert that the use of Native American names and symbols in professional sports is neither offensive nor disrespectful. Supporters for the use of the names argue that, by doing so, they are "honoring" Native American culture and therefore are not demeaning the culture. [\[FN30\]](#) Others suggest that they do not intend any ill will or offensive import by using Native American names. [\[FN31\]](#) Rather, they suggest that these names reflect positive attributes of Native Americans such as dedication, courage, and pride. [\[FN32\]](#) While these sentiments may have some truth, it is arguable whether they are more true in theory than in practice.

Query whether the "grinning idiot vestige of Chief Wahoo [mascot for the Major League Baseball (MLB) team the Cleveland Indians] with \*120 his exaggerated features" [\[FN33\]](#) is really a legitimate way to offer respect for Native American culture or honor its heritage? Controversy surrounding this particular team mascot has been brewing for years and Chief Wahoo was the subject of the first case relating to the use of a Native American mascot. [\[FN34\]](#) In 1972, the Cleveland Indian Center brought suit against the Cleveland Indians baseball team seeking monetary damages and injunctive relief to compel the team to adopt a more distinguished looking Native American as the team's mascot rather than the "smiling, dumb savage" that the team had been using. [\[FN35\]](#) The two parties ultimately reached an undisclosed settlement. [\[FN36\]](#) Despite this suit, the team continues to use Chief Wahoo as its mascot to this day, thirty years later. [\[FN37\]](#)

However, one Cherokee chief stated that the Redskins name is not bothersome to his tribe and provides Native Americans with some recognition. [\[FN38\]](#) Another Cherokee sang the national anthem before a Redskins game and one tribe even supports the Atlanta Braves by making fake tomahawks for the team's fans. [\[FN39\]](#) This sentiment, while apparently not the majority view among the Native American community, suggests that Native Americans view different things as offensive.

### III. TRADEMARK LAW: PROTECTION OR FRUSTRATION?

Federal trademark law provides one legal avenue for addressing this issue. In recent years, intellectual property law has expanded and is now a viable source of protection for a number of legal interests. Components of intellectual property law include trade secrets, copyrights, patents, trademarks, and the statutory provisions providing for their protection. With respect to the use of Native American team names and symbols, intellectual property law is a rich source of both protection and debate. More specifically, trademark law is a primary focus of both supporters and opponents of team names and logos.

Intellectual property rights in the United States are premised on the notions of free enterprise and profit. [\[FN40\]](#) The policy behind trademark law is public consumer protection by permitting businesses and entities the \*121 exclusive use of names and symbols in differentiating their products. [\[FN41\]](#) Trademark law affords businesses and individuals the opportunity to adopt a trademark or symbol from the public marketplace of ideas and to secure a right of ownership free from interference and to the exclusion of other users. [\[FN42\]](#)

Federal trademark registration affords the holder of a registered trademark several benefits. First, registration of the trademark provides constructive notice to others that the registrant owns the trademark, [\[FN43\]](#) an important protection against potential trademark infringers. Second, registration facilitates incontestability of a trademark once it "has been in continuous use for five consecutive years subsequent to the date of such registration and is still in use in commerce." [\[FN44\]](#) Third, registration allows the holder of the trademark to renew registration of it in ten year increments, thus allowing for continuous protection. [\[FN45\]](#) These benefits are important because they afford trademark holders protection from misappropriation of goodwill by having their trademarks associated with inferior products and because they help to protect a consumer's expectation of quality and consistency.

#### A. Lanham Act

The Lanham Act (the Act) governs the registration and protection of trademarks under federal law. [\[FN46\]](#) Under this statute:

The term 'trademark' includes any word, name, symbol, or device, or any combination thereof--

(1) used by a person, or

(2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this [chapter], to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. [\[FN47\]](#)

Those looking to protect the use of Native American symbols have turned to the Act for federal law protection. Under section 2 of the Act, trademark protection is generally extended to goods distinguishable from \*122 the goods of others. [\[FN48\]](#) However, under section 2(a) of the Act, (hereafter "section 2(a)") trademark protection can be denied to trademarks that are immoral, deceptive, scandalous, or disparaging. [\[FN49\]](#)

Trademark protection is important because the absence of registration of a trademark prevents the user from gaining protection. Most notably, nonregistered trademarks do not give their owners the exclusive right to use them. [\[FN50\]](#) This right of exclusivity is a practical legal means employable to prevent another from appropriating a valued trademark or symbol. Therefore, challenges to the trademarks of team names and logos may be a means by which the Native American community can attempt to curb the use of such monikers by demonstrating that they are disparaging to the Native American community.

