

TRADEMARKING ANIMAL ABUSE: SHOULD THE TENNESSEE WALKING HORSE BREEDERS' AND EXHIBITORS' ASSOCIATION ("TWHBEA") LOSE THE TWHBEA TRADEMARK PORTFOLIO UNDER THE LANHAM ACT FOR FAILURE TO COMPLY WITH THE HORSE PROTECTION ACT?

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I. INTRODUCTION

Animal welfare and intellectual property are hot topics in American culture, business, and jurisprudence. American society is becoming more aware of, and concerned with, the proper care and stewardship of animals of all classifications, including family pets, food stock animals, circus animals, amusement park animals, animals used in laboratory testing, and wild animals. Typically, however, animal advocates look to criminal statutes alone to assist them in their efforts to enforce animal cruelty laws. This paper investigates the potential of synchronistic efforts between sister branches of government, including the United States Department of Agriculture ("USDA") and the United States Patent and Trademark Office ("USPTO"), to help end the abusive practice known as "soring" in the Tennessee Walking Horse industry.

II. THE TENNESSEE WALKING HORSE

A thoughtful discussion of these two traditionally dichotomous areas of law and their potential interdisciplinary application requires sufficient knowledge of the underlying animal abuse issue. Accordingly, the first section of this paper provides a focused summary of the Tennessee Walking Horse breed, its natural gaits, and the enhanced "performance" or "big lick" gait that is the subject of much debate within the animal welfare community and the greater equine business community.

A. A Brief History of the Breed

Horses were introduced into the region now known as the state of Tennessee by early settlers in the late eighteenth century.¹ Upon the opening of a mail route between Nashville, Tennessee, and Natchez, Mississippi, the rugged terrain and lack of established roadways demanded sure-footed riding horses of great stamina and steady temperament.² Settlement of this region expanded rapidly during the early and mid-nineteenth century.³ Pioneers from the east, northeast, and northern regions of North America moved into the area and introduced equine of many different sizes, shapes, and breeds.⁴

The Tennessee Walking Horse breed was developed in the early 1900s and derived from blending six breeds of riding and utility horses already established on the continent.⁵ The goal was to produce a breed of animal that would be hardy enough to plow fields and haul loads, yet refined enough to have smooth, rideable gaits, with all of these mechanical traits governed by a docile temperament and embodied within a conformation that is pleasing to the eye.⁶ Because the Tennessee Walking Horse is

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¹ See ROBERT WOMACK, *THE ECHO OF HOOFBEATS: A HISTORY OF THE TENNESSEE WALKING HORSE* 4-14 (2d ed. 1984) (After American independence was won in 1776, the various tribes of indigenous peoples in the region were forced to sign treaties with white colonists; by 1779, permanent white settlement of the area was rapidly expanding.).

² *Id.* at 13.

³ *Id.* at 17.

⁴ *Id.* at 44-55.

⁵ See *id.* at 20-47. Of these six, only the Thoroughbred – imported from Europe into Virginia and cherished there as a fine, fast mount – had identifiable bloodlines or documented lineage. The other breeds arose from “grade” horses that were selectively bred to develop desired traits exhibited by the original animals. The Tennessee Walking Horse was developed in similar fashion, primarily from grade foundational stock with some Thoroughbred influence introduced to refine the general coarseness typically found in grade stock. *Id.* at 448; see also *The Tennessee Walking Horse Breed History and Description*, TWHBEA, <http://www.twhbea.com/breed/history.php> (last visited Aug. 2, 2016) [<https://perma.cc/KH3E-NL7L>].

⁶ WOMACK, *supra* note 1, at 70-73.

noted for its famed “running walk” – a gait unique to the breed – a brief discussion of the various equine gaits is in order.⁷

Four of the foundational Tennessee Walking Horse breeds – the Thoroughbred, Standardbred, American Saddle Horse, and Morgan – perform traditional gaits.⁸ These gaits (in ascending order according to speed of ambulation), include: (1) a four-beat walk, in which each of the horse’s hooves strike the ground separately in a repeating pattern 1-2-3-4, 1-2-3-4, (2) a two-beat trot, in which diagonal pairs of hooves strike the ground together in a repeating pattern 1-2, 1-2, and (3) a four-beat gallop.⁹ These breeds, and others with similar ambulates, are generally grouped together as “walk-trot-canter” or “w/t/c” horses.

However, two of the Tennessee Walking Horse foundation breeds do not trot. The Narragansett Pacer and the Canadian Pacer walk, pace, and canter.¹⁰ In this pace, the horse’s hooves strike the ground in lateral pairs with both hooves on the same side of the horse striking the ground together.¹¹ The infusion of these pacing breeds into the w/t/c breeds resulted in the Tennessee Walking Horse’s unique running walk.¹²

In the running walk, the horse’s hooves strike the ground in a similar 1-2-3-4 sequence, as a typical quadruped walks. However, the running walk is defined by its unique combination of speed, fluid transition of weight distribution as each hoof strikes the ground and then lifts again, and the lack of vertical movement of the horse during each transition between hoof strikes.¹³ In the running walk, the horse appears to glide across the ground with a pronounced forward motion, particularly in the hind legs, so that the hind hooves strike the ground ahead of the fore hoof on the same side.¹⁴ This natural overstride enhances the

⁷ See *The Tennessee Walking Horse Breed Gaits*, *supra* note 5.

⁸ WOMACK, *supra* note 1, at 20-39.

⁹ Sandra D. Starke, et al., *Walk-Run Classification of Symmetrical Gaits in the Horse: A Multidimensional Approach*, U.S. NAT’L INST. OF HEALTH’S NAT’L LIBR. OF MED. (July 29, 2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2658658/> [https://perma.cc/L52Q-EZL2].

¹⁰ WOMACK, *supra* note 1, at 39-47.

¹¹ *Id.*

¹² *Id.* at 148-49.

¹³ See generally JOSEPH WEBB, *THE CARE AND TRAINING OF THE TENNESSEE WALKING HORSE* (1962).

¹⁴ *Id.* at 4.

speed of the walk, such that many Tennessee Walking Horses can perform the running walk faster than most w/t/c horses can trot.¹⁵ Unique to the Tennessee Walking Horse breed is the evolution of an alternative means for the spine to absorb any impact during weight transfer when performing the running walk. Instead of the mid-spine (back) flexing vertically in an up-and-down motion as the horse's weight is transferred between hooves during movement (similar to a suspension bridge), the anterior spine – those vertebrae forward of the horse's shoulders – flexes vertically in a prominent fashion, and the horse appears to nod or shake its head up and down in rhythm with its stride.¹⁶ This transfer of movement, and impact from the back of the horse to its neck and head creates an animal that is smooth and comfortable to ride, even for long distances over rough terrain.¹⁷

Along with its unique gait and comfortable ride, the Tennessee Walking Horse was also bred to be intelligent, trainable, and extremely docile.¹⁸ This combination of riding comfort and tractable disposition, along with the breed's innate physical beauty allowed the breed to maintain its popularity in the era of the combustion engine.¹⁹ From the mid-1930s forward, the Tennessee Walking Horse has excelled in numerous equestrian disciplines. These disciplines include trail riding and also competitive disciplines such as endurance riding,²⁰ dressage,²¹ and shows dedicated exclusively to the breed and its unique gait.²²

¹⁵ *Id.*

¹⁶ *Id.* at 99.

¹⁷ *Id.* at 3-4; see also Kim Klimek, *Now That's a Walking Horse!*, HORSECHANNEL.COM (May 24, 2015), <http://www.horsechannel.com/horse-news/2015/05/now-thats-a-tennessee-walking-horse.aspx> [https://perma.cc/2JR7-JEG3].

¹⁸ WOMACK, *supra* note 1, at 101-08.

¹⁹ *Id.* at 7; WEBB, *supra* note 8 (providing an in-depth description of Tennessee Walking Horse Conformation).

²⁰ See generally, Klimek, *supra* note 18.

²¹ Claudia Coombs, *Beginning Dressage for Tennessee Walking Horses*, TENN. WALKING HORSE BREEDERS' AND EXHIBITORS' ASS'N, <http://www.twhbea.com/programs/dressagebyclaudia.php> (last visited July 26, 2016).

²² See generally *Celebration Information*, THE TENN. WALKING HORSE NAT'L CELEBRATION, <http://twhnc.com/content/celebration-information/> (last visited July 26, 2016) [https://perma.cc/N5ZG-B23C].

B. Formation of the Tennessee Walking Horse Breeders' and Exhibitors' Association

The Tennessee Walking Horse Breeders' and Exhibitors' Association ("TWHBEA") was formed in 1935.²³ The purpose of TWHBEA was to "collect, record, and preserve the pedigrees of the strain of horses known as the Tennessee Walking Horse, wherever located; and the publication [sic] of a Register or Stud Book in such form as shall be adopted by the Association, and such other matters pertaining to the breeding, exhibiting, and sale of the strain of horses known as Tennessee Walking horses, as may be deemed advisable."²⁴

Between 1935 and 1948, the popularity of the Tennessee Walking Horse grew steadily, with prices for top stallions reaching \$55,000.²⁵ The Tennessee Walking Horse Celebration (hereinafter "Celebration"), an annual championship show to showcase the breed, was organized in 1939; it was, and is, operated by an independent entity,²⁶ with enthusiastic support from the TWHBEA. The breed grew in acceptance in non-walking horse shows across the country as well, and many new trainers entered the industry.²⁷ As one historian notes of this period in the breed's development, "[t]he two most obvious consequences which accompanied the presence of the new trainers were that competition in the show ring became much keener and the added emphasis on show horses all but dealt a death blow to the pleasure horse as a vital part of the industry."²⁸

The robust walking horse market of the post-Second World War era, however, resulted in a surplus of horses being bred, and

²³ See NONPROFIT CORP. FILING, CONTROL RECORD 000085606, TENN. SECRETARY OF STATE, <https://tnbear.tn.gov/Ecommerce/FilingSearch.aspx> (last visited Aug. 2, 2016); see also WOMACK, *supra* note 1, at 288.

