

# Baseball's Doping Crisis and New Anti-Doping Program

by James A.R. Nafziger\*

The first World Baseball Classic confirmed that baseball is no longer simply the national pastime of a single country, the United States.<sup>1</sup> It is thoroughly international. The sport has become a national pastime in several other countries, including Japan, Taiwan, Korea, the Dominican Republic, Mexico, Nicaragua, Panama, Cuba, and Venezuela. (It is clear from this list that international politics is irrelevant.) Major League Baseball (MLB) rosters in North America are replete with foreign nationals. Foreign teams regularly win the Little League World Series for young people and other international competitions. Latin Americans make up 37% of all players under contracts with MLB clubs. In 2006 Venezuela won a Caribbean World Series and Japan won the first World Baseball Classic.

To be sure, the globalization of baseball has been uneven. Sometimes the process has been two steps forward and one step backward. For example, the demise of the Montreal Expos in 2004<sup>2</sup> left MLB with only one Canadian franchise, the Toronto Blue Jays, and in 2005 the International Olympic Committee (IOC) dropped baseball as an Olympic sport beginning after the 2008 Games.<sup>3</sup> The process of globalization nevertheless continues apace, as the MLB's new anti-doping program demonstrates.

## I. Baseball's Doping Crisis

The most significant issue confronting professional baseball has been the use by players of performance-enhancing drugs.<sup>4</sup> The widespread use of steroids, in particular, led to a doping crisis in the sport and irresistible pressures for reform emanating from congressional hearings in the United States on the crisis. As a result, MLB first accepted minimum testing procedures and sanctions against doping in 2002 and then, under continuing public and congressional pressures, rapidly instituted a respectable program of testing and sanctions in 2005. Frontier issues involving difficult-to-detect and undetectable drugs remain to be resolved in the future.<sup>5</sup> What may be particularly significant about baseball's new program is not simply its rapid development under pressure but its growing conformity with the standards and procedures of international sports law—a significant development, given the independent role of player contracts and collective bargaining in professional baseball. This study first summarizes baseball's doping crisis, then discusses MLB's response to it and the significance of the response in the context of international sports law and the globalizing process.

It is not entirely clear why the IOC decided to drop baseball as an Olympic sport so soon after it had been added in 1992. The sport's lack

of a popular following in many countries may have been a factor.<sup>6</sup> Many other Olympic sports, however, also would fail that test—for example, curling, skeleton, the pentathlon, synchronized swimming, the biathlon, and Greco-Roman wrestling. Moreover, in reducing the breadth and complexity of international competition, the International Olympic Committee (IOC) and international federations (IFs)<sup>7</sup> are divided over the issue of whether to eliminate entire sports or, rather, excessive or redundant events within a particular sport.

Instead, it is likely that baseball's demise as an Olympic sport was attributable to two other factors: the unwillingness of the players, especially the superstars, to participate in the Olympics and other sanctioned competition; and baseball's reputation in the past for turning a blind eye to its doping problem, which involves a widespread use of performance-enhancing steroids. It is true, of course, that other sports such as cycling, swimming, and track and field have been seriously tainted by doping, but their respective sports federations have taken substantial measures to respond to the problem—generally in conformity with international sports law. Unfortunately, the International Baseball Federation, headquartered in Switzerland, has been ineffective in establishing MLB anti-doping measures. In any event it is reasonable to infer from the IOC decision a direct link between MLB noncompliance in the past with international anti-doping standards and baseball's demise in Olympic and related competitions.

Professional baseball's doping crisis came to a head only in the late 1990s. Although the first claims of steroid use date back to the late 1980s,<sup>8</sup> MLB's concerns about substance abuse in that decade centered on criminally prohibited (so-called recreational) drugs, especially cocaine.<sup>9</sup>

In 1983, after four Kansas City Royals players had received jail sentences on cocaine convictions, MLB first proposed comprehensive drug testing. The following year players and franchise owners reached agreement on for-cause testing whereby a player could be tested if a club claimed to have reasonable cause to believe the player was using drugs. Unfortunately the agreement died in 1985 because the Major League Baseball Players Association, the players union, refused to cooperate in implementing it. During the same year, however, MLB Commissioner Peter Ueberroth announced his intention to establish a mandatory testing program for all minor league players and major league officials.

