

FROM SHOELESS JOE TO CHARLEY HUSTLE: MAJOR LEAGUE BASEBALL'S CONTINUING CRUSADE AGAINST SPORTS GAMBLING

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I. INTRODUCTION

Imagine this "court" scene: with the Chicago Bulls leading their opponents, 110-101, with eight seconds to play, Michael Jordan takes the out-of-bounds pass, dribbles downcourt and, a split second before the buzzer sounds, lofts a thirty-five-footer that falls through the hoop. Bulls win, 113-101! Within seconds, a chorus of "boos" fills Chicago Stadium, fans upset that Jordan's final shot pushed the final margin of victory to twelve points. Why? Because the official point-spread was eleven points.

This scenario may seem outlandish, but it is exactly this scenario, among others, that worries the executives of professional and amateur sports organizations presently seeking, through federal legislation, to make unlawful state-sanctioned and state-operated sports gambling enterprises such as lotteries¹ tied to the outcome of sports contests.² Major League Baseball has been one of the most outspoken

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1. A "lottery" is composed of three elements: the payment of consideration, for the chance, to win a prize. See, e.g., *National Football League v. Governor of the State of Delaware*, 435 F. Supp. 1372, 1383 (D. Del. 1977). A pool system is a method of betting on any combination of two or more professional athletic contests or events. *Id.* In defining the term "chance," the majority of American jurisdictions has adopted the so-called "dominant factor" rule in which the requirement of chance is satisfied "if chance is the dominant or controlling factor." *Id.* at 1384 (quoting WHARTON'S CRIMINAL LAW AND PROCEDURE § 935 (Anderson ed. 1957)).

2. *Hearings on S. 474 Before the Senate Subcomm. on Patents, Copyrights and Trademarks*, 102d Cong., 1st Sess. (1991)(statement of Paul Tagliabue, Commissioner of the National Football League)[hereinafter *Hearings on S. 474*]. At the hearings, Paul Tagliabue stated:

There is a major difference between team-sport betting and a typical lottery. Typical lotteries are inherently a gambling vehicle that exists by reason of pure chance. Sports lotteries (tied to the outcome of games) are entirely different, involving coaches and athletes who, unlike numbers, are subject to temptation and whose performances can have an impact on the game and thus the outcome of the bet.

Id.

proponents of federal sports gambling legislation currently under consideration in both the Senate³ and the House of Representatives.⁴ Over the course of the two-year debate⁵ on the proposed sports gambling legislation, league executives, as well as several players and

The professional sports leagues do not and cannot, because of absence of any substantive trademark infringement or misappropriation issues, legally oppose lottery schemes that generically refer to the sports and/or terms within the sport (i.e., "Play Ball" scratch-off game where the player scratches off a "single," "double," or "homer" to determine if she is a winner). S. REP. NO. 102 - 248, 102d Cong., 1st Sess. 9 (1991). The leagues, however, do oppose lottery schemes tied to the outcomes of their games, which the pending federal sports gambling legislation is specifically designed to prohibit. *Id.*

3. S. REP. NO., *supra* note 2, at 2. Senate Bill 474 ("The Professional and Amateur Sports Protection Act") was introduced in the Senate in February 1991 by Senators Dennis DeConcini (D-AZ), Orrin Hatch (R-UT) and Bill Bradley (D-NJ). Senate Bill 474 provides, in part:

It shall be unlawful for —

(1) a government entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a government entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate. . . .

Id.

Senate Bill 473 ("The Sports Service Mark Protection Act") was also introduced at this time, but the focus of MLB's efforts has been on S. 474. More narrowly tailored than S. 474, S. 473 (the progeny of S. 1772) again proposed to amend the Lanham Act (15 U.S.C. § 1051 (1946)(amended 1989)) to protect the service marks of professional and amateur sports organizations from misappropriations by State lotteries. DeConcini's efforts to address the state sports gambling issue through application of the Lanham Act drew strong criticism.

4. *Hearings on H.R. 74 Before the Subcomm. on Economic and Commercial Law*, 102d Congress, 1st Sess. (1991)[hereinafter *Hearings on H.R. 74*]. House Bill 74, entitled "The Professional and Amateur Sports Protection Act," was introduced in the House of Representatives by Rep. John Bryant (R-TX) and Rep. Hamilton Fish, Jr. (R-NY) on January 3, 1991, and is the companion bill to S. 474. The only substantive difference between the two bills is that H.R. 74 contains a broader exception allowing sports betting to continue in casinos if the betting scheme was in effect up to one year after the date of enactment of the new legislation. H.R. CONF. REP. NO. 102-405, 102d Cong., 2d Sess. 179 (1991). This exception was, in effect, a compromise to assuage the state of New Jersey's Atlantic City casino lobbyists.

5. See *Hearings on S. 1772 Before the Subcomm. on Patents, Copyrights and Trademarks*, 101st Cong., 1st Sess. 1 (1990) [hereinafter *Hearings on S. 1772*]. Ironically, the Senate hearings on S. 474 and S. 473 were conducted exactly one year to the day after high-ranking officials of professional sports leagues had gathered in Washington to testify in favor of Senate Bill 1772, DeConcini's original Senate bill introduced in October 1989 to prohibit state-sanctioned sports gambling. *Id.*

Senate Bill 1772 ("Sports Service Mark Protection Act of 1989"), nearly identical to S. 473, sought to amend the Lanham Trademark Act of 1946 (15 U.S.C. §§ 1051-1127) to provide sports leagues and teams stronger trademark protection, by adding new § 40 (15 U.S.C. § 1122). This section in pertinent part provides:

§ 40 MISAPPROPRIATION OF SERVICE MARKS OF PROFESSIONAL SPORTS ORGANIZATIONS BY STATE LOTTERIES; PROHIBITION.

(a) No state or other jurisdiction of the United States or any political subdivision or any agency thereof may sponsor, operate, advertise, or promote any lottery, sweep-

managers, have appeared before Congress to voice their personal concerns over the prospect of legalized state-sanctioned sports betting.⁶ In addition to aggressively and jointly lobbying Congress, in conjunction with the other professional and amateur sports organizations, Major League Baseball (MLB) has lodged a concerted grass-roots campaign against the legalization of state-sanctioned and state-authorized sports gambling enterprises. This campaign is aimed at preserving the integrity of our sports contests, preserving the image of its athletes as role models for our nation's youth, and preventing the deleterious effects that sports gambling would have upon the youth of America.⁷

stakes, or other betting or gambling scheme that uses or exploits in any fashion, directly or indirectly, a service mark owned by a professional sports organization.

(b) For purposes of this section, a lottery, sweepstakes, or other betting or gambling scheme that is based, directly or indirectly, on games of a professional sports organization shall be deemed to use or exploit the service mark owned by the professional sports organization.

Id. In conjunction with S. 1772, Representative John Bryant introduced a companion bill to S. 1772 in the House in 1990: H.R. 4844, "Sports Service Mark Anti-corruption Act of 1990." Rep. Bryant simultaneously introduced two other related bills in his fight to prohibit state-sanctioned sports gambling: H.R. 4842 "State-sponsored Professional and Amateur Sports lottery Prohibition Act" and H.R. 4843 "State-controlled Sports Lottery Clarification Act of 1990." After hearings and much debate, both the House and the Senate ultimately passed bills in late 1990 to prevent the spread of sports gambling. However, for reasons unrelated to the sports gambling issue, a consolidated sports gambling bill did not make it into the Comprehensive Crime Control Act of 1990. As Representative Bryant explained: "In the last hours of Congress [1990], . . . the crime bill conferees could pass only a very limited version of the crime bill. Consequently, many well-supported provisions of that legislation, including the [sports] lottery ban, were excluded from the package." 137 CONG. REC. E41 (daily ed. Jan. 3, 1991) (statement of Rep. Bryant).

6. *Hearings on H.R. 74, supra* note 4, at 38, 39 (statement of Frank Robinson, Assistant General Manager of the Baltimore Orioles) (stating that state-sanctioning of sports betting can only exacerbate the situation).

7. *See Hearings on H.R. 74, supra* note 4, at 165 (testimony of James J. Davey, Director of the Oregon State Lottery). Mr. Davey has repeatedly argued, unpersuasively, against the leagues' position that state-sanctioned sports gambling threatens the youth of our nation. Before Congress, Davey asserted that professional sports leagues should concentrate on eliminating beer advertising from broadcasts and stadiums if they are genuinely concerned about our youth. *Id.*

The notion that legal age limits for purchasing lottery tickets eliminates any problem is simply naive, as is the notion that stadiums simply stop selling beer and/or accepting advertising (revenues that, in most cases, accrue, at least in part, to the state or local municipalities!). The argument that setting the legal drinking age at 21 has eliminated teenage alcohol abuse is specious. As NFL Commissioner Paul Tagliabue stated at the hearings, "the bottom line is that legalized sports gambling sends a regrettable message to our young people about government — that anything goes when it comes to raising revenues or bolstering local economies, and we might as well legalize, sponsor and promote any activity so that the state can get its "cut." *Id.*

Opposing the leagues: states' rights proponents and debt-ridden states looking for new revenue streams.⁸ There are naturally staunch advocates on both sides of the sports gambling issue. However, on one issue neither side can disagree: sports gambling is a mega-business. Statistics show that in 1990 more than \$25.8 billion was wagered on legal gambling in the United States, including \$10.3 billion on lotteries and \$125 million on professional sports bookmaking.⁹ The numbers are even more staggering when one includes the estimated amounts spent on illegal wagering. For instance, in 1989 it was estimated that, in the United States alone, \$290 billion was wagered legally and illegally on everything from horse racing and bingo to lotteries and casinos.¹⁰

The sports community, and MLB in particular, has long been concerned by the influence of gambling activities surrounding its games — a concern that dates back to the World Series scandal of 1919 that threatened to destroy baseball. Most vocal have been the commissioners of professional sports who, at various times in the past, have appeared before congressional committees to speak out against sports team-related gambling.¹¹ However, in response to the outbreak of gambling fever that occurred in the early 1980's, when a handful of states began looking for supposedly "painless" ways to raise money, the nation's professional and amateur sports organiza-

at 16. That negative message would certainly be sent by a state lottery based on something as popular with young people as team sports.

8. *Hearings on S. 1772, supra* note 5, at 152. (statement of Michael J. Carr, Pres. of North American Association of State and Provincial Lotteries). Mr. Carr stated:

The voters and taxpayers of thirty-two states and the District of Columbia have—most frequently as the result of free and fair elections or referenda — directed their governments to organize and conduct state-sponsored lotteries. The citizens of these states have debated the relative merits of lottery programs and then approved them for one fundamental reason: to raise sorely needed revenues to pay for sorely needed programs

By prohibiting these state governments from introducing sports pool betting as one additional game in the variety of games now available to interested participants, this proposed legislation would unwisely curtail the ability of these governmental entities to enhance the revenues that they need to fund . . . critical services. This legislation is being proposed at a time of severe budget deficits, declining federal commitments to the states and increasing pressure to avoid increased taxes at both the federal and state levels.