²⁴ WOMACK, *supra* note 1, at 288; see also THE TENN. WALKING HORSE BREEDERS AND EXHIBITORS' ASS'N, *supra* note 22.

²⁵ WOMACK, *supra* note 1, at 295.

²⁶ See *Nonprofit Corp. Filing, Control Record 000065219*, TENN. SECRETARY OF STATE, <https://tnbear.tn.gov/Ecommerce/FilingDetail.aspx?CN=163251067006200069140100022032031154147238179130> (last visited Aug. 2, 2016).

²⁷ WOMACK, *supra* note 1, at 294-95.

²⁸ *Id.* at 294.

market prices fell accordingly.²⁹ Believing the glut to be caused by the then-innovative technology of artificial insemination, the TWHBEA's Board of Directors, in 1952, passed a regulation prohibiting the practice.³⁰ The ban, however, was never enforced.³¹ The failure to enforce this regulation proved to have a profoundly negative impact on the TWHBEA and the walking horse industry as a whole. As one historian notes:

The real significance of the industry's disregard for the regulation against artificial insemination was, (1) It initiated an era in which members of the Association believed it quite proper to ignore any regulation with which they disagreed, and (2) It revealed the inability of the Association to enforce its own rules [sic]. Either circumstance would have been serious; together they proved catastrophic. The seed of moral decay was sown within the Walking Horse industry It is appropriate to note that it was at this precise time that the practice of soring horses began [I]t was no longer possible for the farmer to develop his own colt, since the complications attending the "show lick" demanded the talents of a professional trainer. There was also a general belief that unless a breeder were "in" with the right crowd, he had little hope for success at the horse show. The "one gallus" breeder saw little encouragement for his kind and bowed out. With him went much of the knowledge and integrity from the industry.³²

²⁹ *Id.* at 296 (explaining that some horses dropped in value by as much as one half or two-thirds, while others were either given away or sold to slaughterhouses).

³⁰ *Id.* at 296-98 (explaining that the Board outlawed artificial insemination after a breeder who owned a former champion, turned retired stud, had a virtual monopoly on the walking-horse breeding industry).

³¹ *Id.* at 299.

³² *Id.* at 299-300.

C. The “Performance” Horse and the Evolution of the “Big Lick”

With “insider” breeders and professional trainers now in control of the growth and directives of the TWHBEA, the Celebration became the focal point of showcasing top animals,³³ and the desire to refine the running walk into a “show lick” or “big lick” intensified.³⁴ Competition being what it is, many trainers had begun to modify the front hooves of the horses by the late 1950s.³⁵ The goal of modification is to artificially reframe the horse’s natural spinal alignment by “loading” weight onto the hindquarters of the animal and taking weight off the forehand of the horse.³⁶ In theory, this allows the animal to extend its front legs further forward and upward with each stride, and forces the animal to step further under its body with its hind legs. This enhanced, albeit mechanically induced, “action” is considered highly desirable³⁷ in specific show classes known as “performance” classes, and the animals who can be made to exhibit this exaggerated action are called “performance” horses. Performance horses that exhibit this artificially exaggerated running walk are said to perform the “big lick” and are often described as “big lick” horses.³⁸

Along with trimming the horse’s front hooves so they are long in the toe and very short in the heel (requiring the horse to reach well forward in order to set his front hooves on the ground³⁹), internationally acclaimed “big lick” trainers have long advocated adding weight to the front hooves by the use of stacks

³³ See *The 78th Annual Tennessee Walking Horse Celebration*, TENN. WALKING HORSE NAT’L CELEBRATION (2016), <http://twhnc.com/content/wp-content/uploads/2016/07/2016-CELEBRATION-PREMIUM.pdf> [<https://perma.cc/W8R2-NTBW>].

³⁴ See WEBB, *supra* note 14, at 66-67; see also WOMACK, *supra* note 1, at 161. In 1943, a promising young Tennessee Walking Horse mare was sent to various farms for corrective training. In an effort to help the young horse feel calm and settled, a goat was stabled with her as a companion animal. At one point, Mac Tenpenny – a worker at trainer Steve Hill’s farm in Beech Grove, Tennessee – suggested he could fix the mare’s nerves, if not her gait. Womack recounts, “Given the ‘go ahead’ to pursue his theory, Tenpenny reportedly “beat the devil” out of the mare and barbecued the goat.” WOMACK, *supra* note 1, at 161.

³⁵ See generally WEBB, *supra* note 14, at 54.

³⁶ *Id.*

³⁷ See generally *id.* at 51.

³⁸ See generally *id.* at 66.

³⁹ See *id.* at 54.

of rubber pads,⁴⁰ which are nailed to the hoof and weighted horse shoes which are nailed through the pads to the hoof.⁴¹ If even more weight is desired, trainers may add lead to the feet.⁴² Chains, rollers, and other devices⁴³ can also be added around the horse's lower leg to add weight and friction, all in an effort to induce the animal to lift each forelimb higher and throw it more forward with each stride, thus creating "action" in the front end and greater overstride behind.

In 1960, members of TWHBEA met in Lewisburg, Tennessee for their annual meeting with two primary concerns on the agenda:⁴⁴ internal unrest over the self-perpetuating nature of the TWHBEA Board of Directors⁴⁵ and soring of the Tennessee Walking Horse.⁴⁶ A succinct and poignant account of the negative impact of soring upon the walking horse industry is offered by noted industry historian, Womack:

By far the most significant development of the fifties was the "sore lick." Perhaps no single

⁴⁰ See *id.* at 52-53.

⁴¹ *Id.*

⁴² *Id.* at 113. Other training techniques include "setting the tail" (whereby several muscles in the tail are severed so that the horse's tail may be broken and bent backwards over the horse's back to produce the elevated tail carriage as found in Big Lick horses). *Id.* at 59-60. "Tying the head back" (whereby the horse's head is restrained in an elevated position by tying a length of rope or cable from the horse's mouth to its back and tightening the rope or cable until the desired elevation is reached – and leaving the horse thus tied to, "get his mouth in shape"). *Id.* at 68-69. Use of a "nerve cord" whereby a thin metal chain is wrapped around the horse's upper gum line and attached to the bit, so that, when pressure is applied to the bit, the nerve chain places additional pressure on the gum and, to relieve this pressure, the horse tucks his head down and in towards his body and thus redistributes weight from the front end to the hind end. *Id.* at 113.

⁴³ See *id.* at 78-79.

⁴⁴ See WOMACK, *supra* note 1, at 300 (quoting Alice Higgins, *Hot Heads Over Hot Feet*, SPORTS ILLUSTRATED at 75 (June 13, 1960,)) (In a testament to the significance of the Tennessee Walking Horse industry as a sport, as well as the magnitude of unrest within the governance by TWHBEA at that time, Womack notes Sports Illustrated magazine reported on the 1960 TWHBEA Annual Meeting, characterizing the event as, "well organized as a train wreck and twice as noisy.").

⁴⁵ WOMACK, *supra* note 1, at 300. Vacancies on the TWHBEA Board are filled by proxy election. A nominating committee comprised of Board members or TWHBEA members known to be sympathetic to the Board selects candidates from a small pool of TWHBEA members known to be supportive of the Board; these candidates are then voted on by proxy of the TWHBEA members. Since each candidate is pre-vetted to assure support for the Board, any candidate may win the election and the Board's overall control remains constant. *Id.* at 301-02.

⁴⁶ *Id.* at 300.

incident in the history of the breed more tragically revealed the industry's inability to deal with the problems building within it. The Walking Horse industry seemed completely helpless to take effective steps against the soring of show horses, and while everybody waited for somebody else to do something, the Walking Horse was converted into an artificial [sic] imitation of its former self.

The State of Tennessee, in reaction to national pressure, enacted a law against soring in 1957. The law was ignored by the Walking Horse industry, just as it was by the government that passed it. [The TWHBEA] has so many problems of its own it scarcely had time to notice sore horses. The Association had long since ceased publication [sic] of its stud books as prescribed by its Charter, and for all practical purposes that organization had become a closed fraternity for members accepted by a select group of leaders. As the decade of the fifties came to a close it was every man for himself.⁴⁷

One positive outcome of the 1960 Board meeting was the adoption by the Board of a strong set of regulations against soring.⁴⁸ The new regulations, however, were ignored and never enforced. Indeed, many of those Board members who voted for the anti-soring regulations were suspected to be "among the worst offenders" when it came to soring horses. "Those few men on the Board who truly desired to eliminate sore horses were without the necessary authority to do so, and as a result no measureable progress was made."⁴⁹

⁴⁷ *Id.* Despite some of TWHBEA's original organizers' attempts to resume control of TWHBEA, even to the point of filing suit in Chancery Court in Lewisburg, these efforts failed. *Id.*

⁴⁸ *Id.* at 306. Reported regulations allowed the executive committee to suspend members of the association for crude or uncouth conduct, or for making false or misleading statements about the association or its officers. The regulations also placed responsibility on the horse owner by not allowing him to claim he does not know about the condition of his horses. Where formerly a sore horse was merely disqualified, the regulations made it so the horse, the trainer, and the owner can be disbarred. *Id.* at 307.

⁴⁹ *Id.* at 307. In 1969, Collierville, Tennessee resident, George Lenox, the owner of champion Tennessee Walking Horse "Carbon Copy," was one who opposed the heavy-

From 1960 to 1970, public pressure continued to mount against soring. Numerous editorials were written to condemn the abuse,⁵⁰ and horse shows around the country dropped their gaited horse classes to preclude showing of sored Tennessee Walking Horses.⁵¹ TWHBEA, beset by ongoing internal discord, lacked sufficient leadership to address the soring issue itself.⁵² In 1970, in response to increasing public pressure to do something about soring and the apparent inability or unwillingness of TWHBEA to eliminate the abuse, the United States Congress took action to try and end this form of animal abuse.⁵³

III. THE HORSE PROTECTION ACT OF 1970⁵⁴

A. *History and Purpose*

Title 15, Chapter 44 of the United States Code, Public Law 91-540, also known as the, “Horse Protection Act of 1970,” or “HPA,” was enacted by Congress to address a type of “cruel and inhumane”⁵⁵ animal abuse called “soring.”⁵⁶ As defined by the HPA,

handedness of the TWHBEA Board. Lenox issued his own, non-biased proxy vote to the TWHBEA membership. The proxy vote failed, but the process uncovered sufficient malfeasance on the part of the TWHBEA Board that a compromise was reached, whereby three seats on the Board were gained by Lenox and those who supported his position. Before this compromise could be executed, however, Lenox was murdered near his home. *Id.* at 306.

