

The right to be offended: should we toughen up? Legal argumentation analysis in the case of blackhorse v. pro-football inc.

Blaž Marinčič Udvarc

ABSTRACT

It is arguable that the use of the term »Redskins« is controversial, and thus should be supported by substantial evidence until proven as such. This paper explores the controversies associated with the Washington Football Team, formerly known as the Washington Redskins. It further analyzes the legal arguments and examines the logical strengths behind the conclusions outlined in this research paper. To achieve the aforementioned objectives, scholarly articles were revised alongside an analysis of the Blackhorse V. Pro-Football Inc. case. It is hypothesized that the judge in this case Gerald Bruce Lee's argumentation was flawed in the verdict of the infringement of the First Amendment right to free speech put forward by Pro Football Inc. in correlation with the Section 2(a) of the Lanham Act. The aforementioned conclusion was deduced on the basis of his argumentation being irrational and unsupported by evidence. Whereby insufficient differentiation of the term "disparage" (among others) was inappropriately utilized in various contexts it causes legal ramifications as well. It is of questionable grounds to presume that the use of the word »Redskins« may be deemed offensive no matter the context. Notably, societal alterations, norms, and time periods contribute to the offensive and misconstrued nature of various terminology. Hence, good legal argumentation is dependent on the consideration of all circumstances and societal state of condition.

Keywords: Redskins, Disparagement, Argumentation, Society, Offensiveness

Pravica biti užaljen: se moramo utrditi? Analiza pravne argumentacije v zadevi Blackhorse V. Pro-Football Inc.

POVZETEK

Predmet raziskovanja je vprašanje ali je uporaba izraza »Redskins« sporna in ali bi bilo treba uporabo tega izraza podpreti s tehtnimi utemeljitvami, dokler se ne dokaže, da ta izraz ni sporen. Ta znanstveni članek raziskuje polemike, povezane s poimenovanjem športnega moštva Washington, prej znanega kot Washington Redskins, ki igra ameriški nogomet. Nadalje so v članku analizirani pravni argumenti za in proti, obenem pa članek preučuje logične prednosti zaključkov, opisanih v tej raziskavi. Da bi dosegli omenjene cilje, so v raziskavi analizirani relevantni akademski pogledi na to problematiko, opravljena pa je tudi analiza sodne odločbe v zadevi Blackhorse V. Pro-Football Inc. Domneva se, da je bila argumentacija, ki jo je v obrazložitvi navedene sodne odločbe uporabil sodnik Gerald Bruce Lee napačna v delu o ugotovitvi kršitve pravice do svobode govora iz prvega amandmaja ameriške ustave, ki jo je predložila stranka Pro Football Inc. v povezavi s členom 2(a) Lanhamovega zakona. Omenjeni sklep je sodnik izpeljal na podlagi argumentacije, ki je neracionalna in nepodprta z dokazi. Ker je bilo nujno razlikovanje izraza »zaničevanje« oziroma »omalovaževanje« (med drugim) neustrezno uporabljeno v različnih kontekstih, to povzroča tudi pravne posledice. Vprašljiva je namreč presumpcija, da je uporaba besede »Redskins« žaljiva vedno in povsod, ne glede na kontekst, v katerem je uporabljena. Predvsem družbene spremembe, norme in različna časovna obdobja prispevajo k napačno razumljeni naravi različnih izrazov oziroma njihovi (ne)žaljivosti. Zato je dobra pravna argumentacija zgolj tista, ki upošteva vse navedene okoliščine in družbeno stanje.

Ključne besede: »Redskins«, »Omalovaževanje«, »Argumentacija«, »Družba«, »Žaljivost«

1. Introduction

Washington Football Team, formerly known as the Washington Redskins is an American football team that was founded as the Boston Braves in the year 1932 but changed its name the following year. From 1933 (Kirkland, 2017, pp. 480) until the franchise moved to Washington D.C. in 1937 the football team was called the Boston Redskins. From 1937 to 2020 the team went under the name of the Washington Redskins. This name sparked many controversies. A group of people found the name to be racially offensive and inappropriate. That is why Amanda Blackhorse, Marcus Briggs-Cloud, Phillip Gover, Jillian Pappan and Courtney Tsotigh decided that it is time to end the use of the name »Redskins« and filed a case with the Trademark Trial and Appeal Board of the United States Patent and Trademark Office in order to cancel the trademarks of the aforementioned name. The Trademark Trial and Appeal Board of the United States Patent and Trademark Office decided (two to one) to cancel the trademarked names, stating the reason behind it as disparaging to a substantial number of Native Americans. They argued that their decision is based on the fact that there is a significant drop in the usage of the term amongst the members of the society which should indicate that the term has a negative connotation. The government agency also stated that it found the term »Redskins« to refer to Native Americans and it does not have a different meaning when it comes to the context of sports. The group of petitioners provided evidence of disparagement in the shape of references made by journalists and lines from movie scripts that refer to »Redskins« as enemies. The Trademark Trial and Appeal Board of the United States Patent and Trademark Office followed this evidence and did not put any weight to the claims of the football team that the term is solely descriptive and does not differ from any other term that uses color to racially differentiate people.

The Washington Redskins filed the appeal on the grounds that the government agency ignored the weight of the evidence which caused the infringement of their First Amendment right to free speech. The U.S. District Court of Alexandria in Virginia affirmed the decision of the Trademark Trial and Appeal Board finding that the evidence before the Court supports the legal con-

clusion that the use of the name »Redskins« may disparage Native Americans.

On October 30, 2015 Pro-Footbal Inc. filed an appeal with the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia. In this appeal they argued that there are many more names that could be potentially deemed offensive but have been given trademarks by the same government agency that now states that one of that trademarks may disparage Native Americans.

United States Court of Appeals for the Fourth Circuit decided that while the aforementioned appeal number 15-1874 was still pending, the Supreme Court gave ruling in the *Matal v. Tam* (SCOTUS, 137 S. Ct 1744, 1751) case, finding a violation of the free speech clause of the First Amendment. In light of this case that was decided by the Supreme Court of the United States the United States Court of Appeals for the Fourth Circuit vacated the order made by the district court and remanded for further proceedings that should be consistent with the ruling in *Matal v. Tam*.

