

WHAT THE SIOUX SHOULD DO:
LANHAM ACT CHALLENGES IN THE POST-*HARJO* ERA

I. INTRODUCTION	301
II. NATIVE AMERICAN TEAM NAMES AND THE ROAD TO <i>HARJO</i>	305
A. <i>History of the Use of Native American Names for Athletic Teams</i>	306
B. <i>The Harjo Case Sequence</i>	307
C. <i>Are Future Trademark Challenges Under the Lanham Act Viable After Harjo?</i>	311
III. THE UND FIGHTING SIOUX AND THE 2005 NCAA POLICY	314
A. <i>The 2005 NCAA Policy</i>	315
B. <i>Reactions to the 2005 NCAA Policy</i>	317
C. <i>UND's Efforts to Fight the Provisions of the 2005 NCAA Policy</i>	320
IV. APPLICATION OF UND'S "FIGHTING SIOUX" UNDER THE <i>HARJO</i> TEST	324
A. <i>Definitions of "Sioux"</i>	324
B. <i>UND Logo</i>	324
C. <i>Financial Considerations</i>	325
D. <i>Polls and UND Student Demographics</i>	328
E. <i>UND Academic and Athletic Practices</i>	330
V. CONCLUSION	332

I. INTRODUCTION

In the heart of Grand Forks, North Dakota, lies Ralph Engelstad Arena ("the Arena"), home of the University of North Dakota ("UND") "Fighting Sioux" hockey, basketball, volleyball, and soccer teams.¹ This pristine, world-class facility, which cost over \$100 million to construct, is self-proclaimed as "the finest facility of its kind in the world."² In addition to being the home of UND sports since its inception in the Fall of 2001, the arena has provided a grand stage for professional sporting events, NCAA

¹ Ralph Engelstad Arena, Sioux Sports, <http://www.theralph.com/asp/default.asp?p=15> (last visited Dec. 22, 2007).

² Ralph Engelstad Arena, The Ralph, <http://www.theralph.com/asp/default.asp?p=13> (last visited Dec. 22, 2007).

Championships, big-ticket entertainers, and myriad other performances.³ At the behest of Ralph Engelstad, the alumnus and former UND hockey goalie who donated an excess of \$100 million for the arena built in his name, the arena touts over two thousand “Fighting Sioux” logos⁴ for the purpose of effectively endorsing school spirit.⁵ What might be most notable about Ralph Engelstad Arena, however, is the dichotomy it symbolizes: on one hand, it is a beautiful, magnificent structure that has become the prize of UND, while on the other hand it has developed into the subject of an equally ugly controversy.

Since 1930, the nickname for UND athletic teams has been the “Sioux,” and more specifically the “Fighting Sioux” since the late 1960’s.⁶ Though “the Sioux are indelibly etched into the state’s lore and culture” and the “name is a source of pride and honor” among the overwhelming majority of UND’s student population, there has also been a great deal of backlash against the use of a Native American name in this context.⁷ On one side of the disagreement stand those who believe that using the “Fighting Sioux” name is an appropriate means of honoring one of the most powerful groups in the history of that part of the country.⁸ However, several other groups are adamantly opposed to the name, as well as the use of any other Native American names for athletic teams. These groups include some of the Native American students at UND,⁹ members of the Sioux tribes of North Dakota,¹⁰ other Native Americans throughout the country,¹¹ and the National Collegiate Athletic Association (“NCAA”).¹²

³ *Id.*

⁴ *Id.*

⁵ Andrew Brownstein, *A Battle Over a Name in the Land of the Sioux*, CHRON. OF HIGHER EDUC., Feb. 23, 2001, at 46.

⁶ Ralph Engelstad Arena, Fighting Sioux, <http://www.theralph.com/asp/default.asp?p=24> (last visited Dec. 22, 2007). UND had previously been known as the “Flickertails” until 1930, when the name was changed in order to “strike fear into the hearts of the Bison at rival North Dakota State University.” Brownstein, *supra* note 5.

⁷ Brownstein, *supra* note 5.

⁸ See Fighting Sioux, *supra* note 6 (“UND officially adopted the name of the Fighting Sioux in the 1930’s because the Sioux Warriors were the most courageous of all warriors. The great Sioux Nation epitomized honor, courage, pride, overcoming adversity and winning battles.”).

⁹ Brownstein, *supra* note 5.

¹⁰ News Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on University of North Dakota Review (Sept. 28, 2005) <http://www.ncaa.org> (follow “Media & Events” hyperlink; then follow “News Release Archive” and “Official Statements” hyperlinks) (“The university did not have the support of [the] recognized Sioux tribes of North Dakota.”).

¹¹ See generally Leonard Shapiro, *Offensive Penalty is Called on ‘Redskins’; Native Americans Protest the Name*, WASH. POST, Nov. 3, 1991, at D1.

¹² See News Release, NCAA, NCAA Executive Committee Approves Native American Mascot Review Process, (Aug. 19, 2005) <http://www.ncaa.org> (follow “Media & Events” hyperlink; then follow “News Release Archive” and “Announcements”) (NCAA President

While efforts have been made over the past fifty years to pressure professional and scholastic athletic teams to change their names to not reflect Native American culture,¹³ the past decade has seen the most fervent push following the landmark decisions in *Pro-Football v. Harjo*.¹⁴ In *Harjo II*, the Trial Trademark and Appeal Board (“TTAB”) held that the National Football League’s Washington Redskins were in violation of the Lanham Act for using a logo-mark that was disparaging to a large number of Native Americans.¹⁵ The TTAB relied on section 2(a) of the Lanham Act, which prohibits the use of a trademark that is “scandalous” or “which may disparage” a certain group.¹⁶ However, four years later in *Harjo III*, the United States District Court for the District of Columbia reversed that decision on grounds that the plaintiffs did not meet the requisite burden of proof, and also because of a laches defense argued by Pro-Football and the Washington Redskins.¹⁷

In the wake of the *Harjo* case sequence, many have argued that the Lanham Act no longer provides a viable conduit for future trademark challenges by groups who dispute athletic team names which they feel are disparaging in today’s society.¹⁸ In August 2005, seemingly as a partial response to such concerns, the NCAA set forth a detailed policy (“policy” or “the policy”) for its member institutions that banned the use of “hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery at any of the 88 NCAA championships,” specifically targeting schools using Native American names, mascots and logos.¹⁹ One of the initial nineteen schools subject to that new policy was UND for its

Myles Brand stressed the importance of “maintain[ing] a balance between the interests of a particular Native American tribe and the NCAA’s responsibility to ensure an atmosphere of respect and sensitivity for all who attend and participate in our championships.”)

¹³ See generally The American Indian Sports Team Mascots, Chronology, <http://www.aistm.org/1chronologypage.html> (last visited Dec. 28, 2007). The American Indian Sports Team Mascots (“AISTM”) organization advocates Native American mascots, logos and nicknames being retired from the athletics context.

¹⁴ *Harjo v. Pro-Football, Inc. (Harjo I)*, 30 U.S.P.Q. 2d (BNA) 1828 (T.T.A.B. 1994); *Harjo v. Pro-Football, Inc. (Harjo II)*, 50 U.S.P.Q. 2d (BNA) 1705 (T.T.A.B. 1999); *Pro-Football, Inc. v. Harjo (Harjo III)*, 284 F. Supp. 2d 96 (D.C. 2003); *Pro-Football, Inc. v. Harjo (Harjo IV)*, 415 F.3d 44 (D.C. Cir. 2005).

¹⁵ *Harjo II*, 50 U.S.P.Q. 2d (BNA) at 1748.

¹⁶ Lanham Act §2(a), 15 U.S.C. § 1052(a) (2007).

¹⁷ *Harjo III*, 284 F. Supp. 2d at 145. This decision was ultimately reversed and remanded in *Harjo IV* based on an improper application of laches. 415 F.3d 44. See *infra* Part II.B for a more detailed analysis of the *Harjo* case sequence.

¹⁸ See, e.g., Christian Dennie, *Throw Away the Key: The Lanham Act is Locked for Future Trademark Challenges*, 15 SETON HALL J. SPORTS & ENT. L. 197 (2005). For more examples of these viewpoints, see Part II.C.

¹⁹ News Release, NCAA, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (Aug. 5, 2005) <http://www.ncaa.org> (follow “Media & Events” hyperlink; then follow “News Release Archive” and “Announcements”). See *infra* Part III.A for a full description of the NCAA’s policy.

use of the “Fighting Sioux” name and logo.²⁰ In 2006, after an unsuccessful appeal to the NCAA Executive Committee to reconsider its decision to subject UND to the policy,²¹ UND, along with the state of North Dakota and the North Dakota State Board of Education, sued the NCAA and filed for a preliminary injunction which would allow the school to continue using the “Fighting Sioux” name and logo until a trial could be held on the issue.²² With trial scheduled to begin in December, in September of 2007, Judge Lawrence Jahnke, the presiding judge, sealed all future case documents in hopes of promoting settlement discussions between the parties.²³ As a result of Judge Jahnke’s efforts, the NCAA and UND reached a settlement on October 26, 2007, whereby UND was given three years to obtain approval from the two major Sioux tribes in North Dakota to use the “Fighting Sioux” name and logo, or else be forced to retire them.²⁴

In light of the aforementioned dispute, this Note argues that future challenges under section 2 of the Lanham Act are not “dead.” Although UND did not challenge the NCAA under Lanham Act principles in its lawsuit since the NCAA can set its own governance rules for its member institutions,²⁵ this Note uses it as a case study. Using UND and the “Fighting Sioux” as an academic exercise in applying both the Lanham Act and the test laid forth in *Harjo*, this Note explores whether future challenges still have potential merit. After ultimately concluding that Lanham Act challenges are not barred in this context, this Note explains how the evidence weighs heavily in favor of UND’s use of the Fighting Sioux name and logo; hence, the NCAA, as well as the two major Sioux tribes of North Dakota, should allow UND to remain known as the Fighting Sioux.²⁶

²⁰ *Id.* Though not part of the original eighteen schools, the College of William and Mary was later added to the list. News Release, NCAA, Native American Mascot Policy – Status List (Feb. 16, 2007) <http://www.ncaa.org> (follow “Media & Events” hyperlink; then follow “News Release Archive” and “Announcements”).

²¹ See Statement by NCAA Senior Vice-President for Governance and Membership, *supra* note 10.

²² See generally Complaint, State of North Dakota v. NCAA, No. 06-C-1333 (Grand Forks County Dist. Ct. Oct. 6, 2006) [hereinafter Complaint]; Pl.’s. Mem. Supp. Mot. Prelim. Inj. State of North Dakota v. NCAA, No. 06-C-1333 (Grand Forks County Dist. Ct. Oct. 6, 2006) [hereinafter Motion for Preliminary Injunction].

²³ First Amendment Center, *Judge Seals Documents in ‘Fighting Sioux’ Nickname Case*, Sept. 23, 2007, <http://www.fac.org/news.aspx?id=19077>.

²⁴ News Release, NCAA, NCAA Settles University of North Dakota Lawsuit (Oct. 26, 2007) <http://www.ncaa.org> (follow “Media & Events” hyperlink; then follow “News Release Archive” and “2007 Miscellaneous”). See *infra* Part III.C for discussion over the specifics of the settlement.

²⁵ See *infra* Part III.B for discussion on the NCAA’s authority to impose such measures on its member schools.

