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Washington “Redskins” – Disparaging Term or Valuable Tradition?:
Legal and Economic Issues Concerning *Harjo v. Pro-Football, Inc.*

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I'll never change the name of the Redskins. You have my word on that. In addition to that, it's really what the Redskins mean that's not quite out there...what it means is tradition. It means winning. It means a great tradition for the franchise.

Daniel Snyder, Owner of the Washington Redskins ¹

A long habit of not thinking a thing wrong gives it a superficial appearance of being right, and raises at first a formidable outcry in defense of custom.

Thomas Paine²

In 1970, the University of Oklahoma became the first prominent National Collegiate Athletic Association (NCAA) institution to discontinue its affiliation with a Native American name or mascot.³ Over 100 other colleges and universities have since changed their names and imagery – sometimes amid public scrutiny and campus pressure.⁴ In 2005, the NCAA passed a resolution requiring 18 member schools to either justify the retention of their Native American affiliation through formal Native American support or face potential postseason penalties.⁵ Most institutions have either demonstrated sufficient Native American support to retain their affiliation (Florida State University, University of Utah, Central Michigan University, etc.) or have elected to change their monikers (Newberry College, Northeastern State University, etc.); however, the University of North Dakota has pursued litigation against the NCAA to retain their “Fighting Sioux” nickname.⁶ Recently, a district judge has granted a preliminary injunction that prevents the NCAA from banning the University from hosting postseason

¹ The Novak zone: Interview with Daniel Snyder, ¶ 34 (Jan. 11, 2003). Retrieved November 6, 2006 from <http://transcripts.cnn.com/TRANSCRIPTS/030111/smn.20.html>.

² Thomas Paine, *Common Sense*, at 1 (1776)

³ (Garber, 1999, ¶ 9).

⁴ (Conrad, 1999, ¶ 2; Morrison, 2005, ¶ 1).

⁵ (Prisbell, 2005, ¶2).

⁶ (Johnson, 2006, ¶ 1; Powell, 2006, ¶ 4).

games because of its nickname.⁷ Franchises in the major North American professional sports leagues that have Native American trademarks, such as Major League Baseball's (MLB) Atlanta Braves and Cleveland Indians, the National Hockey League's (NHL) Chicago Blackhawks, and the National Football League's (NFL) Kansas City Chiefs and Washington Redskins have occasionally faced similar public protests or condemnation but have not changed their names.⁸

Opposition specifically devoted to the Washington Redskins' name has involved protests as well as ongoing litigation.⁹ The primary legal contention from the Redskins' opponents is that section 2 of the 1946 Lanham Act prohibits trademarks that "consists of...matter which may disparage [persons] or bring them into contempt or disrepute"¹⁰ and that the term "Redskins" is known in the dictionary and in the common American lexicon as "a disparaging term for a Native American" ("Redskins," n. d.), and is considered "the most derogatory thing Native Peoples can be called in the English language."¹¹ The Washington Redskins have continually resisted moral pleadings and legal challenges to change their name and have consistently responded that their name is not disparaging¹², and that it merely conveys a tradition of winning.¹³ Although never discussed by Washington Redskins' owner Daniel Snyder or other team representatives, resistance to a potential name change may be motivated at least somewhat by economic concerns as the Redskins' name is estimated to be worth at least \$5 million dollars a

⁷ ("NCAA won't appeal ruling on 'Sioux' flap," 2006, ¶ 1)

⁸ ("Despite objection, Redskins to remain Redskins," 1991, ¶ 3; "Foes fight Cleveland Indians...", 1999, ¶ 1; "Kansas City Chiefs," n. d.).

⁹ (See *Harjo v Pro-Football, Inc.*, 1994; 1999; *Pro-Football, Inc. v Harjo*, 2003; 2005).

¹⁰ (15 U.S.C. § 1052).

¹¹ ("Harjo: Get educated," 1999, ¶ 7).

¹² (Anderson, 1999, ¶ 2; *Pro-Football, Inc. v Harjo*, 2003).

