KEEPING THE HOME TEAM AT HOME: ANTITRUST AND TRADEMARK LAW AS WEAPONS IN THE FIGHT AGAINST PROFESSIONAL SPORTS FRANCHISE RELOCATION

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INTRODUCTION

Hearken back to the good old days of professional sports: the Rams played in Los Angeles; the Colts played in Baltimore; the Cardinals played in St. Louis; the Raiders had not moved to Los Angeles and back; Houston's team was called the Oilers; more football teams played in New York than in New Jersey. Teams were called the Lakers because they played in the Land of Ten Thousand Lakes, the Jazz because they played in the Birthplace of Jazz, and the North Stars because they played in the North Star State. Hockey teams played in cold weather cities like Winnipeg and Quebec, not warm climes like Carolina and Phoenix. What happened?

Sports franchises became, first and foremost, businesses. No longer were sports franchises about competition and athleticism; they were about the bottom line. In the 1990s, athletes began making millions in salary,[1] and augmented their pay with multi-million dollar endorsement deals. Sports had become a full-fledged entertainment commodity. Although the commercialization of sports has led to great innovations—instant replay, great new facilities, that little yellow line that shows TV viewers where the first down marker is—it has also caused sports owners to become very fickle in their choice of city. When the Brooklyn Dodgers left New York in 1958, an entire New York City borough found a new hate. When the

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1. Eric R. McDonough, *Escaping Antitrust Immunity—Decertification of the National Basketball Players Association*, 37 SANTA CLARA L. REV. 821, 821 n.3 (1997).

Baltimore Colts moved to Indianapolis in 1984, one of its former players called the owner "sick."[2] Yet, thirteen years later, in 1997, when the Houston Oilers moved to Tennessee, it was a move everyone expected and agreed with.

The rash of moves in the National Football League, National Hockey League, and the National Basketball Association is bad for sports. Franchise relocations destroy fan loyalty, the result of which is not only decreased enjoyment of the games by fans, but also a decrease in revenue for the franchises themselves.[3] If the trend continues, the effect on those leagues and their fans could be disastrous. This comment examines the reasons behind relocations in the NFL, and what legal strategies can and should be used to slow the trend. These strategies include: a legislative solution—exclusion of the NFL's relocation control from antitrust law; an enforcement solution—enforcement by the NFL of the rules it adopted that required pro-competitive reasoning before disallowing a move; and a trademark solution—enactment of new rules by the NFL that force relocating teams to leave their team names, colors, and history in the city they abandon. Section I of this comment defines "franchise free agency" and examines its causes, particularly the profit-sharing agreements that provide greater encouragement for NFL teams to move when compared to the agreements of the NBA and NHL. Section II discusses antitrust law, particularly under the Sherman Antitrust Act, and the hurdles antitrust law presents when sports leagues attempt to prevent teams from moving, as well as legislative attempts to slow franchise relocations. Finally, Section III analyzes trademark law and how franchises' trademark rights are affected by relocating teams, including the concepts of actual infringement, abandonment and dilution in the context of sports. In conclusion this comment argues that the best solution is for Congress to enact legislation exempting the NFL from antitrust law in the context of franchise locations. In the absence of such legislation, the NFL must adopt new trademark rules regarding team names and colors, and should enforce its rules to discourage teams from moving; teams that do

2. *Unitas Wants Colts to Omit Records*, CHI. SUN-TIMES, Dec. 29, 1985, at 96, 1985 WL 3608921.

3. *See generally* JEFFREY DALTON JAMES, BECOMING A SPORTS FAN: UNDERSTANDING COGNITIVE DEVELOPMENT AND SOCIALIZATION IN THE DEVELOPMENT OF FAN LOYALTY (1997).

relocate would be required to leave their team name and colors with the abandoned city. To understand these problems and their potential solutions, one must first understand the current state of franchise relocation.

I. "FRANCHISE FREE AGENCY"

Because of franchise owners' and leagues' increased emphasis on profits in the modern era of sports, franchises are no longer connected to the city in which they play; instead, franchises have become "free agents."[4] To the altruistic sports fan, sports leagues originally came into existence because of a love for the game, regional competitiveness and rivalry, and overall improvement of life for a city's residents.[5] Now, that all seems laughable in this age of multi-million dollar salaries, worldwide licensing agreements, ubiquitous video games, shoe contracts, and bobble-head dolls.

Nowhere is this lack of relationship between a team and its city more visible than in the NFL, where, between 1995 and 1997, four franchises have relocated.[6] "Franchise free

4. The term "franchise free agency" is attributed to former NFL Commissioner Pete Rozelle in the early 1980s. *Professional Sports Franchise Relocation: Antitrust Implications: Hearing Before the House Comm. on the Judiciary*, 104th Cong. 78–84 (1996) (statement of Paul Tagliabue, Comm'r, NFL), 1996 WL 7135436 [hereinafter Tagliabue]. Traditionally, the term "free agent" is used to describe a player without a contract to play for any particular team. That player is free to negotiate with his former team or any other interested teams until he finds a satisfactory location to exhibit his talents. Similarly, a franchise described as a "free agent" is one which is unhappy with its current city, and seeks to find a superior situation elsewhere. *See id. See also* Sanjay Jose Mullick, *Browns to Baltimore: Franchise Free Agency and the New Economics of the NFL*, 7 MARQ. SPORTS L.J. 1, 2 (1996).

5. *Cf.* Kathleen L. Turland, *Major League Baseball and Antitrust: Bottom of the Ninth, Bases Loaded, Two Outs, Full Count, and Congress Takes a Swing*, 45 SYRACUSE L. REV. 1329, 1341–42 (1995) (noting that baseball's control of franchise relocation is intended to preserve franchise stability, fan loyalty, and local rivalries).

6. In 1995, the Rams moved from Los Angeles to St. Louis, the Raiders moved from Los Angeles (back) to Oakland, and the Browns moved from Cleveland to Baltimore, where they were renamed the Ravens. Mullick, *supra* note 4, at 4–5. In 1997, the Houston Oilers moved to Tennessee, where they became the Titans. Alvin B. Lindsay, *Our Team, Our Name, Our Colors: The Trademark Rights of Cities in Team Name Ownership*, 21 WHITTIER L. REV. 915, 915 (2000). As if that much league activity were not enough, the same period saw the birth of four new teams: in 1995, the Jacksonville Jaguars and Carolina Panthers were formed; in 1999 the Cleveland Browns were born again; in 2002, the Houston Texans entered the league. *See* Official Website of the Jacksonville Jaguars, *at*

agency"—the tendency of franchises to shop for a new home when their current situation is anything less than ideal—has hit the NFL particularly hard because of its profit-sharing scheme. NFL owners adhere to a philosophy called "League Think,"[7] where teams currently share eighty-six percent of the NFL's revenue, as opposed to a relatively small twenty-eight percent for the NBA, and only nine percent for the NHL.[8]

That means that eighty-six percent of the money coming in—through ticket sales, television contracts, merchandising, etc.—is pooled and then split evenly among all NFL franchises. Because high revenue teams, such as the Dallas Cowboys and the Washington Redskins, are forced to share so much of their income, small market teams like the Green Bay Packers can be profitable.[9] However, the NFL's revenue sharing also drastically reduces the correlation between the quality of the team on the field, and the profitability of the franchise. A team does not need to win the Super Bowl, or even make the playoffs, for the franchise to make money. Similarly, a team that does win the Super Bowl will not necessarily make more money than a team inhabiting the League cellar.[10] "League Think" does not reach all revenue; income derived from stadiums, including six-dollar nachos, eight-dollar beers, and twenty-dollar parking, as well as significantly more expensive signage, stadium club fees, and luxury box sales, is not subject to the revenue sharing plan.[11]

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http://www.jaguars.com (last visited Feb. 29, 2004); Official Website of the Carolina Panthers, *at* http://www.panthers.com (last visited Feb 29, 2004); Official Website of the Cleveland Browns, *at* http://www.clevelandbrowns.com (last visited Feb. 29, 2004); Official Website of the Houston Texans, *at* http://www.houstontexans.com (last visited Feb. 29, 2004).

7. Mullick, *supra* note 4, at 1. "League Think" was coined by legendary NFL Commissioner Pete Rozelle to describe his vision for the continued viability of the league. By pooling resources and acting with unified purpose, Rozelle argued, the teams would increase competitiveness on the field, thereby improving the quality and entertainment value of the game. Rozelle's strategy resulted in a tenfold increase in television revenue over the next three years. *Id.* at 1–2.

8. Stephen John Kolias, *Offensive Interference: How Communities Have Harnessed Market Forces to Retain NFL Franchises, Eliminating the Need for H.R. 3817's Proposed Antitrust Exemption*, 8 SPORTS LAW. J. 43, 44 (2001).

9. *See id.* at 44–45.

10. For example, after the Green Bay Packers won the Super Bowl in 1996, the value of the team only rose twelve percent. The average value increase across the NFL was eighteen percent. *Id.* at 44 (citing Kurt Badenhausen, et al., *More than a Game: An In-Depth Look at the Raging Bull Market in Sports Franchises*, FIN. WORLD, June 17, 1997, at 43).

