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May 27, 1998

Paper No. 100
CEW

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Suzan Shown Harjo; Raymond D. Apodaca; Vine Deloria, Jr.;
Norbert S. Hill, Jr.; Mateo Romero; William A. Means;
and Manley A. Begay, Jr.

v.

Pro-Football, Inc.

Cancellation No. 21,069
to Registration Nos. 1,606,810; 1,085,092; 987,127;
986,668; 978,824; and 836,122¹

Michael A. Lindsay, Stephen R. Baird and Joshua J. Burke of
Dorsey & Whitney for petitioners.

John Paul Reiner, Robert L. Raskopf, Marc E. Ackerman,
Claudia T. Bogdanos and Lindsey F. Goldberg of White & Case
for respondent.

Before Sams, Cissel and Walters, Administrative Trademark
Judges.²

¹ Throughout this proceeding, petitioners have included a reference to Registration No. 1,343,442 in the caption of all filings. However, as indicated in the October 5, 1992, order of the Board instituting this proceeding, the petition to cancel, filed September 10, 1992, was not instituted as to Registration No. 1,343,442 because it was moot at the time of filing. Registration No. 1,343,442, which issued June 18, 1985, for the mark SKINS for "entertainment services in the form of professional football games and exhibitions" in International Class 41, was canceled as of August 20, 1992, under the provisions of Section 8 of the Trademark Act.

² Assistant Commissioner Philip Hampton, II, who heard the oral argument in this case, resigned prior to the issuance of this decision. Therefore, Administrative Trademark Judge Robert Cissel has been substituted for Assistant Commissioner Hampton as a member of the panel

Opinion by Walters, Administrative Trademark Judge:

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Introduction

Suzan Shown Harjo, Raymond D. Apodaca, Vine Deloria, Jr., Norbert S. Hill, Jr., Mateo Romero, William A. Means, and Manley A. Begay, Jr. filed their petition to cancel the registrations of the marks identified below, all owned by Pro-Football, Inc.:

THE WASHINGTON REDSKINS³ and REDSKINS⁴ for "entertainment services - namely, presentations of professional football contests";

³ Registration No. 978,824, issued February 12, 1974, in International Class 41. Sections 8 and 15 affidavits accepted and acknowledged, respectively. Registration renewed for ten years from February 12, 1994.

⁴ Registration No. 1,085,092, issued February 7, 1978, in International Class 41. Sections 8 and 15 affidavits accepted and acknowledged, respectively. Registration renewed for ten years from February 7, 1998.

REDSKINETTES for "entertainment services, namely, cheerleaders who perform dance routines at professional football games and exhibitions and other personal appearances"⁵;

The Redskins

for "entertainment services - namely, football exhibitions rendered live in stadia and through the media of radio and television broadcasts"⁶;

and the following two marks for "entertainment services - namely, presentations of professional football contests":

WASHINGTON



REDSKINS

⁵ Registration No. 1,606,810, issued July 17, 1990, in International Class 41. Section 8 affidavit accepted.

⁶ Registration No. 836,122, issued September 26, 1967, in International Class 41. Sections 8 and 15 affidavits accepted and acknowledged, respectively. Registration renewed for twenty years from September 26, 1987.

⁷ Registration No. 986,668, issued June 18, 1974, in International Class 41. Section 8 affidavit accepted. Registration renewed for ten years from June 18, 1994.

and



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The Pleadings

Petitioners allege that they are Native American⁹ persons and enrolled members of federally recognized Indian tribes. As grounds for cancellation, petitioners assert that the word "redskin(s)"¹⁰ or a form of that word appears in the mark in each of the registrations sought to be canceled; 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"; that the marks in Registration Nos. 986,668 and 987,127 "also include additional matter that, in the context used by registrant,

⁸ Registration No. 987,127, issued June 25, 1974, in International Class 41. Sections 8 and 15 affidavits accepted and acknowledged, respectively. Registration renewed for ten years from June 25, 1994.

⁹ We adopt the term "Native American" throughout this opinion, except when quoting from evidence, testimony or the parties' briefs.

¹⁰ Throughout this opinion we use "redskin(s)" to include both the singular and plural forms of the word "redskin." If any legal conclusions are to be reached regarding distinctions that may exist between the singular and plural forms of "redskin," such issues will be addressed separately herein.

is offensive, disparaging and scandalous"; and that registrant's use of the marks in the identified registrations "offends" petitioners and other Native Americans. Petitioners assert, further, that the marks in the identified registrations "consist of or comprise matter which disparages Native American persons, and brings them into contempt, ridicule, and disrepute" and "consist of or comprise scandalous matter"; and that, therefore, under Section 2(a) of the Trademark Act, 15 U.S.C. 1052(a), the identified registrations should be canceled.

Respondent, in its answer, denies the salient allegations of the petition to cancel and asserts¹¹ that "through long, substantial and widespread use, advertising and promotion in support thereof and media coverage, said marks have acquired a strong secondary meaning identifying the entertainment services provided by respondent in the form of professional games in the National Football League"¹²; and that "the marks sought to be canceled herein

¹¹ In its answer as filed, respondent asserted eleven "affirmative defenses," ten of which were challenged by petitioners in a motion to strike. The Board, deciding petitioners' motion on March 11, 1994 (pub'd. at 30 USPQ2d 1828), struck all of respondent's affirmative pleadings except those set forth herein.

¹² In deciding not to strike this "defense," the Board stated that proof that respondent's marks have acquired "secondary meaning" would not establish a good defense to petitioners' claims under Section 2(a). However, in view of respondent's explanation of this paragraph in its answer, the Board concluded that it is not a "secondary meaning"

cannot reasonably be understood to refer to the Petitioners or to any of the groups or organizations to which they belong [as] the marks refer to the Washington Redskins football team which is owned by Respondent and thus cannot be interpreted as disparaging any of the Petitioners or as bringing them into contempt or disrepute."¹³

Summary of the Record

The record consists of: the pleadings; the files of the involved registrations; numerous discovery and testimony depositions on behalf of petitioners and respondent, respectively, all with accompanying exhibits¹⁴; and numerous exhibits made of record by petitioners' and respondent's notices of reliance. Both parties filed briefs on the case, petitioners filed a reply brief, and an oral hearing was held.

defense. Rather, it is "a mere elaboration of respondent's denial of the allegations of paragraphs 1, 2 and 3 of the petition to cancel."

¹³ As with the preceding allegation, this allegation is also essentially an elaboration of respondent's denial of petitioner's allegations, rather than an affirmative defense.

¹⁴ Petitioners and respondent stipulated (under an agreement filed June 3, 1997, and modified July 18, 1997), *inter alia*, to the admission of all discovery depositions as trial testimony; and to the admission as trial or rebuttal testimony of the depositions of certain specified witnesses despite the fact that their depositions were taken outside the appropriate periods for taking those depositions. The parties also stipulated that such depositions would remain subject to objections properly raised.

The Parties

Petitioners are seven Native American persons. Each petitioner is an enrolled member of a different federally recognized Indian tribe. Further, each petitioner is active in his or her respective tribal community and belongs to, or has belonged to, tribal organizations as well as national organizations that are composed of Native American persons, or national organizations that are interested in issues pertaining to Native American persons, or both.

Respondent is the corporate owner of the Washington Redskins, a National Football League football team located in the Washington, D.C. metropolitan area. Respondent is the owner of the six registrations that are the subjects of this petition to cancel.

Preliminary Issues

Before turning to the merits of this case, there are several outstanding procedural and evidentiary issues that we must address. As the record reveals, the parties have been extremely contentious, and the evidence and objections thereto are voluminous. Further, in their zeal to pursue their positions before the Board, it appears that the parties have continued to argue, through the briefing period and at the oral hearing, certain issues that have

already been decided by the Board in this case. In particular, both parties have continued to argue their positions regarding the admissibility of, and weight that should be accorded to, a 1997 resolution of the National Congress of American Indians (NCAI). Additionally, respondent has devoted a significant portion of its lengthy brief to its argument regarding the constitutionality of Section 2(a) of the Trademark Act. We address these two points and the remaining procedural and evidentiary issues below.