²⁶ For the most current list of NCAA institutions subject to, exempt from, and no longer subject to the 2005 policy, see News Release, NCAA, *supra* note 20. As of this

Part II of this Note provides a comprehensive analysis of the *Harjo* line of cases and their relationship to the Lanham Act and trademark law. Other related trademark issues, such as secondary meaning and protection of unregistered marks, are also discussed. This part also includes a general history of the use of Native American names for athletic teams and the development of movements to prevent such practices both before and after *Harjo*.

In Part III, the 2005 NCAA Native American mascot policy is discussed in great detail. This part summarizes how the policy has been received among NCAA institutions, and how schools have either adapted to or ignored its provisions and sanctions. This part concludes with a discussion of the previous appeals made by UND against the NCAA policy and the ultimate settlement between the parties.

Part IV discusses the circumstances concerning UND and the school's use of the "Fighting Sioux" name and logo. This section provides a comparison of how similar or different UND's state of affairs is versus that of exempt and non-exempt institutions under the NCAA policy. The Lanham Act, trademark law, and *Harjo* are then applied to UND's situation. Even though this Note argues that challenges are still viable under the Lanham Act after *Harjo* in the appropriate circumstances, the evidence proves that UND passes the test and should thus be permitted to continue using the "Fighting Sioux" name.

II. NATIVE AMERICAN TEAM NAMES AND THE ROAD TO *HARJO*

Perhaps the sentiments contained in the following pages are not *yet* sufficiently fashionable to procure them general favor; a long habit of not thinking a thing *wrong*, gives it a superficial appearance of being *right*, and raises at first a formidable outcry in defence [sic] of custom. But tumult soon subsides. Time makes more converts than reason.²⁷

writing, the schools currently exempt from the policy are the Catawba College "Catawba Indians," Central Michigan University "Chippewas," Florida State University "Seminoles," Mississippi College "Choctaws," and the University of Utah "Utes." *Id.* The reasons for these exceptions will be explained *infra* Part III.B. *Id.*

²⁷ THOMAS PAINE, COMMON SENSE 1 (Buccaneer Books 1976) (1776). Quote is similarly used on the opening page of the website for the American Indian Sports Team Mascots at <http://www.aistm.org>. See "Chronology," *supra* note 13.

A. History of the Use of Native American Names for Athletic Teams

Athletic teams of all variety represent themselves through the use of nicknames, mascots and logos encompassing a broad range of ideas and categories. Often, these are reflective of concepts that evoke a sense of pride,²⁸ including geography (i.e., New York “Islanders” of the National Hockey League (“NHL”)), local culture (i.e., Dallas “Cowboys” of the National Football League (“NFL”)), historical references (i.e., Philadelphia “76ers” of the National Basketball Association (“NBA”)), and local animals or peoples (i.e., Florida “Marlins” and Seattle “Mariners” of Major League Baseball (“MLB”)).²⁹ Many sports played in the United States and around the world were first developed by Native Americans, including basketball, ice hockey, and lacrosse.³⁰ Consequently, many professional sports teams such as baseball’s Cleveland “Indians”³¹ and football’s Washington “Redskins”³² have decided to honor American history through the use of Native American references in their names and logos. Hundreds of collegiate and high school athletic programs have likewise adopted Native American names, mascots and logos.³³

However, most of the names were chosen prior to the more “politically correct” era that began developing in the 1960’s and has continued over the latter half of the twentieth-century and

²⁸ “People don’t name teams after things they hate. A team name is designed to project certain qualities fans and athletes can admire and emulate, whether it’s toughness, ferocity, or regional pride.” John J. Miller, *Fighting Sue: The Unsavory War Against Indian Symbols*, 1 VA. SPORTS & ENT. L.J. 291, 291 (2002).

²⁹ “While I’m largely ignoring the bizarre modern trend toward naming teams after abstract concepts, even here the names are positive: It’s ‘Heat’ and ‘Wild,’ not ‘Tepid’ and ‘Tame.’ Roger Clegg, *American Indian Nicknames and Mascots for Team Sports: Law, Policy, and Attitude*, 1 VA. SPORTS & ENT. L.J. 274, 278 (2002) (referencing the Miami Heat of the NBA and Minnesota Wild of the NHL).

³⁰ Brad M. Gallagher, *The Disappearance of the Great American Indian Athlete*, 24 ENT. & SPORTS LAW 1, 15 (Fall 2006). The author further notes some of the most accomplished athletes in American history, including Billy Mills and the legendary Jim Thorpe, arguably the single greatest athlete of all time, as examples of Native American athletes who left a legacy in the sporting world. *Id.*

³¹ The Cleveland Indians claim to have originally adopted their name to honor Louis Sockalexis, a former member of the ball club and the first Native American to play major league baseball. *Id.*; Cleveland Indians, *Indians Timeline*, <http://cleveland.indians.mlb.com/cle/history/timeline1.jsp> (last visited Jan. 2, 2008); Humboldt State University, *Indian Mascots, Symbols and Names in Sports: A Brief History of the Controversy*, <http://www.humboldt.edu/~go1/kellogg/mascots.html> (last visited Jan. 2, 2008).

³² Washington Redskins owner George Preston Marshall allegedly chose the name “Redskins” to honor William “Lone Star” Dietz, who was the team’s head coach and was also of Native American descent. *Harjo III*, 284 F. Supp. 2d 96, 104 (D.C. 2003). For a full discussion on the controversy over the Washington Redskins, see *supra* Part II.B amidst the analysis of *Pro-Football v. Harjo*.

³³ See *supra* note 31, at “Indian Mascots, Symbols and Names in Sports: A Brief History of the Controversy.”

into today,³⁴ which has put pressure on some athletic teams to change their names. The first notable sports-related change came in 1970, when the University of Oklahoma retired the use of “Little Red” as its mascot, which, over the course of its use since the 1940’s, had been an important part of school tradition.³⁵ Throughout the 1970’s, ‘80’s, and ‘90’s, many other NCAA institutions followed the precedent set forth by the University of Oklahoma, including Marquette University, Stanford University, and St. John’s University.³⁶ During this time, many high schools made similar changes to their names and mascots,³⁷ and, as of 2002, there were more than 600 schools and minor league professional teams who had also dropped their Native American names and mascots.³⁸ This issue did not greatly impact professional athletics, though, until the mid-1990’s when Suzan Harjo and six other Native Americans filed a lawsuit with the Trademark Trial and Appeal Board (“TTAB”) seeking to end the trademark protection of the NFL’s Washington Redskins’ team name.³⁹

B. *The Harjo Case Sequence*

Suzan Shown Harjo, a Cheyenne and Hodulgee Muscogee American Indian, is a well-known American Indian writer, poet, and lecturer; additionally, Harjo has been a major political advocate on behalf of her fellow Native Americans.⁴⁰ As part of

³⁴ Joel Bleifuss, *A Politically Correct Lexicon*, IN THESE TIMES, Feb. 21, 2007, http://www.inthesetimes.com/article/3027/a_politically_correct_lexicon. While substituting for Bill O’Reilly’s *The Radio Factor*, controversial radio host Michael Smerconish has recently referred to the hypersensitive politically correct movement as “the sissification of America.” Media Matters for America, *Smerconish: United States is “a nation of sissies” and this “limp-wristedness . . . is compromising our ability to win the war on terror,”* Apr. 7, 2006, <http://mediamatters.org/items/200604070002>. See also *Politically Correct Texts Distort United States History, Critics Say*, EDUC. REP., July 2004, <http://www.eagleforum.org/educate/2004/july04/history.html> (critiquing how political correctness prevents accurate historical accounts being taught to today’s students).

³⁵ Chronology, *supra* note 13. “Little Red” was the school’s mascot and consisted of a student dressed in an “Indian war bonnet, buckskin costume and moccasins.” S.L. Price, *The Indian Wars*, SPORTS ILLUSTRATED, Mar. 4, 2002, at 66.

³⁶ See *supra* note 31, “Indian Mascots, Symbols and Names in Sports: A Brief History of the Controversy.” Marquette retired its “Willie Wampum” logo in 1971; Stanford changed its name from the “Indians” to the “Cardinals” between 1972 and 1973; St. John’s, in 1994, dropped the “Redmen” for the “Storm.”

³⁷ *Id.*

³⁸ Price, *supra* note 35.

³⁹ See generally *Harjo I*, 30 U.S.P.Q. 2d (BNA) 1828 (T.T.A.B. 1994).

⁴⁰ Suzan Shown Harjo, INDIAN COUNTRY TODAY, <http://www.indiancountry.com/author.cfm?id=26> (last visited Jan. 2, 2008). For an example of her writing advocating the elimination of the Washington Redskins trademarks, see Suzan Shown (Harjo), *Chief Offenders*, NATIVE AM. TIMES, Feb. 1, 2003, at 1.

her work, she has engaged in projects that have helped Native Americans reclaim over one million acres of land, and has led many movements to protect Native American art and culture.⁴¹ In 1992, Harjo, along with six other Native Americans, sued Pro-Football, the corporate owner of the Washington Redskins, for using six trademarks containing a derivation of the word “redskin.”⁴² After a number of preliminary hearings and pretrial orders, two groundbreaking decisions ensued.

In 1999, in *Harjo v. Pro-Football (Harjo II)*, the TTAB ordered the cancellation of the various trademarks owned by Pro-Football incorporating the word “redskin.”⁴³ The plaintiffs argued that the names violated the provisions of section 2(a) of the Lanham Act, which states that:

[N]o trademark . . . shall be refused registration on the principal register on account of its nature *unless* it . . . consists of or comprises immoral, deceptive, or *scandalous* matter; or which may *disparage* or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.⁴⁴

The defendants argued that the term “redskins” was only being used as a “purely denotative term, used interchangeably with ‘Indian,’” and that it was “an entirely neutral and ordinary term of reference.”⁴⁵ Furthermore, they argued that using the term “redskins” in the context of a football team “has absolutely no negative effect on the word’s neutrality – and, indeed, serves to enhance the word’s already positive associations – as football is neither of questionable morality nor *per se* offensive.”⁴⁶

The TTAB concluded that the trademarks in question were “disparaging of Native Americans to a substantial composite of this group of people,” and could “bring Native Americans into contempt or disrepute;”⁴⁷ therefore, the TTAB cancelled the registered trademarks. To reach this outcome, the TTAB employed the test set forth in the 1994 case *In re Hines*.⁴⁸ This test

⁴¹ Suzan Shown Harjo, *supra* note 40.

⁴² *Id.* The specific registered marks being challenged were REDSKINS, SKINS, REDSKINETTES, THE REDSKINS & DESIGN, WASHINGTON REDSKINS & DESIGN, WASHINGTON REDSKINS, and THE REDSKINS (in stylized letters). *Harjo I*, 30 U.S.P.Q. 2d (BNA) at 1828.

⁴³ *Harjo II*, 50 U.S.P.Q. 2d (BNA) 1705, 1748 (T.T.A.B. 1999).

⁴⁴ Lanham Act §2(a), 15 U.S.C. § 1052(a) (2007) (emphasis added).

⁴⁵ *Harjo II*, 50 U.S.P.Q. 2d (BNA) at 1720.

⁴⁶ *Id.* This Note will not critique Pro-Football’s argument over whether or not football is a “moral” sport.

⁴⁷ *Harjo II*, 50 U.S.P.Q. 2d (BNA) at 1748.