¹³ ("The Novak zone...", 2003, ¶ 36).

year.¹⁴ In addition, the NFL's assistance in the Redskins' legal battles¹⁵ may partially be explained by the Redskins' contribution to the NFL's \$3.2 billion yearly licensed merchandise revenue.¹⁶

This Article briefly details the Washington Redskins' history and discusses the continuing litigation surrounding the Washington Redskins' trademark protection. In addition, it conducts an examination of recent name changes in sports and costs associated with *re-branding* efforts. An analysis is then conducted to attempt to quantify the value the Washington Redskins' name provides to owner Daniel Snyder above and beyond what a typical NFL name is worth. Finally, the authors provide discussion and conclusions.

I. The History of the Redskins' Trademark and Litigation

On July 8, 1932 George Preston Marshall headed a syndicate that purchased an NFL franchise in Boston.¹⁷ The team played its home games in the same stadium as MLB's Braves and used the same nickname.¹⁸ In 1933, the team was renamed the "Redskins."¹⁹ According to the team, in addition to avoiding confusion with MLB's Braves, the new name was designed to honor their coach, Native American William "Lone Star" Dietz.²⁰ In 1937, Marshall moved the franchise to Washington D.C. and began to utilize "Washington Redskins" in commercial activities.²¹ During the subsequent 30 years, the Washington Redskins introduced a team band and formally established team cheerleaders named the "Redskinettes." On July 14, 1966 the Redskins

¹⁴ (Barker, 2005, ¶ 7).

¹⁵ (Anderson, ¶ 5).

¹⁶ ("Raiders lead NFL merchandise sales," 2004, ¶ 1).

¹⁷ (*Pro-Football, Inc. v Harjo*, 2003).

¹⁸ ("Redskins history," n. d., ¶ 152).

¹⁹ ("Redskins history", ¶ 151).

²⁰ (*Pro-Football, Inc. v Harjo*, 2003).

solicited trademark protection for “the Redskins” written in a stylized script.²² After their initial trademark was granted in 1967, five additional trademarks were granted in later years (three in 1974; one in 1978; one in 1990) with no dispute or opposition from Native American parties.²³

In 1992, Suzan Shown Harjo and six other Native Americans petitioned the Trial Trademark and Appeal Board (TTAB) to cancel six Redskin trademarks (U.S. registration numbers 1,606,810; 1,085,092; 987,127; 986,668; 978,824; 836,122), arguing that they disparaged Native Americans and cast Native Americans into contempt or disrepute in violation of the 1946 Lanham Trademark Act (15 U.S.C. § 1051). The Washington Redskins (as Pro-Football, Inc.) argued that 1) the Redskins’ trademarks do not disparage Native Americans, 2) the trademarks do not bring Native Americans into disrepute, 3) Section 2(a) of the Lanham Act violates the First Amendment, 4) Section 2(a) of the Lanham Act violates the Fifth Amendment, and 5) the petitioners standing is barred by the doctrine of laches.²⁴

The Trial Trademark and Appeal Board issued a pretrial order in March 1994 that struck down Pro-Football’s constitutional defenses as beyond the scope of the Board’s authority.²⁵ In addition, it held that the laches defense was unavailable since the petitioner argued on behalf of a broad, public interest.²⁶ In 1999, the TTAB issued a cancellation order noting the Redskins name may “bring Native Americans into contempt or disrepute.”²⁷ The order, if upheld upon appeal, would permit Pro-Football, Inc. to

²¹ (*Pro-Football, Inc. v Harjo*, 2003).

²² (*Pro-Football, Inc. v Harjo*, 2003).

²³ (Barker, 2005, ¶ 4; *Pro-Football, Inc. v Harjo*, 2003).

²⁴ (*Harjo v Pro-Football, Inc.*, 1999; *Pro-Football, Inc. v Harjo*, 2003).

²⁵ (*Harjo v Pro-Football, Inc.*, 1994).

²⁶ (*Harjo v Pro-Football, Inc.*, 1994).