1997 NCAI Resolution

The Board, in its decision of February 6, 1998 (*pub'd.* at 45 USPQ2d 1789), denied, *inter alia*, petitioners' motions to reopen testimony (1) to introduce, by way of the testimonial deposition of W. Ron Allen, a resolution adopted by the National Congress of American Indians (NCAI) on June 8-11, 1997, and accompanying documents, and (2) to introduce two issues of the periodical *Copy Editor* and related documentation; and granted respondent's motion to strike W. Ron Allen's testimonial deposition and accompanying exhibits. To the extent that it may be necessary to do so, we reaffirm that decision of the Board and, thus, in reaching our decision herein, we have not

considered the aforementioned evidence or the parties' further arguments in connection therewith.

Constitutionality Of Section 2(a) Of The Trademark Act

In its order of March 11, 1994 (pub'd at 30 USPQ2d 1828, 1832-1833), the Board granted petitioners' motion to strike, *inter alia*, respondent's "affirmative defenses" asserted in paragraphs 11,¹⁵ 12¹⁶ and 13¹⁷ of respondent's answer. Respondent states in its brief that it "recognizes the Board's decision that to strike Section 2(a) from the Lanham Act as unconstitutional is beyond its authority ... [but] the Board nonetheless remains obliged to apply the statute's terms in a constitutional manner" (respondent's brief, n. 29, *emphasis in original*). Respondent contends that "[c]ancellation of Respondent's registrations would curb Respondent's First Amendment right to communicate

¹⁵ This paragraph reads as follows: "Petitioners' claims under Section 14 of the Lanham Act, 15 U.S.C. § 1064, are barred because they are based upon Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), which abridges the Respondent's right to freedom of speech provided by the First Amendment of the United States Constitution. Respondent's registered marks are a form of speech protected by the First Amendment of the United States Constitution and thus cannot be regulated or canceled merely because these Petitioners may find them objectionable."

¹⁶ This paragraph reads as follows: "Petitioners' claims are barred because the statutory language of Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), relied upon by Petitioners in connection with the cancellation petition herein under Section 14 of the Lanham Act, 15 U.S.C. § 1064, is unconstitutionally overbroad."

¹⁷ This paragraph reads as follows: "Petitioners' claims are barred because the statutory language of Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), relied upon by Petitioners in connection with the cancellation petition herein under Section § 14 of the Lanham Act, 15 U.S.C. § 1064, is unconstitutionally void for vagueness."

through its trademarks and would therefore impermissibly regulate commercial speech ..." (*id.* at p.26); and that "[a]s applied to Respondent, the terms 'scandalous' and 'disparage' are also unconstitutionally broad" (*id.*) and, therefore, respondent's First and Fifth Amendment rights are abridged. Finally, respondent argues that a Board determination in favor of petitioners would "amount to impermissible viewpoint discrimination" in violation of the First Amendment (*id.* at p. 28).

Respondent contends, essentially, that the constitutional arguments in its brief are distinguished from its stricken "affirmative defenses" because the "affirmative defenses" comprise a general attack on the constitutionality of Section 2(a), whereas the arguments in respondent's brief challenge the constitutionality of Section 2(a) "as applied to respondent." We believe that this is a distinction without a difference. Rather, we find respondent's constitutionality arguments propounded in its brief to be, in substance, the same as, or encompassed by, the "affirmative defenses" asserted in paragraphs 11, 12 and 13 of respondent's answer. First, respondent's argument in its brief that the cancellation of its registrations would curb its First Amendment right to communication and impermissibly regulate commercial speech

is contained within the broad language of respondent's "affirmative defense" asserted in paragraph 11 of its answer. Further, the "defense" specifically identifies the effect on respondent and is not stated in general terms.

Second, respondent's arguments in its brief that the terms "scandalous" and "disparage" are overbroad and vague are contained within the unqualified language of paragraphs 12 and 13 of respondent's answer.

Third, even though it is not expressly identified therein, we find that respondent's assertion of "impermissible viewpoint discrimination" in violation of the First Amendment is encompassed by the very broadly pleaded "affirmative defense" asserted in paragraph 11 of respondent's answer, wherein respondent asserts a First Amendment violation generally.¹⁸

¹⁸ In alleging "impermissible viewpoint discrimination," respondent acknowledges the Board's statements in *In re Old Glory Condom Corp.*, 26 USPQ2d 1261, 1220 n.3 (TTAB 1993), that the issuance of a registration is neither an endorsement of the goods on which the mark is used, nor an implicit government pronouncement that the mark is a good one, from an aesthetic or any other viewpoint. However, respondent then cites *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1104 (D. Md. 1997), and argues that a decision for petitioners in the case before us would not be a viewpoint-neutral decision as required by the First Amendment. In the cited case, the court noted that, regardless of the forum (*i.e.*, public, limited or designated public, or private), any government regulation of speech must be viewpoint-neutral. In that case, in response to complaints of negative racial connotations, the Maryland Motor Vehicle Administration (MVA) suspended and recalled license plates, issued to members of the Sons of Confederate Veterans, which displayed a logo containing the Confederate battle flag. Finding that the Confederate battle flag does not mean the same thing to everyone, the court concluded that, in halting the issuance of the license plates, the MVA had advanced the view of those

Again, to the extent that it may be necessary, we reaffirm the Board's decision in striking respondent's affirmative defenses in paragraphs 11, 12 and 13 of its answer. Further, that decision is equally applicable to the constitutional arguments asserted by respondent in its brief. However, should respondent's aforementioned arguments ultimately be found to differ from those set forth in respondent's answer, we find such arguments unpersuasive, as the Board has no authority to determine, either generally or with respect to respondent, whether Section 2(a) is overbroad or vague, or to declare provisions of the Trademark Act unconstitutional. *See, In re McGinley*, 660 F.2d 481, 211 USPQ 668, 672 (CCPA 1981), *aff'g* 206 USPQ 753 (TTAB 1979). Thus, we have given no further consideration to respondent's arguments regarding the constitutionality of Section 2(a).

Indian Trust Doctrine

Petitioners maintain that the Indian trust doctrine should be applied by the Board in determining the Section 2(a) issues

offended by the flag and discouraged the viewpoint of those proud of it, which constituted impermissible viewpoint discrimination.

The logical conclusion of respondent's line of reasoning in the case before us is that all Board decisions pertaining to Section 2(a) scandalousness or disparagement constitute viewpoint discrimination since the Board must find that a challenged mark either is or is not scandalous or disparaging. This is, essentially, an attack on the constitutionality of Section 2(a). As we have already stated in this case, the Board is without authority to determine the constitutionality of Section 2(a).

raised in this case. The Indian trust responsibility is a judicially created doctrine that has evolved from its first appearance in Chief Justice Marshall's decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). There, in an action to enjoin enforcement of state laws on lands guaranteed to the Cherokee Nation by treaties, Chief Justice Marshall observed that Indian tribes, rather than being foreign states, "may, more correctly, perhaps, be denominated domestic dependent nations . . . in a state of pupillage," and concluded that "[t]heir relation to the United States resembles that of a ward to his guardian." *Id.* at 17.

The trust doctrine is by no means clear or consistent in basis or application.¹⁹ Courts have defined the scope of the federal government's fiduciary duties by looking to treaties, statutes, the federal common law of trusts and a combination of these sources for guidance.²⁰ Based on a treaty or statute, they have applied the doctrine in connection with the application of federal criminal laws to tribal members on reservations,²¹ to allowing Indian hiring preferences in the Bureau of Indian

¹⁹ See, D. McNeill, *Trusts: Toward an Effective Indian Remedy for Breach of Trust*, 8 Am. Ind. L. Rev. 429, 430 (1980).

²⁰ See, N. Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 Cath. U.L. Rev. 635, 638 (1982).

²¹ *United States v. Kagama*, 118 U.S. 375 (1886) (upholding constitutionality of the Major Crimes Act as an exercise of congressional guardianship power).

Affairs²² and to the dissolution of Indian tribes' governing structures.²³ When looking to the common law of trusts, courts typically identify a trustee (the United States), a beneficiary (the Indian tribes or the Indians) and a trust corpus. In most cases, the trust corpus comprises Indian funds,²⁴ Indian lands²⁵ or their appurtenances such as timber,²⁶ hunting,²⁷ and fishing rights.²⁸

The Supreme Court decisions of *Mitchell v. United States*, 445 U.S. 535 (1980), and *Mitchell v. United States*, 463 U.S. 206 (1983), pertaining to the same facts but different statutes, establish a fiduciary obligation in instances where a treaty, executive order or agreement contains language concerning a trust or a trust responsibility. In determining whether a trust obligation exists, these cases require consideration of (a) the

²² *Morton v. Mancari*, 417 U.S. 535 (1974) (denying an equal protection challenge against Indian hiring preferences).