⁵⁰ *Id.* at 308. Along with soring, some of the allegations against TWHBEA included fraudulent registration of horses, inconsistent judging practices, and misuse of the TWHBEA organization for personal gain by select members in power. *Id.*

⁵¹ *Id.* at 307.

⁵² *Id.* at 309.

⁵³ Horse Protection Act, 15 U.S.C. §§ 1821-31 (1970).

⁵⁴ *Id.*

⁵⁵ *Id.* at §1822.

⁵⁶ See Doug Corey, et al., *Putting the Horse First: Veterinary Recommendations for Ending the Soring of Tennessee Walking Horses*, AM. ASS’N OF EQUINE PRACTITIONERS (2008),

<http://www.aaep.org/custdocs/AAEPWhitePaperonTWHSoring.pdf> [<https://perma.cc/6S68-JWPS>]. A typical “soring” episode involves rubbing caustic chemicals – such as mustard oil, kerosene, diesel fuel, or similar irritant – directly onto the skin of the limbs of a horse, and then wrapping the leg with plastic wrap so the chemicals cannot evaporate. Instead, they are absorbed into the skin tissue; this results in chemical burns to the skin and subcutaneous tissues, thus creating painful sensitivity to any pressure, including impact pressure as the animal’s weight is transferred to that hoof and/or direct pressure when a chain or roller is wrapped around the scorched skin. Additional pain-induced incentive to come off the forefeet quickly may be achieved by “pressure shoeing” – where foreign objects or substances are placed between the sole of the

The term “sore” when used to describe a horse means that –

- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
- (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
- (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
- (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given⁵⁷

The American Association of Equine Practitioners (“AAEP”)⁵⁸ has called soring, “one of the most significant

hoof and the stack “package” to create pressure on the bones and internal tissues of the hoof and lower leg.

⁵⁷ Horse Protection Act § 1821.

⁵⁸ AM. ASS’N OF EQUINE PRACTITIONERS, www.aaep.org/info/about-aaep?osCsid=f6mirpdmmdp20in2q1u0kp7q6 (last visited Aug. 7, 2106) [<https://perma.cc/ST6H-ULQC>] (The American Association of Equine Practitioners was organized in 1954 by a group of veterinarians who specialized in equine medicine and therapeutics; presently the AAEP has over 9,000 members in over 60 countries.).

welfare issues affecting any equine breed or discipline”⁵⁹ and defines soring even more broadly:

[T]he practice of inflicting pain to create an extravagant and exaggerated show gait for both padded and flat-shod horses and includes but is not limited to the use of irritants; the treatment of the pastern region to remove the visible effects of irritants or scar/callus remnants resulting from previous irritants and/or action devices; pressure shoeing and excessive paring of the sole and/or frog⁶⁰; and any method utilized to induce pain or laminitis.⁶¹

⁵⁹ COREY, *supra* note 56, at 2.

⁶⁰ See Russell Hanson, et al., *Disorders of the Foot in Horses*, MERCK MANUAL: PET HEALTH EDITION (July 2011), http://www.merckvetmanual.com/pethealth/horse_disorders_and_diseases/bone_joint_and_muscle_disorders_in_horses/disorders_of_the_foot_in_horses.html [https://perma.cc/6DMS-SGCA] The “frog” is a wedge-shaped section of the hoof sole. Unlike the harder primary sole surface, the frog is “spongy” or malleable in order to provide shock absorption to the foot as it expands to take the horse’s weight during normal ambulation. The frog contains a vast network of blood vessels; excessive paring (cutting) of the sole and/or frog can result in bruising and bleeding from the bottom of the hoof. This makes the hoof vulnerable to infection and, in extreme cases, sloughing of the entire hoof exterior.

⁶¹ COREY, *supra* note 56, at 2.

B. Enforcement

*i. Current scheme*⁶²

When drafting and passing the HPA, Congress published the following statement of findings:

The Congress finds and declares that –

- (1) the soring of horses is cruel and inhumane;
- (2) horses shown or exhibited which are sore, where such soreness improves the performance of such

⁶² Horse Protection Act § 1822 (In 2012, the American Association of Equine Practitioners published an article entitled, *FAQs: Equine Cruelty, Abuse and Neglect*, to provide guidelines for veterinarians who often must use their own best judgment to determine whether an equine has been abused or neglected.). *FAQs: Equine Cruelty, Abuse and Neglect*, AAEP, <http://www.aaep.org/custdocs/aaepfaqsequineabuse.pdf> (last visited Nov. 7, 2016) [<https://perma.cc/8Q9A-4LJJ>] The article included, *inter alia*, the following definitions to assist veterinarians in making their determinations as to what, if any, abuse or neglect a particular animal had endured:

Animal abuse: More willful failing to provide care or doing something harmful. Abuse implies maltreatment regardless of the intent, motivation or mental condition of the perpetrator, whereas cruelty connotes more deliberate intention.

Animal cruelty: The common term used in animal anti-cruelty statutes and societies for the prevention of cruelty to animals. Although legal definitions vary by jurisdiction, several popular definitions have been disseminated. These include: any act that, by intention or by neglect, causes an animal unnecessary pain or suffering (Sinclair, Merck & Lockwood, 2006). Or: deliberate infliction of pain on an animal from which the abuser derives enjoyment or amusement (King 1998). Or: the infliction of pain or distress unnecessarily (Blood & Studdert, 1999). Or: socially unacceptable behavior that intentionally causes unnecessary pain, suffering, or distress to and/or death of an animal (Ascione, 1993).

Animal physical abuse: The infliction of injuries or causing unnecessary pain and/or suffering. Abuse may be caused by hitting, kicking, throwing, beating, whipping, spurring, shaking, poisoning, burning, scalding, suffocation, etc.

Emotional abuse: Bullying, excessive teasing, exploitation, or coercion that leads to a fragile emotional state is easier to recognize in humans than in animals. In animals, persistent threatening behaviour or a failure to provide basic needs is considered by some to constitute emotional abuse. While a typology of companion animal abuse presented in South Africa includes a category of “mental abuse,” (Vermeulen & Odendaal 1993) this has not been recognized clinically or in statutory language in the U.S., U.K. or Canada.

Non-accidental injury (NAI): A synonym for physical abuse (Munro & Thrusfield, 2001a-d). <http://www.aaep.org/custdocs/aaepfaqsequineabuse.pdf>.” *Id.*

horse, compete unfairly with horses which are not sore;

- (3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;
- (4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and
- (5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.⁶³

Further, the HPA prohibits the “shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale or auction; . . .”⁶⁴

The HPA provides for a complex enforcement scheme.⁶⁵ The United States Department of Agriculture (“USDA”), under their Animal and Plant Health Inspection Service (“APHIS”) division, is charged with enforcing the HPA.⁶⁶ However, statutory responsibility for identifying sored horses, and precluding them from participating in any activity regulated by the HPA, falls to each individual horse show’s management. In the case of a horse sale, sale management bears this responsibility.⁶⁷ Horse Industry Organizations (“HIOs”) utilize specific, trained individuals at relevant shows and sales to inspect horses for potential soring.⁶⁸ These individuals, called “Designated Qualified Persons,” (“DQPs”) ⁶⁹ must meet mandatory minimum training requirements. Additionally, DQPs must be appointed or retained

⁶³ Horse Protection Act § 1822.

⁶⁴ *Id.* at § 1824.

⁶⁵ *Id.* at § 1823.

⁶⁶ *Id.* at § 1821.

⁶⁷ *Id.* at § 1823.

⁶⁸ 9 C.F.R. § 11.1.

⁶⁹ *Id.*

by show or sale management to inspect horses for soring.⁷⁰ In addition, at some shows or sales, the USDA sends APHIS veterinary medical officers (“VMOs”) to conduct inspections.⁷¹

Typically, inspections consist of a DQP or VMO observing the animal’s limbs for any visible signs of soring, palpating the animal’s limbs for any response that appears to be pain-induced, and observing the animal walk to check for soring.⁷² Often, horses that have been sored have noticeable hair loss on the lower limb.⁷³ They may also be extremely sensitive to touch on their lower limbs.⁷⁴ Additionally, they may exhibit lameness when asked to walk.⁷⁵ After such inspection, participants found to be in violation of the HPA may be fined, disqualified from showing for a set period of time, or criminally prosecuted; APHIS and the USDA make this determination.⁷⁶

⁷⁰ 15 U.S.C. 44 § 1821.

⁷¹ *Id.*; see, e.g., *Horse Protection Program Reports*, USDA: ANIMAL AND PLANT HEALTH INSPECTION SERVICE, https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_hpa/activity-and-show-reports [https://perma.cc/M3WG-ZYPM] (last visited Aug. 2, 2016) Due to funding constraints, USDA VMOs attend less than 10 percent of HIO-governed shows each show season.

