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ETHNIC TEAM NAMES AND LOGOS — IS THERE A LEGAL SOLUTION?

CATHRYN L. CLAUSSEN*

The social implications of ethnic team names and logos in sport have been extensively discussed in the literature of sport sociology. The primary focus of this discussion has been Native American names and symbols, since this is the ethnic group predominantly represented in this fashion. Despite the fact that not all Native American groups support the elimination of ethnic team names and symbols, most of the commentary has taken the position that such representations are stereotypically racist and demeaning, and should be eradicated. Whether there are any legal means for eliminating ethnic team names and logos in sport is the focus of this Article.

This issue involves consideration of a tension between two cherished principles: the teams' right to free speech and the right of ethnic minorities to live free from discrimination. "It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values."¹ When two such fundamental principles compete, how should the tension be resolved? Should measures aimed at achieving equality carry more weight than the freedom of speech in determining a legal solution to this social problem?

Specifically, the legal issue here is whether it is possible for a state or local government to prohibit the use of ethnic team names and logos without running afoul of the First Amendment's protection of the freedom of speech.² In interpreting the First Amendment, the general rule is that content-based restrictions on speech violate the Constitution unless they are necessary to achieve a compelling governmental interest.³ However, over the years the Supreme Court has developed a tradition of categorical analysis of speech that has afforded less constitutional protection to certain categories of speech. According to this traditional

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1. *Doe v. University of Michigan*, 721 F. Supp. 852, 853 (E.D. Mich. 1989).
2. U.S. CONST. amend. I.
3. *Burson v. Freeman*, 112 S.Ct. 1846, 1851 (1992)(plurality).

analysis, “[c]ore political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.”⁴ Commercial speech and “fighting words” are the two types of speech within this hierarchy that are relevant to the issue at hand.

Five legal approaches to the problem of offensive team names or logos may be analyzed in the context of First Amendment jurisprudence. The first two, permit denials and funding denial statutes, are considered in the context of commercial speech analysis. Two others, hate speech codes and pupil discrimination laws, are analyzed under the fighting words doctrine. And the last, trademark cancellation, is reviewed separately.

I. COMMERCIAL SPEECH AND ETHNIC SPORT SYMBOLS

The Supreme Court extended First Amendment protection to commercial speech in 1976.⁵ Commercial speech includes such things as trade names, signs, posters, and product labels because their purpose is to provide information to consumers about the identity and quality of products.⁶ Team names and logos certainly qualify as commercial speech because they serve as identifiers of sports teams and associated merchandise.

A. *Permit Denials/Revocations*

The first legal approach to the problem of ethnic team names and logos is the denial or revocation of some kind of permit — for example, construction permits, signage permits, or advertising label permits (Certificates of Label Approval). In two cases involving Sambo’s Restaurants, permission to construct the restaurants or erect Sambo’s signs was at issue. Sambo’s Restaurants used a logo featuring a “Little Black Sambo” — a little grinning African-American boy. The name Sambo has been used as a derisive nickname for African-American men throughout the last 100 years, and black schoolchildren often used to be

4. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2564 (1992)(Stevens, J. concurring).

5. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

6. See *Friedman v. Rogers*, 440 U.S. 1, 11 (1979); *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991); *Sambo’s Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 694 (6th Cir. 1981); *Baldwin v. Redwood City*, 540 F.2d 1360, 1366 (9th Cir. 1976); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1233 (E.D.N.Y. 1993); *Sambo’s of Ohio v. City Council of City of Toledo*, 466 F. Supp. 177, 179-180 (N.D. Ohio 1979).

subjected to ridicule with the name.⁷ In Ann Arbor, Michigan, Sambo's Restaurants sought a construction permit for a Sambo's. When some members of the City Council balked because of the name's offensive connotations, the restaurant company agreed not to use it, and built under the name Jolly Tiger instead. Jolly Tiger proved not to be as profitable as restaurants operated under the name Sambo's, so they later applied for permits to change the name and erect two Sambo's signs. The City Council granted them permits and then revoked them a week later, saying Sambo's was violating their earlier agreement; Sambo's then sued the city of Ann Arbor. The city argued that the name Sambo's was not protected speech. Disagreeing, the United States Court of Appeals, Sixth Circuit, held that the revocation of the sign permits clearly violated the First Amendment because the signs were protected commercial speech.⁸

