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# Skin in the Game: Providing Redress for American Sports' Appropriation of Native American Iconography

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SKIN IN THE GAME: PROVIDING REDRESS FOR AMERICAN SPORTS'  
APPROPRIATION OF NATIVE AMERICAN ICONOGRAPHY

by  
Geraud Blanks

A Thesis Submitted in  
Partial Fulfillment of  
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in Media Studies

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August 2016

## ABSTRACT

### SKIN IN THE GAME: PROVIDING REDRESS FOR AMERICAN SPORTS' APPROPRIATION OF NATIVE AMERICAN ICONOGRAPHY

by

Geraud Blanks

The University of Wisconsin-Milwaukee, 2016

Under the Supervision of David Pritchard

To date, legal efforts to eradicate the use of Native American iconography in American sports have focused on the concept of Indian nicknames as disparaging terms, and Indian mascots as harmful images. But subjective claims of harm are hard to prove and are often thwarted by First Amendment protections, because judges remain reluctant to regulate expressive and commercial freedom of speech based on offense. And while a 2014 ruling by the United States Patent and Trademark Office's Trademark Trial and Appeal Board cancelling six of the Washington Redskins' trademark registrations was a landmark moment for name-change advocates, the decision could be overturned on appeal.

This paper outlines a different approach in exploring the legal validity of American Indian sports nicknames and mascots by examining trademark, copyright and right of publicity laws that govern the appropriation of personal and brand identity. While the commercial use of one's identity is protected under right of publicity laws, this legal principle is rarely evoked in legal petitions brought by activists, resolutions encouraged by legislators, or by the many scholars who agree on the harmful effects of cultural misappropriation. Based on my case study of the Chicago Blackhawks, an NHL team using the moniker of a legendary Indian chief, I offer a proposal that uses existing right of publicity law to challenge the unfettered appropriation of Native American indicia of identity.

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To my daughter, Karma, and the native people whose fight for equality continues.

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The original idea for this paper—as all original ideas I have—was first mediated through a discussion with my wife, Element-Everest Blanks, and then later my mother Deborah Clements Blanks. These two women act as my sounding board for every creative idea that comes to mind. Thus they wield a great deal of power in determining whether or not a project will ever see the light of day. Luckily for me, my family supports most every decent idea I have.

Other than my wife and mother, the two most important fixtures in my development as a scholar have been Professors Dana Schowalter and David Pritchard. When I returned to school in 2013, 12 years removed, Professor Schowalter was one of the first instructors to fully embrace me as a student with potential, empowering me at a time when I needed confidence.

Perhaps no instructor at any academic level has influenced me more than Professor Pritchard. This paper is a direct result of his tutelage. Without his scholarly expertise and personal guidance, I may have lost my way a long time ago.

Finally, I would like to thank my thesis committee: Professor David Allen, Professor Gladys Mitchell-Walthour and Professor David Pritchard.

**CHAPTER I: INTRODUCTION: SKIN IN THE GAME  
PROVIDING REDRESS FOR AMERICAN SPORTS' APPROPRIATION OF NATIVE  
AMERICAN ICONOGRAPHY**

The primary work of culture is to organize or categorize human experiences, to create systems by which humans are able to understand and make sense of the world. Through these cultural arrangements, including law, people organize work, kinship, gender, emotion, and all other forms of human interaction and communication.<sup>1</sup> One of the most powerful American cultural arrangements is the institution of sport, or play. As participants, Americans invest a great deal of their identity in what they play and how they play. As spectators, Americans construct alternate ways of being that include ritualistic ceremonies, dress, and performances of masculinity. It is within this context that traditions both real and imaginary are constituted, and the legacy of one of the most enduring American cultural forms, the American Indian mascot, is given its folklore.

For decades, activists and advocates have sought to eliminate Indian mascots, nicknames and iconography (e.g. mascots, symbols, etc.) from American sports culture, with some success. Legal efforts to restrict use of American Indian imagery have helped to bring more attention to the mascot issue, yet, in 2016, more than 2,000 Indian mascots still existed in high school, college and professional sports.<sup>2</sup> One of the primary problems legal petitions, such as those that target trademark registration, face is that much of the debate about the appropriation of indigenous iconography focuses on moral appraisals: whether or not mascots should be interpreted as disparaging symbols that cause emotional or psychological harm. Petitioning agencies like the United States Trademark and Patent Office and federal courts to decide what terms are disparaging, and thus unworthy of trademark protection, has proven problematic on

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<sup>1</sup> Lawrence Rosen, *Law as culture: An invitation*. Princeton University Press, 2006. 3

<sup>2</sup> Hayley Munguia, "The 2,128 Native American Mascots People Aren't Talking About." *FiveThirtyEight*. September 05, 2014. Accessed April 01, 2016. <http://fivethirtyeight.com/features/the-2128-native-american-mascots-people-arent-talking-about/>.



first amendment grounds.<sup>3</sup> While moral and ethical arguments are worthy of discussion, any petition restricting personal or commercial speech will meet vigorous free speech opposition. But even free speech doctrine has its limits.

In this thesis I explore how a group of common laws known as the right of publicity, created to protect the commercial exploitation of individual identity, can be applied to the use of indigenous tribal names and iconography by collegiate and professional sports teams. The right of publicity has superseded First Amendment doctrine in cases where courts have found that an individual's right to exploit their identity for commercial benefit was infringed upon by another party. Whereas past legal petitions have focused on disparagement claims, this thesis addresses fundamental legal concepts of ownership of identity, and the commercial value of Indian mascots and team names. Although all Indian mascots are derivative of American Indian culture, not all names and likeness can be traced back to specific individuals or tribal names (e.g. Braves, Chiefs, etc.). Additionally, not all names and images carry equal commercial value. This thesis will focus primarily on examples of Indian chiefs and tribes with significant brand identity and name value. Because this thesis is purporting the use of a law that protects the economic interest of name and likeness, I chose to narrow my focus to examples that illustrate the considerable commercial value of specific indigenous identities. While I appreciate that caricatures such as Chief Wahoo and fan rituals like the tomahawk chop may actually be more objectionable than Indian inspired team names, the purpose of this thesis is to address the legality of long-term commercial exploitation of American Indian identity and the opportunity for legal recourse, not to litigate cultural insensitivity—although I do explore those issues to a certain degree.

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<sup>3</sup> Ron Coleman, *The Policy and Constitutional Challenges to Contemporary Application of Section 2(A) of the Lanham Act* (2015). Coleman's paper was distributed as part of a panel entitled, "Federal Registration of Disparaging, Immoral and Scandalous Marks" at the Intellectual Property Owners Education Foundation 25th Annual PTO Day in Washington, DC.

In the following chapters I will discuss arguments for and against appropriation of American Indian iconography, and explore the ongoing evolution of laws created to protect against the exploitation of Native American culture—specifically two laws addressing Indian cultural rights. Starting with chapter II, I examine how mainstream American culture constructs mythologies around the American Indian that facilitate an intimate connection with sports activities and teams. I argue that the deeply entrenched, emotional association with sports in American society prompts the resistance to eliminating Indian team mascots. In this chapter I provide an overview of evidence suggesting that use of Native American iconography by sports teams not only disparages indigenous culture, but creates a fantasy world that contextualizes an entire ethnic group as relics of the past.

Chapter III examines the evolution of activism around Indian mascots in sports, delving into the name-change debate extensively. I later demonstrate why efforts to place legal restrictions on the use of Native American names and symbols by sports teams have been thwarted by First Amendment concerns about limiting expression. I focus on the challenges of cultural and legal change with respect to the use of Native American names and iconography by sports teams in the United States, and explore the use of trademark law as a legal strategy.

In Chapter IV, I further outline obstacles to legal change and assert that unauthorized uses of Native American personal and tribal identity violate their right of publicity. I also introduce a proposal that creates a way of granting tribes' rights to control the commercial use of their names and iconography that does not run afoul of the First Amendment.

Chapter V provides a case study on the Chicago Blackhawks, a National Hockey League team using the moniker and image of a legendary Indian chief. The Blackhawks case study provides an example of how American Indian personal property rights have been appropriated

over time. Ultimately, I make the case for modest expansions to established state laws that support limited tribal control of Indian cultural artifacts and names.

Finally, in chapter VI I discuss the implications of my proposal and further explain why right of publicity tort is the path of least resistance for American Indian tribes seeking to reclaim the valuable brand identity of their culture and ancestors.

## CHAPTER II: MAINSTREAM CULTURE AND NATIVE AMERICANS

Before examining how existing law can be applied to the appropriation of Native American iconography, it is important to examine the historical facts and contemporary understandings that contextualize Native American mascotting in the United States. Research for this thesis includes analyzing anecdotal arguments that inform what most people know about American Indian culture, as well as scholarship that reflects entrenched issues of race and representation. And while I will discuss the merits of arguments contrary to Indian mascot removal, it is important to state that the vast majority of scholarship on American Indian mascots has identified links between the use of this iconography and racist views toward American Indian people and culture.

Numerous studies, resolutions and articles have cited the psychological and emotional consequences of mascotting Native Americans. In 2005, the American Psychological Association (APA) issued a resolution calling for the “immediate retirement of all American Indian mascots, symbols, images and personalities by schools, colleges, universities, athletic teams and organizations.”<sup>4</sup> Citing scientific research and academic studies, the organization stated that its position was based on evidence that showed the increasingly harmful effects American Indian sports mascots were having on the “social identity development and self-esteem of American Indian young people.”<sup>5</sup> One of the primary sources used to support the APA’s assertions is a 2008 article “Of warrior chiefs and Indian princesses: The psychological consequences of American Indian mascots.” The article consisted of four separate studies that examined how representations of American Indians affected self-concept for American Indian

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<sup>4</sup> *APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations*. 2005. Resolution, Washington D.C.

<sup>5</sup> *Ibid.*

students.<sup>6</sup> The 2014 report, “Missing the Point--The Real Impact of Native Mascots and Team Names on American Indian and Alaska Native Youth,” examined research about the impact of mascots and team names on the mental health and self-esteem of American Indian and Alaska Native students in the report.<sup>7</sup>

Most scholars studying the historical and contemporary implications of appropriating Native American iconography agree that hegemonic processes of colonization, which include imperialist nostalgia, savagism discourse and commodification racism, have systemically exploited American Indians for centuries and continue to do so.<sup>8</sup> These forms of cultural and ethnic appropriation are influenced by European American interpretations of ownership of cultural properties, and neither honor nor instill pride in native people.<sup>9</sup> However, much of this scholarship is focused on the social and psychological effects mascotting has on natives. But misappropriation of native history and culture also affects non-native people’s awareness of important issues of race, culture, and ethnicity as well. While one group suffers from outdated stereotyping, the other, often unknowingly, participates in harmful racialized demonstrations that are insensitive and demeaning. Thus, all Americans lose in this scenario.

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<sup>6</sup> Stephanie A Fryberg, Hazel Rose Markus, Daphna Oyserman, and Joseph M. Stone. "Of warrior chiefs and Indian princesses: The psychological consequences of American Indian mascots." *Basic and Applied Social Psychology* 30, no. 3 (2008): 208-218. *See also:* Aaron Goldstein, “Intentional Infliction of Emotional Distress: Another Attempt at Eliminating Native American Mascots” (1999), Tawa Witko, “In whose honor: Understanding the psychological implications of American Indian mascots” (2005), Davis-Delano, Laurel R. “Eliminating Native American mascots ingredients for success” (2007). Peter A Leavitt, Rebecca Covarrubias, Yvonne A. Perez, and Stephanie A. Fryberg. “‘Frozen in Time’: The Impact of Native American Media Representations on Identity and Self-Understanding” (2015)

<sup>7</sup> Victoria Phillips and Erik Stegman, “Missing the Point: The Real Impact of Native Mascots and Team Names on American Indian and Alaska Native Youth.” (2014).

<sup>8</sup> *See:* Renato Rosaldo, "Imperialist nostalgia." *Representations* (1989); Jackson B. Miller, “Indians,” “Braves,” and “Redskins”: A performative struggle for control of an image” (1999); Jason Edward Black, “The Mascotting of Native America: Construction, Commodity, and Assimilation” (2002); Richard A. Rogers, “Deciphering Kokopelli: Masculinity in commodified appropriations of Native American imagery” (2007); Daniel Morley Johnson, “From the tomahawk chop to the road block: Discourses of savagism in whitestream media” (2011); Jason Black, “Native American ‘Mascotting’ Reveals Neocolonial Logics” (2014); Michael Taylor, “Indian-styled mascots, masculinity, and the manipulated Indian body: Chief Illiniwek and the embodiment of tradition” (2015).

<sup>9</sup> Jason Black, Native American ‘Mascotting’ Reveals Neocolonial Logics. *Spectra* 50, no. 3 (September 2014): 14-17.

The following section first examines the scholarly link between America's historical colonialism of indigenous people and more contemporary neocolonial logics revealed in the discourse that surrounds mascot iconography.<sup>10</sup> The second part of this section reviews the history of legal and activist resistance to Native American mascotting.

### **Mythologizing Indians: White Claims of Native Cultural Properties**

Whether it is American culture pushing to correct inequality, or federal and state law tweaking harmful behavior, the correction of all great societal wrongs is accomplished through a confluence of cultural and legal rectification. For example, while white Americans' perception of African-American civil rights was already shifting during the mid-1960s, it wasn't until President Lyndon Johnson signed the landmark 1964 Civil Rights Act<sup>11</sup> and 1965 Voting Rights Act<sup>12</sup> into law that the country was able to make discernable progress in eliminating discrimination in public accommodations and voting.<sup>13</sup> This accomplishment led to a shift in public morality and a revision in the American understanding of human rights. Government's role in developing civil rights legislation is especially significant because of the role government played in establishing civil wrongs. After the formal end of slavery, southern states and municipalities began enacting statutes that legalized racial segregation known as "Jim Crow laws."<sup>14</sup> These laws laid the historical groundwork for decades of discrimination against black American descendants of enslaved African people. Thus, chattel slavery initially sanctioned by

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<sup>10</sup> Ibid.

<sup>11</sup> United States. The U.S. National Archives and Records Administration. *The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*. <https://www.archives.gov/education/lessons/civil-rights-act/>.

<sup>12</sup> "History of Federal Voting Rights Laws." U.S. Department of Justice. Accessed September 23, 2015. <https://www.justice.gov/crt/history-federal-voting-rights-laws>.

<sup>13</sup> Hugh Davis Graham, *The civil rights era: Origins and development of national policy, 1960-1972*. Oxford University Press, USA, 1990.

<sup>14</sup> "A Brief History of Jim Crow." - Constitutional Rights Foundation. Accessed July 01, 2016. <http://www.crf-usa.org/black-history-month/a-brief-history-of-jim-crow>.

the federal government, and segregation enacted at the state level, were directly responsible for the legal injustice the mid-1960s civil rights legislation sought to eradicate.

Similarly, the link between United States government policies and the destruction of American Indian culture is a well-documented part of America's history.<sup>15</sup> The 1830 Indian Removal Act authorized the forcible removal of Indian tribes from ancestral homelands in the eastern and southern United States to what would be known as a new Indian Territory, west of the Mississippi.<sup>16</sup> Fifty-seven years later, the Dawes Severalty Act of 1887 divided and allocated Indian tribal land for individual Indians.<sup>17</sup> In 1903, the Supreme Court found that Congress could dispose of Indian land without gaining the consent of the Indians involved,<sup>18</sup> reducing Indian territory from 154 million acres in 1887 to 48 million in 1937.<sup>19</sup> Ironically, indigenous Americans were not granted full citizenship until 1924, 56 years after the ratification of the 14<sup>th</sup> amendment granted citizenship to freed slaves. The United States government's historic exploitation, confinement and systematic removal of Native Americans from traditional Indian land is, in part, responsible for the condition of native people more than 100 years later.<sup>20</sup>

After decades of broken treaties and government policies that displaced American Indians and restricted them to reservations, Native Americans have become a virtually invisible

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<sup>15</sup> This thesis is not advocating for reparations, nor is my proposal for extending right of publicity laws contained within. While I found issues of Indian cultural appropriation and reparations are connected, the scope of this thesis was far too narrow to include a reasonable discussion on the merits of reparations. With that said, it is important to address how the American government has been implicit in both endorsing the appropriation—and later the reclamation—of native identity.

<sup>16</sup> Indian Removal Act of 1830, §§ 148-1-8 (1830); Cave, Alfred A. "Abuse of Power: Andrew Jackson and the Indian Removal Act of 1830." *Historian* 65, no. 6 (2003): 1330-1353.

