Hearing: Paper No. 100
May 27, 1998 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 836,122[1]

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]

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[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:

Table of Contents

Introduction
The Pleadings
Summary of the Record
The Parties
Preliminary Issues
- 1997 NCAI Resolution
- Constitutionality of Section 2(a) of the Trademark Act
- Indian Trust Doctrine
- Protective Order
- Respondent's Motion to Strike Notice of Reliance and Testimony Depositions
- Respondent's Motion, in its Brief, to Strike Testimony and Exhibits
  1. Objections to Testimony and Exhibits in their Entirety
  2. Objections to Specified Testimony and Exhibits
  3. Objections to Notice of Reliance Exhibits

Summary of the Arguments of the Parties
- Petitioners
- Respondent

The Evidence
- The Parties' Notices of Reliance
- Petitioners
  1. Summary of Petitioners' Witnesses and Evidence
  2. Testimony of the Seven Petitioners
  3. Harold Gross
  4. Resolutions by Organizations
  5. History Expert
  6. Social Sciences Experts
- Respondent
  1. Summary of Respondent's Witnesses and Evidence
  2. Respondent's Witnesses
- Linguistics Experts
  1. Denotation and Connotation
  2. Use of the Word "redskin(s)"

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deciding this case. The change in the composition of the panel does not necessitate a rehearing of the oral argument. *See, In re Bose*, 772 F.2d 866, 227 USPQ 1, 4 (Fed. Cir. 1985).

3. Dictionary Definitions of "redskin"
4. Use of "redskin(s)" in Modern Context
5. Findings of Fact Regarding Linguists' Testimony
Film Expert
Survey Evidence
1. Petitioners' Survey
2. Respondent's Rebuttal
3. Findings of Fact Regarding Survey
Applicable Legal Principles
Section 2(a)
Scandalous Matter
Matter Which May Disparage
Matter Which May Bring Persons … into Contempt or Disrepute
Legal Analysis
Disparagement
Contempt or Disrepute
Scandalousness
Decision

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 REDSKINS[3] and REDSKINS[4] 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];

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":

[7]

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[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

[8]

The Pleadings

Petitioners allege that they are Native American[9] 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,

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[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 asserts[11] 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

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[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 exhibits[14]; 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.

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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] 12[16] and 13[17] 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]

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[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

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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 pupilage," 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

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[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).

Affairs[22] 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 lands[25] 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

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[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

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[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),

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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; 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

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[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,

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[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 resolution[41]; 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

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[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]

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[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

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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

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] newspapers[52] and

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[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 party[54]; press clippings, which are essentially compilations by or

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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-party[55]; 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 guides[64] or yearbooks[65] 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

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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.

other; in fact, both parties have treated all of this material as being properly made of record by notice of reliance. Thus, we have considered all such material of both parties as part of the record in this case.[66]

We hasten to add that much of this evidence has been submitted without proper foundation and, thus, its probative value is severely limited. We note, however, that some of these exhibits were identified and authenticated by witnesses during their testimony and, therefore, have been considered, properly, in that context.

Petitioners

1. Summary of Petitioners' Witnesses and Evidence.

Each of the petitioners testified. Several witnesses, namely, Joanne Chase, of the National Congress of American Indians, Judith Kahn, of the American Jewish Committee of Portland, Oregon, Elliott Stevens, of the Central Conference of American Rabbis, and Walterene Swanston, formerly of Unity 94, a coalition of minority journalist organizations, testified as to resolutions that were passed by their respective organizations. Harold Gross, formerly of the Indian Legal Information Development Service, testified about correspondence and a meeting between his

[66] We have separately addressed, *supra*, respondent's objections to the admissibility of evidence on grounds other than whether the matter is proper for submission by notice of reliance.

organization and Edward Bennett Williams, who owned the "Washington Redskins" football team at the time of this meeting and correspondence. Several witnesses testified in their areas of expertise: Geoffrey Nunberg in linguistics, Susan Courtney in film, Ivan Ross in trademark surveys, Frederick Hoxie in American history, Teresa LaFromboise in multicultural counseling issues, and Arlene Hirschfelder in Native American educational issues. The discovery and testimony depositions of the petitioners and witnesses, and exhibits in connection therewith, are of record.[67]

2. Testimony of the Seven Petitioners.

Each of the petitioners testified that he or she is a Native American who is a registered member of a federally recognized Indian tribe. The petitioners described incidents when the word "redskin(s)" was directed at them, or at other Native Americans in their presence, by non-Native Americans in what they described as derogatory manners. These incidents were described as occurring at various times during petitioners' lives, beginning with the petitioners' childhoods, which go back, in some cases, to

[67] To the extent that the Board has excluded certain portions of testimony or individual exhibits, or portions thereof, in connection with objections made by the parties, these issues will not be discussed again herein. Rather, the discussion presumes that the excluded material has not been considered.

the 1950's. Each petitioner described feelings of anger and humiliation, among other feelings, that he or she experienced in these situations.

Each of the petitioners expressed his or her opinion about the word "redskin(s)," both as a term defined as "a Native American" and as part of the name of respondent's football team. To summarize some of these opinions, petitioners were unanimous that "redskin(s)" is a racial slur that is objectionable in any context referring to Native Americans; that the petitioners are not honored by the inclusion of the word "Redskins" in respondent's football team's name; that the manner of use of the team name by respondent, and the use of Native American imagery by respondent, the media and fans is insulting; that the part of respondent's marks that includes a portrait of a Native American portrays a stereotypical image; and that the mark REDSKINETTES is demeaning to Native American women.

Mr. Apodaca identified and authenticated the 1993 resolution of the National Congress of American Indians (NCAI), No. EX DC-93-11, entitled "Resolution in Support of the Petition for Cancellation of the Registered Service Marks of the Washington Redskins AKA Pro-Football Inc.," which was introduced in connection with the testimony of

Joanne Chase, of the NCAI. The resolution includes, and indicates NCAI's familiarity with, the petition to cancel in this case, the marks in the challenged registrations, and the context in which those marks are used. The resolution supports the petition to cancel and states that "the term REDSKINS is not and has never been one of honor or respect, but instead, it has always been and continues to be a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for Native Americans," and that "the use of the registered service marks [in the challenged registrations] by the Washington Redskins football organization, has always been and continues to be offensive, disparaging, scandalous, and damaging to Native Americans."

A copy of a 1992 resolution by the Oneida Tribe, of which Mr. Hill is a member, was properly introduced in connection with Mr. Hill's testimony. It refers to, *inter alia*, the "Washington Redskins," and condemns the "use of Indian mascots in any form for any purpose, especially athletic teams, as being disrespectful and racist in implication and destructive of the self-esteem of Indian children," and resolves "to stop, in any lawful way, the insensitive and defamatory use of Indian characters, images

and names for commercial or other public purposes such as professional sports teams like the Washington Redskins…"

3. Harold Gross.

Harold Gross testified that he was the director of the Indian Legal Information Development Service (ILIDS)[68] in 1972; that on January 15, 1972, he wrote a letter on behalf of his Native American colleagues to Edward Bennett Williams, the then-owner of the "Washington Redskins" football team, urging Mr. Williams to change the name of the football team[69]; and that he and a group of seven individuals[70] met with Mr. Williams to express the group's view that the team's name is disparaging, insulting and degrading to Native Americans and to request that certain specified changes be made.[71] Mr. Gross testified that, as a

[68] Mr. Gross testified that the ILIDS was a legislative oversight program located in Washington D.C. with a mission to train young Native Americans interested in careers in journalism, law or public affairs in the legislative process and to provide legislative information to the Native American tribes through a monthly magazine. ILIDS was founded in 1971 and folded into another organization, the Institute for Development of Indian Law, in 1973.

[69] The record includes a copy of this letter and subsequent letters between Mr. Gross and Mr. Williams, including a letter from Mr. Williams forwarding to Mr. Pete Rozelle, the then-Commissioner of the National Football League, a copy of Mr. Gross' original letter.

[70] The record indicates that these individuals were from the following organizations: National Congress of American Indians (NCAI), Americans for Indian Opportunity, Youth Programs of the Bureau of Indian Affairs, the publication *Legislative Review*, American Indian Movement, and American Indian Press Association.

[71] The record indicates that this group requested not only an end to the use of the nickname "Redskins," but also that a new name be sought; that the use of "Indian-stereotyped images and language" in commercial

result of this meeting, Mr. Williams agreed only to change certain of the lyrics of the team song, *Hail to the Redskins*.

Mr. Gross expressed his personal opinion that the word "redskin(s)" is "a derogatory, denigrating epithet, … a racial slur which is used to describe Native Americans"; and that the effect of the use of the word "redskin(s)" as part of the team name is to "promulgate a stereotyped view of Native Americans … to a very large audience of people who have very little knowledge otherwise of the existing culture of Native Americans."

4. Resolutions By Organizations.

Through the testimony of Judith Kahn, Director of the American Jewish Committee of Portland, Oregon, (AJCP), petitioners established that the AJCP is a membership organization with a stated mission to work with Jewish and non-Jewish groups on issues pertaining to civil rights and bigotry; and that on September 2, 1992, the Board of Directors of the AJCP unanimously passed a proclamation, which is of record herein, noting, *inter alia*, the team name "Redskins," and condemning the use of "racial or

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promotion and advertising cease; that half-time performances, cheerleader garb and performances, and the team song be revised; and that the Washington team "actively encourage other professional sports organizations to cease the use of similar stereotyped degradation of America's Indian peoples."

ethnic stereotypes in the names, nicknames, or titles of business, professional, sport or other public entities" as "dehumanizing and promot[ing] practices that trivialize and demean people, religious beliefs and symbols"; opposing such use "when the affected group has not chosen the name itself"; and encouraging such entities "to end their use of offending stereotypes."

Through the testimony of Rabbi Elliot Stevens, Executive Secretary and director of publications for the Central Conference of American Rabbis (CCAR), petitioners established that in April, 1992, the CCAR unanimously passed a resolution entitled "Racism," of record herein, which resolved to "call upon the Washington Redskins and the Atlanta Braves to change formally their names and to renounce all characterizations based on race or ethnic background," and to "call upon the Washington Redskins and the Atlanta Braves to undertake programming in the private sector to combat racial stereotyping in the larger society."

Through the testimony of Walterene Swanston, petitioners established that Ms. Swanston, a journalist, was the coordinator, between 1993 and 1995, of Unity 94, a coalition of four minority journalists associations representing Asian journalists, Black journalists, Hispanic

journalists and Native American journalists; that Unity 94 held a convention in Atlanta in 1994, which was attended by approximately 6,000 people, to “demonstrate that there are talented qualified journalists of color” and to provide training and workshops for members; and that, immediately prior to the convention, the Unity 94 Board of Governors passed by a majority vote a resolution entitled the “Mascot Resolution.” The resolution, of record herein, calls upon various news and media organizations to, *inter alia*, “officially discontinue the use of Native American and other culturally offensive nicknames, logos and mascots related to professional, college, high school and amateur sports teams.” The resolution notes favorably the policy of two newspapers to refrain from using the names “Redskins and the derivation Skins, Redmen, Braves, Indians, Tribe and Chiefs” to refer to sports teams.

Through the testimony of Joanne Chase, Executive Director of the NCAI since April, 1994, petitioners introduced from the records of the NCAI a resolution passed by the General Assembly of the NCAI at its meeting of December 3, 1993. The resolution, No. NV-93-143, entitled “Resolution to Justice Department Investigation of Human Rights Violations,” calls for “the abolition of Indian nicknames, mascots and images and commercial use of these

by sporting industries, colleges, universities and automobile manufacturers" and requests "the Justice Department to investigate any human and civil rights violations by colleges, universities, and public institutions that exploit Indian imagry (*sic*) and lifestyles."

5. History Expert.

The record establishes Dr. Frederick Hoxie as petitioners' expert in Native American history. Dr. Hoxie testified that he based his opinions in this case on the published historical literature of the period and he summarized his opinions in the following three points: (1) that, beginning in the British colonial period of the 17th and 18th centuries and continuing into the 19th century period of American expansion, government policies and public attitudes towards Native Americans were based on the belief in the fundamental inferiority of the Native American people and their culture; (2) that, beginning in the late 19th century with the development of the field of anthropology and as reflected in federal Indian policy in the 1930's and 1940's, there have been efforts to overcome this "racist philosophy or viewpoint" concerning Native Americans and to view Native Americans as equal to Anglo-Americans and deserving of equal membership in American

society, and to view Native American culture as a legitimate cultural tradition; and (3) “that the word ‘redskin’ is an artifact of the earlier period and really has no place in modern life.”

Dr. Hoxie described the development of the relationship between Native Americans and Anglo-Americans, beginning with the British settlers on the east coast of North America in the 17th century and continuing through to the present, as based on the clear policy, first, of the colonies, and subsequently of the new American government as it expanded west across the Appalachian Mountains, that their settlements should be purely European/Anglo-American and that expansion would require the displacement of the Native American people. This view was supported by the commonly held belief that Native Americans were savages, *i.e.*, that the Native Americans were not Christians and were uncivilized.