⁴⁸ *In re Hines*, 31 U.S.P.Q. 2d (BNA) 1685 (T.T.A.B. 1994) (denying trademark registration of the mark BUDDA for beachwear and other clothing products after finding the association to violate the “disparaging” provision of § 2(a) of the Lanham Act).

requires looking at the “perceptions of those referred to, identified or implicated in some recognizable manner by the involved mark.”⁴⁹ Thus, under *Hines*, the TTAB had to find 1) that the “redskins” trademarks owned by Pro-Football were “reasonably understood” to refer to the plaintiffs, and then, if so, 2) that a “substantial composite” of Native Americans found the marks “disparaging.” Based on the evidence provided, including the testimony of linguists, dictionary definitions of “redskin(s),” and survey evidence,⁵⁰ the TTAB found both prongs of the test to be satisfied, and thus ruled to cancel Pro-Football’s trademarks.⁵¹

Four years after the decision by the TTAB, the District Court for the District of Columbia reversed the cancellation of the “redskins” marks, both for a lack of sufficient evidence to support the finding of disparagement and because of a laches defense.⁵² The District Court had no qualms with the *Hines* test used by the TTAB, but it objected to the way in which it was employed. The District Court felt that the TTAB had based its decision “on a paucity of actual findings of fact that were linked together through inferential arguments that had no basis in the record.”⁵³ So while there was no objection to the first part of the test, where “redskins” was reasonably understood to refer to the plaintiffs, the court found that limited linguist expert testimony of the term “redskin” and inadequate survey evidence presented by the plaintiffs was not enough to carry the requisite burden of proof of indicating disparagement to a substantial composite of Native Americans.⁵⁴ In *Harjo II*, most of the evidence relied upon by the plaintiffs focused around general, popular mass-media portrayals of Native Americans in conjunction with the Washington Redskins, claiming it was performed “in a manner that often portrays Native Americans as either aggressive savages or buffoons.”⁵⁵ The District Court found this evidence to be extraneous though. The evidence was not found to be indicative of whether this was actually disparaging to *a substantial composite of Native Americans*, as is

⁴⁹ *Id.* at 1688. Likewise, in *Hines*, the section 2(a) analysis focused on the perceptions of Buddhist worshippers.

⁵⁰ *Harjo II*, 50 U.S.P.Q. 2d (BNA) at 1721-34.

⁵¹ *Id.* at 1748.

⁵² *Harjo III*, 284 F. Supp. 2d 96, 145 (D.C. 2003).

⁵³ *Id.* at 144.

⁵⁴ *Id.* at 145. Specifically, the District Court felt that the dictionary definitions used were misleading since they were too general, and the fact that “redskins” was only listed as being offensive when referring to Native Americans, while not being as such when referencing the professional football team. *Id.* at 130. The survey evidence was not deemed substantial enough either, as, among other reasons, only 131 of the 358 Native Americans surveyed (36.6%) felt that the term was disparaging to them, falling short of the “substantial composite” standard. *Id.* at 133 n.32.

⁵⁵ *Harjo II*, 50 U.S.P.Q. 2d (BNA) at 1746.

required under the *Hines* test, and said “nothing about whether the term ‘redskin(s)’ when used in connection with Pro-Football’s football team disparages Native Americans.”⁵⁶ Thus, that evidence led the TTAB in the wrong direction by showing how the general public perceived “redskins,” instead of how Native Americans themselves viewed the use, and the District Court was consequently forced to reverse the decision.

The other basis for reversing the TTAB decision to cancel the “redskins” trademarks was based on a laches defense asserted by Pro-Football.⁵⁷ Laches is a defense “founded on the notion that equity aids the vigilant and not those who slumber on their rights.”⁵⁸ In order to argue such a defense, the defendant must meet “three affirmative requirements: (1) a substantial delay by a plaintiff prior to filing suit; (2) a plaintiff’s awareness that the disputed trademark was being infringed; and (3) a reliance interest resulting from the defendant’s continued development of good-will during this period of delay.”⁵⁹ Accordingly, the *Harjo* court found that the plaintiffs had waited too long to bring their lawsuit against Pro-Football and the Washington Redskins, and “the net result of the delay is that there is no direct or circumstantial evidence in the record that, at the time the trademarks were registered, the trademarks at issue were disparaging.”⁶⁰

Though the District Court reversed the decision to cancel the “redskins” trademarks owned by Pro-Football, the court was aware of the potential aftermath of its holding and, therefore, made it clear that “this opinion should not be read as making any statement on the appropriateness of Native American imagery for team names.”⁶¹ The court did not doubt the legitimacy of the arguments brought forth by Harjo; however, the court could not rule in favor of the trademark cancellation because of the specific circumstances of the case brought against Pro-Football. In addition to a valid defense of laches, a lack of sufficient evidence prevented the plaintiffs from fulfilling the burden of proof required in order to have a trademark cancelled for violating section 2(a) of the Lanham Act.

⁵⁶ *Harjo III*, 284 F. Supp. 2d at 145. For a study evidencing that Native Americans actually approve of the use of such names and mascots, see Price, *supra* note 35, discussed *infra* Part II.C.

⁵⁷ *Harjo III*, 284 F. Supp. 2d at 136-38.

⁵⁸ *Id.* at 136 (quoting *NAACP v. NAACP Legal Def. and Educ. Fund, Inc.*, 753 F.2d 131, 137 (D.C. Cir. 1985)).

⁵⁹ *Id.* at 136 (quoting *NAACP v. NAACP Legal Def. and Educ. Fund, Inc.*, 753 F.2d 131, 137 (D.C. Cir. 1985)).

⁶⁰ *Id.* at 136. The “redskin” trademarks were in fact registered in 1967. *Id.* at 105.

⁶¹ *Id.* at 145.

Two years later, in 2005, the Court of Appeals for the District of Columbia Circuit reversed the holding of the District Court regarding the laches defense.⁶² The Court of Appeals felt the lower court wrongly started running the clock for determining laches in 1967, when the marks at issue were first registered, for all of the plaintiffs.⁶³ Instead, the clock should have started later, since one of the plaintiffs, Mateo Romero, was only one year of age in 1967, and therefore could not legally bring such a claim against Pro-Football at that time.⁶⁴ Thus, it was incorrect for the District Court to impute the laches of the other six plaintiffs to Romero, and the appellate court subsequently remanded the case for further determination on whether laches barred Romero's claim.⁶⁵

C. Are Future Trademark Challenges Under the Lanham Act Viable After Harjo?

The *Harjo* decisions reignited the already hotly-debated issue concerning the role of Native American names in sports, particularly after the 2003 ruling to cancel the "redskin" trademarks. One scholar at the time compared the team name of the Washington Redskins with other hypothetical "patently offensive" names such as the "Miami 'Spics, the New York WASPS, the Mississippi Sambos, or the Los Angeles Gooks."⁶⁶ According to many, though, the major legal problem, particularly after the 2003 decision in *Harjo III* to deny cancellation of the "redskin" marks, was that "Native Americans seeking to challenge sports teams' trademarks related to Native American culture face nearly insurmountable obstacles" as a result of having to find overwhelming evidence and support to demonstrate that the trademark is offensive to the requisite "substantial composite" of Native Americans.⁶⁷

⁶² See generally *Harjo IV*, 415 F.3d 44 (D.C. Cir. 2005).

⁶³ *Id.* at 48.

⁶⁴ *Id.*

⁶⁵ *Id.* at 50. See 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31 (3d ed. 1996), for further discussion on the idea of laches.

⁶⁶ Kristine A. Brown, *Native American Teams Names and Mascots: Disparaging and Insensitive or Just Part of the Game*, 9 SPORTS LAW J. 115, 115 (2002).

⁶⁷ Dennie, *supra* note 18, at 198, 203.

An interesting story about a group striking out against the use of Native American names developed at the University of Northern Colorado in 2002. Upset with Eaton High School, a school nearby the university, for using the nickname of the "Fightin' Reds," an intramural men's basketball team comprised mostly of Native Americans and Hispanics decided to call itself the "Fighting Whities" and "Fighting Whites." The team's mascot depicted a stereotypical 1950's white businessman, and the team's motto was "Every

Trademark protection over marks allows the owners of such marks to have the “exclusive use of names and symbols” and “the opportunity to adopt a trademark or symbol from the public marketplace of ideas and to secure a right of ownership free from interference and to the exclusion of other users.”⁶⁸ This provides trademark owners with the assurance that, “where the owner of a trademark has spent energy, time and money in presenting to the public the product, he is protected in his investment from its appropriation by pirates and cheats.”⁶⁹ However, a successful challenge to a mark on any of the grounds permitted under sections 2(a) – (e) of the Lanham Act will lead to cancellation of the mark, thus “arguably lessening the economic value of the trademark” once others can then begin similarly using that previously-exclusive mark.⁷⁰

For a professional sports team like the Washington Redskins, decades of development of a broad fan base across the country creates great economic value in the team’s related trademarks.⁷¹ The *Harjo III* court, in the context of Pro-Football’s laches defense, discussed the economic harm that could result from the plaintiffs’ delay in bringing its suit, equating the prejudice “with investment in the trademark that theoretically could have been diverted elsewhere had the suit been brought sooner.”⁷² Therefore, with the goal of trademark law to protect mark owners, it is justifiable to require a high burden of proof for those challenging the marks. Scant evidence, such as that provided in the *Harjo* cases, most definitely should *not* be enough to secure cancellation of an

Thang’s Gonna Be All White.” The team printed up t-shirts and other promotional items to sell in order to raise money for a scholarship fund for Native American students. While the team’s purpose was to create some controversy, the name seemed to draw more attention out of humor than from criticism, which actually helped sell many of the promotional items to support the scholarship fund. See Cafepress.com, “Go Fighting Whites!” (Fighting Whites online store), <http://www.cafepress.com/fightinwhite/106> (last visited Jan. 2, 2008); GRAEME B. DINWOODIE & MARK D. JANIS, TRADEMARKS AND UNFAIR COMPETITION, 325-26 (2d ed. 2007); Court TV News, Protesting Native American Mascot, Students Create ‘Fighting Whities’ Team, COURTTV.COM, http://www.courttv.com/archive/news/2002/0312/mascot_ap.html (Mar. 12, 2002); Nick Wadhams, *Fighting Whities Mascot Causes Stir*, FREEREPUBLIC.COM, <http://www.freerepublic.com/focus/news/647579/posts> (Mar. 16, 2002). It should be noted that, despite the Fighting Whities’ efforts, Eaton High School has retained the “Fightin’ Reds” name. Eaton School District, Eaton High School, <http://eatonsd.high.schoolfusion.us/> (last visited Jan. 2, 2008).

⁶⁸ Brown, *supra* note 66, at 121.

⁶⁹ DINWOODIE & JANIS, *supra* note 67, at 15 (quoting S. Rep. No. 1333, 79th Cong., 2d Sess. 3 (1946)).

⁷⁰ Brown, *supra* note 66, at 122. For all grounds for challenging trademarks with the Patent and Trademark Office (PTO), see generally the Lanham Act.

⁷¹ “There is no dispute that in this case Pro-Football has invested heavily in the marketing and development of its brand . . .” *Harjo III*, 284 F. Supp. 2d 96, 143 (D.C. 2003).

⁷² *Id.*

already registered mark, and the *Harjo III* decision by the District of Columbia District Court to raise the evidentiary bar was well-grounded in promoting trademark law's role in society.