11. Mullick, *supra* note 4, at 16 (citing N.F.L. CONST. art. 19.1(A)(3). Prices of nachos, beer, and parking were observed by the author at a recent Colorado

Unquestionably, it is vital to the economic health of an NFL franchise—the viability of the franchise as a business, not the quality of the team on the field—to have a state of the art facility.[12] With such a facility, parking and concession prices can soar even higher, sponsors will continue to want to attach their names to the field, and the luxury boxes will be filled.[13] Thus, it is not surprising that Art Modell moved the Cleveland Browns to Baltimore, despite an average draw of 64,000 fans per game.[14] The Browns were stuck in a sixty-four-year-old stadium and unable to persuade Cleveland voters to pay for a new one, even though Jacobs Field had just been built for the Cleveland Indians. In return for moving to Baltimore, Modell was offered a new stadium, rent-free for seven years, in addition to all revenue from all one hundred eight luxury boxes, 7500 box seats, parking, and in-stadium advertising. As if that were not enough, the city of Baltimore paid Modell $50 million for moving expenses.[15]

So why is franchise relocation bad for the NFL? Because fans do not like their teams moving away,[16] and fans, in the end, pay the salaries of the players, coaches, and everyone else employed by the franchise. Then why do NFL teams move? The NFL is in a unique business position, due to the necessity of both competition and cooperation among the business owners. The NFL creates one form of entertainment, which then competes against other sports leagues, as well as entertainment of all other kinds.[17] In order to ensure competitiveness on the field and positive relations between the team and the community, each franchise is controlled by a separate owner.[18] The NFL requires each owner to adhere to the Constitution and bylaws of the NFL.[19] Those franchises are treated as separate

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Avalanche game at the Pepsi Center in Denver. The author is not currently in a position to have personal knowledge of the price of a luxury box.

12. Mullick, *supra* note 4, at 16.

13. *Id.*

14. Lindsay, *supra* note 6, at 917 n.14.

15. Bart Hubbuch, *Modell Moving Browns to Baltimore*, BUFF. NEWS, Nov. 7, 1995, at B5, 1995 WL 5512259; Athena Schaffer, *NFL's Browns Begin Play in Baltimore Next Year*, AMUSEMENT BUS., Nov. 13, 1995, at 17. Whether Modell plans on moving the team when he has to start paying rent is yet to be seen.

16. *See generally* JAMES, *supra* note 3.

17. Tagliabue, *supra* note 4 at 80.

18. *Id.*

19. *Id.*

business entities, except for behavior mandated by NFL rules.[20] However, the cooperation required among franchises cannot square with the NFL's treatment of them as separate; if each franchise were truly separate, it would be worthless, because it must have the cooperation of the other franchises to perform its function, *i.e.* play football games.[21] As a separate entity, an owner may have interests disparate from that of the NFL as a whole; what is best for an individual team may not always be best for the League, contrary to the "League Think" ideal. For example, when the Rams moved from Los Angeles to St. Louis, it was, presumably, an effective business decision for the franchise. Commissioner Tagliabue, however, claims that overall, the move was bad for the NFL.[22] The result was a classic tragedy of the commons: the shared revenue stream, based primarily on TV contracts,[23] was hurt by the move. Because Los Angeles is so much larger than St. Louis, many more fans would watch the Los Angeles Rams than the St. Louis Rams. However, since the Rams only absorb a small part of that decrease, due to the shared revenue scheme,[24] its increase in stadium profits made the move worthwhile. The aggregate effect on all the owners makes it an inefficient move for the NFL as a whole.

In the other major professional sports leagues, revenue sharing affects franchise relocation in a drastically different way.[25] The NHL, with so little of its TV and other revenue being shared among the franchises, has found its franchises going south—usually from Canada to the United States.[26] Canadian cities like Winnipeg and even Quebec simply cannot compete with the revenue generated in U.S. cities like Phoenix and

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20. *See id.* An example of behavior controlled by NFL rules is the agreement that the team designate a home location, and play its home games there. *See id.* This paper takes the position that the above-mentioned rule does not actually operate to constrain NFL owners at all. *See infra* Part II.B.

21. Tagliabue, *supra* note 4, at 80–81.

22. *Id.* at 81.

23. *See id.* at 80.

24. *Id.*

25. Major League Baseball has a statutory antitrust exemption, which allows the league to have significantly more control over relocations. Thus, MLB has not had nearly the deluge of moves that the other three major sports have; there were no moves between 1903 and 1953, and none since 1972. Turland, *supra* note 5, at 1341 n.73.

26. *See* Steve Pearlstein, *Canada Considers Sport-Team Subsidies*, WASH. POST, Oct. 9, 1998, at A40, 1998 WL 16561165.

Denver.[27] The NHL does not have as profitable a national TV contract as the NFL. Rather, NHL teams depend on local and regional TV revenues to be profitable; small market TV stations simply cannot afford contracts lucrative enough to support businesses the size of professional sports teams.[28] Similarly, NBA owners are more apt to move their teams into larger and more profitable markets, because they do not have as large of a shared revenue stream to ameliorate the difference in income from sources like TV revenues, ticket sales, and merchandising. George Shinn was able to move the Charlotte Hornets to New Orleans, even though the fans wanted the team to stay in North Carolina (though without Shinn).[29] Because the NBA and NHL do not engage in significant revenue sharing like the NFL, the profits of the NBA and NHL as a whole are not affected nearly as much in either direction by team relocations. Shinn, presumably, moved the Hornets to New Orleans because he believed they would be more profitable there, based on projected TV revenues, ticket sales, and merchandising. In the NFL, such revenue streams are shared, so the owners are much less inclined to consider those factors significant. A move where the team will be more profitable, like the Hornets', is good for the NBA. Neither the NBA nor the franchise will suffer any negative economic consequences. While such a move may have affected the image of the NBA in fans' minds, it did not do the amount of monetary damage to the NBA that the Rams' move to St. Louis did to the NFL.

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27. *Id.* Quebec and Winnipeg have populations under 700,000. M. David Bennett, Teaching and Learning About Canada, *at* http://www.canadainfolink.ca/cities.htm (last visited Feb. 29, 2004). Denver's population is 2.6 million; Phoenix's population is 3.3 million. U.S. Census Bureau, Ranking Tables for Metropolitan Areas, 1999 and 2000 Population, *available at* http://www.census.gov/population/cen2000/phc-t3/tab02.pdf (last modified Apr. 30, 2001). The most troubling aspect of relocating NHL teams—the fact that more hockey games are now played in the southern US than in Canada—is beyond the scope of this article.

28. Kolias, *supra* note 8, at 44. During the week of December 30, 2002, the Ottawa Senators were unable to pay their players; instead of paychecks, the players got envelopes explaining how a delayed refinancing left the team without funds to disperse. *Sportscenter* (ESPN television broadcast, Jan. 2, 2003).

29. Stewart Yerton, *In Contest for Hornets, Cities Facing Jump Ball; Both Charlotte and N.O. Boast Benefits, Face Hurdles*, NEW. ORL. TIMES-PICAYUNE, Feb. 17, 2002, at 1, 2002 WL 3083931. In fact, the city of Charlotte has already begun talking to the NBA about an expansion franchise. Jason Cole, *Heavy Price for a Second Chance; Beware, S. Florida: It's Costly to Get a New Franchise After Losing a Team*, MIAMI HERALD, Aug. 11, 2002, at 1C, 2002 WL 24342430.

Because relocations in the NFL are more detrimental to the league and the sport as a whole, the majority of this paper will focus on those moves. The first effort to halt such moves in the NFL occurred over two decades ago, when Raiders' owner Al Davis attempted to move his team from Oakland to Los Angeles. When the NFL owners voted to disallow the move, he sued. That case became the starting point for all franchise relocation lawsuits.

II. THE ANTITRUST BATTLE

Contrary to Al Davis' anti-"League Think" ideals, it seems that there should be numerous legal avenues to prevent relocations. City attorneys have been diligent and creative in their efforts to keep teams in their cities. When Modell announced his now infamous decision to move the Browns, Cleveland's citizens were, not surprisingly, outraged.[30] In response, the city of Cleveland filed a breach of contract claim against the Browns based on its stadium lease in an effort to halt the relocation.[31] Fans held demonstrations, sent thousands of protest postcards, held rallies, and bussed fans to the team's final game in Pittsburgh, where even the Pittsburgh fans wore orange armbands protesting the move.[32] The NFL owners reached a settlement with Modell in February,[33] but what could have been the NFL's biggest bargaining chip—a rule in the NFL Constitution requiring a vote of league owners before any team can move—had been taken off the table years earlier when the Ninth Circuit held that the rule was a violation of § 1 of the Sherman Antitrust Act.[34]

This section begins with an explanation of the basics of antitrust law, particularly as it applies to professional sports leagues. It next discusses the watershed antitrust case for relocating sports franchises, known as *Raiders I*, as well as legislative attempts to overturn that decision. It concludes with a

30. Lindsay, *supra* note 6, at 917–18.

31. *Id.* at 918.

32. *Id.*

33. *Id.* at 919. The settlement included damages for the city of Cleveland, but, more importantly, Modell agreed to leave the Cleveland Browns trademark, colors, and team records in trust with the NFL for a new Cleveland franchise, which was guaranteed to be granted by 1999. *Id.*

34. L.A. Mem'l Coliseum Comm'n v. NFL, 726 F. 2d 1381, 1383 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984) (*Raiders I*).

discussion of the effect that *Raiders I* has had on the NFL, and what course should be taken to reverse that effect.