If successful in such a challenge, the Patent and Trademark Office (PTO) will cancel a trademark's federal registration, arguably lessening the economic value of the trademark. Therefore, because federal trademark law does not protect unregistered trademarks against use by others, [\[FN51\]](#) there is the possibility that others would use the same, or similar, trademarks. This could lead to consumer confusion in the marketplace and the devaluation of the integrity of the trademark because it might represent similar products of substandard quality to those which consumers have come to associate with products bearing a particular trademark.

In *In re McGinley*, the United States Court of Customs and Patent Appeals asserted that section 2(a) was not "an attempt to legislate morality, but, rather, a judgment ... that such [trademarks] not occupy the time, services, and use of funds of the government." [\[FN52\]](#) Thus, under that court's view, there appears to have been an attempt to address the root effects of immoral, scandalous, and disparaging trademarks without making a blanket subjective statement as to the standard of public morals and values. Indeed, some would agree that more recent applications of section 2(a) amount to "a means of fighting hate speech without having \*123 to persuade the public to change its views." [\[FN53\]](#) As such, perhaps there is some merit to the assertion that section 2(a), and principles of intellectual property law in general, can serve as vehicles for addressing Native Americans' concerns with respect to teams using registered trademarks that the group finds offensive or disparaging.

Today, most professional team names and logos are federally registered trademarks. [\[FN54\]](#) These trademarks are a vital source of revenue both for individual teams and for the sports leagues as a whole. [\[FN55\]](#) This is due, in part, to the considerable income derived from team licensed paraphernalia such as clothing, equipment, and novelty items. [\[FN56\]](#) In fact, some professional sports leagues have been so successful in marketing their teams' trademarks that they have created exclusive licensing agents [\[FN57\]](#) such as NFL Properties, Major League Baseball Properties, NBA Properties, and the Licensing Company of America. [\[FN58\]](#) Given the lucrative nature of the sports team marketing industry, one potential method for Native Americans to capture the attention of teams and organizations that they believe use blatantly racist and culturally insensitive trademarks is to attack the protection of these trademarks, thereby influencing the "purse strings" of the

respective teams.

## B. Disparaging Trademarks

To attack the protection of a trademark, petitioners may bring challenges under section 2(a) alleging that such trademarks are "disparaging." [\[FN59\]](#) If they initiate cancellation proceedings and show that the trademark in question is disparaging, then the remedy for such a finding would be to strip the trademark of its federal registration and protection. [\[FN60\]](#) This would effectively remove the trademark holder's right of exclusive use and weaken the market power of the trademark. [\[FN61\]](#) This potential financial impact is fertile ground on which Native Americans can attack sports teams' commercial use of Native American monikers.

\*124 Some scholars and activists argue that Native American team names are disparaging because they bring Native Americans into disrepute and promote racial insensitivity. [\[FN62\]](#) In a trademark challenge, the petitioner must demonstrate that the trademark in question was "disparaging" at the time it was registered. [\[FN63\]](#) The Trademark Trial and Appeal Board (TTAB) determines the nature of trademarks. [\[FN64\]](#) The TTAB examines the nature of the trademark in light of the test for disparagement set out in *Greyhound Corp. v. Both Worlds, Inc.* [\[FN65\]](#) In *Greyhound*, the TTAB held that in order for a trademark to be deemed "disparaging," two elements must be present: (1) the trademark must be reasonably understood as referring to the plaintiff, and (2) the trademark must be considered offensive or objectionable by a reasonable person of ordinary sensibilities. [\[FN66\]](#)

It is important to note that the second prong of the *Greyhound* test employs the objective standard of "a reasonable person of ordinary sensibilities." [\[FN67\]](#) This point of reference appeals to the sensibilities of an ordinary member of the public, not the reasonable Native American of "ordinary sensibilities." This is an important distinction because past performance and present practice have shown that many "reasonable" people do not find professional sports' use of Native American names or symbols "offensive or objectionable." As such, attacking offensive trademarks under section 2(a) as "disparaging" is somewhat undermined. As with other determinations based on a "reasonable person" standard, the seemingly objective nature of such a standard of conduct becomes transformed into a subjective test that fails to address the underlying problem it is designed to resolve.

