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## What's in a Name, or, Better Yet, What's it Worth?: Cities, Sports Teams and the Right of Publicity

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# WHAT'S IN A NAME OR, BETTER YET, WHAT'S IT WORTH?: CITIES, SPORTS TEAMS AND THE RIGHT OF PUBLICITY

By  
Mitchell Nathanson\*

## ABSTRACT:

This article examines the harm that accompanies real and threatened in-market relocations of professional sports teams and proposes a federal statutory remedy that will protect the interest of city residents given the reality that city governments have demonstrated their inability to adequately protect their electorate through contract law alone. Although, as this article discusses, there have been myriad bills proposed by Congress in response to several high profile out-of-market sports franchise relocations (mostly those involving NFL teams and mostly during the 1990's), in-market relocations have historically occurred much more frequently, inflicting similar harms to the spurned city residents. Moreover, as this article shows, these harms accrue even when these franchises ultimately decide to remain within the boundaries of their urban bases; it is the mere threat and resulting relocation negotiations pitting city against nearby suburb, each hoping to curry the local team's favor, that cause damage. As in-market relocations are likely to become even more prevalent in the future, this article contends that legislation is needed. This article concludes that amending the federal Lanham Act by providing cities with a limited property right -- a right of publicity -- in their names will cure many of these ills. By commodifying the names of cities, the true costs of in-market relocations will be felt by teams that, as of now, are free to relocate at their whim, taking advantage of superior lease terms offered by suburban political entities while at the same time benefiting from the affiliation with the cities they have spurned. A federally created right of publicity would prevent such actions or, at a minimum, compel sports franchises to pay for the right to associate with a city in which it no longer plays if it wishes to reap the attendant benefits of the association.

## I. INTRODUCTION

On November 8, 2006, in a scene repeated dozens of times across the United States over the past several decades, the NFL's San Francisco 49'ers announced that because they were unable to come to terms with the city in which they played for the construction of a new stadium, they had no choice but to relocate.<sup>1</sup> Having spurned San Francisco, their home since 1946, they now set their sights upon Santa Clara, a logical choice given that the team's headquarters and practice facility had been located there

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<sup>1</sup> Dennis Georgatos, *49'ers Tell S.F. They're Leaving, Team Ends Stadium Talks, Plans to Pursue Site in Santa Clara Instead*, Contra Costa Times, November 9, 2006, at F4.

since 1987. Although Santa Clara is approximately 45 miles and, depending upon the fickle Bay Area traffic, at least an hour's drive from San Francisco, the 49'ers likewise announced on that date that they intended to keep the San Francisco name.<sup>2</sup> This too was not unusual as several teams in all four major professional sports leagues (Major League Baseball, the National Football League, the National Basketball League and the National Hockey League) play their home games in geographical locations other than the ones emblazoned on their uniform tops: the NFL's Dallas Cowboys play in Irving, Texas; MLB's Tampa Bay Devil Rays in St. Petersburg, Florida; The NBA's Detroit Pistons in Auburn Hills, Michigan, and the NHL's Phoenix Coyotes in Glendale, Arizona, to name but a few. What *was* unusual was the reaction of the city of San Francisco to this announcement: it strongly objected to the continuation of this practice as far as the 49'ers were concerned.<sup>3</sup> Across the San Francisco bay, baseball's Oakland A's were in the midst of a similar relocation: they too were abandoning the city and stadium they called home for decades and were adamant upon relocating in Fremont, a 27 mile, half hour drive away.<sup>4</sup> And like the 49'ers, the A's as well intended on keeping their Oakland affiliation.

400 miles to the south, in Anaheim, a somewhat different but fundamentally similar battle between city and team over the geographical designation of a sports team's

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<sup>2</sup> *Id.*; Cecilia M. Vega, *49'ers Insist They'll Keep 'San Francisco' City, City Leaders Upset, Say the Name Won't Move with Team*, San Francisco Chronicle, November 14, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/11/14/MNG5JMC45C1.DTL&ty>. Said Lisa Lang, team spokeswoman: "We absolutely remain committed to the San Francisco 49'ers name. We will not change our name. It's the San Francisco Bay Area. We've been the San Francisco 49'ers for 60 years, and if you look at other examples it's very common now for teams to be outside of their namesake."

<sup>3</sup> *Id.*; Jim Sanders, *Balking Over Team's Name: S.F. Assemblyman to Propose Law Barring 49'ers from Using 'San Francisco' if they Move*, Sacramento Bee, November 11, 2006, at A3. California Senator Diane Feinstein has also intimated that she would fight to prevent the 49'ers from transporting the "San Francisco" name to Santa Clara. See Edward Epstein, *Feinstein Says She'll Fight 49'ers Over 'SF' Identity*, San Francisco Chronicle, November 14, 2006, <http://sfgate.com/cgi-bin/article.cgi>.

<sup>4</sup> See Patrick Hoge, *Oakland A's Sign Fremont Land Deal*, San Francisco Chronicle, May 10, 2007, <http://sfgate.com/cgi-bin/article.cgi>.

name had recently concluded with the city of Anaheim ultimately unable to prevent Anaheim Angels' owner Arturo Moreno from rechristening his Anaheim Angels baseball team the Los Angeles Angels of Anaheim – a mouthful, to say the least.<sup>5</sup> The Anaheim legal battle, discussed in detail below, foretells the future of the San Francisco and Oakland scrums should either city decide to press its demand to prevent the relocating 49'ers and A's from using their geographical identifiers without their permission. For as the law currently stands, “[p]retty much whatever a team wants to call itself, it can.”<sup>6</sup> Without a change in the law, San Francisco is powerless to stop the 49'ers, or anyone else for that matter, from using its name, for its benefit, without the city's permission. Thus, as it presently stands, the cities of Oakland, San Francisco and Anaheim, as well as Los Angeles which likewise had its name appropriated in the Angels litigation, are without a remedy. Their names are free and available to any professional sports team seeking to profit from the association with the market and image they represent. This article asks whether this represents unjust enrichment and whether Congress should step in and protect what may very well be a property right that has gone, up to now, unprotected: the limited right of a city to its name.

This article analyzes the motivations by professional sports teams behind in-market moves such as the ones contemplated by the 49'ers and A's, and shows that, contrary to popular assumption, such moves are not benign; in fact they involve harm to any city at the mercy of the sports team contemplating such a relocation. In fact, in-market relocations, regardless of whether they are consummated or merely threatened, invariably result in the very same improper benefits to sports franchises that are decried

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<sup>5</sup> See *City of Anaheim v. Angels Baseball*, No. G035159, 2005 WL 1523338 (Cal. App. 4 Dist.).

<sup>6</sup> *Vega 49'ers Insist*. The article quotes Matt Mitten, director of Marquette University's National Sports Law Institute.

whenever a team moves out-of-market for the greener pastures (and below market rents and above-market benefits) of a far away city. Because, due to changing demographics and economic developments in professional sports, in-market relocations are likely to become only more common in the future as they represent to many teams their best option in their eternal quest to maximize revenue by squeezing as much money from public sources as possible, such harm may need to be addressed and remedied. This article examines the playing field, so to speak, upon which the negotiations between professional sports team and city (or political subdivision) take place and concludes that, because cities do not own the rights to the use of their names, the field is invariably and improperly tilted in favor of the teams, with the result being corporate welfare far and above what cities would have had to concede if only the field were level. Accordingly, Congress may have an interest in stepping in and remedying the imbalance. As for the nature of this remedy, this article proposes an exception to the Lanham Act that would grant cities a limited quasi-property right – a right of publicity – not unlike the right Congress created in its 1999 Anti-Cybersquatting Protection Act (“ACPA”)<sup>7</sup> wherein it granted individuals, in effect, similar rights within the limited context of registered Internet domain names. As the granting of this similarly limited and circumscribed right would have the effect of equalizing the bargaining power of cities and the professional sports franchises seeking to profit off of the use of their names, it would pave the way for stadium leases between city and team that more accurately reflect and represent the interests of both parties.

## **II. THE RE-CHRISTENING OF THE LOS ANGELES ANGELS OF ANAHEIM**

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<sup>7</sup> 15 U.S.C. §§ 1125(c)-(d), 1129 (2000).

In 1996, the Anaheim Angels were bought by the Walt Disney Company, which likewise operated Disneyland within the city limits of Anaheim.<sup>8</sup> At the time of the purchase, the city of Anaheim entered into a lease with Disney for the use of Anaheim's stadium. Pursuant to the lease, the city agreed to fund \$30 million of the approximately \$100 million cost of renovating the aging stadium in exchange for a lease provision that stipulated that the Angels keep the Anaheim designation for the duration of the contract.<sup>9</sup> In 2003, however, Disney sold the Angels to Moreno for approximately \$180 million.<sup>10</sup> With such a significant investment in the team, Moreno sought to maximize his return. Very quickly, he realized the financial significance of the geographical identification of his team and recognized that some identities were more valuable than others. In his case, he had purchased a Major League Baseball team with the unfortunate geographic designation of Anaheim. If only his Angels were identified with Los Angeles instead, they would be worth so much more. For proof of this assertion, Moreno had to look no further than his local television contract. Even though the Angels were the 2002 World Series Champions while the Dodgers had not even played in a World Series since 1988, even though both teams recorded identical viewership shares, and even though both teams had maintained a Southern California presence for nearly half a century (the Dodgers arrived in 1958; the Angels a mere three years later in 1961), the best television deal the Angels could wring from local station KCAL was one worth \$5.5 million; the

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<sup>8</sup> See City of Anaheim.

<sup>9</sup> *Id.*

<sup>10</sup> Laura M. Holson, *Disney Reaches a Deal For the Sale of the Angels*, New York Times, April 16, 2003, at S3.

Dodgers received a \$10 million deal from the same station.<sup>11</sup> Clearly, the Los Angeles designation was more valuable than the Anaheim one.