A. *The Sherman Act*

The cornerstone of American antitrust law is the Sherman Act, enacted in 1890.[35] The majority of antitrust cases, including those discussed *infra*, are brought under Section One of the Sherman Act. That section states that any "contract, combination . . . or conspiracy in restraint of trade . . . is . . . illegal."[36] The Supreme Court has stated, however, that since every contract is, to some degree, a restraint of trade,[37] only those restraints deemed to be unreasonable violate the Sherman Act.[38] This became known as the "rule of reason."[39] While Section One of the Sherman Act does not mention competition, it is clear from the legislative history and the common law that predated the Sherman Act that it targets anticompetitive restraints.[40] Thus, a successful antitrust suit almost always begins with the identification of the effects on competition of the challenged restraint.[41] If such effects are proven, the defendant has the opportunity to rationalize his actions; if the restraint has a legitimate objective—one that produces socially desirable results—the restraint may be judged lawful.[42] However, the defendant must still prove that the restraint actually achieves the desired result, and is no more restrictive than necessary to affect that outcome.[43] These rules are generally applied to firms that would otherwise be competitors, but who conspire together in an effort to gain advantage over the market. Sports franchises within a league, while admittedly competitors, are also required to cooperate with each other in order to bring

35. 15 U.S.C. §§ 1–7 (2001).
36. *Id.*
37. United States v. Topco Assocs., 405 U.S. 596, 606 (1972).
38. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. Am. Tobacco Co., 221 U.S. 106 (1911).
39. VII PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1501 (2d ed. 2003).
40. *Id.* ¶ 1502.
41. *Id.* ¶ 1503.
42. *Id.* ¶ 1504.
43. *Id.* ¶ 1505.

their product to the market. Courts have, accordingly, treated sports leagues differently than other businesses.[44]

Sports leagues have been the target of many antitrust cases, falling mainly into four categories: ethical rules for players, hiring rules for teams, team management rules (including relocation), and rules governing owners' relations to other sports.[45] In order to escape liability, sports leagues have often attempted to characterize the league as a single entity, analogous to a large firm with many divisions.[46] Because there is no combination or conspiracy, Section One of the Sherman Act cannot apply to a single entity.[47] Most courts have rejected the single entity theory, holding the control a sports league has over individual owners is not enough to consider them anything but disparate entities.[48] Instead, courts have recognized that sports leagues are neither open marketplaces nor totally integrated entities, and have attempted to apply an intermediate standard.[49] Unfortunately, what is a "reasonable" rule for sports leagues is far from settled.[50] The Ninth Circuit Court of Appeals attempted to lend sports leagues some guidance in a case brought by the Oakland Raiders against the NFL.

B. *The Oakland, Formerly Los Angeles, Formerly Oakland, Raiders and the Sherman Antitrust Act*

The Oakland Raiders were the first team to challenge the NFL's relocation rules under antitrust law. In 1978, the Los Angeles Rams NFL franchise chose to stop playing its games in the Los Angeles Coliseum in favor of a new stadium in nearby

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44. *See, e.g.*, Brown v. Pro Football, Inc., 141 L.R.R.M. (BNA) 2942 (D.D.C. Mar. 1992); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976); Flood v. Kuhn, 407 U.S. 258 (1972); Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953); Radovich v. Nat'l Football League, 352 U.S. 445 (1957).

45. VII AREEDA & HOVENKAMP, *supra* note 39, ¶ 1478d.

46. *Id.*

47. 15 U.S.C. § 1 (2001).

48. 15 U.S.C. § 1 (2001). *See* N. Am. Soccer League v. Nat'l Football League (soccer), 670 F. 2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982). Conspiratorial action has even been found when the league owns all the teams. *See* Fraser v. Major League Soccer, 284 F. 3d 47 (1st Cir. 2002).

49. VII AREEDA & HOVENKAMP, *supra* note 39, ¶ 1478d.

50. *Id.*

Anaheim.[51] The Coliseum, after finding that expansion was not likely, began actively negotiating with existing NFL teams in hopes that one would relocate to Los Angeles.[52] In 1980, Al Davis, managing general partner of the then Oakland Raiders, signed an agreement with the Coliseum, and announced his relocation plans to the NFL.[53] One week later, the league voted unanimously against the move, under Rule 4.3 of the NFL Constitution, which requires three-fourths of franchise owners to approve a relocation.[54] The Raiders joined with the Coliseum in a suit against the NFL (hereinafter *Raiders I*), claiming that Rule 4.3 violated Section One of the Sherman Act[55] by unlawfully restraining trade.[56] The Ninth Circuit held, as a preliminary matter, that the NFL could not be considered a single entity, and thus was not immune to antitrust scrutiny, allowing the merits of the case to be heard.[57] The NFL claimed, and the court agreed, that the restraint on franchise relocation was only ancillary to its main purpose—producing professional football.[58] Under the ancillary restraint doctrine, the restraint was evaluated under the rule of reason.[59] The court noted that territorial allocations were necessary for professional football to be able to be successful.[60] Nonetheless, the court held that the restraints necessary for football to survive could have been achieved with a less restrictive rule.[61] This prohibited the NFL owners from restricting the relocation of NFL franchises, and,

51. L.A. Mem'l Coliseum Comm'n v. NFL, 726 F. 2d 1381, 1383 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984) (*Raiders I*).

52. *Id.* at 1384.

53. *Id.* at 1385.

54. *Id.* The NFL Constitution is the governing document for the NFL. New owners are required to adhere to it. *See* Tagliabue, *supra* note 4 at 80. Rule 4.3 previously stated that any move to "a location within the home territory of any other club shall only be effective if approved by a unanimous vote," *Raiders I*, 726 F.2d at 1385 n.1 (quoting NFL Const. Rule 4.3), but was amended in 1978 in an effort to avoid this lawsuit. The amendment did away with the unanimity requirement, but left intact the rule that for any franchise relocation, an "affirmative vote of three-fourths of the existing member clubs of the League." *Id.*

55. 15 U.S.C. § 1 (2001).

56. *Raiders I*, 726 F.2d 1381.

57. *Id.* at 1387–90.

58. *Id.* at 1395.

59. *Id.*

60. *Id.* at 1396.

61. *Id.*

as NFL fans know, allowed the Raiders to move to Los Angeles.[62]

Not only was the NFL forced to allow the move, but in a subsequent suit (hereinafter *Raiders II*) it was also held liable for treble damages that totaled approximately $50 million.[63] In *Raiders II*, the Ninth Circuit upheld the jury's determination of damages owed to both the Raiders franchise and the Los Angeles Coliseum.[64] Those damages were based on the projected difference in the team's profits, as well as the loss to the Coliseum of the lease income.[65] Moreover, some of those amounts were trebled in order to compensate the team and the stadium for the "injury caused by the [NFL's] violation."[66]

In 1995, when the NFL owners voted against allowing the Los Angeles Rams to move to St. Louis, the Rams and the Attorney General of Missouri threatened to seek billions of dollars in punitive damages.[67] The NFL owners, noting the decisions in *Raiders I* and *II*, chose to allow the move, rather than risk the possibility of treble antitrust damages.[68]

Do the decisions in *Raiders I* and *II* really foreclose the possibility of the NFL preventing franchises from relocating? The NFL seems to believe that they do. However, even the court in *Raiders I* conceded that the unique nature of the NFL made it "difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors,"[69] as opposed to arrangements made within a cooperative organization like the NFL. The court further noted that the "reasonableness of a restraint is a 'paradigm fact question.'"[70] This would imply that in different factual circumstances, a similar restraint could be reasonable; in other words, that there may be reasonable bases to force a franchise to stay put.[71] The court

62. They would be back, though. Davis soon tired of the Coliseum, and returned the Raiders to Oakland in 1995. *See supra* note 6.

63. L.A. Mem'l Coliseum Comm'n v. NFL, 791 F. 2d 1356 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) (*Raiders II*).

64. *Id.* at 1365–66.

65. *Id.* at 1365.

66. *Id.* at 1374.

67. Mullick, *supra* note 4, at 7.

68. *Id.*

69. L.A. Mem'l Coliseum Comm'n v. NFL, 726 F. 2d 1381, 1401 (9th Cir. 1984) *cert. denied*, 469 U.S. 990 (1984) (*Raiders I*).

70. *Id.* (quoting Betaseed, Inc. v. U & I, Inc., 681 F. 2d 1203, 1228 (9th Cir. 1982)).

71. Perhaps such reasons might include a fan base so rabid that a replace-

stated that proper evaluation of "objective factors . . . such as population, economic projections, facilities, regional balance, . . . [f]an loyalty[,] and location continuity"[72] could provide sufficient proof that a disallowed relocation was not an unreasonable restraint of trade. These explicit bases all weighed in favor of permitting the NFL to block the Rams' move, which was from the second largest city to the forty-ninth largest city in the U.S.[73] However, the NFL chose not to adopt such a strategy.[74] Instead of disallowing the move and utilizing those factors as justification, as the *Raiders I* court suggested, it sought relief from Congress.[75]

C. *Congressional Efforts to Halt Franchise Free Agency*

The relief sought has taken the form of numerous bills considered by Congress. Each was designed to assist the NFL in regulating franchise relocation. In 1985, after the Colts' virtually overnight move from Baltimore to Indianapolis,[76] Congress examined four bills: the Professional Football Stabilization Act,[77] the Professional Sports Franchise Relocation Act,[78] the Sports Community Protection and Stability Act,[79] and the Professional Sports Team Community Protection Act.[80] Similarly, in 1995, after the moves of the Rams, Raiders, and

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ment expansion franchise would have to be guaranteed as part of the relocation agreement, as was the case in Cleveland. *See supra* note 33.

72. *Raiders I*, 726 F. 2d at 1397.

73. THE WORLD ALMANAC AND BOOK OF FACTS 2002, at 337, 340 (William A. McGeveran, Jr. et al., eds.). In fact, the NFL adopted similar factors to consider before allowing a team to move in 1984. Mullick, *supra* note 4, at 4–5. However, those factors were exposed as completely inoperative when an NFL memo, stating that the Browns, under the above factors, did not qualify for relocation, was leaked to the press. *See Around the NFL*, WASH. POST., Apr. 10, 1996, at B5.

74. *See infra* Part II.D.

75. *Raiders I*, 726 F. 2d at 1401 ("To the extent the NFL find the law inadequate, it must look to Congress for relief.").

76. *See supra* note 2; *see* discussion *infra* Part III.