The recent TTAB *In re Hines* decision provides some evidence for this hypothesis. [\[FN68\]](#) In *Hines*, the TTAB was faced with a case alleging disparagement of a religious group. [\[FN69\]](#) The TTAB noted that determining disparagement with respect to such a group was extremely subjective, and, therefore, the perceptions of the general public were irrelevant and "only the perceptions of those referred to, identified or implicated in some recognizable manner by the involved trademark are relevant to this \*125 determination." [\[FN70\]](#) This situationally specific standard for determining disparagement relative to a particular group would be useful in challenges to professional sports teams' use of Native American-related trademarks. Under this scheme, the critical inquiry would address whether the trademarks of the Atlanta Braves, Cleveland Indians, or any other teams using Native American names and/or mascots, are disparaging to Native Americans rather than to the general public.

## C. The "Redskins Case"

The practical implications of using the *Hines* standard in granting relief to Native American challenges to an allegedly disparaging trademark were recently realized and expanded. [\[FN71\]](#) In *Harjo v. Pro-Football, Inc.*, a group of Native Americans brought cancellation proceedings against the Washington Redskins football team, alleging that the team's registered trademarks were disparaging. [\[FN72\]](#) The petitioners asserted that the word "redskin(s)," or a form of that word, appeared in each of the trademarks they sought to have cancelled; that the word "redskin(s)" "was and is a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for a Native American person;" and that the "registrant's use of the [trademarks] in the identified registrations 'offends' petitioners and other Native Americans." [\[FN73\]](#) They further contended that "the [trademarks] in the identified registrations 'consist of or comprise matter which disparages Native American persons, and brings them into contempt, ridicule, and disrepute'" and were therefore violative of section 2(a). [\[FN74\]](#)

The respondent in the case, Pro-Football, Inc., denied the petitioners' allegations and asserted:

through long, substantial and widespread use, advertising and promotion in support thereof and media coverage, said [trademarks] have acquired [] secondary meaning ... and that ... the [trademarks] ... cannot reasonably be understood to refer



to the Petitioners or to any of the groups or organizations to which they belong [as] the [trademarks] refer to the Washington Redskins football team ... and ... cannot be interpreted as \*126 disparaging any of the Petitioners or as bringing them into contempt or disrepute. [\[FN75\]](#)

However, in a lengthy decision, the TTAB held that the trademarks "the Washington Redskins," "Redskins," and "Redskinettes" and their associated symbols were disparaging to Native Americans and, therefore, cancelled the federal trademark registration for those trademarks. [\[FN76\]](#)

In Harjo, the TTAB articulated a broad, liberal test for determining what constitutes a "disparaging" trademark. [\[FN77\]](#) The TTAB noted that the term "disparage" as it appears in section 2(a) addresses an identifiable target such as a person or institution. [\[FN78\]](#) Based on this premise, the TTAB concluded that a finding of whether a trademark was "disparaging" would be determined by the views of the referenced group, rather than the general public. [\[FN79\]](#) From this basis, the TTAB concluded that the trademarks challenged by Harjo and the other Native American petitioners were in fact disparaging, and therefore not capable of being registered under section 2(a). [\[FN80\]](#) This ruling is a victory not only for Native Americans, but also for the general movement toward equality and the eradication of racism in our modern culture. As Suzan Shown Harjo, the named plaintiff in the cancellation action noted, "[t]his is one of the last vestiges of overt racism right out in public in America, and it happens on a weekly basis during sports season." [\[FN81\]](#)

Given the construction the TTAB devised for determining whether a trademark is "disparaging" under section 2(a), the success of future challenges to offensive trademarks based on this theory may be more frequent. Under the standard articulated in Harjo, the relevant audience for determining whether a trademark representing Native Americans is disparaging will be other Native Americans. Greyhound and Harjo suggest that Native Americans will have greater potential for success in future trademark infringement cases. The trademarks most likely to be challenged (e.g., caricatures of Native Americans as mascots and names directly derived from Native American culture) will easily meet this test. Symbols like the Cleveland Indians' Chief Wahoo or names such as the "Chiefs" refer to Native Americans and therefore meet prong number one of the Greyhound test. The main area of contest may be prong \*127 number two, that such trademarks are offensive to a community of other Native Americans, because some Native Americans do not object to the use of such trademarks. However, given the current sentiment of many Native Americans, as evidenced by their active protests, demonstrations, and public outcry, that such trademarks are offensive, prong number two of the Greyhound test may also be met, thus making for a successful cancellation challenge under current trademark law.

