

2020 and Its Impact on Dragging Some Brands Into the 21st Century

Peter J. Rosene

With 2020 bringing racial equality and social justice to the forefront of the public eye, companies across the nation are suddenly running from a few of their brands containing racially stereotyped iconography, some of which have appeared in advertisements and on store shelves for over a century.

This hurried move away from these brands, many of which are trademarked with the Patent and Trademark Office, comes, ironically, just a few years after the Supreme Court's 2017 decision in *Matal v. Tam*, a case in which an Oregon-based rock band attempted to trademark their name, The Slants, which the PTO later rejected as a pejorative term disparaging those of Asian descent. Prior to *Tam*, the Lanham Act prohibited registration of marks that may "disparage . . . or bring [persons, institutions, beliefs, or national symbols] into contempt or disrepute," but the Supreme Court sided with the band finding this provision of the Act created an unconstitutional burden on free speech.

Coupled with the Court's 2019 decision in *Iancu v. Brunetti* striking down the Act's prohibition on "immoral" or "scandalous" matter, it seems the ceiling has been largely removed on what is worthy of trademark registration. Whether this includes anything up to hate speech, fighting words, or other forms of "unprotected speech" is yet unknown, but I'm sure there are those among us who would be happy to test these boundaries.

Given the racially charged social climate of 2020, it is unlikely we will see many companies taking the court up on this as a new branding opportunity. Yet racially insensitive names have long existed on the Federal Register. These trademarks include Quaker Oats' Aunt Jemima line of trademarks and the Washington professional football team's Redskins marks, both of which are still valid trademarks.

Granted, it may seem a little odd to pick battles over things like packages of rice and syrup bottles, but it is undeniable that symbols have power. These companies, and many others like them, have good reason to distance themselves from their outdated labels. For the average business, controversy is often undesirable since the priority of any for-profit business is to make money. Corporations want to appeal to the largest pool of consumers possible. Why make red or blue political statements or make products "for" black, brown or white consumers when the only color that *really* matters is green. And now more than ever consumers are making their opinions known with their pocketbooks and Twitter.

This is evident in recent years where many companies now make at least some token showing of support for equality. Like clockwork, corporate social media accounts roll out their perfunctory support of minority groups with an LGBTQ flag during Pride Month or the black, red, yellow, and green of Black History Month. 2020, however, requires something more. Whether due to long-time pressure or in preemption of future backlash, companies are finally shedding some of their most outdated—albeit highly successful—brands.

One of the longest running pushes for a branding change in recent memory is the aforementioned Washington Redskins, the football team of our nation's capital. Between 1990 and 2006, two different Native American groups petitioned the PTO to cancel the Redskins mark under the

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anti-disparagement provision of the Lanham Act, discussed above. Remember, this is before *Tam* in 2017, so this would have been valid grounds for cancellation at the time. In fact, both groups were successful in cancelling the registration both at the Trademark Trial and Appeal Board in 2014 and later in the United States District Court. This was later reversed and vacated by the Fourth Circuit following the *Tam* decision in 2017.

The three-year suspension of their trademark, however, made little practical difference because management still refused to change the team's name. It was only after pressure from corporate sponsors like FedEx and retailers like Amazon and Nike that the owners finally announced they would drop the Redskins name in July of 2020. No doubt, this was likely a decision made, at least in part, because Nike and Amazon did not want their customers to associate them with a denigrating name.

No substitute name has yet been permanently selected for the football team, and although it is the right decision, it is one many would argue came decades late. At least to the sponsors and retailers, the optics were bad enough that it was not worth selling the team's merchandise at the risk of enraging potential customers. But the Washington Redskins was not the only brand to find itself plucked from public use.

Some of the most frequent uses of racial stereotypes in branding seem to appear in major food brands. For example, another high-profile brand change in 2020 came from Quaker Oats' popular Aunt Jemima line of products, including syrup and pancake mix, after a spate of criticisms following the death of George Floyd and the Black Lives Matter movement. The brand's image, a smiling Black woman, is a traditional minstrel character known as "mammy," a stereotype for Black women working for white families in the south. Minstrelsy was a form of entertainment beginning in the 19th century, frequently utilizing the (now recognized as) highly offensive practice of blackface.

Almost immediately after Quaker Oats' announced the change of its Aunt Jemima brand, several other food brands utilizing similar imagery quickly followed suit. Mars Food announced it would change the name

of its Uncle Ben's Rice, one of the most popular rice brands in America, to Ben's Original. In addition to changing the name of the brand, Mars Food will remove its representation of a smiling, grey-haired Black man—the titular Uncle Ben—from its packaging. The character's likeness is said to derive from the head waiter of an upscale Chicago restaurant. Uncle Ben's is just another example of a company utilizing imagery of minorities in roles of servitude to market food products.

Other similar brands changing their image in the wake of the Black Lives Matter movement in 2020 include ConAgra Brand's Mrs. Butterworth maple syrup, the packaging of which takes the shape of a woman in a traditional dress and apron. Many critical of the brand perceived this to be yet another traditional depiction of the mammy. B&G Foods, Inc. is also reevaluating its Cream of Wheat subsidiary, whose packaging depicts a Black chef the company has named "Rastus," a pejorative term for black men.

All that can be said about these brands, brands that existed after the abolition of slavery, after the civil rights movement, after the passing of the Civil Rights Act and Voting Rights Act, it's about time.

Symbols have meaning. Symbols can provoke fear just as much as they can instill pride or show a group it is welcome or unwelcome. Whatever these companies' motivations are in changing their brands, I must hope these changes say something more intrinsic about the changing values of our nation and how we choose to represent ourselves—something more than a choice to simply make more money.

There are those who have and will continue to argue this is just another piece of a "cancel culture" feedback loop—an extension of the fallacy of "you're being intolerant of my right to be intolerant!" but equality and social justice does not simply end with passing laws. Whether it is the choice to remove symbols glorifying the Confederacy from our state flags, our parks and our municipal buildings or just taking your cream of wheat without any baggage, Americans are slowly, ever so slowly, coming to terms with the rich, complicated and sometimes grim aspects of our history.

Peter J. Rosene received his J.D. from the University of Kentucky College of Law in 2017, after which he served as staff attorney for Judge Ernesto Scorsone in Fayette Circuit Court. He now practices as an intellectual property attorney at McBrayer PLLC. ■



Farewell, Lauren!



Lauren Butz, who served as the LBA's Communications Coordinator the last four years, accepted a new position with Capture Higher Ed in mid-November. During her time at the LBA, Lauren developed content for *Bar Briefs*, e-mailed the weekly eBriefs, updated our website and managed our social media presence, among other duties. She snapped the photo of her cat, Lady Olenka, that graces the cover of this year's pictorial roster. We wish her well in her new job.