



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com  
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

## Native Mascot Foes Eye Public Arena After High Court Loss

By **Andrew Westney**

Law360, New York (June 23, 2017, 3:56 PM EDT) -- The U.S. Supreme Court's blockbuster decision striking down a federal ban on registering offensive trademarks cemented the legal right of the Washington Redskins and other sports teams to trademark Native American-themed names and logos, but critics of those teams will now redouble their efforts to turn public opinion against the use of those marks.

The high court **ruled Monday** in *Matal v. Tam*, a separate case brought by a rock band called The Slants, that the Lanham Act's ban on offensive trademark registrations ran afoul of the First Amendment. This allows Washington's NFL team to prevail in a battle over its marks with Native American activists that is currently on pause in the Fourth Circuit.

The decision is a major blow to Native Americans and others who consider the name of the team to be a racial slur. It eliminates a key weapon they were hoping to use to undermine the use of such marks by the NFL team and other pro franchises like the Cleveland Indians, whose "Chief Wahoo" logo has also been the target of **trademark proceedings**, according to Loeb & Loeb LLP partner Douglas Masters.

"As one piece of the strategy to create pressure legally to put the teams at a disadvantage in terms of their ability to control their [intellectual property], I think that's been effectively nullified by the decision in the Tam case," Masters said.

The ruling "certainly doesn't end the issue with regard to attempts to change sentiment around the use of Native American names and imagery, but it does change the tool," he added.

But given that teams couldn't be legally forced to stop using their controversial marks whether they won or lost their trademark registration battles, the suit accomplished its goal of focusing unwanted negative attention on the teams, attorneys say.

Now, the overarching concern for the marks' opponents is to continue to sway advertisers, sponsors, fans, media and politicians to increase the pressure on teams and their respective leagues to do away with the marks.

Monday's decision was "a touchdown for the Redskins" and "a home run for the Indians," said Glen A. Rothstein of Rothstein Law APC, but "what this really is going to come down to is what effect this is going to have in the court of public opinion."

The Washington team has long insisted that the use of its name is a positive one. After a May 2016 Washington Post poll found that 9 out of 10 Native Americans weren't offended by the term, team owner Dan Snyder said in a statement that the team, "our fans and

community have always believed our name represents honor, respect and pride."

Justice Samuel Alito's ruling on Monday, which held that the so-called disparagement clause of Section 2(a) of the Lanham Act effectively discriminated against unpopular speech, will permit the team to restore their trademark registrations after they were revoked under the law in 2014.

Attorneys for the team said they were thrilled by the ruling — and they had good reason to be, according to Lori Landew of Fox Rothschild LLP.

"It's a big win from the perspective of any time you're battling anything, the fewer fronts you have to battle on, the better," Landew said. "If you're battling it both in the forum of public opinion but also in a battle over whether you are legally allowed to do something, that divides your attention and eats up resources."

But officials of the National Congress of American Indians and the Change the Mascot campaign counted the case as at least a partial success, saying in a statement Monday that they were "gratified that this Supreme Court case amplified the intensifying public debate over the NFL's support for bigotry against Native Americans."

The groups, which backed the efforts of Amanda Blackhorse and other activists to compel the team to abandon the "R-word," said that the term was "designed from the beginning to promote hatred and bigotry against Native Americans," and they urged the NFL not to "hide behind these rulings."

Change the Mascot and Oneida Nation spokesman Joel Barkin told Law360 that "the solution to this was never going to be a legal one, and at the end of the day, it was going to be about enough people coming together, organizing and making it clear to the NFL ownership and Dan Snyder that in 2017 it is unacceptable to use a dictionary-defined slur as a team name."

And the Tam ruling may embolden opponents of the marks by resolving the decadeslong legal muddle over application of the Lanham Act's disparagement clause and putting pressure squarely on the teams when they go to register their marks, Rothstein said.

"This actually could have a productive effect. Now commissioners and athletes and celebrities have a new fire to stoke, because they can say, 'Look, now you've got clarity on the issue, you're going ahead and doing this anyway, and it's wrong,'" he said.

Although Snyder still appears unwilling to budge on his team's use of the marks, public pressure has already started to have an impact on the Cleveland Indians' use of its Chief Wahoo logo, experts say.

The Indians' World Series run last fall **put a spotlight** on the name and logo, and MLB Commissioner Rob Manfred said during an Oct. 26 press conference before Game 2 of the Series that the logo, which depicts the head of a grinning, red-skinned man wearing a feather, is "offensive to some people" and that he planned to talk with Indians owner and CEO Paul Dolan after the end of the Series about the logo.

Then **in April**, MLB said Manfred had had "productive discussions with the Cleveland Indians regarding the commissioner's desire to transition away from the Chief Wahoo logo."

Barkin said that MLB has shown "a real change in tone," which he believes is due in part to the campaign against the Washington NFL team's marks.

And while — thanks to the Tam decision — Cleveland is expected to see the end of

Trademark Trial and Appeal Board proceedings seeking to invalidate its trademark registration for the logo, opponents have found another way to attract public attention: by filing human rights complaints over the use of the mark in Canada.

While Cleveland **defeated a bid** in Ontario court last fall to stop the Indians and MLB from being able to use the team's nickname and logo in the province during the American League Championship Series, the team and league **still face** Canadian human rights activist Doug Cardinal's discrimination claims over the "Chief Wahoo" logo before the Human Rights Tribunal of Ontario and the Canadian Human Rights Commission.

Michael Swinwood, an attorney for Cardinal, said the human rights actions have a twofold purpose of raising public awareness and seeking "to demonstrate how unconsciously racist North American society is."

"I think it's inevitable we're going to win out," Swinwood said. "I think it goes without saying that any properly informed, reasonable person presented with the facts would conclude it's a discriminatory use of a logo against indigenous people and should not continue."

Barkin stressed that opposition to both teams' marks isn't limited to Native Americans or those on the liberal side of the political spectrum, noting that the New York Legislature passed a unanimous resolution in 2014 calling on Washington to drop its name.

"There are those in the media who'd like to try to turn this into a partisan issue, but at its core, it's a human rights issue, a justice issue, and regardless of who's in political power, that's the way it should be and hopefully will be received," he said.

Although the Tam ruling frees up teams to register whatever trademarks they wish, having free speech protections doesn't validate the marks or mean using offensive marks is worth it, attorneys say.

"It doesn't necessarily make it right or necessarily make it a good decision from a business or moral standpoint when you're trying to have your team and league viewed as welcoming and inclusive," Landew said.

And if the ruling leads to a spate of filings to register offensive trademarks, that's not the company a high-profile team wants to keep, attorneys say.

In the end, a given team's decision to hold on to or let go of an offensive mark will come down to both the team ownership's sensitivity to criticism and the cost to the franchise's bottom line from continuing to use the mark — and the less criticism affects a particular club, the stronger the economic threat will have to be.

While teams that use controversial marks benefited from the Tam decision, the case put a little more weight in the scale for their opponents, experts say.

"The whole point with the fight is: 'How do we bring pressure to bear on people reluctant to make changes, or aren't making them fast enough?'" Masters said. The case "certainly created visibility, certainly created exposure, so they get the benefit of that even though they lost."

Representatives for the two teams, MLB and the NFL did not respond to requests for comment.

--Editing by Katherine Rautenberg and Sara Ziegler.