In 1986 a second scandal resulted from the conviction of a Pittsburgh cocaine dealer who had found a market among players on

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1 The first World Baseball Classic, which was intended to be a sort of World Cup in the sport, took place in March 2006. See Tom Verducci, *Global Warming*, SPORTS ILLUS., Mar. 6, 2006, at 56. It is debatable whether baseball is the national pastime of the United States, but there is no doubt that it is a national pastime. For example, when John Roberts appeared before the Judiciary Committee of the United States Senate

for a hearing on his (eventually successful) nomination to become Chief Justice, his opening statement was couched in a baseball metaphor ("Judges are like umpires. Umpires don't make the rules; they apply them."). N.Y. TIMES, Sept. 13, 2005, at A16.

2 See George Vecsey, *Take the Renewal, Leave the Memories*, N.Y. TIMES, Jan. 13, 2005, at D2.

3 See Lynne Zinser, *I.O.C. Drops Baseball and Softball*, N.Y. TIMES, July 9, 2005, at D1. Softball also was dropped from the Olympic roster, quite likely because of its association with baseball despite their gender-related and other differences. The modern pentathlon was also subject to removal but was retained because of

European support for it. The last previous sport to be removed from the IOC list was polo in 1936.

4 See generally JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 147-64 (2d ed. 2004).

5 See James A.R. Nafziger, *Circumstantial Evidence of Doping: BALCO and Beyond*, 16 MARQ. SPORTS L. REV. 45 (2005).

6 See Zinser, *supra* note 3.

7 The Olympic Charter provides for recognition of IFs. OLYMPIC CHARTER, Rule 29 (2004).

8 José Canseco claimed that steroids made their appearance in MLB on September 2, 1985, the day he debuted for the Oakland Athletics. See JOSÉ CANSECO, JUICED: WILD TIMES,

RAMPANT 'ROIDS, SMASH HITS, AND HOW BASEBALL GOT BIG 53 (2005). In any case, Canseco was the first prominent baseball player to be publicly accused of using steroids—an accusation leveled in 1988 by Thomas Boswell, the distinguished *Washington Post* sports-writer. E.g., *Baseball Insider*, ST. PETERSBURG TIMES, Sept. 30, 1998, at 4C.

9 Lee Jenkins et al., *Another Chance for Baseball to Settle Its Score With Drugs*, N.Y. TIMES, Dec. 12, 2004, § 8, at 1 (from which the history of doping in baseball, as follows in this text, is primarily drawn).

the Pittsburgh Pirates, the local MLB franchise team. The bad publicity generated by this scandal led Commissioner Ueberroth to suspend eleven team members conditionally for cocaine use. The incident also prompted the Commissioner to propose a program under which major league players would be tested up to four times a year for cocaine, heroin, marijuana, and morphine, without a penalty for a first-time positive test. Implementation was stalled, however, when an arbitrator struck down clauses in players' contracts that provided for random drug testing because they had not been negotiated in the process of collective bargaining between MLB and the players union. It had again delayed efforts to respond to baseball's growing drug problem. The scourge of drug abuse continued unabated.

During the next decade the use of anabolic steroids, which had barely been apparent in baseball, began to grow. Some of these synthetic agents, which mimic testosterone and other hormones, have the metabolic effect of boosting the production of muscle mass and thereby the strength of batters.<sup>10</sup> As the problem emerged full-blown in the mid-1990s, MLB took no action to test players for the use of steroids or to impose sanctions against their use. By contrast, the IOC and several professional sports organizations not directly governed by IOC rules have prohibited their use, based on five principles.<sup>11</sup> These principles are the "unnaturalness" of steroids, their unfairness to competing athletes who do not choose to use them, the consequential unevenness of the playing field or competitive balance on it, the uncertain long-term effects of steroids on the health of athletes, and their questionable effect on the role of athletes as models for youth.