²³ *Board of Commissioners v. Seber*, 318 U.S. 705 (1943).

²⁴ *Seminole Nation v. United States*, 316 U.S. 286 (1942) (Seminole trust fund for per capita payments).

²⁵ *United States v. Creek Nation*, 295 U.S. 103 (1935) (Creek land sold to non-Indians following an incorrect federal survey of reservation boundaries).

²⁶ See, *Mitchell v. United States*, 445 U.S. 535 (S.Ct. 1980) (timberlands of Quinault Indian Reservation).

²⁷ *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (reservation lands implicitly secured rights to hunt).

²⁸ *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) (fishing rights of Metlakahtla Indians on Annette Islands in Southeastern Alaska).

underlying statutes, agreements, treaties or executive orders, (b) actual supervision over the property or rights in question and (c) the elements of a common law trust. Thus, in determining whether a trust obligation exists, at a minimum, a tribunal would have to search for support in the underlying statute, treaty, agreement or executive order for a trust obligation.

However, officials of the executive branch of the federal government have undertaken actions that affect Indians and Indian tribes based on a statute when the authorizing or underlying statute is silent as to a trust or fiduciary obligation. Most reported decisions addressing such actions involve officials of the Bureau of Indian Affairs or the Bureau of Land Management, both of which have jurisdiction over Indian lands, forests, etc. which form part of a traditional trust corpus. Where the doctrine has been applied, it is based solely on a judicially imposed trust responsibility.²⁹ Other cases have

²⁹ See, e.g. *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919) (the Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws); *Cramer v. United States*, 261 U.S. 219 (1923) (the Court voided a federal land patent that 19 years earlier had conveyed lands occupied by Indians to a railway, even though the Indians' occupancy of the lands was not protected by any treaty, executive order, or statute; the Court found the trust responsibility limited the general statutory authority of federal officials to issue land patents); *United States v. Creek Nation*, 295 U.S. 103 (1935) (money damage award affirmed to the Creeks for the taking of lands which had been excluded from their reservation and later sold to non-Indians following an incorrect federal survey of reservation boundaries); *Navajo Tribe of Indians v. United States*, 624 F.2d 981 (Ct. Cl. 1980) (the government's argument that the fiduciary

found no trust relationship or have narrowly applied the trust relationship.³⁰

It is well established as a corollary to the trust doctrine that the meaning of *certain* treaties, agreements, statutes and administrative regulations must be construed favorably to Indians. See, *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899); *Choate v. Trapp*, 224 U.S. 665 (1912);³¹ *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); and *United States v. Santa Fe Pacific Railroads*, 314 U.S. 339 (1941), *reh'g denied*, 314 U.S. 716 (1942). More recently, the Supreme Court recognized in *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976),

obligation only arises on an express or statutory term of trust is irrelevant to claims involving accounting for mismanagement and disposition of Navajo funds and property when government has taken on or controls or supervises such funds and property); and *Manchester Band of Pomo Indian, Inc. v. United States*, 363 F. Supp. 1238, 1245-46 (N.D. Cal. 1973) (the duty to make trust property income productive arises from the trust relationship between an Indian tribe and the United States; if it exists even in the absence of a specific statute). Recognizing a fiduciary duty in *Pyramid Lake Paiute Tribe v. Navy*, 898 F.2d 1410 (9th Cir. 1990) (finding Navy's outlease program did not violate the affirmative obligation to conserve endangered species under the Endangered Species Act, court recognized that Secretary of Interior has a fiduciary duty to preserve and protect the Pyramid Lake fisheries).

³⁰ See, e.g., *Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194 (Ct. Cl. 1970), *cert. denied*, 400 U.S. 819 (1970) (no duty to provide adequate educational facilities, instructors and instruction in particular subjects created by affirmative acts of providing Indian education, health services and administration); and *Virgil v. Adrus*, 667 F.2d 931 (10th Cir. 1982) (recognizing broad government fiduciary responsibility to Indian tribes, court nevertheless found trust relationship did not require provision of free lunches to all Indian children because no express provision in any statute or treaty requiring government to provide free lunches).

³¹ Extending this principle to Indian agreements, which took the place of Indian treaties. See, C. Decker, *The Construction of Indian Treaties, Agreements, and Statutes*, 5 Am. Ind. L. Rev. 299, 301 (1977).

that "statutes passed for the benefit of the Indians are to be liberally construed, and all doubts are to be resolved in their favor." This suggests that the liberal construction doctrine does not apply to every statute, but only those which are primarily directed to Indians, Indian assets or Indian affairs.³²

Petitioners, members of federally recognized Indian tribes, have asserted, *inter alia*, that under the Indian trust doctrine, the Board owes them "a higher degree of care and deference in construing the provisions of Section 2(a) than it would otherwise owe persons not belonging to federally recognized Indian tribes." In support of this contention, petitioners argue that the trust relationship between the federal government and Native Americans is broadly defined, citing *Pyramid Lake Paiute Tribe v. Navy*, 898 F.2d 1410 (9th Cir. 1990), wherein the court states

³² While treaties and agreements are bilateral dealings, wherein the tribes are involved with representatives of the United States, this is not the case with acts of Congress. In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), the Court noted the "general rule" that "doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith," *Id.* at 586, but went on to point out:

But the 'general rule' does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary In all cases 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye towards determining what congressional intent was

Id. at 587. Accordingly, application of the liberal construction rule to statutes should be based on congressional intent.

that "while most cases holding the government to this [fiduciary] duty have involved Indian property rights, the government's trustee obligations apparently are not limited to property." *Id.* at 1420-21.

Respondent argues, on the other hand, that a fiduciary duty arises only when there is an agreement between the federal government and an Indian tribe in an area where the Indians have a specific economic interest, citing *Mitchell v. United States*, 463 U.S. 206 (1983) for the proposition that, when there is no statute, regulation, writing, agreement or implied obligation governing the relationship between the Patent and Trademark Office (PTO) and Native Americans that would impose any sort of fiduciary duty on the Board, the trust doctrine does not apply.³³

We find that the Indian trust doctrine is inapplicable to the case before us and we decline to apply it herein. We have found no decisional law addressing the Indian trust doctrine in the context of a patent, trademark or copyright case. Thus, we have considered this as an issue of first impression in relation to the Trademark Act. The majority of cases relied upon by petitioners for application of the trust doctrine herein involve statutes or treaties specifically directed towards Native Americans, which is not the case with the Trademark Act. Nor do

³³ While respondent's trial brief is silent on this issue, we refer to respondent's arguments in opposition to the motion for leave to file an *amicus* brief in this case.

we find any language in the Trademark Act of 1946, as amended, or its legislative history, that specifically obligates the federal government to undertake any fiduciary responsibilities on behalf of Native Americans.

Further, we find no basis for petitioners' contention that the trust relationship applies even in the context of a statute, such as the Trademark Act, that has broad application to both Native Americans and non-Native Americans. Petitioners rely on the *Pyramid Lake* case in this regard, which is distinguishable from the case herein since the claims in that case involved a body of water, Pyramid Lake, which was specifically reserved for the Tribe based on an Executive Order signed by President Grant in 1874. Thus, *Pyramid Lake* involves an item of trust property that was specifically identified in the creation of the trust, which is not the case before us.³⁴ Here, Indian land, water,

³⁴ We note the case of *Hornell Brewing Co., Inc. v. Brady*, 819 F. Supp. 1227 (E.D.N.Y. 1993), wherein the court found that the Indian trust doctrine did not apply in connection with a First Amendment challenge to Pub. L. 102-393, § 633, prohibiting labeling of distilled spirits, wine and malt beverage products bearing the name "Crazy Horse." In *Hornell*, the plaintiff placed the label "Crazy Horse Malt Liquor" on a series of alcoholic beverages pursuant to a Certificate of Label Approval from the Bureau of Alcohol, Tobacco and Firearms. "Crazy Horse" is the name of an Indian chief who was known for urging his people not to drink alcohol. After public outcry, Congress enacted Pub. L. 102-393, § 633. While *Hornell* ultimately found the statute unconstitutional under the First Amendment, the court did not accept the government's argument that the statute was constitutional in view of the trust relationship with American Indians. Specifically, the court noted that while cases have applied the trust relationship in connection with various classifications, the challenged classifications "in some way treated Native Americans differently from the rest of the population. . . . [and thus] the cases are not analogous to Public Law 102-393, § 633." *Id.* at 1236.

fish, timber or minerals, i.e. typical elements of an Indian trust corpus, are not in issue. No specific item of Native American intellectual property is in issue. In fact, the subject registrations are not owned by petitioners or even by Native Americans - the registrations are owned by non-Native Americans. Thus, under a common law trust analysis, the trust doctrine cannot apply since there is no identifiable trust corpus.