This paper aims to analyze the legal argumentation behind the verdict in the case mentioned at the beginning of this paper. The main objective is to showcase the arguments that lead to certain conclusions and test them for their logical strength.

2. Analysis

Before we start with our analysis we need to point out the legislation that Pro-Football Inc. argued as unconstitutional. According to Pro-Footbal Inc. Lanham Act, more precisely its Section 2(a) which prohibits registration of marks which may disparage others or bring them in contempt or dispute, causes unconstitutional restrictions on free speech. It argued in front of The U.S. District Court of Alexandria that such a restriction is too vague which is unconstitutional and as such the Trademark Trial and Appeal Board of the United States Patent and Trademark Office violated due process by issuing a cancellation of their trademarks based on unconstitutional legislation.

Judge Gerald Lee rejected the mentioned arguments and held that there are no free speech concerns regarding Section 2(a) of the Lanham Act. He went as far as saying that the federal trademark registration programme is government speech and thus

exempt from the First Amendment scrutiny that was argued by Pro-Football Inc.

In addition to that, judge Gerald Lee held that Section 2(a) of the Lanham Act is not unconstitutionally vague due to the fact that it provides a clear and fair warning regarding which conduct is prohibited and which is allowed. His opinion was that the relevant section does not encourage arbitrary and discriminatory enforcement. Is his argument based on solid grounds? To find out we must first analyze Section 2(a) of the Lanham Act which states:

»No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it— (a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 3501(9) of title 19) enters into force with respect to the United States.» (U.S. Trademark Law Federal Statutes, U.S. Patent & Trademark Office, 25.11.2013, § 2 (15 U.S.C. § 1052), pp. 9).

We can clearly see that there is an exemption from the obligation not to refuse registration on account of its nature. The nature of the trademark needs to be of such matter that it either comprises immoral, deceptive, or scandalous matter, or it may disparage or falsely suggest a connection with persons (living or dead), institutions, beliefs or national symbols, or bring them into contempt or disrepute.

The wording of Section 2(a) is set out in a way that we can immediately see it needs some sort of judicial interpretation to enact the meaning of certain words such as »immoral«, »deceptive«, »scandalous« onto a case which the judge has in front of them. Not to mention the wording »*may disparage*« and »*bring them into contempt or disrepute*« which also gives a broader field of interpretation to the judge. Such interpretation can potentially lead to judicial activism if the judge decides to go out of the frame that the legislator intended and provided with the bill. But did judge

Gerald Bruce Lee of the U.S. District Court of Alexandria impose more than the legislator intended when deciding in the *Blackhorse v. Pro-Football Inc.* case? We will try to resolve this question.

The position that judge Gerald Bruce Lee took was marred by the fact that the term »*Redskins*« was implied to be used in a derogatory way. The Section 2(a) of the Lanham Act uses the term »*may disparage*« but it is not clear whether Native Americans were actually represented as being of little worth. When someone or something is disparaged it is regarded or represented as being of less worth. The role of the judge here was not to deem what the name »*Redskins*« means but to rule in a case regarding the trademark of the name. Before deciding in this case, there was a need to decide if the use of the name »*Redskins*« regards Native Americans as being of less worth or not. This was not done, as it was by some absent logic decided that it does and then the Section 2(a) of the Lanham Act was applied onto the fact that was not proven beforehand. It was merely stated by Amanda Blackhorse and others. The court did not go deeper than that.

For example, we can highlight the *Harjo v. Pro-Football Inc.* case from the year 1992 (Rasul, 2015, pp. 340) in which the Trademark Trial and Appeal Board decided that the term »*Redskins*« may be disparaging of Native Americans because a group of Native Americans which were the petitioners in that case were offended. The Trademark Trial and Appeal Board followed entirely the claims of the petitioners that they found the name to be a racist designation for a Native American person which brings Native Americans into contempt, ridicule and disrepute only to have its ruling reversed in September of 2003 by the United States District Court for the District of Columbia which ruled that decision made by the Trademark Trial and Appeal Board regarding disparagement was not supported by substantial evidence (Paczkowski, 2004, pp. 1).

The mentioned case is important because it shows that the Trademark Trial and Appeal Board was quick to jump to a conclusion. A tad too quick if we recall the verdict of the United States District Court for the District of Columbia. The main objective that the Trademark Trial and Appeal Board had was to decide whether the standard of disparagement was met, which included looking at the dates when trademarks were registered and then decide if it was disparaging back then to use such names. For the

»Redskins« it was the time window from 1967 to 1990 regarding the Hanjo v. Pro-Football Inc. case. At the time of solving this case there was no precedent so the Trademark Trial and Appeal Board had to set a precedent by first determining what is the meaning of the word »*disparage*« (Paczkowski, 2004, pp. 2). On top of that, the Trademark Trial and Appeal Board decided that the perception of the word needs to be tied to a reference group instead of the views of the general population.

The United States District Court for the District of Columbia heavily criticized the conclusion that the term »Redskins« can refer to either a Native American person and a football team since there was no evidence supporting that. If the term was disparaging it would have already fallen out of use in society, to which the United States District Court for the District of Columbia concluded that even if the term was disparaging or even offensive to Native Americans, it would not mean that the use of this term would be automatically offensive when used in the context of the Washington Redskins football team (Paczkowski, 2004, pp. 3).

This is an important distinction that the United States District Court for the District of Columbia. Even if the general use of the term was to become virtually non-existent due to derogatory implications, this does not automatically disqualify the term from its use in the context of sports. Knowing this we can now firmly state, that there needs to be a line that is drawing at when and where a term is used. Such a conclusion enables us to differentiate between the different contexts of use, be it formal or informal, benevolent or malevolent. It would be of common logic to determine whether the context of the usage of the term wants to convey hostility or wants to link a certain tradition or historical meaning behind it. The proof of this is certainly the fans of the Washington Football Team that referred to the team by its registered name due to the historical linkage which was given when the team and franchise were founded, and not because they would want to mock, slander, traduce or defame Native Americans.