77. Professional Football Stabilization Act of 1985, S. 172, 99th Cong. (1985).

78. Professional Sports Franchise Relocation Act of 1983, H.R. 785, 99th Cong. (1985).

79. Sports Community Protection and Stability Act of 1985, S. 298, 99th Cong. (1985).

80. Professional Sports Team Community Protection Act, S. 287, 99th Cong. (1985); *see* Daniel S. York, *The Professional Sports Community Protection Act: Congress' Best Response to Raiders?*, 38 HASTINGS L.J. 345, 358–66.

Browns, two other bills were proposed: the Fans Rights Act[81] and the Fan Freedom and Community Protection Act.[82] All the bills share the same purpose. That purpose, in the words of the Fan Freedom and Community Protection Act, is "to protect sports fans and communities throughout the Nation."[83] The bills also have many of the same relocation requirements: proper notice of the relocation must be publicly given, and the NFL may veto the relocation if certain factors are not met.[84] Some of the bills supported an antitrust exemption, while others relied on the *Raiders II* statement that it is possible to prevent relocations without violating antitrust laws.[85]

Of the six bills, the most progressive rules are found in the Fan Freedom and Community Protection Act of 1995 (FFCPA), which would have taken further significant steps in protecting fans. The FFCPA explicitly stated that antitrust laws did not apply to agreements that authorize a sports league's members to reject a proposed relocation.[86] In addition, the FFCPA would have required a relocating team to give up its trademarked name and colors to the league, for use only by the abandoned city.[87] Those trademarks would remain league property until trademark protection expires, or the city informs the league that it will not be using the marks.[88] The FFCPA would have guaranteed the city an opportunity to use the old team name by giving the community three years to find a suitable investor for a new team, at which point the league would have one year to grant a franchise to the abandoned city.[89] Unfortunately, neither the FFCPA nor any of the other bills were enacted.

Most recently, U.S. Representative Martin Meehan of Massachusetts introduced the Professional Sports Franchise

81. Fans Rights Act of 1995, H.R. 2699, 104th Cong. (1995).

82. Fan Freedom and Community Protection Act of 1995, H.R. 2740, 104th Cong. (1995) (enacted).

83. H.R. 2740 ; *see also* H.R. 2699; York, *supra* note 80, at 358–59.

84. *See* H.R. 2740; H.R. 2699; York, *supra* note 80, at 358–66.

85. L.A. Mem'l Coliseum Comm'n v. NFL, 791 F.2d 1356, 1373 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) (*Raiders II*).

86. H.R. 2740.

87. *Id.*

88. *Id.* These provisions seem to be inspired by the settlement between Art Modell and the city of Cleveland. *See* Lindsay, *supra* note 6, at 919.

89. H.R. 2740. A suitable investor would be proved by the existence of an escrow account containing an amount equal to that of the last sale of a team, in addition to the expansion fee. That expansion fee would be discounted to eighty-five percent of the last expansion fee charged. *Id.*

Relocation Act of 1998.[90] This bill, like its predecessors, creates an antitrust exemption for professional sports leagues.[91] It requires that the team submit its request nine months before the start of play in the new location, and requires the league to investigate factors such as fan support, the quality and age of the current stadium, and whether the franchise is losing money before allowing the move.[92] Finally, this newest bill requires that a league hold a hearing at which interested parties may submit evidence and make a decision within five days of that hearing.[93] The bill expressly states that any sports league that rejects a proposed relocation will be immune from antitrust litigation unless the league fails to comply with these requirements.[94]

This bill was referred to the House Committee for the Judiciary and the House Committee on Commerce in 1998, and has not made it back to the floor of the House. Most likely, it will remain in committee until another relocation surfaces. Until that time, sports fans will remain in limbo, uncertain of what they can do to keep their teams.

D. What Will Keep Teams from Moving After Raiders I *and* II*?*

Are fans powerless to keep their teams? *Raiders I* and *II* seem to allow professional sports leagues to halt, or at least slow, franchise free agency. The NFL, in 1984, did just as the *Raiders I* court suggested, by assimilating factors into its Constitution similar to those in Congress' failed attempts to regulate franchise free agency.[95] However, the flurry of relocation, and the lack of response by the NFL since 1995 shows that the NFL owners either believe that any antitrust case brought against them would be successful, or are unwilling or unable to absorb the cost and time an antitrust suit would require. NFL Commissioner Paul Tagliabue claims that the Rams move was approved because of the mere threat of litigation.[96] The move

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90. Professional Sports Franchise Relocation Act of 1998, H.R. 3817, 105th Cong. (1998), *available at* http://thomas.local.gov (last visited Feb. 29, 2004).
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *See* Mullick, *supra* note 4, at 4–5; *see also supra* Part II.B.
96. *See* Tagliabue, *supra* note 4 at 81-82.

took place in spite of the failure of the Rams to show that their move satisfied the NFL's criteria.[97] Tagliabue stated that, though the NFL believed it would "have prevailed in any lawsuit, the NFL members were unwilling to endure years of antitrust litigation . . . ."[98] The owners also have self-serving interests in allowing other franchises to move—an owner who votes today against another franchise's move may find himself hoping to move tomorrow.

While the owners may or may not desire to regulate their colleagues' actions, as noted above, Tagliabue's testimony is compelling.[99] He strengthens his claim by noting the lawsuits that were then pending against the league: despite the NFL's approval, the St. Louis Convention and Visitors Commission still brought an antitrust suit against the NFL;[100] the Raiders brought an antitrust suit after its 1994 move (back) to Oakland, even though the owners never even took a vote to stop them;[101] and a former owner of the New England Patriots filed suit claiming that the NFL illegally prevented him from moving the team, even though he never even submitted a relocation proposal.[102]

Tagliabue claims that the only way to avoid this litigation, and return some control over franchise relocation back to the League, is through Congressional action effecting special rules for professional sports leagues under antitrust law.[103] His conclusion, while motivated by the practical desire to slow franchise free agency, is based on the fact that NFL (and other sports leagues') teams, unlike competitors in a marketplace, *must* cooperate in order to prosper.[104]

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97. *Id.*

98. *Id.* at 82. Tagliabue did not mention that before the original rejection was reversed, the Rams agreed to pay a $71 million relocation fee. Some commentators suggest that this fee was more instrumental in the reversal than the threatened lawsuits. *See* Mullick, *supra* note 4, at 7.

99. If an owner seeks to have the NFL's rules enforced, he may be hoisted on his own petard; there is no franchise owner immune to the lure of attractive stadium leases, and his previous vote against a relocation may come back to haunt him.

100. St. Louis Convention & Visitors Comm'n v. NFL, 154 F. 3d 851 (8th Cir. 1998); *see also* Tagliabue, *supra* note 4 at 81-82.

101. *See* Tagliabue, *supra* note 4 at 82.

102. *Id.*; *see* VKK Corp. v. NFL, 244 F.3d 114 (2d Cir. 2001).

103. Tagliabue, *supra* note 4 at 82.

104. *Id.* at 80.

Tagliabue's conclusion is correct. The NFL was right in attempting to stop the Rams' move in 1995, according to the League's factors, which are in accord with the holding in *Raiders I*.[105] Whether the League chose not to enforce its rule in fear of litigation or for other reasons, it has become clear that the NFL will not require a team to satisfy the League's list of factors before it is allowed to relocate. Thus, if franchise free agency is to be stopped by the NFL, Congress must pass an express antitrust exemption for the NFL. Until that time, fans will have little or no power to keep their teams.

Unfortunately, as noted above, proponents of such bills have been unsuccessful in passing such an exemption.[106] If the League is unable (or unwilling) to force a team to stay put, can fans keep any part of their team? The next section discusses what rights fans or cities have in a team's name, colors, and records.

III. SPORTS TRADEMARKS

The fans in Cleveland, despite being powerless to retain the Browns, refused to let their team leave them empty-handed. As previously noted, Cleveland Browns fans partially succeeded in their fight against Art Modell. Though he still absconded with the team itself, he agreed to leave the team name, colors, and records for a new Cleveland franchise.[107] Hall of Fame Baltimore Colts quarterback Johnny Unitas hoped the fans of the Baltimore Colts would be so lucky. "Nothing against Indianapolis, but . . . . I would like for them to take my name out of their record book," Unitas stated.[108] "[T]hey have no right to anything that happened in Baltimore."[109] Unfortunately for Unitas, his impassioned words carry no legal import. His records remain in Indianapolis with

105. 726 F.2d at 1397.

106. *See* discussion *supra* Part II.C.

107. *See supra* note 33.

108. *Unitas Wants Colts to Omit Records*, *supra* note 2. Unitas is believed by some to be the greatest quarterback of all time. *Id.* *See also* Jerry Magee, *Paying Respects to the Greatest Quarterback of All Time,* SAN DIEGO UNION-TRIBUNE, Sep. 15, 2002 at C1, 2002 WL 100343824; *A Century of Sport*, DENV. POST, Aug. 29, 1999, at C16.

109. *Unitas Wants Colts to Omit Records*, *supra* note 2. Unitas went on to comment on Robert Irsay, the owner of the Colts: "In my opinion, Irsay is a sick guy. What happened to the Colts is a disgrace to sports." *Id.*

the Colts; Peyton Manning, not Kyle Boller or Anthoney Wright, is the quarterback striving to break them.[110]

If fans are to lose their franchise, they should not also lose the team name, colors, and records that they have supported throughout the years. While an antitrust exemption may be the only way to keep the team from relocating, trademark law may allow fans to reserve some ownership in the colors and name of their team. What can fans do to keep their team's name, colors, and records, when that team's owner has abandoned their city? Part A gives an overview of the Lanham Trademark Act and how it relates to sports teams. Parts B and C contain analyses of two significant sports trademark cases, both of which involved relocated franchises. Parts D and E discuss potential trademark cases, and their results after recent changes in trademark law.