The new American government negotiated with the Native Americans to create clear boundaries for separate areas of Native American settlement. During the early 19th century, referred to by historians as the Removal Era, the eastern tribes were forcibly evicted from land east of the Mississippi. Under the Removal Act of 1830, Native

Americans were moved to settlements in Oklahoma and, later, to sections of Nebraska and Kansas.

In the mid-1800s, the outcome of the Mexican-American War and the California gold rush, respectively, “vastly increased the size of the United States [and] stimulated an extraordinary interest in settlement of the trans-Mississippi west … placing tremendous pressure on American Indian communities.” To address this problem, the U.S. government transferred the Office of Indian Affairs from the War Department to the Interior Department, which was newly-created in 1849. The Office of Indian Affairs administered programs that funded missionaries to establish schools in Indian communities that Native American children were required to attend; and established regulations of Native American life. Dr. Hoxie finds these policies representative of the codification into government policy of the Anglo-American view that Native Americans “were inferior people who required forcible education and preparation for civilized life.” Dr. Hoxie testified that the process of American western expansion, the creation of Indian reservations and of a bureaucracy to administer reservation life, and the pacification of tribes that militarily resisted American expansion, began in the 1850’s and peaked in the 1880’s.

Dr. Hoxie referred to the time period from the late 1880's to the 1930's as a period marked by government policies of assimilation, *i.e.*, "forced incorporation of Indian people into American society by forcing them through this process of emulating Anglo-American standards of civilization." During the same time period, government regulations outlawed Native American religions and individuals were punished for practicing these religions.

Dr. Hoxie testified that at the end of the 19th century, American scholars and political and religious leaders realized that separation of Anglo-American and Native American populations was no longer practical, and they began to question the assumption that Native American people and their culture were backward. Further, during the 1920's and 1930's, American anthropologists began to argue that Native American culture should be valued. In 1934, the passage of the Indian Reorganization Act ended the process of land allotment established in 1887 by the Dawes Act and allowed Native American communities to organize their own governments. Subsequent Executive Orders ushered in a period during which Native American religious practices were tolerated and Native American cultural traditions were made part of the educational curriculum of Indian schools. These governmental policies

recognizing the equality of Native American people and their culture have continued to evolve to the present time.

Dr. Hoxie testified that he has encountered the word "redskin(s)" in American popular writing of the 19th century, including newspapers and settlers' writings. He concluded by expressing the opinion that, as used in these contexts, the word "redskin(s)" is a disparaging reference to Native Americans because it refers to them as backward, uncivilized, savage people. Dr. Hoxie added that he has not seen the word "redskin(s)" used by historical scholars as part of their original prose or, during the modern period, by the Bureau of Indian Affairs (BIA) or its predecessors; rather, scholars and the BIA have used the words American Indian, Native American and Indian. Dr. Hoxie opined, further, that in the modern context the word "redskin(s)" remains disparaging as it is "an artifact of an earlier period during which the public at large was taught to believe that American Indians were a backward and uncivilized people." Dr. Hoxie concluded by expressing his personal opinion that, for this same reason, the use of the word "redskin(s)" by respondent's football team is inappropriate and disparaging.

6. Social Sciences Experts.

In addition to several written articles, petitioners presented the testimony of two social sciences experts, Teresa LaFromboise and Arlene Hirschfelder. Their testimony addresses, *inter alia*, petitioners' claims that "redskin(s)" is a racial slur; that the use of racial slurs perpetuates negative ethnic stereotyping; and that such stereotyping is extremely damaging to the self esteem and mental health of the targeted group. Proof of psychological distress suffered by petitioners or, generally, Native Americans, is not a necessary element of the Section 2(a) claims herein. Thus, we do not draw any conclusions in this regard. We find that both witnesses discuss negative stereotyping, in the context of their respective specialties, based essentially on their assumptions that the word "redskin(s)" is a racial slur. As the disparaging nature of "redskin(s)" is the legal question before us, we consider their testimony in this regard simply as adding to the record two additional individual opinions as to the nature of the word "redskin(s)."

We turn first to the testimony of Arlene Hirschfelder, an educator and consultant in the field of Native American studies, who expressed her opinion that Native Americans

are portrayed in educational curricula, children's literature and toys, in a stereotypical manner, primarily as savages who are a "violent, war-like, provocative" people. She concluded that such stereotyping has a negative effect on the self-esteem of Native American children.

Ms. Hirschfelder expressed her personal opinion that the word "redskin(s)" is an offensive, disparaging and insulting word and that, even as used in connection with the Washington football team, "Redskins" connotes Native Americans.

Petitioners presented the testimony of Dr. Teresa LaFromboise, an associate professor of counseling psychology and chair of Native American Studies at Stanford University, whose areas of specialty are multicultural counseling and research in Native American mental health. Dr. LaFromboise testified as to the negative effects of ethnic stereotyping and discrimination against Native Americans as a minority culture in the United States. She concluded that stereotyping has a detrimental effect on the mental health of people who are stereotyped because stereotyping "objectifies" and "dehumanizes" the individual, which "can lead to serious psychological disturbance such as depression, low self-esteem." Dr.

LaFromboise noted that “there is a lot of evidence [in the education literature] of low self-esteem [among Native Americans] in terms of depression”; that this depression is reflected in the suicide rate among Native American adults and adolescents, which is three times greater than among the general population; and that, among Native American children, the suicide rate is five times greater than among children in the general population.

Dr. LaFromboise expressed her personal opinion that the name “Redskins,” as used by respondent’s football team, is a negative ethnic stereotype that communicates a message that “Indian people are ferocious, strong, war-like, brave.”

Respondent

1. Summary of Respondent’s Witnesses and Evidence.

John Kent Cooke and Richard Vaughn testified on behalf of respondent. Also testifying for respondent were two linguistics experts, David Barnhart and Ronald Butters; and a marketing and survey expert, Jacob Jacoby. Of record are exhibits submitted in connection with testimony and evidence submitted by respondent’s notices of reliance.

2. Respondent’s Witnesses.

John Kent Cooke, executive vice-president of respondent, Pro-Football, Inc., and a director in

respondent's holding company, Jack Kent Cooke, Incorporated, testified that the "Washington Redskins" team was originally located in Boston; that the team was originally known as the "Boston Braves" and, in 1933, was renamed the "Boston Redskins"; and that the team moved to Washington, D.C. in 1937 and was renamed the "Washington Redskins." Without elaborating, Mr. Cooke stated that he is generally aware of college and high school teams that are named "Redskins"; however, he stated that those teams are not sponsored by or otherwise related to the "Washington Redskins" team.

Mr. Cooke testified that the team does not have a mascot. He acknowledged that, during the 1980's, an individual named Zema Williams, known as Chief Z, was a self-described mascot and received free tickets to games, a practice that was stopped by Mr. Cooke when he became aware of it in 1987. Mr. Cooke also acknowledged that an individual dressed in a Native American motif, known as Princess Palemoon, sang the national anthem at some "Redskins" games in the mid-1980's; that she was not formally associated with the team; and that, due to some controversy as to whether she was a Native American person, her performances were stopped.

Mr. Cooke testified that respondent provides support for the “Washington Redskins” Band, a volunteer band that performs at “Redskins” games and whose costumes include Native American-style headdresses. Additionally, respondent has a contractual relationship with the “Redskinettes” cheerleaders, which is an independent, incorporated entity that is authorized to use specified trademarks of respondent in ways approved by respondent.

Mr. Cooke testified that the song “Hail to the Redskins” has been played at “Redskins” games since 1938; that certain of the lyrics to the song were changed prior to his tenure, which began in the 1980’s; that the lyrics were changed to be sensitive to respondent’s fans; and that the phrase “Braves on the warpath” in the song refers to the football team “marching down the football field to score points to win a game” rather than referring, in this context, to Native Americans.

Mr. Cooke acknowledged that respondent’s logo design depicts a Native American wearing feathers; and that “[t]he Washington Redskins are named after or are associated with Native Americans.” He expressed his opinion that, in playing football in the National Football League and representing the nation’s capital, the team name and logo “reflect the positive attributes of Native Americans”; and

that those attributes include "dedication, courage and pride." Mr. Cooke stated that respondent has guidelines for its own use of its trademarks, and use by its licensees, to ensure uniformity and to project a professional, clean-cut and wholesome team image.[72]

Mr. Cooke testified that, since the 1950's, respondent has surveyed television broadcasts to determine listenership and audience share. However, respondent has never commissioned studies of fans' beliefs and attitudes towards the team.[73] Mr. Cooke stated that respondent has received communications both from people opposed to the use

[72] In relation to a joint advertising campaign with McDonald's, respondent set out the following parameters for the use of "the Redskins name, logo and image," which Mr. Cooke testified remain the standard:

- Reserved and Tasteful.
- Redskins Logo Not to be Changed in any way.
- No Caricatures.
- No Indian Costumes or Headresses.
- No War Chants, Yelling, Derogatory Indian Language (i.e., "Scalp the Cowboys," etc…).
- Use of "Hail to the Redskins" must be Presented Tastefully.
- Film and Photography used Must be Beneficial to the Redskins' Image.
- No Smart-Elect (sic) Language or Humor.
- No Insulting Language or Humor.

[73] Mr. Cooke and Mr. Vaughn testified that they knew of a radio survey and a newspaper poll, both pertaining to the "Redskins" team name, and taken independently of respondent. However, we have given no weight to the results of the survey and poll as reported by Mr. Vaughn, and as referred to in communications made of record by notice of reliance, because there is no foundation established in the record for evidence regarding the survey or poll and, thus, no basis for the Board to consider the reliability of the methodology used, or the results reached, in the survey or poll.

of the word “Redskins” as part of the team name and from people supporting the team name.

Mr. Cooke expressed his opinion that the word “redskin(s)” means the “Washington Redskins” football club and nothing else, regardless of whether it appears in singular or plural form; that, except in connection with peanuts, he has heard the word “redskin(s)” only in reference to the football club; and that he could not answer the question of whether it would be appropriate to use the word “redskin(s)” in addressing a Native American person. Mr. Cooke testified that he does not recall anyone ever telling him that he or she considers the word “redskin(s)” offensive as a reference to Native Americans.

Respondent also presented the testimony of Richard Vaughn, director of communications for the “Washington Redskins” football team. Mr. Vaughn testified that, in responding to letters received about the team name, he usually writes that the “Redskins” name has always been very respectful; that the team is proud of its tradition; and that Native Americans have always been depicted respectfully by the team.

Mr. Vaughn expressed his personal opinion that the word “redskin(s)” means the “Washington Redskins” football team; and that, while he has heard the word used to refer

to Native Americans in Western movies, it was neither disparaging or scandalous, nor complimentary or descriptive. Referring to newspaper cartoons representing the “Washington Redskins” football team through various caricatures of a Native American, Mr. Vaughn opined that the cartoons are not disrespectful to anyone because they are about football. He acknowledged that such representations “are not something that we would use,” and he described the reproduction of several of these cartoons in the “Redskins” yearbooks as respectfully reflecting the team’s history and traditions.

Linguistics Experts

Petitioners presented the testimony of Geoffrey Nunberg, who the record establishes as a linguistics expert. Respondent offered, in rebuttal, the testimony of David Barnhart and Ronald Butters, who are also established in the record as linguistics experts.

1. Denotation and Connotation.

These experts explained, essentially, that linguistics is the study of language and its uses, both generally and within particular populations or historical contexts; and that lexicography is the branch of linguistics concerned with the meanings of words with respect to the production of dictionaries.

In explaining the concepts of denotation and connotation of words, the three experts essentially agree that words may be denotative, a neutral description of a thing or phenomenon, out of context and without suggesting significant additional meanings; or connotative, describing a thing or phenomenon and evoking a mental image or association which may be positive, negative or neutral; and that the connotation of a word may change over time. The parties' linguistics experts principally disagree over whether a word can be intrinsically negative in connotation, as posited by Dr. Nunberg, or whether, as respondent's witnesses posit, one must always look to the context in which a word is used to determine its connotation and whether that connotation is neutral, positive or negative.[74] However, it is unnecessary for us to determine whether "redskin(s)" is intrinsically positive, negative or neutral, as the record includes numerous examples of the use of the term "redskin(s)," all of them in a "context." Further, as we indicate *infra*, Section 2(a) requires us to consider the term or other matter at issue in the context of the marks in their entireties, the services identified in the challenged

[74] We note that Dr. Butters' position in this regard is mitigated by his acknowledgment that some terms, for example, "kike" and "nigger," are "almost always offensive and disparaging."

registrations, and the manner of use of the marks in the marketplace. Thus, we consider the meaning of the word "redskin(s)" in this context.