<sup>17</sup> "Dawes General Allotment Act." Encyclopedia Britannica Online. Accessed December 23, 2015.

<https://www.britannica.com/topic/Dawes-General-Allotment-Act>; see also: Washburn, Wilcomb E. *The Assault on Indian Tribalism: The General Allotment Law (Dawes Act) of 1887*. Philadelphia: Lippincott, 1975.

<sup>18</sup> Clark, Blue. *Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century*. Vol. 5. U of Nebraska Press, 1999.

<sup>19</sup> Mathew T. Gregg, and D. Mitchell Cooper. "The Political Economy Of American Indian Allotment Revisited." *Journal of Business & Economics Research (JBER)* 8, no. 5 (May 28, 2010): 89. doi:10.19030/jber.v8i5.722.

<sup>20</sup> According to the 2012 U.S. Census, 29% of those who identify as American Indian or Alaska Native as their only race live in poverty.

minority for most non-Indians—apart from the presence of sports mascots, symbols, and team names.<sup>21</sup> Additionally, stereotypes of American Indians as either crazed savage, regal princess or over-sexed brute have been constructed through 20<sup>th</sup> century newspaper cartoons, print advertising, television series, and Hollywood film motifs that replace actual contact with native people with a caricature.<sup>22</sup> Such misrepresentations of American Indians, based on early colonial representations of natives deeply entrenched in the American subconscious,<sup>23</sup> facilitate the commodification of the American Indian as mascot. And nowhere in American culture is commodified racial imagery so frequently used as in American sports.

### ***American sports and the disembodied Indian as mascot***

The ritual of athletic competition creates meaning and values that “undergird the American collective way of life,”<sup>24</sup> providing identity for institutions and communities—and by proxy the individuals who reside in them—through performative representation. In this sense, sports embody more than just athletic competition; they serve as a mechanism to mediate communal reality through rhetorical cultural discourse,<sup>25</sup> priming normative behavior in which group members acquiesce to a collective identity.<sup>26</sup> Sports act as a primary form of American cultural hegemony by offering a shared emotional experience, “one which reasserts the desirability of belonging to a community,” says Henry Jenkins.<sup>27</sup> The regulation of American cultural identities by a dominant white, capitalist, patriarchal value system meant early sports culture excluded

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<sup>21</sup> “In Memory and Misrepresentation in Borrowed Power: essays on cultural appropriation,” Nell Jessup Newton notes that “native people as inhuman, timeless, and essentialized . . . help promote the myth of the vanishing Indian and in so doing, deprive Indians not just of their history but of their present reality.”

<sup>22</sup> Elizabeth S. Bird, “Gendered construction of the American Indian in popular media.” *Journal of Communication* 49, no. 3 (1999): 78.

<sup>23</sup> Daniel Morley Johnson, “From the tomahawk chop to the road block: Discourses of savagism in whitestream media.” *The American Indian Quarterly* 35, no. 1 (2011): 104.

<sup>24</sup> Jeffrey O. Segrave, “The sports metaphor in American cultural discourse.” *Culture, Sport Society* 3, no. 1 (2000): 48.

<sup>25</sup> *Ibid.*

<sup>26</sup> Celeste Michelle Condit, “Hegemony in a mass-mediated society: Concordance about reproductive technologies” *Critical Studies in Media Communication* 11, no. 3 (1994): 206.

<sup>27</sup> Henry Jenkins, “*Never trust a snake*”: *WWF wrestling as masculine melodrama*, (2005).



non-whites, and often propped up ideas of the supremacy of white masculinity. But the primitive masculinity of the American Indian presented a contradiction.<sup>28</sup> White men wanted to possess the masculine virtues of virility and strength they saw in American Indians, while at the same time constraining these qualities in Indian men.

The folklore of the 19<sup>th</sup> Century American frontier gave way to the mythology of the Indian hunter.<sup>29</sup> In mimicking Indian hunters, “white heroes achieve manhood by becoming ‘like’ Indian Warriors, while nonetheless remaining unmistakably white.”<sup>30</sup> Thus, white male hunters could both revere the Indian persona, as fierce animal, and revile Indian men as nothing more than animalistic. The obsession with portraying the Indian as a fierce war-like creature that personifies all of the masculine characteristics embodied in the American ethos, is a product of imperialist nostalgia: a yearning for the very thing that you were responsible for destroying.<sup>31</sup> For many white Americans the appropriation of indigenous culture fulfills a nostalgic fantasy full of masculine stereotypes that memorialize the Indian as a great warrior, conquered by the industry of white intellect.<sup>32</sup>

A contemporary example of this mythologizing goes on every fall during football season. More than any other American sport, football thrives on the enactment of violence and comparisons to war.<sup>33</sup> The war metaphors associated with football make the Indian mythology a perfect conduit for the “ritualized enactments of violence repeated in modern day coliseums

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<sup>28</sup> Richard A. Rogers, “Deciphering Kokopelli: Masculinity in commodified appropriations of Native American imagery.” *Communication and Critical/Cultural Studies* 4, no. 3 (2007): 250-251

<sup>29</sup> Richard Slotkin, “Nostalgia and progress: Theodore Roosevelt’s myth of the frontier.” *American Quarterly* 33, no. 5 (1981): 612.

<sup>30</sup> Gail Bederman, *Manliness and civilization: A cultural history of gender and race in the United States, 1880-1917*. University of Chicago Press, (2008): 173.

<sup>31</sup> Renato Rosaldo, “Imperialist nostalgia.” *Representations* 26, no. 2 (1989): 69.

<sup>32</sup> Ibid.

<sup>33</sup> Segrave, “The sports metaphor,” 49.

around the country during the season.”<sup>34</sup> Through the allegories of the sport-as-war metaphors, depictions of Native Americans as lazy and deceitful are transformed into heroic portrayals of warriors and wise chiefs. The Plains Indians’ headdress—often used to represent all Indians—“war paint,” and contrived ritual movements of mascots and spectators (e.g. Tomahawk Chop) become a part of the spectacle known as “playing Indian”—a term scholars use to describe the act of replicating perceived Indian rituals.<sup>35</sup> However, spectators, often fascinated with both the legend of Indian athletes and new romanticized “images of exotic, warlike Plains Indians in Hollywood films,” do not consciously identify with the racial politics of playing Indian.<sup>36</sup>

The origin of Indian mascots in America can be traced to the late 1800s, when college and professional sports teams began using Native American tribal names.<sup>37</sup> A growing association in the public mind between the athletic success of famous Native American athletes like Jim Thorpe in baseball, football, and track and field, led to the proliferation of Indian mascots.<sup>38</sup> By the early 1900s, American lodges and fraternities also began to name themselves after Native American tribes and use other mythological imagery related to native people.<sup>39</sup>

In football and other sports, the American Indian mascot acts as an emblem of masculinity. The spectacle of the Indian mascot encourages spectators to embody a warlike

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<sup>34</sup> Jackson B. Miller, “Indians,” “Braves,” and “Redskins”: A performative struggle for control of an image.” *Quarterly Journal of Speech* 85, no. 2 (1999): 189

<sup>35</sup> See: C. Richard King and Charles Fruehling Springwood, eds. *Team Spirits: The Native American Mascots Controversy* (2001); Carol Spindel, *Dancing at halftime (2000): Sports and the controversy over American Indian mascots*; and Dwanna Lynn Robertson, “Navigating indigenous identity” (2013).

<sup>36</sup> J Gordon Hylton, “Before the Redskins Were the Redskins: The Use of Native American Team Names in the Formative Era of American Sports, 1857-1933.” *NDL Rev.* 86 (2010): 891.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> According to Carol Spindel, the Boy Scouts of America’s (BSA) Order of the Arrow were one of the earliest groups to integrate an indigenous cultural aesthetic into its corporate identity. Founded in 1915, the group appropriated the regalia, ceremonies and symbols of Native American tribes. The BSA not only continues to use “the skills and traditions of the Native American Indians,” but has assumed licensing rights over the marketing and distribution of custom products manufactured by the BSA. The group has even laid out a policy called “Native American References on Licensed and Custom Products” to oversee the process of licensing these native inspired products. Groups like the BSA promote the idea that by producing derivative Indian inspired products they are keeping indigenous culture alive.

aesthetic, and to enact rituals that resemble a neo-colonial desire for primitive masculinity.

These sports rituals both commodify and justify the appropriation of a colonized culture.<sup>40</sup>

Native cultural artifacts like sacred eagle feathers, ritual headdress and ceremonial dance become little more than props in the performance, making the Indian mascot the “preferred type of Indian allowed for public display rather than the reality of indigenous peoples such as Native Americans.”<sup>41</sup>

Florida State University (FSU), where a mascot replica of Seminole Indian Chief Osceola is depicted throwing a flaming arrow onto the field during halftime of football games, is a prime example of the commodification of native culture. FSU students consume this folklore simply by enrolling in the school. And when native people ask these spectators to relinquish the use of such iconography, they are often met with ironic platitudes about the tradition and legacy of white ownership of the symbol that whites appropriated. The contemporary consumer culture, in which consuming cultural products qualifies as ownership, has “emerged as one of the key sites of struggle over white power and the ways in which it can be articulated in an increasingly multicultural society.”<sup>42</sup>

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<sup>40</sup> Michael Taylor, “Indian-styled mascots, masculinity, and the manipulated Indian body: Chief Illiniwek and the embodiment of tradition.” *Ethnohistory* 62, no. 1 (2015): 140.

<sup>41</sup> Ibid

<sup>42</sup> Rogers, “Deciphering Kokopelli,” 250.

### CHAPTER III: PAST ATTEMPTS TO USE LAW TO MINIMIZE HARM AND APPROPRIATION OF NATIVE AMERICAN NAMES AND SYMBOLS

In what some consider the opening salvo in the “war on mascots,” the National Congress of American Indians launched a campaign in 1968 to combat stereotypes of native people in popular culture and media, as well as in sports.<sup>43</sup> The first mascot lawsuit to arise against a professional sports team was in 1972, when the Cleveland American Indian Center, led by activist Russell Means, filed a \$9 million libel suit against the Cleveland Indians.<sup>44</sup> In addition to monetary damages, the suit requested that the baseball team be forced to change its Chief Wahoo mascot “from a ‘smiling, dumb savage’ to a more distinguished representation of an Indian.”<sup>45</sup> The case was settled in 1983; the settlement terms are not publicly available.<sup>46</sup>

While Means gained notoriety as the first Native American activist to file suit against a professional sports team over the use of an Indian mascot, other Native American activists were quietly engaging representatives from the Washington Redskins in discussions about the team’s name.<sup>47</sup> The same year as the Means lawsuit against the Cleveland Indians, Redskins’ team president Edward Bennett Williams met with a delegation including Leon Cook, then president of the National Congress of American Indians.<sup>48</sup> The group asked Williams to drop the Redskins nickname, team cheerleaders the “Redskinettes,” and the inflammatory team song, “Hail to the Redskins.”<sup>49</sup> A few months after the meeting, Williams admitted that while he was not

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<sup>43</sup> Ending the Era of Harmful “Indian” Mascots | NCAI Ncai.org (2015), <http://www.ncai.org/proudtobe> (last visited Aug 25, 2015); Jason Edward Black, *The Mascotting of Native America: Construction, Commodity, and Assimilation*, 26 *The American Indian Quarterly* 605-622 (2002).

<sup>44</sup> Daniel J Trainor, “Native American Mascots, Schools, and the Title VI Hostile Environment Analysis.” *U. Ill. L. Rev.* (1995): 976

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, 977.

<sup>47</sup> Dan Steinberg, “The Great Redskins Name Debate of ... 1972?” *Washington Post*. June 3, 2014. Accessed June 08, 2016. <https://www.washingtonpost.com/news/dc-sports-bog/wp/2014/06/03/the-great-redskins-name-debate-of-1972/>.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

convinced the team's nickname was offensive, he did believe the team's song could use some overhauling. Williams sought to eliminate one line in particular: "the swamp 'ems, scalp 'ems and heap 'ems" is a mocking of dialect, we won't use those lyrics anymore," he said.<sup>50</sup> Williams also removed the Indian-style wigs worn by the Redskinettes.<sup>51</sup> But for many native American activists, the concessions were not enough.

### *The evolution of name-change activism*

Over the next 20 years the campaign against the Washington Redskins mascot took a back seat to student-led activism that resulted in the abandoning of famous collegiate mascots such as Oklahoma's "Little Red," Stanford's "Indian" and Syracuse's "Saltine Warrior."<sup>52</sup> Subsequently protests headed by the American Indian Movement (AIM) in Minneapolis at the World Series in 1991, and Super Bowl XXVI a year later, helped to bring national attention to a fight that had previously been waged in meeting rooms and through press releases.<sup>53</sup> The World Series demonstrations were directed squarely at the "tomahawk chop," employed by the fans of the Atlanta Braves, who lost the 1991 World Series to the Minnesota Twins. Activists targeted the Washington Redskins mascot during 1992 Super Bowl protest.

Months after the World Series and Super Bowl demonstrations, a group assembled by American Indian activist Suzan Shown Harjo petitioned the United States Patent and Trademark Office's (USPTO) Trademark Trial and Appeal Board (TTAB) to cancel the Washington Redskins trademark (PRO-FOOTBALL, INC. v. HARJO). A trademark is a design or expression that can distinguish the products of one business from those of another. Trademarks for high-profile products, such as professional sports teams like the Washington Redskins, have

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> ChangeTheMascot.org, History of Progress - ChangeTheMascot.org (2015), <http://www.changethemascot.org/history-of-progress/> (last visited Aug 25, 2015).

<sup>53</sup> Steinberg, "The Great Redskins Name Debate of"

considerable value. The Trademark Trial and Appeal Board, which hears petitions to cancel trademark registrations, ruled in Harjo's favor in 1999. The decision was appealed to the United States District Court for the District of Columbia, which overturned the ruling in 2003.<sup>54</sup>

Undeterred by the district court's decision, Harjo recruited a group of young activists that included Amanda Blackhorse, and refiled the petition in June 2013 (*PRO-FOOTBALL, INC. v. BLACKHORSE et al.*).<sup>55</sup> A year later the TTAB canceled six trademark registrations for the nickname Redskins. The Blackhorse petition cited § 2(a) of the Lanham Act as the primary argument for cancellation of the Redskins trademark registration.<sup>56</sup> Referred to as the "disparagement clause," § 2(a) grants the USPTO the power to deny registration of trademarks it finds disparaging to a group or person.<sup>57</sup> The TTAB split decision stated: "the majority found that there is a clear trend beginning in 1966 to label this term as offensive."<sup>58</sup> As of June 2016, the case is pending appeal by the Washington Redskins. Even without trademark protection, the team retains the right to use its name and logo, however, its ability to exclusively license Redskins merchandise would be affected.<sup>59</sup>

The initial success of Harjo's second petition, *PRO-FOOTBALL, INC. v. BLACKHORSE et al.*, nearly a decade after *PRO-FOOTBALL, INC. v. HARJO*, has been viewed as an indication that legal attitudes towards Native American sports mascots and team names are changing.

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<sup>54</sup> *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 99 (D.D.C. 2003). Because the petition was brought 25 years after the initial registration in 1967, the court cited the Laches defense, a legal doctrine that bars long delays in pursuing a claim. In 2005, Harjo recruited a group of young activists that included Amanda Blackhorse. Because of their age—all of the plaintiffs were between the 18-24 years old—Harjo believed that the Laches defense would not apply to them.

<sup>55</sup> H. Walker, (2014, June 18). Meet The Native American Grandmother Who Just Beat the Washington Redskins. Retrieved March 24, 2015, from <http://www.businessinsider.com/meet-the-native-american-grandmother-who-just-beat-the-redskins-2014-6>

<sup>56</sup> *Ibid.*

<sup>57</sup> 15 U.S.C. 1052 § 2(a)

<sup>58</sup> *Blackhorse v. Pro-Football, Inc.*, 11 U.S.P.Q.2d (BNA) 1080 (T.T.A.B. 2014)

<sup>59</sup> Michele M. Riley and Duke J. Schaeffer. "Hail to The... Redskins? How the TTAB's Cancellation of a Historic Mark Impacts Brand Value and the NFL" | Stout Risius Ross, Fall 2014. Accessed September 30, 2015. <http://www.srr.com/article/hail-the...-redskins-how-ttab's-cancellation-historic-mark-impacts-brand-value-and-nfl>.