Here lies the problem. The legal argumentation that judge Gerald Bruce Lee used was flawed because he did not deduce the two operational uses for the term »Redskins«. His reasoning was based on a fact that was not yet proven by substantial evidence. His inductive reasoning was amiss because he failed to take into account the precedent set forth by the United States District Court

for the District of Columbia in giving terms their own context in which they are used. At this point we can see the problem that the slippery slope has caused. By not putting the right context around the use of the term »Redskins« judge Gerald Bruce Lee wrongly deemed it a disparaging term and then used it according to the Section 2(a) which could not have given good results due to the fact that the previous steps of legal reasoning that were done could not aid in the legal argumentation that followed.

This shows that the argumentation used was flawed. The mistake was done partially also due to the flawed logical argumentation that followed. This happens when the steps of the argumentation are weakly connected (Novak, 2010, pp. 69).

But what if the use of the term »Redskins« is offensive no matter the context in which it is used? Do all those plaintiffs have the right to be offended even if it was only used in sports jargon? Let us delve into that.

Native Americans have long argued that the term »Redskins« was racially unacceptable for the members of their tribes which are now considered an ethnic group in the United States of America. But the majority of trademark registrations which are today regarded as questionable was done in the 1960s and 1970s, which means that there is a period of fifty years that has passed since some of the registrations regarding sports teams. Undoubtedly society changes significantly in such an amount of time, many things that were once acceptable become (or are deemed) unacceptable by today`s standards. For example same can be said for a few examples from Europe, such as Nestlé`s Beso de Negra, Negroni`s Negerküsse, Sarotti-Mohr, Mohrenkopf also known as Super Dickmann`s, Tête-de-nègre or tête au chocolat, Haribo`s Skipper Mix, Knorr`s Zigeuner sauce and La Negrita Rhum.

It is safe to say that the case of the Washington Football Team shows how something that is not offensive, questionable or disparaging at the time of registration may turn out to be such at a later time. Does that necessarily mean that people back in the day of the 1960s and 1970s did not think anything of these names for sports teams? This is difficult to determine. As it is known, the Washington Redskins are not the only sports team that is named with some sort of a derivative that implies there is something to do with the Native American tradition: Chicago Blackhawks, the Atlanta Braves, the Cleveland Indians, Gulf Coast Indians, Peoria

Chiefs, Spokane Indians, Moose Jaw Warriors, Golden State Warriors, Chiliwack Chiefs, Burlington Chiefs, Brooklin Redmen, Elora Mohawks and the Kansas City Chiefs (Tryce & Smith, 2015, pp. 2) to name a few are all connected to the tradition of the Native Americans in the United States of America. We can speculate of the reasons why these teams bear such names, be it for cultural reasons, reasons of respecting heritage, paying tribute, or just because it is a part of the American identity. One thing is certain, there was a period in time in which naming the teams after the Native American tradition or with the terms that are associated with the Native Americans was contemporary.

Looking at this phenomenon now makes it look oldfangled. Could this attribute to the legal argumentation used in the case we are analysing? The answer is yes. It all comes down to the perception that is relevant in society at any given time. For example, there were many sports teams that have either mascots or names that were associated with Native Americans, but no longer have them as it has become socially unacceptable. In 1972, the University of Massachusetts replaced an Indian as the team mascot with a Minuteman and Stanford University replaced an Indian with a cardinal while Eastern Michigan, Syracuse and Dartmouth all put an end to their team names and mascots that were referencing Native Americans (Pace, 1995, pp. 11). All of these teams at some point felt that their names or mascots were either inappropriate or at least questionable from the societal point of view. At the same time we might add that they also felt that the names were appropriate at some point in time.

With this information we can set a claim, that the legal argumentation of the case we analyzed would have been completely different were it based in the 1970s. Much of it goes hand in hand with the fact that judge Gerald Bruce Lee decided in that case in the year 2015. The verdict was reached on the 8th of July 2015.

The predecessor to the Lanham Act was put in force in the year 1905 (Pace, 1995, pp. 23) and it had the same prohibitions as the Lanham Act, yet the name »*Redskins*« was still able to get registered even though it is now deemed to be disparaging. It was not deemed as such at the time of registration despite the same provisions that prohibited disparaging terms from being trademarked. This shows that we need to look at societal norms for the answer to why it has become disparaging now. What is disparaging to

society today might not have been disparaging to society at the time it was trademarked.

Pace argues that the case law does not provide an appropriate definition of disparagement or a workable test to determine when a mark is unregistrable because it could disparage, which means that we should turn to the definition in the dictionary at the time when Lanham Act was enacted which defines disparage as to speak slightly of, to undervalue, to discredit, depreciate and cheapen (Pace, 1995, pp. 32).

The Harjo case saw the Petition claim that the trademark was *at the time of registration* and continues to be a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging, and racist designation for Native American persons (30 U.S.P.Q. 2d BNA, PP.1828).

It is important to point out that the claim extends to the moment in which the trademark was given as well as the moment in time when the petition was filed. This creates a window for interpretation according to the standards put in place at the time of trademark issue as well as in the present time. This is why it is important to acknowledge such facts when it comes to inferring the legal argumentation used in a verdict. A verdict that is surmised in a way that is not mindful of all the circumstances, including the state of society at any given historical time cannot provide good legal argumentation for it can be, as seen in the case above, anchored on weak arguments.

This brings us to the second part of this paper: Do Native Americans have the right to be offended by the names of sports teams? The answer to this question demands us to answer two prior questions:

- 1) Did Native Americans find the term offensive in 1967 when the »Redskins« trademark was registered?
- 2) Is the registered trademark in any way derogatory of Native Americans in the context of sports?

The answer to the first question is not straightforward. According to the petitioners in the abovementioned cases, it would seem affirmative. But this is only one group of people out of the entire ethnic group present in the United States of America. When the Trademark Trial and Appeal Board at the United States Patent and Trademark Office on the 18th of June 2014 cancelled the trademarks of the Washington Redskins football team it stated that the

petitioners have shown by a preponderance of the evidence that a substantial composite of Native Americans found the term to be disparaging in connection with respondent's services between the years of 1967 to 1990. (Amanda Blackhorse, Marcus Briggs-Cloud, Philip Gover, Jillian Pappan and Courtney Tostigh v. Pro-Football Inc., 2014, Trademark Trial and Appeal Board, United States Patent and Trademark Office, Cancellation No. 92046185, pp. 72).