2. Use of the word "redskin(s)."

Regarding the word "redskin(s)," Dr. Nunberg testified that, throughout its approximately 300 years of use, "redskin(s)" has been and is "a connotative term that evokes negative associations, or negative stereotypes, with American Indians." Dr. Nunberg based his opinion on his review of historical documents, namely, citations of the word in the press, books, and encyclopedias from the late 1800's through the first half of this century; from contemporary citations (*i.e.*, the latter half of this century) in the press and in other publications; from use of the word in movies from 1920 to the present; from dictionary entries; and from use of the word in news articles and correspondence associated with this proceeding.[75]

Dr. Nunberg concluded that all occurrences of the word "redskin(s)" as a reference to Native American people in 19th and early 20th century news accounts in this record are

[75] Dr. Nunberg testified that newspaper articles were relevant to reflect both the educated use and the widely circulated use of a word; and that newspaper and television usage influence the way words are used and understood.

in contexts of savagery, violence and racial inferiority; and that, thus, the word must have been considered a disparaging word for Native Americans during this period. Dr. Nunberg finds similar allegedly negative connotations in historical examples of the use of the word "redskin(s)" in the *Oxford English Dictionary* (2nd edition, 1986), and in a report in the *Encyclopedia Britannica* (11th ed. 1910).[76] He notes that certain words, such as "redskin(s)," carry negative connotations, regardless of the context in which they appear; and that, therefore, such words are not likely to be found in a positive context.

Dr. Nunberg concluded that, in all the materials he reviewed, both historical and modern, he did not find a single denotative or neutral reference to "redskin(s)" as a reference to Native Americans. He noted that he found several occurrences wherein the word "redskin(s)" itself is the subject of discussion and it appears in quotes.

On the other hand, considering the same historical and contemporary material in the record, respondent's experts disagree with Dr. Nunberg's conclusion that the word

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[76] This edition says the following about the term redskin(s): "Other popular terms for the American Indians which have more or less currency are 'red race,' 'red man,' 'redskin,' the last not in such good repute as the corresponding German, 'rothaute,' or French, 'peaux rouges,' which have scientific standing."

"redskin(s)" has always been a connotative word of disparagement, or that the evidence of use of the word "redskin(s)" to refer to Native Americans reflects a negative connotation. Rather, Mr. Barnhart described several of the same passages discussed by Dr. Nunberg as connotatively neutral, or even positive, uses of the word "redskin(s)" and concluded that the word "Indian" could easily be substituted therefor without changing the connotation. Dr. Butters, while agreeing that much of the quoted language disparages Native Americans, concluded that it is not the word "redskin(s)" alone that is disparaging. Rather, he concludes that it is the context in which the word appears that portrays Native Americans in a disparaging manner, and that the word "Indian" could be easily substituted in each instance. Dr. Butters states that "Native American," "Indian," and "redskin" are all acceptable words, but that "redskin" is the least formal of the three words and is "only a respectful minor variant alternative for 'American Indian.'"

Dr. Butters testified that the traditional meaning of "redskin(s)" as identifying Native Americans is and always has been "an overwhelmingly neutral, generally benign alternative designator for the indigenous peoples of North America"; that, during the second half of this century, the

word has taken on “an important, powerfully positive new meaning” identifying the Washington, D.C. professional football team; that “redskin(s)” primarily refers to the football team in contemporary American English[77]; and that the connection between the contemporary meaning of “redskin(s)” as a football team with the original meaning as a Native American is greatly attenuated. Dr. Barnhart’s testimony is in agreement with this position.

3. Dictionary definitions of “redskin(s).”

Regarding dictionary definitions of “redskin(s)” and usage labels therefor, Dr. Nunberg considered definitions of the word “redskin(s)” in a number of different dictionaries, focusing on the several dictionaries that include usage labels indicating that the word is offensive or disparaging. Regarding the inconsistent application of usage labels among the dictionaries of record, he testified that dictionaries often do not include usage labels for offensive words; that space is a factor determining the use of such labels; and that no conclusions can be drawn from

[77] Dr. Nunberg conceded that the majority of references to “redskin(s)” in newspapers from the 1950’s to the present pertain to the football team. However, he stated that this does not lead to a conclusion that the reference to the football team is the dominant meaning; rather, it simply means that “redskin(s)” is extremely rare in the press as a reference to Native Americans and that the press must have strong reasons for avoiding such use of the term.

the lack of a usage label in other dictionary excerpts defining "redskin(s)".

Claiming that the majority of dictionary entries of record do not include usage labels indicating that the word "redskin(s)" is offensive or disparaging,[78] respondent's linguists contend that dictionaries that have applied such labels to the word "redskin(s)" as it refers to Native Americans have done so incorrectly.[79] Rather, both of respondent's linguists contend that, as a reference to Native Americans, the word "redskin(s)" is merely informal, has no negative connotations absent a negative context, and remains synonymous with "Indian."[80]

Regarding the inconsistent application of usage labels among the dictionaries of record, Mr. Barnhart testified that usage labels are decided upon by the editor of a dictionary based on a study of the contexts in which a word appears, including cumulative quotations, interviews,

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[78] We note that, in grouping the dictionary excerpts by publisher, approximately half of the entries include usage labels.

[79] Dr. Butters acknowledged that this is the only incorrect dictionary label he could identify.

[80] While maintaining his view that "redskin(s)" is an acceptable, informal word, Mr. Barnhart acknowledged that the usage labels appearing in some dictionaries over the last ten to fifteen years may indicate some shift in usage of the word "redskin(s)" outside of the sports context. Similarly, Dr. Butters acknowledged that, in the 1980's, he began to see scholars, such as historians, sociologists and archeologists, making reference to the word "redskin(s)" as a word that one should probably avoid using.

questionnaires, on-line news services, broadcast transcripts and film; and that limited dictionary space and the time constraints of editing all contribute to usage labeling decisions.[81] He stated, further, that unlabeled words are assumed to be standard English; and that it is not unreasonable for lexicographers to disagree about the application of usage labels.

4. Use of "redskin(s)" in modern context.

All three linguistics experts spent a substantial amount of time discussing their opinions on the meanings of the words "scandalous," "disparaging," and "offensive," the extent to which "disparaging" and "offensive" are synonymous, and whether the word "redskin(s)" is scandalous, disparaging and/or offensive. Predictably, Dr. Nunberg concluded that the word "redskin(s)" has been scandalous, disparaging and offensive from at least 1967 to the present[82]; whereas Mr. Barnhart and Dr. Butters came to the opposite conclusion.

In support of his position, Dr. Nunberg discussed a linguistic concept called "transfer function" which

[81] However, Mr. Barnhart noted that no project with which he has been associated has misapplied a usage label or omitted a usage label due to time or space constraints.

[82] Dr. Nunberg noted that this conclusion is not affected by the fact that Native Americans may use this term to refer to themselves, as

describes a process where one sense of a word is extended to yield another sense of the word. For example, with respect to sports team names, Dr. Nunberg testified that the transfer is a metaphorical one in which certain properties of the core or original meaning of the word are exploited in forming an extended use of that word to acquire another denotation. Referring specifically to the "Washington Redskins," Dr. Nunberg concluded that "redskin(s)" conveys a savage, ferocious impression and this original association is relied upon for its efficacy as the name of the football team.[83]

Respondent's linguistics experts reiterated their opinion that the word "redskin(s)" is a standard, albeit informal, English word that refers to Native American persons; that "redskin" and Native American are completely

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there is a long history of ethnic groups or other groups taking disparaging terms and using them defiantly.

[83] Dr. Nunberg testified that he studied and listed the names of professional sports teams and concluded that these names fell in two general categories, namely, names which relate to the local community and names of people, animals or inanimate objects; that this latter group of names usually sound "fierce, ferocious, savage, inhuman, implacable so as in a symbolic way to strike fear into the hearts of opponents"; and that "Washington Redskins" and other Indian names fall into this latter category. In this regard, Dr. Nunberg refers to the headlines of newspaper articles about the football team and notes that the headlines all reflect the theme of Indians on the warpath. Dr. Nunberg concluded that these headlines indicate the "degree to which the association of the team name and the use of the word to refer to Indians remains vivid and salient in the minds of sports writers and to the general public"; and that, therefore, while "Redskins" may have acquired another meaning as a football team, the meaning is not divorced from, or independent of, its use to refer to Native Americans.

synonymous; and that, while the predominant use of the word "redskin(s)" is to refer to the football team, the lack of use of the word to refer to Native Americans is not an indication that the word is offensive as it pertains to Native Americans.

Dr. Butters acknowledged that, under some circumstances, some, but not the majority, of Americans today would find the word "redskin(s)" offensive as a reference to Native Americans. However, he indicated that the word had no such negative connotations prior to 1967, when the movement towards "political correctness" in language began.

Dr. Nunberg disagreed with respondent's witnesses' claim that the word "redskin(s)" is merely informal as it pertains to Native Americans, noting that such a conclusion does not explain the fact that it never appears in a neutral denotative context. Dr. Nunberg indicated that linguists characterize words along a spectrum which ranges from informal, through specialized and standard, to formal. Dr. Nunberg stated, however, that placement of a word on this spectrum does not indicate connotation; for example, designation of a word only as "informal" does not indicate whether it has a positive or negative connotation.

6. Findings of fact regarding linguists' testimony.

Each party has offered the testimony of linguistics experts about the denotation and connotation of "redskin(s)" as a reference to Native Americans and as it appears in the name of respondent's football team. To some extent, this testimony is self-serving and the opinions of the different individuals seem to negate each other's assertions, which offsets whatever probative value could be attributed to this portion of their testimony. However, we find that there are certain points upon which the parties' experts agree and, further, that certain conclusions can be drawn regarding some areas of disagreement.

There is no dispute among the linguistics experts that the word "redskin(s)" has been used historically to refer to Native Americans, and is still understood, in many contexts, as a reference to Native Americans; that, from at least the mid-1960's to the present, the word "redskin(s)" has dropped out of written and most spoken language as a reference to Native Americans; that, from at least the mid-1960's to the present, the words "Native American," "Indian," and "American Indian" are used in spoken and written language to refer to Native Americans; and that, from at least the mid-1960's to the present, the word

"redskin(s)" appears often in spoken and written language only as a reference to respondent's football team.

The experts agree the evidence of record establishes that, until at least the middle of this century, spoken and written language often referred to Native Americans in a derogatory, or at least condescending, manner and that references to Native Americans were often accompanied by derogatory adjectives and/or in contexts indicating savagery and/or violence. There is no dispute that, while many of these usage examples refer to Native Americans as "Indians," the word "Indian" has remained in the English language as an acceptable reference to Native Americans during the second half of this century. The question remaining, about which the parties' experts, predictably, disagree, is the significance of the word "redskin(s)" in written and spoken language from the 1960's to the present, both as a reference to Native Americans and as part of the name of respondent's football team. In this regard, the experts draw conclusions regarding the application of the legal standards in this case that are not binding on the Board or the courts. Thus, we have not considered these conclusions. *See, The Quaker Oats Company v. St. Joe Processing Company, Inc.*, 232 F.2d 653, 109 USPQ 390 (CCPA

1956); and *American Home Products Corporation v. USV Pharmaceutical Corporation*, 190 USPQ 357 (TTAB 1976).

However, the experts made several statements in reaching their conclusions that bear scrutiny. For example, while respondent's linguistics experts contend that the word "redskin(s)" is merely an informal term, petitioners' expert notes, credibly, that such a characterization does not address the issue of whether the connotation of "redskin(s)" in any given instance is negative, neutral or positive. Nor does the characterization of the word "redskin(s)" as informal adequately address the question of why the word appears, on this record, to have entirely dropped out of spoken and written language since, at least, the 1960's, except in reference to respondent's football team.

Looking to dictionary definitions of the word "redskin(s)," the experts agree that the many dictionaries in evidence, including dictionaries from the time periods when each of the challenged registrations issued, define "redskin" as a Native American person; that one dictionary also defines "Redskin" as respondent's professional football team; and that several dictionaries, dating from 1966 to the present, include usage labels indicating that the word "redskin" is an offensive reference to Native

Americans, whereas several other dictionaries, dating from 1965 to 1980, do not include such usage labels in defining "redskin." Predictably, the experts' opinions differ as to the significance to be attached to the usage labels, or the lack thereof. We find these contradictory opinions of little value in resolving this dispute. Thus, we have considered the dictionary definitions themselves in the context of the entire record.

Film Expert

Susan Courtney[84] testified that she was hired by Geoffrey Nunberg, in connection with his testimony as a linguistics expert for petitioners in this case, to conduct a study of the use of the word "redskin(s)" in American film. Ms. Courtney compiled a filmography, *i.e.*, a bibliography of films, of fifty-one Western genre films that were produced up to and including the 1970's. Based primarily on availability, she viewed twenty of the films listed in her filmography to determine whether the word "redskin(s)" is used in any of the viewed films. She cataloged her results and prepared both a video containing excerpts of the viewed films wherein the word "redskin(s)"

[84] At the time she compiled this study, Ms. Courtney was a Ph.D candidate at the University of California at Berkeley in the Rhetoric Department. She was specializing in American cinema and the representation of gender and race in film, literature and other cultural contexts.

is used, and an interpretive index describing the excerpted scenes and the use of the word “redskin(s)” therein. She offered her opinion that the excerpted films are representative both of the Western genre in American film and of the manner in which Native Americans are depicted in American film.