Id. at 181.

9. USA TODAY, Nov. 8, 1991, at 3A.

10. Greg Boeck, *Leagues Look to Congress for Protection*, USA TODAY, June 25, 1991, at 1C.

11. See, e.g., 118 CONG. REC. E4761 (daily ed. May 8, 1972)(position of Baseball Commissioner Bowie Kuhn).

tions have increasingly mobilized forces collectively in voicing their opposition to state-sanctioned sports gambling.

On June 26, 1991, the commissioners of three of the major professional sports leagues — Francis T. "Fay" Vincent, Jr. of Major League Baseball (MLB), David Stern of the National Basketball Association (NBA), and Paul Tagliabue of the National Football League (NFL) — converged on Capitol Hill to testify before the Senate Subcommittee on Patents, Copyrights and Trademarks in support of legislation that would prohibit state-sanctioned or state-authorized sports gambling, including but not limited to lotteries tied to the outcome of sports contests. The hearing focused on two pieces of legislation introduced by Senator Dennis DeConcini. The first is Senate Bill 473 (S. 473), designed "to protect the service marks and integrity of professional and amateur sports organizations by prohibiting States from sponsoring or operating any lottery or other gambling scheme based directly or indirectly—through use of geographical references or otherwise—on professional or amateur sporting events."¹² The other bill is Senate Bill 474 (S. 474), broadly designed to prohibit a governmental body or an individual for sponsoring, operating, advertising or promoting a sports betting scheme.¹³ Senate Bill 474, which has become the primary focus of MLB's efforts, is also designed to lower the enforcement hurdle faced by the federal government by providing civil remedies for violations of the law.¹⁴

12. 137 CONG. REC. S.2256 (daily ed. Feb. 22 1991) (introductory remarks by Senator DeConcini). Senate Bill 473, the 1991 version of S. 1772, expanded upon S. 1772 in several ways by: 1) including "amateur sports organizations" in addition to professional sports organizations; 2) expanding the legal remedies available to the sports organizations; 3) prohibiting states from the use of "geographical references or otherwise," thus effectively closing a loophole whereby states could conduct a lottery tied to the outcome of sports contests by referring only to cities in which the teams are located (i.e., "Pittsburgh v. St. Louis") and 4) "grandfathering" those states that had already conducted sports lotteries (Oregon and Delaware, which had conducted a sports lottery pool in 1976) and exempting private sports gambling in Nevada and parimutuel racing (thus alleviating many of the concerns of representatives of those states and the parimutuel racing organizations). *Hearings on S. 1772, supra* note 5, at 15.

13. See *Hearings on S. 474, supra* note 2, at 6.

14. *Id.* (statement of DeConcini). In his introductory remarks, DeConcini stated: "Presently, there is no satisfactory legal remedy available to sports organization for such misappropriation of their service marks. Federal law does not allow private parties to sue violators of the Federal lottery and gambling statutes, and Federal prosecutors are understandably reluctant to prosecute State lottery officials under those laws." *Id.*

Despite federal statutes, state governments continue to look to sports lotteries and other forms of sports gambling for revenue. See *infra* note 17. Apparently, state officials are not deterred by federal law. It is politically difficult to enforce the present law because violations of it are criminal offenses and federal law enforcement officials are unwilling to pursue criminal sanctions against state officials. For example, notwithstanding the urgings of the NFL and

Specifically, it allows the affected sports organizations, as well as the United States Attorney General, to seek civil remedies, including injunctive relief, in the United States District Courts.¹⁵

The timing of the 1991 hearings was appropriate indeed. At this time, in addition to Nevada's legal and privatized sports gambling status and Oregon's fledgling "Sports Action Lottery",¹⁶ thirteen states had initiated proposals or bills to legalize some form of sports betting.¹⁷ In both the 1990 and 1991 Congressional hearings on sports gambling legislation, high-ranking officials, representing both professional sports leagues and amateur sports organizations, testified forcefully as to the potential risks that state-sponsored sports lotteries posed to the integrity of the games and to the nation's youth.¹⁸ In

NBA, the Department of Justice has chosen not to enforce the prohibition against the Oregon Sports Action Lottery.

15. S. REP. NO. 102-248, *supra* note 2, at 2.

16. OR. REV. STAT. § 461.213 (1990)(directing the Oregon State Lottery Commission to create lottery games with sports themes or lotteries that are "based upon the results of sporting events"). This section further directed that part of the funds derived from those games be allocated to an Intercollegiate Athletic Fund for the purpose of financing sports programs, including specifically women's athletics and non-revenue sports, at state institutions of higher education. *Id.* The state subsequently created a lottery entitled "Sports Action" tied to the scores of NFL and NBA games (excluding the Portland Trail Blazers).

The NFL voiced its opposition, but took no legal action; nor did the NFL make any suggestions when offered the opportunity by the Lottery to do so to minimize the alleged impact on the NFL. The NBA filed a twenty-one count lawsuit against the Lottery in federal court in Oregon, including trademark misappropriation, RICO and state constitutional claims, but did not seek a preliminary injunction. *National Basketball Ass'n v. Oregon State Lottery Comm'n*, No. 89-6470 (D. Ore. filed Dec. 21, 1989). On March 30, 1990, Judge Malcolm J. Marsh issued an opinion and order dismissing twelve of the twenty-one counts, including the misappropriation, RICO and state constitutional claims, leaving principally the trademark claims to be adjudicated. *Id.* Oregon subsequently dropped the NBA portion of the lottery due to a decline in revenues (attributed largely to the absence of the Trail Blazers in the lottery), and the case never went to trial. *Hearings on S. 1772, supra* note 5, at 168 & n.2.

17. *Increasing number of states are considering initiatives*, USA TODAY, June 25, 1991, at 8C. In addition to the two states that have legalized state-sponsored sports pools (Oregon) or private sports books (Nevada), and one in which sports-team related lotteries have been authorized by statute but are not in operation (Delaware), the following states, as well as the District of Columbia, have recently considered sports gambling legislation: California, Illinois, Kentucky, Massachusetts, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, and Rhode Island. *Id.*

18. *Hearings on S. 474, supra* note 2 (statement of Francis T. "Fay" Vincent, Commissioner of Major League Baseball). Vincent stated:

The intense feelings with which I approach betting on Baseball might best be understood if one remembers that the Office of the Commissioner of Baseball was created in direct response to the 1919 "Black Sox" scandal. Protecting the integrity of the game is our primary job.

State-sponsored sports betting runs the real risk of undermining public confidence in the honesty of what transpires on the field. . . . No state should be permitted

addition, they attested to the ability of the leagues themselves to control their product and their reputation.¹⁹ The professional and amateur sports organizations base their opposition in large part on the necessity to protect and preserve the integrity of their games, to lessen the potential for such gambling to undermine the public confidence in the games and their participants, and to lessen the risks of young sports fans falling into the ever-growing numbers of compulsive gamblers.²⁰ To these organizations, the scenario described in the opening paragraph is only too likely to cast aspersions not only on the games and leagues themselves, but, of equal detriment, upon the games' participants as well.²¹

The debate over the proposed federal sports gambling legislation has focused primarily upon two issues: 1) the appropriateness of broadening and applying the Lanham Act specifically for the protection of the trademarks and goodwill of sports leagues and teams, pursuant to S. 473²² and, 2) the intrusion of the proposed legislation

to create an environment that is conducive to a major sports betting scandal, which would affect the citizens of all states.

. . . We believe the net effect of legalized gambling will be to increase the overall volume of betting. Those who bet with illegal bookies are likely to continue to do so, because the bookmakers usually offer different betting formulas, greater odds, betting on credit and the ability to hide income. Once the moral status of sports betting has been redefined by legislation, however, many new gamblers will be created. Some of these will inevitably seek to move beyond lotteries to wager with higher stakes and more serious consequences. . . .

The legalization of team sports betting by any state or municipality would increase the chances that persons gambling on games will attempt to influence the outcome of those games. . . .

Id.

19. *Id.*

20. *Id.*

21. *Hearings on S. 1772, supra* note 5, at 23 (statement of Reggie Williams, former Cincinnati Bengals football player and Cincinnati city councilman). Williams stated:

I know that I have left pints of blood on football fields all over America, and I would like to think that someone knew that I had a commitment to the integrity of the sport, rather than some type of commitment to dealing with the point spread. I would hope that we can continue looking forward to having kids who will be collecting football and baseball cards rather than kids growing up collecting lottery tickets. I would encourage you with all my heart to prevent sports [from] being sanctioned as an institutional form of gambling.

Id. at 24.

22. *See Hearings on S. 474, supra* note 2; *see also supra* note 5.

upon states rights, including state governments' ability to raise revenues in any lawful manner it so chooses, as presented by S. 474.²³

The arguments pertaining to the question of federal preemption and states rights are specious on three counts. First, the sports that states would make use of are national sports, and the deleterious effect would be felt outside the states authorizing sports betting. In fact, most of the states considering sports betting would allow betting only on out-of-state teams!²⁴ If nothing else, this underscores the concerns that states themselves have regarding the potential harmful effects of sports betting upon their own citizens and teams within their own borders.

Secondly, it is impossible for the federal government to take a "right" from the states that they never had in the first place. Congress has made it a crime to bribe, or attempt to bribe, an individual in order to influence the outcome of a sporting event.²⁵ This long-

23. For a constitutional analysis of S. 474, see *infra* Bill Bradley, *The Professional And Amateur Sports Protection Act - Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5 (1992).

(1992). See also, *Hearings on S. 1772*, *supra* note 5, at 36 (statement of Senator Harry Reid). Reid, a senator from Nevada, stated that the proposed sports gambling legislation would: not only establish a new and unprecedented level of federal involvement in areas traditionally left to the states, [but] would also single out state governments and state lotteries for unfair treatment. While private enterprises continue to offer "tout services" throughout the nation to facilitate sports wagering, while Las Vegas casinos continue to profit from the public's interest in such betting, while newspapers and television networks continue to offer point spreads and other information aimed at promoting sports betting, and while athletes and even some sports franchises openly associate with state lotteries, state lotteries would be unfairly prohibited from generating revenue from the public's interest in sports wagering.

Id.

24. *Hearings on S. 474*, *supra* note 2 (statement of Fay Vincent). Major League Baseball Commissioner Fay Vincent stated: "To those who suggest that we are overstating the potential problems, I would point out that Oregon, the only state that has a sports lottery, excluded its local professional sports teams from its lottery. We find this ironic but illuminating." *Id.* The failure of the Oregon sports lottery to include the Portland Trail Blazers in its scheme has been cited as one of the reasons for the failure of Oregon's NBA lottery. Equally ironic and illuminating, the state of Nevada prohibits gambling on its own sports franchises, most notably the University of Las Vegas Runnin' Rebels.