A. *The Lanham Trademark Act*

The Lanham Trademark Act of 1946 is the federal statute that codified centuries of common law trademark tradition, providing for the registration of trademarks and service marks, and establishing remedies for infringement.[111] The Lanham Act provides for protection to "any word, name, symbol, or device, or any combination thereof . . . used . . . to identify and distinguish [the trademark owner's] goods . . . ."[112] The rationale behind trademark law is chiefly twofold: to protect the public from deception and to encourage production quality by pro-

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110. Peyton Manning has been the starting quarterback for the Indianapolis Colts since 1998, and has broken the Colts' record for most 3,000-yard seasons, previously held by Unitas. Indianapolis Colts, Career Notes, *at* http://www.colts.com/ (last visited Feb. 22, 2004). Kyle Boller, Anthoney Wright, and Chris Redman all took snaps at quarterback for the Baltimore Ravens in the 2003–04 season. *See* Baltimore Ravens Statistics, *at* http://www.baltimoreravens.com (last visited Feb. 22, 2004). Unitas's records would be far safer in Baltimore, since, in 2003, the Ravens ranked last in the NFL in completions, attempts, and passing yards. National Football League, Statistics: 2003 Regular Season, *at* http://nfl.com/stats/teamsort/NFL/OFF-PASSING/2003/regular?sort_col_1=8 (last visited Feb. 22, 2004).

111. Lanham Trademark Act, ch. 540, 60 Stat. 427 (1942) (codified as amended at 15 U.S.C. §§ 1051–1127 (2003)).

112. 15 U.S.C. § 1127. The Lanham Act has been interpreted as including shape, sound, and color as protectable trademarks. Qualitex Co. v. Jacobson Prod. Co., 514 U.S. 159, 162 (1995) (court cites trademark registration of Coca-Cola bottle shape and NBC's three chimes in holding that color, when not a functional component of the product, can be protected by trademark law).

tecting mark holders.[113] Once a mark holder begins using a qualifying mark in business, that holder is afforded an exclusive right to use the mark.[114] Most trademarks, including the names of all teams in the four major sports leagues, are registered with the U.S. Patent and Trademark Office (PTO).[115] Such registration is possible as soon as the mark has been used in interstate commerce, or when an applicant has a bona fide intent to use the mark.[116] Registration does not, however, create the trademark. Rather, a trademark is created by its use in commerce; that is, a mark that is registered but unused is afforded no protection, while an unregistered mark that is used in commerce is afforded the full protection of the Act.[117] Both the courts and the PTO acknowledge that not all product names qualify as trademarks.

Trademarks typically are divided into four categories: generic, descriptive, suggestive, and arbitrary or fanciful.[118] While team nicknames are almost all arbitrary or fanciful—which would garner them automatic trademark protection[119]—their geographic designations are wholly descriptive.[120] For descriptive terms to be protected by trademark law, as all team names are, the mark must acquire secondary meaning. Secondary meaning is achieved when the public is aware of the mark, and associates the mark with a particular brand or product.[121]

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113. *See* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:1 (4th ed. 2003).

114. *See id.* § 2:14.

115. *See generally* 3 MCCARTHY, *supra* note 113, § 19.

116. *Id.* § 19:1. Since 1989, forty-seven percent of registrations have been use-based, and forty-nine percent intent-to-use applications. *Id.* The remainder have occurred through a third basis: registration of a mark that is already registered in another country. *Id.*

117. *Id.* § 19:3.

118. Zatarains, Inc. v. Oak Grove Smokehouse, Inc. 698 F.2d 786, 790 (5th Cir. 1983).

119. *See id.* at 791. There is, in fact, a distinction between an arbitrary and fanciful mark, though it is often forgotten. An arbitrary mark is a common word or words that have absolutely no relation to the product; a fanciful mark is a coined word or words that is created expressly for use as a trademark. 2 MCCARTHY *supra* note 113, § 11:5. An example of an arbitrary mark is Dr. Pepper for a soft drink (or Broncos for a football team). An example of a fanciful mark is Kodak.

120. *See* 2 MCCARTHY, *supra* note 113, § 14:1.

121. *Zatarains*, 698 F.2d at 790. When consumers attach secondary meaning to a descriptive mark, it is afforded trademark protection just as arbitrary, fanciful, or suggestive marks are. 2 MCCARTHY, *supra* note 113, § 11:25.

Marks that are derived from a person's name are also considered descriptive marks.[122] Thus, they are not considered inherently distinctive, but can be protected upon a showing that they have acquired secondary meaning.[123] In this way, the Cleveland Browns' mark, named after founder Paul Brown, is protected. Arrangements of colors, while presumptively descriptive, may be protectable, provided that secondary meaning can be shown.[124]

The trademarks most important to an NFL franchise are the team name, including the city or other geographic description, and the arrangement of colors. Because of the fame of NFL teams, secondary meaning will be presumed for the remainder of this comment.

Because proving the existence of a senior mark is usually straightforward due to registration with the PTO, a trademark infringement case usually centers on the likelihood of confusion between the senior and junior marks, a necessarily ad hoc determination.[125] If likelihood of confusion is proven, the remedy is typically both legal and equitable in nature.[126] Because damages are almost always inadequate to compensate the holder of the senior mark for harm that may continue perpetually, an injunction is usually necessary.[127]

Various defenses can be asserted against a trademark claim; among them are the common law equitable defenses of the doctrine of laches and the clean hands doctrine.[128] One defense unique to trademark is the abandonment defense. This defense was successful in a case involving the Los Angeles Dodgers and a restaurant in their former home, Brooklyn.[129]

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122. *See* 2 MCCARTHY, *supra* note 113, § 13:2.

123. *Id.*; *see also* Larsen v. Terk Tech. Corp., 151 F.3d 140, 148 (4th Cir. 1998); R.J. Toomey Co. v. Toomey, 683 F. Supp. 873, 878 (D. Mass. 1988); Marker Int'l v. DeBruler, 844 F.2d 763, 764 (10th Cir. 1988).

124. *See* 1 MCCARTHY, *supra* note 113, §§ 7:39–52.

125. *See, e.g.*, AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 350–53 (9th Cir. 1979).

126. The Lanham Act specifically provides for injunctive relief. 15 U.S.C. § 1116 (2003). Damages are calculated in numerous ways: defendant's profits, either as measurement of plaintiff's loss or under a theory of unjust enrichment; plaintiff's actual damages and losses; plaintiff's lost profits; any of these in addition to punitive damages and/or any attorneys' fees incurred. 5 MCCARTHY, *supra* note 113, § 30:57.

127. 5 MCCARTHY, *supra* note 113, § 30:2.

128. *See generally id.* §§ 31:1 to 31:160.

129. Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd., 817 F. Supp. 1103, 1130 (S.D.N.Y. 1993).

B. *Trademark Abandonment and The Brooklyn Dodger*

The Lanham Act states that a protected mark is abandoned, and thus no longer protected under the Act, if "its use has been discontinued with intent not to resume . . . ."[130] No express abandonment is necessary; intent can be inferred from the circumstances.[131] Furthermore, the Act goes on to say that, "[n]onuse for 3 consecutive years shall be prima facie evidence of abandonment."[132] The consequences of abandonment are dire: the mark may be cancelled, and may return to the public domain.[133] This policy is in accord with the aims of trademark law—holders are to be protected only as much as is necessary, and only protected proportionately to the amount of goodwill they build in their mark. When a mark is no longer used, it is returned to the public domain, so that other businesses will not be limited by an endless list of marks that have no value.

By using trademark abandonment, sports fans won a major victory in *Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd.*[134] In that case, the plaintiffs were the Los Angeles Dodgers baseball team and the official licensing company for all twenty-six Major League Baseball teams.[135] The defendants were restaurant owners in Brooklyn, New York, whose restaurants' names included "The Brooklyn Dodger."[136] The Dodgers moved to Los Angeles from Brooklyn in 1958.[137] This move was, perhaps, the beginning of "franchise free agency" for all sports; the relocations that have given rise to that description are characterized by the alienation of the team's fans, and disregard for the history of the franchise. The fans were so alienated by this move that a Brooklyn resident testified that the notion of the Los Angeles Dodgers having any "'goodwill' in Brooklyn is almost 'laughable.'"[138] In general, the Dodgers' departure was accompanied by "monumental hard

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130. 15 U.S.C. § 1127.

131. *Id.*

132. *Id.*

133. Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc., 892 F.2d 1021, 1023 (Fed. Cir. 1989).

134. 817 F. Supp. 1103 (S.D.N.Y. 1993).

135. *Id.* at 1109.

136. *Id.* at 1108, 1111. For example, one restaurant was called "The Brooklyn Dodger Sports Bar and Restaurant." *Id.* at 1103.

137. *Id.* at 1110.

138. *Id.* at 1111.

feelings" in Brooklyn and the entire New York area.[139] The court found that since the Dodgers' use of the mark "Brooklyn Dodgers" was so nominal in the period after 1958, the mark had been abandoned.[140] The Dodgers' use of their "Los Angeles Dodgers" trademark did not confer protection for the "Brooklyn Dodgers" mark, since the "'Brooklyn Dodgers' was a non-transportable cultural institution separate from the 'Los Angeles Dodgers.'"[141]

When a mark has been abandoned, the court commented, "'any other person has the right to seize upon it immediately . . . and thus acquire a right superior not only to the right of the original user but of all the world . . . .'"[142] Thus, the defendants had the right to use "The Brooklyn Dodger" as the name of their restaurants.[143]

Does the abandonment of the mark "Brooklyn Dodgers" mean that the mark could be used for a new sports team in Brooklyn? Unfortunately for Brooklyn, the answer is no. If an expansion baseball team sought to be named the Brooklyn Dodgers, the lawsuit would not be over the infringement of the "Brooklyn Dodgers" mark, as it was in the previously discussed

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139. *See id.* at 1111 (calling the Dodgers' relocation "one of the most notorious abandonments in the history of sports").