As for petitioners' argument that evidence submitted by Native Americans -- in any context -- is to receive greater weight than other evidence, we find no authority for that proposition in the decisional law applying the trust doctrine, even in actions involving typical Indian trust property such as tribal funds or tribal lands.³⁵ Thus, we find no basis for extending the Indian trust doctrine to the Trademark Act in the case before us.³⁶

³⁵ Petitioners contend that the Indian trust doctrine should be applied in this case under either of two conditions: (a) if "the Board were to consider the evidence more evenly balanced" or (b) "to the extent that any doubt remains as to the cancelability" of the subject marks. Petitioners provide no legal basis for this proposition. Moreover, in this case, we do not "consider the evidence more evenly balanced" and our decision does not involve any doubt.

³⁶ We do not decide the question of whether the Indian trust doctrine applies, generally, to the Trademark Act. Our decision relates only to the case herein.

Protective Order

Petitioners filed two exhibits under notice of reliance that are labeled "Confidential, Filed Under Seal Subject To Protective Order" (Exhibit No. 7, "Respondent's Licensing Agreements"; and Exhibit No. 25.001, "3/27/72 Pro-Football, Inc. Minutes of Regular Meeting"). Additionally, the testimony deposition of John Kent Cooke contains several noted pages that have been separately bound and designated as confidential.³⁷ However, the record does not contain a protective order pertaining to these exhibits and testimony.³⁸

In this regard, we note the relevant provisions of Trademark Rule 2.125(e), 37 CFR §2.125(e):

Upon motion by any party, for good cause, the Trademark Trial and Appeal Board may order that any part of a deposition transcript or any exhibits that directly disclose any trade secret or other confidential research, development, or commercial information may be filed under seal and kept confidential under the provisions of §2.27(e).

³⁷ Additionally, these pages refer to several exhibits submitted in connection with this deposition and indicate that the referenced exhibits are also confidential.

³⁸ The Board, in its decisions of December 15, 1995, and October 24, 1996, on various motions of the parties, respectively, granted petitioners' motion for a protective order only to "the extent that petitioners need not respond to those discovery requests denied in respondent's motion to compel" and granted respondent's motion for a protective order only to the extent that certain depositions were considered complete and conditions were specified for the taking of certain other depositions. Neither order pertains to the submission of confidential documents by either party and the record does not contain such a protective order.

Neither petitioners nor respondent requested a protective order with respect to these exhibits, nor did the parties file a stipulated protective order. Within thirty days from the date of this decision, petitioners and/or respondent are directed to prepare a protective order, preferably upon terms mutually agreeable to them, for the Board's consideration upon motion, including an explanation of why the exhibits and testimony proposed to be considered confidential are deemed to be confidential in nature. We will keep petitioners' exhibits and Mr. Cooke's testimony and exhibits which are designated "confidential" under seal until we decide a motion for a protective order if one is submitted or, if no motion is submitted within the specified period, we will place petitioners' Exhibits Nos. 7 and 25.001 and Mr. Cooke's testimony and exhibits in the cancellation file.

***Respondent's Motion To Strike Notice Of Reliance And
Testimonial Depositions***

On March 27, 1997, respondent filed a "Motion for Discovery Sanctions" based upon petitioners' alleged failure to produce during discovery several specified sets of documents and materials which were introduced as evidence during petitioners' testimony period. Respondent requested that the Board (1) preclude petitioners from

introducing the documents into evidence during the testimony period; (2) modify petitioners' notice of reliance to delete the documents; and (3) strike testimony related to the documents by petitioners' witnesses. The Board, in its order of July 28, 1997, determined that the subject motion would be treated as a motion to strike a notice of reliance and testimonial depositions and that it would be determined at the time of final decision. Thus, we consider this motion now.

In particular, respondent seeks exclusion of (1) a 1993 resolution of the National Congress of American Indians (1993 NCAI resolution)³⁹ and documents and testimony of Joann Chase, Susan Harjo and Raymond Apodaca related thereto; (2) a resolution of the Portland, Oregon, Chapter of the American Jewish Committee (Portland resolution) and documents and testimony of Judith Kahn related thereto; (3) a resolution of Unity '94 (Unity resolution), an organization described as a coalition of four minority journalist associations, and documents and testimony of Walterene Swanston related thereto; and (4) a videotape and

³⁹ Respondent identifies this resolution by its title "Resolution in Support of the Petition for Cancellation of the Registered Service Marks of the Washington Redskins AKA Pro-Football Inc." This resolution, No. EX DC-93-11, was passed by the Executive Council of the National Congress of American Indians (NCAI) and is distinguished from another 1993 resolution, No. NV-93-143, entitled "Resolution to Justice Department Investigation of Human Rights Violations," passed by the NCAI General Assembly, which is also of record in this case.

related documents created by Susan Courtney (Courtney videotape) and testimony of Susan Courtney and Geoffrey Nunberg related thereto.

Respondent argues, under Trademark Rule 2.120(g)(1) and Fed. R. Civ. P. 37(b)(2)(B), that the aforementioned documents were not produced during discovery. Respondent maintains that, by not producing these documents prior to the close of discovery and not requesting an extension of the discovery period, petitioners have violated the Board's trial order setting the closing date for discovery.⁴⁰ Respondent asserts that, as a result, it was prejudiced and could not properly prepare for trial. Respondent has also raised certain other specific objections with regard to each of the items it seeks to exclude.

Respondent has made several very technical objections that we find to be without merit. We find that petitioners adequately disclosed information pertaining to the aforementioned documents during discovery and that petitioners have not violated any orders of the Board in relation thereto. Additionally, we find respondent's further objections specified herein to be without merit.

⁴⁰ The Board, in its order of July 28, 1997, rejected respondent's arguments concerning petitioners' alleged non-compliance with an order and report and recommendation of the United States District Court for the District of Columbia in view of the Board's lack of jurisdiction to enforce such an order.

In particular, regarding the 1993 NCAI resolution, the record reveals that both petitioners and NCAI (a non-party) disclosed copies of the 1993 NCAI resolution during discovery; that both petitioners and NCAI disclosed during discovery what further minimal information each had regarding the resolution⁴¹; and that the differences between the several copies of the resolution disclosed are insignificant.

We conclude that the 1993 NCAI resolution submitted by petitioner as an exhibit to Mr. Apodaca's testimony has been properly authenticated by Mr. Apodaca as a copy of the resolution that was passed by the Executive Council of the NCAI, and that the authenticity of this document has been corroborated by the testimony of Ms. Joann Chase, Executive

⁴¹ The Board has never ordered petitioners to provide additional discovery referring or relating to the NCAI 1993 resolution. Respondent does not identify any specific document request for which petitioners have withheld documents. As Document Request No. 3 appears to be the only document request that covers the 1993 resolution and related communications, the discussion herein is limited to the same. The Board's December 15, 1995 order at p. 3 specifically states with respect to Document Request No. 3, that "petitioners have already provided all responsive documents and things within their possession, custody and control" and denies respondent's motion to compel regarding this request. Thus, at least with respect to discovery requests concerning the NCAI resolution, petitioners have responded in full and the requests are not the subject of any Board or court order.

Further, the Board does not have the authority to hear any complaints about NCAI's failure to produce documents as NCAI is not a party herein. Nor is there is any evidence in the record for treating petitioners and NCAI as one; e.g., that they are in collusion, that one controls the actions of the other or that petitioners have initiated the cancellation proceeding in their capacity as officers or representatives of NCAI.