Ms. Courtney stated that, in the twenty films viewed, she looked for any usage of the word “redskin(s)”, either positive or negative, but that she did not find any instance in which the word “redskin(s)” is used in a positive manner. Ms. Courtney drew the conclusion from her research viewing these films that the word “redskin(s)” is significantly different from other words that refer to Native American people. She stated that, in the films, the word “redskin(s)” is often coupled with negative adjectives such as “dirty,” or “lying”; or that the word is used in the context of violence, savagery, or dishonesty; and that the word “Indian” could not reasonably be substituted for the word “redskin(s)” and retain the same connotation. She noted that she did not track the use of words other than “redskin(s)” in her research, so she cannot conclude that the word “Indian” is not also used in a derogatory manner.

Survey Evidence

1. Petitioners' Survey.

Ivan Ross, a market research and consumer psychologist, described the methodology and results of a telephone survey that he designed and supervised on behalf of petitioners. He stated that the purpose of the survey was to determine the perceptions of a substantial composite of the general population and of Native Americans to the word "redskin(s)" as a reference to Native Americans. Three hundred one American adults, representing a random sample of the general population, and 358 Native American adults were surveyed. Both groups included men and women ages 16 and above. These individuals were identified according to a random sampling procedure, which Dr. Ross described in the record. Dr. Ross described the Native American population as a stratified sample, wherein census reports were used to identify the twenty states with the largest numbers of Native Americans, from which the Native American sample was chosen according to a random sample plan. Dr. Ross testified that the Native American sample reflected a consistent mix of rural and urban Native Americans; and included both registered members of Indian tribes and non-registered individuals who identified themselves as Native American.

Individuals in both population groups were read a list, in varying order, of the following terms: “Native American,” “Buck,” “Brave,” “Redskin,” “Injun,” “Indian,” and “Squaw.” With respect to each term, participants were asked whether or not they, or others, would be “offended” by the use of the term[85] and, if so, why. Dr. Ross testified that he chose these terms as representative of a spectrum of acceptability, positing that, in general, “Native American” would be likely to be considered acceptable and “Injun” would be likely to be considered pejorative. Dr. Ross testified that, for the question, he chose the word “offensive” as most likely to reflect, to those unfamiliar with trademark law, the behavioral concepts embodied in the terms “scandalous” and “disparaging” in the trademark law. Dr. Ross stated that asking participants whether others might be offended is an accepted additional means of obtaining the speaker’s opinion, based on the assumption that the speaker may be circumspect in answering a direct question.

Dr. Ross tabulated the results three different ways. First, he grouped together responses to both questions “is it offensive to you” and/or “is it offensive to others.”

[85] This question was changed so that it was posed to participants, variably, with either the positive or the negative option stated first.

He also tabulated the results considering responses only to the question “is it offensive to you” and he separately tabulated responses only to the question “is it offensive to others.” In all cases, and in both population groups, the tabulated order of “offensiveness” of the terms was the same, although the percentage of the sample finding each term “offensive” differed between the two population groups. Following is the tabulation of only those responses indicating that the speaker was personally offended.

Number and percentage answering “yes, offensive to me”:

	General Population Sample (total sample=301) Yes	**Native American Sample** (total sample=358) Yes
INJUN	149 (49.5%)	181 (50.6%)
REDSKIN	139 (46.2%)	131 (36.6%)
SQUAW	109 (36.2%)	169 (47.2%)
BUCK	110 (36.5%)	99 (27.7%)
BRAVE	30 (10.0%)	25 (7.0%)
INDIAN	8 (2.7%)	28 (7.8%)
NATIVE AMERICAN	6 (2.0%)	10 (2.8%)

2. Respondent’s Rebuttal.

In response to petitioners’ survey and testimony of Dr. Ross, respondent presented the testimony of Jacob Jacoby, a psychologist and expert in the area of marketing and trademark surveys. Not surprisingly, Dr. Jacoby presented a detailed attack on the design of the survey, its implementation, and the tabulation of results. For

example, regarding the questions asked, Dr. Jacoby contended, *inter alia*, that the questions asked were leading and not neutral; that the list of words referring to Native Americans contained an insufficient number of words; that, in using the term “offensive” in its questions, the survey did not ascertain the appropriate information for a determination under Section 2(a); and that research shows that proxy respondents, *i.e.,* asking what others think, leads to ambiguous results. Regarding the sampling procedure, Dr. Jacoby contended, *inter alia*, that the Native American sample is too geographically limited to be representative; that the method for determining whether a participant is Native American is flawed; that the birthday sample method employed violates the randomness of the survey and, further, that the age parameters include participants who could not reflect the state of mind of people in 1967; and that there was a less than 50% response rate to the survey, which renders it a very weak probability survey. Regarding the tabulation of the results of the survey, Dr. Jacoby contends, *inter alia*, that certain responses were incorrectly tabulated as positive responses, in particular, those responses dependent upon the context in which the word may be used, and those responses indicating that others may be offended.

Dr. Jacoby concluded that the defects he has identified in the sampling plan, in the questions asked as part of the survey, and in the tabulation of the results render it completely unscientific. Dr. Jacoby expressed his opinion that the survey is further flawed because it sought the current views of its participants rather than their perceptions during the relevant time period; and it failed to obtain perceptions of the word "redskin(s)" as used in the context of respondent's team name.

3. Findings of Fact regarding survey.

In view of the contradictory testimony of the parties' marketing experts regarding the extent to which petitioners' survey realized its stated objective, we find it useful at this time to state our factual conclusions regarding this survey. While a few of Dr. Jacoby's criticisms have some merit, we note that no survey is perfect and 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 (S.D.N.Y. 1990) and cases cited therein; and *Selchow & Righter Co. v. Decipher, Inc*., 598 F. Supp. 1489, 225 USPQ 77, 86 (E.D. Va. 1984). After careful consideration of Dr. Ross' testimony, the survey report and the substantial survey

data in the record, we find ample support for the viability of the survey methodology used, including the sampling plan, the principal questions asked, and the manner in which the survey was conducted.[86]

However, we agree that this survey is not without flaws. In particular, we are not convinced that a survey participant's conjecture about the views of "others" actually reflects the participant's personal views. We see little value to this question in the survey, and we find the survey results tabulated by merging positive answers to questions both about the participant's personal reaction to the word list and his opinion about others' reactions to be of questionable significance. Thus, we have given this portion of the survey results no weight. However, this flaw does not negatively affect the results of the survey as tabulated only for actual positive responses regarding participants' personal reactions to the word list. Further, our review of the transcripts of the actual interviews convinces us that the interviewers accurately

[86] We specifically mention the use of the word "offensive" in the survey question as the linguistics and survey experts of both parties argued about whether "offensive" adequately reflects the meaning of "disparage," as used in Section 2(a). We find that the dictionary definitions of "disparage," as well as the testimony of these experts, indicates that the words are sufficiently similar in meaning to justify the use of "offensive" in the survey questions.

transcribed results as either positive, negative, or no opinion.[87]

We find no error in including adults aged 16 and above in the survey, even though the younger participants were not alive, or not adults, at the time of registration of several of respondent's marks herein. Dr. Ross does not represent this survey as anything other than a survey of current attitudes as of the time the survey was conducted. We agree with Dr. Jacoby that a survey of attitudes as of the dates of registration of the challenged registrations would have been extremely relevant in this case, if such a survey could be credibly constructed. But neither party chose to undertake such a survey.

Similarly, a survey that considered participants' views of the word "redskin(s)" as used by respondent, the media and fans in connection with respondent's football team would have been extremely relevant. But, again, neither party chose to undertake such a survey.

Neither of these points diminishes the value of petitioners' survey for what it is – a survey of current attitudes towards the word "redskin(s)" as a reference to

[87] In several instances, a participant responded that "yes" he or she would be offended by a certain term "depending upon the context" in which it was used. While, in hindsight, a follow-up question to clarify this response might have been useful, we find no error in tabulating this as a positive response.

Native Americans. In this regard, we find that the survey adequately represents the views of the two populations sampled. While certainly far from dispositive of the question before us in this case, it is relevant and we have accorded some probative value to this survey, as discussed in our legal analysis, *infra*.

Applicable Legal Principles

The case herein is a petition to cancel several registrations, the oldest of which issued almost twenty-five years prior to the filing of this petition. For the reasons stated in the March 11, 1994, interlocutory decision addressing this issue (*Harjo, et al. v. Pro Football, Inc*., 30 USPQ2d 1828, 1832 (1994)) and reaffirmed herein, our decision on the Section 2(a) issues in this case pertains to the time periods when the subject registrations issued.[88] The Board must decide whether, at the times respondent was issued each of its challenged registrations, the respondent's registered marks consisted

[88] We note that, because petitioners allege that the term "redskin(s)" is, and always has been, a derogatory term in connection with Native Americans, we have considered the evidence pertaining to the entire period of history presented in the record, from the mid-nineteenth century to the present. Evidence concerning the significance of the term "redskin(s)" before and after the relevant time periods may shed light on its significance during those periods. Our opinion in this case is not inconsistent with the cases cited herein stating that the issue of scandalousness must be decided on the basis of "contemporary attitudes," as those cases are all *ex parte* cases wherein the issue of scandalousness is being addressed, similarly, "at the time of registration" or when registration was being sought.

of or comprised scandalous matter, or matter which may disparage Native American persons, or matter which may bring Native American persons into contempt or disrepute.[89]

Section 2(a)

The relevant portions of Section 2 of the Trademark Act (15 U.S.C. 1052)[90] provide as follows:

> 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,

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[89] While respondent does not appear to contest this point, petitioners state that an issue in this case is whether petitioners have established their standing, contending, of course, that they have. We previously found that petitioners had pleaded a legitimate interest in the outcome of this proceeding. *Harjo, et al. v. Pro Football, Inc.*, *supra at* 1830. We now agree that petitioners have established by proper evidence their standing herein. *See*, *Bromberg, et. al. v. Carmel Self Service, Inc.*, 198 USPQ 176 (TTAB 1978); and *Ritchie v. Simpson*, No. 97-1371 (Fed. Cir. March 15, 1999) (1999 U.S. App. LEXIS 4153).

[90] Respondent contends that because its constitutional rights would be abridged by cancellation of its registrations, petitioners should be required to establish their case by "clear and convincing" evidence. However, we have elsewhere in this opinion stated that the constitutional issues raised by respondent have not been considered because such issues are not properly before the Board.

It is well established that a registration is prima facie valid and that, in an opposition or cancellation proceeding, the challenger's burden of proof generally is a preponderance of the evidence. *See, Cerveceria Centroameicana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 13 USPQ2d1307, 1309 (Fed. Cir. 1989); and *Eastman Kodak Co. v. Bell & Howell Document Management Products Co.*, 994 F.2d 1569, 26 USPQ2d 1912 (Fed. Cir. 1993). As noted by petitioners, the case cited by respondent in support of its contention, *Woodstock's Enters., Inc. v. Woodstock's Enters., Inc.*, 43 USPQ2d 1440 (TTAB 1997), addresses the traditionally higher burden of proof required in fraud cases, which is not the issue herein. We are not aware of any authority that would warrant applying a standard of proof other than a preponderance of the evidence to Section 2(a) issues.

> living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute;

Scandalous Matter

The vast majority of the relevant reported cases involving that part of Section 2(a) with which we are concerned in this case were decided principally on the basis of whether the marks consisted of scandalous matter. We begin with a review of this precedent.

Faced with a "paucity of legislative history," to aid in interpreting the term "scandalous" in Section 2(a), one of the predecessor courts of our primary reviewing court found that it must look to the "ordinary and common meaning" of that term, which meaning could be established by reference to court and Board decisions, and to dictionary definitions. In particular, the Court looked to dictionary definitions extant at the time of the enactment of the Trademark Act in 1946, and noted that "scandalous" was defined as "'Giving offense to the conscience or moral feelings; exciting reprobation, calling out condemnation * * *. Disgraceful to reputation * * *.' [and] 'shocking to the sense of truth, decency, or propriety; disgraceful, offensive; disreputable, as *scandalous* conduct.'" *In re McGinley*, 660 F.2d 481, 211 USPQ 668, 673 (CCPA 1981). In a case predating the

Trademark Act of 1946, the Court had looked to similar dictionary definitions of "scandalous," and concluded that the use of the mark MADONNA upon wine which is not limited to a religious use was "scandalous" under the relevant provision of the 1905 Trademark Act. *In re Riverbank Canning Co*., 95 F.2d 327, 37 USPQ 268, 269 (CCPA 1938).

The Board has acknowledged that the guidelines for determining whether a mark is scandalous are "somewhat vague" and the "determination [of whether] a mark is scandalous is necessarily a highly subjective one." *In re Hershey*, 6 USPQ2d 1470, 1471 (TTAB 1988); and *In re Over Our Heads Inc.*, 16 USPQ2d 1653, 1654 (TTAB 1990). Nonetheless, taking as their starting point the "ordinary and common meaning" of scandalous, as did the CCPA in *Riverbank Canning, supra,* and *McGinley, supra,* the U.S. Court of Appeals for the Federal Circuit and this Board have, in subsequent decisions, established some guidelines for determining whether matter is scandalous. In the context of an *ex parte* refusal to register the mark BLACK TAIL in connection with adult magazines, the Court of Appeals for the Federal Circuit summarized this guidance in *In re Mavety Media Group Ltd*., 31 USPQ2d 1923, 1925 (1994), as follows:

> The PTO must consider the mark in the context of the marketplace as applied to only the goods described in Mavety's application for registration. Furthermore, whether the mark BLACK TAIL, including innuendo, comprises scandalous matter is to be ascertained (1) from "the standpoint of not necessarily a majority, but a substantial composite of the general public," and (2) "in the context of contemporary attitudes." (*citations omitted*.)