In the mid-1990s the Federal Bureau of Investigation (FBI) of the United States Department of Justice notified MLB of the growing use of steroids among players.<sup>12</sup> In 1998 home-run king Mark McGuire admitting using a testosterone-boosting supplement, androstenedione (andro).<sup>13</sup> Although the IOC, IFs, and several professional sports organizations such as the National Football League (NFL) had banned the agent, MLB did not. MLB Commissioner Bud Selig responded to the controversy, however, by initiating a study of andro that was later published, undertaking to educate players with a pamphlet on the known dangers of performance-enhancing agents and hiring medical expertise to advise MLB on doping.<sup>14</sup> In 2004 Congress amended the Anabolic Steroid Control Act of 1990 so as to ban the sale of andro.<sup>15</sup> As of the new millennium, however, MLB still had no testing program or mandatory sanctions against doping.

Further reports of rampant doping among players contributed to a crisis in baseball, but there was still no effective response to the problem. In 2002 the players union and owners finally agreed to a steroid-testing program after Ken Caminiti, MLB's Most Valuable Player in 1996, admitted that he had used steroids, claiming that the majority of players did so, too.<sup>16</sup>

In summary, "[f]rom 1986 until 2002, about the only way a team could take recourse [against doping] was if a player was arrested on drug charges."<sup>17</sup> In retrospect, what explains MLB sluggishness in responding to a serious and growing problem of which it was clearly aware? Several likely explanations include the concerns of the players union about breaches of personal privacy, the confidentiality of physician-player relationships, and MLB's confidence in the ability of the owners to control doping without outside intervention.<sup>18</sup> Perhaps the most likely explanation, at least until recently, was public tolerance, if not encouragement, of steroids whenever their use might help the

superstars set new records on the baseball diamond. The public loves big hitters. By 2002, however, public tolerance had waned, putting new pressure on Congress to conduct investigations, on the MLB to take effective action, and on the players union to cooperate in efforts to address the doping problem.

## II. Major League Baseball's Response to the Crisis and Its Significance

### A. MLB's Response

#### 1. The 2002 Program

MLB's first step in 2002 toward an effective anti-doping program initiated a year of anonymous, random testing. According to the program, if more than five percent of the tests proved to be positive, mandatory testing and sanctions would follow. The sanctions included suspension of players and disclosure of their names, along a scale calibrated according to the number of offenses. First-time offenders would remain anonymous and be subjected only to mandatory treatment. In late 2003 the stricter program went into effect after a determination that the five-percent threshold of use had been reached.<sup>19</sup>

Despite growing skepticism about the efficacy of MLB's minimal 2002 program, it was at least a first step. On the other hand, it might not have led very soon to more effective measures had it not been for the BALCO controversy.<sup>20</sup> In 2003 a police raid on the Bay Area Laboratory Cooperative (BALCO) in Burlingame, California, brought to light documents that indicated BALCO's widespread distribution of performance-enhancing drugs to leading athletes. As the ensuing cause célèbre developed in the Olympic year of 2004, much of the public attention was focused on track-and-field superstars. Several baseball stars, notably Barry Bonds, Jason Giambi, and Gary Sheffield,<sup>21</sup> however, were also linked to BALCO and testified before grand juries. Barry Bonds' stature as a home-run king brought him sharply into the public limelight following media reports of his admission before a grand jury that he had used two kinds of steroids: "the clear" (taken orally) and "the cream" (rubbed on the skin).<sup>22</sup> He attracted further attention when his trainer was indicted on BALCO-derived evidence in early 2004.<sup>23</sup> Bonds, however, publicly denied using steroids.