Director of NCAI, based on the regularly kept records of NCAI.

Finally, with regard to the 1993 NCAI resolution, we conclude that respondent's assertion pertaining to the circumstances under which the resolution was adopted (e.g., whether persons voting on the resolution understood the specific nature of the referenced registrations and cancellation proceeding) goes to the probative value of the document rather than to its authenticity and, thus, its admissibility. Similarly, we are not persuaded that the resolution is irrelevant by respondent's argument that this resolution does not pertain to opinions held during the relevant time periods. The 1993 NCAI resolution is not irrelevant. Evidence concerning the significance of the word "redskin(s)" before and after the relevant time periods may shed light on its significance during those time periods.

Thus, respondent's motion to strike the 1993 NCAI resolution and related testimony and documentation is denied.

Regarding the Portland and Unity resolutions and the Courtney videotape, we note, at the outset, that respondent does not allege that petitioners have failed to provide the documents pursuant to one of respondent's discovery

requests. Instead, by alleging that petitioners violated the Board's scheduling order,⁴² respondent appears to rely on the automatic disclosure requirements of Fed. R. Civ. P. 26(a)(3) requiring, within a specified time frame, the disclosure of documents to the opposing party which the disclosing party anticipates will be used at trial. Although Trademark Rule 2.120(a) provides that the provisions of the Federal Rules of Civil Procedure relating to discovery shall apply in Board proceedings, the Office has determined that several provisions of the Federal Rules do not apply to the Board, including Fed. R. Civ. P. 26(a)(3). *See, Effect of December 1, 1993 Amendments to the Federal Rules of Civil Procedure on Trademark Trial and Appeal Board Inter Partes Proceedings*, 14 TMOG 1159 (February 1, 1994). *See also, Trademark Trial and Appeal Board Manual of Procedure*, Section 419, para. (7), and cases cited therein. Petitioners were not under any obligation to prepare a list of trial witnesses and documents. Therefore, the fact that the resolutions were

⁴² Respondent references the Board's order of October 24, 1996, which decided a motion to compel and several discovery disputes, and included a scheduling order resetting the close of discovery and trial dates. We find that petitioners have not violated the scheduling order. Further, we do not find any reference in the remaining portion of the order that could be understood to require production of the resolutions or videotape discussed herein.

not specifically named in the list of documents proffered to respondent is of no consequence.

Further, the procedure set forth in Fed. R. Civ. P. 34 for the production of documents pertains only to discovery from parties. It does not pertain to the discovery of documents not in the possession of a party. Except under certain circumstances not present in this case, a party does not have an obligation to locate documents that are not in its possession, custody or control and produce them during discovery.⁴³ There is no indication in this record that petitioners had copies of either the Portland and Unity resolutions or the Courtney videotape in their possession, custody or control during the discovery period; thus, petitioners were not under any obligation to produce a copy of the Unity '94 or Portland Chapter resolutions during discovery. They also were not under any obligation, under Fed. R. Civ. P. 26, to identify the documents in advance of trial.⁴⁴

⁴³ In fact, Fed. R. Civ. P. 34(c) directs a party seeking discovery of third-party documents to the subpoena procedure authorized by Fed. R. Civ. P. 45. A Rule 45 subpoena would not have involved petitioners. See J. Moore, A. Vestal and P. Kurland, *Moore's Manual Federal Practice and Procedure*, § 15.11 (1998).

⁴⁴ Further, we find respondent's contentions disingenuous. Although a party has an obligation to amend its discovery responses as information becomes available to it, amendment was not the issue herein. Well prior to the close of discovery, petitioners notified respondent of their intention to rely on "resolutions from various organizations protesting use of the term 'redskins' and Indian names in sports"; and

With respect to the Portland resolution, we conclude that Ms. Kahn's testimony is adequate to authenticate this resolution. Additionally, we are not persuaded by respondent's arguments that the resolution is irrelevant. As we have stated with respect to the 1993 NCAI resolution, evidence concerning the significance of the word "redskin(s)" before and after the relevant time periods may shed light on its significance during those time periods. We have given no further consideration to respondent's arguments in the context of the admissibility of this evidence.

With respect to the Courtney videotape, we are not persuaded that alleged flaws in the methodology employed by Ms. Courtney in compiling the film montage contained on the Courtney videotape render the videotape inadmissible. Ms. Courtney is presented by petitioners as an expert in film, and she testified that the methods she employed in compiling this film montage both met the parameters of the job as described to her and are consistent with standards

of their intention to rely on a montage of films, naming at least some of the films it would include, and that petitioners' expert, Dr. Nunberg, would rely, in part, on cinematic evidence in forming his opinions. However, there is no indication herein that respondent sought more specific information or that petitioners refused to comply. We note, further, that the Courtney videotape was not completed until shortly before Ms. Courtney's deposition. Petitioners gave the videotape to respondent within a reasonable time after its completion, albeit shortly before Ms. Courtney's deposition.

in her field for compiling such a montage. Respondent has provided no evidence suggesting otherwise. Further, neither Dr. Nunberg nor Ms. Courtney, in their testimony, present this montage as other than a sample of films in the Western genre wherein the word "redskin" appears. This is not a survey and, as such, it is not subject to the standards established for such undertakings. We find the film montage does not run afoul of the principles established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Any deficiencies in the methodology used in preparing this videotape pertain to its probative value rather than to its admissibility.

Thus, respondent's motion to strike the Unity '94 resolution, the Portland resolution, the Courtney videotape, and related testimony and documents is denied. In short, respondent's motion to strike is denied in its entirety.

Respondent's Motion, In Its Brief, To Strike Testimony And Exhibits

In addition to those objections addressed above in relation to its earlier motion to strike,⁴⁵ respondent, in its brief, renews numerous objections to the entire testimony of certain witnesses, to specified statements of

certain witnesses, and to specified exhibits introduced in connection with the testimony of certain witnesses.

Additionally, respondent objects to specified exhibits submitted by petitioners' notices of reliance. Respondent moves to strike the aforementioned testimony and exhibits. These objections are considered below.

Before turning to the specific objections, we address two general points pertaining to several of respondent's objections. First, respondent has made numerous objections aimed at excluding various witnesses' views on the nature and use of the word "redskin(s)." We emphasize that witnesses' opinions on the specific questions of whether "redskin(s)" is scandalous, disparaging, or falls within the other pleaded proscriptions of Section 2(a) are not determinative. The Board must reach its own conclusions on the legal issues before it, based on the record in each case. The Board will not simply adopt the opinions of particular witnesses on the ultimate questions of scandalousness or disparagement, even if such witnesses are experts. See, *Saab-Scania Aktiebolag v. Sparkomatic Corp.*, 26 USPQ2d 1709 (TTAB 1993) and cases cited therein. Thus, rather than excluding this evidence, we have considered

⁴⁵ Objections raised in respondent's brief that are addressed herein in connection with respondent's earlier motion to strike are not considered again.

such statements as reflecting the witnesses' views and we have not accorded these statements determinative weight as to the ultimate issues before us.

Second, respondent made a number of objections on the basis of relevance, contending, variously, that the challenged testimony or exhibit is (1) unrelated to the use of "redskin(s)" by the Washington team; (2) unrelated to the use of the word "redskin(s)"; (3) only one individual's view, which is not representative of the majority of Native Americans; (4) outside the relevant time period; and/or (5) unrelated to any issue in this proceeding.

Except as otherwise indicated herein, we find respondent's objections on the stated grounds of relevance to be without merit. While respondent contends, in part, that "redskin(s)," as used and registered in connection with its football team, connotes *only* its football team, petitioners contend otherwise. Thus, evidence of uses of the word "redskin(s)" that are unrelated to the use of that word in connection with respondent's football team are relevant to the development of petitioners' case. Similarly, the views of individuals are cumulative and are not inadmissible simply because they cannot possibly, alone, be representative of the views of the majority of Native Americans. While several witnesses may claim that

their individual views are also representative of other Native Americans' views, such statements have been taken for what they are, namely, the views of particular individuals.