⁷² *Horse Soring and the Past Act*, S. 1121 and H.R. 3268, AM. VETERINARY. MED. FOUND. 38 (July 29, 2015), https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Documents/2015-Soring-Booklet-Final_Logo.pdf [https://perma.cc/A3A9-7QWR].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Horse Protection Act Enforcement*, USDA: ANIMAL AND PLANT HEALTH INSPECTION SERVICE [hereinafter APHIS *Horse Protection Act Enforcement*], https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_hpa/ct_hpa_enforcement (last visited Nov. 8, 2016) [https://perma.cc/5UCX-E58Z] The United States Department of Agriculture, Animal and Plant Health Inspection Services offers an online summary of HPA violation penalties: “APHIS may bring administrative or criminal complaints against alleged violators of the HPA. Administrative complaints may result in civil penalties of not more than \$2,200 for each violation, and an order disqualifying the violator from showing or exhibiting horses or otherwise participating in any horse event except as a spectator. Periods of disqualification are determined on a case-by-case basis but must be no less than 1 year for the first violation and no less than 5 years for any subsequent violations. Civil penalties of up to \$3,300 can be assessed for a violation of an order of disqualification. The Act also authorizes the Secretary of Agriculture to provide for the settlement of cases. Criminal proceedings may be initiated against individuals who knowingly violate the Act. Criminal penalties include fines of up to \$3,000 and 1 year in prison for a first offense. Each subsequent violation may result in fines of up to \$5,000 and imprisonment for up to 2 years.” *Id.*

Further, this bifurcation between private entity identification of soring and government-sanctioned penalty enforcement by the USDA was confirmed as recently

While the VMOs are sent to shows by the USDA/AHPIS, the DQPs are hired by the HIO.⁷⁷ DQPs are often owners of Tennessee Walking Horses; thus the DQP performing inspections at one show may, in turn, be subject to reciprocal inspection by a fellow owner/DQP at another show.⁷⁸ This conflict of interest may explain why HPA violation findings and citations rise dramatically when a VMO is present to inspect at a show, compared to shows where DQPs inspect without VMO supervision.⁷⁹

ii. Enforcement issues

Visual inspection and palpation are inherently subjective in nature. Thus, once the HPA was enacted, unscrupulous trainers began using substances such as salicylic acid,⁸⁰ which is used in an effort to try and repair a horse's burned skin to pass visual inspections.⁸¹ In an attempt to pass palpation inspections,

as 2015 by the Fifth Circuit. *Contender Farms, L.L.P. v. USDA*, 779 F.3d 258, 273 (5th Cir. 2015). In *Contender Farms*, the court rejected an attempt by the USDA to require show or sale management to ascribe to a uniform and mandatory "private" enforcement regime, despite the USDA's argument that such a regime was necessary to adequately monitor and eliminate soring. *Contender Farms*, F.3d at 273. Arguably, the USDA created the proposed private enforcement regime in response to a 2010 report by the Office of Inspector General which found that the established method – whereby each individual management team selects their own methods of inspection and their own level of enforcement and penalties – failed to adequately address the prevalent soring within the industry and also subjected competitors to inconsistent HPA enforcement policies between the various HIOs, thus encouraging those with sored horses to seek out the more lenient HIOs. See, e.g., USDA Agriculture Office of Inspector General, *Audit Report Animal and Plant Health Inspection Service Administration of the Horse Protection Program and the Slaughter Horse Transport Program*, USDA 22 (Sept. 2010), <https://www.usda.gov/oig/webdocs/33601-02-KC.pdf> (hereinafter *APHIS Horse Protection Program*) [<https://perma.cc/DE22-GUUU>]. Whatever the motive behind the proposed mandatory private entity enforcement regime, competitor Contender Farms challenged it successfully, with the court stating decisively, "It is clear that Congress did not authorize the USDA to develop a private enforcement scheme administered by HIOs as a means of policing the HPA." *Contender Farms*, 779 F.3d at 273.

⁷⁷ Horse Protection Act, 15 U.S.C. § 1823 (1970).

⁷⁸ See, e.g., *APHIS Horse Protection Program*, *supra* note 76, at 10.

⁷⁹ *Id.*

⁸⁰ See National Center for Biotechnology Information, *Salicylic Acid*, PUBCHEM COMPOUND DATABASE, <https://pubchem.ncbi.nlm.nih.gov/compound/338> (last visited July 23, 2016) [<https://perma.cc/5ZUE-YD7F>] (sometimes called 2-hydroxybenzoic acid, salicylic acid has a chemical formula of $\text{OHC}_6\text{H}_4\text{COOH}$, and is typically used as a dermatological peel in the treatment of human acne).

⁸¹ Frank Lessiter, *Disgraceful Practice Continues*, AM. FARRIERS J. (July 1, 2008), <https://www.americanfarriers.com/articles/995-disgraceful-practice-continues> [<https://perma.cc/93WT-SCRF>]. Some owners and trainers attempt to cover up these scars

trainers began “stewarding” big lick horses to stand still despite the pain in their feet and limbs.⁸² Stewarding involves inflicting pain elsewhere on the horse’s body,⁸³ including beating the horse on the head⁸⁴ to teach it not to flinch or lift its feet when undergoing palpation inspection. Since many of the DQPs are entrenched inside the industry,⁸⁵ the current system is replete with concerns about lack of impartiality, and direct conflicts of interest.

At the present time, there is a statutory cap of \$500,000 on appropriations for enforcement of the HPA.⁸⁶ This limited budget restricts wholesale enforcement of the HPA; the AAEP⁸⁷ has called the HPA annual budget “woefully inadequate.”⁸⁸ The AAEP has taken the position that it is on the industry participants, including owners, trainers, and breeders, to “take full responsibility for developing a program which succeeds in eliminating the recognized abuses that are at the core of the problem.”⁸⁹

Given such a limited budget for a nationwide inspection and enforcement system, visual and palpation inspections remain the standard of HPA inspection and enforcement today, despite

by applying salicylic acid to the scarred area to “burn off” the scarred skin — a procedure that is thought to be more painful than the actual chemical soring. While the “new” skin is normally free of the grotesque granular calluses caused by soring, it is still thickened with sparsely haired scar tissue. *Id.*

⁸² Stephanie Twining, *The HSUS Releases Undercover Video of Shocking Horse Abuse at Tennessee Training Stable*, HUMANE SOC’Y (May 25, 2012), http://www.humanesociety.org/news/press_releases/2012/05/horse_soring_investigation_051712.html [<http://perma.cc/7S9E-VRGB>]. The trainer involved, Jackie McConnell, pled guilty to federal charges. *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *The Horse Protection Act*, USDA (June 2005), https://www.aphis.usda.gov/publications/animal_welfare/content/printable_version/Horse_Protection_6-3-5.pdf [<https://perma.cc/XN26-R2WL>].

⁸⁶ *Horse Soring and the Past Act*, S. 1121 and H.R. 3268, *supra* note 72, at 37.

⁸⁷ AMERICAN ASSOCIATION OF EQUINE PRACTITIONERS, www.aaep.org (last visited Aug. 7, 2016) [<https://perma.cc/W9WR-DQQT>]. The American Association of Equine Practitioners is, “the world’s largest professional organization dedicated to equine veterinary medicine and is a leading medical authority on the health and welfare of the horse. . . . [T]he AAEP . . . [works] to raise the standard of horse health for all breeds and disciplines.” *Id.*

⁸⁸ *Horse Soring and the Past Act*, S. 1121 and H.R. 3268, *supra* note 72.

⁸⁹ *Id.*; *see also*, *McCloy v. USDA*, 351 F.3d 447 (10th Cir. 2003) (finding an owner knowingly allowed a sored horse to be shown in violation of the HPA); *but see*, *Baird v. USDA*, 39 F.3d 131 (6th Cir. 1994) (finding an owner did not knowingly allow a sored horse to be shown, thus an HPA violation against the owner was invalid).

the fact that portable infrared technology is available. If adequate funds were available, DQPs and VMOs could scan the horse's limb for heat signatures caused by soring.⁹⁰ And, as noted by the AAEP, "[c]ontinued reliance on the use of traditional techniques dependant [sic] upon the subjective response of the horse would appear a wasted effort and funding for the development of objective methodology for use by qualified veterinary inspectors must be provided."⁹¹

In 2007, the AAEP established a Tennessee Walking Horse Task Force to, "[contribute] the expertise of the veterinary community to efforts that will permanently eliminate [soring]."⁹² In addition to recommending modification of the traditional DQP role so that a licensed veterinarian would always perform inspections, the Task Force offered very specific and objective additional means to inspect and evaluate horses, not only before and after a show, but before and after each class in which the horse was entered. These evaluation methods were proffered, "to ensure the health and welfare of the equine participants"⁹³ and included enhanced detection processes. The enhanced detection processes included: drug testing,⁹⁴ prohibition of certain devices, (e.g., syringes and the like, in the make-up area where horses are gathered for an upcoming class) objective stewards in the warm-up areas,⁹⁵ round-the-clock security staff and supervising inspectors in all stabling areas of the show facility to ensure no soring is performed outside the show ring,⁹⁶ physical inspection of each horse's limbs and back by a licensed veterinarian,⁹⁷ and "thermographic screening of the limbs to assist in defining specific anatomical areas requiring additional clinical examination and/or surface swabbing to detect forbidden substances."⁹⁸

⁹⁰ *Horse Soring and the Past Act, S. 1121 and H.R. 3268*, *supra* note 72, at 40.

⁹¹ *Id.* at 37.

⁹² *Id.*

⁹³ *Id.* at 38.

⁹⁴ *Id.* Specifically, plasma, serum, and cutaneous swabbing, using similar protocols to those sanctioned by the United States Equestrian Federation.

⁹⁵ *Id.* at 38-39.

⁹⁶ *Id.* at 38.

⁹⁷ *Id.* The Task Force noted they specifically wanted the physical inspection to include, "Removal of saddles/girths to check for pain-inducing objects."