25. 18 U.S.C. § 224 (1979). The offense is punishable by a fine of up to \$10,000 or imprisonment of up to five years, or both. See also *Hearings on H.R. 74*, *supra* note 4, at 18-19 (prepared statement of Paul Taliabue). Commissioner Tagliabue stated:

Beyond the federal lottery and gambling laws, Congress has legislated to protect the integrity of professional sports contests. In 1964, Congress made it a federal crime under Title 18 to influence or attempt to influence by bribery any sporting contest. 18 U.S.C. § 224. Congress has recognized a distinct federal interest in protecting sports from corruption. The House Judiciary Committee called such corruption 'a challenge to an important aspect of American life—honestly competitive sports'

standing provision, in fact, preempts state law and represents Congress' intent to protect the integrity of athletic competition on a national and uniform basis. Furthermore, when Congress created an exemption from the federal criminal statute governing gambling to allow states to conduct lotteries, it acted again to protect the integrity of sports by stating that a "lottery does not include the placing or accepting of bets or wagers on sporting events or contests."²⁶

Finally, those advocating the right of states to implement sports lotteries tied to the outcome of games argue, wrongly so, that the sports leagues have generally acquiesced in the existence of the gambling element in sports.²⁷ The long-standing policies of the professional and amateur sports organizations were aimed at ridding our games of the elements and evils of gambling and at policing our own leagues and players against the gambling element. This included a litany of star players banned, suspended or penalized for gambling-related activities and the institution of numerous rules intended to insulate the sports from gambling interests, thereby giving little

Id.(citing H.R. 1053, 88th Cong., 1st Sess. 2 (1963)).

26. 18 U.S.C. § 1307(d) (1979). For a review of the federal government's historical view on sports and gambling, see "*Gambling in America*" *Final Report of the Commission on the Review of the National Policy Toward Gambling*, Washington, D.C., October 15, 1976 ("the Federal interest in gambling activity is substantial"). See also ROBERT C. BERRY AND GLENN M. WONG, *Professional Sports and Gambling*, 2 THE LAW AND BUSINESS OF SPORTS INDUSTRIES 477 (1986).

27. *Hearings on H.R. 74, supra* note 4, at 156. James J. Davey, Director of the Oregon State Lottery, stated: "The professional sports leagues have long been aware of extensive wagering on their games, have taken virtually no action to prevent it, have frequently acquiesced to it, and, in fact, have benefitted from it." *Id.* at 159. Davey pointed specifically to the presence of NFL logo chairs in which Caesar's Palace bettors sit while betting; the NBA's allowing wagering on exhibition games played in Las Vegas; the presence of Jimmy "the Greek" Snyder and Pete Axthelm on NFL pre-game shows, arguably with the NFL's endorsement and certainly with the NFL's knowledge (a practice that the NFL has since been terminated in agreement with its broadcast partners) and the NBA's licensing of its official merchandise as prizes in several state lotteries. *Id.* at 160. National Football League Commissioner Tagliabue, responding to such allegations, stated:

It has been suggested by some opponents of the legislation that the league has actually encouraged gambling at Las Vegas and that we have lent our name to gambling in Las Vegas. One of the witnesses circulated a brochure showing NFL chairs with the team logos at Caesar's Palace. To me, this kind of suggestion is a farce and not worthy of this committee or of the Congress of the United States, to put this kind of thing in front of a committee.

... It is ridiculous to suggest that a product bought at retail, sold all over the United States, somehow involves the NFL encouraging gambling in Las Vegas.

Hearings on H.R. 1772, supra note 5, at 38-39. (statement of Paul Tagliabue).

credence to the notion that professional sports leagues have encouraged or tolerated gambling.²⁸

In addition to the specious "states-rights" argument, opponents of the proposed sports gambling legislation have argued that amending the Lanham Act to protect professional and amateur sports organizations, as S. 473 provides, is contrary to the judicial interpretation of the Act. The Lanham Act, a federal trademark statute enacted in 1946, provides for a system of federal registration and protection of trademarks and service marks.²⁹ The appropriateness of using the Lanham Act to attack the issue of sports gambling was first debated in Senate hearings on sports gambling legislation conducted in June, 1990.³⁰ In defending the use and application of the Lanham Act to the sports gambling problem, one noted law school professor stated that, simply put, the Act was chosen because it is "the closest Fed-

28. See *Baseball Bets Banned*, N.Y. TIMES, Mar. 24, 1983, at B12. While it may be true that MLB and the other sports leagues have little choice but to tolerate sports gambling in Nevada, where such activity is legal, MLB has nonetheless been, if anything, overzealous in addressing activities in Nevada that impact, or potentially impact, MLB. *Id.* For instance, in 1983 MLB successfully fought the State of Nevada to prohibit the association of Nevada casinos with two Nevada-based minor-league baseball teams, the Las Vegas Stars and Reno Padres. *Id.* Under pressure from Commissioner Kuhn, the Nevada Gaming Control Board reluctantly agreed to enact statutory regulations banning legalized gambling on the Las Vegas Stars as a prerequisite for MLB's approving the shift of the franchise from Hollywood, California. *Id.* Kuhn also successfully instituted a ban on the Stars and Padres from accepting any form of advertising (including advertisements in game programs and on outfield fences) from Nevada casinos. See Steve Sneddon, *Nevada is a Casualty in Kuhn's War on Gambling*, RENO GAZETTE, June 25, 1983, at 10. In another episode, the 1984 Triple A World Series, matching champions of baseball's three AAA leagues, was cancelled when Kuhn, citing the "gambling issue," refused to allow the games to be played in Las Vegas and the three league commissioners could not agree on an alternate site. See Randy Knobler, *Commissioner Steps in and Pulls Plug on Series*, BASEBALL AMERICA, May 15, 1984, at 5.

29. 15 U.S.C. § 1114(1). This statute states in part:

Any person who shall without the consent of the registrant -

a. use in commerce any reproduction, counterfeit, copy or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of goods or services in or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

b. reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided.

Id.

30. *Hearings on S. 1772*, *supra* note 5, at 4.

eral statute to this subject"³¹ It was also persuasively argued, specifically on behalf of the NFL, that the Act as presently written inadequately protects the professional sports leagues' "interest in good will, in reputation, in avoiding the misappropriation of the enormous value they have created"³² and that such value is "well worthy of protection by the United States Congress by legislation."³³

The use of the Lanham Act to address the issue of sports gambling has been criticized by organizations such as the United States Trademark Association (USTA), which have viewed any such proposed amendments to the Lanham Act as simply special legislation on behalf of the professional sports leagues.³⁴ These organizations

31. *Id.* at 252 (statement of Arthur Miller, Harvard Law School professor). Miller stated: "[Senate Bill] 1772 addresses a serious intellectual property problem of national scope with which the Lanham Trademark Act currently is not well equipped to deal." *Id.*

32. *Id.* at 255.

33. *Id.* at 256. Miller stated:

The leagues have every right to prevent the exploitation of the goodwill and popularity they have earned in a way that reshapes the basic meaning of their games. The right to control the reputation and image of one's product or service is an essential ingredient in American intellectual property law. "The trademark laws are designed not only to prevent consumer confusion but also to protect the 'synonymous right of a trademark owner to control his product's reputation.'"

Id. (citing *Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979)).

34. *Id.* at 263. Garo Partoyan, President of the United States Trademark Association, stated:

Apart from the substantive aspects of the Lanham Act, its keystone has been uniformity. It does not distinguish one class of trademarks or owners from any other class or classes. Its standard of protection is consistent for all trademarks and owners' trademarks. Its treatment of the rights of trademark owners and others has been balanced and equitable.

Id.

United States Trademark Association respectfully submits that S. 1772 would upset that uniformity. It would create a special class of trademarks—namely, those of professional sports organizations. It would create a prohibition against particular activities of specific others—namely, State lotteries. It would create a different standard of protection for certain trademarks. In short, the cornerstone of the Lanham Act would be undermined by S. 1772. Organizations such as the USTA thus argued that the proposed legislation, in seeking to amend the Lanham Act, unnecessarily corrupts the Act on four interwoven counts. First, it is argued that existing trademark law is sufficient to protect the legitimate trademark claims of professional sports leagues, pointing to the courts' decisions in *Delaware v. Governor of the State of Delaware*, 435 F. Supp. 1372 (D. Del. 1977), and *National Basketball Ass'n v. Oregon State Lottery Comm'n*, No. 89-6470 (D. Ore. filed Dec. 21, 1989), as having properly established the criteria upon which professional sports leagues can defend against alleged infringements; primarily, that of "likelihood of confusion." See *infra* notes 89-101 and accompanying text. Secondly, it is argued that the proposed legislation would inappropriately exempt professional sports leagues from having to prove the primary factual issue in trademark infringement law, "likelihood of confusion." The proposed legislation would, in effect, establish a per se standard

claim that this proposal essentially amounts to "special interest" legislation favoring the professional sports leagues over other trademark holders.³⁵ They, however, have conveniently overlooked the fact that sports gambling schemes, such as the Oregon "Sports Action" lottery, have simply exploited an existing loophole in the Lanham Act by using city names without actually using the protected trademarks of the professional sports teams.³⁶ Clearly, resorting to the use of city names in professional sports-themed gambling schemes, nonetheless, exploits the goodwill and reputation of the professional sports leagues, as well as creates the potential likelihood of confusion that the sports leagues endorses or sanctions such a lottery. Major League Baseball thus supports amendments to the Lanham Act that would prohibit states from sponsoring and authorizing lotteries or other gambling schemes that involve professional or amateur sports teams or leagues either directly or indirectly through the use of geographical references or otherwise.³⁷

In addition to providing states with the above loophole, the Lanham Act, as currently interpreted by some courts,³⁸ also allows poten-

that would not require confusion or any harm to the professional sports leagues, a standard "inconsistent with the Lanham Act's purpose of permitting free and fair competition while at the same time protecting the role of trademarks as indicators of origin and protecting the public from misrepresentation and deception." *Hearings on S. 1772*, *supra* note 5, at 273 (written answers of Partoyan to questions posed by Senator Grassley).

Thirdly, it is argued that the proposed legislation would inappropriately exempt professional sports leagues from having to prove any actual or infringing use by assuming the use or exploitation of a mark — regardless of actual use or nonuse — by any sports lottery, thus eliminating the Act's explicitly-codified "fair use defense" that allows use of a mark in a "descriptive" or "informational" manner. *See* 15 U.S.C. § 1115(b)(4). Finally, it is argued that the proposed legislation corrupts the Lanham Act by providing for the prohibition of state-sponsored sports lotteries as its sole remedy: "By eliminating the need to show any actual (or infringing) use or any 'likelihood of confusion,' S. 1772 effectively makes every state-sponsored sports lottery an infringer. The sweeping nature of the proposed legislation is then made unmistakable by its sole remedy: prohibition of the lottery." *Hearings on S. 1772*, *supra* note 5, at 287 (statement of Carr).

35. *Hearings on S. 1772*, *supra* note 5, at 152 (statement of Carr).

36. *Id.* at 154.

37. *Hearings on S. 474*, *supra* note 2.