In 2002, *Sports Illustrated* conducted a survey seeking to measure how a "substantial composite" of Native Americans viewed the use of their names in the sports arena.⁷³ According to the poll, 81% of the Native American respondents said they did not believe high school and college teams should retire nicknames referencing Native American culture; similarly, in the professional sports context, 83% of the respondents did not find the usage offensive or something worth changing.⁷⁴ More specifically referencing the *Harjo* debate and use of the "redskin" marks, 69% of the overall Native Americans answering the survey said they were not offended by the Washington Redskins name.⁷⁵ A tribal council member of the Ute tribe explained the results by noting that, "[t]o a lot of the younger folks the name Redskins is tied to the football team, and it doesn't represent anything more than the team."⁷⁶ This sentiment is similar to one expressed by then-NFL Commissioner Paul Tagliabue in 1991 when he stated:

[T]he fans don't identify . . . Redskins with Native Americans. They think of John Riggins and Sonny Jurgensen. When you think of the 49ers, you don't think of a guy going into the mountains and digging for gold, you think of Joe Montana and Jerry Rice. When you think of the Green Bay Packers, you don't think of people packing meat or fish.⁷⁷

With all of this in mind, the disparagement test from *Hines* and *Harjo II* remains good law today.⁷⁸ The critics of the *Harjo* cases, who claim that future challenges under the Lanham Act for Native Americans in this context are barred, seem to have made an overly-broad reading of the holdings. Particularly after *Harjo IV*, which put the laches defense in a state of flux, there is no well-founded reason to believe that Native Americans cannot fight sports teams under the "disparaging" and "scandalous" notions of section 2(a). Even if the laches defense can still be asserted, it will only be acknowledged as a viable defense in certain situations,

⁷³ Price, *supra* note 35.

⁷⁴ *Id.* However, it should be noted that Native Americans living on reservations were slightly more divided on the issue, with only 67% (still a majority) supporting professional sports teams from using the discussed names. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* The article also noted two Native American men who attended a conference on race relations to speak out against Native American nicknames, ironically both wearing Redskins sweatshirts and one with a Redskins hat to match. *Id.* For a rebuttal against the *Sports Illustrated* survey findings, see generally G. Richard King, et al., *Of Polls and Race Prejudice*, 26 J. SPORT & SOC. ISSUES 381 (2002), <http://aistm.org/fr.2002.of.polls.htm>.

⁷⁷ Shapiro, *supra* note 11.

⁷⁸ *E.g.*, *In re Squaw Valley Dev. Co.*, 80 U.S.P.Q. 2d 1264 (2006).

since the plaintiffs bringing the suit will need to have been legally able to bring the claim within a reasonable time after the trademark's registration. *Harjo IV*, though, seems to leave the window open for the possibility of joinder of plaintiffs who have just recently reached the legal age to bring a lawsuit. Furthermore, putting laches aside, if the Native American plaintiffs can gather more evidence than mere definitions and linguistics tricks, and actually show some factual instances of disparaging use by the team employing the Native American name and imagery, that group of plaintiffs, under the *Harjo* case sequence, should deservedly win their case to have the trademark cancelled.

The remainder of this Note traces the circumstances of the University of North Dakota's use of the "Fighting Sioux" name and logo. For reasons to be discussed, UND provides an excellent test case applying the *Harjo* analysis and its application of section 2(a) of the Lanham Act. Though I will ultimately conclude that challengers to the use of the "Fighting Sioux" name would fail as a result of the evidence weighing too heavily in favor of UND, the case study will demonstrate that the *Harjo* test is still applicable today and that it can be utilized by a Native American group in the right situation with enough proof to support its claim against another professional team or school.

III. THE UND FIGHTING SIOUX AND THE 2005 NCAA POLICY

Following a University of Minnesota men's home basketball game against the University of Illinois "Fighting Illini," a major demonstration and brawl ensued over Illinois' controversial use of the "Fighting Illini" nickname.⁷⁹ As a result, the University of Minnesota implemented a policy under which the school refused to schedule regular-season games against schools using such offensive Native American names and imagery.⁸⁰ Shortly thereafter, the University of Wisconsin played a men's basketball game against the Alcorn State "Scalping Braves" in December of 1992, and the Great Lakes Intertribal Council became similarly upset and offended by Alcorn State's moniker.⁸¹ With the Council

⁷⁹ Amy Rosewater, *Two Big Ten Schools Take on Mascot Debate*, CLEV. PLAIN DEALER, July 16, 1993, at 2D. The name "Fighting Illini" was in reference to a Native American group, and the school also used a logo depicting such an image.

⁸⁰ *Id.*

⁸¹ Alan Schmadtke, *Mascots Make Badgers Upset*, ORLANDO SENTINEL, July 15, 1993, at D2. Alcorn State currently employs the nickname "Braves," but no longer includes the "Scalping" signifier along with it.

representing eleven Native American tribes in Wisconsin, this reaction prompted the University of Wisconsin to create a policy, very similar to that of Minnesota, expressing an objection to the use of Native American mascots and nicknames.⁸² The regulations of both schools, though, did make room for some exceptions, including games against schools in their conference (the Big Ten), postseason tournament games, and games against some traditional rivals.⁸³ While these policies were some initial progressive steps, the next major move amongst NCAA programs in battling the use of Native American names and mascots would not come for another twelve years.

A. *The 2005 NCAA Policy*

On August 5, 2005, the NCAA formally announced the adoption of a policy forbidding its member institutions from employing “hostile and abusive . . . mascots, nicknames or imagery” during NCAA championship play, specifically pertaining to Native American references.⁸⁴ While the timing of the policy would suggest it being a direct response to the decisions in *Harjo* and its application of the “scandalous” and “disparaging” prohibitions of section 2(a) of the Lanham Act, NCAA President Myles Brand stated that the policy was designed to promote the core values expressed in the NCAA Constitution, including “cultural diversity, ethical sportsmanship and nondiscrimination.”⁸⁵ The NCAA claimed that the impetus for the policy was a combination of NCAA member feedback, a report from the United States Commission on Civil Rights dealing with

⁸² *Id.*

⁸³ *Id.* While referring specifically to the Wisconsin policy, though applicable to that of both schools, one commentator has criticized these exceptions as creating a great deal of bark, without much bite. He notes that the “[University of Wisconsin] is willing to appease those who are sensitive to the mascot issue when it comes to non-conference, lower revenue generating games, but when it comes to big money-makers like a bowl game, the policy is thrown out the window.” John B. Rhode, *The Mascot Name Change Controversy: A Lesson in Hypersensitivity*, 5 MARQ. SPORTS L.J. 141, 157 (1994).

⁸⁴ See News Release, NCAA, *supra* note 19. See also Gary T. Brown, *Policy Applies Core Principles to Mascot Issue*, NCAA NEWS, Aug. 15, 2005, http://www.ncaa.org/wps/portal/newsdetail?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/NCAA/NCAA+News/NCAA+News+Online/2005/Association-wide/Policy+applies+core+principles+to+mascot+issue++8-15-05+NCAA+News.

⁸⁵ See News Release, NCAA, *supra* note 19. Myles Brand later discussed the importance of “balanc[ing] between the interests of a particular Native American tribe and the NCAA’s responsibility to ensure an atmosphere of respect and sensitivity for all who attend and participate in [NCAA] championships.” See News Release, NCAA, *supra* note 12. Please note that had *Harjo III* been decided in favor of the plaintiffs, being that the NCAA is a private, voluntary organization, the decision may not have been binding on the NCAA.

Native American imagery in sports, and recurring NCAA debates over the use of the Confederate Flag in similar situations.⁸⁶ Eighteen institutions were initially found by the NCAA to be using hostile and abusive Native American references, causing them to fall within the scope of the policy.⁸⁷

Under the policy, NCAA teams were immediately prohibited from wearing uniforms with “hostile or abusive” indicators at NCAA championship events.⁸⁸ Effective February 1, 2006, colleges and universities having such Native American mascots were to be prohibited from hosting any NCAA championships at their facilities.⁸⁹ If schools falling under the policy’s umbrella had been pre-approved to host a championship event prior to its adoption, since host sites are chosen years in advance, those institutions would be forced to cover up the relevant references to the best of their ability.⁹⁰ By August 1, 2008, all schools with hostile or abusive mascots or references on their cheerleading, dance team, or band uniforms would be prohibited from wearing them at NCAA championship events.⁹¹ Lastly, NCAA institutions were strongly recommended to review any written publications they distribute which have hostile and abusive references and to remove those parts, as well as to “educate their internal and external constituents on the understanding and awareness of the negative impact of hostile or abusive symbols, names and imagery, and to create a greater level of knowledge of Native American culture through outreach efforts and other means of communication.”⁹²

Two weeks after the policy was announced, the NCAA Executive Committee approved an appeals process by which colleges and universities subject to the sanctions could challenge their individual status.⁹³ NCAA senior vice-president for governance and membership, Bernard Franklin, was named to chair a staff review committee which would hear all appeals from member institutions and analyze their specific facts on a case by

⁸⁶ See News Release, NCAA, *supra* note 19. For the entire United States Commission on Civil Rights statement, see Press Release, U.S. Commission on Civil Rights, The Use of Native American Images and Nicknames as Sports Symbols (2001), <http://www.usccr.gov/press/archives/2001/041601st.htm>.

⁸⁷ See News Release, NCAA, *supra* note 19.

⁸⁸ *Id.*

⁸⁹ *Id.* For many schools, this is not a problem, as there are many factors that are considered when the NCAA chooses a location for its championships, including seating capacity, facility quality, accessibility, and interest from the school in hosting the event. However, as will be discussed *infra* Part IV.C, UND and the Ralph Engelstad Arena are a seemingly-ideal location for NCAA’s hockey championship.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See News Release, NCAA, *supra* note 12.

case basis.⁹⁴ However, after the staff committee made its decisions, the NCAA Executive Committee was given authority to review those determinations and have a final say on the matter.⁹⁵

B. Reactions to the 2005 NCAA Policy

There has been a wide range of reactions to the 2005 NCAA policy. A number of schools quickly acceded to the provisions and changed their team names to ones less “hostile and abusive.” Examples of such schools include the Midwestern State University “Indians” switching to the “Mustangs” and the Southeastern Oklahoma State University “Savages” switching to the “Savage Storm.”⁹⁶

A number of other schools were not as quick to react to the policy and are currently in the process of indicating their intent to change their names and have already established definitive future dates to do so. These schools include the College of William and Mary “Tribe”, the McMurry University “Indians”, and the University of Louisiana at Monroe “Indians”, amongst others.⁹⁷

Currently, there are five NCAA schools that have been exempted from the 2005 policy: Catawba College (“Catawba Indians”), Central Michigan University (“Chippewas”), Florida State University (“Seminoles”), Mississippi College (“Choctaws”), and the University of Utah (“Utes”).⁹⁸

The NCAA staff review committee analyzing appeals claims by schools subject to the 2005 policy takes many factors into consideration when determining the merits of such appeals. For example, with Florida State, the committee had looked at evidence such as the general enthusiasm throughout the 3100 members of the Seminole Tribe of Florida, including the tribe members’ assistance in creating the costume for the school’s mascot, “Chief Osceola.”⁹⁹ The University of Utah was able to maintain the “Utes” name largely as a result of sending the NCAA review committee two letters supporting the usage from Craig Thompson, the Mountain West Conference commissioner, and,

⁹⁴ *Id.*

⁹⁵ *Id.* See *infra* Part III.C for UND’s appeal to the NCAA staff review committee.