A similar situation occurred in Toledo, Ohio. Sambo's Restaurants applied for a construction permit, but the National Association for the Advancement of Colored People (NAACP) objected to the use of the Sambo's name in Toledo. The City Council approved the permit, but on condition that the name Sambo's not be used. Again, Sambo's sued, and the United States District Court held that use of the name was protected commercial speech, regardless of its offensiveness to some people.⁹

Finally, in another case, Hornell Brewing Company applied for a Certificate of Label Approval to name a malt liquor "Crazy Horse." Crazy Horse was a revered American Indian leader who advocated sobriety and sought to prevent Native American exploitation by the federal government. Because of the offensive use of the name, the United States Congress passed a federal statute barring anyone from using the name Crazy Horse on an alcoholic beverage. Hornell sued the federal government for violating their freedom of speech. The United States District Court ruled in favor of Hornell Brewing, holding that the name was protected commercial speech.¹⁰

It must be recalled here, however, that commercial speech has only limited protection under the First Amendment. Since *Central Hudson Gas v. Public Service Commission* was decided in 1980, the Court has allowed some restrictions on the content of commercial speech if the regulation directly advances a substantial government interest in a nar-

7. *City of Ann Arbor*, 663 F.2d at 701-702.

8. *Id.* at 701-702.

9. *Sambo's of Ohio*, 466 F. Supp. at 178-180.

10. *Hornell Brewing*, 819 F. Supp. at 1246.

rowly tailored manner.¹¹ Any attempt to restrict the usage of team names or logos would have to pass this *Central Hudson* test, and prohibiting them on the basis of pure offensiveness would probably fail the substantial government interest prong. "If there is a bedrock principle of the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."¹² In other words, eliminating offensive speech cannot, in and of itself, be a substantial government interest.¹³ Therefore, ethnic team names and symbols are protected commercial speech under the First Amendment, and may not be eliminated simply because of their offensive nature.

The courts have recognized, however, a substantial government interest in preventing racial unrest. In the case of *Sambo's*, the City of Ann Arbor argued that it had a substantial interest in promoting its policy of equality and racial harmony. The court agreed that this was a substantial interest, but concluded that the city had not proved that the name *Sambo's* would cause disruption enough to significantly frustrate that goal. Speculation as to the name's negative effect was not enough — tangible proof was required and none was proffered.¹⁴ Thus, preventing the use of the name *Sambo's* did not directly advance the City of Ann Arbor's interest in promoting racial harmony. Therefore, attempting to regulate the use of the name failed the direct advancement prong of the *Central Hudson* test and violated the First Amendment. In the "Crazy Horse" case, the federal government did not try to argue that it had a substantial interest in abating the perceived offensiveness of the name; this, of course, is what the First Amendment protects against. Instead, the government argued that it had a substantial interest in protecting the health and welfare of Native Americans by preventing the enhanced appeal of alcohol due to the Crazy Horse label. The court concluded that this claim was too speculative, and thus the statute did not directly advance any governmental substantial interest.¹⁵

Similarly, in the case of a team name like *Redskins* or a logo like the *Cleveland Indians' Chief Wahoo*, even if the government could assert a substantial interest in promoting racial harmony and equality, producing tangible evidence that use of the symbol directly disrupted that goal

11. *Central Hudson Gas v. Public Service Comm.*, 447 U.S. 557 (1980).

12. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

13. *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1234 (E.D.N.Y. 1993) (citing *Texas v. Johnson*, 491 U.S. 397, 399 (1989)).

14. *City of Ann Arbor*, 663 F.2d at 695.

15. *Hornell Brewing*, 819 F. Supp. at 1235, 1237-1238.

would be difficult. It is speculated that the use of such names and logos contributes to inequality by damaging the self-esteem of Native American children.¹⁶ But it would be difficult to prove a direct connection between the symbol and that harm to the exclusion of other factors contributing to low self-esteem, like poverty and reservation life. Nor does the fact that several Native American advocates have protested the use of such names and logos necessarily constitute sufficient evidence of racial disruption. Indeed, the NAACP protested the use of the name Sambo's in Toledo, and several City Council members objected to it in Ann Arbor — one even threatened to lead an economic boycott of the restaurant if they used the name. But the courts in both cases did not find these protests to be so disruptive of the cities' interest in maintaining racial harmony that denying or revoking permits would directly advance that goal by eliminating the stimulus for the protests.¹⁷ The demonstrations against the use of ethnic sport symbols that occurred outside the 1991 Braves World Series and the 1992 Redskins Super Bowl in Minneapolis, where the police reported 500 and 3,000 protesters respectively, would probably not constitute any greater evidence of racial disruption.¹⁸ Therefore, it is unlikely that the direct advancement prong of the *Central Hudson* test would be met.