In addition to the Blackhorse petition, several politicians have also sought to use arguments purporting “disparagement” as a means to introduce new legislation. In 2013 D.C. city councilman David Grosso introduced a resolution citing the use of the term “redskin” as “racist and derogatory”<sup>60</sup> The D.C. city council approved Grosso’s resolution in November 2013. However, the resolution was merely symbolic and held no legal consequences. It was largely ignored by Redskins ownership and the general public. The following year State Senator Eric H. Kearney introduced a resolution in the Ohio Senate to encourage the Cleveland Indians to change their nickname and mascot.<sup>61</sup> The resolution failed to pass. Another attempt at legislating Indian mascots out of sports came in February 2015, when U.S. Representative Mike Honda (D-Calif.) introduced legislation that would deny trademark protection for sports teams that use a “derogatory slur” for Native Americans as their nickname.”<sup>62</sup> According to Honda, “The Non-Disparagement of Native American Persons or Peoples in Trademark Registration Act,” would “revoke the trademarks for the Washington NFL team for as long as the franchise keeps its controversial name.”<sup>63</sup> “Allowing trademark protection of this word is akin to the government approving its use,” Honda said.<sup>64</sup> “Removing that trademark will send a clear message that this name is not acceptable.” Honda’s legislation would have been a legally binding act, carrying the weight of penalty that Grosso’s resolution did not. The bill would have

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<sup>60</sup> M. DeBonis & A. Davis, (2013, November 5). D.C. Council calls on Redskins to ditch 'racist and derogatory' name. Retrieved March 24, 2015, from [http://www.washingtonpost.com/local/dc-politics/dc-council-calls-on-washington-redskins-to-ditch-racist-and-derogatory-name/2013/11/05/17cbbd66-4646-11e3-bf0c-cebf37c6f484\\_story.html](http://www.washingtonpost.com/local/dc-politics/dc-council-calls-on-washington-redskins-to-ditch-racist-and-derogatory-name/2013/11/05/17cbbd66-4646-11e3-bf0c-cebf37c6f484_story.html)

<sup>61</sup> “Kearney Introduces Resolution to Encourage The Cleveland Indians To Retire Nickname And Mascot.” *The Ohio Senate*. N.p., 6 Aug. 2014. Web. 30 June 2016.

<sup>62</sup> “Congressman Honda Introduces Legislation to Remove Trademark Protection for Washington Football Team Name.” Congressman Mike Honda. February 03, 2015. Accessed September 30, 2015. <https://honda.house.gov/news/press-releases/congressman-honda-introduces-legislation-to-remove-trademark-protection-for>.

<sup>63</sup> Mollie Reilly, “House Bill Would Revoke Washington NFL Team's Trademarks.” *The Huffington Post*. February 4, 2015. Accessed July 02, 2016. [http://www.huffingtonpost.com/2015/02/03/redskins-trademarks-bill\\_n\\_6609090.html](http://www.huffingtonpost.com/2015/02/03/redskins-trademarks-bill_n_6609090.html).

<sup>64</sup> *Ibid*.

officially deemed the word “redskins” a disparaging term, making it ineligible for trademark under the Lanham Act. The legislation also would have retroactively revoked the team's existing trademarks and blocked new ones using the term. Nevertheless, the bill did not pass. While both Grosso’s resolution and Honda’s proposed legislation were well intentioned, both measures relied on government bodies to legislate disparagement, a strategy that has its merits but, as I will discuss, is difficult to prove.

### **Arguments That Frame the Debate**

Perhaps the most fervent opposition to Indian mascot and name changes comes from local communities where public officials have had some success in passing referendums limiting use of American Indian iconography by high school athletic teams.<sup>65</sup> Public school districts in Wisconsin and Minnesota began eliminating American Indian related sports team logos, mascots and nicknames in 1988. During the following years, schools in Illinois, North Dakota, and Colorado followed suit, eliminating their Indian team nicknames and mascots. This trend of public school districts passing resolutions, or individual schools deciding to voluntarily adopt new nicknames, resulted in a dramatic drop in the use of American Indian mascots throughout public high schools and colleges during the 1990s and 2000s. In 2016, the State of California passed one of the more significant anti-mascot legislations in the country: a bill that prohibits all public schools from using the term "Redskins" as a nickname or mascot.<sup>66</sup>

Ironically, for all the progress made shifting the attitudes of public school administrators since the late 1980s, national sentiment about Indian mascots has moved at a much slower pace.<sup>67</sup> The limited success of efforts to ban the use of American Indian symbols and mascots

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<sup>65</sup> See: Appendix A: History of mascot protest and legislation (table)

<sup>66</sup> Lauren Brock, “New Approach to an Old Problem: Could California's Proposed Ban on Redskins Mascots in Public Schools Have Withstood a Constitutional Challenge, A.” *Sports Law. J.* 12 (2005): 75.

<sup>67</sup> Ibid.



nationwide can largely be attributed to anti-political correctness sentiments that tend to reflect two basic counterattacks. As outlined by Nell Jessup Newton, the initial justification for Indian cultural appropriation typically begins with the innocence argument.<sup>68</sup> The innocence argument presumes that the appropriator means no harm by using Indian imagery and relics. This argument is “based solely on the intent of the speaker,” effectively dismissing the insulted group’s claim of injury.<sup>69</sup>

A March 4, 2015 *New York Times* article about suburban Buffalo high school Lancaster Central confirms Newton’s assessment. As one former student said, during a forum the school hosted on the possibility of changing the school’s “Redskin” nickname: “We hope they start to understand that it’s all positive values. It’s all goal-oriented. It’s all commitment to excellence. Why wouldn’t you want to have a name associated with those core values?”<sup>70</sup>

Defining what should or should not offend native people is an integral part of constructing the parameters of the innocence argument. White stakeholders (those individuals who have a personal and emotional investment in preserving the status quo) convince themselves that mimicking the physical appearance, movement, and parlance of indigenous people, for the sake of entertainment, is acceptable because no one is hurt by it. White entitlement surmises that American Indians are not harmed and should not be offended by the use of selective interpretations of their culture because it is as much a part of white American culture as it is Native American culture.

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<sup>68</sup> Nell Newton Jessup, “Memory and Misrepresentation: Representing Crazy Horse.” In *Borrowed Power: Essays on Cultural Appropriation*, 1003-1006. New Brunswick, NJ: Rutgers University Press, 1997.

<sup>69</sup> Brock, “New Approach to an Old Problem,” 75.

<sup>70</sup> John Woodrow Cox, “Another American High School Battles over Its Redskins Nickname.” *Washington Post*. March 4, 2015. Accessed June 08, 2016. <https://www.washingtonpost.com/news/local/wp/2015/03/04/another-american-high-school-battles-over-its-redskins-nickname/>.

The second defense, the cynical argument, is similar to the innocence argument in that it claims no intended harm.<sup>71</sup> However, the cynical argument goes a step farther, claiming that the use of Native American iconography is done in an effort to honor native people.<sup>72</sup> Words like “tradition” and “heritage” are often used by non-Indians to create what C. Richard King calls “the narrative”—origin stories in which whites adopt a tradition and culture that is not theirs.<sup>73</sup> Another person quoted in the *New York Times* article about Lancaster Central confirms King’s assertion: “The name now is continuing a legacy of what the school was brought to be when it was first started. I think changing the name would be changing the whole tradition of the school.”<sup>74</sup> In other words, students at Lancaster have been “playing Indian”—literally referring to themselves as “Redskins”—so long they have begun to interweave the most endearing parts of the Indian mythology into their own identity. These “sincere fictions” justify the tradition and heritage clichés so frequently propagated by fans and supporters of teams that use Native American iconography.<sup>75</sup>

No one employs “the narrative,” or Newton’s “cynical argument,” more succinctly than Washington Redskins team owner Dan Snyder, who defends his team’s use of the term “redskin” as the definition of “honor” and “respect,” and “pride.”<sup>76</sup> Snyder made these remarks in 2013 as a part of his declaration that the team would “NEVER” change its name as long as he was

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<sup>71</sup> Newton, “Memory and Misrepresentation,” 1005

<sup>72</sup> Ibid.

<sup>73</sup> C. R. King & C. F. Springwood, (Eds.). (2001). *Team Spirits: The Native American Mascots Controversy*. U of Nebraska Press.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid; see also Dwanna Lynn Robertson who notes in “Navigating indigenous identity” (2013) that fictive narratives constructed by sports teams and organizations help legitimize racialized imagery to the general public. Subsequently, “these racist actions, discourses and institutions are often viewed as ordinary without malice.”

<sup>76</sup> “Daniel Snyder Defends 'Redskins'” ESPN. August 6, 2014. Accessed March 02, 2015.  
[http://espn.go.com/nfl/story/\\_/id/11313245/daniel-snyder-redskins-term-honor-respect](http://espn.go.com/nfl/story/_/id/11313245/daniel-snyder-redskins-term-honor-respect).

owner.<sup>77</sup> Similarly, Cleveland Indians chief executive Paul Dolan has stated that while he is empathetic to those who take issue with the Chief Wahoo logo adorning the team's jersey, he asserts that the team has no plans to get rid of Chief Wahoo, characterizing the mascot as a significant part of the team's history.<sup>78</sup> While Snyder and Dolan certainly have a large base of support for their assertions, a growing cadre of activists, educators, and sportswriters characterizes the Redskins name as an ethnic slur: one that denigrates millions of indigenous people every time it's used.<sup>79</sup>

### ***The Washington Redskins name-change controversy***

Following the Super Bowl and World Series protests, public debate over use of Indian mascots has become a hot-button issue among prominent public supporters and dissenters. Even President Barack Obama weighed in on the issue of the "Redskins" name and mascot, telling the Associated Press in 2013 that he'd "think about changing it" if he were the team's owner.<sup>80</sup> Those four words ignited a firestorm of highly-politicized debate that would help reignite the mascot fervor for the next three years.<sup>81</sup> Political blogs, cable news shows, even NFL sportswriters such as Peter King and television analysts Tony Dungy, Bob Costas and Phil

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<sup>77</sup> A May 21, 2016 *Washington Post* article notes that "both team officials and their opponents agree on at least one thing: Snyder's all-caps comment — "NEVER" — set a course for what has happened since. That, along with his refusal to meet with Native American advocates, gave them license, they said, to frame him as the enemy.

<sup>78</sup> In "Cleveland Indians should finally retire racist logo," the *Los Angeles Times* discusses the Cleveland Indians announcement to "further reduce its use of Chief Wahoo, an offensive racial caricature that serves as its logo," the paper notes that the Chief Wahoo name originates from a 1930s comic strip. The article also acknowledges that the team now uses the block letter "C" on its baseball hats, but that the team continues to sell merchandise bearing the image of Chief Wahoo.

<sup>79</sup> Educators such as Richard King (*Defensive dialogues: Native American mascots, anti-Indianism, and educational institutions*) and activists such as Suzan Harjo ("Fighting Name Calling: Challenging "Redskins" in Court." In *Team Spirits: The Native American Mascots Controversy*), have led the way in re-characterizing the term "redskin," while sportswriters such as Dave Zirin, Bomani Jones, Dan Le Batard, Peter King and others have led the charge in print, online and television sports media platforms.

<sup>80</sup> Theresa Vargas, and Annys Shin. "President Obama Says, 'I'd Think about Changing' Name of Washington Redskins." *Washington Post*. October 5, 2013. Accessed July 03, 2016. [https://www.washingtonpost.com/local/president-obama-says-id-think-about-changing-name-of-washington-redskins/2013/10/05/e170b914-2b70-11e3-8ade-a1f23cda135e\\_story.html](https://www.washingtonpost.com/local/president-obama-says-id-think-about-changing-name-of-washington-redskins/2013/10/05/e170b914-2b70-11e3-8ade-a1f23cda135e_story.html).

<sup>81</sup> *Ibid.*

Simms refrained from using the team's nickname while covering the 2014 NFL season. On the other side of the argument, former Chicago Bears head coach Mike Ditka and conservative radio host Rush Limbaugh eschewed the idea of avoiding the name, while rock n' roller turned conservative commentator Ted Nugent wrote on his website "there are many other issues that should demand our attention instead of talking about how insensitive the Tomahawk Chop is to Native Americans."<sup>82</sup> And then there was Washington Redskins quarterback Robert Griffin III, who tweeted "in a land of freedom we are held hostage by the tyranny of political correctness," in response to the public debate concerning the storied nickname of his team.<sup>83</sup> Categorizing protest against Indian mascots as tyrannical identity politics has been a common theme among name-change opponents. 2016 Republican presidential candidate Jeb Bush also cited political correctness when asked on the campaign trail about the trending topic. "I think 'Washington' is the pejorative term, not 'the Redskins,'" he joked.<sup>84</sup>

By 2016, three years after Obama's public comments on the Redskins' nickname, the debate had become increasingly partisan, and bitter, with name-change advocates winning many of the public-relations battles during that period.<sup>85</sup> For the first time NFL commissioner Roger Goodell felt compelled to address the issue, stating that he "grew up as a Washington Redskins

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<sup>82</sup> Ted Nugent, "THE TED OFFENSIVE: A Tomahawk Chop to Political Correctness." TedNugent.com. April 17, 2013. Accessed July 02, 2016. <http://www.tednugent.com/the-ted-offensive-a-tomahawk-chop-to-political-correctness>.

<sup>83</sup> Sarah Kogod, "RGIII Speaks out against 'tyranny of Political Correctness'." Washington Post. May 1, 2013. Accessed July 03, 2016. <https://www.washingtonpost.com/news/dc-sports-bog/wp/2013/05/01/rgiii-speaks-out-against-tyranny-of-political-correctness/>.

<sup>84</sup> Jesse Byrnes, "Bush: 'Washington' Is Pejorative, Not 'Redskins'" The Hill. October 09, 2015. Accessed July 03, 2016. <http://thehill.com/blogs/blog-briefing-room/256482-bush-washington-is-pejorative-not-redskins>.

<sup>85</sup> John Woodrow Cox and Theresa Vargas, "Inside the Fight between Daniel Snyder and Native American Activists over 'Redskins.'" Washington Post. May 21, 2016. Accessed May 22, 2016. [https://www.washingtonpost.com/local/inside-the-fight-between-daniel-snyder-and-native-american-activists-over-redskins/2016/05/21/1aa2b514-1e9b-11e6-b6e0-c53b7ef63b45\\_story.html](https://www.washingtonpost.com/local/inside-the-fight-between-daniel-snyder-and-native-american-activists-over-redskins/2016/05/21/1aa2b514-1e9b-11e6-b6e0-c53b7ef63b45_story.html).

fan” and in the context of the team’s use of the term, it was not a racial slur.<sup>86</sup> Once a fringe issue, garnering little mainstream support, the Redskins nickname was criticized by a sitting president, lambasted by popular talk show hosts such as Jon Stewart, and acknowledged by other NFL owners and officials as a real issue.<sup>87</sup>

Then on May 19, 2016, Snyder and other Redskins supporters received a reprieve from the onslaught of bad press. The *Washington Post*, which had followed the issue for several years, published a survey it conducted between January and April of 2016 suggesting that the vast majority of Native Americans are not bothered by the Redskins team name.<sup>88</sup> The survey findings—nearly identical to a 2004 study conducted by the Annenberg Public Policy Center—concluded that 90% of Native Americans did not find the name “Redskins” offensive.<sup>89</sup> Just as revealing as the numbers featured in the piece—which included 73% of respondents stating that they did not find the word “Redskins” disrespectful—were the testimonials of respondents such as 70-year-old Chippewa school teacher Barbara Bruce. Bruce proclaimed that she was “proud of being Native American and of the Redskins,” and that she was “not ashamed” of the name.”<sup>90</sup> Other Native American respondents, representing diverse age and educational backgrounds, answered similarly. A 29-year-old Navajo college student stated that he too was not offended by the name because the term “skins” was broadly used among natives he associated with, while a 39-year-old Winnebago from Iowa, and a 73-year-old Oneida physician from Wisconsin both

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<sup>86</sup> Liz Clarke, “As Chicago Embraces NFL Draft, Roger Goodell Defends Redskins’ Name.” *Washington Post*. April 30, 2015. Accessed May 29, 2016. <https://www.washingtonpost.com/news/football-insider/wp/2015/04/30/as-chicago-embraces-nfl-draft-roger-goodell-defends-redskins-name/>.

<sup>87</sup> Cox and Vargas, “Inside the Fight”

<sup>88</sup> John Woodrow Cox, Scott Clement, and Theresa Vargas. “New Poll Finds 9 in 10 Native Americans Aren’t Offended by Redskins Name.” *Washington Post*. May 19, 2016. Accessed May 20, 2016. [https://www.washingtonpost.com/local/new-poll-finds-9-in-10-native-americans-arent-offended-by-redskins-name/2016/05/18/3ea11cfa-161a-11e6-924d-838753295f9a\\_story.html](https://www.washingtonpost.com/local/new-poll-finds-9-in-10-native-americans-arent-offended-by-redskins-name/2016/05/18/3ea11cfa-161a-11e6-924d-838753295f9a_story.html).

