

The Ongoing Fight for the Fighting Sioux

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Introduction

Of the numerous civil rights and social justice issues prevalent within the discourse of the United States, use of Native American mascots and imagery by college and professional athletic teams continues to be a divisive issue within and beyond sport. There are many historical, legal, political, economic, and sociological factors that have been used to explain the origins of Native American team monikers and why they have prevailed over time. There are strong views both in favor of retaining and eliminating this practice, and continued use of team names, mascots, and imagery remains a topic of much debate. Sport management scholars, in particular, have debated the legal options available to schools facing controversy over continued use of Native American team names, mascots, and imagery (Claussen, 1996; Moushegian, 2006; Staurowsky, 2007).

Legal Options

Use of Native American imagery in sports implicates several legal bases, including public accommodations civil rights law, the First Amendment, and trademark law (Botnick, 2008; Wright, 2007). The legal vehicle most often pursued to challenge the practice of using Native American team names is the trademark challenge using the Lanham Act for cancellation as a disparaging mark (Wright, 2007). Section 2(a) of the Lanham Act provides for denial of registration or cancellation of a registered trademark if the mark is found to be disparaging, defined as "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." In *Harjo v. Pro Football* (2003), the high-profile and protracted litigation challenging the Washington Redskins trademark, the plaintiff's initial cancellation petition to

the Trademark Trial and Appeal Board (TTAB) in 1992 alleged that the Redskins mark disparaged Native Americans and cast Native Americans into contempt or disrepute in violation of Section 2(a) of the Lanham Act (p. 99). In subsequent legal proceedings in 1999, the TTAB issued a cancellation order noting the Redskins name may "bring Native Americans into contempt or disrepute" (*Harjo*, 1999, p. 1748). During litigation in 2009, notably 17 years after the initial cancellation petition, the owners of the Washington Redskins were able to establish economic prejudice showing heavy investments in marketing and developing the Redskins brand and cancellation of the marks was stopped (*Harjo*, 2009; Clement & Grady, 2012).

Prior legal challenges to use of Native American team names and mascots have been largely unsuccessful for the most part (Wright, 2007) and the legal difficulties in eliminating public universities' use of team names and mascots are well-established (Moushegian, 2006). Alternatives to litigation have included protesting outside stadia as well as public pressure from groups such as the NCAA, which have developed policies about use of Native American imagery by colleges and universities in connection with athletic team names. Since the early 1970s, more than 600 high school and college teams have stopped using Native American team names or mascots (Behrendt, 2000). Perhaps reflective of their educational mission, "numerous intercollegiate athletic teams have changed names and implemented re-branding marketing activities to support those efforts [while] major professional sports franchises have resisted" (Nagel & Rascher, 2007, p. 795).

The NCAA Enters the Debate

The debate intensified in 2005 when the NCAA created a policy to prohibit the use of Native American team

names/monikers, mascots, and imagery in college sports on the basis that such names are "hostile or abusive" (NCAA, 2005). The policy stemmed from a June 2005 meeting of the NCAA Minority Opportunity and Interest Committee, which met to discuss the ongoing debate surrounding the Confederate Battle Flag and the U.S. Commission on Civil Rights' statements regarding the use of Native American imagery at sporting events. Overwhelming opposition to the practice from Native American organizations and most tribal leaders have led to further contention about this continued practice.

In its policy dissemination, the NCAA declared that schools with offensive mascots and imagery could not display their logos on the court or field or on a uniform, nor could they allow students to don the mascot costumes on the sidelines during any postseason play (NCAA, 2005). The ban targeted 19 colleges displaying Native American imagery, although some were granted exceptions or changed their mascot and imagery (Staurowsky, 2007). Noted one legal commentator, "the ban has received much criticism since its inception, including allegations that the ban violates civil rights, First Amendment, and anti-trust laws" and "also contains possible trademark law violations, although no school has challenged the ban on such grounds" (Botnick, 2008, p. 737). Under trademark law, it can be argued that the policy forces schools to change or abandon their established marks, names, and images, effectively depriving each school the use of its trademark (Botnick, 2008).

Since the NCAA enacted this policy in 2005, 12 schools have changed their name and/or mascots to adhere to the NCAA's mandate, five were permitted to retain their name and/or mascot under the rule's "namesake exemption" by producing support from American Indian tribes, and the University of North Dakota (UND) has retained its Fighting Sioux mascot while disputing the NCAA's ability to restrict and punish those schools that do not adhere to the NCAA's policy related to use of Native American team names/monikers, mascots, and imagery.