Given this reality, Moreno promptly ignored the contract his predecessors signed with Anaheim and rechristened his team the Los Angeles Angels of Anaheim, hoping to benefit from the association with the larger Los Angeles market.<sup>12</sup> Although the city of Anaheim protested, sued and sought a preliminary injunction forbidding the name change, alleging that the change caused irreparable harm to the city by relegating it to second-class status and damaging local pride, Moreno prevailed despite a contract that seemingly protected Anaheim's interests.<sup>13</sup> By the close of the 2005 baseball season, the name change became permanent. In the end, Anaheim was powerless to protect and control the use of its name. Although not a party to the suit, the city of Los Angeles likewise was given no say in the use of its name for the financial benefit of Moreno and his Angels. There is no indication that its interest in the litigation was even considered. Aware of the reality demonstrated in the Angels litigation but nevertheless realizing that it "feels a bit of a rip-off" for a team such as the 49'ers to relocate but continue to reap the benefits of the San Francisco name, a local assemblyman introduced a bill into the California legislature that would make such a practice illegal unless the mayor and Board of Supervisors of the abandoned city authorized such use.<sup>14</sup> This came on the heels of Assembly Bill 1041, introduced by an Anaheim assemblyman in response to the Angels litigation, that would have required a team named for a city where it does not play to

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<sup>11</sup> City of Anaheim, at 8.

<sup>12</sup> Moreno argued that, technically, the name change complied with the lease negotiated by his predecessor, Disney, given that the name "Anaheim" still appeared in the official team's name, albeit at the end. In order to technically comply with the lease, however, a tongue-teaser of a name resulted with the likely result being that most fans and news organizations lopping off the "of Anaheim" designation and simply referring to the former Anaheim Angels as the Los Angeles Angels instead.

<sup>13</sup> *See Id.*

<sup>14</sup> Sanders, *Balking over a Team's Name*.

disclose that fact on tickets and promotional material.<sup>15</sup> Although both bills are noble in their aims, both are doomed in their effect: because they conflict with federal trademark law, specifically, the Lanham Act (the “San Francisco 49’ers,” as are all professional sports team names, is a registered trademark owned by team itself),<sup>16</sup> any proposed state law would invariably conflict with it and, as such, would be destined for failure.

Although the specifics of the Angels litigation certainly were unusual, the supposedly minor, benign, in-market relocation desires of both the 49’ers and A’s just as certainly are not. Relocation, or, more accurately, threatened relocation, has been a way of life in major professional sports for more than half a century. Between 1950 and 1998 there were 68 relocations in the four major sports – with the vast majority of these being in-market relocations.<sup>17</sup> Between 1990 and 2000, there were 77 major league facility lease re-negotiations, modernizations or newly constructed stadium in these sports.<sup>18</sup> And between 2000 and 2005, an additional 21 stadiums were built for teams in these four leagues.<sup>19</sup> The overwhelming majority of these relocations, new stadiums and lease re-negotiations were the result of in-market maneuvering in which a team, like the NFL’s 49’ers or MLB’s A’s, sought to improve its leverage by threatening relocation, very often no further than across the nearest river or city limit. The dynamics of such a scenario are amazingly simple and predictable: inevitably, a bidding war between city and suburb ensues with the team needing to do little more than sit back and fan the competitive

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<sup>15</sup> *Id.* Although Assembly Bill 1041 passed the Assembly (52-17), it failed to pass in the State Senate.

<sup>16</sup> See Jennifer E. McGarry, *A Team With No Name, A City With No Name: Trademark Issues Relating To Sports Franchise Relocation*, 6 U. Balt. Intell. Prop. L.J. 71, 77-79 (1997).

<sup>17</sup> Kerry M. Fraas, Comment, “Bankers Up!” *Professional Sports Facility Financing And Other Opportunities for Bank Involvement In Lucrative Professional Sports*, 3 N.C. Banking Inst. 201, 203 (1999).

<sup>18</sup> Martin J. Greenburg, *Stadium Financing and Franchise Relocation Act of 1999*, 10 Marq. Sports L.J. 383 (2000).

<sup>19</sup> Frank A. Meyer, *Stadium Financing: Where We Are, How We Got Here, And Where We Are Going*, 12 Vill. Sports & Ent. L.J. 195 (2005).



flames between its potential suitors. Eventually, a new deal is consummated with the team either relocating across the city limit or remaining within the city. Under either scenario, the new lease terms are invariably one-sided, inuring solely to the benefit of the team and at the expense of local taxpayers. Although, to date, commentators and members of Congress have largely ignored these ever-increasing political ballets, perhaps it is time they paid attention. The resulting harms are very real and oftentimes devastating.

### **III. RELOCATION DESIRES AND RESPONSES**

Traditionally, it has been the out-of-market relocation that has drawn the attention of both Congress and commentators, although not to the extent that anything much has been done about it. The costs and benefits of such moves have been widely debated and although several bills have been proposed to curb the practice, none have ever garnered enough support to pass into law. The impetus for relocation as well as the bills proposed in response to the flurry of out-of-market relocations in the NFL in the mid 1990's are discussed below.

#### A. Why Teams Move

In each of the four major sports leagues, teams are granted exclusive geographic territories in which to operate.<sup>20</sup> In the NFL, for example, eastern Pennsylvania, southern New Jersey and northern Delaware mark the exclusive territory of the Philadelphia Eagles. The Baltimore Ravens cannot encroach from the south, the Pittsburgh Steelers cannot encroach from the west and the New York Giants and Jets cannot encroach from the north, absent permission from the NFL. In theory, this absence of competition should

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<sup>20</sup> Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations From Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 Md. L. Rev. 57, 59, 95-96 (1997).

ensure that each team thrives within its geographic region and would never seek to relocate. In practice, it has not worked out this way, for while teams and their leagues do indeed benefit from geographic exclusivity, they learned long ago that they can benefit even more by using it to their advantage.<sup>21</sup> The logic is simple: in order to maximize profit, professional sports leagues must expand quickly enough to deter the formation of rival leagues that would create a market and hence, undercut profitability, but slowly enough to ensure that there remain “viable, vacant locations to which existing teams could move.”<sup>22</sup> According to at least some economists, two to four potential markets appears to be the ideal number.<sup>23</sup> The presence of these available markets forces a team’s home city to take relocation threats seriously and results in the bidding war hoped-for by the team seeking to improve its lease. In this game, the team cannot help but win: either it relocates to the city offering the most lucrative deal (one that is far and away superior to the team’s present lease) or it remains and benefits through either a renegotiated lease or a renovated or new stadium, with either alternative a marked improvement over its current deal. By engaging multiple cities in a competitive bidding process for it, the team emerges victorious regardless.

Cities, by contrast, do not enjoy similar negotiating advantages. Geographic exclusivity puts them at a disadvantage in that, by definition, they are unable to negotiate with more than one team at a time. Given the extremely limited uses of large sports facilities and given the monopoly power of sports leagues to limit competition within

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<sup>21</sup> *Id.* at 96.

<sup>22</sup> John Siegfried & Andrew Zimbalist, *The Economics of Sports Facilities and their Communities*, 14 J. Urban Perspectives 95, 98 (2000). *See also*, Daniel S. Mason & Trevor Slack, *Appropriate Opportunism or Bad Business Practice? Stakeholder Theory, Ethics, and the Franchise Relocation Issue*, 7 Marq. Sports L.J. 399, 412-13 (1997).

<sup>23</sup> Siegfried & Zimbalist, at 98-99.

geographic regions, cities are left vulnerable at the bargaining table, with no other recourse than to outbid potentially several other cities by offering up sub-market rents and above-market perks if they hope to retain their teams.<sup>24</sup> In this way, “[a] sports franchise can extract a monopoly price from a community by insisting on millions of dollars of publicly financed subsidies, such as reduced rental fees, playing facility or infrastructure improvements, or new arenas and stadiums.”<sup>25</sup> Given this reality, it is little wonder why teams seek to relocate despite the apparent perks of geographic exclusivity.

A few recent examples illustrate the extent to which teams benefit from their superior bargaining positions. In the NFL, the city of St. Louis, which had been without a team ever since its Cardinals relocated to Phoenix in 1988, was determined to outbid its rivals in order to secure the Rams, who had made it clear that they were unsatisfied with their lease arrangement in Anaheim. With several cities vying for the franchise, St. Louis offered up the key to its city and then some, promising to turn over to the team 75% of all advertising revenue from its newly constructed domed stadium (paid for, at a cost of \$300 million, primarily with public funds), personal seat license revenue of \$74 million, luxury seat revenue, and \$1.3 million per year in naming rights.<sup>26</sup> In exchange, the city and state of Missouri kept for themselves all of \$250,000 per year in ticket sales and \$1 million per year in taxes based upon attendance.<sup>27</sup> If all of this were not enough, the city agreed to include in its lease an opt-out clause which would allow the Rams to void the agreement and relocate without penalty if the stadium was not ranked in the top 25% of

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<sup>24</sup> *Id.* See also Mitten & Burton, at 60-61.

<sup>25</sup> Mitten & Burton, at 97-98.

<sup>26</sup> Zachary A. Phelps, Note, *Stadium Construction for Professional Sports: Reversing the Inequities Through Tax Incentives*, 18 St. John’s J. Legal Commentary 981, 1004-1008 (2004).

<sup>27</sup> *Id.*

all NFL stadiums.<sup>28</sup> Finally, when a snafu between the NFL and Rams emerged over the league's insistence that the Rams pay a \$29 million league-mandated relocation fee, the city agreed to pay \$20 million of this.<sup>29</sup> In all, by one estimate, as a result of this arrangement the city and state receive no more than 10% each year of what they spend on the stadium.<sup>30</sup> Clearly, St. Louis's lack of bargaining power contributed to this overwhelmingly one-sided deal.<sup>31</sup>

The St. Louis deal is typical of the types of arrangements reached between public entity and professional sports franchise due to the inequality of bargaining power. In Baltimore, the city, seeking to replace the NFL's Colts who relocated to Indianapolis years earlier, agreed to fund 100% of a new, \$200 million football stadium in order to entice the Cleveland Browns to relocate.<sup>32</sup> In addition, it offered the team free rent as well as 100% of all luxury box, parking and stadium advertising revenue.<sup>33</sup> Publicly funded stadiums, offered up at little or no cost to teams, are a common carrot used to lure opportunity-sniffing franchises. In 1990, the city of St. Petersburg, Florida built a \$138 million stadium in the hopes of luring either the Chicago White Sox or San Francisco Giants to town.<sup>34</sup> Neither team took the bait, choosing instead to use the new stadium in St. Pete as a chip in which to negotiate superior lease agreements with their home towns instead. As a result, the cities of Chicago and San Francisco soon helped to finance the construction of new homes for their teams. The impetus for publicly funded stadiums was perhaps best summarized by Arlington, Texas mayor Richard E. Greene, who

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Close Loophole That Has the Public Subsidizing Ever Glitzier Stadiums*, The Buffalo News, August 11, 1996.

