SPORTS BROADCASTING IN AN ERA OF TECHNOLOGY: SUPERSTATIONS, PAY-PER-VIEW, AND ANTITRUST IMPLICATIONS

TABLE OF CONTENTS

I. INTRODUCTION

Sports broadcasting is an integral part of American society. Turn on any television set in America on a Saturday or Sunday afternoon, and a live televised sporting event is taking place. Professional and amateur sports are so ingrained within the fiber of our society, that we have evolved into a nation of arm-chair quarterbacks. Today, sporting events are big business, and the business of professional sports encompasses a broad range of activities which are "necessary to, or an integral part of, the purchase or sale of rights to, or the promotion or conduct of, a professional sporting event."[1] Judge Cooper once said: "Baseball's

1. WARREN FREEDMAN, PROFESSIONAL SPORTS AND ANTITRUST 1 (1987).

status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business."[2]

Even though we consider sports to be big business, such was not always the case. In 1922, Justice Holmes stated the business of baseball was merely that of "giving exhibitions of baseball, which are purely state affairs" and outside the scope of antitrust restrictions.[3] Nearly seventy-five years later, professional sports still enjoy limited judicial[4] and congressional[5] exemptions from antitrust laws, as embodied in the Sherman Antitrust Act,[6] which prohibit unreasonable restraints of trade.[7] Even baseball, however, which enjoys the broadest antitrust exemption, is not precluded from antitrust scrutiny in regards to broadcasting and television.[8] Therefore, any broadcast which does not fall within the narrow exemptions afforded by the Sports Broadcasting Act of 1961,[9] will be subject to the Sherman Antitrust Act.[10]

As home entertainment technology continues to advance, coupled with the growth of cable television, pay-per-view, satellite dishes, and direct TV, a greater number of sports programming will fall within the purview of antitrust analysis. This Note analyzes the judicial and legislative history of sports broadcasting, in view of the Sherman Antitrust Act, and decides what types of broadcasting agreements should withstand antitrust scrutiny as technology advances. Part II examines the history of sports broadcasting in the United

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2. Flood v. Kuhn, 309 F. Supp. 793, 797 (S.D.N.Y. 1970).

3. Federal Baseball Club v. National League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1922). This decision, although questioned, was upheld under the principle of stare decisis. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 273 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953) (Burton, J., dissenting); Salerno v. American League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970).

4. *See* Toolson v. New York Yankees, Inc., 346 U.S. at 357; Federal Baseball Club v. National League of Prof'l Baseball Clubs, 259 U.S. at 208.

5. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (1994).
In relevant part, the Sports Broadcasting Act reads,

> The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports . . . by which any league . . . sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games . . . .

Id.

6. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1994).

7. *Id.* § 1.

8. *See* Henderson Broad. Corp. v. Houston Sports Ass'n, 541 F. Supp. 263, 271 (S.D. Tex. 1982) ("To hold that a radio station contract to broadcast baseball games should be treated differently for antitrust law purposes than a station's contract to broadcast any other performance or event would be to extend and distort the specific baseball exemption.").

9. 15 U.S.C. § 1291.

10. 15 U.S.C. § 1.

States to determine where we have been and where we are going. Part III investigates the implications of the Sherman Antitrust Act on sports broadcasting agreements, with emphasis on the Sports Broadcasting Act of 1961 and recent court decisions. After determining that some sports broadcasting agreements—primarily those made with cable stations, superstations, and pay-per-view providers—are subject to antitrust scrutiny, Part IV considers what agreements should withstand antitrust scrutiny.