If, however, a government attempted to restrict the use of such names, and the regulation did directly advance a substantial government interest in maintaining racial harmony and equality, then the last prong of *Central Hudson* would have to be met: the regulation would have to be narrowly tailored to achieve the government's goal. That is, it should not burden more speech than necessary. If there are alternative measures that hinder speech less than the regulation does, then the statute is not a proportionate means to accomplishing the government's goal. To pass this prong of the test, any law would have to carefully define what types of names (Redskins versus Braves versus Seminoles) and what types of logos (Wahoo versus Illiniwek) were being prohibited. And if means other than burdening speech were available, such as educating the community about Native American culture in order to prevent racial misunderstandings sparked by the use of ethnic team names and logos, then this would be an argument that restricting speech by eliminating these symbols was not narrowly tailored enough to the specific problem

16. Laurel R. Davis, *Protest Against the Use of Native American Mascots: A Challenge to Traditional American Identity*, 17 J. SPORT & SOCIAL ISSUES (no. 1) 9, 14-15 (1993).

17. *City of Toledo*, 466 F. Supp. 177; *City of Ann Arbor*, 663 F.2d 686.

18. Davis, *supra* note 16, at 11.

of preventing racial disharmony. In sum, attempts to deny permits for construction, signage, or advertising are likely to fail the test for proper regulation of commercial speech.

B. *Statutes Denying Funding*

A second approach to the problem of ethnic sport symbols has been state and federal legislation that proposes to deny land or funds for facilities that use demeaning names or symbols or that allow activities that use them. United States Senator Campbell recently proposed a bill denying use of public lands for a new stadium for the Washington Redskins.¹⁹ In Ohio, state senator Johnson sponsored a bill that would deny state funds to offending facilities. The bill would have made it possible to threaten to deny use of the new Gateway stadium to the Cleveland Indians to pressure management to drop the team's Chief Wahoo logo.²⁰ Neither bill passed, but if they had and were subsequently challenged on First Amendment grounds, these measures too would be subject to the *Central Hudson* test for restrictions on commercial speech and would probably fail for the same reasons as would permit denials.

There is, however, an argument that might support both statutes of this type and permit denials. If the particular state has a public accommodations law that includes a provision prohibiting discrimination in access to places of public accommodation, and if the government argued that facilities supporting the use of such names discourage ethnic patronage and thus effectively create unequal access to the facilities, and if they can provide tangible evidence of this (e.g., a high percentage of Native Americans refuse to patronize Redskins or Indians games because of the names or logos), then a permit denial or statute denying funding to such a facility might be upheld. Indeed, this rationale suc-

19. Lyle Spencer, *Indian Nicknames: the Great Debate*, COLLEGE SPORTS, Nov. 1993, at 13.

20. Section B of the Bill reads as follows:

No public agency shall allocate, spend, or use public funds in the construction, management, or operation of a public facility if the owners or managers of the public facility display, advertise, or disseminate, or if any official public activity at the public facility involves the display, advertisement, or dissemination of, material at the public facility that demeans a recognized racial or ethnic group. 'Material at the public facility that demeans a recognized racial or ethnic group' includes an emblem, logo, mascot, or symbol, associated with an athletic team that uses the public facility to play its home schedule or associated with any other organization that uses the public facility to conduct an event open to the public, that incorporates or uses a recognized racial or ethnic group in a demeaning manner.

Ohio Senate Bill No. 189, 120th General Assembly, Regular Session, 1993-94.

ceeded in a Rhode Island case with the result that the Rhode Island Human Rights Commission ordered Sambo's Restaurants to cease using the name Sambo's.²¹

II. FIGHTING WORDS AND ETHNIC SPORT SYMBOLS

The other relevant category of speech in First Amendment jurisprudence is fighting words. An argument exists that offensive names such as "Redskins" (the structural equivalent of "nigger") should be so construed. According to the Court's decision in *Chaplinsky v. New Hampshire*, fighting words, such as calling someone a "damned Fascist," are words:

which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.²²

Fighting words, therefore, are afforded little or no First Amendment protection. Under certain circumstances, racial slurs might fall into the fighting words category and thus be susceptible to regulation.