²⁷ (*Harjo v Pro-Football, Inc.*, 1999, p. 1748).

continue use of the disparaging marks, but would remove trademark protection, allowing any individual or entity to produce and distribute merchandise bearing the “Redskins” logo.

Pro-Football, Inc. sought relief in the District of Columbia’s district court. On October 1, 2003, Judge Colleen Kollar-Kotelly ruled that the TTAB erred in its finding that there was sufficient evidence to decisively conclude that the name “Redskins” was disparaging to Native Americans.²⁸ In addition, the court agreed with Pro-Football, Inc. that an unreasonable amount of time had passed since the trademarks were filed and granted.

The best time to resolve this case was 1967 or shortly thereafter. The net result of the delay is that there is no direct or circumstantial evidence in the record that, at the times the trademarks were registered, the trademarks at issue were disparaging; even though the Native Americans contend that during this entire time period the trademarks were disparaging.²⁹

Though rescinding the petitioners standing based upon laches, the court did not resolve any constitutional issues pertinent to the case. The case was then appealed.

In 2005, the United States Court of Appeals for the District of Columbia remanded the Redskins’ case back to the district court after ruling that the doctrine of laches did not apply to one of the petitioners.³⁰ Mateo Romero was only one year old in 1967 when the first Redskins’ mark was registered.³¹ Since Romero did not reach the age of majority until 1984, his participation in the 1992 filing could not be perceived as

²⁸ (*Pro-Football, Inc. v Harjo*, 2003).

²⁹ (*Pro-Football, Inc. v Harjo*, 2003).

³⁰ (*Pro-Football, Inc. v Harjo*, 2005).

³¹ (*Pro-Football, Inc. v Harjo*, 2005).

unjustifiably delaying his litigation to unreasonably hurt Pro-Football, Inc.³² The remanded case is still pending at the district level.

The decision to remand the case to the district court spurred an August 12, 2006 petition involving Native Americans who, upon filing, had “only recently reached the age of majority.”³³ Philip Mause, an attorney representing the Native American litigants in both cases, noted the importance of the courts potential ruling on the merits, rather than technical aspects of the cases, “Sooner or later, the disparagement issue has to be faced and resolved. And hopefully it will make the [Washington] team realize that the term is disparaging.”³⁴

Given the continual legal action against the franchise, some may be surprised that owner Daniel Snyder has remained steadfast in his commitment to the “Redskins” name.³⁵ When faced with costly and time-consuming litigation, many businesses quickly diffuse the potential problems by altering business practices or by settling out of court. By simply implementing a name change that protestors and litigants have suggested, Snyder would appear to remove what at best is an annoying obstacle and at worst is a time and resource-draining legal battle. However, consumer familiarity and franchise tradition are elements of brand value or *brand equity*, a rapidly increasing concern for sport franchises.³⁶ Although numerous intercollegiate athletic teams have changed names and implemented re-branding marketing activities to support those efforts, major professional sports franchises have resisted. Suzan Shown Harjo has noted why the Redskins and other professional sports teams may be reluctant to listen to even the

³² (*Pro-Football, Inc. v Harjo*, 2005).

³³ (“Petitioners’ petition for cancellation,” 2006, ¶ 6).

³⁴ (Moses, 2006, ¶ 9).

³⁵ (“The Novak zone...,” 2003, ¶ 34).

harshest criticism or powerful litigation, “Educational sports has been willing to change, and pro sports has not been willing to change, because one is about education and one is about money, period.”³⁷ However, despite Harjo’s claims and the Redskins reluctance to change their name, no studies exist that attempt to measure the financial benefits or detriments associated with a Native American logo, nickname, or mascot.