While not often articulated as such, determining whether matter is scandalous involves, essentially, a two-step process. First, the Court or Board determines the likely meaning of the matter in question and, second, whether, in view of the likely meaning, the matter is scandalous to a substantial composite of the general public. Relevant precedent holds that the meaning of the matter in question cannot be determined by reference only to dictionary definitions, as many words have multiple definitions (denotative meanings), and the connotation of a word, phrase or graphics is usually dependent upon the context in which it appears.[91] See, *In re Mavety Media Group Ltd., supra at* 1927. Thus, the meaning of the matter in question cannot be ascertained without considering (1) the relationship between that matter and any other element

[91] In the testimony of the linguistics experts herein, a distinction is made between the denotative and connotative meanings of words. We use the term "denotation" to signify the "literal," or dictionary, meaning of a word and the term "connotation" to signify the meaning of that word in a particular context, which may or may not be the same as the word's denotative meaning.

that makes up the mark in its entirety and (2) the goods and/or services and the manner in which the mark is used in the marketplace in connection with those goods and/or services.

For example, finding that dictionary definitions alone were insufficient to establish that the mark BLACK TAIL, in connection with adult magazines, is scandalous, the Court in *In re Mavety Media Group Ltd.*, *supra at 1927*, concluded that there were several definitions of "tail," only one of which was vulgar; that two of these definitions were equally plausible in connection with the identified magazines; and that the record was devoid of evidence demonstrating which of these definitions a substantial composite of the general public would choose. *See also*, *In re Hershey*, supra[92]; *In re Thomas Laboratories*, Inc., 189 USPQ 50 (TTAB 1975)[93]; and *In re Hepperle*, 175 USPQ 512 (TTAB 1972).[94]

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[92] In *Hershey*, the Board found, particularly in view of labels showing a design of a large-beaked bird directly below the mark, that dictionary definitions and six articles from the NEXIS database were insufficient to establish a vulgar meaning of "pecker" in the BIG PECKER BRAND mark, or that it would be so understood by a substantial composite of the general public.

[93] In *Thomas Laboratories*, giving "fullest consideration to the moral values and conduct which contemporary society has deemed to be appropriate and acceptable," the Board found not scandalous a mark consisting of a "cartoon-like representation of a melancholy, unclothed male figure ruefully contemplating an unseen portion of his genitalia" where the goods were identified as corrective implements for increasing the size of the human penis.

Additionally, while the decisional law may suggest that intent, or lack thereof, to shock or to ensure that the scandalous connotation of a mark is perceived by a substantial composite of the general public is one factor to consider in determining whether a mark is scandalous, there is no support in the case law for concluding that such intent, or a lack thereof, is dispositive of the issue of scandalousness. *See*, *In re Old Glory Condom Corp*., 26 USPQ2d 1216 (TTAB 1993)[95]; and *In re Wilcher Corp*., 40 USPQ2d 1929 (TTAB 1996).[96]

Matter Which May Disparage

The plain language of the statute makes clear that disparagement is a separate and distinct ground for refusing or canceling the registration of a mark under

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[94] In *Hepperle*, the Board found that, while ACAPULCO GOLD may be a synonym for marijuana, when the mark was applied to suntan lotion it was likely to suggest, to the average purchaser, in a normal marketing milieu, the resort city of Acapulco, which is noted for its sunshine.

[95] In *Old Glory*, the Board found the mark, OLD GLORY CONDOM CORP and design of American flag in the shape of condom, for condoms, not scandalous, noting that "the seriousness of purpose surrounding the use of applicant's mark -- which (is made) manifest to purchasers on the packaging for applicant's goods -- is a factor to be taken into account in assessing whether the mark is offensive or shocking."

[96] In *Wilcher*, the Board found that the mark, DICKHEADS and a design which is a grotesque caricature of a man's face formed with a depiction of male genitalia, for restaurant services, was scandalous despite dictionary evidence indicating several possible connotations of the word portion of the mark, as the drawing "clearly and blatantly projects a vulgar connotation."

Section 2(a).[97] However, there is relatively little published precedent or legislative history to offer us guidance in interpreting the disparagement provision in Section 2(a).[98] As with scandalousness, the determination

[97] This is notwithstanding the fact that a number of older decisions appear to consider scandalousness and disparagement under Section 2(a) as a single issue wherein the questionable matter is determined to be scandalous, or not, because it is, or is not, disparaging. *See*, *In re Reemtsma CigarettenFabriken G.m.b.H.*, 122 USPQ 339 (TTAB 1959); and *In re Waughtel*, 138 USPQ 595 (TTAB 1963).

[98] The following comments concerning disparagement in the legislative history of the Trademark Act of 1946, P.L. 79-489, Chapt. 540, July 5, 1946, 60 Stat. 427, are excerpted from a discussion of whether the disparagement provisions of Section 2(a) will protect associations from the use by unauthorized third parties of their names or insignia on goods. It follows a discussion of Section 2(c) regarding the use of the name, etc., of a deceased president of the United States. Hearings on H.R. 4744 Before the Subcommittee on Trademarks of the House Committee on Patents, 76th Cong., 1st Sess. 18-50 (1939):

> MR. LANHAM. It seems to me that there might be a little doubt, Mr. Rogers, as to whether [Section 2(a)] is sufficiently comprehensive [to include within the connotation of the word 'institution' fraternal organizations and other various groups]. [Section 2(a)] prohibits disparaging persons, living or dead, institutions, beliefs, or national symbols.
>
> MR. FENNING. I think there has been no real trouble with the 1905 statute as it stands now, as I understand it. The wording in the statute with respect to insignia has apparently been satisfactory, and it seems to me it might be just as well to carry it over. There may be controversy over what some people call disparagement.
>
> MR. LANHAM. Of course, that is the very thing that subsection (a) was designed to meet.
>
> MR. ROGERS. Yes, sir.
>
> MR. FENNING. There is a good deal of question as to what disparagement is. If excellent athletic goods, for instance, are marketed with the name of the New York Athletic Club on them, that is not detrimental to the club.
>
> MR. LANHAM. Of course, I am not sitting here in a judicial capacity, and I cannot construe that.
>
> MR. ROBERTSON. Mr. Chairman, I have not any hesitation at all in saying that I do not think that section as presently drawn does cover the matter at all. The word "disparaging" is too

of whether matter may be disparaging is highly subjective and, thus, general rules are difficult to postulate. However, we undertake an analysis similar to that undertaken by the Court and Board in relation to scandalousness to make our determination herein. As with scandalousness, we begin by considering the "ordinary and common" meaning of the term "disparage." Then, to determine whether matter may be disparaging, we undertake a two step process of considering, first, the likely meaning of the matter in question and, second, whether that meaning may be disparaging.

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comprehensive in meaning. For instance, it does not cover the use of an ex-President's name the use of it in a respectful manner on goods on which the family might not desire it used. That is not disparagement at all, but at the same time it does not cover that situation.

MR. FRAZER [*Assistant Commissioner of Patents*]. I would like to make this suggestion with respect to the word "disparage." I am afraid that the use of that word in this connection is going to cause a great deal of difficulty in the Patent Office, because, as someone else has suggested, that is a very comprehensive word, and it is always going to be just a matter of the personal opinion of the individual parties as to whether they think it is disparaging. I would like very much to see some other word substituted for that word "disparage."

MR. LANHAM. That seems to me, in the light of administration, to be a very pertinent suggestion, and if you gentlemen can clarify that with verbiage you suggest it would be helpful.

The legislative history does not indicate whether the suggestions solicited by Mr. Lanham were made. Further, if made, they certainly were not adopted, as the word "disparage" appears in the Trademark Act of 1946 without further explanation. Thus, Congress essentially left to the courts and Board the task of establishing the meaning of this provision of the statute and guidelines for its applicability.

To establish the meaning of the term "disparage," we refer to dictionaries that were contemporaneous with the passage of the Trademark Act of 1946. "Disparage" is defined as follows:[99]

> *Webster's New International Dictionary*, G. & C. Merriam Company (2nd ed. 1947) –
> 2. To dishonor by comparison with what is inferior; to speak slightingly of; to deprecate; to undervalue; 3. To degrade; lower; also (*chiefly passive*), to discourage by a sense of inferiority;
>
> *New "Standard" Dictionary of the English Language, Funk and Wagnalls Company* (1947) –
> 1. To regard or speak of slightingly. 2. To affect or injure by unjust comparison, as with that which is unworthy, inferior, or of less value or importance; as, I do not say this to *disparage* your country. 3. [*Rare*] To degrade in estimation by detractive language or by dishonoring treatment; lower; dishonor; as, such conduct *disparages* religion.

From these definitions we conclude that, in considering whether matter in a mark "may disparage … persons, living or dead, institutions, beliefs, or national symbols," we must determine whether, in relation to identified "persons, living or dead, institutions, beliefs, or national symbols," such matter may dishonor by comparison with what

[99] We note that the meaning of "disparage" has not changed appreciably since the passage of the Lanham Act. The 1993 edition of the *Random House Unabridged Dictionary* defines "disparage" as "to speak of or treat slightingly; depreciate; belittle; to bring reproach or discredit upon; lower the estimation of."

is inferior, slight, deprecate, degrade, or affect or injure by unjust comparison.

Considering the “ordinary and common” meanings of the words “scandalous” and “disparage,” we find that distinct differences in these meanings dictate that we apply different standards for determining disparagement from those enunciated by the Court and Board for determining scandalousness. In particular, the “ordinary and common meaning” of “scandalous” looks at the reaction of American society as a whole to specified matter to establish whether such matter violates the mores of “American society” in such a manner and to such an extent that it is “shocking to the sense of truth, decency or propriety,” or offensive to the conscience or moral feelings, of “a substantial composite of the general public.” On the other hand, the “ordinary and common meaning” of the word “disparage” has an entirely different focus, as disparagement has an identifiable object which, under Section 2(a) of the Trademark Act, may be “persons, living or dead, institutions, beliefs or national symbols.”

A further difference between scandalousness and disparagement is found in the language of Section 2(a). While Section 2(a) precludes registration of matter that **is** scandalous, it does not preclude registration of matter

that **is** disparaging. It precludes registration of matter that **may be** disparaging. There is no legislative history or precedent that specifically addresses this distinction between the two statutory provisions. Respondent's linguistics experts herein have testified that, as they understand the meaning of the word "disparage," disparagement of someone or something usually requires some degree of intent by the speaker to cause offense, although, as petitioners' expert notes, this may be inferred from the circumstances and from evidence regarding the acceptability of the language or imagery used. Thus, we believe the use of the term "may" is necessary in connection with "disparage" in Section 2(a) to avoid an interpretation of this statutory provision that would require a showing of intent to disparage. Such a showing would be extremely difficult in all except the most egregious cases. Rather, this provision, as written, shifts the focus to whether the matter may be perceived as disparaging.[100]

In seeking guidance for determining, under Section 2(a), whether matter may be perceived as disparaging, we look to the limited precedent of the courts and the Board

[100] Thus, as with scandalousness, the intent, or lack thereof, to ensure that the disparaging connotation of matter in a mark is so perceived is merely one factor to consider in determining whether a mark may be disparaging. It is not dispositive of the issue of disparagement.

on the issue of disparagement, as well as to the previously enunciated precedent on the related issue of scandalousness. As with most trademark issues, including scandalousness, the question of disparagement must be considered in relation to the goods or services identified by the mark in the context of the marketplace. *See, In re Riverbank Canning Co., supra at 269. See also*, *Doughboy Industries, Inc. v. The Reese Chemical Company*, 88 USPQ 227 (Pat. Off. 1951), wherein the Patent Office denied, *ex parte*, the registration of DOUGH-BOY for an anti-venereal medication. In that case, the Patent Office concluded that, as with scandalousness, the question of disparagement must be determined by reference to the particular goods in connection with which the mark is used. The Patent Office found the mark DOUGH-BOY, a name for American soldiers in the first World War, to be disparaging as used in connection with the identified goods, particularly in view of the packaging which pictured an American soldier.

To ascertain the meaning of the matter in question, we must not only refer to dictionary definitions, but we must also consider the relationship between the subject matter in question and the other elements that make up the mark in its entirety; the nature of the goods and/or services; and

the manner in which the mark is used in the marketplace in connection with the goods and/or services.