Board member Mark Bergsman dissented, stating that petitioners did not submit any evidence or argument as to what comprises a substantial composite of that population (Rimmer, 2016, pp. 5).

Siclari put forth an opinion that proving disparagement as it pertains to Section 2(a) of the Lanham Act is no easy task, mainly due to the fact that the America Invents Act has made it harder for petitioners to prevail on claims of disparagement, namely by placing a higher evidentiary burden on those parties to show disparagement. (Siclari, 2015, pp. 34).

According to Siclari, a careful examination of the evidence failed to show by a preponderance of the evidence that a substantial composite of Native Americans found the term to be disparaging, especially during the 1967-1990 period (Siclari, 2015, pp. 27).

What concerns most when it comes to the evidentiary burden is the fact that there is no given amount that would substantiate the prerequisite that is referred to as »*substantial composite of the referenced group*«. This can bring up absurd situations in which the Trademark Trial and Appeal Board at the United States Patent and Trademark Office could say that a substantial composite of the referenced group consists of (e.g.) dozen people that are affected by the term. The petitioners in the cases mentioned above stated that there were many Native Americans who were offended but did not actually meet the high evidentiary burden as it is set out by the legislator.

In the Harjo case, the Trademark Trial and Appeal Board at the United States Patent and Trademark Office admitted that determination of whether the matter may be disparaging is highly subjective, but it did not state how the subjectivity of the matter influenced their decision.

In addition to that, the Harjo case gave an insight into how Native Americans really feel about the use of the term »Redk-

sins». Due to the fact that the survey was done on the behalf of the petitioners which provided their results obtained through the labour of their chosen survey expert Dr. Ivan Ross, the results are to be taken *cum grano salis*. Dr. Ross performed the survey amongst three hundred and one (301) non-Native Americans and three hundred and fifty-eight (358) Native Americans all over the United States of America which made the sample of all the Native American population stratified in order to determine the substantial composite. The performed telephone survey showed that 46.2% of the general population sample would be personally offended by the use of the term »redskin« while only 36.6% of the Native American population would be offended by the same term (Siclari, 2015, pp. 9). Not even half of the sample of Native Americans found the term to be offensive while almost half of the general population found it offensive. This leads us to believe that the use of the test by which the Trademark Trial and Appeal Board at the United States Patent and Trademark Office finds the disparagement amongst the referenced group is not showing the result that the legislator wanted. If they deem it to be disparaging but only when it comes to the general population, then it cannot be said that they need to look for disparagement in the referenced group, in this case the Native Americans. If we adopt this concept then it is no doubt left that the legal argumentation in the aforementioned case was weak, since it was based on the incorrect perception of the test for the occurrence of disparagement.

We asked if Native Americans found the term offensive in 1967 when the »*Redskins*« trademark was registered and ironically the answer shows that the circumstances around the naming might prove to be rather peculiar. In fact, according to the reports from Boston Globe, the name change from Braves to Redskins was in accordance with keeping up with the plan to sign several Native American players.

What is more, Kirkland points out that early historical records of the origin for the name “Redskin” indicate that the term was used by Native Americans themselves to differentiate themselves from Americans and even when they negotiated with the French and later with the Americans (Kirkland, 2017, pp.486). It goes against logic that those who coined the term exclusively for themselves would deem it derogatory or even disparaging. The more likely conclusion would be, that due to the origin of the

term, it has now become a part of their heritage and is in no way meant to disparage the Native Americans as it was not intended to disparage them from the beginning when they started calling themselves by that term. In addition to that, Rogers found that the name »Redskins« is not offensive to a large number of Native Americans, moreover, the literature presents numerous examples of universities with a predominantly Native American population that have team names reflective of their origin (Moore et al, 2014, pp. 10).

The dilemma which caused the weak legal argumentation in the analyzed case lies in the fact that there is a serious discrepancy between the historical continuity and the perceived usage of the name today. That is why we have questioned whether the registered trademark is in any way derogatory of Native Americans in the context of sports.

The concept of Native Americans having the right to be offended only if the abovementioned questions are resolved positively shows that if they found it to be offensive back in the year 1967 but today`s standards limit the use only to sports-related affairs then there is no right to be offended by it and *vice versa* if they did not find it to be offensive or disparaging in the year of 1967 then there is no higher likelihood that they would find the use offensive in the sports context today.

The element of heritage should not be forgotten when it comes to the linguistic part. The term was first used by and for Native Americans as they identified themselves through this term when dealing with the French and the Americans. This is part of their cultural history and heritage. Sports mascots are not meant to diverge the image of the Native Americans and subject it to ridicule but to connect with their heritage and keep it alive. Such is the nature of sports with its combativeness, that it needs mascots which become the identity of the team and by doing so serve as a way of fans identifying certain teams as theirs. The mascots` priority is not to gather negative emotions but to provide a boost to the fans. There should not be anything adversely connected with sports mascots which also means that those who dislike the mascots which link to the heritage of Native Americans wish not to see the historical importance of Native Americans and their cultural protagonism.

Judge Gerald Bruce Lee failed to realize that in order for the

verdict to stay on the grounds of good legal argumentation he must use logic to see how the evidence of the case correlates to the case at hand and the law that needs to be applied. The representative for the Washington Redskins football team stated that a vast majority of Native Americans had no objection to the name when the trademarks were granted. The first one was granted in 1967. The first case that disputed the use of the term dating from 1992 (Harjo case). That shows a clear time frame of 25 years without any dispute regarding the offensiveness of the term and its disparagement. Judge Gerald Bruce Lee ignored this fact and did not agree with the argument of the representative for the Washington Redskins football team.

After a quarter of a century of being trademarked the term »Redskins« came under scrutiny with the Trademark Trial and Appeal Board at the United States Patent and Trademark Office and after almost half a century it was deemed to be offensive by the court. The reasoning behind it does not entirely convince one, especially due to the fact that all of a sudden many have voiced out their concerns with several names of sports teams, calling out the names as inappropriate or offensive.