An example of this type of analysis arose in a dissenting opinion in the *City of Ann Arbor Sambo's* case. The judge argued that "Sambo's" was a fighting word, asserting that "the name Sambo's is offensive and harms the general community by promoting racial insensitivity. This offensiveness and harm is not lessened simply because the word is contained in an advertisement or placed on a sign 30 feet in the air."²³ However, the majority of the court disagreed; by that time the Supreme Court had limited the *Chaplinsky* fighting words exception to words that provoke an average person to immediate violence.²⁴ Therefore, it is likely that team names and symbols, which are more like Sambo's signs than words hurled at a specific person, will be held to be less susceptible to regulation than they would had they fallen within the fighting words exception to the First Amendment.

Moreover, the Court has recently tinkered with this traditional categorical analysis, making it even less likely that restricting such symbols

21. *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 703 (1981) (Keith, J., dissenting).

22. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1941).

23. *City of Ann Arbor*, 663 F.2d at 702-703 (Keith, J., dissenting).

24. *Gooding v. Wilson*, 405 U.S. 518, 524 (1971); *Lewis v. City of New Orleans*, 415 U.S. 130, 139 (1973).

will pass constitutional muster. In *R.A.V. v. City of St. Paul*, a majority of the Supreme Court diverged from the usual categorical approach to First Amendment jurisprudence. In the factual context of an ordinance ostensibly prohibiting fighting words, the Court asserted that the fighting words category was not "invisible to the Constitution."²⁵ St. Paul, Minnesota, had passed the following ordinance:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.²⁶

The Supreme Court held that although this ordinance was construed as regulating fighting words, entirely permissible under the *Chaplinsky* doctrine, it was still unconstitutional because it attempted to restrict such speech because of its underlying discriminatory message.²⁷ That is, only certain types of fighting words were targeted; for example, racist and sexist speech were prohibited, but not speech directed against homosexuals or individuals with disabilities. Targeting certain types of hate speech but not others was considered an unconstitutional content-based restriction on speech. Following this decision, any attempt to regulate hate speech based on its racist content will probably violate the First Amendment. Therefore, attempts to restrict the use of offensive sport labels will have to be in the form of restrictions on discriminatory *conduct* — for example, racial harassment — rather than restrictions on the demeaning *content* of the speech.

A. Hate Speech Codes

A third approach to the problem of ethnic names and symbols is the enactment of "hate speech" or discriminatory harassment codes, similar to those recently put in place in many universities.²⁸ Occasionally, schools elect to abandon an ethnic symbol over the objection of the student body. A school's attempt to do so in reliance upon a hate speech code aimed at preventing demeaning racist speech would probably fail,

25. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2543, 2545 (1992).

26. *Id.* at 2541 (quoting the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn. Legis. Code § 292.02 (1990)).

27. *Id.* at 2543-44.

28. See generally ARATI R. KORWAR, WAR OF WORDS: SPEECH CODES AT PUBLIC COLLEGES AND UNIVERSITIES (1994).

because after *R.A.V.* the constitutionality of most hate speech codes is suspect.

It is, however, conceivable that because of the special nature of the educational setting, another rationale could support such an effort. One high school eliminated its "Johnny Reb" mascot after the principal received several complaints from black students and their parents. Several students filed suit claiming that their collective First Amendment right in their school's symbol was violated. The Fourth Circuit upheld the principal's decision under the *Hazelwood* doctrine that school officials, for reasons of maintaining a proper educational environment, are not required to promote all student speech, especially that speech that the public "might reasonably perceive to bear the imprimatur of the school."²⁹ The court found that a school mascot or symbol "bears the stamp of approval of the school itself," as did the school newspaper in the *Hazelwood* case. The court concluded that the confederate symbol was offensive enough to limit black students' participation in school activities, and "[t]herefore, school authorities are free to disassociate the school from such a symbol because of educational concerns."³⁰

Often, however, schools do not voluntarily relinquish an established team name or symbol. Then the question becomes, can a state legislature *force* schools to change these labels? If the state attempts to do so by enacting a hate speech statute, such an attempt most likely will not pass constitutional muster. The conclusion that must be drawn after *R.A.V.* is that most hate speech laws are unconstitutional. In *R.A.V.*, the hate speech statute that prohibited placing an incendiary symbol on public property was struck down; similar statutes construed as forbidding the adoption of offensive names and logos would in all likelihood suffer the same fate. Hence, hate speech laws cannot be used to force schools to change their offensive ethnic symbols and names.