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

stated that the name meant nothing to them.<sup>91</sup> The poll results coupled with the interviews the *Post* conducted, prompted many name-change opponents, such as former Redskins quarterback Joe Theismann, to assert that the issue may have finally been “put to rest for a long time.”<sup>92</sup>

While many supporters of the Redskins nickname hailed the *Washington Post* poll as a victory over political correctness, this notion was misinformed. The underlying message in the poll data that Redskins supporters overlooked was not that Native Americans love being mascots, but that they like all other marginalized groups, long for representation—even at the risk of being exploited.

While the survey is clear in its inquiry about feelings toward the Redskins name and imagery, the poll does not address how many of the respondents, other than those interviewed for the article, actually conceptualize “pride” or “honor” in the term “redskins.” In other words, the *Post* article does not provide the necessary contextual framework for understanding why some indigenous people may find mascots and nicknames like “Redskins” appealing. The article constructed a narrative that isolated the question of mascots as offensive or disrespectful from other factors.

For example, during the 1960s a public debate ensued over the merits of the terms “negro,” and “Afro-American.”<sup>93</sup> While some black intellectuals saw the term “negro” as an “inaccurate epithet which perpetuates the master-slave mentality,” others proclaimed the word was just as suitable as “black” and other terms.<sup>94</sup> Contrast this split among 60s black leadership about the meaning of the word “negro” with public perceptions six decades later. If you polled

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<sup>91</sup> Ibid.

<sup>92</sup> Cindy Boren and Liz Clarke. “Joe Theismann on Redskins Name: ‘The People That Matter Are the Native Americans’.” *Washington Post*. May 19, 2016. Accessed May 20, 2016. <https://www.washingtonpost.com/news/dc-sports-bog/wp/2016/05/19/joe-theismann-on-redskins-name-the-people-that-matter-are-the-native-americans/>.

<sup>93</sup> Lerone Bennett, “What’s in a Name?” *Ebony*, November 1, 1967, 46+.

<sup>94</sup> Ibid.

African-Americans a couple of generations removed from the cultural movements of 1960s, there would be near consensus about the word as a vestige of Jim Crow era oppression. Context is everything. The feelings about a subject change drastically based on the framework in which that subject is presented. Consequently, the context in which a question is asked can help determine how a respondent will answer.

As many of the Native Americans noted in the *Washington Post* article, mascots like the “Redskins” present much needed recognition for a community starved for acknowledgement.<sup>95</sup> For a member of a minority group that is virtually invisible to much of the mainstream population, often any kind of representation of that group’s existence will do. The *Washington Post* confirmed this when it referred to statements made by Barbara Bruce and other respondents in the article. “She and many others surveyed embrace native imagery in sports because it offers them some measure of attention in a society where they are seldom represented,” the article proclaimed.<sup>96</sup> Barbara Bruce’s quote speaks to the power of representation, giving a perspective often ignored by name-change detractors and supporters. Unfortunately, most readers will focus squarely on the numbers. The lack of context in the survey’s questions, and the simplistic framing of the poll data, leads readers to think that American Indians desire to be mascotted, when in fact what respondents favorable to mascots were really saying was something is better than nothing. What other form of representation provides native people with the recognition, and promises of cultural appreciation, on the widespread level of sports mascots? Hollywood films and television have traditionally depicted native people as historical figures, relics of a time gone by, which in turn has relegated real native people to the imagination.<sup>97</sup> Although scholars insist

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<sup>95</sup> Cox, Clement and Vargas, “New Poll Finds.”

<sup>96</sup> Ibid.

<sup>97</sup> Peter Leavit, et, al. ““Frozen in Time”: The Impact of Native American Media Representations on Identity and Self-Understanding.” *Journal of Social Issues* 71, no. 1 (2015): 39-53.

that mascots perpetuate similar antiquated caricatures of Native Americans, it is not surprising that Bruce and other respondents from the survey would prefer even the most outdated depictions of tomahawk carrying, horse riding, plains Indian men to nothing at all.

It was clear from the *Washington Post* survey that at least some Native Americans see team nicknames like the Redskins as non-threatening. The desire for representation, as well as indifference about an issue that does little to address the high levels of alcoholism, depression, suicide, and high school dropout rates among native people, may have been leading causes for the poll results.<sup>98</sup> Another cause may have been that many of the activists on the front line of the fight against Indian sports mascots, especially Snyder's Redskins, overlooked the need for outreach within the Indian community. "More than half of the 504 self-identified Native Americans surveyed had heard either nothing or "not too much" about the debate," the *Post* article noted.<sup>99</sup>

### **The virtues of trademark law and the need for a new approach**

As I noted earlier, the strategy for challenging use of Indian mascots by professional sports teams has primarily relied on claims of racial disparagement. While most resolutions and petitions have not failed, the Suzan Harjo and Amanda Blackhorse led trademark suit became a watershed moment for name-change activism. Both Harjo and Blackhorse's petitions also used arguments based on the anti-disparagement Section 1052(a) of the Lanham Act. And while a popular strategy among activists and advocates, disparagement claims inherently run afoul of the free speech protections. The First Amendment not only prohibits governmental interference in personal and public forms of expressions, but also in commercial speech designed to convey

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<sup>98</sup> A 2015 report published by the CDC's National Center for Health Statistics found that American Indian or Alaska Native youth between the ages of 18-24 have the highest suicide rate in the country. Along with the socio-economic difficulties, native people also have to deal with an antiquated depiction and uninformed public perception of their culture.

<sup>99</sup> Cox, Clement and Vargas, "New Poll Finds."



information about a product or service.<sup>100</sup> This is important because as Lauren Brock explains, “it is undisputed that team names, symbols, and logos qualify as commercial speech, as they provide consumers with information about the identity and quality of sports teams.”<sup>101</sup>

In her article on California's proposed ban on "Redskins" mascots in public schools, Brock lays out several possible methods for overcoming free speech protections including, fighting words standard, hate speech doctrine, group libel principle and governmental interest.<sup>102</sup> Brock states that these approaches are inapplicable for several reasons: use of iconography is symbolic; there is often no singular origin or meaning behind the symbol; disparagement is unintended, and identifying harms is difficult.<sup>103</sup> In the case of substantial governmental interest, one of the evaluating standards for regulation, she notes that Congress has never attempted to place a federal ban on disparaging Native American mascots, names and symbols, except when it attempted to ban "Crazy Horse" beer, presumably out of moral obligation due to the already high rate of alcoholism among Native Americans.<sup>104</sup> That bill was subsequently shut down by a district court citing Congress's purported government interest (preventing increased beer consumption by reservation Indians) “was illegitimate and not directly advanced by the bill.”<sup>105</sup> In fact courts, the Supreme Court in particular, have yet to rule in favor of a case permitting regulation of American Indian symbols.<sup>106</sup> This is because First Amendment standards thwart most disparagement litigation. And while commercial speech does not enjoy full First Amendment protection, scholars such as Joseph J. Hemmer Jr. suggest that efforts to limit the use of such symbols might be better served by “appeals based on moral and ethical standards,

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<sup>100</sup> Hemmer, “Exploitation of American Indian Symbols,” 135.

<sup>101</sup> Brock, “New Approach to an Old Problem,” 74.

<sup>102</sup> *Ibid.*, 78.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*, 83.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

appeals that are directed at the conscience of the symbol user.”<sup>107</sup> John M. Touhy and Lauren R. Noll also point out that conflicts between regulation of free expression and First Amendment doctrines are inherent, and that “any restrictions on a person commenting on or using another person’s name will run squarely into the First Amendment.”<sup>108</sup>

Take, for example, the case of *The Slants*, an Oregon-based rock band led by musician Simon Tam. Tam attempted to register *The Slants* as an official trademark in 2011, but was denied by the United States Trademark and Patent Office. Although each member of *The Slants* is of Pacific-Islander descent—and the group cited re-appropriation of the presumed racial slur as the purpose for using the term—the United States Trademark and Patent Office stated that the “name was disparaging to people of Asian descent.”<sup>109</sup> After a failed follow-up attempt, including a “new ethnic-neutral” application for *The Slants* that removed “all mention of their own ethnicity,”<sup>110</sup> the group took their case to the Trademark Trial Appeals Board in 2013, where they were also denied trademark registration under §2(a), which prohibits registration of disparaging trademarks.<sup>111</sup> Tam appealed the denial to the United States Court of Appeals for the Federal Circuit. In his appeal, Tam argued that the band’s name was mischaracterized as a disparaging word. In December 2015, Tam and his band won a 9-3 decision that directly challenged the validity of §2(a).<sup>112</sup> Striking down more than thirty years of precedent, the ruling bolstered the Washington Redskins appeal to reinstate their trademark registrations by challenging the constitutionality of §2(a).

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<sup>107</sup> Hemmer, “Exploitation of American Indian Symbols,” 137

<sup>108</sup> John M. Touhy and Lauren Noll. “The Right of Publicity in Illinois.” *Illinois Bar Journal* 99, no. 3 (March 2011): 148.

<sup>109</sup> Jacqueline Keeler, “The Slants’ Simon Tam: ‘Courts Hijacked My Case’” *Indian Country Today Media Network.com*. January 4, 2016. <http://indiancountrytodaymedianetwork.com/2016/01/04/slants-simon-tam-courts-hijacked-my-case-162956>.

<sup>110</sup> *Ibid.*

<sup>111</sup> 2013 TTAB LEXIS 485; 108 U.S.P.Q.2D (BNA) 1305

<sup>112</sup> *In re Simon Shiao Tam* 108 U.S.P.Q.2d 1305, 1309-10 (T.T.A.B. 2013).

Although Tam did not view his case as a First Amendment fight, stating that the “case got hijacked to become this case about free speech,”<sup>113</sup> the federal court clearly viewed the disparagement clause as a violation of the First Amendment. Writing for the court's majority, Judge Kimberly Ann Moore stated that “Section 2(a) is a viewpoint-discriminatory regulation of speech,” and that the federal trademark office suppresses content-based free speech.<sup>114</sup>

Both the Blackhorse and Tam cases could ultimately be decided the Supreme Court. In April 2016, the USPTO petitioned to the Supreme Court, urging it to reverse the decision of the Federal Circuit.<sup>115</sup> If the ruling that §2(a) is facially unconstitutional is upheld, the USPTO can no longer use the law to refuse registration.<sup>116</sup> Until the matter is resolved the USPTO cannot continue to process registration applications.<sup>117</sup> In the USTPO’s favor is a June 2015 Supreme Court ruling that messages displayed on specialized license plates are a form of government speech.<sup>118</sup> In a 5-4 decision, the court ruled that Texas could reject a proposed design that included Confederate flag.<sup>119</sup> The majority held that Texas should have the right to refuse validating messages it did not approve of, and that without control over who it issued the state sanctioned plates to, the state could be implicated in disparaging speech it did not endorse.<sup>120</sup> The USTPO makes a similar argument that §2(a) does not restrict speech or terms that may be used as trademarks, but rather denies registration to marks considered disparaging. Even disparaging marks are allocated common law protections without registration.

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<sup>113</sup> Keeler, “The Slants’ Simon Tam”

<sup>114</sup> Ibid.

<sup>115</sup> Peter Sullivan, “Of Slants, Skins And Signs: The March To The Supreme Court.” Trademark and Copyright Law. April 28, 2016. Accessed July 28, 2016. <http://www.trademarkandcopyrightlawblog.com/2016/04/of-slants-skins-and-signs-the-march-to-the-supreme-court/>.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Robert Barnes, “Supreme Court: Texas Doesn’t Have to Allow Confederate Flag License Plates.” Washington Post. June 18, 2015. Accessed July 26, 2016. [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-texas-doesnt-have-to-allow-confederate-flag-license-plates/2015/06/18/d328b824-15c6-11e5-89f3-61410da94eb1\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-texas-doesnt-have-to-allow-confederate-flag-license-plates/2015/06/18/d328b824-15c6-11e5-89f3-61410da94eb1_story.html).

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

Regardless of the outcome of the Blackhorse case, if the disparagement clause is eventually upheld by the Supreme Court it will only apply to the Washington Redskins trademark registration. And as the USPTO points out in its petition to the Supreme Court, there is no legal recourse to keep the team from continuing to use the name and logo. Thus, permanent cancellation of the Redskins' trademark registration would serve as a symbolic victory for name-change advocates, but wouldn't address the 2,000 other teams using Indian mascots, or the large sums of money that have and will continue to be made off the sale of merchandise using these mascots. Use of Native American iconography cannot be regulated merely because it is judged to be "offensive" by a segment of society.<sup>121</sup> First Amendment doctrine will make it nearly impossible to challenge other teams not named "redskins" with the same strategy.

I believe a new approach using right of publicity tort could have a more lasting impact on protecting American Indian cultural iconography. In the following sections I will discuss the historical precedent for establishing guidelines regarding use of native cultural artifacts, including name and likeness, and demonstrate how the right of publicity protects against the appropriation of identity without banning expressive speech or evoking first amendment protections.

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<sup>121</sup> Brent Kendall, "Government Can't Reject Trademarks for Being Offensive, Court Says." WSJ. December 22, 2015. Accessed July 03, 2016. <http://www.wsj.com/articles/government-cant-reject-trademarks-for-being-disparaging-or-offensive-court-says-1450809668>.

## CHAPTER IV: A LEGAL STRATEGY THAT AVOIDS FIRST AMENDMENT PROBLEMS

In 2009, descendants of legendary Apache Chief Geronimo filed a federal lawsuit against the U.S. government, Yale University, and the Order of Skull and Bones—a secret society shrouded in the lore of initiation rites and bizarre rituals.<sup>122</sup> Members of the Skull and Bones, serving as army volunteers stationed in Fort Sill, Okla. during World War I, allegedly dug up Geronimo's skull and femur from a burial plot. The group then brought the remains back to Yale where it planned to incorporate them in ceremonies. Skull and Bones supposedly has kept the remains in its clubhouse ever since.<sup>123</sup> Although there is skepticism about whether the remains are actually those of the former Apache leader, the story demonstrates the power of Indian mythology, and the lengths some will go to appropriate the folklore associated with Indian bodies and cultural properties.

The United States has a long history of appropriating Indian remains and decimating burial sites. In 1865, the U.S. Surgeon General issued orders that led to systematic grave robbing on Indian reservations in order to preserve the remains for study at the Army Medical Museum.<sup>124</sup> Three years later, 4,000 Indian heads were taken from corpses at battle grounds, prisoner of war camps, hospitals, and Indian graves at the behest of the Army Surgeon General.<sup>125</sup> As museums and universities became accustomed to receiving indian remains, they began to do their own excavating of Native American burial sites in the name of science and education.<sup>126</sup> Less scrupulous museums paid what amounted to bounties for the stolen remains

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<sup>122</sup> James C. Mckinley, "Geronimo's Heirs Sue Secret Yale Society Over His Skull." The New York Times. February 19, 2009. Accessed March 28, 2016. <http://www.nytimes.com/2009/02/20/us/20geronimo.html>.

<sup>123</sup> Ibid

<sup>124</sup> Robert Eugene Bieder, A Brief Historical Survey of the Expropriation of America Indian Remains. Native American Rights Fund, 1990.

<sup>125</sup> Ibid

<sup>126</sup> Ibid.

of native peoples whose graves had been plundered by tomb raiders.<sup>127</sup> During the nineteenth and twentieth centuries grave robbing became a popular practice, as many private collectors sought to obtain the skulls of famous Indian chiefs.<sup>128</sup> The receipt of these stolen objects created an industry worth several billion dollars since the late 1800s.<sup>129</sup> Yet, petitions by Native American tribes seeking the return of these remains for reburial were often ignored.<sup>130</sup> As a matter of reconciliation for the U.S. government's history of misappropriating the remains of dead Indian soldiers by way of public and private museums, Congress began enacting protective legislative measures during the early 1900s.<sup>131</sup>

Starting with the Antiquities Act in 1906, the United States government has continually adapted how it treats Native Americans cultural items.<sup>132</sup> The Antiquities Act prohibited appropriation, excavation, or destruction of any historic or prehistoric ruin or monument, or any object of antiquity located on federal lands.<sup>133</sup> The law subjected all grave site contents excavated to permanent preservation and study by suitable professionals.<sup>134</sup> However, while the Act addressed the scientific community's desire to study the remains found in Native American graves, it was crafted with no input from American Indians.<sup>135</sup> Many Native American activists

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<sup>127</sup> Ibid.