38. *Hearings on S. 1772*, *supra* note 5, at 254. The *Delaware* case first established the notion of "disclaimer relief." *National Football League v. Governor of the State of Delaware*, 435 F. Supp. 1372 (D.Del. 1977). Miller stated:

[B]ecause "consumer confusion" is the heart of a Lanham Act action, there is no assurance that a court will enjoin the defendant from exploiting the mark. Instead, courts may provide only "disclaimer relief" — that is, whoever is offering the product or service will be allowed to continue doing so as long as he makes absolutely clear that it has nothing to do with the mark holder. This is where the district court was

tial trademark infringers what has been called "disclaimer relief,"³⁹ which allow the entity to continue providing a product or service as long as it includes some form of a "disclaimer" notice indicating that the product or service is not sponsored by or affiliated with the mark holder. Such disclaimer notices are, however, rarely readily visible and even more rarely read by the average consumer. Thus, "disclaimer relief" fails to provide any meaningful protection to the leagues.

In defending its support of the proposed Lanham Act amendments, the professional sports leagues have also successfully addressed the issue of utilizing scores of professional sports contests. Admittedly, the scores of MLB games, as with those of any other professional or amateur sports contest, once played, fall within the public domain. However, the "public domain" argument, as espoused by opponents of the gambling legislation, fails when one considers that lotteries such as Oregon's "Sports Action" do not simply disseminate scores of games, but they promote wagering on the outcomes of games *not yet played*.⁴⁰ This distinction underscores MLB's concern over protecting the integrity of its games while in progress.

Given both the fact that the Lanham Act has in the past carved out individual exceptions to protect certain entities,⁴¹ and the importance of preserving the integrity of professional and amateur sports

headed in the *Delaware* lottery case. . . . But disclaimer relief is not a wholly sufficient remedy for the leagues. . . .

Hearings on H.R. 1772, supra note 5, at 255 (statement of Miller).

39. *Hearings on S. 1772, supra* note 5, at 254. Miller stated:

The premise of S. 1772 is that disclaimer relief is unsatisfactory and that consumer confusion or economic injury is beside the point in this context. The character of the game is defiled regardless of whether people believe the leagues have endorsed the defilement. . . . Only by recognizing state sports lotteries for what they are — a misappropriation and tarnishing of the names and reputations of professional sports organizations — and by making such misappropriation and tarnishing unlawful, can satisfactory relief be assured.

Id. at 258.

40. *Id.* After the 1990 hearings on S. 1772, Senator Edward Kennedy, inquiring as to the leagues' ability to protect the use of its scores, asked Arthur Miller: "Should a law firm be entitled to protect its results in a lawsuit as a trade or service mark after a judge has issued a decision?" Responded Miller:

The proper analogy would be to a lottery based on the performance of contending law firms in pending lawsuits. Such a lottery — gambling on how a case will be decided by a judge — would produce understandable outrage from the legal profession. Imagine the reaction if a state were to hold a lottery on the outcome of a highly publicized criminal trial.

Id. at 262.

41. *See, e.g., id.* at 254. Miller stated:

from the slightest perception of gambling-related misconduct, the application of the Lanham Act to this problem and the amendments to the Lanham Act as proposed in Section 473 are indeed appropriate and justifiable.

II. MLB'S OPPOSITION TO SPORTS GAMBLING: A HISTORICAL PERSPECTIVE

In addition to the general opposition voiced by interest groups that view gambling as an increasingly common social and individual illness,⁴² the most ardent lobbyists against state-sanctioned sports gambling are the professional and amateur sports leagues. Their collective histories include such blemishes as the 1919 Black Sox scandal,⁴³ the New York City College point-shaving basketball scandal in 1951,⁴⁴ the NFL's suspension of Alex Karras, Paul Hornung and teammates in 1963,⁴⁵ the suspension of Denny McLain, MLB's last

Our intellectual property statutes are replete with provisions that meet the special needs of particular industries and works. . . . The Patent Act contains specialized provisions on inventions in the drug, medical device, and other fields. The USTA . . . objects that S. 1772 would give professional sports organizations "greater rights" than others enjoy. But the fact is that states are not sponsoring lotteries that misappropriate the popularity and goodwill of anyone else. And the "special trademark protections that S. 1772 would afford professional sports organizations would not benefit them financially."

Id. at 259. The Lanham Act also affords special protections for certain individuals and entities. *Id.* Section 2(b) prohibits registration of any mark comprising the name, portrait or signature of any deceased U.S. President during the life of his widow without her consent; § 34(d)(1)(A) provides special remedies in civil actions involving counterfeit marks of the U.S. Olympic Association. *Id.* at 260.

42. See Boeck, *supra* note 10, at 1C. Among the leading advocates of the federal sports gambling legislation is the National Center For Pathological Gambling. That organization's executive director, Valerie Lorenz, states: "Compulsive gambling has already become the addiction of the '90's." See George J. Church, *Why Pick on Pete? Charlie Hustle Has Become the Symbol of America's Tolerance of Gambling—and the Cost of an Obsession*, TIME, July 10, 1989, at 16; see also Art Levine, *Playing the Adolescent Odds*, U.S. NEWS & WORLD REPORT, June 18, 1990, at 51; *Compulsion a Risk as Gambling Increases*, USA Today, June 26, 1991, at 8C.

43. See, James Kirby, *The Year They Fixed the World Series*, ABA J., Feb. 1, 1988, at 65.

44. See *Again, the Fix*, NEWSWEEK, Feb. 26, 1951, at 74; *Who's Clean*, NEWSWEEK, Mar. 5, 1951, at 81; *The Last Straw*, NEWSWEEK, Mar. 12, 1951, at 78.

45. See *Hornung and Karras Fired*, LIFE, Apr. 26, 1963, at 38; *Judgment Day: Suspension of Paul Hornung and Alex Karras*, NEWSWEEK, Apr. 29, 1963, at 84; *Players Are Not Just People*, SPORTS ILLUSTRATED, Apr. 29, 1963, at 18. For overall negative reaction to the Hornung-Karras episode and the perceived gambling invasion in professional sports, see *True Crisis: Corruption in Sports*, SPORTS ILLUSTRATED, May 20, 1963, at 16; *State as Bookie: Legalized Gambling*, SPORTS ILLUSTRATED, Jan. 4, 1965, at 5.

30-game winner in 1970,⁴⁶ the sad episode that led to the suspension for gambling of NFL quarterback Art Schlichter,⁴⁷ the 1978 Boston College basketball point-shaving scandals,⁴⁸ the 1985 Tulane University⁴⁹ and the Pete Rose gambling issue.⁵⁰

It is not surprising that, given its history, tradition and policies, MLB, arguably more than any of the other professional and amateur sports organizations, has always staunchly opposed state-sanctioned sports gambling.⁵¹ The Office of the Commissioner, in particular, has an underlying opposition to gambling and a deep-rooted commitment to protecting the national pastime from any appearance of impropriety. Illustrative of MLB's long-standing opposition to gambling is its official rule against gambling, Major League Rule 21(d), originally enacted in 1928 and at all times prominently posted in the clubhouse of every Major League Club.⁵²

46. See JOE DURSO, *BASEBALL AND THE AMERICAN DREAM* 98 (1986).

47. Pete Axthelm, *All-American in Trouble*, *NEWSWEEK*, Apr. 25, 1983, at 81; Doug Looney, *A Big Loss for a Gambling Quarterback*, *SPORTS ILLUSTRATED*, May 30, 1983, at 30. The NFL cracked down on Johnny Unitas, another star quarterback, when it learned of his gambling-related involvement during his retirement and ordered Unitas to end his role as a consultant for a weekly tip sheet. Pam Pawlyna, *Johnny Unitas Gets Thrown for a Loss by NFL*, *PEOPLE*, Oct. 5, 1981, at 40.

48. See Henry Hill, *How I Put the Fix In*, *SPORTS ILLUSTRATED*, Feb. 16, 1989, at 14. In February, 1981, confessed mobster-turned-informant Henry Hill unveiled his role in "fixing" Boston College basketball games during the 1977-78 season. See also BERRY & WONG, *supra* note 26, at 479.

49. Doug Looney, *Big Trouble at Tulane*, *SPORTS ILLUSTRATED*, Apr. 8, 1985, at 36; M.S. Serrill, *The Fix is On*, *TIME*, Apr. 15, 1985, at 89; Armen Keteyian, *The Tulane Scandal: A Time for Harsh Measures*, *SPORTS ILLUSTRATED*, Apr. 15, 1985, at 17; Doug Looney, *All I Want is to Be Happy*, *SPORTS ILLUSTRATED*, Apr. 22, 1985, at 36.

50. See, e.g., Jill Lieber & Craig Neff, *The Rose Probe*, *SPORTS ILLUSTRATED*, Mar. 27, 1989, at 13.

51. See also Vicki Jones, *Sports Betting: The Delaware Story: Part II*, *GAMING BUS. MAG.*, May 1980, at 17. Major League Baseball and the other major professional sports leagues first appeared collectively before Congress to address the sports gambling issue in the mid-1970's. *Id.* Then, the impetus for the hearings was the recent creation and implementation of an NFL-themed lottery game by the state of Delaware, which the NFL had failed to prevent through litigation. *House Select Comm. on Professional Sports, Inquiry into Professional Sports, Final Report*, H.R. Doc. No. 94-1786, 94th Cong., 2d Sess. (1986) (making recommendations in various areas including the question of legal and illegal gambling on sports and federal taxation of such gambling). See also *Commission on the Review of the National Policy Toward Gambling and Gambling in America* (1976) (discussing federal and state gambling enforcement measures, surveys American gambling attitudes and behavior, reviews the various legal and illegal forms of gambling, and recommends that regulation of gambling be explicitly left to the states).

52. OFFICIAL BASEBALL RULES, *SPORTING NEWS*, Oct. 15, 1991, at 17. The Major League Rule 21 reads in part:

(d) BETTING ON BALL GAMES. Any player, umpire or club or league official or employee, who shall bet any sum whatsoever upon any baseball game in connec-

It is this rule that led to the lifetime banishment of all-time base hit leader Pete Rose, by late Commissioner Bart Giammati, on August 23, 1989.⁵³ In addition, MLB's opposition to gambling was illustrated by the disciplining of Philadelphia Phillies' outfielder, Lenny Dykstra, for his participation in high-stakes poker games during the 1990 off-season.⁵⁴ The circumstances surrounding these two most recent gambling incidents represent MLB's concern over gambling and the appearance of impropriety.

It is instructive in understanding and appreciating MLB's staunch opposition to any form of sports gambling to examine a historical overview of MLB's long-waged battles to police against the elements and evils of gambling. This historical perspective then uses the 1977 landmark case on state-sanctioned sports gambling, *National Football League v. Governor of the State of Delaware*,⁵⁵ as a backdrop to reviewing MLB's most significant legal battle on the sports-gambling front: its successful effort to halt a Canadian sports betting pool in 1984.

A. *The Landis Years*

Regardless of the verdict of juries, no player that throws a ball game, no player that entertains proposals or promises to throw a game, no player that sits in a conference with a bunch of crooked players and gamblers where the ways and means of throwing games are discussed, and does not promptly tell his club about it, will ever play professional baseball Just keep in mind that regardless of the verdict of juries, base-

tion with which the bettor has no duty to perform, shall be declared ineligible for one year.