B. Pupil Discrimination Laws

Approach number four is for a state or school to enact pupil discrimination laws or discriminatory harassment codes. This approach differs from hate speech codes only in that the focus of the prohibition is on discriminatory conduct rather than offensive speech. The decision in *R.A.V.* appears to indicate that laws primarily focused on regulating conduct, that also incidentally include a regulatable category of speech (like

29. Crosby by Crosby v. Holsinger, 852 F.2d 801, 802 (4th Cir. 1988) (quoting *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)).

30. *Holsinger*, 852 F.2d at 802.

sexual harassment law under Title VII),³¹ will not violate freedom of speech.³²

An example of this approach is the Wisconsin pupil discrimination statute. It provides that:

No person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.³³

The Wisconsin Attorney General, James E. Doyle, issued an official opinion interpreting this statute as applicable to Native American team names, mascots, and logos. His opinion construed the statute in the context of an administrative rule defining discrimination as stereotyping, pupil harassment, or perpetuation of past discrimination that differentiates a person or group because of their membership in certain protected categories.³⁴ His opinion stated:

It is entirely possible that an American Indian logo, mascot or nickname could cause an American Indian harm by reinforcing a stereotype and/or creating an intimidating or offensive environment, thus perpetuating past discrimination. Therefore, the language of the statute . . . is comprehensive enough that an American Indian logo, mascot or nickname used by a public school could be a violation of section 118.13.³⁵

This statute has not yet been tested in court on the issue of ethnic sport symbols, but its structure, paralleling as it does the structure of Title IX, should withstand scrutiny.³⁶ The interpretation of the Attorney General, based on Wisconsin law, stands a good chance of being supported by a Wisconsin court because the law focuses on regulating discriminatory or

31. Title VII of the Civil Rights Act of 1964 has been construed to prohibit sexual harassment on the grounds that it constitutes sex discrimination. 42 U.S.C. § 2000(e) et seq. (1988); *Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399 (1986); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1991).

32. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2546-47 (1992).

33. WIS. STAT. § 118.13(1) (1994).

34. WIS. ADMIN. CODE §§ PI 9.02(5), (9), (14) (1986).

35. 80 Op. Att'y Gen. State of Wisconsin 325 (1992).

36. Title IX of the Education Amendments of 1972 reads as follows: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a) (1988).

harassing conduct — which might incidentally include the symbolic speech of endorsing a Native American logo or name.

III. TRADEMARK CANCELLATION AND ETHNIC SPORT SYMBOLS

Finally, the fifth approach to the problem of ethnic team names and logos is to control offensive trademarks under the federal trademark registration and cancellation provisions, as Paul Loving suggests in an in-depth article on this subject.³⁷ This is possible because most professional and collegiate team names and logos are federally registered trademarks. According to the Lanham Act,³⁸ which is the federal trademark law, the trademark examiner in the United States Patent and Trademark Office may refuse registration of a mark under section 1052 of that law. Section 1052 allows for refusal to register a mark if it “[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter 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.”³⁹ Marks held to have violated this law include such things as the name “Madonna” for wines, a representation of Christ as a lamb for tabernacle safes, and the name “Dough-boy” for a condom.⁴⁰ Also held to violate section 1052(a) was the name “Senussi” for cigarettes; this was the name of a sect of Muslims that forbade using cigarettes.⁴¹

Two marks that were arguably offensive to different groups have, however, recently been approved for registration: JAP and Moonies. The trademark JAP was allowed for two reasons: one, it was applied for before the Trademark Board determined that “injury to feelings” could give standing to challenge the mark; and two, a Japanese American owned the corporation seeking to register the mark and the Board felt that he could not be disparaging himself. Loving makes the argument that this is poor reasoning: the Board would not allow an African-American to trademark the word “nigger.” In fact, one court has refused to allow an African-American to change his own name to include a form of the word “nigger.”⁴² “Moonies” was granted trademark registration despite the apparent disparagement of the Unification Church, because it has the alternative meaning of exposing one’s behind and was

37. See generally Paul E. Loving, *Native American Team Names in Athletics: It's Time to Trade These Marks*, 13 LOY. L.A. ENT. L.J. 1 (1992).

38. Lanham Act, 15 U.S.C. §§ 1051-1127 (1988).

39. 15 U.S.C. § 1052(a) (1988).