II. Financial Implications of Franchise Re-Branding

In recent years, professional sports teams have begun to release multiple versions of their uniforms, hats, and other licensed merchandise to enhance revenues by capitalizing on their trademarks and logos.³⁸ Most teams in the major North American sports leagues have at least three different jerseys – home, road, and retro, with some teams also offering special opening day or holiday uniforms.³⁹ Major League Baseball’s San Diego Padres have even played in camouflaged jerseys to honor the large military presence in the area as well as to increase their jersey sales.⁴⁰ Offering multiple uniforms enables the franchise to sell more merchandise to die-hard fans who want every version their team offers and to casual consumers who want to choose from an array of styles. In some instances, teams have not only expanded the number of uniform styles or colors, but have also changed their geographic name or their nickname. The change of a geographic name, when not associated with franchise relocation, has occurred to expand potential marketing opportunities (e.g., Golden State Warriors) or to reap benefits from a sponsorship agreement (e.g., Los Angeles Angels of Anaheim). Franchises have changed

³⁶ (Gladden, Milne, and Sutton, 1998, p. 1).

³⁷ (Hyland, 2004, ¶ 10).

³⁸ (Williams, 2004, ¶ 2).

³⁹ (Williams, ¶ 3).

⁴⁰ (“Novelty jerseys toy...,” 2000, ¶ 1).

their nickname in the case of new ownership (Anaheim Ducks), relocation (Dallas Stars), or for political reasons (Washington Wizards).

Any nickname or related mascot change will present a sport franchise with potential financial tradeoffs. A potential benefit is the ability to re-brand in the minds of current consumers. This enables the team to promote and sell new merchandise, possibly at higher levels than prior years. Name changes also may initiate sales to customers who were previously not interested in the old brand. In the cases where franchises may re-brand a name or logo that was offensive to some constituents (such as the Cleveland Indians or the Washington Redskins), the elimination of potential public demonstrations may be augmented by sales to previously hostile consumers. After many years of criticism of their name's potential inference to gun violence, the NBA's Washington Bullets changed their name to "Wizards" in 1997.⁴¹ The name change was partially attributed to Wizards owner Abe Pollin's friendship with Yitzhak Rabin – who was killed by a gunshot wound in 1996.⁴² Despite some initial negative reaction from long-time fans, merchandise sales increased substantially as fans purchased the new branded apparel.⁴³

Certainly, the altering of an offensive nickname, logo, or mascot offers the franchise an initial positive public relations platform on which to launch its new marketing efforts. However, though unknown, the possibility exists that fans attached to the previous name or logo may refuse to purchase re-branded products – negating or potentially overcoming any new financial benefits from the change. For the potential re-branding of a controversial name like the Washington Redskins, some fans have voiced

⁴¹ (“Like magic, Wizards name becomes cool,” 2002, ¶ 6).

⁴² (Id.).

their displeasure with the potential name change and have raised concern that their support for the team may wane if it yields to public pressure.⁴⁴

When changing a franchise's name, logo, or mascot, the out-of-pocket costs can be substantial as previous uniforms, practice gear, transportation, office supplies, and other items must be altered or new items purchased. For instance, in 2000, the San Jose Clash of Major League Soccer (MLS) changed its name to Earthquakes (formerly used by the San Jose franchise of the North American Soccer League). Licensed merchandise sales initially rose, but then settled near previous levels. Overall, the hard costs associated with the re-branding were higher than the actual net gain in sales, making it a losing financial proposition, according to a discussion with a former Clash employee.⁴⁵ It also may have been the case that some fans of the Clash chose not to purchase new Earthquakes merchandise.

The decision to potentially change a team name, logo, or mascot is one that directly impacts a professional sports franchise's bottom line and will therefore be undertaken only after thorough financial analysis. Even as early as 1992, the Washington Redskins generated 8% of their roughly \$60 million in revenue from licensed merchandise sales. Since costs associated with the development and manufacture of licensed merchandise are extremely low compared to other expenses (such as player salaries), franchises will attempt to protect their brand equity as its contribution to overall profits is extremely high.

Attempting to project the exact value of a franchise changing a negative name is difficult. Implementing a thorough cost-benefit analysis requires access to a variety of

⁴³ (Id., ¶ 11).