<sup>128</sup> Michelle Hibbert, "Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment." *American Indian Law Review* 23, no. 2 (1998): 425-458.

<sup>129</sup> Murray, Virginia H. "A" right" of the dead and a charge on the quick: Criminal laws relating to cemeteries, burial grounds and human remains." *JOURNAL OF MISSOURI BAR* 56, no. 2 (2000): 115-121. Murray estimates selling human remains and artifacts to be a billion dollar per year business. While no accurate accounting of the amount of American Indian corpses have been dug up from their graves, Jack Trope and Echo Hawk estimate the number to be between 100,000 and 2 million have been appropriated for storage, sale, or display at government agencies, museums, universities, and tourist attractions. See also: Goodwin, Derek V. "Raiders of the sacred sites." *New York Times*, December 7 (1986): A65.

<sup>130</sup> Hibbert, "Galileos or Grave Robbers?," 427

<sup>131</sup> Ibid.

<sup>132</sup> Ibid, 427

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

and non-native advocates have viewed the excavation of indigenous human remains, even those done under the guise of scientific pursuit, as grave robbing.<sup>136</sup>

In 1979, the government passed the Archaeological Resource Protection Act, which deemed human and funerary remains as protected archaeological resources to be preserved by federally funded universities, museums or other scientific or educational institutions.<sup>137</sup> The U.S. government's labeling of human remains as "archaeological resources" appeared dehumanizing and angered many American Indian advocates who cited the designation as interference in native religious practices.

In response to growing opposition to government claims of ownership of Indian remains, Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990. Described by Jack Trope as "first and foremost, human rights legislation,"<sup>138</sup> NAGPRA restricts access to historically-sacred sites, makes grave robbing a criminal act, and provides funding to museums and federal institutions to repatriate identifiable Native American skeletal remains and cultural affects to requesting Indian tribes who can present evidence showing lineal descendency.<sup>139</sup> NAGPRA not only created a protocol for tribes to re-appropriate the remains of descendants, but perhaps more importantly established the principle that tribes should have control over their cultural artifacts. That same year, Congress passed the Indian Arts and Crafts Act of 1990, a truth-in-advertising law that prohibits the "misrepresentation in marketing of Indian arts and crafts products within the United States."<sup>140</sup> Originally created in 1935 to protect the commercial interests of Native American craftsmen, the revised version of the law added additional punitive damages to safeguard tribal identities and brands by creating

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<sup>136</sup> Ibid, 428

<sup>137</sup> Ibid.

<sup>138</sup> Jack Trope was the executive director of the Association on American Indian Affairs since from 2001-2015

<sup>139</sup> Public Law 101-601; 25 U.S.C. 3001-3013).

<sup>140</sup> Public Law 101-644

government trademarks of authenticity for Indian products and the products of particular tribes.<sup>141</sup>

Through the passage of NAGPRA, the U.S. government has formally acknowledged the sacred culture of Native Americans is a vital part of the ongoing lifeway of the United States.<sup>142</sup> Since its inception Native American tribes have used the law in several high profile cases to repatriate remains from universities and museums. One such case led to the return of a pair of 9,500-year-old skeletons to a group of tribes in San Diego. In 2012, a collective of 12 Native American tribes known as the Kumeyaay Cultural Repatriation Committee sued the University of California-San Diego in federal court over human remains (“La Jolla Bones”) discovered on the school's campus in 1976.<sup>143</sup> The group claimed the university violated NAGPRA by refusing to return the remains upon request.<sup>144</sup> After two lower courts ruled in favor of the Kumeyaay, the Supreme Court declined to hear the case in January 2016, effectively ending the matter.<sup>145</sup> The “La Jolla Bones” case serves as an important model for future NAGPRA cases, as well as local communities trying to balance their own traditions with the rights of native people whose culture they appropriate in school sporting events.

When it comes to the issue of Indian mascots—much like Indian bones—the task of appeasing both native and non-native groups is a difficult one. However, increasingly states are choosing to include Native American tribes in the decision-making process. In 2012, Oregon’s Board of Education ruled that schools with Native American mascots must select new symbols

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<sup>141</sup> Brendan Johnson and Seth Nielsen, "The Indian Arts And Crafts Act - A Powerful Tool - Law360." The Indian Arts And Crafts Act - A Powerful Tool - Law360. June 30, 2015. Accessed July 24, 2016. <http://www.law360.com/articles/673518/the-indian-arts-and-crafts-act-a-powerful-tool>.

<sup>142</sup> Guest, Richard A. "Intellectual Property Rights and Native American Tribes." *American Indian Law Review* 20, no. 1 (1995): 111-139.

<sup>143</sup> Carl Zimmer, "Tribes’ Win in Fight for La Jolla Bones Clouds Hopes for DNA Studies." The New York Times. January 29, 2016. Accessed July 26, 2016. <http://www.nytimes.com/2016/02/02/science/tribes-win-in-fight-for-la-jolla-bones-clouds-hopes-for-dna-studies.html>.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.



by 2017 or risk losing state funding.<sup>146</sup> After pushback from the state legislature, the board modified its stance in 2016, approving use of Native American mascots by schools who secure permission from one of Oregon's nine tribes.<sup>147</sup> Effectively, Oregon public school boards must work with tribes if schools want to keep their mascots. While some Native American activists in Oregon are displeased with the new ruling, others find the guidelines as a way to start a dialog about Native American culture and history.<sup>148</sup> Similarly, Colorado Gov. John Hickenlooper signed an executive order in 2015 that created a commission made up of the state's American Indian tribes, to discuss use of Native American mascots in Colorado high schools.<sup>149</sup> Both cases in Oregon and Colorado indicate the willingness of Indian tribes to work within their local communities to find solutions to the Indian mascot issue. But before such cooperation can be established, non-Indians must relinquish ownership claims of tribal names and iconography they use to represent their sports teams and ultimately allow American Indians the right of refusal.

The synthesis of legal actions such as NAGPRA, IACA, and state governing bodies in California, Oregon, and Colorado has established that in some cases tribes already have control over their names and cultural artifacts. Thus, proposing a modification to state right of publicity laws to address Native American indicia would merely be a slight extension of legal principles that already exist and have been upheld by U.S. courts and state legislatures.

### **Delineating right of publicity and intellectual property doctrine**

Perhaps the greatest challenge in protecting indigenous cultural rights is intellectual property law. Trademarked logos existing for nearly a century have escaped right of publicity violations,

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<sup>146</sup> Oregonian/OregonLive, Casey Parks | The. "Some Oregon Schools Can Keep Native American Mascots, Oregon State Board of Education Rules." OregonLive.com. January 21, 2016. Accessed May 31, 2016. [http://www.oregonlive.com/education/index.ssf/2016/01/some\\_oregon\\_schools\\_can\\_keep\\_n.html](http://www.oregonlive.com/education/index.ssf/2016/01/some_oregon_schools_can_keep_n.html).

<sup>147</sup> Ibid

<sup>148</sup> Ibid

<sup>149</sup> Joey Bunch, "Colorado Governor Creates Task Force on American Indian Mascots." The Denver Post. October 06, 2015. Accessed July 02, 2016. <http://www.denverpost.com/2015/10/06/colorado-governor-creates-task-force-on-american-indian-mascots/>.

in part because laws protecting name, likeness, personality, mannerisms, and other distinguishing traits are more contemporary legal concepts. Laws protecting personal property (identity) rights from commercial exploitation had yet to develop during the time Indian mascots became popular ornaments for American sports teams of the late 19<sup>th</sup> century and early 20<sup>th</sup> century.

Intellectual property law enables people, organized groups, and corporations to control how, and under what conditions, their intellectual creations are used for commercial purposes. These “creations of the mind” (e.g. art, literature, designs, symbols, etc.) are protected by patent, copyright and trademark laws. Often cultural properties fall under this categorization, although it is not a perfect fit for many reasons. Historical, archaeological, and ethnographical objects embody a cultural ethos passed down from one generation to the next through social connections. Native American cultural sensibilities of ownership and property embody religious and spiritual principles steeped in distinct tribal beliefs that are often at odds with western philosophies of free enterprise and commerce that govern intellectual property laws. Historically, intellectual property law has proven to be less flexible to native appeals for ownership of cultural indicia.<sup>150</sup>

### ***Trademark, copyright and the right of publicity***

The basic difference between copyright and right of publicity laws is that copyright protects ownership of a creative work, while right of publicity protects those depicted in creative works. Copyright law gives ownership of a tangible work of authorship to the creator of the original work. For example, if an independent painter or photographer creates an original work of art, they immediately retain ownership (copyright) of that work.<sup>151</sup> Right of publicity, on the other hand, places control with the subject depicted in the creative work, often a public individual or

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<sup>150</sup> Johnson, “The Indian Arts And Crafts Act”

<sup>151</sup> Marc Greenberg and Michael L. Lovitz, "Right of Publicity and the Intersection of Copyright and Trademark Law." (2012).

celebrity.<sup>152</sup> This is an important distinction because First Amendment doctrines—more specifically fair use doctrine—is used to resolve both copyright and right of publicity claims. Understanding the limits of free speech as well as the ways in which copyright and right of publicity intersect is a vital part of distinguishing the difference between protected speech and individual property rights (i.e., Chicago Blackhawks’ trademark and team name vs. the publicity rights of Chief Black Hawk and the Fox/Sauk nation, respectively).

Like copyright and patent law, trademark protects creative property. A logo or mark helps to distinguish one brand from another, and trademark registration assigns legal ownership of those marks. Because the law does not provide native individuals or tribes comprehensive rights to exclude others from using their names, trademark law tends to provide the biggest obstacle as it pertains to challenging sports branding of Native American names and likeness.<sup>153</sup> Additionally, Indian sports mascots provide a complicated example of overlap between trademark and right of publicity doctrines. For instance, when a person's name or likeness is used in connection with a commercial activity that receives trademark protection (e.g. team logo), both laws are induced. However, instead of using trademark law to contest the registration of such marks—as Amanda Blackhorse and Suzan Harjo did in their petition against the Washington Redskins—a proposal based on the right of publicity can challenge the use of specific native identities altogether.

Before Suzan Harjo and Amanda Blackhorse made trademark law the weapon of choice in litigation against the Washington Redskins, trademark doctrines had been used in lawsuits brought by the Navajo Nation and Zia Pueblo tribe of New Mexico during the 1990s.<sup>154</sup> In the

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<sup>152</sup> Ibid

<sup>153</sup> Johnson, “The Indian Arts And Crafts Act”

<sup>154</sup> Olivia Greer, “Using Intellectual Property Laws to Protect Indigenous Cultural Property.” *Bright Ideas* 22, no. 3 (Winter 2013): 28

Zia Pueblo case, the tribe sought to block registration of trademarks that used their sacred sun symbol.<sup>155</sup> The sun symbol, which dated back to religious ceremonies conducted during the 1200s, had been appropriated into the logos of numerous public and private entities throughout the state, including plumbing and pest control companies.<sup>156</sup> When the tribe attempted to acquire registration of the symbol as its trademark, it was denied because an interpretation of the Zia sun symbol already appears in the state flag.<sup>157</sup> §2(b) of the Lanham Act bars the registration of any mark that “consists of, or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality,”<sup>158</sup> Later the tribe brought suits against two area businesses, citing §2(a) of the Lanham Act to successfully discourage the companies from continuing to use the tribe’s symbols in their trademarks.<sup>159</sup> But although the two companies dropped their trademark registration, the withdrawals produced no precedent that might discourage other commercial entities from registering similar marks.<sup>160</sup> Ultimately the problem with trademark challenges is that they offer little concrete remedy against appropriation of iconography outside of the public pressure exerted through bad press and public campaigns.<sup>161</sup>

The Navajo Nation found itself in a similar fight over use of its tribal name. Claiming more than 300,000 enrolled members, the Navajo Nation is one of the United States’ largest Native American tribes.<sup>162</sup> The Navajo name recognition and brand identity, synonymous with mainstream concepts of Indian culture, hold particular significance in the American marketplace.

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<sup>155</sup> Ibid, 29

<sup>156</sup> Ibid, 29

<sup>157</sup> Olivia Greer states that New Mexico began using a stylized version of the Zia Sun Symbol in its flag in 1925.

<sup>158</sup> 15 U.S.C. § 1052 (b)

<sup>159</sup> Section 2(a) prohibits registration of marks that “falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols.”

<sup>160</sup> Greer, “Using Intellectual Property,” 29

<sup>161</sup> Ibid.

<sup>162</sup> Bill Donovan, “Census: Navajo Enrollment Tops 300,000.” - Navajo Times. July 7, 2011. Accessed July 03, 2016. <http://navajotimes.com/news/2011/0711/070711census.php>.

In 1943, the Navajo Nation trademarked numerous products associated with its name, and then in 1975 attempted to trademark the word “Navajo.”<sup>163</sup> Ruling that the term “Navajo” was too common, courts denied the registration.<sup>164</sup> The court’s decision reflected what many American Indian advocates such as Sasha Houston Brown perceive as traditionally western, capitalist interpretations of tribal names as adjectives for consumer objects, rather than nouns.<sup>165</sup>

In 2012, the tribe sued Urban Outfitters and affiliate subsidiaries for use of its name in a product line that included a “Navajo Nations Crew Pullover,” “Navajo Print Fabric-Wrapped Flask” and “Navajo Hipster Panties.”<sup>166</sup> Urban Outfitters had been marketing the “Navajo” name on its products since 2001,<sup>167</sup> but it was not until Brown, a member of the Santee Sioux nation, penned an open letter chastising the store and posted it to the internet in 2011 that the issue became a public controversy.<sup>168</sup> Citing violations of the Indian Arts and Crafts Act, the Navajo Nation sued for trademark infringement. The tribe argued that use of the Navajo name intentionally misled consumers who may have been looking to purchase authentic Navajo products.<sup>169</sup> Urban Outfitter’s defense stated that its use of the word “Navajo” was descriptive and that the word is a generic term for a style or design.<sup>170</sup> Navajo patterns are an art form

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<sup>163</sup> Greer, “Using Intellectual Property,” 28

<sup>164</sup> “Navajo Nation Seeks Millions from Urban Outfitters for Using Tribe’s Name.” *Chicagotribune.com*. February 3, 2016. Accessed May 08, 2016. <http://www.chicagotribune.com/business/ct-navajo-nation-urban-outfitters-lawsuit-20160203-story.html>.

<sup>165</sup> The United States District Court or New Mexico denied Urban Outfitters 2013 motion to dismiss the complaint citing that although Navajo is a dictionary defined adjective referring to “geometric designs of symbolic meaning” (i.e. “Navajo blanket” and “Navajo rug”), even when used as an adjective the term conveys information that the source of the product (e.g. rug or blanket) is the Navajo tribe or tribal member. Consequently, the court ruled that use of “Navajo” as an adjective “could reasonably create a likelihood of confusion among consumers as to whether ‘Navajo’ refers to the NAVAJO brand and the Navajo Nation as the source of the product.”; 935 F. Supp. 2d 1147 - Dist. Court, D. New Mexico 2013

<sup>166</sup> 935 F. Supp. 2d 1147 - Dist. Court, D. New Mexico 2013

<sup>167</sup> *Ibid.*

<sup>168</sup> Kristin Tillotson, “Urban Outfitters’ Hipster Panty Is a Navajo No-no.” *Star Tribune*. October 11, 2011. Accessed July 02, 2016. <http://www.startribune.com/urban-outfitters-hipster-panty-is-a-navajo-no-no/131612793/>.

<sup>169</sup> *Ibid.*

<sup>170</sup> Gabriela Maya Bernadett, “Navajo Nation Suit Against Urban Outfitters Ongoing; ‘Navajo’ Is Not a ‘Generic Term,’ Diné Argue.” *Indian Country Today Media Network.com*. February 19, 2016. Accessed April 02, 2016. <http://indiancountrytodaymedianetwork.com/2016/02/09/navajo-nation-suit-against-urban-outfitters-ongoing->

commonly incorporated into many different types of works, which makes registering the term “Navajo” as a trademark extremely difficult. The tribe sued for revenue from products sold by Urban Outfitters using the “Navajo” name dating back to 2008, which would have amounted to millions of dollars.<sup>171</sup> Public outcry and media backlash from the lawsuit led Urban Outfitters to discontinue the “Navajo” product line. However, Urban Outfitters subsidiaries have continued to use Navajo inspired geometric print designs. Although the Navajo nation has been unable to trademark its name, the tribe holds 86 registered trademarks with the United States Patent and Trademark Office for goods sold under the Navajo name.<sup>172</sup>

The Navajo Nation and Zia Pueblo’s use of intellectual property doctrines to protect cultural property, suing for the trademark rights to their iconography, highlights the limits of trademark challenges. In both cases non-Indian entities were using Indian terms and symbols for so long that those symbols (i.e. New Mexico’s flag) and terms (i.e. Urban Outfitters clothes) ceased to belong to the tribes they originated from. American jurisprudence effectively assigned to American entities ownership of culturally and religiously significant native property.