Reiner points out a survey, published on September 24, 2004 by the Annenberg Public Policy Center of the University of Pennsylvania which found out that only ten percent of the Native Americans find the term offensive, while almost 65,000 thousand people surveyed of all races and nationalities do not find the term offensive at all, which brings Reiner to conclude that general public needs to be educated about the term and its racial origins for it to not be used as a denotative term for the Washington Redskins football team (Reiner, 2005, pp. 33).

His conclusions are largely intertwined with the fact that he got to experience the atmosphere at the stadium prior, during, and post-football games where, as he writes, throngs of fans, young and old, women and men, black and white, all wore headdresses of Native Americans that symbolized support for their beloved home team (Reiner, 2005, pp. 1).

The fans of the football team wore attire that was historically a part of the Native American heritage. They wore it to symbolize the support for the team, not to offend the Native Americans. In no way was the name intended, as we have now proven, to offend or disparage. We should not generalize the term to cover all

the prejudice that hovers over the Native Americans in American society, neither should we idolize it. But what we should do, prior to any verdicts made, be it regarding a trademark or its offensiveness, we should see in what way it is being used.

Where should we draw the line? Should we limit everything that has to do with Native Americans or other ethnical groups or should we allow everything as long as it is not derogatory? The latter seems to be a better place to start. The name of a sports team has no intention of offending anyone as long as it is not hostile towards a certain group of people or derogatory. The complicated part is allowing the margin for freedom of speech while also containing the correct amount of dignity and respect for those who might be involved with the content of this speech. The retention of Native American names might mean embracing the common historical tradition and heritage of the American people. The elimination of Native American names on the other hand might mean distancing oneself from the common historical heritage of the American people living on American soil.

The point we want to make is threefold: First, the Native American group should not be actively pushed out of the society in which they live, be it with eliminating all the Native American names or censoring anything that has to do with Native Americans. Second, by assigning positive connotations of valued cultural virtues instead of savagery and heathendom, the Native Americans should not feel that the name »Redskins« describes anything of spiteful nature. Third, the problematic term should not be evaluated solely with the intent to vilify it and observe it as a racial slur. We can now see why judge Gerald Bruce Lee used the legal argumentation that he used in the analyzed case, as he was coming from a point of view from which only negativity was seen upon the term »*Redskins*«.

Thornton, himself being a member of the Cherokees, spoke of the use of Native American names, mascots, terms, and tribe names with respect, adding that this only brings honor and recognition to Native Americans (Reiner, 2005, pp. 1).

Davidson, a Native American who supports the Washington professional football team stated that the Washington Redskins have chosen to honor Native Americans and their ancestors by using both Native American names and images for their football organization because those names and images represent a

great tribute to Native Americans (Grimshaw, 2016, pp. 58). Native Americans themselves have used the term in their own communities too (Phillips, 2018, pp. 1078).

On the other hand, Kirkland states that the name »*Redskins*« itself is derogatory, but it is not up to the government to decide whether it should or should not receive protection under the federal trademark laws, due to the fact that when it comes to governments regulating speech, no matter if the term was derogatory in the past or not, but if it is derogatory in the present and will be regarded as such in the future, it should not be up to the government to decide, especially if the decision is made on the basis of past beliefs of how the mark is currently perceived (Kirkland, 2017, pp. 505).

Epstein even goes so far as to say the name »*Redskins*« is culturally insensitive (Epstein, 2013, pp. 57). Hylton alternately says that the early Native American team names were just that – team names and the main idea behind naming teams after Native American cultural circumstances were to promote geographic identifiers and plainly as patriotic gestures (Hylton, 2010, pp. 902).

Hylton stated that the Native American community is actually divided on the issues of the Indian team mascots and names (Hylton, 2010, pp. 881). This is another indicator that the legal argumentation used by judge Gerald Bruce Lee was not backed up by solid facts. If the Native American community still remains divided upon this issue, there can be no (logical) assumption that the term is disparaging to a »*substantial composite of the referenced group*« since the entire community is divided on this issue. The judge had to make a fact solid, in order to build his argumentation onto this fact. The problem is that the fact he perceived as true was inasmuch true as he needed it to be true in order for his legal argument to stand. The reality of the matter is far from the picture that was painted in accordance with the result of the analyzed legal argumentation. The sheer preponderance of facts that speak of a different position is a sure sign that the judge should not have used the statement of disparagement to a substantial composite of the referenced group as a given fact because there is as much of those who are not offended by the term as is those who are (see *supra*).

The following dilemma occurs; if the Native Americans have the right to be offended by the term, then there is no need for

the petitioners to prove that a substantial composite of the referenced group finds it offensive. Because if there is a right to be offended by the term, there should not be additional checks to see if this right is exercised by everyone. If someone has the right to be offended, there is no use in checking whether everybody consumed this given right to be offended. We are going into extremes here, but the purpose of this is to find out why did the Lanham Act provide additional hoops to jump through? The main objective was to determine if a substantial composite of the referenced group finds the term disparaging. This means that the created standard presupposes a term to be disparaging but afterward limits the reach of the effects of such disparagement by putting a volume barrier. This volume barrier gives the court some leeway to determine if the effects of the presumed disparagement of the term have the extend that would comply with the wording of the statute, in this case Lanham Act, Section 2(a).

With this in mind, we can see where judge Gerald Bruce Lee was coming from. The basis, given in the Lanham Act and with the standards upheld by the court it is clear that there is little to no margin in which a term might be (potentially) analyzed as benevolent or at least contextualized without any negative agenda attached to it. This can surely be one of the reasons why the legal argumentation used by judge Gerald Bruce Lee was such. One of the options to mend this would be for the Congress to step in and reform the Lanham Act as it did for the National Football league with the Communications Act of 1934 regarding blackouts (Fecteau, 1995, pp. 233).

Changing the legislation is not the only way in solving this problem. Riley and Carpenter have shared their findings that the calls for action, coming from Native Americans are primarily not for laws, but education and understanding (Riley, 2016, pp. 917). This means that a lot of the desired progress in society can be achieved through education, which in turn means that amending the laws would come as a last resort.

We mentioned that naming professional sports teams with terms that are connected with the historic aspect of the American continent has become a part of the general American heritage. This statement is backed by the fact that the naming habit goes as far back as the year 1886 when this practice began. Hylton mentions that there were no Native American team names in 1885,

but the following year there were teams called the Indians in New York, Missouri, Arkansas, Ohio and Pennsylvania (Hylton, 2010, pp. 895). We can see that this practice of naming sports teams with names that derive from the Native American culture is more than 130 years old.