⁴⁴ ("Harjo: Get educated," 1999).

proprietary data. However, there are certainly cases where the actions of universities demonstrate the value they place upon their traditions. At the University of North Dakota, a \$100 million gift to build a new hockey arena was accepted despite protests from some students, faculty, and members of the community.⁴⁶ Alumnus Ralph Engelstad demanded that the University of North Dakota retain the nickname “Fighting Sioux” or the donation would be withdrawn. Conversely, Marquette University changed their name from the “Warriors” to the “Golden Eagles” in 1993.⁴⁷ Despite one Board of Trustees’ member pledging a million dollars to change the name back to Warriors, Marquette elected to retain a less controversial moniker.⁴⁸

III. Methodology and Data

The potential harm to the team due to the “Redskins” logo can not be measured through an investigation of past team name changes as there is not nearly enough relevant data available to determine the net financial gain or loss. However, an alternative methodology can determine if a team, vis-à-vis other teams in its league, is being financially harmed by its name, logo, or mascot.

The methodology implemented developed a model of licensed revenue sales to determine if the Washington Redskins are heterogeneous compared to other NFL franchises. The null hypothesis was that the Redskins’ licensing sales are not adversely affected by its trademarked name. Data from 1989-1996 containing each NFL team’s annual licensing revenue ranking (used as a proxy for the marketplace acceptance of the Redskins name and logo), as well as yearly NFL team wins, lagged wins, metropolitan

⁴⁵ (Robert Wilmot, personal communication, January 20, 2005).

⁴⁶ (“Opulent rink fuels controversy...,” n. d., ¶ 2).

⁴⁷ (“Name change at Marquette,” 2005, ¶ 4).

⁴⁸ (O’Brien, 2004, ¶ 1).

area population, and an indicator variable denoting Redskins was used. A model, utilizing ordinary least squares (OLS), was tested. The model is:

$$LRR_{it} = \alpha + \beta Wins_{it} + \gamma Wins_{it-1} + \delta Pop_{it} + \theta Rind_t + \varepsilon_{it}, \quad (1)$$

where ε_{it} is the error term and is independently and identically distributed, LRR_{it} is the licensed revenue ranking of team i in year t , $Wins_{it}$ is the number of wins for the season, $Wins_{it-1}$ is the number of wins during the previous season, Pop_{it} is the population of the MSA in which the team plays, and $Rind_t$ is an indicator variable that takes 1 if the team is the Redskins and 0 otherwise. The coefficients (Greek letters) represent the incremental impact that each of the variables has on licensed revenue rank. For instance, if a specific team's number of wins goes up by three from one year to the next, the licensing revenue ranking will change by three times β . The OLS analysis generates estimates of the coefficients by fitting a line to the data points represented by each of the variables.⁴⁹ There are 196 observations used in the analysis.⁵⁰

IV. Analysis and Results

As shown in Table 1 below, the final model estimating licensing revenue rankings across NFL teams over an eight-year period has excellent overall explanatory power. The first model is for comparison purposes only and shows that utilizing a Redskins indicator variable, while significant, explains slightly more than 1% of the variation in team licensed revenue rankings over time and across teams. This is hardly surprising since other factors that affect licensed merchandise revenue have been omitted.

⁴⁹ (See "Reference Manual on Scientific Evidence, 2nd ed., pp. 179-228, 2000)

The final model utilizes OLS and explains about 55% of the variation in licensed revenue rankings across teams and over time.⁵¹ The control factors in the model behave as expected. The number of wins a team generates during the season of analyzed licensed merchandise sales is highly significant and each additional win increases the team's licensed merchandise ranking (i.e., a team with one more win can expect to jump past another NFL team in licensed merchandise sales, all else remaining equal). The number of wins from the previous season has an even greater impact upon licensed merchandise revenue, with an additional win the previous year increasing the team's rank by more than one position, all else equal. Prior research in Major League Baseball has indicated that the previous season's winning percentage has a greater impact upon a team's attendance than the winning percentage in the first half of the current season (Rascher, 1999). Although most NFL teams sell out the vast majority of their games through season ticket sales (primarily due to having only eight home games), previous success appears to be one component of licensed merchandise sales. The impact of metropolitan area population on licensed merchandise sales is statistically significant, but the size of the impact is quite small. For instance, a 50% increase in population only increases a team's ranking by one position.