⁹⁸ *Id.* In addition, the Task Force also recommended:

Along with enhanced inspection protocols, the AAEP Task Force included recommendations for strong enforcement measures. “Penalties should be much more severe and consequential to owners, trainers and other support personnel than in the past. Lifetime disqualification of horses found not to be in compliance would penalize trainers and owners to a degree likely to mitigate against a second infraction.”⁹⁹

Regarding the now decades-long soring problem rampant within the industry, the Task Force recommended a complete overhaul of current judging standards for Tennessee Walking Horses, saying specifically, “[e]stablishing standards of judging which value the innate grace and beauty of this breed instead of rewarding the currently manufactured extravagant and exaggerated gaits will facilitate a rapid return to horsemanship and training devoid of the intolerable abuses of soring in all its manifestations.”¹⁰⁰

As far back as 1973, only three years after the HPA was passed, a bill was introduced into Congress that would have eliminated the pads, chains, rollers, and all “action devices” on

“Re-examination of selected horses as they exit the ring (with horses held in the make-up ring while examinations are completed) to include:

- a. Thermographic re-examination.
- b. Removal of both front shoes of randomly selected horses or horses with abnormal thermographic patterns:
 - i. Visual and hoof tester examination of unshod feet for evidence of methods directed at inducing pain, such as pressure devices and excessive paring of the sole and frog.
 - ii. Weighing of the shoes (flat-shod horses) or shoes and package (padded horses).
- c. Digital radiographs of the feet, in randomly selected horses or horses found to have any physical or thermographic abnormalities, to detect:
 - i. Laminitis, acute or chronic, as manifested by either rotation of the third phalanx or sinking of the bony column within the hoof capsule.
 - ii. Sole thickness.
- d. Drug testing including both plasma and urine for the presence of prohibited substances.
- e. Swabbing of the limbs for foreign substance testing utilizing current standard methodology.
 - i. Areas determined to exhibit an abnormal thermographic pattern should be included in the testing.” *Id.* at 39.

⁹⁹ *Id.* at 41 (The Task Force further noted: “We believe that owners are the only individuals who can bring adequate pressure to bear on each other and their trainers to eliminate these intolerable abuses.”).

¹⁰⁰ *Id.* at 42.

Tennessee Walking Horses.¹⁰¹ Eliminating the action devices would, in effect, eliminate the vast majority of soring, because, without the action devices to mechanically throw the forelegs upwards and outwards in an exaggerated fashion, there is no point in chemically burning the skin of the foreleg. Further, soring via pressure shoeing is eliminated due to the lack of pads or stack to hide the pressure-inducing materials.¹⁰² Through rapid negotiations between the then-current governing body of the walking horse community,¹⁰³ industry leaders convinced the USDA to accept and approve a list of action devices,¹⁰⁴ thereby gaining modifications in the language of Senate Bill 2093 such that, when the bill passed on October 9, 1975, action devices remained allowed under the new law.¹⁰⁵

Over the past four decades, the cat-and-mouse game of compliance versus soring has continued. Just last year, at the 2015 Celebration horse show – still the pinnacle show event of the Walking Horse industry – the USDA reported 1392 horses entered, 525 of those were inspected for soring, of which 226 HPA violations were found and 181 horses were disqualified for violations of the HPA.¹⁰⁶ Even assuming the majority of animals

¹⁰¹ WOMACK, *supra* note 1, at 311-12. Senate Bill 2093 was introduced by Senators Warren Magnuson and John Tunney on June 27, 1973. The bill would have made any action device on a walking horse illegal. Womack speculates that the bill was introduced to get the attention of the walking horse industry, noting the walking horse industry's "loose organization and scattered centers of authority." *Id.* at 312-13.

¹⁰² *Id.* at 312.

¹⁰³ *Id.* at 313-14. Womack also provides an overview of the myriad competing and cannibalistic organizations that, over the decades, have tried, without success, to govern the whole of the Tennessee Walking horse industry. The factions, infighting, and power struggles continue to the present time. *Id.* at 286-348.

¹⁰⁴ *Id.* at 316-17. One key player in these negotiations was Dr. Lois Hinson, a veterinarian charged by the U.S.D.A. to negotiate regarding the pending legislation and the industry's desire to continue to use action devices. Over the summer of 1975, Hinson, "made every effort to give Walking Horse people an opportunity to explain their side of the situation . . . she gave them the equipment they said was necessary to produce excellent show horses without soring [yet] overwhelming evidence existed which indicated that soring continued . . . Hinson is quoted as saying, 'I honestly had the hope in my heart the Walking horse industry would be cleaned up. Unfortunately, it has not . . . ' Walking Horses were being sored before shows, then the horse's feet were being sprayed with a freezing agent which allowed the horse to pass the steward's inspection. By the time the horse entered the ring the freezing agent had disappeared and the animal entered the competition sore. Such horses usually were placed high by most judges." *Id.* at 322-23.

¹⁰⁵ *Id.* at 316-17.

¹⁰⁶ See USDA ANN. REP. ON HPA VIOLATIONS (2015), https://www.aphis.usda.gov/animal_welfare/downloads/hp/hp_fy15_annual_report.pdf

entered were in classes other than big lick classes, the statistics are irrefutable: a remarkable *thirty-five percent* of horses inspected were disqualified for soring, with a forty-three percent overall HPA violation rate at the 2015 Celebration. As the American Veterinary Medical Association recently commented: “Regardless of whether soring is done using chemicals or physical methods, it’s unethical and illegal. It has always been unethical, and it’s been illegal since 1970 . . . but it continues.”¹⁰⁷

iii. Potential legislation

In 2010, the USDA Office of the Inspector General (“OIG”) investigated soring and found evidence the practice remains rampant throughout the industry.¹⁰⁸ The OIG recommended an increase in funding for inspection and enforcement, harsher penalties for HPA violations, and having unbiased USDA-trained and –licensed inspectors available to the HIOs.¹⁰⁹ In an effort to comply with the OIG recommendations, the USDA created a new regulation to provide for a uniform system of enforcement among the HIOs; the regulation was challenged successfully in court by a big lick trainer and so the HIO-DQP system remains in place today, with the original HPA budget of \$500,000 per annum.¹¹⁰

Throughout the past half-century of abuse, there have been those inside and outside the industry who have decried soring.¹¹¹ Additionally, even decades ago, industry insiders have acknowledged that the vast majority of humanity is against

[<https://perma.cc/9LHX-UCRY>]. A breakdown of the HPA violations include 31 Bilateral (both forelimbs) sored, 38 Unilateral (one forelimb) sored, 127 violations of the “Scar Rule” – whereby horses exhibited the scarring from past soring are prohibited from competing, regardless of whether the animal is, at present, being sored, and 30 instances of a prohibited foreign substances being present on show animals. *Id.*

¹⁰⁷ Am. Veterinary Med. Ass’n, *Soring Horses: Unethical Practice Making Horses Suffer*, AM. VETERINARY MED. ASS’N (2016), <https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/soring-horses.aspx?PF=1>.

¹⁰⁸ OFFICE OF INSPECTOR GEN., 33601-2-KC, U.S. DEP’T OF AGRIC.: ANIMAL AND PLANT HEALTH INSPECTION SERV. ADMIN. OF THE HORSE PROT. PROGRAM AND THE SLAUGHTER HORSE TRANSP. PROGRAM (2010), <https://www.usda.gov/oig/webdocs/33601-02-KC.pdf> [<https://perma.cc/QY88-PURZ>].

¹⁰⁹ *Id.*

¹¹⁰ See *Contender Farms*, 779 F.3d at 258.

¹¹¹ WOMACK, *supra* note 1, at 347-48; see also, Keith Dane, *Institutionalized Horse Abuse: The Soring of Tennessee Walking Horses*, 3 KY.J. EQUINE, AGRIC. & NAT. RESOURCES L. 201 (2011).

soring. One noted veterinarian and animal science professor, Dr. Dave Whitaker, has been quoted prior to 1984 as stating:

The people of Europe and the United States have gradually moved to a position of stronger human and animal rights. The conviction of these people will, in the end, have a much stronger impact on determining the future of the Walking Horse than any DQP or court conviction for soring.¹¹²

The impetus to end soring has gained great momentum in the past decade, and several attempts to pass federal legislation have arisen within Congress. Echoing the original 1975 Senate bill that would have outlawed the use of action devices and, thus, in effect, end soring in 2014, the 113th Congress saw the introduction of S. 1406 and H.R. 1518 entitled, the “Prevent All Soring Tactics” or, “P.A.S.T. Act.”¹¹³ Despite concerted lobbying efforts by animal rights activists, organizations, and industry insiders that hoped to clean up the industry and eliminate soring and despite enjoying widespread co-sponsorship in each branch of Congress, neither S. 1406 (with fifty-nine co-sponsors in the Senate)¹¹⁴ and H.R. 1518 (with 307 co-sponsors in the House),¹¹⁵ made it out of committee.

Notably, there are close ties between the upper echelon of the TWHBEA and Tennessee’s members of Congress. In 2014, at the same time S. 1406 was pending in the Senate, Mr. Steve Smith – himself an HPA violator¹¹⁶ – served as the President of the International Board of Directors for TWHBEA and, simultaneously, as Tennessee Senator Lamar Alexander’s election finance chair. Tennessee Representative Marsha Blackburn (R-TN) is the current Vice-Chair of the House

¹¹² WOMACK, *supra* note 1, at 347.

¹¹³ Prevent All Soring Tactics of 2013, H.R. 1518, 113th Cong. (2013), <http://www.congress.gov/bill/113th-congress/house-bill/1518> [https://perma.cc/AXV5-SL7E]; Prevent All Soring Tactics of 2014, S. 1406, 113th Cong. (2014), <https://www.congress.gov/bill/113th-congress/senate-bill/1406> [https://perma.cc/Y5EU-F5HV].

¹¹⁴ See S. 1406, *supra* note 113.

¹¹⁵ See H.R. 1518 *supra* note 113.

¹¹⁶ HPA Data Reports (2015), <http://www.hpdata.us/index2.php> (containing an alphabetical list of HPA violators) [https://perma.cc/7499-XZVN].

Committee on Energy and Commerce, which is the committee into which H.R. 1518 was introduced – and where it died.