II. HISTORY OF SPORTS BROADCASTING

The first sporting event ever broadcasted in the United States was the radio broadcast of the 1921 World Series between the New York Yankees and the New York Giants.[11] It was not, however, until May 17, 1939, that America got its first exposure to televised sports.[12] In the past fifty-eight years, sports broadcasting has evolved into a multi-million dollar industry. In 1962, the first exclusive National Football League (NFL) contract brought the league a total of $4.65 million ($320,000 per team).[13] In comparison, the five NFL contracts executed in 1992 generated league revenue of over $950 million ($34 million per team).[14]

Although professional sports leagues have netted millions of dollars through sports broadcasting fees, the major television networks have not realized the same profit.[15] Each of the three major networks has lost millions of dollars on professional sporting events. CBS has lost $604 million on professional

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11. *See* FREEDMAN, *supra* note 1, at 83 (relying on DAVID WALLECHINSKY & IRVING WALLACE, THE PEOPLE'S ALMANAC #2 730 (1978)). The Giants won the world series that year five games to three. *Id.*

12. Robert Alan Garrett & Philip R. Hochberg, *Sports Broadcasting and the Law*, 59 IND. L.J. 155, 155 (1984). The first televised baseball game was between Princeton and Columbia Universities. Brett T. Goodman, *The Sports Broadcasting Act: As Anachronistic as the Dumont Network?*, 5 SETON HALL J. SPORT L. 469, 470 (1995). Princeton won the game two to one and secured fourth place in the 1939 Ivy League baseball standings. *Id.* The following day, the New York Times ran a story about this historic broadcast, reporting that "seeing baseball by television is too confining . . . . What would . . . old timers think of such a turn of affairs—baseball from a sofa!" *Id.* at 470 (citing WILLIAM O. JOHNSON, JR., SUPER SPECTATOR AND THE ELECTRIC LILLIPUTIANS 36 (1971)).

13. PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 422 (1993).

14. *Id.* at 423. Similar increases are noted in Major League Baseball. *Id.* Network contracts in the early 1960s netted Major League Baseball a mere $3 million per year compared with $700 million in 1992. *Id.*

15. David M. Van Glish, *The Future of Sports Broadcasting and Pay-Per-View: An Antitrust Analysis*, 1 SPORTS LAW. J. 79, 81-82 (1994) (citing Chuck Stogal, *Hold That Line*, MEDIAWEEK, June 15, 1992, at 16).

baseball and football, NBC has lost $100 million on the NFL, and even ABC has lost money on Monday Night Football.[16] Cable stations, such as ESPN and TNT, have also lost money on professional sporting events.[17] President of NBC sports, Dick Ebersol, blames cable television for the decrease in network revenues.[18] His reasoning lies on economic principles.[19] As a greater number of broadcast stations air sporting events, advertisers can shop for the best value.[20] In addition, each advertiser must spread their advertising allocation over many networks.[21] To further complicate matters, pay-per-view entered the market with an ever increasing subscriber pool.[22] Therefore, each individual network is realizing a reduction in fees from broadcasting rights.[23]

III. ANTITRUST AND SPORTS BROADCASTING

A. *The Sherman Antitrust Act*

The federal antitrust laws "express the national belief that preserving free and unfettered competition was the summum bonum and the most effective and productive method of regulating economic activity."[24] The purpose of the Sherman Antitrust Act was to prohibit "unreasonable" restraints on trade.[25] It was not, however, the intent of the Sherman Antitrust Act to prevent all agreements which restrain trade.[26] The three prerequisites of the Sherman Antitrust Act are: "(1) the activity alleged to have a restraining effect on interstate trade or commerce does in fact have that effect; (2) the activity in fact must be an unreasonable restraint; and (3) the activity is not exempt from the antitrust laws."[27] The primary focus of antitrust law is unreasonable market power, either in the hands of a single entity or a group of entities that collectively accumulate

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16. *Id.*
17. *Id.* The largest all-sports cable channel, ESPN, has lost $250 million on baseball and football. *Id.*
18. *Id.* at 82.
19. Frank Cooney, *Networks Warn Money Drying Up/Cable, Recession Share Blame*, HOUS. CHRON., July 12, 1992, at Sports 4.
20. *Id.*
21. *Id.*
22. Chuck Stogal, *Hold That Line*, MEDIAWEEK, June 15, 1992, at 16.
23. *Id.*
24. *See* FREEDMAN, *supra* note 1, at 4 (quoting in part Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958)).
25. *Id.*
26. United States v. NFL, 116 F. Supp. 319, 323 (E.D. Pa. 1953).
27. *See* FREEDMAN, *supra* note 1, at 4-5.