<sup>33</sup> *Id.*

<sup>34</sup> *See* Greenburg, at 392.

justified his support for a new stadium for his city's Rangers by stating that "[y]ou don't build a stadium because the rich owners and the millionaire players need the money...[y]ou do it because other communities are willing to do it."<sup>35</sup>

B. How Cities Justify the Expenditure of Public Funds for Professional Sports Stadiums

Mayor Greene's sober analysis aside, many cities have attempted to justify their leap into bed with professional sports teams on various economic and non-economic grounds. Upon closer inspection, these claims appear to be specious.

*i. Economic Benefits*

In Arlington, a consulting/accounting firm hired to study the feasibility of the proposed stadium concluded that new stadium would create 5100 jobs and \$140 million of new money in the city of Arlington the first year the stadium was operational.<sup>36</sup> In Cincinnati, an economic impact study commissioned by Hamilton County and done by the University of Cincinnati concluded that the construction of two new stadiums would bring a one-time economic benefit of \$1.3 billion to the county and that the total economic impact of both the NFL's Bengals and MLB's Reds playing in new stadiums would be \$296 million along with the creation of 6883 jobs.<sup>37</sup> In northern Virginia, the *1996 Final Report of the Joint Subcommittee Studying Financing Options for the Purpose of Constructing a Baseball Stadium in Virginia* concluded that such a stadium would add \$137 million to the Virginia economy, create 1000 jobs and result in \$32 million in new

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<sup>35</sup> Todd Senkiewicz, Comment, *Stadium and Arena Financing: Who Should Pay?*, 8 Seton Hall J. Sport L. 575, 582 (1998).

<sup>36</sup> *Id.* at 581.

<sup>37</sup> Phillip M. Sparkes, *Cincinnati (Stadium Municipal Financing Survey)*, 34 Urban Lawyer 345, 348-49 (2002).

wages.<sup>38</sup> These projections are typical. Many cities considering the construction of new stadiums have trumpeted similar public benefits. David Lonergan, who has been vocal in his support of publicly funded stadiums and whose company specializes in stadium funding alternatives, stated that he believes that for every \$1 spent on professional sports, household income raises \$.17 and that an additional \$1.75 is pumped into the economy.<sup>39</sup> It is for these reasons that some public officials believe (or at least tout) that stadium construction is in the public interest in that it supposedly jumpstarts the local economy and can actually revive dying communities.<sup>40</sup>

These claims have been repeatedly studied and found to be without merit, however. As stated by economist Andrew Zimbalist, “[f]ew fields of empirical economic research offer virtual unanimity of findings. Yet, independent work on the economic impact of stadiums and arenas has uniformly found that there is no statistically significant positive correlation between sports facility construction and economic development.”<sup>41</sup> By way of but one example, a 1997 study conducted by the Congressional Research Service (CRS) found that of the 30 stadium projects considered in the study, 27 had no discernable economic impact on the community and three had, of all things, a negative impact.<sup>42</sup> Baltimore’s stadium building experience is typical: the CRS found that its newly constructed football stadium did indeed create jobs, albeit at a cost of \$127,000 per position -- more than 21 times the \$6,250 it cost to create each new job through

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<sup>38</sup> *Final Report of the Joint Subcommittee Studying Financing Options For the Purpose of Constructing a Baseball Stadium in Virginia*, 17 Va. Tax Rev. 341, A5-A6 (1997).

<sup>39</sup> Mayer, *Stadium Financing*, at 212.

<sup>40</sup> *Id.* The article attributed the growth of Phoenix’s downtown area to the construction of Arizona’s Bank One Ballpark. Cleveland’s new stadiums have also been hailed as helping “the city escape some of the urban blight that had plagued the area.”

<sup>41</sup> Siegfried & Zimbalist, *The Economics of Sports Facilities*, at 103.

<sup>42</sup> See Senkiewicz, *Stadium and Arena Financing*, at 589.

Maryland's general economic development fund.<sup>43</sup> Overall, stadium construction resulted in a negative economic impact upon the community given the diversion of economic resources.<sup>44</sup> Its baseball stadium, long hailed as an economic success story, produced similar dubious benefits. A mid-1990's study of Oriole Park at Camden Yards found that it generated approximately \$3 million annually but at a cost of \$14 million to Maryland taxpayers.<sup>45</sup>

Far from the claims made on behalf of professional sports franchises, they very often have little or no impact on local economies because, despite the proliferation of media coverage they generate and the overwhelming role these teams play in popular culture, comparatively speaking, they are surprisingly small enterprises. One economist, who has studied the interrelationship between sports and local economies since 1987, has concluded that, on the whole, "hosting a franchise has less economic impact on a city in terms of direct revenue and employment than attracting a medium-sized department store."<sup>46</sup> The numbers bear this out: most teams employ approximately 70-130 people in their front offices and hire another 1000-1500 day-of-game personnel who perform unskilled, temporary work for low hourly wages.<sup>47</sup> Zimbalist concluded, generously, that for a typical NFL team playing 10 home games per season, the cumulative annual effect of day-of-game employment was the equivalent of perhaps 20-30 full time, year-round

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<sup>43</sup> See Irwin M. Stelzer, *Socked for Stadiums*, New York Post, August 29, 1996.

<sup>44</sup> See Joseph L. Bast, *Sports Stadium Madness: Why it Started, How to Stop It*, Heartland Policy Study #85, The Heartland Institute, February 23, 1998, 4-5, 16.

<sup>45</sup> Greenburg, *Stadium Financing*, at 388-89.

<sup>46</sup> See Andrew Gasper, Note, *Senator Moynihan's Field of Dreams: If You Build It, They Will Come... But Not at the Federal Taxpayer's Expense*, 17 Va. Tax Rev. 341, 361 (1997). Gasper cites a study conducted by Professor Robert Baade, which was subsequently relied upon by the CRS in its subsequent study of the impact of stadiums on local communities. Baade found a lower rate of economic growth in cities that chose sports development strategies than in those cities that chose other routes to achieve economic growth. In sum, Baade concluded that, at best, the impact of sports stadium development is insignificant if it is not detrimental, at least in comparison with the myriad other ways the money directed toward stadium development could have been spent.

<sup>47</sup> Siegfried & Zimbalist, *The Economics of Sports Facilities*, at 104.

jobs at best.<sup>48</sup> Accordingly, the impact of these businesses is negligible: for a medium-sized city such as St. Louis, Zimbalist concluded that its baseball team accounts for less than .3% of local economic activity.<sup>49</sup> Larger cities such as New York feel even less impact from their teams: a baseball team in Gotham contributes less than .03% to the city's economy.<sup>50</sup> Moreover, whatever low-paying jobs are created typically do not help to jump start the economy as low-paying jobs tend to follow high-paying jobs and not vice-versa.<sup>51</sup> Thus, the benefit of these temporary jobs extends no further than the limited benefits offered by these jobs themselves; they do not stimulate growth and do not lead to other, more stable jobs – jobs complete with benefits and stability that would indeed help to grow the local economy.

Opportunity costs further erode the impact of stadium construction as well as consumer dollars spent on professional sports entertainment. Public spending on construction means that less public money is spent on other projects such as parks, public buildings and infrastructure improvements that likewise would promote the image of the city and act as a public good.<sup>52</sup> In addition, consumer spending on sports entertainment results in less spending on other forms of entertainment.<sup>53</sup> The net result of all this is that, at best, spending on professional sports represents a shift in resources and not the creation of new ones.<sup>54</sup> From the city's perspective, this shift is not without risk in that

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See Bast, *Sports Stadium Madness*, at 13. Bast cites economists, such as Robert Baade, who conclude that while low paying jobs are typically valuable “first rungs on the employment ladder,” the growth of these jobs tends to follow the creation of higher paying jobs, not the other way around. Thus, in order to foster economic growth, Baade counsels the creation of higher paying jobs, not lower paying ones. The lower paying ones tend to lead no further than the created job itself.

<sup>52</sup> *Id.* at 4-5, 16.

<sup>53</sup> Siegfried & Zimbalist, *The Economics of Sports Facilities*, at 108-10.

<sup>54</sup> *Id.* See also Mayer, *Stadium Financing: Where We Are*, at 215.



the debt created by the use of public funds on projects that generate such little economic impact may affect the city's credit rating with the result being that, in the future, it would have to pay a higher interest rate on future loans.<sup>55</sup> In the end, the city's taxpayers bear the brunt of the city's urge to attract or retain a professional sports team at any cost.

In sum, the existence of professional sports teams does little to bolster a city's economy despite loud claims to the contrary. Worse, many professional sports stadiums are such bad deals for cities that one economist, Roger Noll of Stanford, concluded that cities which build them should expect to suffer losses of \$20-25 million annually.<sup>56</sup> To all of the team owners who argue otherwise, professor Noll provides the most basic and obvious retort: if these stadiums were the surefire economic goldmines their supporters claim them to be, they would build them themselves.<sup>57</sup> That they don't, that they instead look to public entities to foot the bill (and therefore take some of the revenue), says all anyone needs to know regarding their profitability.

*ii. Non-Economic Benefits*

Supporters of professional sports team stadium construction likewise tout the non-economic benefits that allegedly flow from these projects. Like the economic claims, these too appear to be specious upon examination.

Proponents of a new baseball stadium in St. Louis urged the passage of a bill funding construction for it by claiming that keeping the Cardinals in the city would save it from irrelevance. State Senate President pro tempore Peter Kinder stated that "the

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<sup>55</sup> See Bast, *Sports Stadium Madness*, at 4-5. Bast cites Dean V. Baim, who authored a previous *Heartland Policy Study* who concluded that "[s]tadium construction is not a low-risk investment." Dean V. Baim, *Sports Stadiums as 'Wise Investments,': an Evaluation*, Heartland Policy Study #32, The Heartland Institute, November 26, 1990, 6.