The NCAA has continually denied the school's use of "Fighting Sioux" because two of the three Sioux tribes in the state oppose the nickname. In 2009, the state Board of Higher Education agreed to drop the nickname and UND agreed to phase both the logo and nickname out by 2011 (Wetzel, 2011). In an unusual legal twist, however, state lawmakers subsequently intervened by passing a law that requires the university to retain the moniker and logo (Finneman, 2011). The Governor signed House Bill 1263, as members of the NCAA, which states that neither UND nor the state Board of Higher Education may take action to discon-

tinue use of the nickname or logo. The school was facing the dilemma of having to either disobey the state law or to disregard the rules of the NCAA. In addition, the matter was further complicated for the Athletics Department in that other schools in the conference, as members of the NCAA, had supported the NCAA's position and were not willing to play against UND in any sport, essentially putting their entire season in jeopardy (Haga, 2010). Potentially more damaging, the Big Sky Conference, which UND hopes to join next year, has said the nickname issue will complicate the school's application for conference membership and more teams are refusing to schedule games against UND (Haga, 2010).

Eight months later (November 2011), the law requiring the school to use its longtime nickname and logo, which shows the profile of an American Indian warrior, was repealed in a bid to help the university avoid NCAA sanctions. Along with the repeal was the caveat that UND not adopt a new nickname or logo until January 2015, a provision intended to allow the furor over the change to quiet before the university re-branded itself. Since the repeal, the school has moved to retire the nickname and logo, dropping references to them from websites and changing Internet addresses that referred to the Fighting Sioux. The Indian profile was replaced by a new logo showing the interlocked letters N and D. In February 2012, ardent nickname supporters filed petitions with more than 17,000 signatures demanding that the issue be put to a statewide vote. As part of that process, the initial law temporarily goes back into effect, allowing them to use the longtime nickname and logo. Consequently, the state Supreme Court is considering a challenge to the law brought by the state board, a move that has cost taxpayers more than \$46,000 in lawyers' fees to date (Wetzel, 2012). The NCAA also responded in late February in a letter indicating that the UND teams, most notably the men's and women's hockey teams, would risk forfeiting any postseason games if their athletes, cheerleaders, or band members wear or display the school's Fighting Sioux nickname and American Indian head logo (Lavigne, 2012). The letter further indicated that the NCAA reserved the right to seek reimbursement for expenses incurred by the association for travel, per diem, or other expenses in connection with the championship.

Marketing Implications

The cost of rebranding has been cited as one of the most obvious and reported marketing implications in responding to a challenge over continued use of a Native American team name or changing team names in response to a challenge. In the UND case, the finan-

cial ramifications of complying with each legal and political development have been staggering. To comply with NCAA policy prohibiting Native American imagery, the university spent more than two years scrubbing all references to the team monikers, mascots, and imagery, including purchasing new uniforms and renaming its web site and booster clubs with an interlocking N and D logo. UND had also stopped approving new merchandise designs in October 2010 as part of the university's plans to quit using the logo and nickname. The state Board of Higher Education mandated the transition be substantially completed by December 31, 2011. As recently as February 11, 2012, North Dakota fans visiting the university's athletics web site found their browsers redirected from fighting-sioux.com to a new domain name, UNDsports.com. The university had also already spent \$750,000 to take the Fighting Sioux nickname and logo off of everything from team uniforms to its website. By late February, fighting-sioux.com had been restored, and announcers resumed calling teams the Fighting Sioux (Borzi, 2012). The financial implications of reverting to the original logo have yet to be reported.

Along with the financial implications of rebranding, the UND marketing department is forced to operate in a "wait and see" mode. Developing multiple marketing plans to anticipate the various outcomes with the name changes is not only time consuming but counterproductive. This state of limbo also hinders the ability to generate brand awareness as each change causes a halt in production of any printed materials, advertising plans, and television production schedules. As evidence of the challenges from a marketing perspective, with the most recent threat of NCAA sanctions, UND men's and women's hockey team pictures have been left out of the 2012 national championship media guides as well as some commercials promoting the team and tournament because their uniforms have "Fighting Sioux" on them (Lavigne, 2012). The diminished opportunities for national-level exposure and promotion have resulted in financial losses and damage in terms of public relations, such that the university potentially stands to lose the support of serious constituencies and cannot fully benefit from the national exposure they would have otherwise been afforded by participating in the national championship tournament.

For any college or university going through a controversial change of name and/or moniker, mascot, and imagery, it is important for the university's marketing department to have a strategic marketing plan that demonstrates an understanding of their constituents' needs on both sides of this issue. With uncertainty over a logo or name change due to legal challenges or leg-

islative action, marketers need to find a deliberate way to incorporate historic and newly adopted logos within their promotional materials. This allows marketers to create various promotional materials with a wide range of interest groups in mind. With consumer familiarity and traditions being an increasing concern for sports teams, a long, drawn out controversy may provide a good opportunity to slowly incorporate a transitional logo without much fanfare. In UND's case, they could have incorporated the interlocking N and D into promotional materials, team uniforms, and facilities as the controversy progressed, which may have resulted in less resistance when the NCAA made its most recent decision. A gradual change may also have allowed team pictures, video, and uniforms to be used in marketing materials during postseason tournaments.

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