The P.A.S.T. Act has been reintroduced in the current 114th Congress. As of this writing, S. 1121 has forty-nine co-sponsors,¹¹⁷ and H.R. 3268 has 265 co-sponsors;¹¹⁸ the final outcome for these pieces of legislation remains unknown.¹¹⁹ In the meantime, despite forty-six years of TWHBEA operating under the Horse Protection Act, soring remains an integral component of HIO-sanctioned horse shows across the country, and twenty-five percent of animals tested during the 2015 show season tested positive for soring.¹²⁰

IV. THE LANHAM ACT

A. Overview

Enacted in 1946, the Trademark Act, or Lanham Act (“Lanham Act”), was crafted to protect a consumers’ expectations regarding the quality and value of goods or services available for purchase.¹²¹ Under the Lanham Act, an applicant may register a trademark or servicemark with the United States Patent and Trademark Office (“USPTO”) and thus represent to the

¹¹⁷ See Kelly Ayotte, *S. 1121: PAST Act* (Apr. 28, 2015), <https://www.govtrack.us/congress/bills/114/s1121> [<https://perma.cc/5T26-J4PD>].

¹¹⁸ See Ted Yoho, *H.R. 3268: PAST Act* (July 28, 2015), <https://www.govtrack.us/congress/bills/114/hr3268> [<https://perma.cc/RLF9-FRKW>].

¹¹⁹ On July 26, 2016, the USDA published a Proposed Rule that, if enacted, should help eliminate soring. See Horse Protection, Licensing of Designated Qualified Persons and Other Amendments, <https://www.federalregister.gov/articles/2016/07/26/2016-17648/horse-protection-licensing-of-designated-qualified-persons-and-other-amendments> (last visited Aug. 2, 2016) [<https://perma.cc/L2HY-ZTEZ>]. The Proposed Rule provides for substantial changes in the HPA enforcement rubric, including, *inter alia*, the removal of “all regulatory burdens and requirements” from the HIOs and transferring these responsibilities directly to APHIS, as well as an expanded list of “devices, equipment, substances, and practices that can cause soring or are otherwise prohibited” under the HPA. The rationale for the Proposed Rule is to “strengthen existing requirements intended to protect horses from the unnecessary and cruel practice of soring and eliminate unfair competition.” *Id.*

¹²⁰ See USDA, *supra* note 107. Despite forty-six years under the HAP, TWBHEA had a 25.14% HPA violation rate in 2015. Of 7883 entries in HIO-sanctioned shows or sales last year, 2003 animals were tested for soring; 509 tested positive. *Id.*

¹²¹ See generally *A Guide to the Lanham Act of 1946*, TRADEMARKLAWS.COM, <http://trademark.laws.com/lanham-act-of-1946/lanham-act-of-1946-background> (last visited Oct. 18, 2016) [<https://perma.cc/RDH8-W76P>]; 15 U.S.C. §1052 *et seq.*

consuming public that the applicant – who evolves into the “registrant” when the mark is accepted for registration by the USPTO – is a viable source of the goods or services protected under the registered mark.¹²²

The USPTO may refuse to register a proposed mark. Title 15, Section 1052 of the United States Code states, in relevant part:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

Consists 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

. . . A mark which would be likely to cause dilution by blurring or dilution by tarnishment under section 1125(c) of this title, may be refused registration only pursuant to a proceeding brought under section 1063 of this title.¹²³

The USPTO may cancel a previously registered mark for various reasons, including, *inter alia*, abandonment,¹²⁴ improper licensing or assignment,¹²⁵ genericity,¹²⁶ and disparagement.¹²⁷ Furthermore, “[a] registration for a mark which would be likely to

¹²² 15 U.S.C. § 1051 (2002).

¹²³ 15 U.S.C. § 1052(a), (f) (2006).

¹²⁴ 15 U.S.C. § 1127 (2006); *see* Major League Baseball Properties, Inc. v. Sed Non Olet Denaius, Ltd., 817 F. Supp. 1103, 1135-36 (S.D.N.Y. 1993), *vacated pursuant to settlement* by 859 F. Supp. 80 (1994).

¹²⁵ *See* Eva’s Bridal Ltd. v. Halanick Enterprises, Inc., 639 F.3d 788, 789-90 (7th Cir. 2011); *see also* Dawn Donut Co., Inc. v. Hart’s Food Stores, Inc., 267 F.2d 358, 369 (2d Cir. 1959)..

¹²⁶ *See* Kellogg Co. v. Nat’l Biscuit Co., 305 U.S. 111 (1938) (wherein the term, “shredded wheat” was confirmed as a descriptive and generic term and thus open for general descriptive use); *see also* Bayer Co. v. United Drug Co., 272 F.505 (S.D.N.Y. 1921) (wherein the term, “aspirin” was determined to be generic and thus open for general descriptive use).

¹²⁷ 15 U.S.C. § 1052; *see* Pro-Football, Inc. v. Blackhorse, 112 F.Supp.3d 439, 490 (D.C. Va. 2015).

cause dilution by blurring or dilution by tarnishment under section 1125(c) of this title, may be canceled pursuant to a proceeding brought under either section 1064 of this title or section 1092 of this title.”¹²⁸

B. Cancellation of Trademarks

When a trademark registrant uses its mark for illegal purposes, the trademark may be cancelled by the USPTO. In 2008, more than sixty members of the Mongols Motorcycle Club (the “Mongols”) were arrested in connection with an indictment covering eighty-six felony counts under the Racketeer Influenced and Corrupt Organizations Act (“RICO”).¹²⁹ As part of a plea agreement with the Mongols’ leader, Ruben “Doc” Cavazos, Cavazos agreed to surrender the Mongols’ U.S. trademark to the United States government,¹³⁰ along with all other properties to be seized under the RICO rubric.¹³¹

When a registrant allows others to use its marks through licensing, assignment, franchising, or other authorized use, the registrant must maintain sufficient control over the authorized user’s goods or services provided under imprimatur of the registrant’s brand; failure to do so risks the mark becoming abandoned under the doctrine known as, “naked licensing”¹³² – defined by one noted jurist as, “allowing others to use the mark without exercising ‘reasonable control over the nature and quality of the goods, services or business on which the [mark] is used by the licensee.’”¹³³

¹²⁸ 15 U.S.C. § 1052(f) (2006).

¹²⁹ TRACY REILLY, *Marks of Mayhem & Murder: When a Few Bad “Mongols” Spoil the Bunch, Should the Government Seize a Motorcycle Association’s Registered Trademark?*, 7 BUFF. INTEL. PROP. L.J. 1, 3 (2009); see Grand Jury Indictment, U.S. v. Cavazos, No. 2:08-cr-1201 (C.D. Cal. Oct. 9, 2008).

¹³⁰ See Reilly, *supra* note 130; MONGOLS, Registration No. 2916965.

¹³¹ Reilly, *supra* note 130, at 3-4.

¹³² See *Barcamerica Int’l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 598 (9th Cir. 2002); see also EDWARD K. ESPING, *Granting of “Naked” or Unsupervised License to Third Party as Abandonment of Trademark*, 118 A.L.R. Fed. 211, II § 3(a) (1994).

¹³³ See *Eva’s Bridal Ltd. v. Halanick Enters., Inc.*, 639 F.3d 788, 789-90 (7th Cir. 2011); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 30, 33 (AM. LAW INST. 1995).

In *Eva's Bridal Ltd. v. Halanick Enterprises, Inc.*,¹³⁴ plaintiff licensor Eva's Bridal sued defendant licensee Halanick Enterprises in 2007 for failure to pay royalties after their license agreement expired in 2002, and Halanick continued to operate a bridal shop under the name, "Eva's Bridal."¹³⁵ The district court dismissed the suit based on the doctrine of naked licensing,¹³⁶ because the long-expired license had never contained guidelines or requirements as to how Halanick must operate the store bearing the licensor's mark, nor did the licensor ever attempt to control any aspect of store operations, or how Halanick used the mark, "Eva's Bridal."¹³⁷

On appeal, the Seventh Circuit affirmed, with Chief Justice Easterbrook writing for the Court.¹³⁸ Discounting the plaintiff's argument that no oversight was needed by the plaintiff as licensor due to licensee's consistent "high quality" business operations,¹³⁹ the Court stated:

There is no rule that trademark proprietors must ensure "high quality" goods – or that "high quality" permits unsupervised licensing . . . The sort of supervision required for a trademark license is the sort that produces consistent quality. "Trademarks [are] indications of consistent and predictable quality assured through the trademark owner's control over the use of the designation". Restatement § 33 comment b

How much control is enough? The licensor's self-interest largely determines the answer. Courts are apt to ask whether "the control retained by the licensor [is] sufficient under the circumstances to insure that the licensee's goods or services would meet the expectations created by the presence of the trademark." Restatement § 33 comment a (summarizing doctrine)

¹³⁴ *Eva's Bridal Ltd.*, 639 F.3d 788.

¹³⁵ *Id.* at 789.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 788.

¹³⁹ *Id.* at 790-91.

Safeway could not license its marks to a corner grocery store, while retaining no control over inventory, appearance, or business methods, just because every grocery store is sure to have Coca-Cola and Wheaties on the shelf.

Trademark law requires that “decision-making authority over quality remains with the owner of the mark.” Restatement § 33 comment c. How much authority is enough can’t be answered generally; the nature of the business, and customers’ expectations, both matter. Ours is the extreme case: plaintiffs had, and exercised, no authority over the appearance and operations of defendants’ business, or even over what inventory to carry or avoid. That is the paradigm of a naked license.¹⁴⁰

A third way a registrant may lose its trademark is cancellation based upon disparagement. In 2014, *Blackhorse v. Pro-Football, Inc.*, in a precedential ruling by the Trademark Trial and Appeal Board (“TTAB”), the adjudicating branch of the USPTO for trademarks, the Washington Redskins football team lost six trademarks – each of which included some iteration of the word, “Redskins” within the mark – based upon a finding by the TTAB that the owner of the marks, Pro-Football, Inc., had violated Section 2(a) of the Lanham Act.¹⁴¹ Four Native Americans filed the cancellation action, claiming the six registrations at issue were disparaging to Native Americans.¹⁴²

The TTAB utilized a two-part test in the disparagement analysis: (a) what is the meaning of the matter in question, as it appears in the marks and as those marks are used in connection with the goods and services identified in the registrations, and (b) is the meaning of the marks one that may disparage Native Americans.¹⁴³ The plaintiffs prevailed on both prongs of the

¹⁴⁰ *Id.*

¹⁴¹ *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080, 2014 WL 2757516 (T.T.A.B. 2014); *see also* 15 U.S.C. § 1052(a) (2006); 15 U.S.C. § 1064(c) (2006).