Instead of suing for trademark infringement, I contend tribes like the Navajo should challenge the use of their name, designs and other distinguishing marks (indicia of identity) as a violation of their right of publicity. The NAGPRA and IACA are existing laws that establish the right of tribes to control the use of some cultural properties that are a part of their ancestral heritage. By using right of publicity tort, native groups like the Navajo can make establish a commercial value of their identity thus requiring consent and compensation for its use.

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navajo-not-generic-term-dine-argue. Navajo tribal members have pointed out that labeling “Navajo” as a generic term further colonizes the word. “Using it to refer to a type of pattern ... it’s not really a pattern,” said Dine [Navajo] tribal member Casey John. “To say it’s just a design, they don’t need permission from a tribe that federally, legally calls themselves Navajo ... it’s just ridiculous. It’s legally the name we use in any kind of actions with other nations, the government. It [the name] should not be taken lightly at all.”

<sup>171</sup> Greer, “Using Intellectual Property,” 29

<sup>172</sup> Ibid.

## CHAPTER V: RIGHT OF PUBLICITY CASE STUDY USING THE CHICAGO BLACKHAWKS

I chose National Hockey League (NHL) franchise the Chicago Blackhawks as my case study for a few reasons. First, unlike more nebulous team names like the Indians, Redskins, and Braves, the Blackhawks name has a direct association with an individual—a Sauk Indian from Virginia named Ma-ka-tai-me-she-kia-kiak, otherwise known as Chief Black Hawk. Leader of the Sauk and Fox, and other related tribes, Black Hawk's descendants live in Oklahoma and Iowa.

My second motive for choosing the Blackhawks is the popularity of the team's logo. In 1969, the Chicago Blackhawks – one of the National Hockey League's founding teams – trademarked the team's name and Indian head logo. After the trademark was granted, anyone who wanted to sell something that featured the team's name or logo had to get the team's permission, typically by buying it for a considerable amount of money or a percentage of sales. Although the Indian head logo is among the most prominent Indian mascots in all of professional sports, the Blackhawks do not receive the same scrutiny that the Cleveland Indians or Washington Redskins do.<sup>173</sup> And unlike the University of Illinois' Chief Illiniwek, the Blackhawks' logo has garnered little protest from activists in the state of Illinois.<sup>174</sup> The logic behind the lack of interest from activist and advocacy groups is that the Blackhawks organization does not employ a mascot during games or for use in promotional events.<sup>175</sup> Although some fans

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<sup>173</sup> Steve Inskeep, "How Is the Blackhawks' Name Any Less Offensive Than the Redskins'?" *The Atlantic*. Atlantic Media Company, 19 June 2015. Web. 03 July 2016. Activist Suzan Harjo Harjo told the Chicago Tribune in 2013 that she believed "the Blackhawks have escaped similar scrutiny because hockey is not a cultural force on the level of football."

<sup>174</sup> "Why Is the Chicago Blackhawks Logo Okay but Washington Redskins Racist?" Indian Country Today Media Network.com. June 17, 2013. Accessed July 03, 2016. <http://indiancountrytodaymedianetwork.com/2013/06/17/why-chicago-blackhawks-logo-okay-washington-redskins-racist-149937>.

<sup>175</sup> According Jon Greenberg of ESPN, "Blackhawks management are careful not to use any Native American culture for entertainment purposes -- no Indian mascot, no Indian cheers. When former Blackhawks coach Denis Savard came up with that catchphrase, "Commit to the Indian," the team never co-opted it." [http://espn.go.com/chicago/nhl/story/\\_/id/11110679/chicago-blackhawks-logo-requires-continued-conversation-team-identity-versus-appropriation](http://espn.go.com/chicago/nhl/story/_/id/11110679/chicago-blackhawks-logo-requires-continued-conversation-team-identity-versus-appropriation).

attend games in headdress and war bonnets, and chant catchphrases like “commit to the Indian,” an expression coined by former coach Denis Savard, these transgressions pale in comparison to the more outward forms of Indianness on display at other sporting events around the country (e.g. the Atlanta Braves tomahawk chop).<sup>176</sup> Another rationale for the lack of outrage from activists is a rather nuanced argument from proponents of the team’s nickname who point out that Blackhawks founder Frederick McLaughlin named the team after the 85<sup>th</sup> Infantry Division, a battalion of the U.S. Army that referred to themselves as “Black Hawks” during World War I.<sup>177</sup>

A commander in the battalion, McLaughlin claims to have named the team in tribute to this division. Thus, Blackhawks fans cite McLaughlin’s assertions as proof the name does not originate directly from an Indian tribal name, as no Blackhawk tribe exists. But these claims are mere semantics, as the Black Hawk Infantry Division was named in “honor” of Chief Black Hawk.<sup>178</sup> McLaughlin’s wife, dancer Irene Castle, was credited with designing the team’s first uniforms, featuring the iconic Indian head as the logo adorning all of the team’s jerseys and most popular merchandise (*see*: Appendix C).<sup>179</sup> Had McLaughlin decided on a militarily themed logo and jersey design, the contextual use of the name could be debated. However, incorporating the Indian head as the primary focus of the uniform leaves little doubt that the name is a clear reference to Chief Black Hawk. If the name referred solely to McLaughlin’s army division, and not the famous Indian chief, then why use an Indian head as the mascot and principal logo?

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<sup>176</sup> Ibid.

<sup>177</sup> George Vass, *The Chicago Black Hawks Story*. Chicago: Follett Pub., 1970. While McLaughlin’s claims about the origin of the Blackhawks team name can be verified through numerous sources, there seems to be some discrepancy between whether or not McLaughlin was in the 85<sup>th</sup> or 96<sup>th</sup> infantry. For the purposes of this paper I choose to use the infantry cited in Vass’s book.

<sup>178</sup> Born in Sauk Sautenuk, Virginia in 1767, Chief Black Hawk’s Indian name was Ma-ka-tai-me-she-kia-kia.

<sup>179</sup> Vass, *The Chicago Black Hawks Story*. Chicago: Follett Pub., 1970



My final reason for scrutinizing the Blackhawks nickname and mascot was that they play in the state of Illinois. Unlike federal laws that govern copyright and trademark, right of publicity laws vary from state to state. Illinois is among 20 states that have strict guidelines governing the right of publicity; I believe making it ripe for the type of legal petition I propose.

### **Right of publicity and freedom of speech**

In the first and only Supreme Court ruling on a right of publicity case, the *Zacchini v. Scripps-Howards Broadcasting Co.*, established the precedent for a right of publicity claim prevailing over First Amendment protection.<sup>180</sup> In the 1977 case, daredevil Hugo *Zacchini*<sup>181</sup> sued *Scripps-Howards Broadcasting Co.* for videotaping his 15-second "human cannonball" act and then airing the footage on the broadcasting company's local television news program later the same day.<sup>182</sup> *Zacchini* argued that the value of his act depended on the public's desire to witness the event live, so broadcasting the act in its entirety devalued his product. Recognizing *Zacchini*'s right to protect the commercial viability of his primary source of fame, the court rejected the Scripps-Howard Broadcasting Co.'s First Amendment defense.<sup>183</sup> Following the *Zacchini* case, states like Illinois have created a variety of First Amendment tests, including the "actual malice" test, "transformative use" test, "relatedness" test ("artistic relevance" test) and "predominant purpose" test, to reconcile right of publicity laws with competing freedom of expression concerns.<sup>184</sup>

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<sup>180</sup> Kevin L. Chin, "The Transformative Use Test Fails to Protect Actor-Celebrities' Rights of Publicity." *Northwestern Journal of Technology and Intellectual Property* 13, no. 2 (September 2015): 198-214.

<sup>181</sup> Hugo *Zacchini*, one half of the daredevil team the *Zacchini Brothers*, is widely considered the first human cannonball. Hugo's father Ildebrando *Zacchini* invented the compressed-air cannon used to propel humans in circus acts.

<sup>182</sup> 433 U.S. 562, 576 (1977).

<sup>183</sup> *Ibid* at note 157

<sup>184</sup> Andrew Koo, "Right of Publicity: The Right of Publicity Fair Use Doctrine-Adopting a Better Standard." *Buff. Intell. Prop. LJ* 4 (2006): 1.

In the case of the Chicago Blackhawks hockey team, the “actual malice” test wouldn’t apply because the Blackhawks’ use of the name and related imagery does not demonstrate “reckless disregard for the truth” or a “high degree of awareness of probable falsity.”<sup>185</sup> In other words, the team’s intended use of the name and logo is not intentionally defamatory of Chief Black Hawk. Likewise, the transformative use test would also fall under the guise of fair use, as the First Amendment safeguards a number of transformative components including fictionalized portrayal.<sup>186</sup> It can be argued that the Blackhawks’ logo could be considered a fictionalized portrayal because it may or may not have been intended to be an accurate rendering of Chief Black Hawk. The “relatedness” test (also known as the “artistic relevance” test) has only been applied to creative works like movies, paintings, books and music, and like the other aforementioned tests, may not be applicable in this particular case. However, the “predominant use” test presents an interesting caveat. The primary function of the “predominant use” test is to discern commercial exploitation of identity from commentary. “Predominant use” weighs the predominant purpose behind the use of another’s identity against the commercial benefit to the appropriator.<sup>187</sup> The Missouri Supreme Court established the “predominant use” test in 2003 to consider conflicting First Amendment and right of publicity interests in the case *Doe v. TCI Cablevision*, where former pro hockey player Anthony “Tony Twist” Twistelli, brought a right of publicity claim against the creators, publishers, and marketers of popular comic book *Spawn*.<sup>188</sup> Twistelli argued that *Spawn*, which featured a mob villain of the same name, was using his identity as a well-known public figure without consent.<sup>189</sup> Series creator Todd

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<sup>185</sup> *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 667 (1989).

<sup>186</sup> John M. Touhy and Laruen Noll. “The Right of Publicity in Illinois.” *Illinois Bar Journal* 99, no. 3 (March 2011): 148.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Doe*, 110 SW3d 363 (Mo 2003).

<sup>189</sup> *Ibid.*

McFarlane admitted that he based the character's attributes on Twist's notoriety as one of hockey's toughest players, and that he often used real-life individuals to craft the personalities of Spawn's characters.<sup>190</sup>

Twistelli asserted that the creators, publishers and marketers of the comic book were responsible to pay him for the market value of, and also to pay damages for the injury to the value others would be willing to pay to use his name in their product endorsements. Because the defendants had agreed that the use was not a parody, expressive comment, or fictionalized account of the real Twist, the "metaphorical reference to Twist...[had] very little literary value compared to its commercial value."<sup>191</sup> As the use of Twist's name was a ploy to sell comic books rather than an artistic or literary expression, "free speech must give way to the right of publicity."<sup>192</sup> Similar to the *Doe v. TCI Cablevision* case, the Chicago Blackhawks' Indian namesake and iconography are derivatives whose origins link to a real-life American Indian person.

It is clear that the purpose behind the use of Chief Black Hawk's name is for commercial benefit. The Chicago Blackhawks sell two products: the hockey team and its merchandise. The hockey team is generally sold through the team's performance and results in lucrative television rights, sponsorships, and other streams of revenue. One of the original six NHL franchises, the Blackhawks went through a period spanning the mid-1990s to mid-2000s where the team performed dismally: making the post-season just once, and often finishing near the bottom of

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<sup>190</sup> Touhy and Noll note that McFarlane's description of the "Tony Twist" character left no doubt as to whom the character was based on. Published in a comic book trade magazine, the character biography for "Tony Twist" read: "The Mafia don...is named for former Quebec Nordiques hockey player Tony Twist, now a renowned enforcer (i.e. 'Goon') for the St. Louis Blues of the National Hockey League." This description appeared below a photo of a Tony Twist hockey trading card.

<sup>191</sup> *Doe*, 110 SW3d 365 (Mo 2003).

<sup>192</sup> *Ibid*.

their division.<sup>193</sup> However, the Blackhawks' fortunes improved greatly after 2009, winning three Stanley Cups during a six-year period. Although the team's merchandise was already popular, winning three championships increased the team's value considerably. With the team's success on the ice, the brand became more valuable than ever,<sup>194</sup> making the second product, the merchandise featuring the trademarked logo, mascot, and team nickname, one of the most prominent insignias in all of American professional sports.<sup>195</sup> According to Chicagobusiness.com, "the Chicago Blackhawks' brand is translating into eye-popping apparel sales numbers after the team's most recent Stanley Cup win."<sup>196</sup> And although the team won the Stanley Cup in 2013, the 2015 championship was its biggest windfall yet, with merchandise up 20 percent over the team's previous Cup win.<sup>197</sup> This lucrative merchandise bears the name of an actual person with no relation to the product and is not being used as commentary or satire (parody is often protected by fair use doctrine). The Chicago Blackhawks use the Indian head logo as a way to associate their sports team with characteristics of Indian masculinity that have become hallmarks of American sports culture. The Indian head logo used in association with the Indian sounding "Blackhawk" does not conjure images of World War I battalions, but rather Indian warriors whose physical prowess is linked with the team's brand.

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<sup>193</sup> Jared Clinton, "Blackhawks Chairman Wirtz Says Team Still Not Turning Profit." The Hockey News. June 4, 2015. Accessed July 02, 2016. <http://www.thehockeynews.com/blog/blackhawks-chairman-wirtz-says-team-still-not-turning-profit/>.

<sup>194</sup> Hine, Chris. "Chicago Blackhawks." Forbes. November 24, 2015. Accessed July 02, 2016. <http://www.forbes.com/teams/chicago-blackhawks/>. Forbes Magazine ranked the Blackhawks as the fourth most valuable NHL franchise through the 2014-15 season. The magazine estimated the team's worth at an estimated value of \$925 million.

<sup>195</sup> According The United Center website, "the Blackhawk Indian head logo has been called by many as the best logo in the history of professional sports." The United Center is the home facility for the NBA's Chicago Bulls and the NHL's Chicago Blackhawks. <http://www.unitedcenter.com/chicago-blackhawks>.

<sup>196</sup> Danny Ecker, Another Stanley Cup, another big night for retailers, <http://www.chicagobusiness.com/article/20150615/BLOGS04/150619874/another-stanley-cup-another-big-night-for-retailers>

<sup>197</sup> Ibid.

It is my contention that an amendment could be added to existing Illinois right of publicity laws that would provide protection and retroactive compensation for use of Chief Black Hawks name. I outline this argument in the following section.

### **The Illinois Act: Illinois' right of publicity law**

The Illinois Right of Publicity Act was codified in 1999.<sup>198</sup> Referred to as the “Illinois Act,” the legislation grants individuals the right to control the use of their identity for commercial purposes.<sup>199</sup> An extension of the right of privacy, which protects individual personal rights, the right of publicity protects an individual’s property rights: the economic value of their indicia of identity.<sup>200</sup> It is the use of native indicia (e.g. stoic or cartoon Indian face), likeness and distinctive garb (e.g. Indian headdress, feathers)—that fans identify with. And it is the use of Native American indicia in the Blackhawks uniforms that make an obvious connection between the name and native people. Consequently, Chief Black Hawk’s rights to commercially exploit the use of his name, or moniker, are fully transferrable under paragraph (3) of subsection (a) of the Act, which states “after the death of an individual who has not transferred the recognized rights by written transfer under this Act, any person or persons who possesses an interest in those rights.”<sup>201</sup> The Sauk and Fox tribe represents clear “interest” in Chief Black Hawks’ rights.

### ***American Indian descendance***

In 1804 Native American leaders agreed to cede 50 million acres of Indian land to the United States government.<sup>202</sup> The policy, which cleared the way for white settlers moving westward,

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<sup>198</sup> 765 ILCS 1075/1

<sup>199</sup> 765 ILCS 1075/5

<sup>200</sup> J. Thomas McCarthy, "Human Persona as Commercial Property: The Right of Publicity, The." *Colum.-Vla JL & Arts* 19 (1994): 134; Section 46 of the Restatement (Third) of Unfair Competition states, “One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability . . .”