Any player, umpire, or club or league official or employee, who shall bet any sum whatsoever upon any baseball game in connection with which the bettor has a duty to perform shall be declared permanently ineligible.

Id.

53. See, e.g., Lieber & Neff, *supra* note 50, at 13; Lieber & Neff, *Rose's Vigil*, SPORTS ILLUSTRATED, Apr. 3, 1989, at 52; Lieber & Neff, *The Case Against Pete Rose*, SPORTS ILLUSTRATED, July 3, 1989, at 10; Thomas Callahan, *The Darkening Cloud Over Pete*, TIME, July 3, 1989, at 57.

54. Timothy Dwyer, *Dykstra Says He Wrote Checks for \$78,000 In Gambling Debts*, PHILA. INQUIRER, Mar. 13, 1991, at 1-A; Dick Polman, *Dykstra Placed on Probation for One Year*, PHILA. INQUIRER, Mar. 21, 1991, at 1-C; Peter Pascarelli, *Vincent Contends that Dykstra Case, Rose Case Aren't in the Same Ballpark*, THE NATIONAL, Mar. 18, 1991, at 23. Although Dykstra was not in violation of Rule 21 D, Commissioner Vincent invoked his powers in the best interests of the game, pursuant to Section 3, Article I of the Major League Agreement.

55. See 435 F.Supp. 1372, 1383 (D. Del. 1977).

ball is entirely competent to protect itself against the crooks both inside and outside the game.⁵⁶

This statement was issued on August 2, 1921 by the newly-appointed Baseball Commissioner, Judge Kenesaw Mountain Landis, the same day that all eight Chicago White Sox players, including the famous Shoeless Joe Jackson, were acquitted by a Cook County, Illinois jury of throwing the 1919 World Series.⁵⁷ Despite the acquittal, the next day Commissioner Landis banned the eight players from ever again appearing in a major league uniform.⁵⁸ With this statement, Commissioner Landis also set the tone for MLB's vigilant protection of the game's integrity. It was a proclamation made long before anyone had ever heard of Leo Durocher, Denny McLain, or Pete Rose.

In fact, the Office of the Commissioner was created in response to the 1919 Black Sox scandal.⁵⁹ In November, 1920, just months after the Black Sox scandal became public, Judge Landis was elected as the first commissioner and officially took his position on January 12, 1921.⁶⁰ It was less than seven months later that Judge Landis issued the lifetime suspensions against all eight White Sox players.⁶¹

During his nearly twenty-five-year reign as baseball commissioner, Judge Landis continued his crusade against gambling and gamblers in baseball, including the creation of baseball's official rules against betting.⁶² One year after his lifetime banishment of the White Sox players, Judge Landis suspended the New York Giants' Phil Douglas for life for offering to throw a game,⁶³ and in 1924, suspended Giants' player Jimmy O'Connell and coach Cozy Dolan for life for attempting to bribe an opposing player.⁶⁴ Much later, in 1943,

56. ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* 273 (1963)(quoting Landis).

57. DURSO, *supra* note 46, at 130. The eight Chicago White Sox players were first indicted by a Cook County, Illinois grand jury in October 1920, but nothing happened for months because the jury's records and the written confessions of several players were stolen from the prosecutor's office. *Id.* By then, the players had repudiated their confessions and in February, 1921 the indictments were dismissed. *Id.* However, Ban Johnson, then American League president, refused to let the case die. He rebuilt the case, submitted his evidence to the grand jury again, and on March 21, 1921, new indictments were handed down. *Id.* See also, Kirby, *supra*, note 43, at 67.

58. DURSO, *supra* note 46, at 67.

59. J.G. TAYLOR SPINK, *Judge Landis and Twenty-Five Years of Baseball* 80 (1947).

60. *Id.*

61. DURSO, *supra* note 46, at 130.

62. See *supra* note 52.

63. SPINK, *supra* note 59, at 107-19.

64. *Id.* at 129-45.

Judge Landis issued a lifetime suspension of Philadelphia Phillies' owner William D. Cox for betting on Phillies games.⁶⁵

B. *Willie, Mickey and the . . . Dupe*

Subsequent baseball commissioners, A.B. (Happy) Chandler, Ford Frick and General William Eckert, were confronted with relatively few gambling-related incidents, the most notable being Chandler's suspension of popular Brooklyn Dodgers' manager, Leo Durocher, for the entire 1947 season for consorting with gamblers and conduct detrimental to baseball.⁶⁶ However, it was Commissioner Bowie Kuhn who raised MLB's collective conscience to new levels, beginning with his efforts to strip several club owners of their interests in Las Vegas gambling casinos.⁶⁷

Kuhn's vigilant attitude toward the "gambling question" was evidenced years later when he was forced to deal with issues raised by two of MLB's greatest legends, Willie Mays⁶⁸ and Mickey Mantle.⁶⁹ Kuhn learned in 1979 that Mays, who was then a New York Mets batting instructor, had been offered a contract to do public relations work for Bally's Park Place Casino in Atlantic City.⁷⁰ Consistent with his views prohibiting club ownership of casino interests, Kuhn ruled against Mays holding both jobs.⁷¹

65. *Id.* at 281-86.

66. *Durocher is Out*, LIFE, Apr. 21, 1947, at 99; *Exit Leo*, TIME, Apr. 21, 1947, at 55.

67. KUHN, *HARDBALL: THE EDUCATION OF A BASEBALL COMMISSIONER* 50 (1987). Reflecting on a 1969 incident in which several club owners were stripped of their interests in Las Vegas gambling casinos, Kuhn stated:

There were people inside and outside the game who saw the 1919 Black Sox scandal as ancient history. I did not. I was convinced that the gambling danger was as great fifty years later, and was supported in that view by the enormous growth in illegal wagering on American sports. Nor was I unaware of the gambling scandals that had struck college basketball and professional football in more recent times. There was no reason to think baseball was immune. People at all levels of the game had to understand that baseball administration was going to be tough on gambling questions. I wanted no false signals given. Critics then and now would decry my concerns as image making.

Id.

68. *Willie's Farewell*, TIME, Nov. 12, 1979, at 122. For an in-depth account of the Mays decision, see also KUHN *supra* note 67, at 323-30. In a much less publicized event, former Cy Young Award winner Sparky Lyle was later precluded from any official association with MLB for signing a contract to represent a casino hotel in Atlantic City, New Jersey in 1984. *Sparky Lyle Takes Casino Job: Strikes Out with Baseball*, N.Y. DAILY NEWS, May 31, 1984, at C2.

69. See Ron Fimrite, *Mantle and Mays*, SPORTS ILLUSTRATED, Mar. 25, 1985, at 70. Mantle was prohibited from holding any official position in Major League Baseball. *Id.*

70. *Willie's Farewell*, *supra* note 68, at 122.

71. KUHN, *supra* note 67, at 324. Kuhn writes:

Kuhn decided that if Mays were to take the Bally's job, he would have to terminate his contract with the Mets and could no longer work in baseball.⁷² As Kuhn points out, the media then and now misinterpreted this decision as "banning" or "suspending" Mays from baseball, which is inaccurate.⁷³ In the seasons between the Black Sox scandal and the Rose incident, perhaps no gambling incident shook the national conscience of baseball and its fans more than that which surfaced in 1970. On Feb. 17, 1970, *Sports Illustrated* featured on its cover a 26-year-old Detroit Tigers' pitcher who had, over the past two seasons, won an astonishing fifty-five games.⁷⁴ But this was not *Sports Illustrated's* annual baseball season preview issue. The headline read: "Denny McLain and the Mob: Baseball's Big Scandal."⁷⁵ Kuhn immediately launched an investigation, the findings of which resulted in his announcement on April 1, 1970 of McLain's suspen-

If our personnel began to work in casino operations, let alone own them, an important support would have been knocked out from under our consistent opposition to legalized gambling. More fundamentally, there was a question of what message Mays' going to Bally's would send to our own people. Were we letting down the bars that had been in place since the time of Judge Landis and the Black Sox? Were we lessening our resolve to support Major League Rule 21, which prohibited gambling on baseball?

Id.

72. *Id.*

73. See Fimrite, *supra* note 69, at 70. Mays still remained eligible to do such things as participate in Old-Timers Games — something that Pete Rose, who is on baseball's ineligible list, cannot do. *Id.* In 1985, Commissioner Peter Ueberroth removed the prohibition on the baseball employment of both Mays and Mantle notwithstanding their current simultaneous employment by two New Jersey casinos. *Id.* In conjunction with this reinstatement, Ueberroth issued a June 12, 1985, memorandum to all Major League Clubs setting forth the following guidelines on the simultaneous employment of Baseball personnel by a legalized gambling entity:

1. The non-baseball employment may not entail direct involvement with gaming activities.
2. Baseball personnel may not engage in advertising on behalf of any legalized gambling employer. This will apply to all forms of advertising media. Personal appearances of the sort associated with a "goodwill ambassador" concept are not prohibited.
3. Simultaneous employment will be permitted only with respect to entities which do not conduct legalized team sports betting. This permission will be withdrawn for any entity which now does not have team sports betting but which hereafter expands or seeks to expand its activities to include it.
4. Notwithstanding the foregoing, all full-time Baseball personnel who have day-to-day responsibility in the game are prohibited from working for any legalized gambling enterprise. . . .

Id.

74. See John Sharnik, *Downfall of a Hero*, SPORTS ILLUSTRATED, Feb. 23, 1970, at 16; see also *Another Shadow*, TIME, Mar. 9, 1970, at 58; Pete Axthelm, *Ideal Sucker*, NEWSWEEK, Mar. 2, 1970, at 24.

75. Sharnik, *supra* note 74, at 16.

sion and probationary period until July 1 of that season.⁷⁶ The next significant "gambling question" arose in 1980 and involved Eddie DeBartolo, Sr.'s efforts to purchase the Chicago White Sox.⁷⁷ DeBartolo's ownership of racetracks in Ohio, Illinois and Louisiana troubled Kuhn, who admits to having "gone along uncomfortably with the small interest the Galbreath family (owners of the Pittsburgh Pirates) had in Churchill Downs and George Steinbrenner's fifty percent interest in Tampa Bay Downs."⁷⁸ This discomfort led Kuhn to issue a directive to all clubs in the spring of 1980 prohibiting ownership of racetrack interests by baseball personnel.⁷⁹

C. MLB Club Restrictions

Major League Baseball has reacted swiftly and firmly to isolated incidents of gambling and gambling associations involving its players and owners. In addition, MLB has also restricted, and carefully monitored, its clubs in their advertising and promotional affiliations

76. KUHN, *supra* note 67, at 70. Recounts Kuhn: "For his stupidity and greed, and for the harm he had done to public confidence in baseball, [McLain] clearly deserved a suspension. . . ." Kuhn also recalls that his discipline of McLain drew intense criticism from both the media and some owners as too lenient. *See also*, Pete Axthelm, *Slap on the Wrist*, NEWSWEEK, Apr. 13, 1970, at 48. McLain returned to the Tigers on July 1, 1970. William Leggett, *Denny McLain: Ready for His Comeback*, SPORTS ILLUSTRATED, June 29, 1970, at 20.; Pete Axthelm, *Second Coming*, NEWSWEEK, July 13, 1970, at 69.

