

Why Redskins decision is wrong

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Redskins trademark canceled

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CNN —

The Washington Redskins find themselves under (deserved) fire for their name, which many Native Americans and others find to be a racial slur. Previously the target of protests and opprobrium, the Redskins have now lost their federal trademark registration for the name, as it was deemed too disparaging to remain protected. There are two issues to consider here: one is technical and the other is one we should all find troubling.

The first: This case was about a trademark, and the primary purpose of trademark law is to protect the public so that the public can accurately know the source or origin of goods and services. But headlines that say the Redskins lost their trademark are inaccurate.



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All they lost was their trademark registration, not the right to use the racist term to identify their team – and that is a key point. In the United States, trademark rights flow from an organization using the trademark; technically, you don't need to register a trademark in order to have trademark rights. (In other countries, you need a registration).

With its common law rights intact, the team is free to continue to call itself the "Redskins." Moreover, it can still sue you for selling counterfeit Washington Redskins gear, and it can still block someone from starting a Washington Redskins dodgeball team. The Washington

Redskins still have trademark rights, and strong rights at that.

If the team owners still have rights in the trademark, why is losing the registration a big deal? What does a registration give you? It gives you a few statutory presumptions in the event that you go to court over enforcement of your trademark. It gives a presumption of ownership and validity. In simple terms, the cancellation only means that if there is a trademark infringement lawsuit, the Washington Redskins team is going to have to pay a bit more in attorneys' fees to win its case.

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But nobody can seriously argue that Dan Snyder's football team is not the owner of the still-intact trademark rights, nor that the public associates his team with the racist name.

The second issue: There is something even more offensive than the team's name: The fact that this case happened at all. The decision, I believe, has First Amendment implications that we shouldn't ignore.

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I do not care whether you like or dislike the Washington Redskins' name. I think it's a pretty dumb thing to call a football team. If Native Americans believe that "redskin" is offensive to them, then it is. Most people agree that it is about as offensive as using any other ethnic slur. I respect their position and their argument.



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Nevertheless, here are my criticisms of this decision: Section (2)(a) of the Trademark Act bars the registration of any trademark that is "immoral" "scandalous" or "disparaging." In other words, a civil servant executing the registration is allowed to be the arbiter of morality. Do we really want that?

Trademarks propose a commercial transaction. When you see or hear a trademark, you immediately receive information in a short-hand way that communicates where the products come from, or what level of service you can expect. Trademarks are First Amendment protected expression. There should be no issue with limiting their use to mislead the public.

After all, what point do they serve if they do not propose a truthful association with their owner? And what rational governmental purpose does it serve to deny a benefit to a business because it might be deemed “immoral” by someone?

And why are we even arguing the point? The government should not be in the business of deciding what is moral, immoral, or offensive. This section of the trademark act is a leftover from Victorian times, and is used now primarily to promote social agendas with coercive censorship.

To justify such censorship, the government must demonstrate that the harms it seeks to address are real and that its restriction will in fact alleviate them to a material degree. In addition, the courts have found, such a restriction “may not be sustained if it provides only ineffective or remote support for the government’s purpose.” These mandates are “critical,” for otherwise “[the government] could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.”

In this case, what is the governmental purpose in depriving the Redskins of their trademark registration? Is it that the government is serving as a morality teacher? Is it choosing a favored position, and then enforcing it by only giving government benefits to companies that agree with that orthodoxy?

Do you trust any government to tell you what your morality should be? If so, do you trust this government to do that?

Remember, even if you’re one of the well-intentioned many who think that the name is disgusting, do you want to surrender your First Amendment rights to the next group who might find your morality to be outside the norm? I do not. While I think that Dan Snyder should change the name of his football team, I think that the government should remain neutral in the matter.

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