Suffice it to say here that the BALCO controversy led to an expression of concern by President Bush in his 2004 State of the Union address,<sup>24</sup> to an investigation by Congress the same year,<sup>25</sup> and eventually, in 2005, to another congressional inquiry into the reportedly widespread use of performance-enhancing agents in baseball.<sup>26</sup>

#### 2. Public Opinion

The 2005 congressional inquiry took place against a background of public disenchantment concerning baseball's sorry record in combating doping. Opinion polls showed that 86% of the public agreed that steroid use was at least a serious problem, if not a threat to the future of the sport. Some 69% doubted that MLB had done enough to prevent steroid use, and 59% agreed that the records of players who had used performance-enhancing agents should not remain in the record books.<sup>27</sup>

In interpreting these statistics, however, a few notes of caution are in order. First, at bottom, the public has become used to performance-enhancement and the use of dietary supplements, some of which

10 See generally Steven Shapin, *Hitters*, NEW YORKER, Apr. 18, 2005, at 191. Stasinios Stavrianeas, who kindly read a draft of this article, pointed out to me that other types of steroids accelerate recovery between activities, increase aggressiveness, and perform various other functions.

11 *Id.* at 191-92, 194.

12 See Andrew Zimbalist, *Stamping Out Steroids Takes Time*, N.Y. TIMES, Mar. 6, 2005, at SP 7.

13 See, e.g., William C. Rhoden, *Baseball's Pandora's Box Cracks Open*, N.Y. TIMES, Aug. 25, 1998, at C1.

14 See Zimbalist, *supra* note 12.

15 See Jenkins et al., *supra* note 9, at 6.

16 See Tom Verducci, *Caminiti Comes Clean*, SPORTS ILLUS., May 28, 2002.

17 Jenkins et al., *supra* note 9.

18 See Zimbalist, *supra* note 12.

19 Jenkins et al., *supra* note 9, at 6.

Subsequently, within a year, the incidence of doping dropped dramatically to about 1.7%. See Curry, *infra* note 37.

20 See generally Jere Longman & Liz Robbins, *Top U.S. Sprinter Barred as Drug Scandal Grows*, N.Y. TIMES, May 20, 2004, at 1.

21 See Jenkins et al., *supra* note 9, at 6.

22 See Mark Sappenfield, *Yield on Bonds and Baseball: Dropping?*, CHRIST. SCI. MONITOR, Dec. 6, 2004, at 2. See generally MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS* (2006).

23 *Id.*

24 See *State of the Union: The President's Address*, N.Y. TIMES, Jan. 21, 2004, at A14, A15.

25 The congressional inquiry centered on a hearing before the United States Senate Commerce, Science and Transportation

committee featuring baseball Commissioner Bud Selig and Donald Behr, Executive Director of the MLB Players Association. See STATESMAN-JOURNAL (Salem, Or.), Mar. 28, 2004, at 6B.

26 See Anne E. Kornblut, *Now Batting: Hearings in Congress on Steroids*, N.Y. TIMES, Mar. 13, 2005, § 8, at 8.

27 See Harry Bruinius, *Will steroids alter baseball records, too?*, CHRIST. SCI. MONITOR, Mar. 24, 2005, at 11.

are at the margins of prohibited performance-enhancing drugs. The growing use of prescription drugs and the general acceptance of chemically enhanced activity have desensitized people to the use of steroids and other so-called enhancers. Moreover, the public perceives that the social impact of such products pales by comparison to that of street drugs such as cocaine and heroin. Second, it must be noted that younger people—some 41% of all people under the age of 30—expressed no concern at all about the problem of doping.<sup>28</sup> One can reasonably conclude from this finding that the younger generation, which is more inured to the use of street drugs and doping of athletes, may be less inclined to adopt strict programs of control in the future.

Third, despite the statistics, sports that rely on the use of steroids for effect, such as televised professional wrestling in the United States, are more popular than ever. It may be, of course, that such sports attract only a distinct minority of the population, whereas baseball is still more of a national pastime, thereby generating higher public expectations about the ethical behavior of the players. In other words, the sport may still symbolize the best in American sports to a substantial majority of the population, even persons who do not participate in it or watch it. On the other hand, to sound a fourth cautionary note about the public's intolerance of doping, one poll revealed that, whatever the sport, 48.7% of the Americans acknowledged that they themselves would take steroids if doing so would boost their income into the millions of dollars.<sup>29</sup> One should be cautious, therefore in reaching conclusions derived from anything as volatile as the aggregate opinion of a spectator public easily excited by brute strength and record-setting.