⁹⁶ News Release, NCAA, *supra* note 20.

⁹⁷ *Id.* Good faith intent to change a nickname or mascot allows a school to avoid being further subjected to the 2005 policy, unless it later reneges or neglects to follow through on such plans.

⁹⁸ *Id.*

⁹⁹ Robert Andrew Powell, *Florida State Can Keep its Seminoles*, N.Y. TIMES, Aug. 24, 2005, at D1. See also Michelle Kaufman, *A Seminole is Still a Seminole*, MIAMI HERALD, Aug. 24, 2005, at A1.

more importantly, from Maxine Natchees, the chairwoman from the Uintah and Ouray Tribal Business Committee.¹⁰⁰ The chairman of the staff review committee, Bernard Franklin, justified the aforementioned exemptions from the 2005 policy based on the unique relationships between the schools and the respective tribes by saying that “the decision of a namesake sovereign tribe, regarding when and how its name and imagery can be used, must be respected even when others may not agree.”¹⁰¹

Some schools have chosen to flex their muscles at the 2005 policy to see if the NCAA would actually enforce the sanctions. The University of Illinois is one of the most notable examples of those feeling the NCAA’s wrath, as its men’s tennis program was adversely affected from maintaining its mascot, “Chief Illiniwek,” and nickname of the “Fighting Illini.”¹⁰² After losing its appeal to have its nickname removed from the “hostile and abusive” list, the Illinois men’s tennis team was prohibited from hosting the first round of the 2006 NCAA championships.¹⁰³ Even though the team earned a number seven seed in the championship tournament, because of the use of its nickname it was the only team in the top sixteen not permitted to host first-round championship matches, thus putting the team at a clear competitive disadvantage.¹⁰⁴

¹⁰⁰ Mike Sorensen, *Utes Get to Keep Name*, DESERT MORNING NEWS, Sept. 3, 2005, at A1. See also *NCAA Approves CMU’s Mascot*, DETROIT NEWS, Sept. 4, 2005, available at <http://www.detnews.com/2005/college/0509/04/C09-303392.htm>.

¹⁰¹ Powell, *supra* note 99.

¹⁰² Emily Badger, *Changing Identities*, ORLANDO SENTINEL, May 12, 2006, at C1. As of this writing, the only school remaining on the NCAA policy list is the Alcorn State “Braves.” In June of 2007, the Mascot Review Committee of Arkansas State University voted to retire its “Indians” nickname and associated imagery. News Release, Arkansas State University, Mascot Review Committee Completes Recommendation on Selection Process (July 16, 2007), available at <http://asunews.astate.edu/MascotSelectionRec.htm>; Arkansas State University, “Mascot Information,” <http://www.astate.edu/mascot/> (last visited Jan. 3, 2008); AISTM, *supra* note 13. Part of the reason why Alcorn State and Arkansas State may have been hesitant to remove themselves from the policy list is their views on self-expression and pride in their names. Additionally, as they are schools with relatively small athletic programs and funding, making changes to all of their uniforms and facilities might not be economically worthwhile, particularly in light of the fact that neither school is likely to compete in any NCAA championship competitions in the near future. For the University of North Dakota’s removal from the policy list, see *infra* Section II.C.

¹⁰³ Badger, *supra* note 102.

¹⁰⁴ *Id.* This sanction ended a run of seven consecutive years that the Illinois men’s tennis team had earned the rights to host the first and second round of the championship tournament. See *Illini Draw Western Illinois in NCAA Tournament Opener*, University of Illinois Athletics, May 3, 2006, <http://fightingillini.cstv.com/sports/m-tennis/spec-rel/050306aaa.html>. The Illinois men’s tennis team eventually made it to the sweet sixteen that year before falling to the then-defending champion UCLA Bruins. See *Illini Netters Edged by Defending National Champs*, University of Illinois Athletics, May 20, 2006, <http://fightingillini.cstv.com/sports/m-tennis/recaps/052006aaa.html>. The University of Illinois has since agreed to end the use of its mascot, Chief Illiniwek, and imagery related to him. However, the NCAA has deemed the name “Fighting Illini”

Beyond the reactions from NCAA institutions, there have been suggestions that the NCAA did not have the proper authority to pass such a legislative program in the first place.¹⁰⁵ Professor Glenn George analyzed certain provisions in the NCAA Constitution and found some disjunction between what the NCAA did in imposing the 2005 policy and what it should be permitted to do.¹⁰⁶ George pointed to Article 4.1.2, which allows the NCAA Executive Committee to “identify core issues that affect the Association as a whole.”¹⁰⁷ Article 2.6 describes how the NCAA is to “promote an atmosphere of respect for and sensitivity to the dignity of every person” in furtherance of nondiscrimination.¹⁰⁸ Article 2.6 appears to conflict with 4.1.2, though, as it states that “it is the *responsibility of each member institution* to determine independently its own policy regarding nondiscrimination.”¹⁰⁹ Hence, as George argues, it would appear that each school should worry about self-regulation in the context of “hostile and abusive” mascots, and should not have the NCAA impose such a regulation upon them.¹¹⁰ This is but one example of an approach from the legal world questioning the 2005 policy.¹¹¹

acceptable for continued use. News Release, NCAA, *supra* note 20. The justification for permitting Illinois to continue using the nickname of “Fighting Illini,” according to NCAA Vice-President Franklin, is that the name is “closely related to the name of the state and not directly associated with Native Americans.” Steve Contorno, *UI Clear of NCAA Postseason Restrictions*, DAILYILLINI.COM, Feb. 20, 2007, available at <http://media.www.dailyillini.com/media/storage/paper736/news/2007/02/20/Basketball/Ui.Clear.Of.Ncaa.Postseason.Restrictions-2729876.shtml>.

¹⁰⁵ Glenn George, *Playing Cowboys and Indians*, 6 VA. SPORTS & ENT. L.J. 90, 104-06 (2006).

¹⁰⁶ *Id.* Though George used the 2006-2007 NCAA Division I Manual, I will be referencing the most recent Manual for the 2007-2008 school year, available at www.ncaa.org (follow “Legislation & Governance” link, then “Rules and Bylaws”) [hereinafter Division I Manual]. The relevant provisions are unchanged between the two versions.

¹⁰⁷ George, *supra* note 105, at 104; Division I Manual, *supra* note 106, art. 4.1.2(e), at 19.

¹⁰⁸ George, *supra* note 105, at 105; Division I Manual, *supra* note 106, art. 2.6, at 4.

¹⁰⁹ Division I Manual, *supra* note 106, art. 2.6, at 4 (emphasis added).

¹¹⁰ George, *supra* note 105, at 105-06. Though not pertaining to the 2005 policy, the Kentucky Supreme Court in 2001 had to grapple with the authority of the NCAA to impose regulations and sanctions against its member institutions, and took a largely hands-off approach. In *NCAA v. Lasege*, the state’s highest court held that, “in general, the members of [voluntary athletic] associations should be allowed to ‘paddle their own canoe’ without unwarranted interference from the courts.” 53 S.W. 3d 77, 83 (Ky. 2001) (quoting *Ky. High School Athletic Ass’n v. Hopkins County Bd. of Educ.*, 552 S.W. 2d 685, 687 (Ky. App. 1977)).

¹¹¹ See also Jonathan Gonzalez, *Trademark Goodwill, Brand Devaluation, and the Neo-Political Correctness of College Athletics: Did Marquette’s Recent Identity Crisis Cost Them Thousands or Even Millions of Dollars in Brand Value?*, 14 SPORTS LAW J. 195 (Spring 2007) (arguing that a “neo-political correctness” movement in college athletics is ultimately doing more harm than good).

C. UND's Efforts to Fight the Provisions of the 2005 NCAA Policy

The University of North Dakota responded to the 2005 NCAA policy with an appeal to the NCAA Executive Committee's staff review committee; this appeal was denied though, leaving UND with little recourse unless it changed its name and logo.¹¹² The appeal's only positive outcome was that, because UND had already been selected to host the 2006 West regional for the men's ice hockey championship tournament before the policy's adoption, the school was not be forced to remove or cover all of the Native American imagery throughout Ralph Engelstad Arena because of the burden it would have imposed on the school.¹¹³ Largely disgruntled at the NCAA's decision on UND's appeal, UND President Charles Kupchella made a formal declaration against the policy and the finding that UND was "hostile and abusive" for using the "Fighting Sioux" name.¹¹⁴

In a letter addressed to the NCAA's President, Myles Brand, and Vice-President, Bernard Franklin, and which was also publicly displayed on UND's website, Kupchella expressed his concerns about the "organizational self-righteousness" and "executive fiat" evident in the NCAA's policy.¹¹⁵ Further, Kupchella felt that the NCAA policy was forcing Native American tribes to accept what is the "right" thing for them, and that the policy was yet another in a long line of patriarchal decisions by the proverbial "white man" telling Native Americans what is "best" for them.¹¹⁶ Specifically regarding the appeals determination in UND's case, Kupchella stated that the "unfair, arbitrary, capricious, fundamentally irrational, and harmful manner" in which the policy was applied to UND "leaves us no recourse but to consider litigation,"¹¹⁷ thus foreshadowing the ensuing lawsuit against the NCAA.

A few months later, in October of 2006, this avowal became a reality, as North Dakota's Attorney General, Wayne Stenehjem, filed a complaint for the state of North Dakota in the state's district court against the NCAA, on behalf of both UND and the North Dakota Board of Education.¹¹⁸ There were three stated causes of action filed: 1) breach of contract;¹¹⁹ 2) breach of

¹¹² News Release, NCAA, *supra* note 10.

¹¹³ *Id.*

¹¹⁴ Letter from Charles Kupchella, President, University of North Dakota, to the NCAA (June 7, 2006), *available at* http://www.universityrelations.und.edu/logoappeal/openletter_6-07-06.html.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See generally* Complaint, *supra* note 22.

¹¹⁹ *Id.* at 18-19. The gist of this claim was that the policy violated the contract between

contract for implied covenant of good faith and fair dealing;¹²⁰ and 3) unlawful restraint on trade.¹²¹ Along with the complaint, Stenehjem filed for a preliminary injunction to “prevent tremendous consequences to UND and its athletic . . . programs by immediate application of an absurd, unauthorized and unlawful Policy of the NCAA.”¹²² Stenehjem declared that the grounds in support of the preliminary injunction included the irreparable damages that would result to UND, the strong likelihood UND would ultimately prevail at trial based on the merits of the case, the fact that UND would suffer a relatively greater harm from not having the injunction than the NCAA would if the injunction were granted, and that the injunction serves the public interest of the people of North Dakota, as “[they] have a pivotal interest in having a nationally recognized, superior state institution of higher education with a correspondingly superior academic program.”¹²³ This preliminary injunction was granted by the presiding judge, Judge Lawrence Jahnke, with the trial set to begin in December of 2007.¹²⁴

In order to help promote settlement negotiations between the parties, Judge Jahnke decided to seal all future documents in the lawsuit in September of 2007, with the pending trial only months away.¹²⁵ Consequently, a settlement was reached only a month later between North Dakota and the NCAA.¹²⁶ Under the agreement, UND has three years to obtain approval for using the name and logo from the two major Sioux tribes in North Dakota: the Spirit Lake Tribe and Standing Rock Sioux Tribe.¹²⁷ If this occurs, UND will become exempt from the policy, as has been the

the NCAA and UND as one of its member institutions, since the Executive Committee acted outside of the scope of its legislative authority. *Id.*

¹²⁰ *Id.* at 19-22. This second cause of action, while tied in with the first, referred more specifically to the duties which the NCAA owes to its member institutions.

