



## The Washington Redskins Lose Again, and Not on the Field

Since 1992 – the year quarterback Robert Griffin III turned two – the Washington Redskins football team has been litigating its right to own service mark registrations for the Washington Redskins team name. Today, the Trademark Trial and Appeal Board (TTAB), an independent administrative tribunal within the U.S. Patent and Trademark Office, issued its second landmark decision on the topic. And for the second time, the TTAB has canceled six Washington Redskins service mark registrations.

Between 1967 and 1990, the Trademark Office issued six service mark registrations that included the words “Redskin,” “Redskins,” and “Redskinettes” without opposition. In 1992, seven Native Americans filed a lawsuit asking the TTAB to cancel these registrations because the Trademark Act prohibits the federal registration of a mark that disparages other persons.

In 1999, the TTAB cancelled the six service mark registrations, eliminating the presumption that these service marks were exclusive to the Washington Redskins. But the TTAB’s decision was reversed in 2003 both on the merits and on a technicality involving the laches (unreasonable delay) doctrine.

Undeterred by the reversal, in 2006, a new group of plaintiffs filed a lawsuit again asking the TTAB to cancel these six registrations. In today’s 81-page decision, with a 19-page dissent, the TTAB issued a 2-1 decision in which it sided with plaintiffs’ position that the term “Redskin,” even in the context of professional football, disparages a “substantial composite” of the Native American population.

In issuing its decision, the TTAB jumped into a time machine to assess whether Native Americans viewed the term “Redskin” as offensive between 1967 and 1990, when the various service mark registrations were issued. The TTAB relied heavily on a 1993 resolution issued by the Executive Council of the National Congress of American Indians (NCAI) stating that “the term REDSKINS . . . has always been and continues to be pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging, and racist . . .” The TTAB also relied on dictionary usage labels (“often offensive” and “disparaging”), expert lexicographer and linguist testimony, testimony from representatives of the Native

American community, and even the absence of the use of the term “Redskin” in major newspapers and articles (other than referring to the football team).

The issue of laches reappeared in today’s TTAB decision. The TTAB strongly rebuked the applicability of laches in any disparagement opposition or cancellation action, stating “[i]t is difficult to justify a balancing of equities where a registrant’s financial interest is weighed against human dignity.” Under the specific facts of this cancellation, the laches doctrine would not have applied anyway.

The ability of the TTAB’s decision to withstand an appeal will largely depend on whether the NCAI resolution represents a “substantial composite” of Native Americans or “a handful of individuals” (as argued by the Washington Redskins). The majority held that the NCAI resolution meant that “*at a minimum*, thirty percent of Native Americans found the term REDSKINS . . . to be disparaging,” whereas the strong dissent called this evidence “a house of cards that collapses upon examination.” The TTAB’s heavy reliance on this resolution as probative evidence of a “substantial composite” of Native American views may prove to be the Achilles’ heel, or perhaps more appropriately the ACL, of the TTAB’s decision.

Of note, the TTAB’s decision relates only to the registration of the Washington Redskins word mark for presentations of professional football contests. The TTAB’s decision does not affect the Washington Redskins’ ability to continue using its name, either as the name of a football team or on souvenir merchandise. The Washington Redskins football team is free to continue using the name, subject to its willingness to be publicly criticized.

In other words, the major effect of the TTAB’s decision, if it is not overruled on appeal, is that the Washington Redskins® become the Washington Redskins™. And if the Washington Redskins successfully appeal, they remain the Washington Redskins®.

The TTAB’s decision has little or no effect on the Washington Redskins’ sale of souvenir merchandise. The Washington Redskins have never owned a federal trademark registration of the Washington Redskins word mark for clothing, and will continue to own uncontested registrations for many of its iconic Native American logos for both professional football contests and various souvenir items.

It is unlikely that any court would turn a blind eye to the attempted sale of unlicensed Washington Redskins souvenir items, without logos or with alternative images, by third parties. The Lanham Act exists to prevent consumers from being misled or deceived. Allowing third parties to sell unlicensed souvenir items would almost certainly mislead and deceive consumers wishing to support the Washington Redskins.

The TTAB’s decision is appealable to a federal district court.

This *GT Alert* was prepared by **Joel R. Feldman**. Questions about this information can be directed to:

- > [Joel R. Feldman](mailto:feldmanjoel@gtlaw.com) | +1 678 553 4778 | [feldmanjoel@gtlaw.com](mailto:feldmanjoel@gtlaw.com)
- > Or your [Greenberg Traurig](#) attorney

<b>Albany</b> +1 518.689.1400	<b>Denver</b> +1 303.572.6500	<b>New York</b> +1 212.801.9200	<b>Shanghai</b> +86 (21) 6391.6633
<b>Amsterdam</b> +31 (0) 20 301 7300	<b>Fort Lauderdale</b> +1 954.765.0500	<b>Northern Virginia</b> +1 703.749.1300	<b>Silicon Valley</b> +1 650.328.8500
<b>Atlanta</b> +1 678.553.2100	<b>Houston</b> +1 713.374.3500	<b>Orange County</b> +1 949.732.6500	<b>Tallahassee</b> +1 850.222.6891
<b>Austin</b> +1 512.320.7200	<b>Las Vegas</b> +1 702.792.3773	<b>Orlando</b> +1 407.420.1000	<b>Tampa</b> +1 813.318.5700
<b>Boca Raton</b> +1 561.955.7600	<b>London*</b> +44 (0) 203 349 8700	<b>Philadelphia</b> +1 215.988.7800	<b>Tel Aviv<sup>^</sup></b> +972 (0) 3 636 6000
<b>Boston</b> +1 617.310.6000	<b>Los Angeles</b> +1 310.586.7700	<b>Phoenix</b> +1 602.445.8000	<b>Warsaw<sup>~</sup></b> +48 22 690 6100
<b>Chicago</b> +1 312.456.8400	<b>Mexico City<sup>+</sup></b> +52 (1) 55 5029 0000	<b>Sacramento</b> +1 916.442.1111	<b>Washington, D.C.</b> +1 202.331.3100
<b>Dallas</b> +1 214.665.3600	<b>Miami</b> +1 305.579.0500	<b>San Francisco</b> +1 415.655.1300	<b>Westchester County</b> +1 914.286.2900
<b>Delaware</b> +1 302.661.7000	<b>New Jersey</b> +1 973.360.7900	<b>Seoul<sup>∞</sup></b> +82 (0) 2 369 1000	<b>West Palm Beach</b> +1 561.650.7900

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