<sup>201</sup> 765 ILCS 1075/20

<sup>202</sup> James Lewis, "Black Hawk." Encyclopedia Britannica Online. Accessed April 02, 2016. <http://www.britannica.com/biography/Black-Hawk-Sauk-and-Fox-leader>.

relocated several tribes from Illinois to Iowa, angering many American Indians who felt betrayed by the arrangement. In 1832, a Chief Black Hawk led faction of nearly 1,000 Sauk, Fox, Kickapoo, and Ho-Chunk men, women and children attempted to reoccupy tribal lands in Illinois.<sup>203</sup> The Illinois Militia, joined by U.S. government troops, confronted the associated tribes, resulting in the Black Hawk War of 1832.<sup>204</sup> After the bloody three-month conflict concluded, the 200 remaining men, women and children were relocated to Oklahoma and Iowa.<sup>205</sup>

In 1926, 88 years after the death of Chief Black Hawk and almost a century after the Black Hawk war, the Chicago Black Hawks begun play in the NHL, using a black and white Indian head as their main logo (*see*: Appendix C).<sup>206</sup> Over the course of the next 90 years, the Chicago “Black Hawks” name—which was eventually consolidated into “Blackhawks”—was used with its ever evolving logo to market and sell merchandise, while developing one of the strongest brands in the National Hockey League.<sup>207</sup> Although Chief Black Hawk’s birth name is Ma-ka-tai-me-she-kia-kiak, the Illinois Act defines "Name" as “the actual name or other name by which an individual is known that is intended to identify that individual.”<sup>208</sup> While the team could claim that use of the name represents McLaughlin’s service in the Blackhawk Infantry, the use of the Indian head would have to be reasonably assumed to reference the Indian chief and not

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<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Timothy James McCollum, "Sac and Fox | Encyclopedia of Oklahoma History and Culture." Sac and Fox | Encyclopedia of Oklahoma History and Culture. 2009. Accessed April 02, 2016. <http://www.okhistory.org/publications/enc/entry.php?entry=SA001>.

<sup>206</sup> § 5 of the Illinois Act defines “individuals” as a “living or deceased natural person,” and further assigns specific rights of publicity “regardless of whether the identity of that individual has been used for a commercial purpose during the individual’s lifetime,” Additionally, §5 defines a person as a “natural or juristic person.” A juristic person is further defined as any organization capable of suing and being sued in a court of law. This is an important designation because the Sauk & Fox tribes are capable of suing in a court of law, so they qualify as juristic persons under Illinois state law, and could assume Chief Black Hawks rights as his descendants.

<sup>207</sup> Matt Zawaski, "The History of the Chicago Blackhawks Logo." Sports Mockery. November 06, 2014. Accessed July 02, 2016. <http://sportsmockery.com/2014/11/history-chicago-blackhawks-logo/>.

<sup>208</sup> 765 ILCS 1075/5

the military battalion. Consequently, the Sauk and Fox tribe has a vested financial interest in regaining control over the use of its former chief's name and likeness. However, obstacles remain.

Like most famous Indian chiefs, Chief Black Hawk lived during a time when he had no personal property rights. Additionally, Black Hawk had been dead for almost 90 years before the team began using his name, which is past the 70-year postmortem limit set by the state of Illinois—so even suing for retroactive violations would be difficult. Furthermore, Black Hawk has no living children or grandchildren, making a transferability claim by descendants moot under §25 of the Illinois Act, which states that the rights of deceased individuals terminate if:

(a) a deceased individual has not transferred his or her rights in writing under Section 15 of this Act; and

(b) the individual has no living spouse, parents, children, or grandchildren.<sup>209</sup>

However, as I mentioned earlier, the passage of NAGPRA and IACA set federal precedent for the protection of Native American cultural artifacts such as remains and original Indian arts and crafts. Black Hawk's death long ago should not deter an amendment to the Illinois Act. Both the NAGPRA and IACA were passed well after marketplaces for Native American remains and derivative native craftwork were reaping millions of dollars for non-Indians. If Congress has acknowledged both the religious and commercial rights of Indian culture through NAGRPA and IACA, safeguarding the commercial use of native indicia of identity is but a small additional step. It does not seem unreasonable that the precedent set by those federal laws could be used to argue the case for safeguarding native identity in much the same way.

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<sup>209</sup> 765 ILCS 1075/25

Take for instance famed athlete Jim Thorpe. Other than Black Hawk, Thorpe is the most famous Sauk and Fox individual. If the University of Illinois—after retiring Chief Illiniwek in 2007—initiated a new Indian head logo, and assumed the name “Fighting Thorpes,” Jim Thorpe’s family could sue the university under the “Illinois Act,” requesting a temporary restraining order and permanent injunction against the continued use of Thorpe’s name.<sup>210</sup> But in the case that Thorpe had no living children or grandchildren, an amendment to the Illinois Act’s §25 could provide the Sauk and Fox a claim to the rights to Thorpe’s name as a cultural artifact similar to his remains. The state of Illinois already recognizes postmortem rights, which means even without descendants to claim these rights, a person whose likeness carries commercial value is still protected after death. But Chief Black Hawk and other well-known deceased Native Americans (e.g. Crazy Horse, Pontiac, Geronimo, etc.) had few basic rights that American citizens are routinely granted today. They certainly did not have the right to protect the use of their identity. During the time many of these Indian chiefs lived the right of publicity had not yet been developed. For example, the *Zacchini v. Scripps-Howard Broadcasting Co.* case, one of the more important U.S. Supreme Court cases concerning rights of publicity, was decided in 1977, a century after the death of Crazy Horse. Even in the state of Indiana, where right of publicity statutes protect personality rights—including name, likeness, signature, photograph, gestures, distinctive appearances, and mannerisms—for 100 years after death, such protection would only extend to those deceased in the early 1900s, too late for chiefs like Pontiac (1769), Black Hawk (1868) or Crazy Horse (1877), whose names have valuable brand identity in contemporary society. And it is this brand identity that I argue makes a right of publicity claim even more effective than cancelling the trademark of one team. Trademarks only value come from the association a mark has with a brand’s identity—an identity that belongs to famous

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<sup>210</sup> 765 ILCS 1075/50



native individuals and tribes who reap no benefits—thus, protecting the identity is ultimately more salient an issue.

### **My proposal: modernizing state right of publicity laws**

I propose three modest changes that states like Illinois could make to insure their rich Indian heritage is provided the same protections as any other brand with valuable indicia:

**1) Extend right of publicity protections to indigenous peoples in perpetuity**

The most valuable American Indian names belong to people and tribes who had no legal recourse to protect the use of their individual or tribal identities during the formation of major sports leagues and corporations. Outlined in §5 of the Illinois Act, commercial purpose is defined as “the public use of an individual's identity on or in connection with the offering for sale or sale of a product, merchandise, goods, or services.” Extending postmodern protections to include any American Indian person or tribe whose name has been trademarked for use in a non-Indian product or service regardless of time limitations establishes the basis for the following changes.

**2) Make descendability based on tribal affiliation, not lineal descendancy**

Extending publicity rights to cover all American Indians is ineffective if it only transfers rights to lineal descendants (children and grandchildren). As I noted earlier, the most famous Indian chiefs—those whose names have become trademarked brands—died so long ago they don't have any living children or grandchildren to transfer their rights to. If descendability extends to their affiliated tribe, the members of that tribe could file a claim on behalf of the individual or family.

**3) Native American tribes should be treated as juristic persons**

The term “juristic person” refers to entities other than human beings on which the law bestows a legal personality.<sup>211</sup> Examples include a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law.<sup>212</sup> This fictive personhood would establish each tribe as a “singular thinking and acting entity for legal purposes,”<sup>213</sup> allowing it protections over its likeness similar to those of a natural person. While Native American tribes have sovereign immunity from lawsuits, they can file lawsuits on their own behalf.<sup>214</sup> Under my proposed addendum, the Sauk and Fox nation could petition Illinois courts as a juristic person. Possessing an interest in Black Hawk's rights under a new statute revising descendability, the tribe could petition the state for a restraining order and

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<sup>211</sup> Dyschkant, Alexis. “Legal Personhood: How We Are Getting It Wrong.” *Illinois Law Review* 15, no. 5 (November 3, 2015): 2084-085.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

permanent injunction to suspend use of Black Hawk's name in conjunction with any products without further consent.

Under these extensions, the Black Hawk name would represent the property of the Sauk and Fox nation. The Sauk and Fox could then make the claim that the identity of the tribe was infringed upon by the Chicago Blackhawks for the purpose of commercial use. As I have suggested, this addition to the Illinois Act—similar to the protocol instituted in NAGPRA—could establish a special system for indigenous people to reclaim ownership of Indian names and iconography from commercial enterprises like collegiate and professional sports teams. This new section would require any commercial enterprises using Indian names or likeness without consent to offer compensation. If an agreement on the amount of retroactive and ongoing compensation cannot be reached between the Indian tribe and appropriator, the case would be sent to arbitration. What I propose is not a new set of laws, but rather amending existing right of publicity state laws to resemble other established statutes created to protect Indian cultural property from exploitation.

## CHAPTER VI: DISCUSSION

I see a few different scenarios that sports teams could use to contest my proposal. For example, the assertion that mascots represent caricatures that use parody, such as Chief Wahoo's buck teeth, big smile, and hooked nose, and do not represent of any real human being.<sup>215</sup> The parody argument is often used when teams are taken to task for proliferating stereotypes of native people. However, if it is not a parody of actual people, as the parody/caricature argument seeks to confirm, then what is the Indian mascot a parody of? This can be confusing because the term parody is often used incorrectly when referring to mascots. Parody is the imitation of an original work for satirical effect. Social commentary or humor must be at the heart of the transformed work. Unlike other mascots like the Philly Phanatic, Indian mascots are not intended to be humorous, nor is the use intended to evoke social commentary.

Perhaps the biggest problem with the parody argument is that it contradicts the "honor" argument. If you are to believe the "honor" argument—that use of American Indian iconography is done in tribute to native people—then it reasons that they represent something real and tangible.<sup>216</sup> You cannot claim that an image is used both to parody and honor someone/something; the two arguments contradict each other. And further, honoring someone through appropriation does not entitle you to nonconsensual use of their identity. In other words, personal property rights are not transferred to the appropriator. A prime example is the \$8.9 million basketball legend Michael Jordan was awarded in 2015 for use of his name and identity without consent.<sup>217</sup> Jordan sued Safeway, Inc., parent company of former supermarket chain

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<sup>215</sup> Hemmer, "Exploitation of American Indian."

<sup>216</sup> Ibid.

<sup>217</sup> Kim Janssen, "Jordan Says 'it Was Never about the Money' after \$8.9M Jury Award." *Chicagotribune.com*. August 21, 2015. Accessed May 31, 2016. <http://www.chicagotribune.com/business/ct-michael-jordan-dominicks-case-0822-biz-20150821-story.html>.

Dominick's, for using his name in 2009 advertisement for Rancher's Reserve steaks.<sup>218</sup> The ad purported to congratulate Jordan for his induction into the Basketball Hall of Fame, by comparing his athletic excellence to a piece of meat.<sup>219</sup> “It was all just about protecting my name and my likeness,” Jordan said.<sup>220</sup> “It is my name, and I have worked hard for it for 30-something years and I’m not just going to let someone take it.”<sup>221</sup> Safeway had hoped to reach a settlement of \$126,900, but the jury decided Jordan’s name—a brand that according to his attorney made him \$100 million in 2014—was worth closer to the \$10 million he claimed he demands for endorsement requests.<sup>222</sup> In effect, Dominick’s used the same honor argument that American sports teams use when they appropriate Indian iconography to sell their product.

While most Indian luminaries could never claim the valuable brand identity of celebrities like Michael Jordan, it is worth noting many of the most famous Indian chiefs (e.g. Geronimo, Pontiac, Black Hawk, etc.) have been used to sell products such as cars, jewelry, clothing, footwear, food, wall coverings, and even alcoholic beverages in the case of Crazy Horse Malt Liquor—nothing seems to be off limits.<sup>223</sup> In fact, appropriating Native American nicknames and tribal names is so popular that hundreds of federally registered trademarks use the words “Cherokee,” “Navajo,” “Sioux,” “Dakota,” or “Lakota.”<sup>224</sup> The monetary value of these corporate brand identities suggests that simply arguing American Indian iconography as cultural property is insufficient. Words like “Apache” (truck) “Cherokee” (sports utility truck) and “Dakota” (pick-up trucks) suggest an association between the product and goods with native

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<sup>218</sup> Ibid

<sup>219</sup> Ibid; the Dominick’s ad stated that Michael Jordan was “a cut above” in dual reference to his achievement and the cut of steak being offered in the \$2 coupon accompanying the ad.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Newton, “Memory and Misrepresentation” in *Borrowed Power*, 1003.

<sup>224</sup> Justin G. Blankenship, “Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words that Offend, The.” *U. Colo. L. Rev.* 72 (2001): 415.

masculinity: rough, rugged, strong, and dependable. Using this brand association, merchandisers such as Chevrolet, Chrysler and Dodge simply take proper names of tribes and individuals that represent a personal, cultural or religious identity, and use them to describe commercial products. Corporations are able to appropriate American Indian identity because American law is outdated in respect to its consideration of Indian property rights. Cases like the Blackhorse and Harjo petitions are needed to persuade judges to recognize the cultural and religious freedoms of native people, as well as the personal property rights that should allow them to commercially exploit their identity. Building on the work of activists such as Blackhorse and Harjo, my proposal takes their past legal challenges a step further by avoiding the complications of arguments that trigger First Amendment protections

As I stated earlier, it is clear that Chicago Blackhawks' use of the Black Hawk name does not describe, or relate to a product being sold; qualify as a work of art, parody, social critique; nor any other fair use factor protected by freedom of expression. Therefore, First Amendment protections should not apply as a viable defense against a right of publicity claim by native tribes. However, using right of publicity doctrine to protect American Indian names and iconography is uncharted territory. While precedent exists to protect the personal property rights of celebrities, no common law has been created to address the nonconsensual use of Indian identity.

This paper is not merely advocating for the eradication of Indian iconography in team sports, but rather contending that native people whose name and likeness have been exploited be granted the right of refusal (consent) in states where right of publicity laws protect indicia of identity. My proposal, while narrow in its scope, is a first step in establishing legal precedent that could open the door for the passage of federal statutes. If one or two lawsuits were

successful, judges and others in the legal community would likely begin to see tribal claims to iconography as legitimate. Over time, a critical mass of states would incorporate protections for the ownership of cultural property, leading to nationwide recognition of the right.