140. *Id.* at 1130–31. The court, after examining use of the "Brooklyn Dodgers" mark in old-timers games in Los Angeles, found that this was not enough to avoid abandonment in the period between 1957 and 1981. *Id.* at 1131–32. Since, under the Lanham Act, nonuse creates a presumption of abandonment, the burden to rebut shifted to the plaintiffs. *See* 15 U.S.C. § 1127 (2003). The court further examined the Los Angeles Dodgers' intent, and found no evidence that proved they intended to resume use of the mark. *MLB Properties*, 817 F. Supp. at 1131. The court also examined the resumption of the use of the mark prior to the defendants' use, and held that such resumption does not make cancellation of the trademark inappropriate. *Id.* at 1132; *see also* Ambrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1550 (11th Cir. 1986). Instead, the Los Angeles Dodgers could claim only what rights they had established since the resumption of use; those rights only extended to the products on which the mark was used: namely, apparel, jewelry and novelty items, and specifically not a baseball team. *MLB Properties*, 817 F. Supp. at 1132–33.

141. *MLB Properties*, 817 F. Supp. at 1128.

142. *Id.* at 1132 (quoting RUDOLF CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 19.67 at 515 (1989)).

143. *Id.* at 1134. Since the court held that the plaintiffs had resumed using the mark in a limited fashion prior to the defendant's use, the question of how broadly the defendants (or anyone else) could use the "Brooklyn Dodgers" mark remains a fact question. The court did, however, hold that the defendants could continue using the mark in selling shirts and hats bearing the restaurant logo and the words "The Brooklyn Dodger," though that was the specific market in which the plaintiffs had been found to resume use. *Id.* at 1134–35.

case, but instead over infringement of the "Los Angeles Dodgers" mark. "Los Angeles Dodgers" is an incontestable mark owned by the L.A. team. Because the Los Angeles Dodgers' mark would be senior, the inquiry would center on likelihood of confusion, and would almost certainly result in a decision against the junior user. This question was resolved by a case involving the Indianapolis Colts.

C. *Actual Infringement and the Baltimore CFL Colts*

In suits between holders of similar marks, the decision often turns on whether there is likelihood of confusion between the marks.[144] Actual confusion is not necessary to obtain equitable relief; only the likelihood of confusion is required. In determining whether confusion is likely, courts typically take into account a list of factors. For example, the Ninth Circuit uses eight factors: the strength of the mark, the proximity of the goods, similarity of the marks, evidence of actual confusion, marketing channels used, type of goods and the degree of care likely to be used by the consumer, the junior user's intent in selecting the mark, and likelihood of expansion of the product lines.[145]

In *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Limited Partnership*,[146] the court had just such an analysis to make. In 1952, a football team began competing in the city of Baltimore, under the name "Baltimore Colts."[147] The Colts became one of the most illustrious teams in the history of professional football,[148] winning two NFL championships[149] as well as taking part in what has been called "The Best Football Game Ever Played."[150] In 1984, the Baltimore Colts moved to

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144. *See* 3 MCCARTHY, *supra* note 113, § 23:12.

145. AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 348–49 (9th Cir. 1979); *see also* Polaroid Corp. v. Polarad Electronics Corp., 287 F.2d 492, 495 (2d Cir. 1961); Nike, Inc. v. "Just Did It" Enterprises, 6 F.3d 1225, 1228 (7th Cir. 1993). The eight factors are illustrative, not exhaustive. *AMF Inc.*, 599 F.2d at 348 n.11 (citing Triumph Hosiery Mills, Inc. v. Triumph Int'l Corp., 308 F.2d 196, 198 (2d Cir. 1962)).

146. 34 F.3d 410 (7th Cir. 1994).

147. *Id.* at 411.

148. *Id.*

149. *See* Indianapolis Colts.Com Team History, *at* http://www.colts.com/ (last visited Feb 22, 2004).

150. The Colts' history includes taking part in the NFL championship game of 1958, which has since come to be known as the "Greatest Game." *See* BEAU

Indianapolis.[151] The city of Baltimore was awarded a Canadian Football League (CFL) franchise in 1993, and the citizens of Baltimore succeeded in having the Colts chosen as their mascot, "out of all the appealing animals in the ark."[152] The Indianapolis Colts of the NFL and the NFL itself brought a trademark infringement suit based on likelihood of confusion, seeking to permanently enjoin the Baltimore CFL franchise from calling itself the Colts.[153]

The defendant claimed, and the district court agreed, that the "Baltimore Colts" trademark was abandoned soon after the team moved to Indianapolis.[154] Because the Indianapolis Colts had not used the name "Baltimore Colts" in almost ten years, they no longer owned the rights to the mark. However, the court held that the defendants, the Baltimore CFL Colts, could still be infringing, if its "Baltimore Colts" mark was likely to confuse consumers; the court further stated that the likelihood of confusion must be evaluated in light of the fact that it is well known that the current Indianapolis Colts were once the Baltimore Colts.[155]

In deciding the likelihood of confusion question, the court, rather than explicitly following the Ninth Circuit's widely used eight-factor test,[156] analyzed surveys performed by both parties to the suit. Indeed, the surveys (and common sense) strongly suggested that it was very likely that consumers would be con-

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RIFFENBURGH, OFFICIAL NFL ENCYCLOPEDIA 41 (4th ed.1986) (quoting Tex Maule, *The Best Football Game Ever Played*, SPORTS ILLUSTRATED, Jan. 5, 1959). The "upstart" Colts defeated the popular New York Giants 23–17 in the first ever sudden death overtime game, led by Johnny Unitas and Alan "The Horse" Ameche. *Id.* The real significance of the game was in how it established the NFL as a major entertainment commodity; over ten million households tuned in. *Id.*

151. *Indianapolis Colts*, 34 F.3d at 411.

152. *Id.* at 411–12.

153. *Id.* at 411. The NFL first sent the defendants a cease and desist letter, which the defendants responded to by altering the name of their franchise to the Baltimore CFL Colts. *Id.*

154. *Id.* at 412.

155. *Id.* at 412–13. The court cites McCarthy:

> When a mark is abandoned, it returns to the public domain, and is appropriable anew—in principle. In practice, because 'subsequent use of [an] abandoned mark may well evoke a continuing association with the prior use, those who make subsequent use may be required to take reasonable precautions to prevent confusion.'

Id. The court infers that "reasonable precautions" means that, in some situations, the mark will not be usable at all. *Id.*

156. *See supra* note 144.

fused by the new franchise name. Some commentators contend that had the court analyzed the eight factors, rather than basing its opinion almost exclusively on the plaintiffs' surveys, it would have found that the majority of the factors favored the defendant.[157]

The defendant tried, as did the defendants in the *Dodgers* case, to raise an affirmative defense of abandonment.[158] In fact, the trial court found that the plaintiffs, the NFL Colts, had abandoned the trademark "Baltimore Colts."[159] However, the plaintiffs were not claiming infringement of that mark; instead, they claimed that there was likely to be confusion between the new Baltimore CFL Colts and the Indianapolis Colts. The plaintiffs seemingly tried, and succeeded, to have their cake and eat it too; while they did not claim that they still owned the trademark "Baltimore Colts," their history, including that under the abandoned trademark "Baltimore Colts," was taken into account when evaluating the likelihood of confusion.[160]

The defendant cited the *Dodgers* case, arguing that the Colts' departure from Baltimore left the name "Baltimore Colts" available to anyone who would continue to use it for a football team in Baltimore.[161] This argument was analogized from the result of the *Dodgers* case. The defendant claimed

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157. Sean H. Brogan, *Who Are These 'Colts'?: The Likelihood of Confusion, Consumer Survey Evidence and Trademark Abandonment in* Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd., 7 MARQ. SPORTS L.J. 39, 69 (Fall 1996).

158. *Indianapolis Colts*, 34 F.3d at 412–13.

159. *Id.*

160. *Id.* at 413. If:

> 'Baltimore CFL Colts' is confusingly similar to 'Indianapolis Colts' by virtue of the history of the Indianapolis team . . . [Baltimore's] use of the abandoned mark would infringe the Indianapolis Colts' new mark. The Colts' abandonment of a mark neither broke the continuity of the team in its different locations . . . nor entitled a third party to pick it up and use it to confuse Colts fans . . . .

Id. This holding stands in stark contrast to the *Dodgers* court, which held that when the Dodgers moved, they abandoned the "Brooklyn Dodgers" trademark. Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd., 817 F. Supp. 1103, 1126–27, 1130 (S.D.N.Y. 1993). There, the court held that when the Dodgers moved to Los Angeles, they forfeited the right to keep the defendants from using "The Brooklyn Dodger" as the name of their restaurant, even though the defendants picked that name specifically to exploit the good will built up by the Dodger organization while it was in Brooklyn. *Id.* at 1124; *see supra* Part III.B.