¹²¹ *Id.* at 22-24. Stenehjem pleaded that the NCAA policy restricts the marketing abilities of schools subject to its provisions by acting as a “commercial boycott of members” and thus puts the “identified member institutions [such as UND] at a competitive disadvantage.” *Id.* at 23, ¶¶ 121-22, respectively.

¹²² Motion for Preliminary Injunction, *supra* note 22, at 1.

¹²³ *Id.* at 40-82.

¹²⁴ See Chuck Haga, *UND Gets Reprieve on Sioux Name*, STAR TRIB., Nov. 13, 2006, at 1B.

¹²⁵ First Amendment Center, *supra* note 23. Because Judge Jahnke is an alumnus of UND and a former member of its Golden Feather pep club, it has been suggested that Jahnke might have been biased in the case between his alma mater and the NCAA. Joseph Marks, *Judge in Nickname Case Denies UND Bias*, GRAND FORKS HERALD, Oct. 27, 2007, at A6.

¹²⁶ See News Release, NCAA, *supra* note 24; see also *North Dakota has Three Years to Get Approval of Fighting Sioux Nickname*, ESPN.COM, Oct. 26, 2007, <http://sports.espn.go.com/ncaa/news/story?id=3080540>.

¹²⁷ See News Release, NCAA, *supra* note 24. The three years will last until November 30, 2010. For information about the Spirit Lake and Standing Rock Sioux tribes, see respectively, <http://www.spiritlakenation.com/> and <http://www.standingrock.org/>.

case with schools such as Florida State.¹²⁸ However, if UND is unable to obtain the tribe's approval within the allotted three years, the school will have to officially retire the "Fighting Sioux" name and logo and will be forced to adopt a new one that does not violate the 2005 policy's "hostile and abusive" standard.¹²⁹

Ancillary to the major portion of the settlement were some important secondary details. As part of the agreement, the NCAA promised to issue a public statement on its website acknowledging the efforts UND has made in promoting Native American educational programs.¹³⁰ This statement was meant to restore UND's reputation and was therefore one of the most important aspects of the settlement as far as UND was concerned.¹³¹ As UND's Assistant Director of University Relations, Peter Johnson, stated, this statement by the NCAA "exonerates us from being a hostile and abusive institution. We don't think anything we do here is at all hostile or abusive."¹³²

The other key element of the settlement impacts the \$100 million Ralph Engelstad Arena. Although UND will be prevented from hosting NCAA championship events if the school is unable to obtain the requisite approval from the Spirit Lake and Standing Rock tribes, the settlement includes some exceptions for the Arena's obligation to subsequently rid itself of those images.¹³³ These exceptions comprise "items of historical significance," such as "championship banners, photos, trophies and dedication memorials," items that would be prohibitively expensive to remove, including inlaid granite logos on the floor of the Arena, and certain transitional items during their "ordinary course of wear and replacement."¹³⁴ This final category, though not applying to "Fighting Sioux" images on decals throughout the premises, consists of logos on aisle seats, carpeting, tile flooring, and brass etched logos, amongst other similar items that have a

¹²⁸ See News Release, NCAA, *supra* note 24.

¹²⁹ *Id.* This course of action will also apply if the relevant tribes give UND authority initially, and then later withdraw such approval. At that point in time, UND would have to make immediate plans for a new name. If approval is denied by November 30, 2010, UND will be given until August 15, 2011 to completely make the transition. Alison Kelly, *UND and NCAA Agree to a Settlement*, DAKOTA STUDENT, Oct. 26, 2007, <http://media.www.dakotastudent.com/media/storage/paper970/news/2007/10/26/News/Und-And.Ncaa.Agree.To.A.Settlement-3060159.shtml>.

¹³⁰ Kelly, *supra* note 129. For the NCAA's public statement, see News Release, NCAA, NCAA Statement on Settlement of University of North Dakota Mascot Lawsuit (Nov. 19, 2007), <http://www.ncaa.org> (follow "Media & Events" hyperlink; then "News Release Archive" and "Official Statements").

¹³¹ Kelly, *supra* note 129.

¹³² *Id.*

¹³³ See generally Chuck Haga, *Some Logos Could Stay at REA Even if It's No Go for Logo, Some Symbols Would Remain to 2012 or Longer*, GRAND FORKS HERALD, Oct. 27, 2007, at A7.

¹³⁴ *Id.*

useful life that would require them to be replaced within the next few years anyway.¹³⁵ While most of those must be replaced no later than the end of 2012, the longest stipulated replacement exception pertains to the glass doors leading to administrative areas of the Arena that have “Fighting Sioux” logos etched into them, which do not need to be substituted for until the end of 2015.¹³⁶

A mixture of reactions quickly followed the settlement agreement. UND and Stenehjem were generally pleased with the outcome, as the three-year timeframe allows “UND time and a chance to act on the nickname in a way that does justice to nickname supporters and opponents alike.”¹³⁷ The people of North Dakota also expressed general approval of the settlement, though many offered other suggestions as well.¹³⁸ After expending over \$2 million in legal fees and a year of negotiating, it is ironic how the ultimate resolution now lays in the hands of the Sioux tribes.¹³⁹ While this seems to be what they had originally asked for, it presents a lesson in being careful what one wishes for, as Standing Rock tribal chairman Ron His Horse is Thunder has indicated that it is a hardship to have the burden placed back in the hands of his people.¹⁴⁰ A scholar and member of the Choctaw Nation of Oklahoma recently promoted the idea that individual tribes ought to be able to choose whether or not to self-identify with a given Native American motif, though this seems to invite exactly what His Horse is Thunder now fears.¹⁴¹ While the Standing Rock and Spirit Lake tribal councils have each publicly

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Tom Dennis, Editorial, *A Good Sign: Settlement Upsets Both Sides*, GRAND FORKS HERALD, Oct. 27, 2007, at A4 (arguing that elation and disappointment by both sides of the dispute suggests that the settlement was fair). At the same time, the NCAA maintains that the settlement is consistent with the 2005 policy’s goals, thus expressing its approval of the terms of agreement. See News Release, NCAA, *supra* note 24.

¹³⁸ Lisa Gibson, *Residents React to Nickname Settlement*, GRAND FORKS HERALD, Oct. 28, 2007, at A4. These ideas include giving the Sioux a certain percentage of merchandise sales of UND apparel in order to let them directly benefit from the use of their name, as well as giving free tickets for UND games and UND merchandise to Sioux tribe members, amongst other suggestions. *Id.*

¹³⁹ Dennis, *supra* note 137.

¹⁴⁰ *Id.* His Horse is Thunder was quoted as saying, “This takes the onus off UND . . . and it puts all the pressure on tribes and tribal councils to somehow change their minds.” Pablo S. Torre, *SI Players: Life On and Off the Field*, SPORTS ILLUSTRATED, Nov. 5, 2007, at 26. See also David Dodds, *Both Sides Find Hope in Settlement*, GRAND FORKS HERALD, Oct. 27, 2007, at A7 (discussing, in part, how American Indians may be unfairly singled out by the settlement terms).

¹⁴¹ Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 CARDOZO J. INT’L & COMP. L. 393, 401 (2003). Clarkson also recommended that the individual tribes be allowed to trademark their own identities and then license them out if or when they felt the situation to be culturally appropriate. *Id.*

stated disapproval of UND's use of "Fighting Sioux," that does not foreclose a change of heart if UND can make a convincing case to them of proper intentions in employing the tribe's name.¹⁴²

IV. APPLICATION OF UND'S "FIGHTING SIOUX" UNDER THE *HARJO* TEST

A. *Definitions of "Sioux"*

As applied in *Harjo II*, an appropriate starting point in a section 2(a) challenge for gauging UND's use of the "Fighting Sioux" name can be derived from dictionary definitions of "Sioux."¹⁴³ According to the American Heritage Dictionary, "Sioux" is defined as "a group of Native American peoples, also known as the Dakota, inhabiting the northern Great Plains from Minnesota to eastern Montana and from southern Saskatchewan to Nebraska."¹⁴⁴ Furthermore, dictionary.com, which is a compilation of twenty-one online dictionaries, lists eighteen results for the term "Sioux," without a single entry denoting any negative connotation with the word in the abstract.¹⁴⁵ While the dictionary definition of a term alone is certainly far from dispositive in a section 2(a) challenge, the *Harjo III* court acknowledged it as one of many factors to be considered.¹⁴⁶

B. *UND Logo*

With regards to the "Fighting Sioux" logo used by UND, which is prominently displayed throughout Ralph Engelstad Arena, an understanding of its symbolic value would be of extreme importance in a section 2(a) challenge. Bennet Brien, an alumnus of UND, was the artist who created the modern logo for UND in time for the 2001-2002 school year.¹⁴⁷ Brien did not

¹⁴² Joseph Marks, *A Settlement: UND-NCAA Come to Terms on Lawsuit*, GRAND FORKS HERALD, Oct. 27, 2007, at A1.

¹⁴³ *Harjo II*, 50 U.S.P.Q. 2d (BNA) 1705, 1730 (T.T.A.B. 1999). Though defining the qualifying word of "fighting" might be appropriate here, I decline to do so. Particularly in the context of sports, a signifying adjective like that is ancillary to the main name and is merely used in order to make the team's name more exciting and recognizable.

¹⁴⁴ "Sioux," AM. HERITAGE DICTIONARY (4th ed. 2006), available at <http://dictionary.reference.com/browse/sioux> (last visited Jan. 4, 2008).

¹⁴⁵ "Sioux," Dictionary.com, <http://dictionary.reference.com/browse/sioux> (last visited Jan. 4, 2008).

¹⁴⁶ *Harjo III*, 284 F. Supp. 2d 96, 145 (D.C. 2003).

¹⁴⁷ Ralph Engelstad Arena, Fighting Sioux, *supra* note 6.

simply draw a cartoon-like, generic Native American bust to be used as the school's logo; instead, he put a tremendous amount of thought and purpose into every last detail in order to connote meaningful import.¹⁴⁸ Examples of these fine details include the paint applied to the face's cheekbone, symbolizing "that life can be a battle and we have daily struggles," and the "determined look in the eyes," which depicts "never giving up and the focus necessary for sustained academic, athletic and lifelong achievement."¹⁴⁹ This is strongly indicative of the good-natured application of the "Fighting Sioux" logo to anything and everything related to UND. Unlike the animated "Chief Wahoo" logo employed by the Cleveland Indians, which has drawn criticism for being derogatory,¹⁵⁰ the "Fighting Sioux" logo is the complete opposite as it portrays the pride and honor of the Sioux and UND.

C. *Financial Considerations*

The potential financial consequences from UND losing the use of the "Fighting Sioux" name and logo is critical to a consideration of the school's disposition. One form of economic harm would come from UND's loss of the use of the logo and name for purposes of marketing merchandise and the goodwill associated with the relevant marks. This idea was alleged in the Complaint filed in the lawsuit against the NCAA and its 2005 policy:

UND's "Fighting Sioux" name and logo are of tremendous economic value to UND. The Policy harms UND by taking or devaluing the intellectual property interest it has in the "Fighting Sioux" name and logo. Member institutions compete for students and fans by building allegiance to their nickname and logo and by associating their nickname with success on the field. The "Fighting Sioux" name and logo are instantly recognized and associated with UND. The Policy negates years of efforts and identity-building by (1) diminishing the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Other meaning-laden details include the feathers and the green, yellow and red colors used. See *id.* for further information.