<sup>56</sup> See Gasper, *Senator Moynihan's Field of Dreams*, at 361

<sup>57</sup> *Id.* According to Noll, if stadiums brought in all the revenue franchise owners claimed they did, they would not be as willing as they are to turn over a portion of their profits to the city governments they currently require to provide the bulk of the financing.

survival of the City of St. Louis is on the line. I don't think St. Louis would be much without the Cardinals."<sup>58</sup> Without its professional sports teams, Kinder believed that St. Louis "would risk becoming another big Omaha."<sup>59</sup> This claim is typical as the "big league" image of a given city is often believed to be the result of the presence of the professional sports teams that call it their home.<sup>60</sup> In Charlotte, for example, its Chamber of Commerce vice president pointed to the arrival of new NBA, NHL and NFL teams in the 1990's as the lynchpin for the city's national image makeover: "Charlotte was in a situation where it was an unheard of community 10 years ago," he said. "With professional sports, we've gone a long way towards getting known."<sup>61</sup> In short, "big league" cities play host to "big league" teams, or so the theory goes. In the never ending competition between and among cities (defined as "Homeric" and worthy of Freudian analysis according to one commentator), cities with major league teams consider themselves superior to those without them; referring to such outposts as "backwaters" or "second-tier" communities.<sup>62</sup> Although this might seem silly and even though the economic impact of these teams is negligible, these feelings are, in the words of the same commentator, "nonetheless real."<sup>63</sup> Cities, just like the teams that call them their home, compete and use these teams as the basis for their competition. As such, the emotional

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<sup>58</sup> Joel K. Goodstein, *St. Louis (Stadium Municipal Financing Survey)*, 34 *Urban Lawyer* 397, 403 (2002).

<sup>59</sup> *Id.*

<sup>60</sup> See generally Steven A. Reiss, *Touching Base: Professional Baseball and American Culture in the Progressive Era* (University of Illinois Press 1999). Reiss studied the history and progression of the "big league" city movement and found that it is closely tied with the identities of the professional sports teams that call these cities their home.

<sup>61</sup> Senkiewicz, *Stadium and Arena Financing*, at 593.

<sup>62</sup> See Mitten & Burton, *Professional Sports Franchise Relocations From Private Law and Public Law Perspectives*, at 65. ("These are epic themes better comprehended by Homeric poets or Freudian analysts than by economists, but they are nonetheless real.")

<sup>63</sup> *Id.*

stakes are high indeed and any advantage is one worth considering, regardless of its financial impact.

Beyond competitive advantages, supporters of stadium construction sometimes tout the “renewed civic pride” resulting from the gleaming new edifices.<sup>64</sup> Increased opportunities to promote the city as a tourist destination and even improved racial harmony have also been cited as justifications.<sup>65</sup> However, all of this could just as easily be achieved by means other than the construction of costly and economically inefficient stadiums. Improved police protection, well-tended parks and other public buildings would likewise raise civic pride and render the city more attractive to outsiders. To the extent that these improvements are foregone due to the shifting of limited resources to stadium construction, it is difficult to conclude that a city is better off merely because a new stadium is built.<sup>66</sup> Once again, opportunity costs must be factored into the equation.

*iii. The Clear Beneficiaries of Stadium Construction.*

While the public benefits of stadium construction are dubious to say the least, the benefits to sports franchise owners are not. Stadium construction puts money in their pockets quickly and in more than one way. First and most directly, franchises see an immediate increase in operating revenue as a result of new and improved streams of revenue that flow from the new stadium – revenue created by the below-market rents and above-market perks received as a result of the competition between communities to secure the team.<sup>67</sup> Second, the value of franchises also seems to rise as a result of the

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<sup>64</sup> See Gasper, *Senator Moynihan's Field of Dreams*, at 364.

<sup>65</sup> See Michael N. Danielson, *Home Team: Professional Sports and the American Metropolis* (Princeton University Press, 1997), chapter one.

<sup>66</sup> See Bast, *Sports Stadium Madness*, at 16.

<sup>67</sup> See Senkiewicz, *Stadium and Arena Financing*, at 594; Mitten & Burton, *Professional Sports Franchise Relocations From Private Law and Public Law Perspectives*, at 65.

new facilities. By way of three representative examples, the Baltimore Orioles were sold in 1988 while they played in decaying Memorial Stadium for \$70 million. Five years later, and one year after moving into Oriole Park at Camden Yards, they were sold again, this time for \$173 million.<sup>68</sup> In Texas, the Rangers were sold in 1989 for \$46 million and resold in 1998 for five times that amount, \$250 million, with the team's glimmering new stadium cited as the primary reason for the team's rapid increase in value.<sup>69</sup> In the NFL, the Cleveland Browns, playing in Cleveland's Memorial Stadium, were estimated to be worth \$160 million in 1995 but \$200 million two years later when they moved into a brand new stadium in Baltimore.<sup>70</sup> Given that, without exception, cities have borne the brunt of the costs while franchises have reaped the majority of the benefits that flow from stadium construction, more than one commentator has concluded that cities are clearly unable to adequately protect the interests of their taxpayers solely by contract.<sup>71</sup> In this atmosphere, teams have an interest in maintaining so-called franchise free agency because, as the above has illustrated, it allows them to maximize revenue and reduce costs, both of which ultimately increase profitability.

Although arguably, the four major sports leagues have the ability to control franchise free agency through league bylaws which mandate majority or super-majority approval by league members before any particular relocation is permitted, historically they have demonstrated that they are unwilling or unable to police themselves. Between 1950 and 1982, 78 franchises relocated with leagues throwing up roadblocks only when personal vendettas, rather than the protection of individual communities, appeared to be

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<sup>68</sup> See Senkiewicz, *Stadium and Arena Financing*, at 594.

<sup>69</sup> *Id.*

<sup>70</sup> See Gasper, *Senator Moynihan's Field of Dreams*, at 362.

<sup>71</sup> See Mitten & Burton, *Professional Sports Franchise Relocations From Private Law and Public Law Perspectives*, at 97.

involved.<sup>72</sup> Major League Baseball has stepped in to prevent relocation by maverick owners such as Bill Veeck and Charles O. Finley; the National Football League attempted to thwart renegade owner Al Davis from moving his Raiders from Oakland to Los Angeles.<sup>73</sup> Other than attempts to even a personal score, however, these leagues, along with the NBA and NHL have rarely acted with zeal to protect a city's best interest or fans by thwarting relocation. Although the 9<sup>th</sup> Circuit's 1984 opinion in *Los Angeles Memorial Coliseum v. National Football League* (commonly referred to as *Raiders I*)<sup>74</sup> may have shed doubt on at least the NFL's ability to control relocation through its bylaws,<sup>75</sup> in practice the decision made little difference; most leagues were not using this power anyway.

The imbalance of power between team and city has only been amplified in recent decades as start-up costs for new leagues have skyrocketed to the point where today there is little threat of new teams from rival leagues potentially entering existing markets and providing the host city with at least some negotiating leverage.<sup>76</sup> Given the overwhelming costs involved in starting a rival major league caliber baseball, football basketball or hockey league and the small chance of success, the four leagues that currently exist are now more assured than ever that there will be no outside challengers competing for a given city's resources. As such, the teams in these established leagues can confidently maximize their monopoly power through the exercise of geographic

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<sup>72</sup> *Id.* at 104.

<sup>73</sup> *Id.* "Apparently, 'personal animosity' and other factors motivated these actions, rather than an honest desire to protect a host city's interests."

<sup>74</sup> 726 F.2d 1381 (9<sup>th</sup> Cir. 1984).

<sup>75</sup> *See Id.* The court held that Rule 4.3 of the NFL's bylaws, which only permitted relocation of a franchise if three-fourths of league owners approved, violated the Sherman Antitrust Act. As such, the NFL did not have the ability to prevent franchise relocations pursuant to this bylaw. After this ruling, several other NFL franchises relocated, setting off a relocation flurry in the league throughout the 1980's and '90's.

<sup>76</sup> *See Mitten & Burton, Professional Sports Franchise Relocations From Private Law and Public Law Perspectives*, at 96.

exclusivity, allowing them to exert ever more pressure on cities to squeeze out sub-market rents and above-market perks.<sup>77</sup> Quite simply, without these teams, cities have nowhere else to turn for top-tier professional sports in their markets.

Because of this, Congress has attempted, amid much criticism, to insert itself into the equation on several different occasions in order to level the playing field. Much of the criticism has labeled such attempts by Congress as “protectionist measure[s] that fl[y] in the face of the American ideal of competitive markets, open markets and a free market economy.”<sup>78</sup> Although such criticism glosses over, or simply ignores, the abusive monopoly power on one side of the bargaining table and the helplessness, as a result of league-imposed and Congressional approved geographic exclusivity, on the other, it has been effective in thwarting several popularly supported bills that have been introduced in both houses of Congress within the past decade and a half. The following section reviews the genesis of these bills and the reasons for their failure.

### C. Proposed Congressional Legislation

Without exception, all of the proposed legislation focused on the harms caused by out-of-market relocation, i.e., teams moving from one exclusive geographic region to another (such as the Colts’ 1980’s relocation from Baltimore to Indianapolis), rather than in-market relocation, i.e., teams relocating within their existing exclusive geographic regions (such as the 1970’s relocation of the New York Giants from New York City to East Rutherford, New Jersey). After the uncertainty created by 9<sup>th</sup> Circuit’s *Raiders I* decision, Congress attempted on several occasions, prompted by the relocation or threatened relocation of various NFL teams which took advantage of the decision to

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<sup>77</sup> See Mayer, *Stadium Financing*, at 206.

<sup>78</sup> Anoop K. Bhasin, *Tax Exempt Bond Financing of Sports Stadiums: Is the Price Right?*, 7 Vill. Sports & Ent. L.J. 181, 194 (2000).

exercise their seemingly unfettered right to threaten relocation unless new stadiums were built for them, to make such moves less attractive by withholding federal money for the construction of these stadiums unless certain conditions were met.<sup>79</sup> None, however, were passed into law.

