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

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

Petitioners

1. Summary of Petitioners' Witnesses and Evidence.

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

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

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

2. Testimony of the Seven Petitioners.

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

---

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

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

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

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

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

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

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

3. Harold Gross.

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

---

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

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

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

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

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

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

4. Resolutions By Organizations.

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

---

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

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

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

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

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

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

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

5. History Expert.

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

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

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

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

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

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

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

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

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

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

6. Social Sciences Experts.

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

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

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

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

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

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

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

Respondent

1. Summary of Respondent's Witnesses and Evidence.

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

2. Respondent's Witnesses.

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

Linguistics Experts

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

1. Denotation and Connotation.

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

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

3. Dictionary definitions of "redskin(s)."

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

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

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

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

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

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

6. Findings of fact regarding linguists' testimony.

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

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

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

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

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

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

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

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

Film Expert

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

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

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

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

Survey Evidence

1. Petitioners' Survey.

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

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

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

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

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

Number and percentage answering "yes, offensive to me":

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

2. Respondent's Rebuttal.

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

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

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

3. Findings of Fact regarding survey.

In view of the contradictory testimony of the parties' marketing experts regarding the extent to which petitioners' survey realized its stated objective, we find it useful at this time to state our factual conclusions regarding this survey. While a few of Dr. Jacoby's criticisms have some merit, we note that no survey is perfect and even a flawed survey may be received in evidence and given some weight if the flaws are not so severe as to deprive the survey of any relevance. *See, Lon Tai Shing Co. Ltd. v. Koch & Lowy*, 19 USPQ2d 1081 (S.D.N.Y. 1990) and cases cited therein; and *Selchow & Righter Co. v. Decipher, Inc.*, 598 F. Supp. 1489, 225 USPQ 77, 86 (E.D. Va. 1984). After careful consideration of Dr. Ross' testimony, the survey report and the substantial survey

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

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

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

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

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

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

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

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

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

Applicable Legal Principles

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

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

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

Section 2(a)

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

> No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it -
>
> (a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons,

---

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

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

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

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

Scandalous Matter

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

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

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

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

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

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

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

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

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

---

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

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

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

Matter Which May Disparage

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

---

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

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

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

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

---

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

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

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

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

---

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

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

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

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

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

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

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

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