Respondent's objections on the grounds of relevance that certain evidence is unrelated to the use of "redskin(s)" because it is outside the relevant time period, and/or is unrelated to any issue in this proceeding, are not well taken. As stated herein, evidence concerning the significance of the word "redskin(s)" before and after the relevant time periods may shed light on its significance during those time periods. Thus, it is relevant for petitioners to submit testimony and exhibits from various time periods that address the attitudes of both Native Americans and the majority culture in the United States towards Native Americans,⁴⁶ including evidence pertaining to a wide range of derogatory and/or stereotypical imagery and words.

⁴⁶ This reasoning in favor of admissibility is equally applicable to evidence regarding the word "redskin(s)" long prior to the issuance of the subject registrations, as well as evidence relating to the period after the issuance of the subject registrations. We have considered the probative value of such evidence in the context of the entire record before us.

1. *Objections to Testimony and Exhibits
in Their Entirety.*

Respondent seeks to exclude entirely certain testimony and exhibits. First, as is the case in many instances when a survey is introduced as evidence in litigation, respondent has raised a multitude of objections and perceived flaws regarding a survey introduced by petitioners, and contends that these flaws render the survey inadmissible. We find that petitioners' survey evidence is admissible and any deficiencies in the survey go to its probative value. The survey was designed and directed by an established expert in the field of trademark-related surveys, and was introduced through his testimony. The survey's methodology is adequately established as acceptable in the field, so that it is admissible as evidence herein. While we agree that several of respondent's criticisms have some merit, we note that even a flawed survey may be received in evidence and given some weight if the flaws are not so severe as to deprive the survey of any relevance. *See, Lon Tai Shing Co. Ltd. v. Koch & Lowy*, 19 USPQ2d 1081 (SDNY 1990); and *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). We discuss the merits and flaws of the study

and its probative value below in the context of our analysis of the substantive issue before us.

Respondent contends that the depositions of petitioners' expert witnesses, Geoffrey Nunberg, Susan Courtney, Teresa LaFromboise, Arlene Hirschfelder and Frederick Hoxie, are inadmissible because each witness' disclosure statement under Fed. R. Civ. P. 26 was written by petitioners' attorneys, rather than by the witness, and was not signed by the witness. This objection has no merit. As discussed herein, the pertinent portions of Fed. R. Civ. P. 26 are inapplicable to Board proceedings and, thus, no disclosure statement is required.

Further, respondent contends that Dr. Nunberg's statements concerning the disparaging nature of the word "redskin" lack a scientific basis; and that Dr. LaFromboise's testimony lacks the requisite standards for expert testimony and is not grounded in scientific method as it is anecdotal in nature. We are not persuaded that the aforementioned statements of Dr. Nunberg or the testimony of Dr. LaFromboise are inadmissible due to lack of scientific "basis" or "method." The nature of the witnesses' respective expertise and the basis for their opinions are adequately established and, further, neither witness claimed to base his or her testimony on a

scientific study or survey. Any purported inadequacy that may exist in the testimony, such as the anecdotal nature of portions of Dr. LaFromboise's testimony, goes to the weight to be given to that testimony.

Respondent contends that Ms. Hirschfelder, as a teacher, and Dr. Hoxie, as a history professor, lack the qualifications to testify as experts on the linguistics topics that they address, and that there is no scientific basis for the opinions they express. We find Ms. Hirschfelder's expertise as an educator specializing in Native American studies and curriculum, including the effects of stereotyping on children, to be adequately established and sufficient to accept her testimony as an expert in this area. Similarly, we find Dr. Hoxie's expertise as a historian specializing in the history of Native Americans in the United States to be adequately established and sufficient to accept his testimony as an expert in this area. We find respondent's objections as to lack of scientific basis for the opinions of these two witnesses to be without merit.

Respondent seeks to exclude a 1992 resolution of the Central Conference of American Rabbis (Petitioners' Exhibit 4.001) as irrelevant because it was adopted "outside the relevant time period" and was "passed by a group that does

not have a single American Indian member." Respondent also seeks to exclude a 1972 letter by Harold Gross on behalf of the Indian Legal Information Development Services (Petitioners' Exhibit 32.007) as irrelevant because "at the time [the organization] had only 'at a maximum, seven' American Indian members"; the organization is no longer in existence; and "the sentiments expressed in the letter cannot be said to represent the views of any tribal chief or tribal leader, and plainly not the United States or American Indian population." For the reasons previously stated regarding respondent's objections on the grounds of relevance, we do not exclude, on the asserted grounds, either the 1992 resolution of the Central Conference of American Rabbis or the 1972 letter by Harold Gross.

2. Objections to Specified Testimony and Exhibits.

Respondent seeks to exclude specified testimony responsive to alleged objectionable questions by petitioners' attorney, and specified exhibits introduced in connection with testimony. These 75 pages of objections are identified in respondent's Appendix A to its brief. Respondent objects to various questions by petitioners' attorney on the ground that such questions are leading, under Fed. R. Evid. 611(c), and/or on the discretionary grounds that such questions are vague, lacking in

foundation, argumentative, asked and answered, compound questions, questions calling for speculation or legal conclusions, and/or incomplete quotes or hypotheticals.

Having reviewed the allegedly objectionable questions, we find no merit to respondent's objections. Further, in view of the manner and frequency with which these types of objections were interposed by respondent throughout the questioning of witnesses by petitioners' attorneys, we find little purpose to these objections as made by respondent's attorney other than, possibly, obfuscation.

Respondent also objects to specified questions as requiring expert opinions of non-experts, and objects to specified testimony as hearsay or irrelevant. Respondent's objections to testimony exhibits include, variously, that such exhibits were never produced,⁴⁷ and/or are untimely, incomplete or irrelevant.

We find respondent's specified objections to testimony on the basis of hearsay to be well taken as the specified questions clearly call for testimony as to the statements of third parties, asserted for the truth of the statements, and such testimony given does not fall into any of the

⁴⁷ As respondent does not identify any specific discovery requests, we assume respondent is referring to the automatic disclosure requirements of Fed. R. Civ. P. 26(a)(3) which, as discussed previously in relation to respondent's earlier motion to strike, is inapplicable to Board proceedings.

exceptions to hearsay. Thus, we have not considered this evidence.

However, we find respondent's remaining objections pertaining to testimony, and exhibits thereto, to be without merit and we have not excluded evidence objected to on the alleged ground that expert opinions are sought from non-experts, or on the alleged grounds of lack of production, timeliness, completeness or, as previously discussed, relevance. Respondent does not specify its reasons for these objections in each case, nor are the reasons apparent. Regarding the allegation that petitioners asked for expert opinions from non-experts, we do not believe that the questions asked either seek opinions for which one would have to be an expert or seek opinions outside the expert's area of expertise. Additionally, as previously stated, all such opinions have been given weight based on our consideration of the background of the witness and in the context of the witness' testimony as a whole. As discussed in relation to respondent's earlier motion to strike, respondent's claims of lack of production are not well taken, as respondent has not identified any pertinent discovery requests to which petitioners' allegedly objectionable exhibits should have been responsive, and there is otherwise no general

obligation on petitioners in Board proceedings to disclose during discovery evidence to be used at trial. Further, we find the alleged incomplete evidence sufficiently complete for the purposes for which it is offered.

3. *Objections to Notice of Reliance Exhibits.*

Respondent also seeks to exclude specified exhibits submitted by petitioners' notices of reliance. These 52 pages of objections are identified in respondent's Appendix B to its brief. The objections are on several grounds, primarily relevance and hearsay.

We have considered each of respondent's objections and find them to be without merit. We note, in particular, that our previous discussion of relevance applies equally to the objections by respondent to the vast majority of these exhibits on the same grounds of relevance and we do not exclude any exhibits on this ground.

Regarding respondent's objections on the ground of hearsay, we reference our discussion, *infra*, concerning the extent to which the exhibits proffered by both parties are amenable to submission by notice of reliance. See, *Trademark Trial and Appeal Board Manual of Procedure (TBMP)*, Sections 707 and 708, and 37 CFR 2.122(e). Newspaper articles cannot be submitted by notice of reliance to establish the truth of the statements contained

therein. Although respondent's objections to the newspaper articles on the ground of hearsay are therefore sustained to the extent that we have not considered the articles for the truth of their statements, they are still admissible for what they show on their face. Thus, we have not excluded any of petitioners' newspaper articles.