¹⁴² *Blackhorse*, 111 U.S.P.Q.2d at 2.

¹⁴³ *Id.* at 8-9.

test;¹⁴⁴ addressing the first prong of the test, the TTAB analyzed the meaning of the word “redskins” when used in general language and when used specifically in the context of Pro-Football’s marks, finding the meaning of the word “when used in connection with professional football retains the meaning Native Americans.”¹⁴⁵ Addressing the second prong, the TTAB noted that, in order for the Plaintiffs to prevail, merely a “substantial composite, which need not be a majority, of Native Americans, at the times of the registrations” would need to show, by a preponderance of evidence, they were disparaged by the marks in question.¹⁴⁶ In ruling in favor of cancellation of registration, however TTAB noted their decision “concerns only the statutory right to *registration* under Section 2(a). We lack statutory authority to issue rulings concerning the right to *use* trademarks.”¹⁴⁷

C. TWHBEA’s Trademark Portfolio

Presently, the Tennessee Walking Horse Breeders’ and Exhibitors’ Association has ten active United States trademark registrations for a variety of goods and services¹⁴⁸ and one active trademark application.¹⁴⁹ Of this group, nine of the registrations are relevant to the present discussion.¹⁵⁰ These nine registrations

¹⁴⁴ *Id.* at 29.

¹⁴⁵ *Id.* at 9.

¹⁴⁶ *Id.* at 28.

¹⁴⁷ *Blackhorse*, 111 U.S.P.Q.2d at 1; *see* *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015) (ruling in favor of cancellation of all six marks was upheld on appeal to the Eastern District of Virginia).

¹⁴⁸ *See* The United States Patent and Trademark Office Trademark Electronic Search System, <http://tmsearch.uspto.gov/bin/gate.exe?f=searchss&state=4809:5y1k0i.1.1> (last visited July 26, 2016); *see also* Appendix A, *attached*. Appendix A comprises the entire TWHBEA trademark portfolio, including recent applications. The following registered trademarks would be vulnerable to cancellation: 3,275,289 for “TWHBEA” word mark and design; 3,244,138 for “TWHBEA” standard character mark; 3,244,137 for “TWHBEA” standard character mark; 3,260,260 for “TWHBEA” word mark and design; 3,271,753 for “TENNESSEE WALKING HORSE BREEDERS’ & EXHIBITORS’ ASSOCIATION” standard character mark; 3,244,018 for “TENNESSEE WALKING HORSE BREEDERS’ & EXHIBITORS’ ASSOCIATION” standard character mark; 3,292,920 for “IPEDS” standard character mark; 1,880,828 for “THE TENNESSEE WALKING HORSE. THE RIDE OF YOUR LIFE.” word mark and design; 1,876,853 for “TWHBEA” word mark and design. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

cover such goods and services as: (1) providing a registry and pedigree database for Tennessee Walking Horses, (2) providing informational services on breed competitive standards of the Tennessee Walking Horse, (3) training the Tennessee Walking Horse, (4) showing the Tennessee Walking horse, (5) show events and programs for the Tennessee Walking Horse, (6) competitive tournaments for the Tennessee Walking Horse, (7) promoting sports events and competitions for the Tennessee Walking horse, and (8) database management in the field of registrations and pedigrees of Tennessee Walking Horses.¹⁵¹

The TWHBEA has steadfastly defended its intellectual property, so as to maintain its position as the sole authorized breed registry for Tennessee Walking Horses in the world.¹⁵² In *Tenn. Walking Horse Breeders' and Exhibitors' Ass'n v. National Walking Horse Ass'n*, the TWHBEA sued the National Walking Horse Association ("NWHHA") on numerous grounds, including, *inter alia*, copyright infringement and trademark infringement.¹⁵³ Since the inception of the breed, the TWHBEA has maintained a comprehensive registry of all horses approved to be registered as Tennessee Walking Horses.¹⁵⁴ The TWHBEA is a "closed" registry: every animal, without exception, that is registered as a Tennessee Walking Horse must be the direct offspring of two parents registered with the TWHBEA.¹⁵⁵

Established in 1998, the NWHHA is a 501(c)(3) nonprofit organization whose purpose is to "promote the sound, natural gaited horse and eliminate the practice of soring."¹⁵⁶ At the time the TWHBEA filed suit, the NWHHA had been in the process of creating its own registry database to provide horse owners who eschewed soring a viable alternative entity with whom to register their animals.¹⁵⁷ To show proof of lineage, the NWHHA allowed

¹⁵¹ *Id.*

¹⁵² *See* *Tenn. Walking Horse Breeders' & Exhibitors' Ass'n v. Nat'l Walking Horse Ass'n*, 528 F. Supp. 2d 772 (M.D. Tenn. 2007); *see also* *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' & Exhibitors' Ass'n*, 344 F.2d 860 (9th Cir. 1965) (noting that TWHBEA was found guilty of violating anti-trust statutes against a member).

¹⁵³ *Tenn. Walking Horse Breeders' and Exhibitors' Ass'n*, 528 F. Supp. 2d at 772.

¹⁵⁴ *Id.*; *see also* WOMACK, *supra* note 1, at 111-12.

¹⁵⁵ WOMACK, *supra* note 1, at 111-12.

¹⁵⁶ *Tenn. Walking Horse Breeders' and Exhibitors' Ass'n*, 528 F. Supp. 2d at 774.

¹⁵⁷ *Id.* at 775-76.

owners to submit their TWHBEA-issued registration certificates to the NWA for concurrent NWA registration.¹⁵⁸

TWHBEA alleged NWA had violated TWHBEA's copyright by copying, on NWA-issued registration certificates, the organizational structure of information contained on each TWHBEA-issued registration certificate.¹⁵⁹ TWHBEA further alleged NWA had infringed the TWHBEA's trademarks by "[using] Plaintiff's trademarked name or acronym on [NWA's] website in announcing that [NWA] would accept TWHBEA Registry Certificates from applicants, and when [NWA] used Plaintiff's trademark in certain of [NWA's] advertising."¹⁶⁰ The Court found for TWHBEA on the copyright infringement claim, but found NWA had utilized the TWHBEA trademarks lawfully under the doctrine of fair use.¹⁶¹ All other claims brought by TWHBEA in the suit were dismissed.¹⁶²

V. SYNCHRONICITY OF HPA AND LANHAM ACTS

Thus, throughout the entire history of the Tennessee Walking Horse, all aspects of the breed – including everything from conformation to color, bloodlines, governance, and championships – reside in a monopolistic fashion with the TWHBEA.¹⁶³ If one does not own a TWHBEA-registered horse, one cannot participate in any sanctioned show, register any offspring, nor gain the added value that such TWHBEA registration and TWHBEA affiliation endows to its members and registered animals. As discussed, the TWHBEA takes a very

¹⁵⁸ *Id.* at 776.

¹⁵⁹ *Id.* at 776-80.

¹⁶⁰ *Id.* at 781.

¹⁶¹ *Id.* at 785 (noting NWA was found to have willfully violated TWHBEA's copyright. The Court ordered damages of \$31,000, \$1,000 over the maximum statutory amount of \$30,000 for "innocent" infringement, noting, "the monetary amount of benefit to the Defendant and the damages to Plaintiff, if any, are not high"); *see also* 15 U.S.C. § 1125(c)(3)(A) (2016).

¹⁶² *Tenn. Walking Horse Breeders' and Exhibitors' Ass'n*, 528 F. Supp.2d at 784-85.

¹⁶³ *See Horses 101*, TENNESSEE WALKING HORSE BREEDERS' AND EXHIBITORS' ASSOCIATION, <http://www.twhbea.com/breed/horses101.php> (last visited Oct. 5, 2016) [<https://perma.cc/K78N-GS57>].

active stance, up to and including litigation, to maintain its monopoly on its brand.

One cannot help but wonder, then, why, after more than four decades, the TWHBEA has not yet eliminated the illegal practice of soring? If the TWHBEA purports to conduct lawful business, it would seem logical that any owner, trainer, or breeder who has violated federal law under the the HPA would be ousted from the TWHBEA; such a policy would assure the TWHBEA is operating its business in a lawful manner and ridding itself of any unlawful entanglements and, thus, placing a proverbial “black eye” upon its brand and trademark portfolio.¹⁶⁴ If the TWHBEA condones soring, then almost five decades of consistent violations throughout the industry, including numerous TWHBEA Board members,¹⁶⁵ is surely sufficient to indicate that the TWHBEA’s efforts at “self-policing” have failed miserably, and perhaps it is time to consider how the USDA and the USPTO might coordinate efforts to eliminate soring completely.¹⁶⁶

¹⁶⁴ See 2016 General Rule 839(n), UNITED STATES EQUESTRIAN FEDERATION (2016), <https://www.usef.org/documents/ruleBook/2016/GeneralRules/GR08-ConductofCompetitions.pdf> [<https://perma.cc/LE5G-DWEY>].

¹⁶⁵ See generally Board of Directors, TENNESSEE WALKING HORSE BREEDERS' AND EXHIBITORS' ASSOCIATION, <http://www.twhbea.com/association/bod.php> (last visited Oct. 5, 2016) (listing of the current TWHBEA Board of Directors) [hereinafter WALKING] [<https://perma.cc/27SU-SDCX>]; see also HPADData Reports, FRIENDS OF SOUND HORSES, INC., <http://www.hpdata.us> (last visited Oct. 6, 2016) (showing a random sampling of the members of the current Board revealing the following HPA violations: Kelly Peevy (2007); Spencer Benedict (2007, 2009, 2009, 2009, 2014); Bruce Vaughn (1993, 2002); Charles Gleghorn (2002, 2008, 2009, 2009, 2010, 2014)) [hereinafter HPADData] [<https://perma.cc/2J4W-SUWZ>].