40. Loving, *supra* note 37, at 20, 21 n.138, 22.

41. *Id.* at 23.

42. *Id.* at 26.

used in that sense to sell a doll which dropped its pants when squeezed. The Board noted that this was a close case because of the widespread use of the word "Moonies" in reference to the Unification Church.⁴³

It is possible that a name like Redskins could be considered to disparage Native Americans in the same way as the examples above. Although it is too late to refuse the granting of trademark registration to the Redskins, the Lanham Act provides for cancellation of a trademark under section 1064 on the grounds that it was improperly registered in violation of section 1052(a).⁴⁴ Indeed, in September 1992 a Native American group filed a cancellation proceeding against the Washington Redskins based on a section 1052(a) violation.⁴⁵ This law does not run afoul of the First Amendment because it does not deprive the business of the right to use the mark, but only the right to have it protected by federal registration. In fact, the court in *Sambo's v. City of Toledo*, after finding a free speech violation on the part of the Toledo City Council for their refusal to grant sign permits, recommended that the city or the NAACP seek a remedy through trademark cancellation proceedings.⁴⁶

The threat of trademark cancellation could make sports teams with offensive names or logos very uneasy. "The merchandising of team trademarks on clothing, athletic equipment, and novelty gifts produces considerable revenues each year. In 1992, analysts estimated professional athletic licensing produced over \$6.4 billion in sales."⁴⁷ And by 1992, total collegiate trademark licensing earned close to \$2 billion.⁴⁸ Given the enormous revenues generated by the sale of trademarked sports products, teams might feel financial pressure to eliminate offensive symbols if such cancellation proceedings prove to be successful, and their trademarks are thus at risk of losing legal protection.

43. *Id.* at 29-30.

44. 15 U.S.C. § 1064 (1988).

45. Loving, *supra* note 37, at 43 n.296. The Trademark Trial and Appeal Board of the United States Patent and Trademark Office ruled on March 11, 1994, that the Native American group does have standing to seek such a cancellation, and need not prove actual damage in order to prevail. *Harjo v. Pro Football Inc.*, 30 U.S.P.Q.2d 1828 (Cancellation No. 21,069) (1994).

46. *Sambo's of Ohio v. City Council of City of Toledo*, 466 F. Supp. 177, 180 (N.D. Ohio 1979).

47. See Ruth H. Alexander, *The Economic Impact of Licensing Logos, Emblems and Mascots*, 5 J. LEGAL ASPECTS OF SPORT 28, 30-32 (1995) (citing 1993 *Annual Industry Report, TEAM LICENSING BUSINESS*, May 1993, at 15-20).

48. *Id.* at 32.

IV. CONCLUSION

In summary, an evaluation of five possible approaches to the problem of ethnic team names and sport logos in light of First Amendment free speech concerns has yielded the following conclusions. Permit denials/revocations are unconstitutional restrictions on protected commercial speech unless it can be proved that the action taken directly advances, in a narrowly tailored fashion, a substantial government interest in promoting racial equality and harmony. Most of the time, arguments to that effect have failed as too speculative.

Laws that would withhold government funding for facilities that used or allowed activities that used demeaning ethnic symbols would probably also be overturned as unconstitutional restrictions on commercial speech. However, measures such as funding statutes or permit denials might find support in the civil rights laws if it can be proved that such symbols violate laws against discrimination in places of public accommodation by effectively denying equal access to minorities.

Hate speech statutes that might be used to force name changes are probably unconstitutional after *R.A.V.* if they target specific types (racist, sexist, etc.) of fighting words. However, pupil discrimination/harassment laws that focus more generally on hateful conduct than on speech may have survived *R.A.V.* and might be useful for eliminating demeaning symbols in educational settings.

Finally, trademark cancellation proceedings may pose enough of a threat of potential lost revenue that teams will voluntarily abandon offensive trademarks that disparage ethnic minorities. A cancellation will not violate the First Amendment because only federal protection of the marks will have been restricted, not the team's right to use the marks.

In conclusion, only limited possibilities exist for addressing the problem of demeaning ethnic team names and symbols using legal means. While both free speech and eliminating unfair discrimination are fundamental to the American democratic enterprise, our legal system appears to place a higher value on the necessity of preserving freedom of speech when the two principles collide as they do on this issue of ethnic sport symbols. Perhaps it is true that the best way to counter such undesirable speech is through the use of better speech by attempting to educate people about the harmfulness of ethnic stereotypes.