Despite this evidence of cynicism, public opinion strongly favored some kind of response in Washington to the doping crisis. The congressional inquiry in 2005 was also conducted against the background of a published exposé by superstar José Canseco, naming many names, about the rampant steroid juicing of players in the MLB.<sup>30</sup> Although Congress was criticized for yet another self-indulgence in its own pastime of investigating baseball,<sup>31</sup> the inquiry appears to have prompted MLB's replacement of its initial 2002 program with a tougher regime of drug testing and sanctions. The Canseco book, for its part, appears to have prompted additional testing, leading quickly to the revelation that yet another superstar, first baseman Rafael Palmeiro, had tested positive.<sup>32</sup>

### 3. The 2005 Program

Whatever may have been the pressures on MLB, the industry took a second step, effective during spring training 2005. For the first time, the players union agreed to reopen an agreement with MLB in order to strengthen its anti-doping clause. Under the new program,<sup>33</sup> each player had to undergo at least one random test between the beginning of spring training and the end of the regular season. Players also had to submit to additional testing based on reasonable cause to believe prohibited activity may have occurred, as well as random testing initiated by the Commissioner. The program was extended to the off-season and could be conducted outside the United States. It also established elaborate provisions for protecting the confidentiality of tests and the identity of tested players, as well as a procedure for appealing administrative decisions. Only when a player is actually suspended, however, may his identity be disclosed.

"Positive" test results, with clinical and administrative consequences, included not only meeting biological levels set forth in annexed testing protocols but also refusals by players to cooperate in the program and attempts by players to alter tests. All players on entry into the program were to be put on a clinical track, which might involve treatment for some of them. Players might be moved from the clinical to the administrative track, involving the possibility of sanctions, after testing positive for other violations of the law (for example, the use or sale of a prohibited substance) or for failure to cooperate in initial evaluations or in the course of required treatment.

This second step in the development of an effective anti-doping program defined "prohibited substances" as both drugs of abuse (cocaine, LSD, marijuana, opiates, and so on) and performance-enhancing agents. The program broadened the list of banned sub-

stances to include not only steroids but also steroid precursors, designer steroids, ephedra, human growth hormone, masking agents, and diuretics (but not stimulants), but imposed specific penalties only against the use of steroids. The penalties fell short of stiffer ones proposed by MLB but nevertheless moved professional baseball another step closer to compliance with the established standards of international sports law and practice.<sup>34</sup>

Then, in November 2005, continuing pressure from Congress and MLB Commissioner Selig's invigorated leadership led MLB to take a third step. It reopened the existing collective-bargaining agreements for the second time in ten months, resulting in tougher penalties, increased frequency of testing, and a first-ever prohibition of the use of amphetamines.<sup>35</sup>

The revised sanctions substantially lengthened penalties for steroid offenses, as follows: a 50-day suspension for a first offense, a 100-day suspension for a second offense, and a lifetime suspension for a third offense with a right to seek reinstatement after two years. This third set of reforms also eliminated alternative fines as well as tolerance of a positive test after a third one. The new program increased the frequency of testing from once during the training and regular season, with additional random testing, to once each during spring training physicals and the regular season, with additional random testing. Players continue to be subject to off-season testing as well. The new penalties for presence of amphetamines are as follows: mandatory follow-up testing for a first positive test, a 25-game suspension for a second positive test, an 80-game suspension for a third positive test, and, for a fourth positive test, a penalty at the Baseball Commissioner's discretion, including the possibility of a lifetime ban from MLB.

Besides MLB's stricter program, the congressional inquiries generated several bills that called for more frequent, random drug testing, made reference to international standards, and largely adopted World Anti-Doping Code sanctions against violations, as implemented by the World Anti-Doping Agency (WADA). Although the players union raised broad objections to the bills, baseball Commissioner Selig raised little objection to their substance and embraced the idea of stricter penalties.<sup>36</sup> The globalization of the MLB was apparent from the influence, if only indirect, of the World Anti-Doping Code.