161. *Indianapolis Colts*, 34 F.3d at 413.

that because the abandoned trademark was a "nontransportable cultural institution," the mark was available to be used not only for dissimilar goods, like a restaurant, but for another team.[162] The court, though, drew a distinction between the two situations. The plaintiff in the *Dodgers* case claimed misappropriation of their "Brooklyn Dodgers" trademark; that claim failed because the mark had been abandoned. The plaintiffs' claim in the *Dodgers* case that there was infringement of their current trademark, "Los Angeles Dodgers," was also unsuccessful because there was no likelihood of confusion. The Brooklyn Dodger is a restaurant, not a sports franchise; because of the dissimilarity of the products, there is no likelihood of confusion between them.[163] Conversely, the NFL Colts did not claim infringement of the mark "Baltimore Colts"; that mark was, according to the court, abandoned. Instead, the NFL Colts claimed infringement of their current trademark, "Indianapolis Colts." Since the Indianapolis Colts were arguing confusion, not misappropriation of a mark that had been abandoned, the *Dodgers* case was wholly unpersuasive.[164]

There is another kind of trademark violation that was only briefly discussed in the *Dodgers* case,[165] and not reached in the Colts' situation: trademark dilution. A dilution claim does not require any likelihood of confusion. Instead, such a claim is based on the lessening of the mark's ability to identify goods in the marketplace, due to the exploitation of the mark by an unlicensed user. As discussed below, a dilution claim, if brought today instead of in 1993, could have been disastrous for the owners of The Brooklyn Dodger.

D. Trademark Dilution

Trademark dilution is a concept that has been present in American common law since the 1920's.[166] The theory behind dilution is that some mark holders should be able to prevent use of their mark on other products, even when use of the mark will not cause confusion.[167] In the context of this comment, the

162. *Id.* (citing *MLB Properties*, 817 F. Supp. at 1128).
163. *Id.*
164. *Id.*
165. *MLB Properties*, 817 F. Supp. at 1135.
166. 4 MCCARTHY *supra* note 113, § 24:67.
167. *Id.* at § 24:70.

type of dilution to be discussed is known as blurring. Blurring occurs when the use of the mark for a different purpose weakens the unique and distinctive significance of the mark in its original use; in other words, the link between the mark and the good or service it identifies is no longer as distinctive.[168] For example, in a case where a business used "Polaroid" to describe a refrigeration systems, Judge Posner commented on the decision: "No longer would the word 'Polaroid' call immediately to mind the highly regarded cameras made by the Polaroid Corporation. The mental image would be blurred."[169]

Perhaps the most important aspect of trademark dilution is that, unlike typical trademark claims, no likelihood of confusion is necessary to a dilution claim.[170] Even when there is no threat that consumers will be confused as to the identity of the company responsible for the product, a mark holder may still prevail on a dilution claim.[171] A dilution claim does require a mental connection between the trademark and both the senior and junior user.[172] However, the link required is different from that necessary for likelihood of confusion: "The connection . . . is not that which serves as the basis of liability for trademark infringement . . . but rather is the accurate recognition that a mark associated with the plaintiff is now also in use as an identifying symbol by another."[173]

Until 1996, dilution was not recognized by federal law.[174] Most states, however, recognized some form of dilution.[175] Many states adopted anti-dilution statutes based on the 1964 United States (now International) Trademark Association Model State Trademark Bill.[176] As of 2002, thirty states had adopted the 1964 Model or its 1992 revision, or a substantially

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168. *Id.* §§ 24:68, 24:100 to 24:103. Blurring is the classic theory of dilution. *Id.* § 24:68.

169. 4 MCCARTHY, *supra* note 113, § 24:102 (quoting Exxon Corp. v. Exxene Corp., 696 F.2d 544, 550 (7th Cir. 1982)).

170. 4 MCCARTHY, *supra* note 113, § 24:70.

171. *Id.*

172. *Id.*

173. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25(1)(a) cmt. f (1995). Note also that the mental connections necessary for infringement and dilution are mutually exclusive; if a consumer is confused about who is using the mark, he cannot also recognize that the mark is shared between two users. 4 MCCARTHY, *supra* note 113, § 24:70.

174. 4 MCCARTHY, *supra* note 113, § 24:83.

175. *Id.*

176. *Id.* § 24:80.

similar bill.[177] In 1996, Congress amended the Lanham Trademark Act to include the federal anti-dilution statute.

1. The Federal Anti-Dilution Act

A new section on dilution was added to the Lanham Act in 1996.[178] The Act defines dilution as "the lessening of the capacity of a famous mark to identify and distinguish goods or services . . . ."[179] The Anti-Dilution Act, as it is commonly known, affirmatively states that dilution does not require likelihood of confusion.[180] This marked a significant change in federal trademark law. Before 1996, trademark law was based on protecting consumers from mistake and deception, whereas since the Anti-Dilution Act was passed, trademark rights much more closely represent the absolute nature of property.[181]

The Anti-Dilution Act requires that the senior mark be famous.[182] This is in contrast to trademark infringement, where any use of the mark is enough to confer protection from infringement. The famousness of a mark is usually difficult to

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177. *Id.* The states with anti-dilution statutes: Alabama, Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Washington, West Virginia, Wyoming. *Id.* § 24:80, n.2.

178. *Id.* § 24:88.

179. Federal Trademark Dilution Act of 1995, Pub. L. 104-98, sec. 4, § 45, 109 Stat. 985, 986 (1995) (codified at 15 U.S.C. § 1127 (1996)).

180. Federal Trademark Dilution Act of 1995, 15 U.S.C. § 1127(2).

181. 4 MCCARTHY, *supra* note 113, § 24:90.

182. *Id.* § 24:88. The Dilution Act gives an illustrative list of factors to consider when making a determination of famousness:

> the degree of inherent or acquired distinctiveness of the mark;
>
> the duration and extent of use of the mark in connection with the goods or services with which the mark is used;
>
> the duration and extent of advertising and publicity of the mark;
>
> the geographical extent of the trading area in which the mark is used;
>
> the channels of trade for the goods or services with which the mark is used;
>
> the degree of recognition of the mark in the trading areas and channels of trade used by the marks' owner and the person against whom the injunction is sought;
>
> the nature and extent of use of the same or similar marks by third parties; and
>
> whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

Federal Trademark Dilution Act of 1995, 15 U.S.C. § 1125 (1996).

assess. In cases involving sports franchises, however, the trademark will almost certainly be famous; thus, no further discussion of this issue is warranted here.

Upon a finding that the senior mark is famous, courts must determine whether there has been dilution of that mark. The Second Circuit, in *Nabisco, Inc. v. PF Brands, Inc.*, created an illustrative list of ten factors to consider when evaluating a claim of dilution through blurring under the Lanham Act.[183] Chief among those factors are the degree of distinctiveness of the senior user's mark,[184] the similarity of the marks,[185] and the proximity of the products and likelihood of bridging the gap.[186]

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183. 191 F.3d 208 (2d Cir. 1999). The most relevant six criteria are: interrelationship among the distinctiveness of the senior mark, the similarity of the junior mark, and the proximity of the products; shared consumers and geographic limitations; sophistication of consumers; actual confusion; adjectival or referential quality of the junior use; harm to the junior user and delay by the senior user. *Id.* at 217–22.

184. 4 MCCARTHY, *supra* note 113, § 24:94.3. *Nabisco*, 191 F.3d at 217:

> [T]he *degree* of distinctiveness of the senior mark has a considerable bearing on the question whether a junior use will have a diluting effect. . . . [T]he more distinctiveness the mark possesses, the greater the interest to be protected. And conversely, the more the senior mark tends toward the weak, common, quality-claiming, or prominence-claiming type, the more strongly that weakness would argue against a finding of dilution . . . .

Nabisco, 191 F.3d at 217.

185. 4 MCCARTHY, *supra* note 113, § 24:94.3. The *Nabisco* court required enough similarity so that the junior mark would create a mental connection with the senior mark. *Nabisco*, 191 F.3d at 217. The court quoted itself: "We hold only that the marks must be 'very' or 'substantially' similar and that, absent such similarity, there can be no viable claim of dilution." Mead Data Cent., Inc. v. Toyota Motor Sales, Inc., 875 F.2d 1026, 1029 (2d Cir. 1989).

186. 4 MCCARTHY, *supra* note 113, § 24:94.3. Previously, anti-dilution laws were aimed at preventing injury between non-competing goods. *Id.* The court in *Nabisco* found that proximity is relevant: "The closer the junior user comes to the senior's area of commerce, the more likely it is that dilution will result from the use of a similar mark." *Nabisco*, 191 F.3d at 219. McCarthy finds this factor troubling; he states that confusion and blurring are two different inquiries altogether. 4 MCCARTHY, *supra* note 113, § 24:94.3. Further, if anti-dilution laws are less likely to apply as goods become less competing, then the law will be useless, since its primary purpose was to protect the marks of non-competing goods. *Id.* The other *Nabisco* factors are the proximity of the products and likelihood of bridging the gap, the interrelationship among the distinctiveness of the senior mark, the similarity of the junior mark, and the proximity of the products, shared consumers and geographic limitations, sophistication of consumers, actual confusion, adjectival or referential quality of the junior use, and harm to the junior user and delay by the senior user. *Nabisco*, 191 F.3d at 219; *see* 4 MCCARTHY *supra* note 113, § 24:94.3.

A further requirement for a dilution claim was created when the Supreme Court decided a case involving the Victoria's Secret Catalog in 2003.[187] In that case, the Court held that a likelihood of dilution was not enough—actual harm to the senior user's mark was required.[188] The Court went on to say that actual economic damage, in the form of lost profits or otherwise, does not need to be shown to prove harm to the mark.[189] The court requires dilution, which is the lessening of the capacity of a famous mark to identify and distinguish goods or services, but does not require economic effects of such a dilution.[190]

The Anti-Dilution statute was not passed until 1996, and the *Nabisco* case was decided in 1999.[191] Because both occurred years after the significant sports trademark cases already discussed, neither had any effect on their outcomes. If the courts had taken these factors into account, at least one lawsuit may have ended differently.