¹⁵⁰ Humboldt State University, *supra* note 31. For explanations on why the Chief Wahoo figure is deemed to be derogatory, see *Little Black Sambo and Chief Wahoo*, BLUECORNCOMICS.COM, May 17, 2000, <http://www.bluecorncomics.com/wahoo.htm> (last visited Jan. 5, 2008). One of the biggest advocates waging a campaign against the use of Chief Wahoo by the Cleveland Indians, as well as Native American mascots in general, was Vernon Bellecourt. Bellecourt recently passed away, but not before making his voice heard on many occasions at protests. Douglas Martin, *Vernon Bellecourt, Mascot Foe, Dies at 75*, N.Y. TIMES, Oct. 17, 2007, at C12.

commercial value of UND's nickname and logo; and (2) forcing UND to actually abandon its name and associated trademarks, copyrights, and other valuable intellectual property.¹⁵¹

As the District Court identified in *Harjo III*, an "economic prejudice arises from investment in and development of the trademark, and the continued commercial use and economic promotion of a mark over a prolonged period adds weight to the evidence"¹⁵²

UND has used the name "Fighting Sioux" since the 1960's, and it is realistic to assume that the university has been able to profit from the aforementioned marketing.¹⁵³ While data indicating the extent of such marketing profits is privately held by the school, the income generated from promoting its marks around the country, and most importantly amongst the citizens of the state of North Dakota who take great pride in the state university, must be acknowledged. This is similar to what was considered with respect to the Washington Redskins in *Harjo*, though arguably not to the same degree due to the financial differences between professional and collegiate sports. Nevertheless, forcing UND to find an entirely new name and logo after such an extended period of use would be sure to prove the validity of the noted argument set forth in the Complaint against the NCAA.

The other form of economic harm that must be considered from the possible forced retirement of the "Fighting Sioux" moniker is the impact upon UND in relation to its hallmark structure: Ralph Engelstad Arena. As mentioned, Ralph Engelstad, an alumnus of UND, donated over \$100 million for the construction of the arena now bearing his name.¹⁵⁴ While this contribution was initially received with a great deal of skepticism and caution as a result of Engelstad's alleged respect for, and multiple celebrations of, Adolf Hitler and the Nazi regime,¹⁵⁵ arguably the most controversial aspect of the gift was Engelstad's decision to make it conditioned upon UND maintaining the use of the "Fighting Sioux" name and logo.¹⁵⁶ After hearing that UND might opt for a new name and logo in the middle of the facility's construction period, Engelstad wrote a letter to UND's President

¹⁵¹ Complaint, *supra* note 22, at 17, ¶ 81.

¹⁵² *Harjo III*, 284 F. Supp. 2d 96, 143 (D.C. 2003) (quoting *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 821 (7th Cir. 1999)).

¹⁵³ Ralph Engelstad Arena, Fighting Sioux, *supra* note 6.

¹⁵⁴ Brownstein, *supra* note 5.

¹⁵⁵ See *id.*; *When a College Gets a Gift that is Tainted*, N.Y. TIMES, Nov. 9, 1988, at B11.

¹⁵⁶ Brownstein, *supra* note 5.

threatening to have the building's heat shut off and thus exhibiting his willingness to take a \$35 million loss on the project.¹⁵⁷ This is clear proof of the now-deceased Engelstad's adamant stance on his conditioned donation, as well as his unrelenting concern for the prolongation of the "Fighting Sioux" name.

Were UND no longer permitted to be recognized as the "Fighting Sioux," it is conceivable that the funding for Ralph Engelstad Arena would be revoked by Engelstad's estate, leaving UND in an awful financial predicament. Unless a massive amount of funds were able to be raised, the school would lose its hold on that first-rate facility. Aside from this being a major landmark on the campus, which is surely an effective means of attracting prospective students, other financial implications must be recognized. Even if UND were able to raise the necessary funds to support the Arena, there would be massive costs involved in replacing all of the two thousand-plus "Fighting Sioux" logos throughout the facility and buying new uniforms to outfit all of the school's athletic teams.¹⁵⁸

In a similar vein, when the NCAA selects a host for its championship events, many factors go into making the determinations, including the quality of the facilities, seating capacity for spectators, and a multitude of other concerns. After successfully hosting the 2006 Men's Ice Hockey West Regional Championship, it is obvious that the Arena is a more-than adequate facility for hockey and was most certainly the impetus for UND being given the honor to host the event.¹⁵⁹ Consequently, if the funding for the Arena is revoked, the school will most likely also lose future opportunities to host NCAA championship events, which will result in a significant loss of revenues from ticket sales, concession sales, NCAA championship merchandise sales, and royalty payments from UND's own merchandise.¹⁶⁰ With the gravity of financial implications that are likely to ensue if UND cannot maintain its use of the "Fighting Sioux," both from its trademarks and from the larger implications on Ralph Engelstad Arena, these consequences must be given a great deal of weight in a *Harjo*-like analysis.

¹⁵⁷ *Id.*

¹⁵⁸ See Haga, *supra* note 133, for an idea of the changes that would be required for the Arena as they were expressed in the settlement between UND and the NCAA.

¹⁵⁹ Ralph Engelstad Arena, The Ralph, *supra* note 2.

¹⁶⁰ Complaint, *supra* note 22, at 14, ¶ 71. It is conceded that a fair percentage of this revenue all goes directly to the NCAA, but there is certainly a fair amount of financial gain received by the host institution as well.

D. Polls and UND Student Demographics

Another important set of factors that must be included in a Lanham Act challenge for a “scandalous or disparaging” Native American team name relates to the opinions of the referenced group.¹⁶¹ For a general picture of Native American perceptions, the aforementioned 2002 *Sports Illustrated* study noted in Part II.C is a starting point.¹⁶² While somewhat indicative, this study would run into the same problem that the plaintiffs in *Harjo* encountered when Pro-Football appealed to the District of Columbia District Court, where the surveys they used were too general and did not adequately portray the concerns of a substantial composite of the referenced group.¹⁶³ As a potentially stronger indicator of the state of affairs in North Dakota amongst Native Americans, a recent poll indicated that “one in four [Native Americans] said that they would support [UND] *less* – yes, less – if we were to change our nickname.”¹⁶⁴ Following the settlement between UND and the NCAA, the fate of UND’s “Fighting Sioux” marks is in the hands of the Spirit Lake and Standing Rock Sioux tribes. Because of the recent settlement and its terms, this Note will not attempt to predict how those tribes are divided on the issue. As an alternative angle, though, and something that ought to be considered by the tribes when making their ultimate decision, the UND enrollment figures are worth noting.

For the 2007-2008 academic year, UND reported a total enrollment of 12,559 students, comprised of both graduates and undergraduates.¹⁶⁵ Of that total, 368 are of Native American descent, or approximately 2.9%.¹⁶⁶ While that number might seem relatively miniscule, other circumstantial factors are extremely relevant. After the overwhelmingly large White/non-Hispanic American numbers, the Native Americans represent the largest minority group at UND, leading Hispanic-Americans (1.2%), African-Americans (1.3%), and Asian-Americans (1.9%) in attendance.¹⁶⁷ To have a better perspective of the Native

¹⁶¹ *Harjo III*, 284 F. Supp. 2d 96, 124 (D.C. 2003) (citing *In re Hines*, 31 U.S.P.Q. 2d 1685, 1688 (T.T.A.B. 1994)).

¹⁶² Price, *supra* note 35 (showing a large amount of support by Native Americans for continued use of their names and imagery in association with sports teams).

¹⁶³ *Harjo III*, 284 F. Supp. 2d at 145.

¹⁶⁴ Letter from Charles Kupchella, *supra* note 114.

¹⁶⁵ University of North Dakota, Student Body Profile, <http://www.und.edu/profile/> (last visited Jan. 5, 2008).

¹⁶⁶ *Id.* When I refer to Native Americans in the student population context here and throughout the remainder of this Note, “Native Americans” will stand for the combination of American Indians and Alaskan Natives, as enrollment profiles do not distinguish further than that.

¹⁶⁷ *Id.*

American presence at UND, a comparison with the only other university of comparable size in the state of North Dakota is informative. North Dakota State University (“NDSU”) has a nearly-identical student enrollment to UND for the 2007-2008 school year, with a total of 12,527 graduate and undergraduate students.¹⁶⁸ Despite the similarity in total campus population, there are only 146 Native American students enrolled at NDSU, making up a mere 1.2% of the student population.¹⁶⁹ One might reasonably expect two public universities within the same state that have practically identical enrollment numbers to have more similar student demographics. However, UND, whether in spite of or because of its use of the “Fighting Sioux” name, clearly distinguishes itself as a school where Native American students choose to enroll.

Even in comparison to NDSU, the Native American student population at UND might still appear low. However, this can be partially accounted for according to the latest census results in which Native Americans comprise 5.3% of the North Dakota population and only 1.0% of the total population of the United States.¹⁷⁰ Furthermore, across the country, Native Americans only make up 1.0% of all undergraduate students enrolled in American colleges and universities.¹⁷¹ Such a small Native American representation at schools of higher education is attributed to a number of factors, including poverty and unequal access to a necessary, early educational foundation.¹⁷² When taking all of this into account, it appears as though UND actually has a proportionally *large* number of Native American students matriculated. While far from conclusory on any consensus support for, or encouragement of, the “Fighting Sioux” reference at UND, these figures are somewhat persuasive by evidencing a lack of wholesale feelings of disparagement from the use of the name and imagery. That sort of sentiment would likely cause UND to have a much smaller number of Native Americans in

¹⁶⁸ North Dakota State University, NDSU Student Demographic Information Fall 2007, http://www.ndsu.edu/equal_opportunity/whatsnew/NDSUStudentDemographicsFall2007.pdf (last visited Jan. 5, 2008).

¹⁶⁹ *Id.*

¹⁷⁰ U.S. Census Bureau, North Dakota QuickFacts, <http://quickfacts.census.gov/qfd/states/38000.html> (last visited Jan. 5, 2008).

¹⁷¹ American Council on Education, Fact Sheet on Higher Education (Feb. 2007) *available at* http://www.acenet.edu/AM/Template.cfm?Section=Search§ion=fact_sheets&template=/CM/ContentDisplay.cfm&ContentFileID=3338. Note that this figure reflects the ACE’s most recent study results, which come from 2004.

¹⁷² See generally Gallagher, *supra* note 30; Andrea Venezia, Michael W. Kirst, & Anthony L. Antonio, *Betraying the College Dream*, Stanford University’s Bridge Project, Mar. 4, 2003, *available at* <http://www.stanford.edu/group/bridgeproject/betrayingthecollegedream.pdf>.

attendance at the school instead of a relatively large assembly when compared with Native American enrollments at NDSU and at other colleges and universities throughout the United States.

A significantly more persuasive argument for a potential group of interested plaintiffs would exhibit that UND had a relatively low percentage of Native American students when compared to other schools in the state and country. This could also be achieved through data exemplifying a great disparity between Native Americans at the school versus their general population in the state as a whole. While such indicators would not be enough on their own to make for a successful *Harjo*-type challenge, using this sort of demographic support would provide a much more substantial argument for such challengers.