There is no evidence that the purpose of naming sports teams after Native American cultural heritage terms sprouted from hate or malice intent. There are no records that would show the purpose of naming teams was done with deprecatory means or with the intent to belittle the Native American community. After all, it is well known that the American people take sports seriously and can get very passionate about them. There is no logic in claims that derogatory names were used to mock Native Americans through the use of such terms of America`s favourite home teams. This is proven by the fact that the name »Braves« (the name initially given to the Boston Braves team) is in no way connected to the Native American community but was used due to the fact that the pretend »braves« threw the British tea overboard during the Boston Tea Party, and in addition to that the term was attached to the Honorable Artillery Company, an honorary military unit based in Boston, who also had nothing to do with the Native American cultural usage of the term (Hylton, 2010, pp. 897).

On top of that, it was the Boston sportswriters who started using the phrases »*going on the warpath*« and »*getting scalped*«, dubbing Braves Field »*the Wigwam*«, while the team did not do anything to exploit the Native American name, other than using the symbol on their uniform (Hylton, 2010, pp. 898).

Here we are at a point where we need to differentiate between the usage of the term in sports and the usage of the term as a racial slur. To accentuate that we need to remind once more, that there should not be a single-minded approach to understanding the meaning of the term »*Redskins*«. There is no doubt that any word can be used as an offensive racial slur if society wants to perceive it as such. In fact, it is up to each individual to assign certain meanings to certain words. Some words have more meanings and undoubtedly the term »*Redskins*« is one of them, but this does not limit the perceived disparagement to solely one meaning of the word. Oxford Living Dictionaries describes the word »*Redskin*« as dated and offensive but also adds an explanation, that the term originally had a neutral meaning and was used by

North American Indians themselves, only eventually did it acquire an unfavourable connotation (Lyne, 2019, pp. 16). As we can see, the complexity of this term is quite severe.

Regarding meanings, Gibbons explains that the semiotic theory of trademark law recognizes and symbols all exist prior to the creation of the mark, which means that the mark is created with the attachment of secondary meaning to it, basically the symbols add one additional meaning which functions as a source, origin or sponsorship indicator (Gibbons, 2005, pp. 198). By following the semiotic theory of trademark law it becomes evident that the term »*Redskins*« can also refer to the secondary meaning, which is of the football team from Washington and not solely as a term exclusively used to refer to Native Americans.

We mentioned at the beginning of this paper, that the Supreme Court of the United States ruled in the Tam case, wherein it found that the disparagement clause of the Lanham Act is unconstitutional as it violates the Free Speech Clause of the First Amendment, with Justice Samuel Alito adding that speech may not be banned on the ground that it expresses ideas that offend (Phillips, 2018, pp. 1065). This ruling shows that free speech is of utmost importance, it trumps the right of the individual to remain unoffended. In addition to that, it gave Washington Redskins a win against the 2014 decision to cancel six trademarks on the basis that they disparage Native Americans (Macinnis, 2017, pp. 26).

As the importance of free speech remains recognized as the most important aspect in American society, there exists a dilemma why should anyone feel the need to not use the term »*Redskins*« as they please. The reason behind it lies in the type of usage that the term is subjected to. Calling a football team by their name is not intended to hurt anyone`s feelings, but ridiculing Native Americans on the basis of their physiognomical traits definitely falls out of the protection of the free speech concept. This is where judge Gerald Bruce Lee failed to differentiate, before making his legal argumentation regarding disparagement. Disparagement clearly indicates degrading and depreciating intent of denigration. Without such intent, there is no case for disparagement and consequently no actual logic in connecting the name of a sports team with the intent of offending an ethnic group.

By limiting the access to the use of the name »*Redskins*« we not only shrink the concept of free speech but also go down the

rabbit hole of making potential exceptions to the use of the term.

For example, if only Native Americans can use the term »*Redskins*« then this might clearly lead to expostulation of all the words regarding the right to use it. Such concept is not only absurd, but also wrong.

Tsosie argues that the decisions of the Trademark Trial and Appeal Board at the United States Patent and Trademark Office to deny trademark protection are a positive development and adds that as long as individuals and corporations are allowed to exploit aspects of Native cultural identity as »property« the battle will continue (Tsosie, 2016, pp. 11). The problem with this statement is the fact that the petitioners did not want to be associated with the term »*Redskins*« and they did not want anything to do with it, let alone take it as part of their Native cultural identity, which means there is actually nothing to exploit if the name is to be denounced. This just comes to show, that the entire debate regarding symbols of the Native American culture and heritage boils down to a tug and pull contention. Grimshaw confirms this by stating that the »ideograph of equality dominates the controversy and serves as an organizing principle for both sides in ways that maintain the controversy« (Grimshaw, 2016, pp. 74).

Smith points out that Section 2(a) of the Lanham Act creates two distinct bars to trademark registration, the first one revolves around the scandalous meaning of the term and the second around the disparaging meaning of the term (Smith, 2002, p. 1304). The *Harjo* case showed these two distinctions greatly, as the Trademark Trial and Appeal Board at the United States Patent and Trademark Office came to a conclusion that a substantial composite of the general population would not find the term »*Redskins*« shocking to their sense of truth, decency or property, finding that the media coverage and fan support of the Washington Redskins since the 1940s was inconsistent with a sense of outrage from the general population that is necessary to prove a term scandalous (Smith, 2002, pp. 1313).

Out of the two significant distinctions between »scandalous matter« and »disparaging matter« the former was not found. That left to checking only whether the term »*Redskins*« was disparaging. To check this, the Trademark Trial and Appeal Board at the United States Patent and Trademark Office decided that the general public`s viewpoints are irrelevant when deciding whether

the term is disparaging (Smith, 2002, pp. 1314). By doing so a clear distinction between the two approaches was set, giving way to formulating a dissimilar standard independent to the approach for determining whether the term is scandalous.

The Disparagement standard was shaped through case law and formulated by the Trademark Trial and Appeal Board at the United States Patent and Trademark Office, thus labelling a mark as disparaging only if it is to be considered offensive or objectionable to a reasonable person of ordinary sensibilities (Guggenheim, 1999, pp. 296).