If, in determining the meaning of the matter in question, such matter is found to refer to an identifiable "[person or] persons, living or dead, institutions, beliefs, or national symbols," it is only logical that, in deciding whether the matter may be disparaging, we look, not to American society as a whole, as determined by a substantial composite of the general population, but to the views of the referenced group.[101] The views of the referenced group are reasonably determined by the views of a substantial composite thereof. In this regard, we follow the precedent established by the Board in *In re Hines*, 31 USPQ2d 1685, 1688 (TTAB 1994),[102] *vacated on other grounds*, 32 USPQ2d 1376 (TTAB 1994), wherein the Board stated the following:

> In determining whether or not a mark is disparaging, the perceptions of the general public are irrelevant. Rather, because the

[101] It is very possible that disparaging matter may provoke a negative reaction from only the relevant group. Thus, matter that may disparage does not necessarily provoke the same widespread societal reaction as scandalous matter. However, if allegedly disparaging matter provokes a widespread negative societal reaction, it is reasonable to infer that the relevant group will, similarly, perceive the matter as disparaging. Further, depending on the facts, matter that may disparage can be found, also, to be scandalous under Section 2(a).

[102] In *Hines*, the Board found the mark BUDDA BEACHWEAR and design for various casual clothing items to be disparaging in view of the particular depiction of Buddha therein.

> portion of Section 2(a) proscribing disparaging marks targets certain persons, institutions or beliefs, only the perceptions of those referred to, identified or implicated in some recognizable manner by the involved mark are relevant to this determination.

Who comprises the targeted, or relevant, group must be determined on the basis of the facts in each case. For example, if the alleged disparagement is of a religious group or its iconography, the relevant group may be the members and clergy of that religion; if the alleged disparagement is of an academic institution, the relevant group may be the students, faculty, administration, and alumni; if the alleged disparagement is of a national symbol, the relevant group may be citizens of that country. *See also, In re Reemtsma Cigarettenfabriken G.m.b.H.*, 122 USPQ 339 (TTAB 1959)[103]; *In re Waughtel*, 138 USPQ 594, 595 (TTAB 1963)[104]; and *In re Anti-Communist World Freedom Congress, Inc.*, 161 USPQ 304, 305 (TTAB 1969).[105]

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[103] The mark in *Reemtsma*, SENUSSI, which is the name of a Moslem group that forbids the use of cigarettes, for cigarettes, was found to be an affront to the members of this group and tended to disparage their beliefs.

[104] The mark in *Waughtel*, AMISH and design of an Amish man smoking a cigar, for cigars and cigar boxes, was found not to affront members of that sect or disparage their religious or moral beliefs because evidence established that nothing in Amish religious principles or teachings prohibits the raising or use of tobacco and, in fact, at least seventy-five percent of the male members of the Amish sect smoke cigars and/or chew tobacco.

[105] The mark in *Anti-Communist World Freedom Congress*, consisting of a design of a large "X" superimposed over a hammer and sickle design, for "patriotic educational services, namely, dissemination of information

We distinguish *Hines* and the case herein from the case of *Greyhound Corp. v. Both Worlds, Inc.*, 6 USPQ2d 1635 (TTAB 1988). In *Greyhound*, on summary judgment, the Board sustained the opposition on the grounds of scandalousness, disparagement, and likelihood of confusion. The mark in question was a design of a defecating greyhound dog, for polo shirts and T-shirts. Citing the *Restatement (Second) of Torts* §629 (1977), wherein disparagement is defined as the publication of a statement, which the publisher intends to be understood, or which the recipient reasonably should understand, as tending "to cast doubt upon the quality of another's land, chattels, or intangible things," the Board established the following standard:

> The two elements of such a claim [of disparagement] are (1) that the communication reasonably would be understood as referring to the plaintiff, and (2) that the communication is disparaging, that is, would be considered offensive or objectionable by a reasonable person of ordinary sensibilities. (*citations omitted*)

The disparagement in the *Greyhound* case involved an "offensive" design that disparages a commercial corporate entity and, thus, is akin to the commercial disparagement of property described in §629 of the *Restatement (Second)*

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relative to United States laws concerning activities of the communist party," was found to disparage the national symbol of the Soviet Union. Applicant's intent to disparage the Communist Party rather than the Soviet Union was considered irrelevant.

of Torts, supra. The disparaging trademark casts doubt upon the quality of opposer's corporate goodwill, as embodied in its running greyhound dog trademarks. The standard in that case, namely, the perception of a "reasonable person of ordinary sensibilities," may be appropriate in cases involving alleged disparagement of individuals or commercial entities. However, the standard enunciated in *In re Hines*, *supra*, namely, the perceptions of "those referred to, identified or implicated in some recognizable manner by the involved mark," is appropriate for determining whether matter may disparage a non-commercial group, such as a religious or racial group, or beliefs or national symbols.

Matter Which May Bring Persons Into Contempt Or Disrepute

We turn, finally, to the Section 2(a) provisions regarding contempt or disrepute. We find no guidance in the legislative history for interpreting this provision and note that this provision is addressed in the case law, generally, in a conclusory manner with few, if any, guidelines. In view of the "ordinary and common" meanings of the words "contempt" and "disrepute," as they were defined in 1947[106] and more recently,[107] we believe that the

[106] In *Webster's New International Dictionary*, Unabridged, 2nd ed., G. & C. Merriam Company (1945), "*contempt*" is defined as "1. Act of contemning, or despising; the feeling with which one regards that which

guidelines enunciated herein in connection with determining whether matter in a mark may be disparaging are equally applicable to determining whether such matter brings "persons, living or dead, institutions, beliefs, or national symbols into contempt or disrepute."

Legal Analysis

We preface our analysis herein by emphasizing the very narrow nature of the question before us. We are determining whether, under the Section 2(a) grounds asserted, the service marks that are the subjects of the six registrations in this proceeding shall remain registered. We do not decide whether the subject marks may be used or whether the word REDSKINS may be used as part of the name of respondent's professional football team.

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is esteemed mean, vile, or worthless; disdain; scorn; as, familiarity breeds contempt; 2. State of being despised; disgrace; shame …"; and "*disrepute*" is defined as "*vt*. To bring into discredit; disesteem *obs*.; *n*. loss or want of reputation; ill character; low estimation; dishonor." In the *New Standard Dictionary of the English Language* (1947), Funk & Wagnalls Company, "*contempt*" is defined as "1. N.the act of despising, or of viewing or considering and treating as mean, vile, and worthless; hatred and scorn of what is deemed mean or vile; disdain; scorn; 2. The state of being despised; disgrace; shame"; and "*disrepute*" is defined as "lack or loss of reputation; ill repute; a bad name or character; disesteem."

[107] In the *Random House Dictionary of the English Language*, 2nd ed., unabridged (1987), "*contempt*" is defined as "1. the feeling with which a person regards anything considered mean, vile, or worthless; disdain; scorn; 2. The state of being despised; dishonor; disgrace"; and "*disrepute*" is defined as "*n*. bad repute; low regard; disfavor (*usually* preceded by *in* or *into*): *some literary theories have fallen into disrepute; syn.* Disfavor, disgrace."

In all of the reported cases discussed above, the issue was whether the involved marks were scandalous or may be disparaging because of the marks' sexual explicitness or innuendo, vulgarity, religious significance, or reference to illicit activity. The case before us differs factually from the aforementioned types of cases in that petitioners contend, principally, that the word REDSKINS in the marks in question is "a deeply offensive, humiliating, and degrading racial slur" in connection with Native Americans. The primary focus of the parties' evidence and arguments is petitioners' allegation that the marks in the subject registrations may disparage Native American persons. We therefore begin our analysis with petitioners' claim of disparagement.

Disparagement

As stated previously herein, our analysis is essentially a two-step process in which we ask, first: What is the meaning of the matter in question, as it appears in the marks and as those marks are used in connection with the services identified in the registrations? Second, we ask: Is this meaning one that may disparage Native Americans? As previously stated, both questions are to be answered *as of the dates of registration of the marks herein*. The oldest registration

involved in this case is of the mark THE REDSKINS, in stylized script, issued in 1967. Registrations of three marks, THE WASHINGTON REDSKINS, WASHINGTON REDSKINS and a design including a portrait of a Native American in profile, and THE REDSKINS and a design including a portrait of a Native American in profile and a spear, issued in 1974. The registration of the mark REDSKINS issued in 1978, and the registration of the mark REDSKINETTES issued in 1990. Thus, while we have properly considered evidence spanning a broad period of time, we focus our determination of the issue of disparagement on the time periods, between 1967 and 1990, when the subject registrations issued.

As we must consider the question of disparagement in connection with the services identified in the subject registrations, we note that, although there are some minor differences in the identifications of services among the six registrations herein, each registration can be described, generally, as pertaining to entertainment services in connection with, or in the nature of, professional football games.

1. Meaning of the Matter in Question.

While the marks in the majority of the subject registrations include matter in addition to the word “Redskins,” the principal focus of the evidence and

arguments in this case is the word “redskin(s)” as it appears in each mark. Therefore, we begin by looking at the meaning of the word “redskin(s).” It is clear from the dictionary definitions and other evidence of record herein, and respondent does not dispute, that one denotative definition of “redskin(s)” is a Native American person.[108] The evidence establishes the use of the term “redskin(s)” to refer to Native Americans since at least the mid-nineteenth century. Both parties agree that since approximately the 1930’s, and certainly by the 1960’s, the occurrences in print or in other media of “redskin(s)” as a term denoting Native Americans declined dramatically. However, there is no question, based on this record, that “redskin(s)” has remained a denotative term for Native Americans throughout this century, in particular, from the 1960’s to the present.[109]

Considering the meaning of the term “redskin(s)” in connection with the services identified in the challenged registrations, respondent contends that the term

[108] There is some indication in the record that “redskin(s)” also identifies a type of potato, a brand of motorcycle, and perhaps, a type of peanut, but there is no evidence in the record that any of these possible meanings of the word “redskin(s)” would pertain to the word as it is used in respondent’s marks in connection with the identified services.

[109] Evidence sufficient to warrant this conclusion includes, at a minimum, dictionary definitions and articles that refer to the word “redskin(s)” in connection with Native Americans.

"Redskins," considered in connection with professional football games, denotes respondent's football team and its entertainment services. Respondent contends that, over its six decades of use, respondent's marks have "acquired a strong and distinctive meaning identifying respondent's entertainment services … in the context of professional football"[110]; that "Redskins" has become "denotative of the professional football team"; and that, although "deriving from the original, ethnic meaning of 'redskin'," the word "'Redskins' was perceived in 1967, and today, to be a distinct word, entirely separate from 'redskin' and the core, ethnic meaning embodied by that term."

We agree that there is a substantial amount of evidence in the record establishing that, since at least the 1960's and continuing to the present, the term "Redskins" has been used widely in print and other media to identify respondent's professional football team and its entertainment services. But our inquiry does not stop here. Our precedent also requires us to consider the

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[110] As we stated in an interlocutory decision in this case, *Harjo et. al. v. Pro Football, Inc., supra at* 1832, proof that respondent's marks have acquired secondary meaning does not establish a defense to petitioners' claims under Section 2(a). However, as respondent expressly states, it "is not raising a traditional secondary meaning defense addressing the issue of the protectability of Respondent's marks." Rather, we view this contention in the context of respondent's arguments regarding the meaning of the word "redskin(s)."

manner in which respondent's marks appear and are used in the marketplace. In this regard, while petitioners concede that, from at least the 1960's to the present, the word "Redskins," in the context of professional sports, identifies respondent's football team, petitioners contend, essentially, that all professional football teams have themes that are carried through in their logos, mascots, nicknames, uniforms and various paraphernalia sold or used in connection with their entertainment services. Petitioners point to the Native American theme evident in respondent's logos and the imagery and themes used by respondent in connection with its football team and games. This imagery is also evident in the writings and activities of the media and in the activities and writings of the team's fans. Petitioners contend that, in view of the team's Native American theme, one cannot separate the connotation of "redskin(s)" as a reference to Native Americans from the connotation of that word as it identifies respondent's football team and is used in connection with respondent's entertainment services.

Respondent correctly notes that the evidence herein establishes that the vast majority of uses of the word "redskin(s)" in the press and other media, since at least the 1960's, refer to respondent's professional football

team, rather than to Native Americans. At the same time, we find that, in determining the meaning of the term "redskin(s)" as it appears in respondent's registered marks, it would be both factually incomplete and disingenuous to ignore the substantial evidence of Native American imagery used by respondent, as well as by the media and respondent's fans,[111] in connection with respondent's football team and its entertainment services. Respondent admits that it "does not claim that its marks bear no association with American Indians, nor that when the team name was first adopted in 1933 it connoted anything other than an ethnic group." However, the evidence simply does not support respondent's further contention that, in view of its use since 1933, the meaning of the word "Redskins," as part of its registered marks, is as "a purely denotative term of reference for the professional football team [with] no connotative meaning whatsoever." As used by respondent in connection with its professional football team and entertainment services, the word "Redskins," as it appears in the marks herein, clearly carries the allusion to Native Americans.

[111] Respondent argues vociferously, and correctly, that it is not responsible for the writings and actions of the media and respondent's fans. However, such evidence is relevant herein because it indicates the public's perceptions of the meanings attributable to, and associations made in connection with, respondent's service marks.

Two of the registered marks include a portrait that respondent acknowledges is a profile of a Native American and a spear that we presume is a Native American spear. We believe these two elements reinforce the allusion to Native Americans that is present in the word “Redskins” in both marks. Because of the manner of use of respondent’s marks in connection with Native American themes and imagery, as discussed herein, this same allusion is also present in the marks that include the word “Washington,” to indicate the full name of the football team, *i.e.*, “Washington Redskins.” Further, the registered mark, REDSKINETTES, clearly consists of the root word “redskin” with the diminutive or feminine “ettes” added as a suffix. Thus, our conclusions regarding the word “Redskins” are equally applicable to the mark REDSKINETTES.