McLain's comeback was short-lived: a series of incidents, including dumping buckets of ice water on two local sportswriters and threatening a parking-lot attendant led to a second suspension. KUHN, *supra* note 67, at 71. During that suspension, Kuhn learned that McLain had been carrying a gun on a scheduled airline flight, which led to a third suspension for the remainder of the season. *Id.* at 72. During the third suspension, and just prior to the start of the 1970 Reds-Orioles World Series, McLain was part of an eight-player trade between the Tigers and Washington Senators. *Id.* at 74. McLain led the American League in losses in 1971, went to the Athletics in 1972, the Braves in 1973 and was soon out of baseball for good, at the age of 28. *Id.* at 75.

77. KUHN, *supra* note 67, at 82. The sale of the Chicago White Sox by Bill Veeck to Eddie DeBartolo, Sr. was not approved by the American League, which did, on January 29, 1981, unanimously approve the sale of the club to Jerry Reinsdorf and Eddie Einhorn. *Id.*

78. *Id.* at 214.

79. *Id.* Kuhn grandfathered the existing Galbreath and Steinbrenner interests:

In issuing the directive I was motivated by two perils. First was the growth of illegal betting on sports. There was no accurate count, but the figures were thought by knowledgeable experts to be stupendous and growing. Second, I was concerned about the increasing efforts to legalize gambling on team sports. I was death on that concept because I thought it was a deadly threat to us. I was determined to keep baseball on the highest possible ground to avoid these perils. The further we were removed from gambling of all kinds, whether legal or illegal, the better positioned we would be to resist gambling on our game.

with legalized gambling and state lottery entities, in order to eliminate any appearance of impropriety.

Again, Kuhn took the lead. Such restrictions were first incorporated into MLB's internal rules in a bulletin from Kuhn to the clubs in 1978.⁸⁰ In the bulletin, Kuhn prohibited clubs from entering into any agreement allowing a state lottery to stage a promotional event in the stadium (such as by giving away lottery tickets and awarding prizes) and similarly prohibited in-game or club-sponsored broadcast sponsorships by state lotteries.⁸¹ In subsequent bulletins, Kuhn prohibited clubs from accepting any form of advertising from casinos, lotteries or racetracks in club publications, or on message boards or public address announcements.⁸² In a memorandum in February of 1984 to all Major League Clubs, Kuhn again reiterated MLB's opposition to club involvement or association with legalized gambling entities.⁸³

Major League Baseball modified its then-existing policy in March of 1985, under newly-elected commissioner, Peter Ueberroth.⁸⁴ The revised policy specifically allowed clubs to accept advertising in any form from any federal, state or provincial lottery, provided that any such advertising "not include or use Club names, logos, announcers, or personnel or in any way be identified with a Major League Baseball Club or Major League Baseball."⁸⁵ However, the bulletin provided that any such agreements could be for one year only (without options) and this exception was subject to withdrawal

80. Memorandum from Kuhn to All Major League Clubs, *Club Promotional Involvements with Legalized Gambling* (May 8, 1978): "In the interest of preserving our freedom and ability to oppose legalized gambling on baseball, it has been my view . . . that tie-ins of this sort are undesirable and should be avoided." *Id.* Later, in a tersely worded memorandum to all Major League clubs on May 1, 1981, Kuhn reiterated baseball's prohibitions against arrangements with local lotteries and other legalized betting enterprises in response to several clubs who were operating in violation of these guidelines: ". . . these arrangements make Baseball look ludicrous and hypocritical in its continuing opposition to legalized gambling on team sports. . . . The Clubs who are so involved obviously know who they are." *Id.*

81. *Id.*

82. Memorandums from Kuhn to All Major League Clubs (May 1, 1981 and Feb. 25, 1982).

83. Memorandum from Kuhn to All Major League Clubs (Feb. 7, 1984): "All Clubs should be aware of the importance of the maintenance of this policy. Promotional tie-ins with legalized gambling enterprises are not in the best interest of our game."

84. Craig Stock, *Baseball Ends No-Dice Policy on Casino Advertising*, PHIL. INQUIRER, Feb. 2, 1986, at 24.

85. Memorandum from Commissioner Peter Ueberroth to All Major League Clubs, *Re: Club Promotions — Tie-ins With Legalized Gambling & Cash Prizes* (Mar. 6, 1985).

“if a governmental authority seeks to expand its activities to include legalized team sports betting.”⁸⁶

In a memorandum to all Major League Clubs in November of 1990, Commissioner Vincent issued a comprehensive policy statement regarding promotional tie-ins with legalized gambling entities designed to supersede all previous bulletins dating back to Kuhn's first bulletin in 1978.⁸⁷ In restating, expanding upon and, in certain minor instances, modifying MLB's policies with regard to the clubs' commercial associations with legalized gambling entities, Commissioner Vincent stated: “Consistent with the long-standing policy of this office, I remain steadfastly opposed to betting in any form on team sporting events.”⁸⁸

As the rules currently stand, clubs may accept straight advertising from legalized gambling entities and utilize the logo of legalized gambling entities on premium give-away items in conjunction with promotional event days. However, they may not authorize any use of club trademarks (names, logos, etc.) in conjunction with such advertisements, or allow the use of club announcers in radio or television advertising on behalf of such entities (including announcer “lead-ins” or on-air “billboards”). Furthermore, the club may not become involved in the business activities of the sponsoring legalized gambling establishment. For example, promotional activity may not include the distribution of lottery tickets, casino chips or legalized gambling establishment coupons for lodging, restaurant or bar services, the in-

86. *Id.* This memorandum also limited to \$50,000, the single cash prize amount that the league and club (or league and club sponsor) may award in a promotion. *Id.* In the memorandum Ueberroth stated: “It is not in Baseball's best interest to be involved in such programs” (offering substantial individual cash awards). *Id.*

87. Memorandum from Commissioner Francis T. (Fay) Vincent to All Major League Clubs, *Advertisements and Club Promotions Involving Legalized Gambling Establishments* (Nov. 14, 1990), stating in part:

B. Conditions Precedent to Advertising Arrangements

1. Federal, State or Provincial Lotteries. The acceptance of lottery advertisements is permissible only from a governmental authority that does not allow, and is not seeking to allow, legalized team sports betting or any other game that involves or refers to professional sports in any way.

2. Casinos. Casino advertisements (1) are acceptable only from casinos that do not permit team sports betting, subject to the limited exception for las Vegas radio and television network affiliate stations discussed below, (2) must be limited in scope to the hotel, restaurant and entertainment activities of the casino, without any reference to gaming activities, and (3) must not use the word “casino” in any respect, except as part of the establishment's name.

Id.

88. *Id.*

stadium announcements or drawings of lottery winners, or the acceptance of lottery ticket stubs as a discount coupon for purchase of baseball game tickets.

III. GAMBLING AND THE SPORTS LEAGUES: BEFORE THE COURTS

As examined above, MLB has been very aggressive in its efforts to disassociate itself from legal and illegal gambling and to police its own, both on and off the field. Major League Baseball has been equally aggressive in responding to various states' efforts to initiate sports betting tied to the outcome of MLB games and, where necessary, pursuing legal avenues. The potholes upon such legal avenues were created with the landmark decision in *National Football League v. Governor of the State of Delaware* discussed below.

A. *The Landmark Case of National Football League v. Delaware*

Sports team betting might today be firmly entrenched in many states, had the state of Delaware's NFL-themed lottery, instituted in 1976, proven successful.⁸⁹ Fortunately for the professional sports leagues, although the NFL lost the legal battle in federal court, it won the war when the Delaware State Lottery discontinued its football-themed lottery at the end of the 1976-77 NFL season. Because of the present heightened interest in state-authorized and state-sanctioned sports lotteries, a brief analysis of *NFL v. Delaware* is instructive.

In the only professional sports league suit on the gambling issue to reach the United States District Court level, the NFL and its twenty-eight member clubs filed suit against the governor of Delaware and the Director of the State Lottery seeking preliminary and permanent injunctive relief barring the state's use of a lottery scheme based on outcomes of NFL games.⁹⁰

The Delaware Lottery implemented a lottery known as "Scoreboard," offering two basic game formats: "Football Bonus" and "Touchdown," with payouts for both games determined on a parimutuel basis (as a function of the total amount of money bet by all play-

89. See *National Football League v. Governor of the State of Delaware*, 435 F. Supp. 1372 (D. Del. 1977). The State of Delaware intervened, and the complaint was amended to add a request that the court create a constructive trust on behalf of the NFL clubs for all revenues derived from the lottery. *Id.* at 1375. This request was subsequently denied. *Id.* Finding no threat of immediate irreparable harm to the NFL, the court denied the motion for a temporary restraining order. *Id.*

90. *Id.* at 1375.

ers).⁹¹ The "Football Bonus" game consisted of fourteen games divided into two pools - A and B. A minimum \$1 bet was required to play each pool. The game was strictly a win/lose proposition; to win, the player had to select all seven winners in one pool. In "Touchdown," the player selected from a listing of fourteen games either three, four or five games, selecting a winner and a point spread (0-7, 8-14, 15-over) for each game selected. A player could bet \$1, \$2, \$3, \$5 or \$10. The Lottery referred to NFL teams on the tickets by geographic rather than team names (i.e., Pittsburgh vs. St. Louis).⁹²

The NFL claimed it was being harmed by the forced association with gambling and claimed misappropriation, violation of trademark and unfair competition laws, violation of Delaware's Trademark Act, and violation of Delaware's Lottery Law.⁹³ The court denied the NFL's request for a temporary restraining order, and the state of Delaware implemented its two NFL-themed games, and, a six-day trial ensued in November, 1976.⁹⁴ On August 11, 1977, District Court Judge Walter Stapleton handed down what is considered to be a landmark decision.⁹⁵

The court, upholding the right of the state of Delaware to conduct a lottery based on NFL scores and game schedules, narrowly held that the NFL was entitled only to limited injunctive relief in the form of disclaimers on all materials disseminated by the Delaware State Lottery.⁹⁶ In addressing the misappropriation issue, the court

91. *Id.* at 1373. "Touchdown II," a third Scoreboard game, was introduced in mid-season and replaced "Touchdown" for the remainder of the season. *Id.* In "Touchdown II," a "line" or predicted point spread on each of twelve games was published on the Wednesday prior to the games. *Id.* Ironically, a widespread public controversy over one of the game's point spreads for the final week of the season caused the Lottery to call off all bets. *Id.* at 1374. The Delaware Attorney General subsequently overruled this decision and all bets were paid off; however, the incident caused the public to lose confidence in the "Scoreboard" Lottery and the NFL-themed lottery was discontinued. *Id.* at 1375.

92. *Id.* at 1376.