¹⁶⁶ See Horse Protection: Licensing of Designated Qualified Persons and Other Amendments, 81 Fed. Reg. 49112-49137 (proposed July 26, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-07-26/pdf/FR-2016-07-26-FrontMatter.pdf> (noting on July 26, 2016, the USDA/APHIS published a Proposed Rule in the Federal Register regarding the Horse Protection Act. It is a comprehensive overhaul of the HPA in response to the 2010 OIG findings, discussed *supra*. The Proposed Rule would virtually end soring, by eliminating all stacks, chains, and other “action devices,” by transferring all regulatory requirements, including enforcement, from the HIOs to APHIS, and by establishing a process where AHPIS would train, license, and oversee the DQPs, thus addressing many of the conflicts of interest currently at issue in the DQP/HIO system) [<https://perma.cc/KD2G-SAMY>].

A. Illegal Goods or Services Analysis

The TWHBEA's trademarks are an imprimatur of the TWHBEA's endorsement of illegal acts, and thus, the trademarks should be cancelled by the USPTO under a *Mongols* analysis. The Horse Protection Act was crafted to eliminate the illegal act of soring a horse.¹⁶⁷ The HPA includes statutory penalties for violations.¹⁶⁸ The Lanham Act was crafted to protect consumers with respect to quality and value of goods or services available for purchase.¹⁶⁹ The Lanham Act specifically disallows trademark registration for any good or service that "comprises immoral, deceptive, or scandalous matter",¹⁷⁰ and the USPTO can cancel trademarks for illegal goods under this rubric.¹⁷¹

Arguably, the TWHBEA offers illegal goods into the stream of commerce in two ways. First, the TWHBEA condones the illegal acts of its Board members, general members, owners, breeders, trainers, and other persons related to the organization by allowing HPA violators to maintain an active membership and participation in the association.¹⁷² Such persons who are members of the TWHBEA and who also have HPA violations still offer their services as TWHBEA-affiliated persons, thus, enjoying the enhanced credibility in the eyes of the consuming public that is concomitant with membership in the TWHBEA as the sole registry within the industry. Second, the TWHBEA offers illegal goods directly to the public in the form of maintaining horses on its registry who have been sored, especially those with proven HPA violations on their records.

If, when notified of an HPA violation, the TWHBEA revoked a person's membership, revoked a horse's registration, or both, one could argue the TWHBEA was making an honest effort to eliminate soring and working to stop offering illegal goods to

¹⁶⁷ 15 U.S.C. § 1821 (2016).

¹⁶⁸ 15 U.S.C. § 1825 (2016).

¹⁶⁹ 15 U.S.C. § 1051 (2016).

¹⁷⁰ 15 U.S.C. § 1052 (2016).

¹⁷¹ 15 U.S.C. § 1064 (2016).

¹⁷² See *Animal and Plant Health Inspection Service*, UNITED STATES DEPARTMENT OF AGRICULTURE (Aug. 9, 2016), https://www.aphis.usda.gov/ies/downloads/disqualification_list.pdf [https://perma.cc/63Z2-JJFD].

the public. The TWHBEA not only does not revoke a member or a horse's registration, but, rather, appears to encourage those persons with HPA violations to join in the primary governance of the association.¹⁷³

If the USPTO revoked the relevant portions¹⁷⁴ of the TWHBEA trademark portfolio based upon the TWHBEA's offering of illegal goods and services, another organization could then utilize the TWHBEA trademarks without fear of infringement. This would assure continuity of the brand to the public and continuity of the underlying registry for the industry. This transfer of the brand would eliminate any concern for a catastrophic collapse of the industry as a whole. Such an organization – one that, like NWHHA, is dedicated to 100 percent compliance with the HPA – should be able to eliminate soring rather quickly.

B. Naked License Analysis

If the TWHBEA purports to maintain the integrity of its brand, *a la* the “high standards” argument posed by the plaintiff in *Eva's Bridal*,¹⁷⁵ it would seem logical that any owner, trainer, or breeder who has violated the HPA would be ousted from the TWHBEA for failure to uphold the stated goal of the organization: “to maintain the purity of the breed, to promote greater awareness of the Tennessee Walking Horse and its qualities, to encourage expansion of the breed, and *to help assure its general welfare*.”¹⁷⁶ (emphasis added). Under a naked license

¹⁷³ See WALKING, *supra* note 168 (listing the current TWHBEA Board of Directors); see also HPADData, *supra* note 168 (sampling of the members of the current Board revealed the following HPA violations: Kelly Peevy (2007); Spencer Benedict (2007, 2009, 2009, 2009, 2014); Bruce Vaughn (1993, 2002); Charles Gleghorn (2002, 2008, 2009, 2009, 2010, 2014)).

¹⁷⁴ It is noted that TWHBEA mark 3041236 covers class 025, “pullover shirts, t-shirts, caps” bearing the mark, “TENNESSEE WALKING HORSE.” As no violations of HPA can occur in the covered goods, arguably this mark would withstand any attempt for revocation due to illegal goods. Under the naked license abandonment doctrine, however, a different outcome could be anticipated.

¹⁷⁵ See *Eva's Bridal Ltd. v. Halanick Enters., Inc.*, 639 F.3d 788, 790 (7th Cir. 2011).

¹⁷⁶ *About the TWHBEA*, TENNESSEE WALKING HORSE BREEDERS' AND EXHIBITORS' ASSOCIATION, <http://www.twhbea.com/association/about.php> (last visited Oct. 5, 2016) [https://perma.cc/4KHN-EL4S].

analysis, per *Eva's Bridal* and the doctrine of naked license abandonment, the TWHBEA trademarks should be cancelled. By its failure to maintain sufficient control over the quality and care of TWHBEA-registered horses and TWHBEA-authorized shows by the TWHBEA's authorized owners, breeders, and trainers so as to eliminate soring throughout the industry, the TWHBEA has abandoned any and all of its trademarks that cover a good or service related to horses and, thus, given a naked license to anyone to use the relevant TWHBEA trademarks at will.

If, upon notification of an HPA violation, the TWHBEA revoked a person's membership, revoked a horse's registration, or both, the TWHBEA would have a strong argument in favor of maintaining its trademark portfolio under pressure of a naked license argument, based upon a positive showing of actions taken to maintain the quality of its goods (non-sored horses) and services (shows where non-sored horses are favored over sored horses). This, however, is not the case, and an argument in favor of abandonment under the naked license doctrine appears to be both strong and valid. Cancellation of the TWHBEA trademarks under the naked license doctrine would allow healthy competition between the TWHBEA and the NWAHA, and this would provide the consumer with a choice of walking horse organizations within the marketplace, each with its own standards of quality with respect to HPA compliance and healthy, un-sored horses.

C. Disparagement Analysis

Similar to the Native American plaintiffs in *Blackhorse v. Pro-Football, Inc.*,¹⁷⁷ there are thousands of owners, breeders, and trainers of Tennessee Walking Horses around the world who neither condone soring, nor inflict soring upon their horses.¹⁷⁸ These individuals could argue they are disparaged by the negative connotations associated with the TWHBEA's brand and trademarks due to nearly a half-century of systemic violations of

¹⁷⁷ See *Blackhorse*, 111 U.S.P.Q.2d 1080.

¹⁷⁸ Home, NATIONAL WALKING HORSE ASSOCIATION, <https://www.nwha.com/home.html> (last visited Oct. 5, 2016) [<https://perma.cc/GAY4-K35B>]; *Welcome to Friends of Sound Horses*, Friends of Sound Horses, Inc., <http://www.fosh.info/index.php> (last visited Oct. 5, 2016) [<https://perma.cc/TVN9-FCAT>].

the HPA.¹⁷⁹ These individuals have also, arguably, been damaged economically; so long as the TWHBEA trademarks remain registered and the breed registry is thus monopolized by the TWHBEA, then, if these individuals wish to affiliate with another organization that has a strict compliance policy with the HPA, they must pay membership fees in *both* organizations in order to maintain their horse's official registration and pedigree. While some individuals may not feel disparaged, it is noteworthy that for a disparagement cancellation, a majority is not required, per *Blackhorse*.¹⁸⁰

VI. CONCLUSION

For almost a half-century, soring has been illegal. Yet, for that same length of time, soring has remained an integral part of the Tennessee Walking Horse industry. Tragically, it appears the Tennessee Walking Horse Breeders' and Exhibitors' Association is complicit in the ongoing abuse of soring, either by direct approval of the illegal practice or by neglect of any viable means of controlling the quality of the TWHBEA brand. It would be a simple thing to revoke membership to any HPA-violator and thus show to the consuming public, to the USDA, and to the USPTO, any sincerity on the part of the TWHBEA to eliminate any illegal practices within its brand and the underlying goods and services while simultaneously maintaining the quality of the TWHBEA's brand and the underlying goods and services. Similarly, to revoke registration for any horse found to be sored would have an immediate and direct negative economic impact on the humans who had so abused the horse. This lost incentive would surely curtail the abuse in quick fashion and send the same powerfully positive message to the consumers, to the USDA and to the USPTO.

Without the monetary incentives to register and show sored horses, those who presently sore horses would have two options: work exclusively with un-sored animals, or leave the industry completely. This was the intended outcome of the HPA,

¹⁷⁹ See WALKING, *supra* note 168; see also HPADData, *supra* note 168.

¹⁸⁰ See *Blackhorse*, 111 U.S.P.Q.2d 1080.

and, forty-six years later, the time is beyond ripe for this result to be achieved. By removing the imprimatur of brand authority that comes with a registered trademark portfolio, the USPTO would provide a level playing field where all owners, trainers, and breeders who comply with the HPA could breed, train, show and sell Tennessee Walking Horses. Absent any effort by the TWHBEA to clean up soring systemically from within, it appears the USPTO has viable means of cancelling the relevant portions of the TWHBEA trademark portfolio, thus opening the way for a new governing organization to take up the brand and repair its value – and its legitimacy – in the eyes of consumers, and, most importantly, to stop the abuse of these animals.