We note that, in considering the meaning of the matter in question, respondent misunderstands the issue when it states, in reaction to newspaper headlines in the record, such as “Skins Scalp Giants, 23-7,” that “no Redskins fan truly believes that the players huddled on the ten yard line are in fact tribal bounty hunters primed to scalp their opponents upon scoring a touchdown.” Clearly, the connection being made between the quoted headline and respondent’s football team by the media, fans, and

respondent itself is metaphorical rather than literal, as acknowledged by respondent's written statement (Cooke Exhibit 10, *see* Cooke testimony, vol. II, pgs. 90-91) that states, in part, "[o]ver the long history of the Washington Redskins, the name has reflected positive attributes of the American Indian such as dedication, courage and pride."

This is not a case where, through usage, the word "redskin(s)" has lost its meaning, in the field of professional football, as a reference to Native Americans in favor of an entirely independent meaning as the name of a professional football team. Rather, when considered in relation to the other matter comprising at least two of the subject marks and as used in connection with respondent's services, "Redskins" clearly both refers to respondent's professional football team and carries the allusion to Native Americans inherent in the original definition of that word. This conclusion is equally applicable to the time periods encompassing 1967, 1974, 1978 and 1990, as well as to the present time.

2. Whether the Matter in Question May Disparage Native Americans.

We turn, now, to the second part of our analysis, the question of whether the matter in question may disparage Native Americans. We have found that, as an element of

respondent's marks and as used in connection with respondent's services, the word "redskin(s)" retains its meaning as a reference to Native Americans, as do the graphics of the spear and the Native American portrait. In view thereof, we consider the question of whether this matter may disparage Native Americans by reference to the perceptions of Native Americans. Our standard, as enunciated herein, is whether, as of the relevant times, a substantial composite of Native Americans in the United States so perceive the subject matter in question. In rendering our opinion, we consider the broad range of evidence in this record as relevant to this question either directly or by inference.

Several of petitioners' witnesses expressed their opinions that the use of Native American references or imagery by non-Native Americans is, essentially, *per se* disparaging to Native Americans or, at the very least, that the use of Native American references or imagery in connection with football[112] is *per se* disparaging to Native Americans. We find no support in the record for either of

[112] Petitioners' linguistics expert expressed his opinion that names of football teams are chosen either to indicate geographic location or to indicate ferocity, and, thus, the choice of "Redskins" as a team name somehow establishes that the word carries negative connotations of savagery. We find this reasoning to be circular and based primarily on conjecture.

these views. Consequently, we answer the question of disparagement based on the facts in this case by looking to the evidence regarding the views of the relevant group, the connotations of the subject matter in question, the relationship between that matter and the other elements that make up the marks, and the manner in which the marks appear and are used in the marketplace.

While petitioners' have framed their allegations broadly to include in their claim of disparagement all matter in the subject marks that refers to Native Americans, their arguments and extensive evidence pertain almost entirely to the "Redskins" portion of respondent's marks. We note that there is very little evidence or argument by either side regarding the other elements of respondent's marks that refer to Native Americans, namely, the spear design and the portrait of a Native American in profile. Both graphics are realistic in style. Respondent acknowledges that the portrait depicts a Native American individual, although it is unclear if it is a portrait of a real individual. There is no evidence that these graphics are used in a manner that may be perceived as disparaging, or that a substantial composite of the Native American population in the United States so perceives these graphics as used in the subject marks in connection with the

identified services.[113] Thus, with respect to the spear design and the portrait of a Native American in profile, as these elements appear in two of the registered marks herein, we find that petitioners have not established, under Section 2(a), that this matter may disparage Native Americans.

The remaining question in relation to disparagement is whether the word "redskin(s)" may be disparaging of and to Native Americans, as that word appears in the marks in the subject registrations, in connection with the identified services, and during the relevant time periods.

We find petitioners have clearly established, by at least a preponderance of the evidence, that, as of the dates the challenged registrations issued, the word "redskin(s)," as it appears in respondent's marks in those registrations and as used in connection with the identified services, may disparage Native Americans, as perceived by a substantial composite of Native Americans. No single item

[113] At least two of the petitioners testified that some types of feathers have religious significance to some Native American tribes and, thus, the secular use of such feathers is offensive. However, there is insufficient evidence regarding this allegation to warrant a conclusion that the mere representation of feathers in the marks herein may disparage Native Americans. Additionally, several of the petitioners testified that the portrait in two of the marks is a stereotypical representation of a Native American. There is insufficient evidence for us to conclude that this portrait is a stereotypical rendering of a Native American or that it may disparage Native Americans. The views of petitioners, alone, do not inform us of the views of a substantial composite of Native Americans.

of evidence or testimony alone brings us to this conclusion; rather, we reach our conclusion based on the cumulative effect of the entire record. We discuss below some of the more significant evidence in the record. We look, first, at the evidence establishing that, in general and during the relevant time periods, the word “redskin(s)” has been a term of disparagement of and to Native Americans. Then we look at the evidence establishing that, during the relevant time periods, the disparaging connotation of “redskin(s)” as a term of reference for Native Americans extends to the word “Redskin(s)” as it appears in respondent’s subject marks and as used in connection with respondent’s identified services. We have considered the perceptions of both the general public and Native Americans to be probative. For example, we have found that the evidence supports the conclusion that a substantial composite of the general public finds the word “redskin(s)” to be a derogatory term of reference for Native Americans. Thus, in the absence of evidence to the contrary, it is reasonable to infer that a substantial composite of Native Americans would similarly perceive the word. This is consistent with the testimony of the petitioners.

We look, first, at the evidence often considered in the decisional law concerning Section 2(a) scandalousness and disparagement, namely, dictionary definitions. Both petitioners and respondent have submitted excerpts defining "redskin" from numerous well-established American dictionary publishers from editions covering the time period, variously, from 1966 through 1996. Across the time period, the number of publishers including in their dictionaries a usage label indicating that the word "redskin" is disparaging is approximately equal, on this record, to those who do not include any usage label. For example, *Random House* publishers include the label "often offensive" in dictionaries published from 1966 onward. *American Heritage* publishers indicate that "redskin" is "informal" in 1976 and 1981 editions and that it is "offensive slang" in 1992 and 1996 editions. The *World Book Dictionary* includes no usage label regarding "redskin" in either its 1967 or 1980 edition and more recent editions are not in evidence. From the testimony of the parties' linguistics experts, it is clear that each entry in a dictionary is intended to reflect the generally understood meaning and usage of that word. Thus, from the fact that usage labels appear in approximately half of the dictionaries of record at any point in the time period

covered, we can conclude that a not insignificant number of Americans have understood "redskin(s)" to be an offensive reference to Native Americans since at least 1966.[114]

Discussing the substantial body of historical documents he reviewed in connection with his testimony herein, Dr. Geoffrey Nunberg, petitioners' linguistics expert, concluded that the word "redskin(s)" first appeared in writing as a reference to Native Americans in 1699 and that, from 1699 to the present, the word "redskin(s)," used as a term of reference for Native Americans, evokes negative associations and is, thus, a term of disparagement. Additional evidence of record that is consistent with the opinions expressed Dr. Nunberg includes excerpts from various articles and publications about language. These writings include, often in a larger discussion about bias in language, the assumption or conclusion that the word "redskin(s)" as a term of

[114] In view of the contradictory testimony of the parties' linguistics experts regarding the significance of a lack of usage label for a dictionary entry, we cannot conclude that the lack of such labels in the other excerpts of record establishes that the word "redskin(s)" was *not* considered offensive during the relevant time period. Similarly, the single dictionary excerpt which contains a separate entry for "Redskins" defined as respondent's football team, does not affect this conclusion.

reference for Native Americans is, and always has been, a pejorative term.[115]

Petitioners made of record a substantial number of writings, including, *inter alia*, excerpts from newspapers and other publications, encyclopedias, and dictionaries, evidencing the use of the word "redskin(s)" from the late 1800's through the first half of this century. As agreed by both parties' linguistics experts, the vast majority of newspaper headlines, newspaper articles, and excerpts from books and periodicals from the late 1800's and early 1900's, which include the word "redskin(s)" as a reference to Native Americans, clearly portray Native Americans in a derogatory or otherwise negative manner.[116] For example, the newspaper articles in evidence from the late 1800's

[115] See, for example, petitioners' exhibits entitled "Defining the American Indian: A Case Study in the Language of Suppression," by Haig A. Bosmajian, in the book, *Exploring Language*, by Gary Goshgarian (1983); by Irving Lewis Allen: *Unkind Words – Ethnic Labeling from Redskin to WASP* (1990) and *The Language of Ethnic Conflict – Social Organization and Lexical Culture* (1983); "I have Spoken: Indianisms in Current English," in *English Language Notes* (March 1992); and "Hostile Language: Bias in Historical Writing about American Indian Resistance," by Robert H. Keller, Jr., in the *Journal of American Culture – Studies of a Civilization* (Winter 1986).

[116] One of respondent's linguistics experts, Mr. Barnhart, challenges this conclusion and points to a number of historical references to Native Americans as "redskin(s)" that he concludes are neutral, if not positive. We disagree with Mr. Barnhart's conclusion and find the specified references to Native Americans to be, in fact, negative. However, even if we agreed with Mr. Barnhart's conclusions about these specified statements, we find these few references to be inconsequential in comparison to the substantial number of undisputedly negative historical references to Native Americans as "redskin(s)" in newspapers and other writings in the record.

reflect a view by Anglo-American society of Native Americans as the savage enemy and the events reported are armed conflicts.[117] The entry for "North American Indian" in the *Encyclopedia Britannica* (11th edition, 1910) clearly refers to "the aboriginal people of North America" as "primitive" people, and includes a detailed table describing the degree to which individual tribes have been "civilized" or remain "wild and indolent." An excerpt from a book entitled *Making the Movies*, by Ernest Dench (MacMillan Company, 1919), includes a chapter entitled "The Dangers of Employing Redskins as Movie Actors," which states: "The Red Indians … are paid a salary that keeps them well provided with tobacco and their worshipped 'firewater,'" and "It might be thought that this would civilise (*sic*) them completely, but it has had a quite reverse effect, for the work affords them an opportunity to live their savage days over again …."

Writings in evidence from the 1930's through the late 1940's, which include the word "redskin(s)" as a reference to Native Americans, reflect a slightly less disdainful, but still condescending, view of Native Americans. For

[117] Interestingly, the word "Indian" is primarily used to refer to Native Americans in the text of these newspaper articles, whereas the word "redskin(s)" appears almost exclusively in the headlines. This would appear to indicate a distinction between the connotations of the two words, although neither party's linguistics experts discuss this point.

example, an article entitled “Redskin Revival – High Birthrate Gives Congress a New Overproduction Headache,” in *Newsweek*, February 20, 1939, while complaining about the financial and administrative burden of “caring” for Native Americans, recognizes that the inequities suffered by Native Americans are a result of actions by the U.S. government.

From the 1950’s forward, the evidence shows, and neither party disputes, that there are minimal examples of uses of the word “redskin(s)” as a reference to Native Americans. Most such occurrences are in a small number of writings about the character of the word itself, or in writings where we find that “redskin(s)” is used in a metaphorical sense juxtaposed with “white man” or “paleface.” Both parties agree that, during this same time period, the record reflects significant occurrences of the word “redskin(s)” as a reference to respondent’s football team.

We agree with respondent’s conclusion that the pejorative nature of “redskin(s)” in the early historical writings of record comes from the overall negative viewpoints of the writings. However, this does not lead us to the conclusion that, as respondent contends, “redskin(s)” is an informal term for Native Americans that

is neutral in connotation.[118] Rather, we conclude from the evidence of record that the word "redskin(s)" does not appear during the second half of this century in written or spoken language, formal or informal, as a synonym for "Indian" or "Native American" because it is, and has been since at least the 1960's, perceived by the general population, which includes Native Americans, as a pejorative term for Native Americans.

We find the context provided by Dr. Hoxie's historical account, which respondent does not dispute, of the often acrimonious Anglo-American/Native American relations from the early Colonial period to the present[119] to provide a useful historical perspective from which to view the writings, cartoons and other references to Native Americans in evidence from the late 19th century and throughout this century.

Finally, we note petitioners' telephone survey, as described herein, purporting to measure the views, at the time of the survey in 1996, of the general population and,

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[118] We agree with petitioners that, although the evidence shows that the word "Indian" became an acceptable term of reference for Native Americans, we cannot conclude from this fact alone that the same is true for the word "redskin(s)."