Respondent objects to petitioners' Exhibits 93-105, consisting of videotapes, on the ground of timeliness. However, contrary to respondent's contentions, petitioners timely submitted Exhibits 93-105 with petitioners' notice of reliance on February 18, 1997, and this evidence has been considered.⁴⁸ The submission objected to contains excerpts from the videotapes previously submitted as Exhibits 93-105 and is characterized by petitioners as a "demonstrative exhibit." Since this excerpted version is untimely, as well as allegedly duplicative, it has not been considered.

Further, respondent's objection, on the ground of relevance, that the videotapes comprising Exhibits 93-105 consist of excerpts that are taken out of context, is not a basis for excluding the videotape evidence. Excerpts are,

⁴⁸ Videotapes are not usually admissible by notice of reliance. However, as indicated, *infra*, this evidence has been considered properly submitted by notice of reliance in this case.

by definition, taken from a larger whole and, thus, are out of context. This evidence has, of course, been viewed in terms of the entire record, wherein respondent has had its opportunity to provide the appropriate "context" for these excerpts.

Summary of the Arguments of the Parties

Petitioners

Petitioners state that the issues in this cancellation proceeding are whether petitioners have standing to file these petitions to cancel and whether, at the time respondent's registrations issued, the registered marks consisted of or comprised scandalous matter, or matter which may disparage Native Americans, or matter which may bring Native Americans into contempt or disrepute.

Petitioners contend that the subject registrations are *void ab initio* and that the word "redskin(s)" "is today and always has been a deeply offensive, humiliating, and degrading racial slur." Petitioners contend that "a substantial composite of the general public considers 'redskin(s)' to be offensive" and that "the inherent nature of the word 'redskin(s)' and Respondent's use of [its marks involved herein] perpetuate the devastating and harmful effects of negative ethnic stereotyping." Petitioners contend, further, that Native Americans "have understood

and still understand" the word 'redskin(s)' to be a disparaging "racial epithet" that brings them into contempt, ridicule and disrepute.

Petitioners contend that the Board must consider "the historical setting in which the word 'redskin(s)' has been used." In this regard, petitioners allege that "the history of the relationship between Euro-Americans and Native Americans in the United States has generally been one of conflict and domination by the Euro-Americans"; that "[b]eneath this socioeconomic system lay an important cultural belief, namely, that Indians were 'savages' who must be separated from the Anglo-American colonies and that Anglo-American expansion would come at the expense of Native Americans"; that, in the 1930's, government policies towards Native Americans began to be more respectful of Native American culture; that, however, these policies were not reflected in the activities and attitudes of the general public, who continued to view and portray Native Americans as "simple 'savages' whose culture was treated mainly as a source of amusement for white culture"; and that it was during this time that respondent first adopted the name "Redskins" for its football team.

Petitioners presented the testimony of its linguistics expert, Dr. Geoffrey Nunberg, regarding the usage of the

word "redskin(s)." Petitioners contend that the primary denotation of "redskin(s)" is Native American people; that, only with the addition of the word "Washington," has "redskin(s)" acquired a secondary denotation in the sports world, denoting the NFL football club; that the "offensive and disparaging qualities" of "redskin(s)" arise from its connotations; and that these negative connotations pertain to the word "redskin(s)" in the context of the team name "Washington Redskins." Regarding whether the negative connotations of "redskin(s)" are inherent or arise from the context of its usage, petitioners contend that "redskin(s)" is inherently offensive and disparaging.

Petitioners argue that the evidence supports their conclusions that, since the first written uses of the word, "redskin(s)" "has been and is used with connotations of violence, savagery, and oppression"; and that the usage "suggests a power relationship, with the whites in control, and the Indians in a position of servitude or capture," and the usage "connects Indians with savagery." Petitioners allege the following:

The term "redskin(s)" rarely appears in formal writing, such as judicial decisions, scholarly dissertations, government documents, or papers of diplomacy, where such terms as 'uncivilized' and 'savages' frequently appeared. The term has been reserved for informal writings as a slur of the most demeaning sort and as an epithet to

influence the sensibilities of the general public. American newspapers ... reveal vivid examples of the offensive and disparaging use of "redskin(s)" as a term associated with violence, savagery, racial inferiority, and other negative ethnic stereotypes.

Petitioners argue that the frequency with which the word "redskin(s)" appears in the context of savagery, violence and oppression is explained by the negative connotation of that word which is not conveyed by such terms as "Indian," "Native American," or "American Indian"; and that the repeated appearance of "redskin(s)" in this context reinforces its derogatory character. Petitioners' evidence in this regard includes newspaper articles, film excerpts, dictionaries and encyclopedias. Petitioners' linguistics expert, Dr. Nunberg, testified, *inter alia*, that "lexicographers consider[ed] the word 'redskin' from the '60s onward as a disparaging word which is variously labeled contemptuous, offensive, disparaging"; and that newspaper writers avoid using the word "redskin(s)", not because it is "too informal for use, even in the popular press," but because it is "a loaded pejorative term."

Petitioners contend that sports team names are chosen to reflect the team's location or to sound "fierce ... so as, in a symbolic way, to strike fear into the hearts of opponents." Petitioners' expert witness, Dr. Nunberg,

states that "Redskins," as part of respondent's team's name, falls into the latter category and is intended to "evoke the sense of an implacable and ferocious foe"; that this association derives from the otherwise negative connotations of savagery and violence attributable to the word "redskin(s)"; and that the word "redskin(s)" as it appears in the team name "Washington Redskins" has not acquired "a meaning that somehow is divorced from or independent of its use in referring to Native Americans."

Respondent

Respondent begins by arguing that petitioners must establish their case under Section 2(a) by clear and convincing evidence; that petitioners' evidence is biased and flawed and falls far short of this standard of proof; and that petitioners' evidence does not focus on either the appropriate time period or population and contains other specified inadequacies.

Respondent contends that the word "redskin(s)" "has throughout history, been a purely denotative term, used interchangeably with 'Indian'." In this regard, respondent argues that "redskin(s)" is "an entirely neutral and ordinary term of reference" from the relevant time period to the present; and that, as such, "redskin(s)" is "[synonymous] with ethnic identifiers such as 'American

Indian,' 'Indian,' and 'Native American'." Respondent also states that, through its long and extensive use of "Redskins" in connection with professional football, the word has developed a meaning, "separate and distinct from the core, ethnic meaning" of the word "redskin(s)," denoting the "Washington Redskins" football team; and that such use by respondent "has absolutely no negative effect on the word's neutrality - and, indeed, serves to enhance the word's already positive associations - as football is neither of questionable morality nor *per se* offensive to or prohibited by American Indian religious or cultural practices."

Respondent states that while "the term 'redskin,' used in singular, lower case form references an ethnic group, [this] does not automatically render it disparaging when employed as a proper noun in the context of sports."

In response to petitioners' contentions, respondent argues that while "'redskin' may be employed in connection with warfare, [this] is but a reflection of the troubled history of American Indians, not of any negative connotation inherent in the term itself." Respondent argues that "'redskin' is not always employed in connection with violence"; that, when "redskin" appears in a violent context, the neutrality of the word "redskin" is apparent

from the fact that, as it appears in the evidence of record, the word "Indian" or "Native American" can be substituted therefor without any change in meaning; and, further, that it is often the negative adjective added to this neutral term that renders the entire phrase pejorative.

Respondent contends, further, that its evidence establishes that Native Americans support respondent's use of the name "Washington Redskins"; and that Native Americans "regularly employ the term 'redskin' within their communities."

Respondent concludes that its marks "do not rise to the level of crudeness and vulgarity that the Board has required before deeming the marks scandalous," nor do its marks disparage or bring Native Americans into contempt or disrepute. Respondent argues that disparagement requires intent on the part of the speaker and that its "intent in adopting the team name was entirely positive" as the team name has, over its history, "reflected positive attributes of the American Indian such as dedication, courage and pride." Similarly, respondent notes that third-party registrations portraying Native Americans and the United States nickel, previously in circulation for many years, portraying a Native American are similar to respondent's

"respectful depiction in the team's logo"; and that petitioners have not established that this logo is scandalous, disparaging, or brings Native Americans into contempt or disrepute.