Harjo was the first cancellation proceeding brought under the "disparagement" provision of section 2(a). [\[FN82\]](#) Perhaps this precedent will open the courthouse doors to other potential plaintiffs in challenging offensive or culturally insensitive trademarks that are injurious to an identifiable group. Indeed, there is evidence that that movement has begun.

#### D. Beyond Harjo

The Native American Resource Academy has filed a cancellation petition, similar to that brought against the Washington Redskins, with the TTAB, challenging the trademark of the Atlanta Braves MLB team. [\[FN83\]](#) Applying the Harjo case as precedent in this pending matter may lead to a successful challenge by the petitioners, thus stripping the Atlanta Braves of federal trademark protection for their registered trademarks at issue.

There is also evidence that state courts are taking notice of the potentially disparaging effect the use of "redskin" may have on the Native American community. In *McBride v. Motor Vehicle Division of Utah State Tax Commission*, the Utah Supreme Court reversed a Utah State Tax Commission's administrative ruling that the term "redskin" was not offensive, but rather, simply a professional sports team's mascot. [\[FN84\]](#) The petitioners, two Native Americans, alleged that personalized state license plates bearing the words "REDSKIN," "REDSKNS," and "RDSKIN" violated a state statute and an administrative rule that prohibited any vanity license plates that were "offensive to good taste and decency" and that displayed words deemed "vulgar, derogatory, profane, or obscene." [\[FN85\]](#) Upon remand from the Utah Supreme Court, the Utah State Tax Commission held that the word "redskin" had at least one \*128 offensive connotation and thereby violated the agency's own rules. [\[FN86\]](#) As such, the Utah State Tax Commission revoked the license plates. [\[FN87\]](#)

These cases seem to indicate a move toward recognition of the damaging effects that racially specific references have on Native Americans. Perhaps this initial progress is indicative of future action that will assist in remedying the cultural insensitivity to the Native American community in the sports context and in general societal terms. Given the lack of

protection afforded disparaging trademarks, trademark laws can be catalysts for change and may persuade team owners to reevaluate their use of Native American names and mascots, [\[FN88\]](#) particularly in light of the Harjo decision. While this argument may not be the ultimate impetus for change, it is a construct in which examination of the broader picture of racism and social responsibility can be framed. Just as legal reform has assisted in moving toward "leveling the playing field" for other minority groups, perhaps trademark law can be the impetus for a reexamination of the import and resulting deteriorative effects the commercial use of Native American names, mascots, and rituals has on the Native American community as a whole.

#### IV. ALTERNATIVE APPROACHES TO PROTECTION AND ECONOMIC CONSIDERATIONS

While the progress made in recent years toward eradicating the irreverent use of Native American names and symbols from popular culture is admirable, it is but the tip of the iceberg. The Harjo case is instrumental in moving toward the eradication of Native American names, logos, and symbols from professional sports enterprises. Yet, the basic policy principles underlying the decision may not be enough of a deterrent to the remaining teams with Native American team names and mascots to refrain from continued use of those trademarks. Rather, it may be the economic impact resulting from favorable rulings for trademark challengers that will have a more direct effect on professional sports organizations.