2. Dilution and The Brooklyn Dodgers

The plaintiffs in the *Dodgers* case did bring a dilution claim in addition to their actual infringement claim.[192] That claim was under a now repealed New York state dilution statute.[193] While the Dodgers court cited factors that included both blurring and tarnishment,[194] it rather summarily dismissed the dilution claim. The court stated that since the trademark "Brooklyn Dodgers" had been abandoned, there was no viable dilution claim.[195] However, under current federal law, a color-

187. Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003).

188. *Id.* at 432–33.

189. *Id.* at 433.

190. *Id.*

191. *Nabisco*, 191 F. 3d 208.

192. Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd., 817 F. Supp. 1103 (S.D.N.Y. 1993).

193. *Id.* at 1134.

194. In this circuit, the test for dilution has consisted of three elements:

> (1) distinctiveness of the mark, either that the mark is 'truly of distinctive quality' or has acquired secondary meaning in the eyes of the public; (2) likelihood of dilution, either as the result of blurring of product identification or the tarnishing of an affirmative association that a mark has come to convey; and (3) predatory intent.

Id. (quoting W.W.W. Pharmaceutical Co. v. Gillette Co., 984 F.2d 576, 576 (2d Cir. 1993)).

195. *MLB Properties*, 817 F. Supp. at 1135.

able claim is present that the current trademark "Los Angeles Dodgers" has been diluted.

If the *Dodgers* case were brought today, the court would have been bound by the Second Circuit's ten-factor test as created in *Nabisco*.[196] Under this analysis, it is quite possible that the plaintiffs would prevail, and the Los Angeles Dodgers would be able to enjoin any use of the Brooklyn Dodgers mark. Under current law, the Dodgers have a strong claim that the defendant calling its restaurant the Brooklyn Dodger lessened the power of the Dodgers' trademark in identifying the plaintiff's product.

a. *Evaluation Under the Nabisco Factors*[197]

Under the *Nabisco* factors, a court would most likely find that the trademark Los Angeles Dodgers was diluted by the Brooklyn Dodger restaurant. The three chief factors—the distinctiveness of the mark, the similarity of the marks, and the proximity of the products—all weigh in favor of the Los Angeles Dodgers.

The Los Angeles Dodgers mark is distinctive if "distinctiveness" refers only to the famousness of the mark, since the name of that mark is known worldwide to refer to the baseball team. However, some commentators believe that the distinctiveness factor is separate from fame, and concerns the inherent distinctiveness of the mark.[198] If that is the case, the Dodgers' argument is weaker.

The marks seem similar enough that a consumer would make the mental connection required. Further, if the court uses the rationale of *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Limited Partnership*,[199] it would evaluate the mark's similarity in light of the history of the Dodgers, including its previous moniker and location. Were the court to do so, it would most certainly find high similarity.

While it may not seem that a sports franchise and a restaurant are closely related products, when evaluated in light of the purpose of anti-dilution law, they are. Anti-dilution law is aimed at preventing abuses of marks between non-competing

196. *Nabisco*, 191 F. 3d at 217–22.
197. *See* discussion *supra* Part IV.
198. *See* 4 MCCARTHY, *supra* note 113, § 24:94.3 .
199. 34 F.3d 410, 412–13 (7th Cir. 1994).

products. A consumer who follows baseball seems very likely to patronize a sports-themed restaurant.

The other factors, while not fully supporting the Los Angeles Dodgers, certainly do not overcome the weight of the first three factors.[200] Upon evaluation of these factors, it is quite likely that a court would find that use of "The Brooklyn Dodger" for a restaurant dilutes the senior mark "Los Angeles Dodgers."

b. *Effect of a Finding of Dilution*

If a court were to find such dilution, the result would be yet another blow to sports fans. Such a finding would eliminate the possibility of fans being able to use their beloved team's nickname to market their local businesses. The remedy would be an injunction against using the use of "Dodger" for a restaurant, and, presumably, for any other business. If this were to happen, not only would the residents of Brooklyn be without a baseball team, but they would also be left without any of the goodwill built into that team name by the fans of Brooklyn.

A different trademark issue was avoided in 2002: when a new team is formed in an abandoned city, can that new team take the name of the team that departed? While the old name may have been abandoned for purposes of identifying the team, it would still be used on at least the team's records.[201] Would

200. The interrelationship between the first three factors weighs in favor of the Dodgers; if the second or third factor is weak, the strength of the first factor overcomes that weakness. The restaurant and MLB share consumers—sports bar patrons are most likely sports fans. The factors actual confusion and adjectival quality of the junior use support the Brooklyn Dodger restaurant; shared consumers, harm to the junior user and delay by the senior user, and effect of senior's prior laxity support the Los Angeles Dodgers. Consumer sophistication is a tougher issue. Some might suggest that sports fans are unsophisticated—witness the "Dog Pound" in Cleveland, the spiked shoulder pad wearing and face-painted fans of the Raider Nation, or the Rally Monkey in Anaheim—I would submit that sports fans are very sophisticated. Millions of sports fans can spout forth statistics unending, comment on why soccer remains (relatively) unpopular in the United States, or explain why the Cover-2 Defense is susceptible to the West Coast Offense. More importantly, sports fans almost always know which restaurants are owned by sports personalities or teams.

201. For example, the Tennessee Titans list Earl Campbell as their all-time leading rusher, and Warren Moon as their all-time leading passer. Titans Team Records, *at* http://www.titansonline.com (last visited Feb. 29, 2004). Both played for the franchise when it was known as the Houston Oilers. *Id.*

such a use be a violation, either through actual infringement or dilution? When the owners of Houston's expansion franchise were choosing the team's name, these questions may have entered their minds.

E. A Final Note: The Houston Oilers, Tennessee Oilers, Tennessee Titans, and Houston Texans

The Houston Oilers became the Tennessee Oilers when they moved in 1997.[202] In 1999, they renamed themselves the Tennessee Titans.[203] In 2002, a new team began playing in Houston, known as the Houston Texans. In choosing its name, the Texans avoided what could have been an interesting legal battle. If the Texans or, more realistically, a franchise in a different league, had chosen to name itself the Oilers, could Tennessee have claimed trademark infringement or dilution?

As previously discussed, a trademark is presumptively abandoned after three consecutive years of nonuse,[204] which results in that mark returning to the public domain.[205] Thus, the new hypothetical Oilers would have a strong affirmative defense of abandonment, absent a showing that the Titans (the former Oilers) were continuing to use its mark in some way. However, if the NFL or the Oilers had sold any throwback jerseys or other merchandise, such sales, combined with the continued use of Oilers' records as property of the Titans, might be enough to combat the abandonment defense.

F. So What Do Fans Have Left After Their Team Abandons Them?

In short: not much. It is well established that the name, records, and colors of the team will relocate with the team itself. The development of federal anti-dilution law makes it more difficult for team names to be used for non-competing

202. Titans Team Records, *at* http://www.titansonline.com/index.html.

203. *Id.* Due to Tennessee's lack of thriving oil business, it did not make sense to be called the Oilers any longer. In contrast, consider the Los Angeles Lakers (L.A. does not have quite the number of lakes that Minnesota, their previous home, does) and the Utah Jazz (Salt Lake City does not have the same reputation as the Jazz' previous home, New Orleans).

204. 15 U.S.C. § 1127 (2003); *see* discussion *supra* Part II.

205. Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc., 892 F.2d 1021, 1023 (Fed. Cir. 1989).

goods, and the fate of the Baltimore CFL Colts shows that previous team names cannot be used in other leagues.

The NFL (and the other professional sports leagues) should enact a rule that forces owners to do the same thing Art Modell did by settlement, and the Oilers did by choice: leave the team name and colors behind. Such a rule would not hurt the new team, since its new fans would support their city's team, and its former fans would be so alienated by the move as to no longer support their team.[206] As suggested in the legislative attempts discussed in Part II.C, the team name and colors should be held in trust by the league until a new team is granted in the abandoned city.

CONCLUSION

Franchise free agency is bad for sports. If the increase in relocations is allowed to continue unchecked, no stability will be left in professional sports. This will not only destroy romantic notions of professional sports—dreams of winning the Super Bowl, of hoisting the Stanley Cup, or of simply a father and son spending a day at the ballpark—but it will also be bad for the business of sports.[207]

If franchise free agency in the NFL is to be stopped, it can only be done with legislative help. The NFL has shown that it is either unable or unwilling to stop franchises from moving at the owner's whim. The NFL claims that lawsuits, which it believes would result in decisions favoring the NFL, would be too expensive to litigate. The only way to avoid such lawsuits is to give the NFL a clear limited antitrust exemption that would allow the NFL, through a vote of the owners, to stop franchises from moving.

If such an exemption is not granted, the NFL must do its part to lessen the effects of franchise free agency. The NFL's fan base, while still the strongest among all sports, has suffered at the hands of greedy owners like Art Modell. By assuring that the team name and colors remain in the abandoned city, the NFL will ameliorate this problem, as evidenced by the popularity of the new Cleveland Browns. This can be easily accomplished through an amendment to the NFL Constitution.

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206. *See* discussion *supra* Part II and Part III.B

207. *See generally* JAMES, *supra* note 3.

Such an amendment would require that teams, when abandoning their home city, must leave their uniform colors and team name in trust with the NFL. The choices of the Baltimore Ravens and Tennessee Titans in changing their names show that relocating franchises give up nothing when they give up their old name—there is no value built into the Baltimore Browns or Tennessee Oilers. The trademarked colors and name would remain property of the NFL until a new franchise was granted in the abandoned city.

Congress should allow the NFL to have some control over its members by granting an antitrust exemption to the league. This exemption need not extend beyond relocation, and can easily contain safeguards to keep the NFL from exercising its control needlessly. In addition, the NFL must take steps to protect fans, by forcing teams to leave at least their names and colors when they leave. In this way, the home team would remain where it belongs—at home.