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## APPENDIX A

A chronological history of Indian mascot protest, activism and legislation<sup>225</sup>

YEAR	EVENT
1968	<ul style="list-style-type: none"> <li>• National Congress of American Indians (NCAI) launches campaign to address stereotypes found in print and other media.</li> </ul>
1970	<ul style="list-style-type: none"> <li>• Protests against the “Indians” professional baseball team’s use of the “Chief Wahoo” mascot take place in Cleveland, Ohio.</li> </ul>
1988	<ul style="list-style-type: none"> <li>• Minnesota State Board of Education adopts a resolution stating that “[t]he use of mascots, emblems, or symbols depicting American Indian culture or race (is) unacceptable” and encourages all districts to immediately proceed to remove such mascots, etc.</li> <li>• Public schools in Wisconsin begin to change their American Indian related sports team logos, mascots and nicknames. As of 1998, 21 schools, almost one-third of the total using such icons, had changed so far.</li> </ul>
1989	<ul style="list-style-type: none"> <li>• Charlene Teters, a Native American graduate student attending the University of Illinois at Urbana-Champaign, initiates efforts to eliminate that school’s “Chief Illiniwek” mascot.</li> </ul>
1991	<ul style="list-style-type: none"> <li>• The Nebraska Commission on Indian Affairs requests 27 public schools in that state to end their use of American Indian mascots and nicknames.</li> <li>• The National Education Association (NEA), the largest democratic education organization of its kind in the world, passes a resolution denouncing the use of ethnic related sports team mascots, symbols and nicknames.</li> <li>• Advocates protest at the Minneapolis Metrodome where Super bowl XXVI found the Buffalo Bills pitted against the Washington Redskins</li> </ul>
1992	<ul style="list-style-type: none"> <li>• The Portland Oregonian announces it will no longer use the “R-word” and several other American Indian related terms in print. Radio stations WASH and WTOP in Washington, D.C. also adopt similar policies.</li> </ul>
1993	<ul style="list-style-type: none"> <li>• National Congress of American Indians issues resolution #MID-GB-58, which “denounces the use of any American Indian name or artifice associated with team mascots.”</li> </ul>
1994	<ul style="list-style-type: none"> <li>• The State of Wisconsin Department of Public Instruction issues a directive “strongly urging” all Wisconsin schools using American Indian related mascots to discontinue such uses.</li> </ul>
1996	<ul style="list-style-type: none"> <li>• The United Methodist Church takes an official stance concerning demeaning names to Native Americans as well as on other related topics.</li> </ul>
1998	<ul style="list-style-type: none"> <li>• The Kansas Association for Native American Education (KANAE) issues a resolution that “...calls for the elimination of use of American Indian mascots and logos in all public and private schools in the State of Kansas...”</li> <li>• Approximately 200 anti-Indian mascot activists from around the country converge at the University of Illinois, Champaign-Urbana for the first national Conference on the Elimination of Racist Mascots.</li> </ul>

<sup>225</sup> Dates and events provided by [changethemascot.org](http://www.changethemascot.org/history-of-progress) ([www.changethemascot.org/history-of-progress](http://www.changethemascot.org/history-of-progress))

1999	<ul style="list-style-type: none"> <li>• The Great Lakes Inter-Tribal Council, a consortium of twelve federally recognized Indian tribes, issues a resolution calling for the end of “the use of depictions of and cultural references to American Indians as mascots, logos, and team nicknames in Wisconsin public schools.”</li> <li>• A three-judge panel of the U.S. Patent and Trademark Office rules in favor of Suzan Harjo’s petition to cancel the trademark registration of the Washington Redskins. The decision has the potential to strip the NFL team of trademark protections.</li> </ul>
2001	<ul style="list-style-type: none"> <li>• The Seminole, Cherokee, Choctaw, Chickasaw, and Muskogee Nations, representing over 400,000 people throughout the United States, pass a resolution “to eliminate the stereotypical use of American Indian names and images as mascots in sports and other events and to provide meaningful education about real American Indian people, current American Indian issues, and, the rich variety of American Indian cultures in the U.S.”</li> <li>• The Maryland Commission on Indian Affairs approves “a Resolution in Support of the Elimination of the Use of American Indian Descriptions of Mascots, Logos and Sports Team Nicknames for Maryland Public Schools and Institutions of Higher Education.”</li> </ul>
2002	<ul style="list-style-type: none"> <li>• New Hampshire State Board of Education unanimously approved a resolution calling for local school districts to stop using American Indian sports mascots.</li> <li>• North Carolina State Advisory Council on Indian Education passes a resolution “in Support of Eliminating American Indian Descriptions Naming Mascots, Logos, and Sport Team Nicknames for North Carolina Public Schools.”</li> </ul>
2003	<ul style="list-style-type: none"> <li>• The Michigan State Board of Education passes a resolution that “supports and strongly recommends the elimination of American Indian mascots, nicknames, logos, fight songs, insignias, antics, and team descriptors by all Michigan schools.”</li> </ul>
2013	<ul style="list-style-type: none"> <li>• Ten members of Congress including Tom Cole, R-Okla., and Betty McCollum, D-Minn., co-chairs of the Congressional Native American Caucus, send a letter to Washington Redskins owner Dan Snyder and National Football League Commissioner Roger Goodell asking them to consider changing the team’s name out of respect for the country’s native people. Congress introduces bill that would amend the 1946 Trademark Act and cancel any trademark that uses the term “Redskin.”</li> <li>• In December, Senate Majority Leader Harry Reid speaks out against the name of the Washington team name saying it “denigrates a race of people.”</li> </ul>
2014	<ul style="list-style-type: none"> <li>• In January, the U.S. Patent and Trademark office denied a company’s request to sell pork rinds with the name “Redskins” under trademark laws because the term is “a derogatory slang word.”</li> <li>• In early May, both houses of the New York State legislature pass a resolution calling upon professional sports leagues to stop using racial slurs, specifically citing the Washington NFL team’s Redskins mascot as a dictionary-defined epithet.</li> <li>• In May, the Oneida Indian Nation and the National Congress of the American Indian send a letter to all current NFL players asking them to take a stand against the use of the racially offensive “Redskins” as the Washington team name. The letter was signed by more than seventy civil and human rights groups.</li> <li>• In June, the Yocha Dehe Tribe airs a TV commercial against the Washington Redskins team mascot in seven major markets during the NBA finals.</li> </ul>



	<ul style="list-style-type: none"> <li>• In June, the United Church of Christ Central Atlantic Conference passes a resolution calling for the Washington Redskins to change its nickname and also calling for members of the church to boycott the team, games, merchandise and products.</li> <li>• In June, the U.S. Patent and Trademark Office cancels the trademark registration for the Washington Redskins.</li> <li>• In October, New Jersey State Assemblymen Patrick Diegnan and Ralph Caputo introduce a set of resolutions calling for a name change from the Washington Redskins.</li> <li>• In November, more than 4,000 Redskins protestors gathered at TCF Bank Stadium in Minneapolis Minnesota prior to a game between the Minnesota and Washington NFL teams.</li> </ul>
2015	<ul style="list-style-type: none"> <li>• June 17, 2015: As landmark legislation banning use of the term “Redskins” by public school sports teams clears key committee in California, U.S. Secretary of Education Arne Duncan calls upon Washington NFL team to drop offensive mascot</li> <li>• June 29, 2015: National United Church of Christ passes a resolution calling on team to change its name and for its 1.1 million membership to boycott games and merchandise.</li> <li>• Oct. 7, 2015: Colorado Governor John Hickenlooper orders executive action to create a commission that will study American Indian representations in the state’s public schools and facilitate constructive dialogue with Native Americans on the topic.</li> <li>• Oct. 11, 2015: Gov. Brown of California signs the California Racial Mascots Act, a law that eliminates the Redskins as a mascot from all of the state’s public schools.</li> <li>• Feb. 17, 2016: U.S. Rep. John Katko becomes the latest elected official to condemn the use of the Redskins nickname, sending a letter to NFL Commissioner Roger Goodell encouraging him to endorse a name change.</li> <li>• April, 2016: Colorado panel of state officials and tribal leaders urge state’s public schools to eliminate derogatory Native American mascots. The panel was created by Gov. John Hickenlooper to address the important issue of Native American representation in the state’s schools.</li> </ul>

## APPENDIX B

### WHAT'S IN A NAME?: ETYMOLOGY OF THE TERM REDSKINS

Contrary to the statements of many activists, the word “Redskin” historically has a rather “benign” origin.<sup>226</sup> “The descent of this word into obloquy is a phenomenon of more recent times,” according to Native American scholar Ives Goddard, a senior linguist in the Smithsonian Institution's National Museum of History's Department of Anthropology.<sup>227</sup> In *I Am A Red-Skin: The Adoption of a Native American Expression*, Goddard outlines the origin of the term “redskin,” stating that it carried neither “a particularly positive or particularly negative connotation.”<sup>228</sup> Both whites and American Indians used the term according to Goddard, who stated that “the word redskin reflects a genuine Native American idiom that was used in several languages, where it grew out of an earlier established and more widespread use of the “red” and “white” as racial labels.<sup>229</sup> “This terminology was developed by Native Americans to label categories of the new ethnic and political reality they confronted with coming of the Europeans.”<sup>230</sup> Much like the term “Negro” was once used by both black and white Americans in reference to African-American people, “redskin” was not initially viewed as a derogatory word or expression.

Essentially the question as to whether or not “redskin” was created as an intentionally pejorative term is a matter of interpreting its etymology. Native American activist Suzan Harjo’s assertion that “the term has despicable origins in the days of Indian bounty hunting in the 1600s and 1700s” is often repeated by name-change advocates who claim the term is derogatory.<sup>231</sup>

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<sup>226</sup> Goddard, Ives. *“I Am a Red-skin”*: *The Adoption of a Native American Expression (1769-1826)*. 2005.

<sup>227</sup> *Ibid*, 16

<sup>228</sup> *Ibid*.

<sup>229</sup> *Ibid*.

<sup>230</sup> *Ibid*.

<sup>231</sup> Harjo 2001, 190

However, the lore of the “bloody red skins and scalps as evidence of Indian kill”<sup>232</sup> simply isn’t supported by the historical record. Marquette Law Professor J. Gordon Hylton notes that Harjo’s claims have been thoroughly discredited,<sup>233</sup> while Goddard points out that even though the term had a practical use for early Indian and non-Indian settlers, finding the term “redskins” objectionable does require acceptance of “Harjo’s unfounded claim.”<sup>234</sup>

### **George Marshall’s Redskins**

Dan Snyder has vigorously defended use of the Redskins nickname since purchasing the NFL team in 1999 for \$800 million. One of his primary lines of defense when asserting that the team’s name honors Native Americans is to cite the lineage of the team’s second head coach, William Henry “Lonestar” Dietz, who proclaimed to be of Sioux heritage. Snyder often insists, as do many other name-change opponents,<sup>235</sup> that Dietz’s presence on the sidelines is in fact evidence that the nickname was indeed inspired by native people closely associated with the team.<sup>236</sup> This despite the definitive statements of Washington Redskins’ founding owner George Preston Marshall, that Dietz was not the inspiration for the team name. A 1933 edition of the Hartford Courant included an Associated Press dispatch that quoted Marshall saying: “The fact that we have in our head coach, Lone Star Dietz, an Indian, together with several Indian players, has not, as may be suspected, inspired me to select the name Redskins.”<sup>237</sup> The reality is

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<sup>232</sup> Goddard, “I Am a Red-skin”

<sup>233</sup> Hylton, *Before the Redskins* 885-886

<sup>234</sup> Goddard, “I Am a Red-skin”

<sup>235</sup> Smith, T. G. (2011). *Showdown: JFK and the Integration of the Washington Redskins*. Beacon Press: 13. One of George Marshall’s granddaughters, Jordan Harrison Price, stated in 1986 that “he chose the name because he had always been an admirer of the American Indian and because one of the coaches William lone star Dietz was himself an American Indian”

<sup>236</sup> Barr, John. “Was Redskins’ First Coach a Fraud?” ESPN. September 2, 2014. Accessed July 02, 2016. [http://espn.go.com/espn/otl/story/\\_/id/11455467/was-washington-redskins-first-coach-fraud](http://espn.go.com/espn/otl/story/_/id/11455467/was-washington-redskins-first-coach-fraud).

<sup>237</sup> McCartney, R. (2014, May 28). 1933 news article disproves cherished tale that Redskins were named to honor Native American coach. Retrieved May 8, 2015, from [http://www.washingtonpost.com/local/1933-news-article-refutes-cherished-tale-that-redskins-were-named-to-honor-indian-coach/2014/05/28/19ad32e8-e698-11e3-afc6-a1dd9407abcf\\_story.html](http://www.washingtonpost.com/local/1933-news-article-refutes-cherished-tale-that-redskins-were-named-to-honor-indian-coach/2014/05/28/19ad32e8-e698-11e3-afc6-a1dd9407abcf_story.html)

Marshall's reasoning for using the "Redskins" nickname and mascot was not intended to honor, nor disparage native people, it was strictly business.<sup>238</sup>

In 1932, Marshall purchased an NFL franchise in Boston, home to Major League Baseball's Braves and Red Sox.<sup>239</sup> Marshall initially named his new team the Braves, in part because they played at Braves field, and also because it was customary that a football franchise would take its name, either directly or indirectly, from the baseball team in its city. For example, "The Chicago Bears used a name clearly derived from that of the Chicago Cubs baseball club," according Hylton. Pittsburgh and Cincinnati football teams initially played as the Pirates and Reds, respectively, and the Detroit Lions derived their name from baseball's Detroit Tigers.<sup>240</sup> When the lease at Braves field ended in 1933, Marshall moved the team's home games to Fenway Park. Marshall also changed the franchise's name from the Braves to the Redskins, "which echoed the principal sounds of 'Red Sox,' the baseball inhabitants of Fenway Park."<sup>241</sup> Thus, the term "redskins" was at least partially derived as a way to associate Marshall's NFL franchise with Major League baseball's "Red Sox."<sup>242</sup> When Marshall eventually moved the team to Washington D.C. in 1937, the team's name officially became the Washington Redskins. As I stated earlier in this thesis, using Native American nicknames was commonplace among baseball teams during the mid-1800's and college teams in the early 1900's.<sup>243</sup> According to Hylton:

*"In the early decades of professional baseball, from roughly 1870 to 1910, team nicknames were usually unofficial and were often given to the teams by sportswriters and fans as opposed to being formally adopted by owners. . . . In the 1910s and 1920s, professional and college teams began to formally adopt Native American team names,*

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<sup>238</sup> Ibid

<sup>239</sup> J. Gordon Hylton, *Before the Redskins Were the Redskins*, 889

<sup>240</sup> Ibid

<sup>241</sup> Ibid.

<sup>242</sup> Ibid

<sup>243</sup> Ibid, 890

*not because of their location, but because of a growing association in the public mind between Native Americans and success in athletics, particularly baseball, football, and track and field.*"<sup>244</sup>

Along with the name change came a new marketing strategy. Marshall requested that the Indian players on his team wear war paint during games and do a "little Indian dance to entertain the paying customers." The players found this request insulting, but nevertheless obliged.<sup>245</sup> Dietz, who ironically was unable to prove his Sioux ancestry during a trial for draft dodging, also wore full headdress while on the sidelines.<sup>246</sup> Marshall commissioned the team's first fight song—"Hail to the Redskins," which included versus sung in mock Indian dialect" and lyrics like "Scalp 'um, swamp 'um, we will take'um big score," and instituted an all-white Indian-garbed Redskins Marching Band and Redskinettes to perform at halftime.<sup>247</sup> While demeaning, Marshall's antics were not employed to make political or social statements in favor of, or against, American Indians. George Marshall was a business man who was trying to keep a fledging NFL franchise afloat post-great depression. Considering that his first professional sports venture—an ABL basketball team he called the "laundrymen"—failed, Marshall was looking for innovative methods to promote his new product.<sup>248</sup> Putting aside subjective partisanship, there simply isn't enough evidence that Marshall meant the name as a derogatory slur, or a complimentary tribute. Marshall's record as the last NFL owner to integrate is a much more obvious example of a racist praxis.<sup>249</sup>

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<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

<sup>246</sup> Smith, *Showdown*

<sup>247</sup> Nunberg, Geoffrey. "When Slang Becomes a Slur." 2014, June 23. Retrieved March 23, 2015, from <http://www.theatlantic.com/entertainment/archive/2014/06/a-linguist-on-why-redskin-is-racist-patent-overturned/373198>

<sup>248</sup> Smith, *Showdown*

<sup>249</sup> Ibid. "It is perhaps not surprising that a team that banned black players for nearly thirty years did not consider the term 'Redskins' racially insensitive," says Smith.

## APPENDIX C

The evolution of the Chicago Blackhawks logo<sup>250</sup>



1926 - 1935<sup>251</sup>



1935 - 1937<sup>252</sup>



1937 - 1955<sup>253</sup>



1956 - 1964<sup>254</sup>



1956 - 1964<sup>255</sup>



1964 - Present<sup>256</sup>

<sup>250</sup> Logos courtesy of sportsmockery.com

<sup>251</sup> The initial logo was originally spelled as two words; <http://sportsmockery.com/2014/11/history-chicago-blackhawks-logo/>

<sup>252</sup> In 1935, color was added to the face and hair of the Chief. Interestingly, the 1935 bright red face resembles the current Washington Redskins logo that has received much of the mascot backlash over the years. <http://sportsmockery.com/2014/11/history-chicago-blackhawks-logo/>

<sup>253</sup> The bright red Indian Chief face lasted only two years. "After the 1937 season, the Blackhawks kept the original hand drawn logo but switched up the color scheme." <http://sportsmockery.com/2014/11/history-chicago-blackhawks-logo/>

<sup>254</sup> According to Sportsmockery.com, "In 1956, the Blackhawks made the first significant changes to the logo. The outer circle was taken away and the Indian Head was changed to something that resembles what the logo looks like in present day." <http://sportsmockery.com/2014/11/history-chicago-blackhawks-logo/>

<sup>255</sup> According to sportsmockery.com, "During the time frame of 1956-1964 the Blackhawks also had an alternative logo which was basically the same as the one above, minus the lettering and the circle around the Indian Head. This would eventually lead to the modern day logo."

<sup>256</sup> "This brings us to the most current version of the logo, which is believed by many to be the best in sports. In 1964 the Chicago Blackhawks logo became what it is today." <http://sportsmockery.com/2014/11/history-chicago-blackhawks-logo/> The "Black Hawks" logo became one word ("Blackhawks") in 1986.