## B. The Significance of MLB's Response in the Process of Globalization

It is too early to judge the effectiveness of MLB's initiatives in the revised 2005 program to control doping. A reported 8% drop in home runs during the 2005 season may indicate that the more modest ini-

27 See Harry Bruinius, *Will steroids alter baseball records, too?*, CHRIST. SCI. MONITOR, Mar. 24, 2005, at 11.

28 See Jere Longman, *Revelations Only Confirm Suspicions About Drugs*, N.Y. TIMES, Dec. 5, 2004, § 8, at 1.

29 See Sappenfield, *supra* note 22.

30 CANSECO, *supra* note 8.

31 Historically, hearings about baseball's conduct has been a popular congressional pastime. Since the early 1990s there have been as many as two dozen inquiries into various baseball topics in at least six committees and subcommittees. Kornblut, *supra* note 26.

32 See Hal Bodley, *Palmeiro, baseball won't fight Congress*, USA TODAY, Aug. 4, 2005, at 1C; Mike Todd, *Experts: Stanazolol Tough to Mask*, USA TODAY, Aug. 4, 2005, at 6C; Mike Todd & Dick Patrick, *Critics: Palmeiro case exposes flawed policy*, Aug. 3, 2005, at 6C.

Palmeiro had denied using steroids in his testimony at a March 2005 congressional hearing, but after being confronted with evidence to the contrary, he admitted using them, but denied using them knowingly. Instead, he speculated

that the presence of stanozolol in his body resulted from his taking a contaminated nutritive supplement. See also a later sensational exposé about slugger Barry Bonds. FAINARU-WADA & WILLIAMS, *supra* note 22.

33 For commentary on the summary of this 2005 agreement (the first of two) that follows in the text, see MAJOR LEAGUE BASEBALL, MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM 11-12 (2005). For a comparison of suspensions, as between the 2002 and the first 2005 MLB testing programs, see Bruinius, *supra* note 27, at 12.

34 See George Vecsey, *Baseball Union Comes a Long Way*, N.Y. TIMES, Sept. 28, 2005, at C22.

35 See Jack Curry, *Baseball Backs Stiffer Penalties for Steroid Use*, N.Y. TIMES, Nov. 16, 2005, at A1.

36 See letter from Bud Selig to Donald Fehr, Apr. 25, 2005, available at [www.businessofbaseball.com/seligletter\\_2005JDA.htm](http://www.businessofbaseball.com/seligletter_2005JDA.htm) (last visited Nov. 2, 2005).

tial program in 2005 deterred would-be violators because of either the lost protection of their anonymity or longer suspensions,<sup>37</sup> but it would be foolish to jump to conclusions based on that statistic alone.

What is clear is that before 2002 MLB moved extraordinarily slowly in response to the huge problem of doping among players until several important developments put it in high gear. MLB's first step in 2002, when the players union finally agreed to a threshold program, was a milestone. Between 2002 and 2005, Congress put continued pressure on the MLB to take further steps.<sup>38</sup> The MLB's program still fell short of longer-established programs in professional sports such as that of professional football, as well as the standards set by the World Anti-Doping Code within the framework of international sports law.<sup>39</sup> The current program, established in November 2005, was influenced by the Code and approximates it, even though it still falls short of full compliance with the Code's requirements.

It is ironic that the IOC decided to drop baseball after the 2008 Games just as the MLB, under public and congressional pressure, was substantially strengthening the sport's anti-doping program. Very likely, MLB's failure until November 2005 to impose strong penalties for doping helped explain why baseball's appeal as an Olympic sport faded, and why baseball became the first castoff by the IOC in nearly seventy years. Another plausible explanation for the IOC decision was that the IOC concluded that many of the best players were not competing in the Olympic Games. Baseball has never fielded anything resembling professional basketball's Dream Team in the Games. To the contrary, many of the best MLB players have largely avoided the kind of international competition that would enhance the visibility and global stature of the sport. That may be due to the scheduling of the Olympic Games during the peak season of baseball. In any event, MLB has provided little encouragement to players who may wish to take time off from prescribed league schedules to join national teams in open international competition at the Games or elsewhere.