93. See Vicki Jones, *Sports Betting: The Delaware Story*, GAMING BUS. MAG., May 1980, at 17. In his deposition, NFL Commissioner Pete Rozelle stated:

The organization and promotion of the (NFL) teams, the playing of the game, the excellence and competitive balance of the teams, the integrity of the game and consequent fan interest, together with the results of the games, have created the reputation and good will of the NFL and its member Clubs, all of which constitute invaluable property right.

Id.

94. *National Football League v. Governor of the State of Delaware*, 435 F. Supp. 1372, 1376 (D. Del. 1977).

95. *Id.*

96. *Id.* Perhaps because Delaware's NFL-themed lottery was discontinued after the 1976-77 season, the court's decision was never appealed by the NFL. The NFL's decision not to

stated that "[t]he only tangible product of the plaintiffs' labor which the defendant utilizes in the Delaware lottery are [sic] the schedule of NFL games and scores."⁹⁷ In addition, "[t]hese are obtained from public sources and are utilized only after plaintiffs have disseminated them at large and no longer have any expectation of generating revenue from further dissemination."⁹⁸

In addition to arguing misappropriation of its schedule and game results, the NFL also argued misappropriation of its "good will" and "reputation" as well as its "popularity."⁹⁹ While the court refused to rule on whether the state of Delaware had "appropriated" the NFL's good will and reputation as a legal matter, it did rely on the concept of good will and reputation in determining that the defendants' activities may have "damaged" plaintiffs' good will and reputation. Based largely upon evidence produced by the NFL that showed that "a substantial portion of the present and potential audience for NFL games believe[d] that the Delaware Lottery is sponsored or approved by the NFL," the court provided the NFL an arguably pyrrhic victory.¹⁰⁰ In addressing the plaintiffs' claims of trademark infringement and unfair competition, the court held that the defendants' geographic use

appeal the judgment could conceivably weaken the professional sports leagues in their current battle against state-sanctioned lotteries that rely on the outcomes of professional sports contests. Witness Oregon's "Sports Action" lottery, which relied heavily upon the *Delaware* decision to justify the creation and implementation of its lottery. The *Delaware* case, which demonstrates the NFL's willingness to battle this issue in court, apparently dissuaded several states, notably Pennsylvania and New Jersey, from instituting lotteries similar to Delaware's. See Jones, *supra* note 93, at 41.

97. *Delaware*, 435 F. Supp. at 1377.

98. *Id.* The NFL, relying on *International News Service v. Associated Press*, 248 U.S. 215 (1918), argued that the State of Delaware was "endeavoring to reap where it has not sown." *Id.* (quoting *International News Service*, 248 U.S. at 239). The court, while asserting the continuing vitality of the INS case and the doctrine of misappropriation, concluded however "that plaintiffs' argument paints with too broad a brush . . . I do not believe the INS case or any other case suggests use of information that another has voluntarily made available to the public at large is an actionable 'misappropriation.'" *Id.* at 1378.

99. *Id.*

100. *Id.* at 1380. In holding only that the defendants' use of the NFL schedules, scores and public popularity in the Delaware Lottery did not constitute a misappropriation of the plaintiffs' property, the court added:

[T]he plaintiffs have not demonstrated that the existence of gambling on its games, *per se*, has or will damage its good will or reputation for integrity . . . I do find . . . that the existence of gambling on NFL games, unaccompanied by any confusion with respect to sponsorship, has not injured the NFL and there is no reason to believe it will do so in the future. The record shows that extensive gambling on NFL games has existed for many years and that this fact of common public knowledge has not injured plaintiffs or their reputation.

Id. at 1378.

of city, instead of team names did not, as a matter of law, constitute a violation.¹⁰¹

B. NFL Gains Other Leagues' Support

The other major league sports commissioners quickly offered their public support for the NFL's position on Delaware's lottery and, in hearings before the Commission on the Review of the National Policy Toward Gambling conducted in 1976, set forth their opposition to team sports-themed lotteries.¹⁰²

Major League Baseball has steadfastly denounced, through public testimony, press releases and targeted lobbying efforts, those states that have, in the years since *Delaware*, initiated plans to create sports-themed state lotteries tied to the outcome of its games.¹⁰³ Major League Baseball, however, had no such chance in 1984, when the

101. *Id.* at 1380 (citing Lanham Act, Section 43(a), 15 U.S.C. § 1125(a)(1974)). The court stated:

[D]efendants may truthfully tell the public what service they perform What one may not do, however, is to advertise one's services in a manner which creates an impression in the mind of the relevant segment of the public that a connection exists between the services offered and the holder of the registered mark when no such connection exists.

Id. It is this practice—arguably authorizing the use of city names instead of trademarked team names—that the current sports gambling legislation seeks to make unlawful as well.

102. *Hearings Before House Select Comm. on Professional Sports. Inquiry into Professional Sports, Part I*, 94th Cong., 2d Sess. (1976) (statement of Bowie Kuhn). Kuhn stated:

Major League Baseball has consistently opposed any legalized gambling on sporting events. In particular, our strong opposition applies directly to any legal gambling scheme proposed to be initiated in the State of Delaware through the Delaware State Lottery or any other such state-sponsored gambling on professional or amateur sporting events

Legalization could jeopardize the very existence of Professional Baseball and other professional team sports by (1) shaking public confidence in the integrity of the game; (2) creating a climate favorable to gambling which would undermine Baseball's historic efforts to prevent gambling by its people; (3) adversely affecting Baseball's strong family following, and (4) threatening the financial stability of Professional Baseball.

Id.

103. See Molly Ivins, *Sports Officials Resist Koch Plan on Letting Betting*, N.Y. TIMES, Mar. 7, 1981, at 25. The state of New York has twice introduced legislation to authorize sports-team related lotteries, both times meeting with strong opposition from MLB and the other professional sports leagues. *Id.* In 1981, a sports lottery bill was introduced in the New York state legislature and the commissioners of the four major professional sports (Bowie Kuhn, Larry O'Brien, Pete Rozelle and John Ziegler) quickly issued a joint statement in opposition to the bill, which was subsequently dropped. See *A Bad Bet on Baseball Games*, N.Y. TIMES, Mar. 14, 1981, at 22; Larry O'Brien, *Why Pro Sports Are Opposed to Legalized Gambling*, N.Y. TIMES, Mar. 15, 1981, at V2 (stating views of NBA Commissioner Larry O'Brien). Although plans for a lottery game tied to the outcome of MLB games failed, New York State did imple-

Canadian Federal Parliament without MLB's prior knowledge or approval enacted Bill C-95 (the "Athletic Contests and Events Pools Act") authorizing the Canadian Sports Pool Corporation ("Crown Corporation") to conduct a "pool system"¹⁰⁴ of betting tied to the outcomes of MLB games.¹⁰⁵ Enacted without MLB's prior knowledge,

ment in 1982 a generic "instant baseball" scratch-off lottery game. See *State Offering Lottery on 'Instant Baseball,'* N.Y. TIMES, Apr. 20, 1982, at B3.

Again, in 1984, New York Governor Mario Cuomo announced plans to introduce a lottery tied to the outcome of contests involving the state's professional baseball, basketball and football teams. See Edward Gargan, *Cuomo to Propose Legalized Betting on Sports Events*, N.Y. TIMES, Jan. 9, 1984, at A1. In 1984, the New York sports lottery initiative again ran into stiff opposition, not only from the professional sports leagues but from New York State officials and media as well. See Edward Gargan, *Abrams Aide Casts Doubt on Legality of Betting Plan*, N.Y. TIMES, Jan. 17, 1984, at B5 (stating that New York State attorney general Robert Abrams' office warned that Cuomo's sports lottery proposal to raise educational funds would "very likely" require an amendment to the state's Constitution); *A Sports Lottery: More Lottery Than Sport*, N.Y. TIMES, Jan. 13, 1984, at A26 (opposing Cuomo's proposal: "Governor Cuomo's suggested sports lottery for New York would hoodwink citizens into believing they are betting on their sports savvy when they would simply be betting on their lottery luck. And it would yield only modest revenue"); Michael Oreskes, *Cuomo Answers Critics of Sports Betting Plan*, N.Y. TIMES, Jan. 19, 1984, at B2 (defending his proposal under heavy criticism); *Anderson Says Plan for Betting is Dead*, N. Y. TIMES, Feb. 15, 1984, at B24 (commenting that Warren Anderson, the Republican majority leader of the New York state senate, says Cuomo's plan is dead: "State-run gambling is a tax on economic disappointment").

MLB also lobbied strongly against sports betting initiatives in Rhode Island and Washington D.C. Although the Rhode Island bill was specifically designed to create an NFL-themed lottery, MLB joined the NFL in hearings before the Rhode Island legislature:

[W]e would view any use of our games for sports betting activities as a violation of our proprietary rights. Accordingly, any unauthorized commercial activities involving Major League baseball teams and games will be strictly scrutinized, and we will not hesitate to take the appropriate steps to protect the rights and interests of Major League Baseball and the Clubs.

Katherine Gregg, *DiPrete Withdraws Sports-Betting Plan*, PROVIDENCE (RI) JOURNAL-BULLETIN, June 27, 1990, at A1 (quoting the affidavit of Commissioner Vincent). Largely due to the intense lobbying efforts of the professional sports leagues, Rhode Island deferred consideration of its sports pool lottery bill. *Id.* Washington, D.C.'s sports lottery initiative was similarly rejected. Nathan McCall, *D.C. Sports Lottery Is Rejected*, WASH. POST, May 16, 1990, at A1.

104. *Bowie Kuhn v. Canadian Sports Pool Corp.*, No. 500-05-003945-845 (filed Apr. 4, 1984). In the Canadian pool system scheme, a single card would contain betting selections for a series of 13 major league games scheduled for the ensuing week. *Id.* The lottery card listed only the cities, and did not include any team names or logos. *Id.*

105. Bill C-95 ("Athletic Contests and Events Pools Act") was passed on July 29, 1983, and became effective in January, 1984. The bill authorized the Canadian federal government to initiate a nationwide "Sport Select" gambling pool on MLB baseball and was created primarily to generate funding for the 1988 Calgary Winter Olympics. The bill, however, drew considerable outcry and several lawsuits from Canada's 10 provincial governments and their respective lottery agencies, who argued that the nationwide lottery broke a 1979 agreement giving the provinces exclusive jurisdiction over lotteries in Canada ("The Paposki Lottery Deal"). See *Full House, Aces Over Kings*, MACLEANS, Sept. 28, 1981, at 25; *Provinces fight Ottawa on Lotteries*, MONTREAL GAZETTE, Mar. 20, 1984, at A4; Paul Hluchy, *Ottawa Dives Into a Crowded*

the bill was designed primarily to generate funding for the 1988 Calgary Winter Olympics.