[119] As Dr. Hoxie recounts, the policies of, first, the colonial government and, then, the U.S. government towards Native Americans reflect the general views of Anglo-Americans towards Native Americans at each point in history.

separately, of Native Americans towards the word “redskin” as a reference to Native Americans. When read a list of seven words referring to Native Americans, 46.2% of participants in the general population sample (139 of 301 participants) and 36.6% of participants in the Native American sample (131 of 358 participants) indicated that they found the word “redskin” offensive as a reference to Native Americans. We have discussed, *supra*, several of the flaws in the survey that limit its probative value. Additionally, the survey is of limited applicability to the issues in this case as it sought to measure the participants’ views only as of 1996, when the survey was conducted, and its scope is limited to the connotation of the word “redskin” as a term for Native Americans, without any reference to respondent’s football team. However, considering these limitations, we find that the percentage of participants in each sample who responded positively, *i.e.*, stated they were offended by the word “redskin(s)” for Native Americans, to be significant.[120] While the survey polls a relatively small sample and the positive

[120] We note that in cases considering other trademark issues, such as likelihood of confusion or secondary meaning, the courts have found that, respectively, confusion or recognition by an “appreciable number of customers” may be much less than a majority. *See, McCarthy on Trademarks and Unfair Competition*, 4th ed. (West Group, 1998), Vol. 5, Section 32.185.

results reflect less than a majority of that sample, we find these results supportive of the other evidence in the record indicating the derogatory nature of the word "redskin(s)" for the entire period from, at least, the mid-1960's to the present, to substantial composites of both the general population and the Native American population.[121]

The evidence we have discussed so far pertains, generally, to the word "redskin(s)" as it refers to Native Americans. From this evidence we have concluded, *supra*, that the word "redskin(s)" has been considered by a substantial composite of the general population, including by inference Native Americans, a derogatory term of reference for Native Americans during the time period of relevance herein. We have also concluded, *supra*, that the word "Redskins" in respondent's marks in the challenged registrations, identifies respondent's football team and carries the allusion to Native Americans inherent in the original definition of the word. Evidence of respondent's use of the subject marks in the 1940's and 1950's shows a

[121] Respondent has presented no evidence suggesting that, as a term identifying Native Americans, the perception of the derogatory nature of the word "redskin(s)" by any segment of the general population, including Native Americans, changed significantly during this time period. To the contrary, the evidence of record suggests that, as a term identifying Native Americans, "redskin(s)" has been perceived consistently, by both the general population and Native Americans as a derogatory term since, at least, the 1960's.

disparaging portrayal of Native Americans in connection with the word “Redskin(s)” that is more egregious than uses of the subject marks in the record from approximately the mid-1960’s to the present. However, such a finding does not lead us to the conclusion that the subject marks, as used in connection with the identified services during the relevant time periods, are not still disparaging of and to Native Americans under Section 2(a) of the Act. The character of respondent’s allusions to Native Americans in its use of the subject marks is consistent with the general views towards Native Americans held by the society from approximately the 1940’s forward.

In particular, the evidence herein shows a portrayal in various media of Native Americans, unrelated to respondent’s football team, as uncivilized and, often, buffoon-like characters from, at least, the beginning of this century through the middle to late 1950’s. As we move through the 1960’s to the present, the evidence shows an increasingly respectful portrayal of Native Americans. This is reflected, also, in the decreased use of “redskin(s),” as a term of reference for Native Americans, as society in general became aware of, and sensitive to, the disparaging nature of that word as so used.

The evidence herein shows a parallel development of respondent's portrayal of Native Americans in connection with its services. For example, various covers of respondent's game program guides and other promotional efforts, including public relations stunts presenting players in Native American headdresses, from the 1940's through the middle to late 1950's show caricature-like portrayals of Native Americans as, usually, either savage aggressors or buffoons. Similarly, for the same time period, the costumes and antics of the team, the Redskins Marching Band, and the "Redskinettes" cheerleaders reflect a less than respectful portrayal of Native Americans.[122]

During the late 1950's and early 1960's, the evidence shows respondent's game program covers with realistic portraits of actual Native American individuals, reflecting society's increased respect for, and interest in, Native American culture and history. During the 1960's through to the present, the evidence establishes that respondent has largely substituted football imagery for Native American imagery on its game program covers; that it has modified the lyrics of its theme song, "Hail to the Redskins" and

[122] See petitioners' Exhibits Nos. 12 and 29. We note that the record clearly establishes a relationship between respondent and both the "Redskinettes" cheerleader organization and the Redskins Band organization warranting attribution of their respective uses of the subject marks and Native American imagery to respondent.

modified its cheerleaders' uniforms; and Mr. Cooke testified that respondent has, for several years, had a strict policy mandating a restrained and "tasteful" portrayal of Native American imagery by its licensees. Of course, the allusion to Native Americans in connection with respondent's team has continued unabated, for example, in respondent's name, its trademarks, and through the use of Native American imagery such as the headdresses worn for many years by the Redskins Band.

Both parties have submitted voluminous excerpts from newspapers, including cartoons, headlines, editorials and articles, from the 1940's to the present, that refer to respondent's football team in the context of stories and writings about the game of football. These excerpts show that, despite respondent's more restrained use of its Native American imagery over time, the media has used Native American imagery in connection with respondent's team, throughout this entire time period, in a manner that often portrays Native Americans as either aggressive savages or buffoons. For example, many headlines refer to the "Redskins" team, players or managers "scalping" opponents, seeking "revenge," "on the warpath," and holding "pow wows"; or use pidgin English, such as "Big Chief Choo

Choo – He Ponder."[123] Similarly, petitioners have submitted evidence, both excerpts from newspapers and video excerpts of games, showing respondent's team's fans dressed in costumes and engaging in antics that clearly poke fun at Native American culture and portray Native Americans as savages and buffoons.[124] As we have already stated, we agree with respondent that it is not responsible for the actions of the media or fans; however, the actions of the media and fans are probative of the general public's perception of the word "redskin(s)" as it appears in respondent's marks herein. As such, this evidence reinforces our conclusion that the word "redskin(s)" retains its derogatory character as part of the subject marks and as used in connection with respondent's football team.

Regarding the views of Native Americans in particular, the record contains the testimony of petitioners themselves stating that they have been seriously offended by respondent's use of the word "redskin(s)" as part of its marks in connection with its identified services. The record includes resolutions indicating a present objection to the use of this word in respondent's marks from the

[123] See, for example, petitioners' Exhibit 12, notice of reliance.

[124] See, for example, petitioners' Exhibit 13, notice of reliance.

NCAI, which the record adequately establishes as a broad-based organization of Native American tribes and individuals; from the Oneida tribe; and from Unity 94, an organization including Native Americans. Additionally, petitioners have submitted a substantial number of news articles, from various time periods, including from 1969-1970, 1979, 1988-1989, and 1991-1992, reporting about Native American objections, and activities in relation thereto, to the word “Redskins” in respondent’s team’s name. These articles establish the public’s exposure to the existence of a controversy spanning a long period of time. Also with respect to Native American protests, we note, in particular, the testimony of Mr. Gross regarding his 1972 letter, in his role as director of the Indian Legal Information Development Service, to Mr. Williams, then-owner of the Washington Redskins, urging that the name of the team be changed; and regarding his 1972 meeting with Mr. Williams, along with colleagues from several other Native American organizations. Mr. Gross testified that the individuals representing the Native American organizations expressed their views to Mr. Williams that the team name, “Washington Redskins,” is disparaging, insulting and degrading to Native Americans. This evidence reinforces the conclusion that a substantial composite of

Native Americans have held these views for a significant period of time which encompasses the relevant time periods herein.

We are not convinced otherwise by respondent's contentions, argued in its brief, 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 has presented no credible evidence in support of either contention. In particular, respondent submitted, by notice of reliance, *inter alia*, letters from fans in support of the team name[125]; several letters and resolutions purported to be from Native American tribal chiefs expressing their support for respondent's team name "Washington Redskins";[126]

[125] Respondent's case includes no testimony by the authors of these letters to establish any foundation for the letters. Thus, this evidence has not been considered for the truth of the statements contained therein. Even if we were to accept these letters for the truth of the statements contained therein, which we do not, the vast majority of letters are from non-Native Americans, some of whom report the views of Native Americans with whom they are acquainted. The contents of the letters are, themselves, hearsay, and the reports by the letter-writers of third-party opinions are also hearsay.

[126] Respondent's case includes no testimony by the authors of these letters and resolutions to establish any foundation for the letters and resolutions. Further, the lack of testimony about the letters and resolutions makes it impossible to determine the extent to which the views contained therein speak for a group of Native Americans or just for the authors, or what is the basis for the views expressed. Thus, this evidence has not been considered for the truth of the statements contained therein. Further, this small number of letters would not change our determination herein even if we were to so consider this evidence.

and unidentified photographs purported to have been taken on Indian reservations.[127]

Finally, we note that both parties' briefs have made and debated, and we have considered additional arguments, the majority of which we find irrelevant and all of which we find unnecessary to discuss.

Thus, we conclude that the evidence of record establishes that, within the relevant time periods, the derogatory connotation of the word "redskin(s)" in connection with Native Americans extends to the term "Redskins," as used in respondent's marks in connection with the identified services, such that respondent's marks may be disparaging of Native Americans to a substantial composite of this group of people.

Contempt or Disrepute

We incorporate by reference our preceding analysis, discussion of the facts, and conclusions with respect to disparagement. As we have indicated, *supra*, the guidelines

[127] There is no testimony in the record establishing a foundation for consideration of these photographs. Respondent's counsel referred to the photographs primarily during cross examination of petitioners' witnesses, none of whom professed any knowledge regarding the subject matter of the photographs. Any information about the photographs herein consists merely of the statements of respondent's counsel. Respondent's witness, Mr. Cooke, indicated during his testimony a general awareness of other teams with the word "redskin(s)" as part of their names; however, he presented no specific testimony about such teams. Thus, we find no probative value in the photographs and counsel's statements in connection therewith, and little probative value to Mr. Cooke's vague statement.

for determining whether matter in the marks in the challenged registrations may be disparaging to Native Americans are equally applicable to determining whether such matter brings Native Americans into contempt or disrepute. Thus, we conclude that the marks in each of the challenged registrations consist of or comprise matter, namely, the word or root word, “Redskin,” which may bring Native Americans into contempt or disrepute.

Scandalousness

As we have indicated, *supra*, determining whether matter is scandalous involves, essentially, a two-step process. First, the Court or Board determines the likely meaning of the matter in question and, second, whether, in view of the likely meaning, the matter is scandalous to a substantial composite of the general public. Regarding the conclusions drawn with respect to disparagement, we incorporate by reference our discussion and conclusion that the meaning of the matter in question, namely, the word or root word “Redskin,” as used by respondent in connection with its professional football team and entertainment services and as it appears in the marks herein, clearly carries the allusion to Native Americans; and that this allusion to Native Americans is reinforced by the design elements in the registered marks incorporating the profile

of a Native American and a Native American spear. However, while we incorporate by reference the analysis of the facts in the discussion, *supra*, of whether the matter in question may disparage Native Americans, as well as the conclusions reached therein regarding the design elements in the subject marks,[128] we reach a different conclusion with respect to the alleged scandalousness of the "Redskin" portions of the marks in respondent's challenged registrations.

In particular, we find that, based on the record in this case, petitioners have not established by a preponderance of the evidence that the marks in respondent's challenged registrations consist of or comprise scandalous matter. We find that the evidence, as discussed above, *does* establish that, during the relevant time periods, a substantial composite of the general population would find the word "redskin(s)," as it appears in the marks herein in connection with the identified services, to be a derogatory term of reference for Native Americans. But the evidence *does not* establish that, during the relevant time periods, the appearance of the

[128] We found, *supra*, that petitioners have not established that these designs are disparaging to Native Americans. Similarly, we find that these design elements, as shown in the subject marks and as used in connection with the identified services, are not scandalous as of any of the relevant time periods.

word “redskin(s),” in the marks herein and in connection with the identified services, would be “shocking to the sense of truth, decency, or propriety” to, or “giv[e] offense to the conscience or moral feelings [of,] excit[e] reprobation, [or] call out for condemnation” by, a substantial composite of the general population. *See, In re Mavety Media Group Ltd.*, *supra at 1925*.

The record reflects the clear acceptance by a substantial composite of the general population of the use of the word “Redskins” as part of the name of respondent’s football team and in connection with its entertainment services, regardless of the derogatory nature of the word vis-à-vis Native Americans. This evidence includes the voluminous number of references, in both letters[129] and news articles, to respondent’s football team by a substantial number of fans and the media over a long period of time from, at least, the 1940’s to the present. Such continuous renown in the sport of football and acceptance of the word “Redskin(s)” in connection with respondent’s football team is inconsistent with the sense of outrage by a substantial composite of the general population that would be necessary

[129] We consider the letters in this regard, not for their content, but for the fact that they evidence knowledge by the writers about the team and the use of the word “Redskins” in the team’s name.

to find this word scandalous in the context of the subject marks and the identified services.

Decision: As to each of the registrations subject to the petition to cancel herein, the petition to cancel under Section 2(a) of the Act is granted on the grounds that the subject marks may disparage Native Americans and may bring them into contempt or disrepute. As to each of the registrations subject to the petition to cancel herein, the petition to cancel under Section 2(a) of the Act is denied on the ground that the subject marks consist of or comprise scandalous matter. The registrations will be canceled in due course.

J. D. Sams

R. F. Cissel

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board