Table 1. Results of Licensed Revenue Ranking Models

⁵⁰ During the period of analysis, the Cleveland Browns played for seven seasons, while the Jacksonville Jaguars and Carolina Panthers each played for four years.

⁵¹ A third model was analyzed that viewed the information as a dynamic panel data by including a one-year lag of the dependent variable (licensed revenue ranking) as a control factor. The estimation of this model uses the Arellano-Bond estimator (a Generalized Method of Moments estimator) which is an augmented instrumental variables estimator. It analyzes a differencing equation which causes the Redskins indicator variable to drop out. This is always the case when an indicator variable is differenced. The findings from that model are consistent with the model shown in Table 1, but are less interesting because they do not contain the variable of interest, the Redskins indicator.

Model:	Linear Regression	Linear Regression
	(1)	(2)
	Ranking of	Ranking of
Dependent Variable:	Licensed Revenue	Licensed Revenue
R ²	0.013	0.55
F-stat	3.09	58.17
Number of Observations	231	196
Independent Variables:		
Constant	15.18****	36.14****
Rank _{t-1}	--	--
Number of Wins	--	-1.06****
Wins _{t-1}	--	-1.27****
Metro Population	--	-4.14e-7****
Redskins Indicator Variable	-5.31*	-4.73***

Significance: * - 10% level; ** - 5% level; *** - 1% level; **** - 0.1% level

The primary variable of study, the Redskins indicator variable, reveals that when other factors are controlled (e.g., winning and population) the Redskins are nearly five spots higher in the licensed merchandise rankings than they “should” be compared to other NFL teams. In other words, when considering licensed merchandise sales, the Redskins appear to have a much more attractive name and logo than other NFL teams. For instance, in 1995, an increase in ranking of licensed merchandise sales by one was worth just less than one million dollars in additional sales. Certainly, other factors contribute to licensed merchandise sales as the Redskins NFL ranking during the period of analysis attests. Specifically, the Redskins ranking changed, on average, by four spots annually during the time period of the data. However, this data indicates that the Redskins’ merchandise sales have not been harmed during the numerous organized protests, negative publicity, and litigation.⁵²

⁵² Sensitivity analyses were conducted on the OLS model. An omitted variable test (Ramsey RESET test) shows that there are no significant variables missing from the model. Other tests for model robustness show that there is not a multicollinearity problem or serial correlation. There was a problem with heteroscedasticity so Huber/White sandwich estimators were used for the error terms. This impacts the t-statistics, but not the coefficients in the model. The results shown in Table 1 include this adjustment.

Conclusion and Discussion

Owner Daniel Snyder has remained steadfast in his commitment to retain the “Redskins” moniker and logo. Although he continually cites tradition as the motive, the results of this study reveal that his refusal to change the name may, in fact, be related primarily or solely to money – as Susan Shown Harjo has noted.⁵³ Certainly, a potential decision on the constitutional merits in the *Harjo* case, or in other cases filed against the Redskins, may result in the loss of trademark protection. However, if litigants are unable to remove trademark protection either by a ruling on “disparagement” or “laches,” their best recourse may be to investigate opportunities for the Redskins (and other teams) to be compensated for a potential name change. As distasteful as that may seem to some, business owners typically respond favorably to proposals that increase their profits.

The actions of the NFL will be interesting to observe if the Redskins prevail on all legal arguments. Though other teams share a portion of the licensing revenue that the Redskins help to produce, the NFL has long tried to seek solutions to problems that benefit the entire league as well as the community. If the courts fail to remove trademark protection, the NFL could eventually attempt to implement a solution that financially compensates the Redskins while also positioning the league as a champion for civil rights. Conversely, the NFL could continue to remain on the sidelines as the protesters, though no longer supported by the hope of victory through the courts, continue to seek success through public opinion. Ultimately, the question that may remain unanswered is the compensation Daniel Snyder would agree to start a new tradition in Washington D.C.

⁵³ (Hyland, 2004, ¶ 10).

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