Perhaps the reason Native Americans have been only marginally successful in garnering public attention and support for their concerns about their public characterization is due in part to their small population relative to other ethnic groups. [\[FN89\]](#) Unlike demeaning images representative of other ethnic groups such as African Americans, Asian \*129 Americans, and Mexican Americans, who have experienced increasing political and market power over recent decades, demeaning representations of Native Americans still permeate the social and industrial landscape. [\[FN90\]](#) Unlike other definable ethnic groups, Native Americans "are not only subject to degrading images that would be unacceptable if applied to other minority groups; their cultural and religious symbols and names are also mined by commerce for images to evoke emotions that will sell their products and services." [\[FN91\]](#)

As the public directs even more attention toward participation in, and observation of, sporting events, there has been a transformation of sports into an insular marketplace. Rather than a simple engagement of rivals for the preservation of the purity of the game and the love of athletic competition, sport has transcended the playing field and invaded the world of international business enterprise. Not only have sporting events themselves become substantial sources of revenue, so too, has the paraphernalia associated with them. Retail marketing and promotion of items bearing team trademarks such as jackets, t-shirts, hats, and umbrellas, has been transformed into a multibillion dollar industry. [\[FN92\]](#)

Given the enormous power of the professional sports industry, its inattention to the concerns of Native Americans may be explained by this particular community's relatively inconsequential impact on the economic structure of professional sports teams. Because the Native American population is comparatively small, it lacks the same degree of consumer buying power that has helped other minority groups influence businesses to change objectionable trademarks. [\[FN93\]](#) This inequality in market power affords business trademark holders the opportunity to ostracize Native American consumers because the businesses are not dependent on Native American patronage for economic success. [\[FN94\]](#) Team owners can therefore afford to ignore Native American protests to the use of Native American team names and mascots until the courts initiate restrictions on these uses. [\[FN95\]](#)

Aside from these economic considerations, there are other vehicles that may provide remedies for the alleged harm. One possibility may be for Native American plaintiffs to bring a state tort action for defamation against the offending team and its owners. Another possibility may be to \*130 pursue suits for violations actionable under Native American tribal law. [\[FN96\]](#) A third outlet may be to bring an action under the international law principle of self-determination. [\[FN97\]](#) Finally, in addition to actions under section 2(a) challenging trademarks as "disparaging," outlets may be available under other provisions of the trademark laws by challenging trademarks as "scandalous" or "immoral."

#### V. CONCLUSION

The utility of intellectual property law as a means for assisting Native Americans in their quest for cultural equality is becoming increasingly more apparent. As an increasing number of tribunals evaluate and decide cases dealing with the disparaging impact of arguably racist monikers, perhaps a move toward the elimination of such symbols will begin to take shape. Given professional sports organizations' enormous commercial and economic power, any attempt at change may have

to come in the form of a market-driven remedy. That is, in affecting the economic structure of a major industry, attention to profit maximization may mean addressing socially sensitive issues. For major league sports teams, the time has come to look beyond the playing field and to prioritize social responsibility and cultural awareness. Although Native Americans are a small minority, they enjoy sports and should not feel ostracized when certain teams take the field. Teams such as the Braves and the Indians should consider that Native Americans are a part of the buying public and are potential contributors to the teams' already tremendous wealth. Maybe social awareness is better swallowed when coated with dollar bills. Maybe it is time to look at the integrity of the institution of sport and its constituent teams. But then, maybe it is not really about the game at all.

[FN1]. J.D. 2001, Northeastern University School of Law, Boston, Massachusetts; B.S., Florida State University.

[FN1]. These are fictional names created solely for illustrative purposes in this Article and do not reflect any animosity or prejudice on the part of the author towards any racial, ethnic or religious group. See Bruce C. Kelber, "[Scalping the Redskins: Can Trademark Law Start Athletic Teams Bearing Native American Nicknames and Images on the Road to Racial Reform?](#)", 17 *HAMLIN L. REV.* 533 (1994).

[FN2]. See Daniel J. Trainor, Note, [Native American Mascots, Schools, and the Title VI Hostile Environment Analysis](#), 1995 *U. ILL. L. REV.* 971, 986 (1995).

[FN3]. See [id.](#) at 973.

[FN4]. See André Douglas Pond Cummings, "[Lions and Tigers and Bears, Oh My" or "Redskins and Braves and Indians, Oh Why: Ruminations on McBride v. Utah State Tax Commission, Political Correctness, and the Reasonable Person](#)", 36 *CAL. W. L. REV.* 11, 33 (1999).

[FN5]. See [id.](#)

[FN6]. See [id.](#)

[FN7]. Nell Jessup Newton, [Memory and Misrepresentation: Representing Crazy Horse](#), 27 *CONN. L. REV.* 1003, 1005 (1995).