This in term means that the task at hand was to consider whether the term “*Redskins*” can be reasonably understood to refer to Native Americans and that such a term is offensive or objectionable from a Native American’s point of view. The legal argumentation from the analyzed case failed in connecting the latter. There is no clear fact that the Native Americans find it offensive or objectionable due to the fact that there are many who do not consider the term to be either of it.

The slippery slope argument was clearly manifested once judge Gerald Bruce Lee took it as a known fact that the Native Americans find the term offensive or objectionable. The fallacious nature of such legal argument shows in the fact that the presupposed actuality needed to have been structured beforehand, for the verdict to not be reversed due to weak arguments. Otherwise (if there was no known fact for the offensiveness or objectionableness to the Native Americans) such argument would not stand. The error in legal argumentation was made due to unconfirmed assumptions.

The standard was criticized by Smith, mainly due to the fact that the »substantial composite approach« ignores the majority of the implicated group members’ viewpoints when deciding whether a trademark is disparaging (Smith, 2002, pp. 1315). Smith also disagreed with the decision of the Trademark Trial and Appeal Board at the United States Patent and Trademark Office to disregard the claims that Pro-Football Inc. made when stating that the trademarks were used in the context of temporary attitudes with respectful nature (Smith, 2002, pp. 1315).

Was this the reason why judge Gerald Bruce Lee erred in his legal argumentation? Was the standard set too wide? This paper disclosed that this was actually the case. Not only was there insuf-

ficient data of the amount of Native Americans who perceived the term as disparaging, but the data available showed that there was no such thing as a substantial composite of the referenced group that perceived the term as disparaging, judging by the numbers alone. Neither did the context in which the term was used show that it was used in a way that would be disparaging to the Native Americans (see *supra*).

A survey that was conducted exclusively amongst Native Americans (sample of three hundred and fifty-one) gave results that go against the whole »substantial composite« argument of disparagement. The survey revealed that seventy-five percent out of all the surveyed Native Americans were not offended by the name »*redskins*« and sixty-nine percent of all surveyed Native Americans feel it is acceptable for Pro-Football to continue using the name »*Redskins*« (Price, 2002, pp. 72).

This survey shows that a substantial composite of the referenced group does not find the name disparaging. In addition to the fact that the Washington football team is a respected organization that does not disparagingly use the trademarks, one is hard-pressed to see the reasoning behind the use of an unconfirmed assumption in the legal argumentation of the ruling that we have analyzed.

Would the outcome be any different if the standard for disparagement would not consider a substantial composite of the referenced group but instead a substantial composite of the general population? Not likely. A survey from 2015 conducted by Benson showed that (on a scale of 1 that equals minimum and 10 that equals maximum) a sample of 254 white/caucasian people out of 306 people surveyed, expressed a preference for the Washington Redskins logo, placed at 6.48 (Benson, 2015, pp. 21).

On top of that, the Washington football team appears to have had a much more attractive name and logo than other teams of the National Football league, judging by the increase in ranking of licensed merchandise sales in 1995 which was worth just less than one million dollars in additional sales (Nagel & Rascher, 2007, pp. 802).

This paper does not aim to disregard the social changes that happened from the year 1967 up to today, even though the Trademark Trial and Appeal Board at the United States Patent and Trademark Office found that the term »*Redskins*« was already dis-

paraging to a substantial composite of Native Americans during the time the registration was sought (Wasserman, 2016, pp. 1513) without taking into account the different societal aspects of that era. The main reason for concern lies in the fact that a judge's argumentation in the ruling strayed away from the facts and data collected in the surveys, moving ostensibly in the direction of the societal narrative from recent years.

The Blackhorse case suffers from the same problems and inconsistencies of evidence when it comes to demonstrating the preponderance of the evidence for a conclusion that the term is disparaging to a substantial composite of Native Americans, just like the initial Harjo Litigation (Hopkins & Joraanstad, 2015, pp. 294). This is one of the reasons why it is difficult to logically decipher why similar evidence would yield different results. In addition to that, in the opening brief of the appellant that was filed on the 30th of October 2015 there is a clear mention of the fact that no one has identified how many Native Americans constitute a substantial composite which is an omission that precludes a meaningful defense (Page-Proof Opening Brief of Appellant Pro-Football, Inc. v. Amanda Blackhorse, Marcus Briggs-Cloud, Phillip Gover, Jillian Pappan, Courtney Tsoitigh, No. 15-1874 In the United States Court of Appeals for the Forth Circuit, On Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division No. 1:14-cv-01043, pp. 48). This leads us to ponder whether it would be necessary to first determine the exact amount that constitutes the substantial composite even before the evidence was analyzed and the ruling was made. It would definitely add one more view of legitimacy to the overall definitive quality of the verdict at hand, mainly because there would be a solid foundation of the argument on why the »Disparagement standard« from the Sector 2(s) of the Lanham Act was met in the first place. We can project that the legal argumentation would be better once the substantial composite was determined and not left to the assumptions of the judge in the case.

3. Conclusion

When it comes to assuring legal argumentation of the highest quality there is no room for unconfirmed assumptions. This paper displayed the adverse effects of anchoring argumentation

on non-proven (so-called) facts. The term »Redskins« has been polarizing the opinion of society for decades but in recent years we saw an increase in the demands for the term to be removed from the use in the National Football league altogether. The term itself has at least two meanings, one of them clearly attached to the Washington football team. The meaning tied to the football team invoked reactions from the petitioners claiming it to be disparaging. Surveys did not prove such claims, even though the Disparagement standard demands the petitioners to prove a substantial composite of the referenced group is disparaged by the term. A judge should not and cannot hold true something that has not been proven. Any arguments that a judge makes, based on non-existent evidence should be avoided as this only shows unwanted judicial activism, possibly motivated by societal pressure. We showed in this paper that there are certain unequivocal requirements in accordance with Section 2(A) of the Lanham Act, especially when it comes to proving the existence of disparagement amongst the referenced group. The right to be offended does not constitute the same matter as to be regarded sufficient for the claim of disparagement amongst a substantial composite of Native Americans. This holds especially true when there are many circumstances regarding the term, that contradict the points made by the petitioners in the case we analyzed.