The first such bill was 1992's Professional Sports Franchise Stabilization Act, which would have required franchises to negotiate in good faith with their local governments before they could seek to relocate elsewhere.<sup>80</sup> Only when the local government demonstrated an unwillingness to address the inadequacies pinpointed by the franchise would relocation be permitted. In essence, this bill provided a quasi "right of first refusal" to the home city.<sup>81</sup> Three years later, The Fans Right Act of 1995 was proposed which differed from the Professional Sports Franchise Stabilization Act in that it called for an antitrust exemption for the NFL, NBA and NHL that would overrule *Raiders I* and permit these leagues to restrict the mobility of their franchises (Major League Baseball was not included in the Act due to its existing antitrust exemption stemming from the Supreme Court's 1922 opinion in *Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs*<sup>82</sup>).<sup>83</sup> Following these were a litany of other bills such as the Fans Rights Act of 1995,<sup>84</sup> the Fan Freedom and Community Protection Act of 1995,<sup>85</sup> The Fan Freedom and Community Protection Act

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<sup>79</sup> See Alvin B. Lindsay, Note, *Our Team, Our Name, Our Colors: The Trademark Rights of Cities in Team Name Ownership*, 21 Whittier L. Rev. 915, 932 (2000).

<sup>80</sup> See Michele Cotrupe, Note, *Curbing Franchise Free Agency: The Professional Sports Franchise Relocation Act of 1998*, 9 DePaul-LCA J. Art & Ent. L. 165, 174-75 (1998).

<sup>81</sup> *Id.*

<sup>82</sup> 259 U.S. 200 (1922).

<sup>83</sup> See Lindsay, *Our Team, Our Name, Our Colors*, at 933-34.

<sup>84</sup> S. 1439, 104<sup>th</sup> Cong. (1995).

<sup>85</sup> H.R. 2740, 104<sup>th</sup> Cong. (1995).

of 1996,<sup>86</sup> the Professional Sports Antitrust Clarification Act of 1996,<sup>87</sup> the Sports Relocation Reform Act of 1996,<sup>88</sup> the Sports Antitrust Reform Act of 1996,<sup>89</sup> the Stop Tax-Exempt Arena Debt Issuance Act (STADIA),<sup>90</sup> the Team Relocation Taxpayers Protection Act of 1996,<sup>91</sup> the Professional Sports Franchise Relocation Act of 1998,<sup>92</sup> and the Stadium Financing and Franchise Relocation Act of 1999.<sup>93</sup> Most of these bills were similar in that they proposed an antitrust exemption for the NFL, NBA and NHL; some also linked the receipt of federal dollars for stadium construction to a franchise's exhaustion of effort to remain within its current geographic region. Only after several conditions had been met, such as notice to the local government of an intent to relocate and good faith negotiations thereafter, would federal dollars be made available under these bills for stadium construction.

The Fan Freedom and Community Protection Act of 1995 (FFCPA) was notable for a provision that stated that, should a team relocate, its registered mark would become the property of its league.<sup>94</sup> Thereafter, the league would reserve the mark for the community which lost its team until either the mark expired or the community notified the league that it did not intend to use it.<sup>95</sup> Under another provision of the bill, a league in which a team relocated was likewise required to offer an expansion team to the spurned community, which would then presumably make use of the reserved mark.<sup>96</sup> In

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<sup>86</sup> H.R. 2740, 104<sup>th</sup> Cong. (1996).

<sup>87</sup> S. 1696, 104<sup>th</sup> Cong. (1996).

<sup>88</sup> H.R. 3805, 104<sup>th</sup> Cong. (1996).

<sup>89</sup> S. 1767, 104<sup>th</sup> Cong. (1996).

<sup>90</sup> S. 1880, 104<sup>th</sup> Cong. (1996); S. 122, 105<sup>th</sup> Cong. (1997); H.R. 916, 107<sup>th</sup> Cong. (2001).

<sup>91</sup> S. 1529, 104<sup>th</sup> Cong. (1996).

<sup>92</sup> H.R. 3817, 105<sup>th</sup> Cong. (1998).

<sup>93</sup> S. 952, 106<sup>th</sup> Cong. (1999).

<sup>94</sup> H.R. 2740, 104<sup>th</sup> Cong. (1995); *see also* Lindsay, *Our Team, Our Name, Our Colors*, at 934.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*



fact, this is precisely what occurred in the late 1990's when the NFL's Cleveland Browns relocated to Baltimore but left their mark and colors in Cleveland. The Browns were rechristened the Ravens and a few years thereafter Cleveland was awarded an expansion franchise which assumed the Browns name and colors. However, this occurred through contract rather than legislation; the FFCPA, like every other proposed bill, died in committee.<sup>97</sup>

Regardless, even had these bills been passed into law, it is doubtful that they would have had much effect on curbing out-of-market relocations due to the fact that nearly every one of them rested upon the flawed premise that an antitrust exemption would have had some teeth. In essence, these bills assumed that professional football, basketball and hockey "leagues" were something other than simply an amalgam of team owners, each of whom might want to relocate themselves one day. Therefore, as a collective group, these leagues have been, even before *Raiders I*, hesitant to block attempted relocations (absent the desire to hoist retribution upon a maverick owner) and, as such, unable to police themselves.

In any event, as teams relocated and all four major leagues expanded throughout the 1990's, out-of-market relocations became less frequent as attractive open markets became more scarce. Accordingly, the desire for legislation waned as the market seems to have corrected itself, albeit to the detriment of city governments across the country, without Congressional input. In the NFL, cities such as Nashville, Charlotte, Jacksonville, Houston, St. Louis, Cleveland and Baltimore all received either relocated or expansion franchises during the decade, leaving, by 2007, Los Angeles as perhaps the

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<sup>97</sup> See e.g., Lindsay, *Our Team, Our Name, Our Colors*, at 936; Greenburg, *Stadium Financing and Franchise Relocation Act of 1999*, at 398.

lone open market, albeit a powerful one, as a bargaining chip for NFL franchise owners looking to better their current stadium leases. In Major League Baseball, the open markets that have been used as bargaining chips for decades – Washington, D.C., Miami and St. Petersburg, Florida likewise have been filled. Although those who argued against Congressional intervention in out-of-market relocations were incorrect in their analysis – as noted earlier, each of these cities wound up on the wrong end of extremely one-sided and detrimental lease arrangements – the damage has, for the most part, been done and there does not appear to be much left, outside of Los Angeles in the NFL, to inflict. Legislation focusing on out-of-market relocations, even if properly focused, would be, at this point, much too little and much too late.

Recent changes in professional sports economics likewise make the specter of out-of-market relocations less common in the future. Commentators have correctly noted that, traditionally, revenue sharing in the NFL, NBA, NHL and even to a lesser extent in Major League Baseball, helped to make smaller cities more attractive as alternate destinations and, as such, effective bargaining chips in the stadium lease negotiating process.<sup>98</sup> Because, historically, in the NFL at least, a team playing in Green Bay, Wisconsin, could reap as much revenue as a team playing in New York, mid-size metropolitan markets were considered reasonable destinations for any franchise with a wandering eye -- the mid-1990's relocation of the Rams from Los Angeles to St. Louis is a prime example of this dynamic. Smaller cities such as the previously noted Charlotte, looking to upgrade their image to "big league" status, have often been willing to be overly generous in lease terms. Because the courted team could reap the benefits of these

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<sup>98</sup> See Mitten & Burton, *Professional Sports Franchise Relocations*, at 102.

terms without suffering a loss of league revenue by downsizing to a smaller market, these offers were obviously tantalizing.

Today, this is less true than ever before. Within roughly the past decade, maximizing revenue depends more on those financial streams that are not subject to revenue sharing than those that are. In particular, revenue generated from luxury box sales and stadium naming rights are not subject to revenue sharing in the NFL and have, as a consequence, become the Holy Grail for franchise owners seeking to maximize profits. Although smaller cities may be able to provide 60,000 ravenous fans each Sunday, all of this revenue goes into the league pot. They may be less able, due to a smaller corporate presence, to fill the many dozens of luxury boxes demanded by team owners in the course of lease negotiations or which would allow them to maximize revenue from stadium naming rights, however. Therefore, a potential relocation from, say, New York to Portland, Oregon may not be as attractive today as it might have been even a decade ago.<sup>99</sup> As the difference between playing in a large market and a smaller one might be the tens or hundreds of millions of dollars available in non-shared revenue, there is now a disincentive to this sort of downsizing.

In addition, there is television revenue to consider. In Major League Baseball, smaller markets mean less revenue in local television deals. In the NFL, although buoyed by network deals subject to revenue sharing, television revenue might decrease in the aggregate if more and more teams relocate from larger markets to smaller ones. At some

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<sup>99</sup> See Ashley Fox, *After Market Settles, Reese Will Be Ready*, The Philadelphia Inquirer, March 11, 2007, E2, noting that the Jacksonville Jaguars recently admitted that they lost money during the 2006 season and that they still are unable to find a naming sponsor for their stadium. Although the Jaguars, like most NFL teams, regularly sell-out home games and are the beneficiaries of revenue sharing, this apparently is no longer adequate to keep teams in the black, as the Jaguars' recent admission attests. Small markets such as Jacksonville, with smaller corporate bases, may be at a competitive disadvantage that no amount of ticket sales can overcome.

point, individual team owners might feel pressured by both their brethren as well as network executives to reconsider abandoning large, lucrative markets such as Los Angeles for smaller ones such as St. Louis. Although this certainly did not prevent the Rams from doing exactly this, there conceivably may become a point, as the available open cities become smaller and smaller due to expansion, where the pressure becomes determinative. As Major League Baseball has expanded from 16 teams in 1960 to 30 teams today, and the NFL has expanded from 12 teams in 1959 to 32 teams today, it is likely that these leagues are closer to this point than ever before. Given the above economic realities, teams in large markets have a significant incentive to remain in their current exclusive geographic regions rather than relocate to smaller ones. This does not mean, however, that the potential for harm to cities has diminished. To the contrary, franchises will continue to seek out the best possible deals for themselves in their never ending quest for maximum profits. And they will increasingly look within their own markets to do so.

#### **IV. THE DYNAMICS AND HARM OF IN-MARKET RELOCATIONS**

##### **A. The Hidden Costs of In-Market Relocations**

Historically, there have been significantly more in-market relocations than out-of-market ones. As stated earlier, at present there are many teams in all four major sports that do not play within the legal limits of the geographic region for which they are named. Regardless, none of the legislation proposed by Congress addressed these types of relocations and, moreover, some of it expressly exempted in-market relocations from their scope. In its original version, the Fan Freedom and Community Protection Act of 1995, by way of example, would not have applied to any relocation “in the case of a

community with a professional sports team if the team relocates within 60 miles of the community.”<sup>100</sup> Later, the exception was narrowed to relocations of 25 miles or less.<sup>101</sup> Still, most in-market relocations would not have been covered by the Act. The Sports Antitrust Reform Act of 1996 defined a team’s “home territory” so as to coincide with a franchise’s exclusive geographic region: “the term ‘home territory’ means the geographic metropolitan area within which a member team operates and plays the majority of its home games.”<sup>102</sup> The Professional Sports Franchise Relocation Act of 1998 contained identical language and further specified that the Act only applied when a franchise proposed to play in a “new location” outside of its traditional “home territory.”<sup>103</sup> Other bills were similar in these regards.