[FN8]. See Aaron Goldstein, Note, [Intentional Infliction of Emotional Distress: Another Attempt at Eliminating Native American Mascots](#), 3 *J. GENDER RACE & JUST.* 689, 691 (2000).

[FN9]. See [id.](#) at 692.

[FN10]. Jack Achiezer Guggenheim, The [Indians' Chief Problem: Chief Wahoo as State Sponsored Discrimination and a Disparaging Mark](#), 46 *CLEV. ST. L. REV.* 211, 214 (1998).

[FN11]. See Kimberly A. Pace, The [Washington Redskins and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?](#), 22 *PEPP. L. REV.* 7, 11 (1994).

[FN12]. See Paul E. Loving, [Native American Team Names in Athletics: It's Time to Trade These Marks](#), 13 *LOY. L.A. ENT. L. REV.* 1, 11 (1992).

[FN13]. Michigan Dep't of Civil Rights, Michigan Civil Rights Commission Report on Use of Nickname, Logos, and Mascots Depicting Native American People in Michigan Education Institutions (1988) (draft on file with Michigan Civil Rights Commission).

[FN14]. [Id.](#) at 1.

[FN15]. See [id.](#) at 9.

[FN16]. See [id.](#)



[\[FN17\]](#). Id.

[\[FN18\]](#). See id. at 10-11.

[\[FN19\]](#). Id. at 11.

[\[FN20\]](#). Id. at 27.

[\[FN21\]](#). Id. at 26.

[\[FN22\]](#). See id. at 29.

[\[FN23\]](#). See [Harjo v. Pro-Football Inc., 50 U.S.P.Q.2d \(BNA\) 1705 \(1999\)](#).

[\[FN24\]](#). See generally Trainor, supra note 2.

[\[FN25\]](#). See, e.g., Newton, supra note 7.

[\[FN26\]](#). See generally Michelle B. Lee, [Section 2\(A\) of the Lanham Act as a Restriction on Sports Team Names: Has Political Correctness Gone Too Far?](#), 4 SPORTS LAW. J. 65 (1997).

[\[FN27\]](#). Activists Bask in Football Spotlight, USA TODAY, Jan. 27, 1992, at 6C; Rachel Shuster, Indian Group Targets Redskins Name Next, USA TODAY, Jan. 17, 1992, at 1C.

[\[FN28\]](#). See Richard Lapchick, Let's Chop Down the Remnants of Racism; It's Not a Brave New World When Native American Traditions Are Mocked, SPORTING NEWS, Apr. 12, 1993, at 8; Robert Fachel, Native Americans Plan to Deal with Mascots, WASH. POST, Nov. 12, 1993, at B2.

[\[FN29\]](#). See Newton, supra note 7, at 1009.

[\[FN30\]](#). See id. at 1013.

[\[FN31\]](#). See Kelber, supra note 1, at 547.

[\[FN32\]](#). See Richard Justice, Washington Redskins, SPORTING NEWS, Mar. 30, 1992, at 29.

[\[FN33\]](#). Guggenheim, supra note 10, at 212.

[\[FN34\]](#). See Trainor, supra note 2, at 975.

[\[FN35\]](#). See id.

[\[FN36\]](#). See id.

[\[FN37\]](#). See id.

[\[FN38\]](#). See Guggenheim, supra note 10, at 233.

[\[FN39\]](#). See id.

[\[FN40\]](#). See Richard A. Guest, [Intellectual Property Rights and Native American Tribes](#), 20 AM. INDIAN L. REV. 111, 115 (1995-96).

[\[FN41\]](#). See [id. at 115-16](#).

[FN42]. See Terence Dougherty, [Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols](#), 29 COLUM. HUM. RTS. L. REV. 355, 399 (1998).

[FN43]. See [15 U.S.C. § 1072 \(1997\)](#).

[FN44]. Id. § 1065.

[FN45]. See id. § 1059.

[FN46]. See Guest, *supra* note 40, at 126.

[FN47]. [15 U.S.C. § 1127 \(1997\)](#).

[FN48]. See id. § 1052.