LITERATURE AND SOURCES

30 U.S.P.Q. 2d (BNA).

Amanda Blackhorse, Marcus Briggs-Cloud, Philip Gover, Jillian Pappan and Courtney Tostigh v. Pro-Football Inc. (18 June 2014), Trademark Trial and Appeal Board, United States Patent and Trademark Office, Cancellation No. 92046185.

Benson, J. (2015). The Washington Redskins: A brand in crisis, Sam M. Walton College of Business University of Arkansas.

Epstein, A. (2013). Maryland Sports Law. University of Denver Sports and Entertainment Law Journal, 15, 49 – 72.

Fecteau, A. (1995). NFL Network Blackouts: Old Law Meets New Technology with the Advent of the Satellite Dish. Marquette Sports Law Review, 5(2), 221 – 242.

Gibbons, J. L. (2005). Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(A) Trademark Law after Lawrence v. Texas. Marquette Intellectual Property Law Review, 9(2), 187 – 248.

Grimshaw, B. E. (2016). Redskins Revisited: Competing Constructions of the Washington Redskins Mascot. University of Montana.

Guggenheim, A. J. (1999). Renaming the Redskins (and the Florida State University Seminoles?): The Trademark Registration Decision and Alternative Remedies. Florida State University Law Review, 27(1), 287 – 319.

- Hopkins, A. J., Joraanstad, M. T. (2015). Challenge-Flag Thrown: The Trademark Trial and Appeal Board's Cancellation of the Redskins' Trademarks and Pro-Football's Chances on Appeal. *Journal of Business & Technology Law*, 10(2), 267 - 296.
- Hylton, J. G. (2010). Before the Redskins Were the Redskins: The Use of Native American Team Names in the Formative Era of American Sports 1857 - 1933. *North Dakota Law Review*, 86(4), 879 - 903.
- Kirkland, M. G. (2017). An Offensive Mark on Offensive Lines: The Question of Violating the First Amendment through the Cancellation of the Washington Redskins' Trademark. *Hastings Constitutional Law Quarterly*, 44(4), 479 - 506.
- Lyne, N. (2019). In Whose Honour? Understanding Native American Sports Mascots, the Washington Redskins, and the Divisive Online Discourse About Them. *Fakulteten för humaniora, psykologi och teologi Åbo Akademi*.
- Macinnis, A., Green, S. (2017). What slant should the law take on »scandalous« trade marks?, *LSJ*, 37, 26 - 27.
- Moore, E. M., Zemanek, E. J., Chullen, L. C., Workman, D. L. (2014). Brand name ethics as a marketing concern: a narrative inquiry of the Washington Redskins' debate. *Innovative Marketing Journal*, 10(4), 7 - 15.
- Nagel, M., Rascher, D. (2007). Washington »Redskins« - Disparaging Term or Valuable Tradition?: Legal and Economic Issues Concerning *Harjo v. Pro-Football Inc.* *Fordham Intellectual Property, Media and Entertainment Law Journal*, 17(3), 789 - 808.
- Novak, M. (2010). *Pravna argumentacija v praksi*. Planet GV.
- Pace, A. K. (1995). The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?. *Pepperdine Law Review*, 22(1), 7 - 57.
- Paczkowski, L. (2004). The Best Offense is a Good Defense: How the Washington Redskins Overcame Challenges to their Registered Trademarks. *Boston College Intellectual Property & Technology Forum*, 1 - 15.
- Page-Proof Opening Brief of Appellant Pro-Football, Inc. v. Amanda Blackhorse, Marcus Briggs-Cloud, Phillip Gover, Jillian Pappan, Courtney Tsoitigh, No. 15-1874 In the United States Court of Appeals for the Forth Circuit, On Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division No. 1:14-cv-01043.
- Phillips, F. V. (2018). Beyond Trademark: The Washington Redskins Case and the Search For Dignity. *Chicago-Kent Law Review*, 92(3), 1061 - 1086.
- Price, S.L. (2002, March 4). The Indian Wars, *Sports Illustrated*: p. 72.
- Rasul, H. (2015). Fourth and Long: The Time is Now for the »Washington Redskins« to Punt the Name. *University of Maryland Law Journal of Race, Religion, Gender and Class*, 14(6), 338 - 355.
- Reiner, J. (2005). Proud Traditions: The Reflections of a Lifelong Washington Redskins Fan on the Harjo Decisions & the use of Native American Names in Sports. *Willamette Sports Law Journal*, 1, 1 - 33.
- Riley, R. A., Carpenter, A. K. (2016). Owing Red: A theory of Indian (Cultural) Appropriation. *Texas Law Review*, 94, 859 - 931.
- Rimmer, M. (2016). Change the mascot: the Washington Redskins - offensive trade marks, freedom of speech and racism in sport. *Australian Intellectual Property Law Bulletin*, 29(7), 178 - 198.
- SCOTUS, 137 S. Ct 1744, 1751 19.6.2017.
- Siclari, J. F. (2015). The Redskins' Trademark Controversy and the Evidentiary Problems Associated with Proving Disparagement Under Section 2(a) of the Lanham Act. *Seton Hall Law*, 809 - 846.
- Smith, C. (2002). Squeezing the Juice out of the Washington Redskins: Intellectual Property Rights in »Scandalous« and »Disparaging« Trademarks after *Harjo v. Pro-Football Inc.* *Washington Law Review*, 77(4), 1295 - 1328.
- Tryce, A. S., Smith, B. (2015). A Mock Debate on the Washington Redskins Brand: Fostering Critical Thinking and Cultural Sensitivity Among Sport Business Students, Saint Joseph's University. *Sport Management Education Journal*, 9, 1 - 10.
- Tsosie, R. (2016). Indigenous Identity and Sports Mascots: The Battlefield of Cultural Production. *The Federal lawyer*, 9 - 11.
- U.S. Trademark Law Federal Statutes, U.S. Patent & Trademark Office. (25.11.2013). § 2 15 U.S.C. § 1052.
- Wasserman, F. M. (2016). What Administrative Law Can Teach the Trademark System. *Washington University Law Review*, 93(6), 15 - 25.