As for the rationale behind the in-market exceptions carved out of these bills, one can only speculate. However, given the atmosphere that led to their proposal, the motivation behind the drafting of the specific language becomes more clear. These bills were introduced, typically with great fanfare and haste, by members of Congress representing the districts threatened with the loss of their home NFL teams. The potential relocations giving rise to Congressional action were, without exception, out-of-market ones. As such, the bills were an attempt to “keep... the home team at home” as one commentator put it.<sup>104</sup> By contrast, in-market relocations usually do not engender the same sorts of emotional responses. Although, for example, residents of the city of Dallas during the early 1970’s might have preferred to keep their Cowboys within the city

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<sup>100</sup> H.R. 2740, 104<sup>th</sup> Cong. (1995).

<sup>101</sup> The bill was reintroduced in 1996 and was identical with the exception of the relocation provision. H.R. 2740, 104<sup>th</sup> Cong. (1996).

<sup>102</sup> S. 1767, 104<sup>th</sup> Cong. (1996).

<sup>103</sup> H.R. 3817, 105<sup>th</sup> Cong. (1998).

<sup>104</sup> See Don Nottingham, *Keeping the Home Team at Home: Antitrust and Trademark Law as Weapons in the Fight Against Professional Sports Franchise Relocation*, 75 U. Colo. L. Rev. 1065 (2004).

limits, where they had played in the Cotton Bowl for nearly a decade, few could see the harm of their short distance relocation to nearby Irving, Texas as it was much less overt. Once the move was complete they would still be able to see their team on television every Sunday and could still travel to games in nearby Texas Stadium to see them play in person if they so desired. In the eyes of many, it was merely an instance of no harm, no foul.

As this example illustrates, because the deprivation of allegiance of home town fans is not at issue in these sorts of relocations, the emotional impact of in-market moves is much less than that of out-of-market ones. Missing from the equation are the throngs of yelling, crying, protesting fans barraging City Hall, dominating the local media and stopping traffic as was the case in Cleveland when the Browns announced their move to Baltimore. Without question, the potential relocation of the NBA's Philadelphia 76'ers and NHL's Philadelphia Flyers to Camden, New Jersey set off a political rumble in the early 1990's. Fans of these teams, however, largely sat back and watched the drama unfold, with interest but at a distance. In the end, they would still be able to see their teams play and could still call them their own regardless of whether they ended up playing in a new arena located in South Philadelphia or in one over the Walt Whitman Bridge in nearby Camden. The harm inflicted by this battle, as is the case in every potential in-market relocation, however, was no less severe despite its covert nature.

Although perhaps not as emotionally charged, many of the same abuses of monopoly power nevertheless occur within the context of in-market relocations and in some respects, are even more severe. Just as with the case of threatened out-of-market relocations, sports franchises are able to extract sub-market rents and above-market lease

concessions when they are able to pit city against nearby suburb or neighboring town in the battle to win a stadium war. That the battle occurs within a single geographic region may somewhat lessen the angst of the hometown fans but it nevertheless results in the same one-sided leases that are considered so insidious when they occur in the out-of-market context. Moreover, given the changing economics of professional sports, these in-market turf wars eliminate whatever leverage larger cities with established teams held over their smaller, out-of-market rivals seeking to lure their teams away from them. Now, by being able to remain within the same geographic region, franchises no longer have to weigh the potential costs of relocating to a smaller region with perhaps a smaller fan base and/or less of the corporate presence so necessary to the team's ability to maximize its luxury box and stadium naming rights revenue.

As has been demonstrated time and time again, sports franchises benefit in many ways from their association with large cities even if they never set foot within their legal boundaries. As stated earlier, it was the lure of the large market association that led Arturo Moreno to shift his team's association from the smaller Anaheim market to the larger Los Angeles market in 2005.<sup>105</sup> The potential increase in local television revenue along with other marketing advantages drove the rechristening of the team despite the fact that after the change, the team played in not only the same city it had for years, but the same stadium as well. The team remained in place. Only the association changed. And this was what mattered most to Moreno.<sup>106</sup> Whether Moreno's assumptions were accurate is irrelevant. Economists can line up on either side of this issue but that does not

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<sup>105</sup> See *City of Anaheim v. Angels Baseball*, No. G035159, 2005 WL 1523338 (Cal. App. 4 Dist.).

<sup>106</sup> *Id.*, at 9. As the court stated: "substantial evidence supports a finding that the change to 'Los Angeles Angels of Anaheim' was a marketing decision, in large part due to the large disparity between the television revenues generated by the Los Angeles Dodgers and the former Anaheim Angels."

change the reality that Moreno saw value in his team's the association with Los Angeles over Anaheim. Because he saw value in a particular association, this by itself gives that association value. At that moment the association has become a commodity. Likewise, it is the value of this commodity that more recently has driven the San Francisco 49'ers to steadfastly maintain their San Francisco affiliation despite their imminent relocation 45 miles to the south.<sup>107</sup> And as the law presently stands, this valuable asset is free for the taking to anyone who wants it.

#### B. The True Beneficiaries of the City/Team Relationship

As for why cities have not fought harder, or in most cases at all, to seek value in return for the benefits provided professional sports franchises (particularly ones who play in-market but beyond city limits) through the use of their names, it is very likely that they believe that they do indeed receive value through the affiliation. However, closer analysis of this presumed value reveals that it is illusory.

Historically, whenever city representatives are called upon to justify the one-sided leases, free land, tax breaks and public money used to lure or keep a professional sports team, they invariably resort to the "big league" status these teams supposedly confer upon their affiliated cities discussed herein in section III(b)(ii). According to this rationale, these benefits accrue even when the city loses the stadium battle so long as it loses to an in-market rival. Thus, as the theory goes, the use of its name confers value upon the city regardless of the fact that the team does not actually play there. However, although, for example, city leaders may have worried that the departure of MLB's Cardinals would

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<sup>107</sup> See Vega, *49'ers Insist They'll Keep 'San Francisco.'*



turn their city into “another Omaha,”<sup>108</sup> in reality, it was the Cardinals who required the association with a large city such as St. Louis as much or perhaps even more.

In truth, the four major professional sports leagues are under just as much pressure as cities to maintain or enhance their “big time” status. Without it, local and national television revenue, among other things, would most likely decrease significantly. Consider the NFL, for example: one wonders if the same billions of dollars would be heaped upon the league by large broadcast and cable networks if the league was populated with the likes of the Irving Cowboys, East Rutherford Giants, Orchard Park Bills, Landover Redskins and Santa Clara 49’ers rather than the major cities with which these teams are currently associated. In fact, such a league harkens back to the early days of the NFL, when the league fought to overcome its second class status perpetuated, at least in part, from the small towns which flew the nascent league’s banner.

At the time of the formation of the NFL, Major League Baseball ruled the American professional sports world with teams located in every major east coast and midwestern city. While baseball could legitimately call itself the country’s national pastime with teams representing cities such as New York, Philadelphia, Washington, Boston, Chicago, St. Louis and Detroit, the NFL was populated with teams representing burghs such as Canton, Toledo, Rock Island, Racine, Dayton, Evansville and, of all places, LaRue, Ohio (The Ooring Indians who were named after a local dog kennel).<sup>109</sup> It did not take much to conclude that, compared to Major League Baseball, the NFL was small

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<sup>108</sup> Goldstein, *St. Louis*, at 403.

<sup>109</sup> See *1922 Standings*, <http://www.pro-football-reference.com/years/1922.htm>. See also *Oorang Indians*, <http://www.profootballhof.com/history/decades/1920s/oorang.jsp>. The team was organized by Walter Lingo, who owned the Oorang Dog Kennels in LaRue. He organized the team for the sole purpose of advertising his kennels and selling Airedale Terriers. He recruited football legend Jim Thorpe for the Indians and then sent them packing, touring other cities so as to advertise his kennels and terriers available back in LaRue. Because of the underlying purpose of his team, the Indians played only one home game and that was played in nearby Marion, Ohio due to the absence of a football field in LaRue.

time and minor league. Other than Chicago, the NFL lacked status because it lacked affiliation with what were then America's "big time" cities. As the league strove for legitimacy, it dropped its affiliation with these smaller locales and developed ones with larger ones. And in at least one instance, this process presaged Moreno's re-branding of his Angels.

*i. The Frankford Yellow Jackets*

In 1924, after a successful stint barnstorming against NFL teams, the Frankford Yellow Jackets, a team located in a North Philadelphia neighborhood, were granted entry into the league.<sup>110</sup> Although a good and soon-to-be great team, the Yellow Jackets, like most teams in the league, often failed to draw much of a crowd or much exposure in the press: high school football typically was more heavily covered.<sup>111</sup> In their initial season, the team went 11-2-1 in NFL league play (and 17-3-1 overall; teams were permitted to play games against opponents outside of the league) and in 1925 were once again a top team. Regardless, the provincialism created by the Frankford affiliation continued to haunt the team as it was not widely accepted by the larger geographic region.<sup>112</sup> In 1926, an upstart league, the AFL (American Football League) was formed and soon, the Yellow Jackets had a rival in the Philadelphia Quakers. Despite being the more established team in the more established league (and a great team at that: the Yellow Jackets would win the 1926 NFL Championship), the Yellow Jackets were routinely outdrawn by the Quakers even though both teams played some of their games in the same stadium: Philadelphia's Shibe Park. By 1931, with the team foundering due to lack of support, a

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<sup>110</sup> See *Frankford Yellow Jackets: National Football League Champions, 1926*.  
<http://ghosts.footballhistory.org/Yellowjackets.htm>.

<sup>111</sup> See Frank Fitzpatrick, *Why Did Winning Coach Leave Philly?*, *The Philadelphia Inquirer*, February 15, 2007, E2.