In other sports, however, the effect of open competition in the

Olympics and other sanctioned international events has been profound. The tough requirements of international sports law and the *lex sportiva*,<sup>40</sup> including the globalizing World Anti-Doping Code, have governed many professional athletes preparing for and participating in open competition, if only sporadically and temporarily. One effect of those requirements has been to discourage professional players from doping even long after such competition. Another effect has been to encourage professional sports bodies—for example, the European football (soccer) leagues—to move toward the tougher international standards and procedures of international sports law.<sup>41</sup>

Professional sports bodies therefore have been gradually adopting standards, procedures, and sanctions consonant with international sports law. Baseball, too, finally seems to be moving in that direction. The international framework has great merit to players and sports bodies alike. It is both effective and uniform, thereby overcoming the unfairness to players of radically different standards, procedures, and sanctions from one sort to another. Baseball and other professional sports may continue to be governed by player contracts and collective bargaining, but that need not affect the adoption by players and owners of adequate, uniform procedures and sanctions, as major league baseball in North America has finally been pressured to do. The International Sports Law Journal

37 Jack Curry, *Fall in Home Runs Raises Some Doubts*, INT'L HERALD TRIB., Aug. 18, 2005, at 18.

38 See, e.g., Richard Pound, *The New Testing Policy Does Not Begin to Solve the Drug Problem*, N.Y. TIMES, Mar. 20, 2005, at 10. Mr. Pound, a former Vice President of the IOC, is Chairman of the World Anti-Doping Agency (WADA), headquartered in Montreal, Canada.

39 See Nafziger, *supra* note 4, at 161-64. See also Klaus Vieweg, *The Definition of*

*Doping and The Proof of a Doping Offense (an Anti-Doping Rule Violation) Under Special Consideration of the German Legal Position*, 15 MARQ. SPORTS L. REV. 37 (2004).

40 "Lex sportiva" refers to a growing jurisprudence of the Court of Arbitration for Sport. See James Nafziger, *Lex Sportiva*, INT'L SPORTS L.J., 2004-1/2, at 3.

41 See generally Nafziger, *supra* note 4, at 132-35, 163.

## Public Viewing in Germany

# Infront Guidelines and the German Copyright Act

by **Wiebke Baars\***

### I. Introduction

The World Cup 2006 will be, next to the Winter Olympic Games, the world's greatest sporting event in 2006. Nearly 10 million football fans are expected to join the World Cup in Germany, but only 3,2 million of them have tickets to visit the games.<sup>1</sup> Fans without tickets will be able to enjoy the games in a communal live atmosphere by watching them on one of the big screens that will be found in nearly every city. Not only fans but also marketing divisions are looking forward to these so called public viewing events. They offer the chance to enjoy the economic fruits of the Football World Cup without being an official sponsor.

These public viewing events are linked to the World Cup broadcasting rights. These have been acquired by Infront Sports & Media

AG. Infront not only markets the transmission rights - assigned in Germany to broadcasting organisations ARD, ZDF, RTL and Premiere - but also licenses the public viewing rights.

Infront and FIFA have agreed on guidelines concerning commercial as well as non-commercial public viewing events.

### II. The Infront / FIFA Guidelines

The Public Viewing Guidelines, as announced in a press release by Infront on January 2005<sup>2</sup>, apply to both commercial and non-commercial public viewing events in Germany. They state that the organiser of each public viewing event is responsible for the technical organisation of the event as well as obtaining any necessary permissions from third parties, which Infront cannot grant (e.g. from Collecting Societies or for the use of public ground). The television signals must not be altered and there are additional rules with respect to the sale of food, drinks and other goods during the show, stating that it must be avoided to give the impression that the seller is in any way officially linked to FIFA. It is especially stressed that no logos or trademarks of FIFA must be used in connection with the events.

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2 See press release dated 20 January 2005, [www.infrontsports.com/webautor-data/6/200501202006FIFAWorldCupPublicViewing-DE.pdf](http://www.infrontsports.com/webautor-data/6/200501202006FIFAWorldCupPublicViewing-DE.pdf)

1 Deutsche Bahn Press release dated 26 January 2006.