

Lawyer who started fight over ‘R-word’ awaits decision



AP FILE PHOTO AMERICAN INDIANS AND SUPPORTERS DEMONSTRATED OUTSIDE THE METRODOME IN MINNEAPOLIS BEFORE THE START OF THE SUPER BOWL BETWEEN WASHINGTON REDSKINS AND THE BUFFALO BILLS ON SUNDAY, JAN. 26, 1992.

By Mike Mosedale

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About a quarter century ago, Steve Baird — at the time, a freshly minted graduate of the University of Iowa law school clerking for a federal judge in Washington, D.C. — was spending most of his free weekends working on an article exploring a provision of federal trademark law. For a young lawyer, the topic — Section 2 (a) of the Lanham Act — was an attractive subject for research, mainly, Baird said, because no one had written much about it yet.

Focusing on the statute’s ban on “scandalous” and “immoral” trademarks, Baird kept plugging away on the article after he wrapped up his clerkship and came to the Twin Cities to take a job at Dorsey & Whitney.

As luck would have it, the move to coincided with two major sporting events in Minneapolis that provoked a spate of noisy protests over the use of Native American mascots — the 1991 World Series, which pitted the Minnesota Twins against the Atlanta Braves, and the 1992 Super Bowl between the Buffalo Bills and the Washington Redskins.

By his own admission, Baird had previously paid little attention to the mascot controversy. But the protests over the Braves’ “Tomahawk chop” rally cry and the NFL’s embrace of the “R-word” struck a chord.



Steve Baird

It also drew Baird’s attention to another provision of the Lanham Act — its prohibition on the registration of trademarks which “disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”

At the time, Baird said, that particular clause had never been invoked to challenge a trademark registration. But the more he thought about it, the more he became convinced that he had stumbled upon a legal toehold that might force the Washington Redskins to reconsider their moniker and mascot.

“Little bells and whistles started going off in my mind,” Baird recalled. “I was shocked that no one had ever pursued the trademark challenge before.”

On a trip to Washington, D.C., Baird shared his theory with Suzan Shown Harjo, the president of the Morning Star

Institute, a Native American legal rights group. Harjo, who had campaigned against the use of Indian mascots since the 1960s, didn't know about the Lanham Act but she was intrigued by Baird's theory.

Over the years, Harjo said, she had consulted with other lawyers in the hopes of developing a legal strategy to combat the use of native mascots. As self-avowed "free speaker," she had not found a way forward that didn't offend her First Amendment concerns.



Suzan Shown Harjo

"What I loved about this approach is that it didn't force [the Washington Redskins] to do anything," Harjo recalled. In her view, Baird's tactic — removing the team's federal trademark protections — didn't threaten speech rights; it simply removed the team's "exclusive privilege of making money off racism."

Although Baird had been with Dorsey for just six months, he approached the firm's litigation partner and was given a green light to take on the case pro bono.

That triggered a legal fight with the NFL that has been litigated, more or less continuously, for two decades.

Baird figures that the NFL has spent upwards of \$20 million in the battle — a sum that he says belies the frequent argument that "rebranding" the team would impose an undue financial burden.

For seven years, Baird toiled on behalf of Harjo and her fellow plaintiffs before the Trademark Trial and Appeal Board — a branch of the U.S. Patent & Trademark Office — ruled that "Redskins" was indeed disparaging to Native Americans and revoked the club's trademarks.

The victory did not withstand the subsequent challenges. The D.C. Circuit Court of Appeals ultimately sided with the league. In a nutshell, Baird said, the court ruled that Harjo and her fellow plaintiffs had simply waited too long to bring their petition.

Baird — whose work on the case ended after he left Dorsey for Winthrop & Weinstine — said he was disappointed in that ruling but, he said, he later came to conclude that "everything happens for a reason."

A new group of plaintiffs — led by Amanda Blackhorse, a Navajo social worker — reprised the trademark challenge in a new suit using the same

argument, but with considerably more evidence added to the mix. With the boom of the Internet, Baird said, Blackhorse's lawyers have been able to document use of Native Americans objecting to the use of the term "Redskins" going back 50 years.

There is another key difference, as well. While the appeals court in Harjo ruled the petition was barred by laches, Blackhorse and her fellow plaintiffs are younger and, under the court's interpretation of statute, their equitable limitations didn't start running until they had reached the age of majority.

Last year, the TTAB issued its decision, ruling once again that the Redskins trademark disparaged Native Americans. The league appealed by bringing a de novo district court trial and sued the Lanham Act petitioners, challenging the acts' constitutionality.

This time, the league's arguments are centered not on whether the trademark disparages Indians, however, but on the constitutionality of the disparagement clause itself.

"The team is now saying that First Amendment case law has evolved and taking away the benefits of trademark is an abridgement of free speech rights," said Baird.

A news release from the Department of Justice issued last January explained: Pro-Football Inc., the owner of the Washington Redskins, filed a complaint ... against the five individuals who had petitioned the TTAB for invalidation of the Redskins trademarks. Pro-Football Inc. is challenging the constitutionality of Section 2(a) of the Lanham Act ... on the grounds that the act violates the First Amendment to the U.S. Constitution. The Lanham Act permits denial or cancellation of a trademark application if the trademark is disparaging or falsely suggests a connection with persons living or dead, institutions, beliefs or national symbols. The act further provides that if a private party believes that a trademark was improperly registered, the party may commence a review proceeding before the TTAB seeking to have the trademark canceled."

Next month, a federal judge in the Eastern District of Virginia will hear oral arguments in Blackhorse and then the case likely will go to the 4th Circuit Court of Appeals.

While Baird is reluctant to make a prediction about the outcome, he said he is optimistic after reading the briefs. "There was enormous amount of

evidence in Harjo to support the board's decision. In Blackhorse, they have everything we had in Harjo and they've built the record even more," he said.

Now 52 — and more than a decade removed from active involvement — Baird still closely tracks the legal battle he helped to start. He likens it to a relay race, in which he ran the first lap and then passed the baton. And he still marvels at the elements of serendipity involved in the long-running fight. What were the chances that the Braves and Redskins would roll into town at the very time he was digging into a then-obscure provision of the Lanham Act? Or, for that matter, that Dorsey would roll the dice and let a young associate take on time-consuming pro bono job just six months into his tenure at the firm? "The stars were all lined up in a perfect way for this to come to life," he said. "Even though I haven't worked on the case since '99, it's still near and dear to my heart and I'm gratified to see the cause goes on." In the wake of that first petition, Baird noted, the disparagement clause has been invoked in other trademark battles. In one of the more recent cases, TTAB rejection rejected a registration sought by an Asian-American rock band, the Slants.

While the NFL has maintained its posture of intransigence, the league has become, increasingly, an outlier on the mascot issue. Speaking at Indian law conference in Grand Casino in Hinckley last week (where she shared the podium with Baird), Harjo noted that Indian mascots are fast vanishing from the American sports landscape.

By her count, over 2000 schools and universities have abandoned the use of Indian mascots in recent decades.

"In most communities, it has really gone the way of the lawn jockey," Harjo said. Even in schools without a single Native American student enrolled, she added, Indian mascots are being dropped at the behest of non-native students. "It's a fascinating phenomenon," Harjo said. "Things are happening in a different way." That's a point of satisfaction for Baird, too, although he notes that there is still plenty of push back from critics who characterize the mascot fight as political correctness gone amok. "Some people call it that," he said. "I think it's just a matter of common decency and respect and social awareness."