<sup>112</sup> See *Frankford Yellow Jackets*; Fitzpatrick, *Why Did Winning Coach Leave Philly?*

push was made by some in the local sports media to help stir up interest in the team by unofficially rechristening it the *Philadelphia Yellow Jackets*.<sup>113</sup> But by then it was too late: the Yellow Jackets folded due to lack of support from the Philadelphia sporting public.<sup>114</sup>

Two years later, in 1933, the franchise's league license was sold to a new owner, Bert Bell, who was not about to recreate the mistake made when the franchise was born. This time, in a shift of allegiances echoed by Moreno over 70 years later, the team's geographic association would be more broad: Philadelphia. Hence, the Philadelphia Eagles, a team playing under the same league license originally awarded to the Frankford Yellow Jackets, were born and very quickly became the city's team rather than the representative of one small part of it.<sup>115</sup> Across the league, as the decades passed, similar changes were taking place: small burgs were abandoned in favor of large cities. By the early 1970's, the NFL would have teams in every city that also hosted an MLB team. At this point, no one could reasonably deny the NFL's claim that it was a "big time" league at last; equal to Major League Baseball in every detail. As for who benefited more from the marriage of city to team, one could take either side. However, it is likely that the league, and therefore the individual teams that comprise it, realized significant benefits in status and, as a result, financially. As this example illustrates, sports franchises require the association with large cities perhaps as much, if not more, than cities need the franchises. In any event, it is, at a minimum, the proverbial two-way street in this regard.

*ii. The Effect of Current Law: A Lose-Lose Proposition  
for Cities Negotiating With Professional Sports Franchises*

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<sup>113</sup> See *Frankford Yellow Jackets*.

<sup>114</sup> *Id.*

<sup>115</sup> See *Id.*

None of this is to suggest that the NFL would return to the bygone, barnstorming era of the Frankford Yellow Jackets and Oorang Indians without its affiliation with large cities. However, it seems fair to question whether its image, and therefore its financial power, would suffer, at least somewhat, without them. Perhaps network television deals would be smaller by a few degrees, and stadium naming rights contracts slightly less lucrative, if the league's geographic designations were downsized. If in fact this would be the case, and it seems reasonable to assume that it would, then there exists a value to professional sports franchises' geographic association with large cities. As such, in-market relocations ultimately harm these cities in that the relocated team is able to profit off of the association for free; the shunned city receives nothing for the valuable use of its name.

Viewed in this light, cities are harmed whenever a team even threatens an in-market relocation: if they "win" by outbidding a rival suburb, they really lose due to the sub-market rents and above-market lease concessions they are forced to offer in order to woo the team looking to maximize its profit; if they lose the bidding and the team, they lose even more through the uncompensated use of their name by the abandoning team. Thus, as the law currently stands, because there is no cost to a team that relocates in-market (it reaps the fruit of the bidding war between city and suburb, knowing that regardless of who wins, it will be able to maintain its valuable association with the city) cities are, in effect, paying a premium (through these unfavorable leases) for the team's ability to freely use its name. As this result is absurd, legal protection to cities to prevent this dynamic is necessary. For if any party should pay a premium for the use of the city's name, it is the team that profits from it, not the city harmed by it.

The situation outlined above is not a rare or contrived one. In fact, it is quite common and is likely to become even more commonplace in the future as in-market relocations become even more favored than they are now. Through rapid expansion and the frequent out-of-market relocations of the 1990's, available large markets have become scarce. The changing economics of professional sports, particularly within the NFL, discussed above, likewise has made smaller markets less attractive than they were previously. In Jacksonville, for example, the NFL's vision of revenue sharing utopia came crashing down when it was revealed in 2007 that despite the common pool, the Jaguars lost money due to the fact that the small corporate presence in Jacksonville has made it exceedingly difficult for the team to secure new naming rights for its stadium. The New Orleans Saints experienced similar problems even pre-Hurricane Katrina, resulting in yet another struggling mid-market franchise due to a lack of what is now considered a necessary stream of revenue. Accordingly, in the future, teams looking to better their financial lot may think twice before abandoning a large market for a smaller one. Although this should, in theory, lead to a reduction of bargaining leverage on behalf of the franchises, the ever-availability of no-cost in-market relocations restores it in practice.

Without legal recognition of the changing realities of the team/city relationship, this practice will continue unabated into the future as the in-market suburbs will always be available to serve as no-cost bargaining chips for teams looking to maximize profits at the expense of their home towns. The concept of geographic exclusivity guarantees this reality. Moreover, with the disappearance and decreasing allure of available out-of-market cities, in-market battles represent the best-case scenario from the perspective of

many teams now and into the future in that they allow teams to maximize revenue while maintaining their fan base. As such, the risks, such as they are, presented by out-of-market moves are non-existent here. If however, cities were afforded limited property rights to their names, the inequalities presented within the in-market relocation battle disappear. Section V examines the form and scope of such a right.

## V. THE RIGHT OF PUBLICITY

The right of publicity is “the right of every person to control the commercial use of his or her identity.”<sup>116</sup> More specifically, it gives the individual the right to prevent or, for a fee, permit the use of his or her identity in such a way that benefits someone else commercially.<sup>117</sup> As such, it allows the individual to receive value in exchange for another’s use of the name for commercial purposes.<sup>118</sup> In this regard, it is not unlike a form of property right.<sup>119</sup> It is also, however, not unlike a privacy right when it is used to prevent the unauthorized use of one’s name. First formally recognized in the Second Circuit’s 1953 *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>120</sup> opinion (coincidentally, a case that likewise dealt with sports law issues), it is a right that, at its core, borrows from both but ultimately stands independent of each. Although right of publicity cases typically involve celebrities (as their names carry the most value), the right applies to everyone, providing that they are flesh and blood human beings; corporations, treated as individuals in most other ways under the law, cannot avail

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<sup>116</sup> J. Thomas McCarthy & Paul M. Anderson, *Protection of the Athlete’s Identity: The Right of Publicity, Endorsements and Domain Names*, 11 Marq. Sports L. Rev. 195, 197 (2001).

<sup>117</sup> *Id.* at 197-98.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*, at 196-97.

<sup>120</sup> 202 F.2d 866 (2d Cir. 1953).

themselves of this right.<sup>121</sup> Neither can geographic identities such as cities or famous landmarks, although as discussed below, consideration has been given in some contexts to readdressing this limitation. Until recently, the right of publicity has been one that falls under state rather than federal law.<sup>122</sup> Just over half of the states provide for such a right, with the majority of these providing so via statute.<sup>123</sup>

#### A. The ACPA

In 1999, however, a limited form of this right was arguably codified in the federal Anti-Cybersquatting Consumer Protection Act (the “ACPA”).<sup>124</sup> In order to prevent improper profiteering with regard to Internet domain names, much of the ACPA targets registered names that are confusingly similar to famous marks. As the Sixth Circuit in *Ford Motor Co. v. Catalanotte* held, “[r]egistering a famous trademark as a domain name and then offering it for sale to the trademark owner is exactly the wrong Congress intended to remedy when it passed the ACPA.”<sup>125</sup> Accordingly, it was added to the federal Lanham Act in order to protect these trademark owners and is triggered whenever someone “registers, traffics in or uses’ an offending domain name.”<sup>126</sup> Before it was passed, however, at the 11<sup>th</sup> hour, the ACPA was amended to also include protection against the use of non-trademarked personal names for the purpose of profiteering. This “personal name” protection legislation was ultimately codified in section 3001(b) of Title III which itself was contained within the Intellectual Property and Communications

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<sup>121</sup> McCarthy & Anderson, *Protection of the Athlete’s Identity*, at 200. “[I]t makes no sense to talk about the right of publicity of Microsoft or Toyota – there is no such thing.”

<sup>122</sup> *Id.*, at 199.

<sup>123</sup> *Id.* As of 2001, 28 states recognized a right of publicity, 18 by statute and 10 by common law.

<sup>124</sup> 15 U.S.C. §§ 1125(c)-(d), 1129 (2000).

<sup>125</sup> *Ford Motor Company v. Catalanotte*, 342 F.3d 543 (6<sup>th</sup> Cir. 2003).

<sup>126</sup> J. Thomas McCarthy, *McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 25:78 (4<sup>th</sup> ed. 2006).

Omnibus Reform Act of 1999.<sup>127</sup> The protection afforded under this provision is quite limited and specific and is thought to be, by at least some commentators, perhaps the first federal codification of at least a limited right of publicity, regardless of Congress's protestations to the contrary:

In sum, this subsection is a narrow provision intended to curtail one form of "cybersquatting" – the act of registering someone else's name as a domain name for the purpose of demanding remuneration from the person in exchange for the domain name. Neither this section nor any other section in this bill is intended to create a right of publicity of any kind with respect to domain names.<sup>128</sup>

Pursuant to the personal name provision, whenever someone registers a name with the intent to profit off of it, liability is triggered (in the form of injunctive relief; money damages are not available) even though the individual harmed does not otherwise have a recognized legal right to their name, such as in the case of cybersquatted trademarks.<sup>129</sup> It is for this reason that some commentators believe that a federal right of publicity has been created notwithstanding the above congressional clarification.<sup>130</sup>

If it is not a right of publicity, it is difficult to grasp what, then, it is, as the elements of the federal statutory claim are substantially similar to the generally recognized elements of a right of publicity claim. Under both, four elements need to be proven: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of the

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<sup>127</sup> J. Thomas McCarthy, *McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 25:80 (4<sup>th</sup> ed. 2006). Technically, it is not part of the Lanham Act and is found instead in 15 U.S.C. § 1129.

<sup>128</sup> Senate Section-by-Section Analysis, Congressional Record, p. S14715 (November 17, 1999), *quoted in* J. Thomas McCarthy, *McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 25:80 (4<sup>th</sup> ed. 2006).

<sup>129</sup> Pursuant to the ACPA, "a court may award injunctive relief, including the forfeiture or cancellation of the domain name or the transfer of the domain name to the plaintiff. The court may also, in its discretion, award costs and attorneys fees to the prevailing party." J. Thomas McCarthy, *McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 25:80 (4<sup>th</sup> ed. 2006).