E. UND Academic and Athletic Practices

More important to a *Harjo*-like test than the number of students from Native American descent who attend UND are the ways in which UND makes use of the “Fighting Sioux” name and logo. UND is very progressive in its Native American cultural education. Since the creation of its unique Department of Indian Studies in 1977, UND has been the only school in the state of North Dakota offering an American Indian/Native American Studies major.¹⁷³ Additionally, the Northern Plains Indian Law Center has been developed as a part of the UND School of Law.¹⁷⁴ This program, whose purpose is to “assist tribal governments in addressing legal issues affecting tribal lands and members, and to promote diversity within the legal profession,” includes such projects as the Tribal Judicial Institute, the Tribal Environmental Law Project, and the Native American Law Project.¹⁷⁵ Overall, Native American educational programs are a \$12 million endeavor and encompass over thirty separate programs at UND.¹⁷⁶

Aside from promoting the education of Native American students and fostering an environment for teaching their culture, UND has a rather amicable relationship with its neighboring Sioux tribes. Ironically, on the very day that UND settled its lawsuit with the NCAA, the UND men’s and women’s basketball teams were running a clinic at the Four Winds School, located on

¹⁷³ University of North Dakota, Indian Studies College of Arts & Sciences, <http://www.und.edu/dept/indian/> (last visited Jan. 5, 2008).

¹⁷⁴ University of North Dakota School of Law, Northern Plains Indian Law Center, <http://www.law.und.edu/npilc/> (last visited Jan. 5, 2008).

¹⁷⁵ *Id.*

¹⁷⁶ Letter from Charles Kupchella, *supra* note 114.

the Spirit Lake Nation.¹⁷⁷ As part of this second annual event, the women's coach, Gene Roebuck, discussed how he finds that "it's very important for our players to understand who they represent."¹⁷⁸ Although it may have seemed suspicious that this event occurred on the same day that UND agreed that the Spirit Lake, along with the Standing Rock Sioux, would have discretion over whether or not to allow UND to continue using the "Fighting Sioux" imagery, the clinic was previously-planned and was the second installment of what appears to be an ongoing annual event. This is evidence of how UND does not use the "Fighting Sioux" name in a malicious, derogatory way, and is instead honoring the tribes. Undoubtedly, with the decision now in the hands of the tribes, UND will be making further efforts to plan more of these types of events in order to prove the school's worth and legitimacy in using the name.

Since the major usage of UND's "Fighting Sioux" name and logo occurs in the athletic environment, it is imperative to analyze this as well. Ralph Engelstad Arena, with an excess of two thousand "Fighting Sioux" logos on its interior and exterior, can be seen as the biggest promoter of the usage.¹⁷⁹ With such an abundance of logos, possibly being to the point of overkill, it is highly unlikely that a school would allow for such a gross display of disparagement and condescension towards the group of people it is claiming to represent. Furthermore, as UND President Kupchella remarked, "we do not do tomahawk chops, we do not have white guys painted up like Indians, and our fans do not do Indian chants."¹⁸⁰ During games, UND sports announcers try to get the fans riled up and excited about their team by telling them to "get your Sioux-venirs" and "Sioux-per hot dogs!"¹⁸¹ One scholar in the field has claimed this to be nothing but mockery of Native Americans and their culture and religion.¹⁸² Such criticism, though, appears to be coming from someone looking at the situation out of context, without a clear framework for how the sporting world works in trying to get fans excited to *support* a team.¹⁸³

¹⁷⁷ Kevin Fee & Tom Miller, *Sioux Reach Out to Spirit Lake on Settlement Day*, GRAND FORKS HERALD, Oct. 27, 2007, at 1.

¹⁷⁸ *Id.*

¹⁷⁹ Ralph Engelstad Arena, "The Ralph," *supra* note 2.

¹⁸⁰ Letter from Charles Kupchella, *supra* note 114.

¹⁸¹ Christine Rose, *Tears of Strangers are Only Water: The Refusal of America to Understand the Mascot Issue*, 1 VA. SPORTS & ENT. L.J. 283, 288 (2002).

¹⁸² *Id.* Rose's brash over-statements are further discredited by the insensate comparison in her article of Native American name and mascot usage with Hitler's dehumanization of the Jews in Germany during World War II. *Id.* at 286.

¹⁸³ It should be recognized that there have been instances of rivals of UND using a derivation of the name of "Fighting Sioux" in order to root against the school. Instances

Instead, as was noted in *Harjo III*, the context for using the name is critical, and this is what differentiates a disparaging use from a festive use in the sporting arena.¹⁸⁴ A future challenge under the rationale from *Harjo* would need to make a much stronger case than the evidence presented here of disparaging use by the mark owner. When a mark owner is able to provide all of this evidence in its favor, as UND is able to do in this situation, the evidentiary bar is greatly heightened for the group opposing the validity of the mark in order to have an effective cancellation proceeding.

PART V: CONCLUSION

Through the case study of the University of North Dakota “Fighting Sioux,” it is evident that claims under the *Harjo* line of analysis are still viable. Even though UND has already agreed to a settlement with the NCAA on the issue, such a trademark challenge might later be instituted by a member of the Sioux tribe who, according to *Harjo IV*, was previously legally barred from bringing such a suit for a scandalous, disparaging team name.¹⁸⁵ With the door still open for such trademark challenges, one must question the appropriate scenarios for a group to bring such a suit. The analysis under the *Harjo* factors regarding UND’s use of “Fighting Sioux” weighs overwhelmingly in favor of UND. This is evidence which the Spirit Lake and Standing Rock Sioux tribes ought to take into consideration over the course of the ensuing three years when deciding whether to accept or reject UND’s nickname and logo. So while challenges under section 2(a) of the Lanham Act still provide a means for a disparaged group to challenge a trademark in the sporting world, were such a case to be brought against UND, a court would likely be persuaded to rule in favor of UND due to the combination of definitions, intended meanings, financial consequences, surveys, and actual applications and usage of the mark in a particular context, as discussed above.

include NDSU fans chanting “Sioux suck” during games, as well as a NDSU fan wearing a shirt with a Native American “suggestively between the legs of a bison” (the mascot of NDSU) with a caption reading, “We saw. They sucked. We came.” Brownstein, *supra* note 5. While such activities are certainly not encouraged, and the second instance flat-out deplorable and immature, the context needs to be recognized. It is doubtful that these people have some prejudice or mean to inflict emotional harm on Sioux tribe members. Rather, that is the way, whether for better or for worse, in which sports fans root against a rival team, and therefore it cannot be viewed as a demoralizing attack on the Sioux people.

¹⁸⁴ *Harjo III*, 284 F. Supp. 2d 96, 145 (D.C. 2003).

¹⁸⁵ *Harjo IV*, 415 F.3d 44, 48 (D.C. Cir. 2005).

The use of a Native American name and mascot by a sports team is a far cry from a distiller seeking to distribute an alcoholic beverage under the label “Crazy Horse” without appropriate approval, especially given the rampant stereotypical portrayals of “drunk Indians” in popular culture.¹⁸⁶ One solution to this would be the creation of a non-mark registry, making it impermissible to register and get protections for the marks specifically denoted on the list.¹⁸⁷ On the contrary, teams and schools, such as UND, appear to use such Native American references as a means of honoring the true founders of our nation.¹⁸⁸ “If Americans didn’t hold Indians in high regard, tribal names wouldn’t find their way onto all kinds of consumer products, such as the Jeep Cherokee and the Dodge Dakota. . . . The Army wouldn’t name their helicopters after tribes: the Apache Longbow . . . and the Blackhawk.”¹⁸⁹ This is an equal-opportunity issue, as mascots do not only reference Native Americans or other minority groups. As one scholar has noted, “I am bombarded every day by cartoon images, symbols, and caricatures that portray my race. Elmer Fudd, Beetle Bailey, Dagwood, Mr. Clean, the Quaker Oats man, the New England Patriots and the Dallas Cowboys do not make me feel like I do not or should not exist.”¹⁹⁰ The same commentator encourages these uses, and those of Native Americans when done in similarly good taste, as noble means of representing athletic teams and honoring a part of our history.¹⁹¹

One final piece of food for thought: in the letter sent by UND President Charles Kupchella to the NCAA prior to the initiation of the lawsuit between those parties, Kupchella noted a hypothetical situation which would create a great degree of irony and dispute.¹⁹² While Florida State University was exempted from the NCAA’s 2005 policy due to the existing relationship between the

¹⁸⁶ See *Estate of Witko v. Hornell Brewing Co.*, 156 F. Supp. 2d 1092 (D.S.D. 2001); Jim Postema, *Crazy Horse Malt Liquor Protest*, INDIANS.ORG, Apr. 14, 1995, <http://www.indians.org/welker/crazhor1.htm> (asking the producers of “Crazy Horse Malt Liquor” to cease selling its product under that name since it is offensive and exasperates condescending Native American stereotypes).

¹⁸⁷ Jeremy Phillips & Ilanah Simon, *No Marks for Hitler: A Radical Reappraisal of Trade Mark Use and Political Sensitivity*, 26(8) EUR. INTEL. PROP. REV. 327 (2004) (explaining the proposal for a non-mark registry); Caspar P.L. van Woensel, *Fuhrer Wines at Your Local Store: Legal Means Against Commercial Exploitation of Intolerable Portrayals*, 27(2) EUR. INTEL. PROP. REV. 37 (2005) (criticizing the creation of such a registry).

¹⁸⁸ See generally *Indian Nicknames Said to Be an Honor*, L.A. TIMES, May 7, 1994, at 3; Lytreshia Green-Bell, *Nicknames Can Be Used to Show Admiration for Native Americans*, USA TODAY, Apr. 29, 1993, at 12C.

¹⁸⁹ Miller, *supra* note 28, at 291-92. Miller also notes how the elimination of such references would result in many U.S. cities (such as Chicago, Miami, and Milwaukee), and a majority of U.S. states, changing their names. *Id.*

¹⁹⁰ Rhode, *supra* note 83, at 159.

¹⁹¹ *Id.*

¹⁹² Letter from Charles Kupchella, *supra* note 114.

school and the Seminole tribe, Kupchella noted that there were only four Seminole students enrolled there, while nearly 100 times as many Native American students attend UND.¹⁹³ Kupchella queried how a potential NCAA championship game hosted by UND against Florida State would look in the eyes of the NCAA and sports fans if UND were denied the right to continue using the “Fighting Sioux” name. Such a situation would:

[A]llow Florida State to come into town with its logo and nickname proudly displayed, led by someone who paints himself up like an Indian “on the warpath” and carries a flaming spear. He could ride into our stadium on a horse and lead FSU fans in a tomahawk chop and an Indian chant. This, while our fans, then the obvious victims . . . seethe in rightful anger.¹⁹⁴

This sort of potential situation could be seen in any number of similar contexts, such as if *Harjo* had been decided the other way, and then the Redskins were to host a game against the Kansas City Chiefs. Is this really the optimal situation that Native Americans would hope for? Furthermore, “it’s tempting to think that the same activists who now complain that the presence of Indian team names is an insult would then say the absence of Indian team names is proof of racism.”¹⁹⁵ Thus, just because there is a viable means to challenge such references under the Lanham Act, the Native American groups who feel strongly enough to do so ought to consider the implications of what a meritorious claim would bring them: the elimination of an honorary means of patronizing a part of their past and culture, thus further accelerating the decline of the Native American population and its history.

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¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Miller, *supra* note 28, at 294.

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