[FN49]. See id. § 1052-1052(a):

No [trademark] by which the goods of the applicant may be distinguish[able] from the goods of others shall be refused registration on the principal register on account of its nature unless it--(a) 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.

[FN50]. See Dougherty, *supra* note 42, at 381.

[FN51]. See [15 U.S.C. § 1115\(a\)](#).

[FN52]. [660 F.2d 481, 486 \(C.C.P.A. 1981\)](#) (citation omitted).

[FN53]. Jendi B. Reiter, *Redskins and Scarlet Letters: Why "Immoral" and "Scandalous" Trademarks Should Be Federally Registrable*, 6 FED. CIR. B.J. 191, 195 (1996).

[FN54]. See Cathryn L. Claussen, [Ethnic Team Names and Logos--Is There a Legal Solution?](#), 6 MARQ. SPORTS L.J. 409, 419 (1996).

[FN55]. See Loving, *supra* note 12, at 14.

[FN56]. See id.

[FN57]. Id. at 15.

[FN58]. See id.

[FN59]. See [15 U.S.C. § 1052\(a\)\(1997\)](#).

[FN60]. Id. § § 1052, 1064.

[FN61]. Id.

[FN62]. See Loving, *supra* note 12, at 40; Michigan Dep't of Civil Rights, *supra* note 13, at 9; [15 U.S.C. § 1052-1052\(a\)](#).

[FN63]. See [15 U.S.C. § 1052\(a\)](#).

[FN64]. See Guggenheim, *supra* note 10, at 229.

[FN65]. [6 U.S.P.Q.2d 1635 \(T.T.A.B. 1988\)](#).

[\[FN66\]](#). See [id. at 1639](#).

[\[FN67\]](#). Id. (citation omitted).

[\[FN68\]](#). [31 U.S.P.Q.2d \(BNA\) 1685 \(P.T.O. 1994\)](#).

[\[FN69\]](#). See [id.](#)

[\[FN70\]](#). Jack Achiezer Guggenheim, [Renaming the Redskins \(And the Florida State Seminoles?\): The Trademark Registration Decision and Alternative Remedies](#), 27 FLA. ST. U. L. REV. 287, 297 (1999) (citing [Hines](#), 31 U.S.P.Q.2d (BNA) at 1688).

[\[FN71\]](#). Id. at 287.

[\[FN72\]](#). [50 U.S.P.Q.2d \(BNA\) 1705 \(P.T.O. 1999\)](#).

[\[FN73\]](#). Id. at 1708.

[\[FN74\]](#). Id.

[\[FN75\]](#). Id. (citation omitted).

[\[FN76\]](#). See [id.](#) at 1749.

[\[FN77\]](#). See Jeffrey Lefstin, Note, [Does the First Amendment Bar Cancellation of Redskins?](#), 52 STAN. L. REV. 665, 669 (2000).

[\[FN78\]](#). See [id.](#) at 670.

[\[FN79\]](#). See [id.](#) (citing [Harjo](#), 50 U.S.P.Q.2d at 1739).

[\[FN80\]](#). See [Harjo](#), 50 U.S.P.Q.2d at 1749.

[\[FN81\]](#). "Redskins" Under Federal Fire, ATLANTA J. & CONST., Apr. 3, 1999, at 9C.

[\[FN82\]](#). See Guggenheim, *supra* note 10, at 235.

[\[FN83\]](#). Guggenheim, *supra* note 70, at 297.

[\[FN84\]](#). [977 P.2d 467, 468 \(Utah 1999\)](#).

[\[FN85\]](#). Cummings, *supra* note 4, at 12 (citation omitted).

[\[FN86\]](#). See [id.](#) at 13.

[\[FN87\]](#). See [id.](#)

[\[FN88\]](#). See Kelber, *supra* note 1, at 575.

[\[FN89\]](#). See Pace, *supra* note 11, at 16.

[\[FN90\]](#). See Newton, *supra* note 7, at 1006.

[\[FN91\]](#). Id. at 1008.

[\[FN92\]](#). See Kelber, supra note 1, at 549.

[\[FN93\]](#). See Pace, supra note 11, at 16.

[\[FN94\]](#). See id.

[\[FN95\]](#). See id.

[\[FN96\]](#). See Guggenheim, supra note 70, at 304-05.

[\[FN97\]](#). See id.

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