<sup>130</sup> *See* Jacqueline D. Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 Wake Forest L. Rev. 1361, 1420. Lipton noted that, like the right of publicity, the federally created right sounds similar to a property right as well as a privacy right. *See also* Neil L. Martin, Note, *The Anticybersquatting Consumer Protection Act: Empowering Trademark Owners, But Not the Last Word on Domain Name Disputes*, 25 J. Corp. L. 591, 605 (2000). "Despite Congress' claim to the contrary, section 3002(b) creates an action that resembles a right of publicity claim."



plaintiff's name or likeness to the defendant's commercial advantage; (3) lack of consent; and (4) resulting injury.<sup>131</sup> The federal claim may provide a somewhat more vigorous challenge to those seeking to fall under its protection in that it requires specific intent on behalf of the defendant to profit from the use of the plaintiff's name but in all other respects, the elements are virtually identical.<sup>132</sup> (Non-celebrity plaintiffs might also face a steep practical challenge in succeeding under the ACPA in that numerous cases considering this provision of the Act have likewise required the plaintiff to prove that his or her name is famous or distinctive such that it has developed a secondary meaning. Non-celebrities would have a difficult time establishing the existence of a secondary meaning of an indistinct name).<sup>133</sup> That the two are so closely related is only natural in that, on a larger scale, the Lanham Act itself is considered by some practitioners to be a close relative of the right of publicity.<sup>134</sup> The personal name protection section of the ACPA might simply be the most explicit example of this reality.

Like the state law right of publicity, the personal name provision of the ACPA presently applies only to flesh and blood human beings. Recently, however, the World Intellectual Property Organization ("WIPO"), a domain name dispute resolution organization accredited by the Internet Corporation for Assigned Names and Numbers ("ICANN") which itself is a private entity charged with the responsibility of managing and coordinating the domain name system by overseeing the distribution of Internet addresses and domain names, has begun to consider the feasibility of an expansion of the

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<sup>131</sup> See Martin, *The Anticybersquatting Consumer Protection Act*, at 605.

<sup>132</sup> *Id.*

<sup>133</sup> See Jonathan H. Gastik, Note, *Cybersquatting: Identity Theft in Disguise*, 35 Suffolk U. L. Rev. 277, 282-83 (2001).

<sup>134</sup> Julian S. Millstein, Feffrey D. Neuburger & Jeffrey P. Weingart, *DOING BUSINESS ON THE INTERNET: FORMS AND ANALYSIS* § 11.05[2] (L.J. Press 2001).

protection of identities beyond personal names.<sup>135</sup> For just as with the case of the appropriation of an individual's name for commercial purpose, culturally significant names and geographic locations are similarly at risk for abuse by profiteers.<sup>136</sup> The Report of the Second WIPO Internet Domain Name Process suggested further consideration of the issue, indicating increasing awareness of the issues that arise whenever an individual or entity attempts to profit off of the name of someone or something else.<sup>137</sup>

Certainly, protection, under the ACPA or, more generally, pursuant to the right of publicity, of culturally significant names and geographic locations presents unique challenges. For example, deciding which group has the strongest legal interest in, say, the Grand Canyon, and which therefore would be able to seek legal protection from profiteers might be difficult to establish: "the social and cultural norms that might be protected by granting legal rights in these names are probably harder to establish with any degree of certainty that those that might be protected with respect to trademarks and personal names."<sup>138</sup> A more limited right, however, one which extends no further than to the protection of legally recognized geographic identities such as states, cities and incorporated political subdivisions would be much easier to administer. Further, the failure to recognize these rights results in real and identifiable harm. Without action on this issue soon, "commercial interests...will come to dominate all law and policy as it applies to domain names. It is possible that very real interests are being overlooked and will continue to be overlooked, unless the debate is refocused to take account of some of

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<sup>135</sup> See Lipton, *Beyond Cybersquatting*, at 1435.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

these issues.”<sup>139</sup> As the trampling of interests within the context of in-market sports franchise relocations attests, this is likewise true outside of the realm of the Internet and beyond the scope of the ACPA.

### B. Beyond the ACPA

The discussion currently taking place within WIPO and the expansion of the ACPA to include protection for personal names indicates the growing concern for the protection of identities of many different types, at least within the parameters of the Internet. Now that Congress has taken its furthest step yet in establishing a limited federal right of publicity, it perhaps is time for it to consider similar harms suffered outside of the realm of cyberspace -- by cities whenever their names are appropriated by professional sports teams that threaten to relocate in-market. Once equipped with this right, cities will then be able to engage in fair and level negotiations with sports franchises seeking new stadiums or renegotiated lease terms. Just as the right of publicity and the ACPA level the proverbial playing field by requiring an individual seeking to use another’s name to pay for the privilege of doing so, the financial burden with regard to in-market relocations will be placed on the appropriate party as well: the one seeking to use the name rather than the one whose name is being used.<sup>140</sup>

Doing so would not mean that teams such as the NFL’s 49’ers could not call themselves the San Francisco 49’ers should they choose to relocate to Santa Clara.

Instead, it simply recognizes the reality that the team receives some benefit from the

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<sup>139</sup> *Id.* at 1437-38.

<sup>140</sup> It is important to note that the legislation proposed within this article would be limited in scope, addressing and redressing only identifiable harms. As such, it would not apply to every commercial and public use of a geographic identifier and certainly not to uses such as “New York” bagels or “Philadelphia Cream Cheese”: uses that have not been shown to inflict harm upon the cities used in connection with the product. This article has demonstrated that, within the stadium name-game context, cities are damaged through misappropriation of their names for the economic benefits of sports franchise owners. As such, legislation limited to this demonstrated harm would be warranted.

association with San Francisco and provides the city with the opportunity to be fairly compensated for the benefits that run to the team as a result of its use of the city's name. In sum, the creation of this limited right of publicity creates a market for a city's name in which its value can be fairly and equitably determined through the bargaining process. Once this is determined, the team would then have a choice: pay a fee to the city for the use of its name or forego the association. For the first time, cities would be able to adequately protect the interest of their citizens when negotiating lease provisions with professional sports teams. This may be the only way for them to do so; without this right, the monopoly power of professional sports leagues, as wielded through the powerful tool of geographic exclusivity, puts cities at their mercy.

Lawyers, economists, public officials, team owners may all disagree about the value of a team's association with a particular city, or even whether there is any value to this at all, but without this right, all such debates are purely in the abstract. Not until the association is offered up for negotiation does anybody truly know how much the San Francisco association means to the 49'ers. Moreover, commodifying a city's name for this limited purpose may very well lead to widely different results, depending on the particulars of each individual negotiation. For example, in recent years, Baltimore Orioles owner Peter Angelos demonstrated a weak commitment to his team's association with the city of Baltimore as he attempted to broaden the team's fan base beyond the near suburbs and into Washington, D.C. and Northern Virginia.<sup>141</sup> To this end, he had the name "Baltimore" removed from both his team's home and road uniforms.<sup>142</sup> One suspects that if he were to consider an in-market relocation beyond the Baltimore city

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<sup>141</sup> See Michael I. Krauss, *Washington, D.C. (Stadium Municipal Financing Survey)*, 34 *Urban Lawyer* 407, 408 (2002).

<sup>142</sup> *Id.*

limit, he would not pay much, if anything, to maintain his team's Baltimore association (although the subsequent relocation of the Montreal Expos to Washington may have changed his thinking). On the other side of the negotiating table, San Diego's mayor has publicly stated that he would like the NFL's Chargers to retain their San Diego affiliation even should they relocate from the city to another location within San Diego County.<sup>143</sup> Under this scenario, it is likely that the association would be offered up to the team for little or no cost. (Given the lack of options presently available to the city, however, the mayor's statement is not surprising; one suspects that he might place more of a value on his city's name if the prospect of remuneration was on the bargaining table.)

In situations where a team values the association and a city is determined to protect it, however, the fee would be higher and would, just as in the Baltimore and San Diego examples, reflect the perceived value of the association. Returning to Arturo Moreno and his Angels, although this limited right of publicity would not have directly affected the city of Anaheim, it would nevertheless have played an important role in the resolution of the issue. Very likely, the city of Los Angeles – Moreno's desired geographic affiliation – would have recognized the value of the affiliation to Moreno and offered it up for a substantial fee. At that point Moreno would have been presented with a choice: pay a high fee for the perceived value the Los Angeles affiliation brings to his team or no fee to maintain the less valuable Anaheim association. Such a choice would represent the realities of in-market relocations or, in this unique example, in-market affiliation relocations. Each party is compelled to weigh the costs and benefits of such relocations and act accordingly. Through this process, the rights of each party are properly expressed and protected.

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<sup>143</sup> See Vega, *49'ers Insist They'll Keep 'San Francisco.'*

## VI. CONCLUSION

Establishing a limited right of publicity, as outlined above, effectively prevents the continuation of professional sports teams' abuse of their monopoly power by pitting city against suburb in stadium lease negotiations. This right recognizes the inherent value in the affiliation of city and team and forces teams to acknowledge the value they receive whenever they take the field in the name of these cities. Should these teams find their current stadiums or lease arrangements insufficient, negotiations would then occur on an even playing field, with city, competing suburb, and professional sports franchise all able and compelled to weigh the true costs and benefits of a potential in-market relocation. One-sided leases with below-market rents and above-market perks would become less frequent in this scenario given the value placed on the large market affiliation. Perhaps a more affluent, more spacious suburb can offer land more cheaply than its nearby city. Recognizing and commodifying the value of the city affiliation enables cities to compete in this market by means other than by offering financially imprudent lease terms which thereby damage their taxpayers.

The true cost of in-market relocations would be recognized as television networks would perhaps put pressure on teams to maintain their large city affiliations through threats of financially reduced broadcast packages should these affiliations disappear. Leagues as well might, at some point, exert similar pressure in recognition of the reality that their "big league" status depends in no small part on their teams' affiliation with large cities rather than small, unknown geographic locations. All of these forces would be at work whenever a team enters negotiations with a city over the terms of a stadium lease. For the first time, it would be the city and not the team which would wield the

hammer at the bargaining table, regardless of professional sports' monopoly power and resultant geographic exclusivity. Because of the increased bargaining power of cities, stadium deals would more truly reflect the interests of the public than ever before as they would properly consider the attendant costs and benefits associated with a professional sports team's playing its games in one particular geographic location rather than another. What's in a name? For the first time, negotiators on both sides of the bargaining table would find out definitively.