Canada's "Sport Select" gambling pool presented MLB with its stiffest challenge to date in its battle against state and provincial lotteries tied to the outcome of its games. Major League Baseball first became aware of the lottery when representatives of the Crown Corporation made an unannounced visit to MLB's offices on February 15, 1984, seeking MLB's support in promoting the lottery! When it became apparent that the Canadian government planned to go forward with the lottery, with or without MLB's approval and cooperation, MLB responded by filing suit on April 4, 1984 in Quebec Superior Court, seeking a temporary restraining order and permanent injunction.¹⁰⁶

Major League Baseball based its suit on several grounds, including unfair and improper appropriation of its trademarks, its trade names, its copyrighted schedule,¹⁰⁷ and its good will.¹⁰⁸ Major League Baseball also based its suit on the premise that the lottery was "inconsistent with an agreement reached five years ago, whereby the federal government of Canada ceded lottery rights to the provincial governments."¹⁰⁹ While the action was still pending, the Crown Cor-

Pool, MACLEANS, May 14, 1984, at 56; *Ottawa Goes to Bat for Baseball Gambling*, BUS. WEEK, May 21, 1984, at 41; Brian Kappler, *Sports Pool Introduced But Tickets Hard to Find*, MONTREAL GAZETTE, May 2, 1984, at A2.

106. *Bowie Kuhn*, No. 500-05-003945-845 (Montreal Sup. Ct. filed April 4, 1984). See *Kuhn Files Lawsuit*, N.Y. TIMES, Apr. 5, 1984, at B24.

107. See, e.g., *Football League, Ltd. v. Littlewoods Pools Ltd.*, 2 All E.R. 546 (Ch. 1959) (holding that a list of games was a compilation and could be the subject of copyright if a sufficient amount of labour, skill, judgment or ingenuity is required in preparing the compilations); *Ladbroke (Football), Ltd. v. William Hill (Football), Ltd.*, 1 All E.R. 465 (H.L. 1964) (holding that the Football League itself owned the copyright in the list of matches that were played by the member teams each week); *British Columbia Jockey Club v. Standen*, 73 C.P.R. (2d) 164, (B.S.S.C. 1983), *aff'd*, 8 C.P.R. (3d) 283 (B.C.A. 1985) (holding, *inter alia*, that it is not necessary to exactly copy a schedule to infringe the copyright therein, but that copyright in the schedule may be infringed even if the information in the schedule is rearranged). Under Canadian law there is no need to register a copyright and it comes into existence upon publication.

108. *Sportsbeat* (ABC television broadcast, Mar. 24, 1984) (Bowie Kuhn went on national television to announce MLB's opposition to Canada's Sports Select Pool)[hereinafter *Sportsbeat*]. See also *Kuhn Threatens to File Lawsuit on Sports Pool*, MONTREAL GAZETTE, Mar. 26, 1984, at D4; *Threat of Suit will not Deter Sports Lottery*, THE GLOBE AND MAIL, Mar. 27, 1984, at 2; *Ottawa Rebuffs Kuhn's Threats on Sports Pool*, MONTREAL GAZETTE, Mar. 27, 1984, at A4.

109. *Sportsbeat*, *supra* note 108. There was some question as to whether MLB had standing to raise this issue, since the real parties to this issue were the Canadian government and the individual provinces.

During his Cosell interview on *Sportsbeat*, Kuhn also intimated MLB's leverage in awarding expansion franchises. Asked by Cosell if the Canadian sports lottery might impact a city like Vancouver's chances of getting an expansion team, Kuhn responded:

poration, with approval of the Canadian government, commenced the sale of "Sport Select" lottery tickets. The Superior Court judge denied MLB's request for a temporary restraining order, stating that baseball would not suffer any irreparable injury in waiting for the judge to hear its case for an permanent injunction.¹¹⁰

The Canadian government, and the Crown Corporation in particular, publicly defended the legality of its position, denying infringement of MLB's trademarks or schedule.¹¹¹ In defending against claims that the lottery violated the 1979 agreement between the Canadian federal government and its provinces, the Crown Corporation argued that the sports pool was not a "lottery" (strictly a game of chance), but instead was a "pool selling" system. Because the system required player's skill to select the results of the games, and hence not contemplated by the 1979 agreement.¹¹²

Major League Baseball's case against the Crown Corporation never went to trial. Consumers found the games too complicated and over 7000 distributors across Canada refused to participate in the sale of the lottery tickets for fear of being ostracized by the provincial lotteries. The newspapers of the various provinces continually questioned Crown Sports and the Canadian government's alleged breach of its 1979 lottery agreement with the provinces. Consequently, tickets sales declined steadily, and by June 1984, the lottery was terminated.¹¹³ Major League Baseball's suit was vacated without

My feeling is it would hurt the prospects of a city like Vancouver, just as it would hurt the prospects at a state — in the United States, for instance, if sports betting were enacted in the state which was looking for expansion. It certainly isn't anything that baseball is going to look on with much favor.

Id.

110. *Bowie Khun*, No. 500-05-003945-845 (Montreal Sup. Ct. filed Apr. 4, 1984).

111. *Id.*

112. See Ross Laver, *The Fight over the Sports Pool*, MACLEANS, Apr. 16, 1984, at 22. In addition to the MLB-themed sports pool, in 1984, The Canadian Sports Pool Corporation also created a NHL-themed sports pool entitled "Hockey Select" requiring participants to correctly predict the outcome of 13 NHL games on one card. *Id.* The NHL sued in the Superior Court in the Province of Quebec on the basis of their copyright in the NHL schedule. *Id.* The "Hockey Select" game was an economic failure and was subsequently ceased and the case became dormant. *Id.*

113. See *Sports Pool Losing \$750,000 a Week: Official*, MONTREAL GAZETTE, June 13, 1984, at A1. Crown Sports sold an average of only 165,000 \$2 tickets each week for its weekly baseball draws and, during the first week of July 1984, lost approximately \$1,000,000; overall, the sports lottery proved a complete financial disaster, losing an estimated \$20.5 million. Susan Riley, *A Pool Filled with Red Ink*, MACLEANS, July 9, 1984, at 15.

prejudice to MLB's claim, in the event that the lottery was ever continued.¹¹⁴

While the proposed federal anti-gambling legislation would adequately and properly address MLB's concerns over sports gambling within the United States, the matter of sports betting on professional leagues within Canada remains a problem. Currently, the National Hockey League is engaged in a lawsuit, based on infringement of the NHL's copyrighted schedule, against Loto-Quebec to enjoin a sports betting game tied to the outcome of NHL games.¹¹⁵ Even in the wake of the NHL lawsuit, Loto-Quebec subsequently introduced a betting scheme tied to the outcome of MLB games on opening day of the 1992 season.¹¹⁶ The words of Bowie Kuhn, issued in his memorandum to the Major League Clubs in August, 1984 upon the termination of the Canadian Crown lottery, have indeed proved prophetic: "We can be sure that the Canadian effort will not be the last attempt to exploit a gambling connection with our game."¹¹⁷

IV. CONCLUSION

Despite the history of financial failures experienced by state and provincial governments when engaged in sports lotteries tied to the outcome of professional sports contests, many states continue to harbor the hope that their sports team lotteries will become the ultimate

114. James Rusk, *Pool, Unity Agency are Axed by Tories*, *GLOBE AND MAIL*, Sept. 22, 1984, at 1. The Canadian government announced the dissolution, as of September 30, 1984, of the Canadian Sports Pool Corporation. *Id.* In return for Ottawa's agreement to terminate its sports pool by September 30, 1984, the provinces agreed to give Ottawa a combined \$100 million from their own lottery receipts to help pay for the 1988 Calgary Olympics. *Id.*

115. *National Hockey League v. La Societe Des Loteries Et Courses Du Quebec*, No. T-194-91, Fed. Court of Canada, Trial Division (filed on January 28, 1991) (pending). In a somewhat related case, the NHL filed suit in Vancouver in 1991 against Pepsi-Cola Canada, claiming the company (which has no official association with the NHL) violated the league's trademark right by running promotions called "Diet Pepsi's \$4,000,000 Pro Hockey Playoff Pool" and "Pepsi's Shoot & Score Pro Hockey Draft" during the 1990 and 1991 seasons. *National Hockey League v. Pepsi-Cola Canada Ltd.*, No. C902104 (filed on April 27, 1990) (pending). Both games are dependent on NHL game results. On promotional materials, Pepsi included a disclaimer acknowledging that the games have no association with the NHL and the materials do not use any NHL trademarks. The NHL argues that pepsu infringed upon NHL trademarks via the very nature of the promotions and admitted guilt in the issuance of the disclaimer. "When you decide to use a disclaimer, it's an admission you're misleading the public," said NHL General Counsel Gil Stein. *TEAM MARKETING REPORT*, Jan. 4, 1992, at 1. "It's a passing off, which shows that the basic thing is misleading. People don't even see them (the disclaimers)." *Id.*

116. See *Baseball Betting Is Now Tres Bien*, *N.Y. Times*, Apr. 6, 1992, at C3.

117. See Memorandum from Kuhn to all Major League clubs, *Re: Promotional Tie-ins with Legalized Gambling* (Aug. 29, 1984).

"cash cow." Additionally, there is no evidence that such sports lotteries can or will serve as a panacea for states' revenue shortfalls.

It is the long-standing position of MLB, as well as the other professional and amateur sports organizations, that such "quick fix" remedies extract a significant price. The cost is the prospect of turning our games into giant roulette wheels, our athletes into roulette chips, and the nation's youngsters into fans not of points scored, but of point spreads.

The enlightened efforts of leading legislators to prohibit state-sanctioned sports gambling are to be commended. Major League Baseball applauds such efforts to pass a federal sports gambling bill which, for two consecutive years, has in the "final innings" been buried and ultimately aborted within the crime bills debates.¹¹⁸ Until federal legislation prohibiting state-sanctioned sports gambling becomes law, MLB, and other professional and amateur sports organizations, have no alternative but to aggressively oppose the states through lobbying and lawsuits.

118. See Joseph Sullivan, *Gambling Debate Rages Anew over Sports*, N.Y. TIMES, Nov. 20, 1991, at B6. As in 1990, the sports gambling issue was absorbed in the larger debate over the so-called Omnibus Crime bill, which is still pending. *Id.* In July 1991, the Senate passed the Omnibus Crime bill (S. 1241), although it did not contain a sports gambling provision. *Id.* In October 1991, the House approved the Omnibus Crime bill (H.R. 3371) which included Title XXI-Sports Gambling. *Id.* This title was based on Rep. Bryant's legislation (H.R. 74) and was amended to include a two-year window for New Jersey to authorize and put in operation sports gambling in its casinos. *Id.* In November 1991, the House adopted the conference report for the crime bill. The conference report contained a compromise sports gambling provision which provided a one-year window for New Jersey to authorize and put in operation sports gambling in its casinos. Stephen Barr, *Gambling: How Much is Too Much?* N.Y. TIMES, Nov. 24, 1991, at 1; *Sports Gambling Would Boost Crime, Not Curb It*, THE RECORD (NJ), Nov. 24, 1991, at A34.

Debate over several controversial clauses unrelated to the sports gambling provisions, a Republican filibuster on the Senate floor and the threat of a presidential veto, delayed any action on the crime bill into 1992. See Maria Puente, *Crime bill is stalled in Senate*, USA TODAY, Mar. 27, 1992, at 4A.