The Evidence

Particularly in view of the size of the record in this case, we find it useful to review the testimony and evidence submitted by the parties. First, we discuss the parties' notices of reliance. Then, except for the testimony and related exhibits of the parties' linguistics experts and marketing and survey experts, we summarize the testimony and related exhibits of, first, petitioners' witnesses and, second, respondent's witnesses. Next, we discuss the testimony and related exhibits of both parties' linguistics experts and draw conclusions in relation thereto. Finally, we discuss and draw conclusions regarding petitioners' survey, the testimony and other exhibits of petitioners' survey expert, and the testimony and related exhibits of respondent's marketing and survey expert in rebuttal.

The Parties' Notices of Reliance

A substantial amount of evidence was submitted by petitioners' and respondent's notices of reliance. We are dismayed by the parties' apparent unfamiliarity with, or

disregard for, the Rules of Practice pertaining to the submission of notices of reliance before this Board.

Except for responses to the opposing party's interrogatories,⁴⁹ third-party registrations,⁵⁰ and excerpts from dictionaries and encyclopedias,⁵¹ newspapers⁵² and

⁴⁹ Petitioners submitted several of respondent's responses to petitioners' interrogatories.

⁵⁰ Petitioners submitted copies of third-party registrations.

⁵¹ Petitioners submitted excerpts defining the word "redskin" from dictionaries and encyclopedias, including volumes dated 1910, 1955, and various years from 1966-1996. Respondent submitted excerpts from dictionaries defining the word "redskin," including volumes from various years from 1965-1981; and an excerpt from the *American Heritage School Dictionary*, 1977, containing separate entries for "redskin" and "Redskin."

⁵² While excerpts from newspapers are properly made of record by notice of reliance, such excerpts do not establish the truth of the statements contained therein. Rather, newspaper excerpts, considered in the context of the record and the issues in this case, are evidence only of the manner in which the term is used therein and of the fact that the public has been exposed to the articles and may be aware of the information contained therein. Thus, we have considered these excerpts for these purposes only. Additionally, excerpts that are unidentified as to either source or date have not been considered, as the extent to which such material is genuine and available to the public cannot be ascertained.

From newspapers, petitioners submitted articles, pictures, cartoons and advertisements pertaining to respondent's football team and its fans, including some material that is either undated or unidentified as to source, and including material from, variously, 1941-1994; articles featuring stories about the racial integration of respondent's team (including material from 1957-1961, 1969, 1986); editorials opposing respondent's team's name (including material from 1969, 1979-1988, 1992); stories about protests by individuals and groups opposed to respondent's team's name (including material from 1987-1992); and excerpts of articles and headlines featuring the term "redskin(s)" as a reference to Native Americans and about the 19th century armed conflicts between the U.S. Government and Native Americans in the Western parts of the United States, including some undated material and including material from, variously, 1879-1891, 1913, 1922, 1932-1937, 1970-1974, and 1991-1992.

Respondent submitted excerpts of two newspaper articles and headlines featuring the term "redskin(s)" as a reference to Native Americans and about the 19th century armed conflicts

books,⁵³ petitioners' and respondent's proffered exhibits are not amenable to submission by notice of reliance. See, *Trademark Trial and Appeal Board Manual of Procedure (TBMP)*, Sections 707 and 708, and 37 CFR 2.122(e). Certain "printed publications" are amenable to submission by notice of reliance because such publications are considered, essentially, self-authenticating, although such publications must be identified as to their source and date of publication. In particular, the printed publications which may be placed in evidence by notice of reliance are books and periodicals available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant to an issue in a proceeding. These printed publications do not include press releases by or on behalf of a party⁵⁴; press clippings, which are essentially compilations by or

between the U.S. Government and Native Americans in the Western parts of the United States, from 1890; articles and photographs from newspapers regarding respondent's football team, from various years from 1940-1994; and a 1992 newspaper article reporting a poll regarding respondent's team's name.

⁵³ Respondent submitted excerpts from *Ulysses*, by James Joyce; *Redskin*, by Elizabeth Pickett; "Paleface and Redskin," *The New Republic*, 1977; "Paleface and Redskin," essays by Philip Rahv, 1957; "Commentary: Research, Redskins, and Reality," by Vine Deloria, Jr., *The American Indian Quarterly*, Fall 1991; and a book cover of *Red Earth White Lies*, by Vine Deloria, Jr.

⁵⁴ Respondent submitted an undated press release regarding respondent's team and petitioners submitted several press releases.

on behalf of a party of article titles or abstracts of, or quotes from, articles; studies or reports prepared for or by a party or non-party⁵⁵; affidavits or declarations; or, as a general rule, catalog advertising or product information.⁵⁶ Similarly, photographs,⁵⁷ videotapes,⁵⁸ transcripts,⁵⁹ letters,⁶⁰ resolutions,⁶¹ contracts or minutes

⁵⁵ Certainly, a report by a government agency would be amenable to submission by notice of reliance as an official record. While petitioners submitted a report of the Michigan Department of Civil Rights, we have no information in the record that establishes whether this report can be considered an official record.

⁵⁶ Advertisements in newspapers or magazines available to the general public in libraries or in general circulation can be made of record by notice of reliance. Petitioners submitted advertisements for sports team clothing and accessories, alleged to be from National Football League (NFL) catalogs, one advertisement is dated 1985, and the remaining ads are undated. We have no information in the record regarding whether this evidence would so qualify for submission in this case.

⁵⁷ Petitioners submitted undated photographs alleged to be of the "Redskins Marching Band" and "Redskinettes" cheerleaders at respondent's team's football games. Respondent submitted photographs alleged to be of various schools and a motel featuring Native American-related names, themes and/or imagery.

⁵⁸ Petitioners submitted videotapes of NFL films and game clips and respondent submitted a videotape containing an excerpt from the 1996 movie *Courage Under Fire*.

⁵⁹ Petitioners submitted a film transcript; a transcript of a *60 Minutes* program; and documents transcribing the lyrics and musical score to respondent's team's fight song, *Rosie the Redskin*, both original and modified lyrics.

⁶⁰ Petitioners submitted, from respondent's files, letters expressing opposition to respondent's team name, dated, variously, from 1986-1993, and letters from respondent responding thereto; and 1993-1994 letters to respondent from an organization identified in the letters as the *Redskin Review*, and credentials letters. Respondent submitted letters expressing support for respondent's team name, dated, variously, from 1988-1992; and letters from Jack Kent Cooke regarding team issues, from 1983, 1987, 1992.

⁶¹ Petitioners submitted resolutions of three organizations, from 1992 and 1994; and respondent submitted 1992 resolutions from alleged tribal

of meetings,⁶² memoranda by or to the parties,⁶³ and, as a general rule, program guides⁶⁴ or yearbooks⁶⁵ are not admissible by notice of reliance as printed publications; nor are such documents otherwise admissible by notice of reliance.

Both parties submitted material that is not properly made of record by notices of reliance, but neither party has objected on this basis to the material submitted by the

organizations and letters from alleged tribal chiefs in support of respondent's team's name or in reference to other alleged uses of the name "Redskins" by sports teams.

⁶² Petitioners submitted minutes of a meeting of Miami University officials; minutes of a meeting of respondent's board of directors; a copy of a Boston proclamation of 1755; and copies of various contractual agreements between respondent and its musician and cheerleader groups.

⁶³ Respondent submitted a 1993 memo pertaining to a radio survey regarding respondent's team's name.

⁶⁴ To the extent that program guides are magazines available to the general public, these documents could be submitted by notice of reliance. Petitioners submitted covers of respondent's football team's game program guides featuring realistic portraits of identified Native American individuals, including an undated page from an opening game and cover pages from, variously, 1955-1960; covers of respondent's football team's game program guides featuring cartoons with caricatures of Native Americans, including several undated pages indicating "15th and 17th years," and pages from, variously, 1938-1958; and press guides and program guides from, variously, 1948-1990. Respondent submitted cover pages of respondent's football team's game program guides featuring realistic portraits of identified Native American individuals, from, variously, 1956-1960. However, the record contains no information indicating the extent to which these program guides may be in general circulation to the public.

⁶⁵ Petitioners submitted excerpts from "Washington Redskins" yearbooks, *Redskins Magazine*, and *Pro! Magazine*. These yearbooks and magazines may be in general circulation to the public and, thus, amenable to submission by notice of reliance. However, the record contains no information in this regard.