such market power through anticompetitive agreements.[28] "Market power exists when consumers have few if any alternatives to the seller's product, thus enabling the seller to dictate terms based on profit maximization rather than competitive pressures."[29]

Section one of the Sherman Antitrust Act reads: "Every contract, combination, . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[30] By limiting section one of the Act to contracts, combinations, and conspiracies, it is clear that section one applies exclusively to joint activity.[31] The necessary elements to a section one offense are: (a) the existence of a combination or conspiracy among two or more participants; (b) specific intent to monopolize some part of "trade or commerce"; (c) some overt act carried out in furtherance of the conspiracy; and (d) an adverse effect upon interstate commerce.[32]

In contrast, section two of the Sherman Antitrust Act provides that, "every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize" is subject to liability.[33] The essential components of a section two offense are: (a) the possession of monopoly power in the relevant market; and (b) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[34] Therefore, if the various teams that comprise a professional sports league are considered a single entity for antitrust purposes, none of their joint decisions can be charged under section one, since the necessary plurality of actors is absent.[35] The possibility of pursuing antitrust violations under section two, however, still exists if the professional sports league is a single entity acting in a willful manner.

B. *The Nature of Professional Sports Leagues*

Analysis of the impact of antitrust law on sports broadcasting is dependent on the "uniqueness" of each professional sports league. A professional sports

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28. *See* WEILER & ROBERTS, *supra* note 13, at 128.
29. *Id.*
30. Sherman Antitrust Act, 15 U.S.C. § 1 (1994).
31. Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 27 (1991).
32. United States v. Yellow Cab Co., 332 U.S. 218, 224-31 (1947), *overruled by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
33. 15 U.S.C. § 2.
34. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
35. *See* Jacobs, *supra* note 31, at 27-28.

league requires a high degree of cooperation among its member teams in order to financially survive.[36] In *North American Soccer League v. NFL*,[37] the court explained the complexities of a professional sports league as follows:

> The success of professional football as a business depends on several factors. The ultimate goal is to attract as many people as possible to pay money to attend games between members and to induce advertisers to sponsor TV broadcasts of such games, which results in box-office receipts . . . all based on public interest in viewing games . . . .
>
> To perform these functions some sort of an economic joint venture is essential. No single owner could engage in professional football for profit without at least one other competing team. Separate owners . . . are desirable in order to convince the public of the honesty of the competition. Moreover, to succeed in the marketplace . . . the teams must be close in the caliber of their playing ability.[38]

Although the above passage discusses the business of professional football, it applies equally to all professional sports leagues. It is the unique nature of each league which creates confusion in an antitrust analysis. It is clear that unlike other businesses, professional sports leagues are unable to have completely independent economic interests because the success of the league is contingent upon the economic welfare of all of its teams.[39]

This interdependency leads many to support the application of the single-entity theory to an antitrust analysis of sports.[40] The single-entity concept stems from the landmark Supreme Court decision in *Copperweld Corp. v. Independence Tube Corp.*,[41] which held a parent corporation and its wholly owned subsidiaries are considered single-entity units for the purpose of antitrust analysis because there was a complete unity of interest.[42] The Court stated that the parent company's exercise of decisional dominion over its exclusive property—the wholly owned subsidiary—could not divest the marketplace of any of the "independent centers of decisionmaking that competition assumes and

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36. *See* FREEDMAN, *supra* note 1, at 5.
37. North Am. Soccer League v. NFL, 670 F.2d 1249 (2d Cir. 1982).
38. *Id.* at 1251.
39. United States v. NFL, 116 F. Supp. 319, 323 (E.D. Pa. 1953).
40. *See* Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 465-66 (1990); Thane L. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 740-49 (1987); *see also* Jacobs, *supra* note 31, at 44 (discussing the single-entity theory).
41. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
42. *Id.* at 771.

demands."[43] This holding, however, has not extended to other types of business arrangements, such as the type utilized by professional sports leagues.

The courts have acknowledged that sports leagues are a unique form of an economic organization along the lines of a joint venture.[44] Moreover, the NFL bylaws define the league as an unincorporated association of independent, for-profit football clubs.[45] This joint venture approach is well founded. Although the individual teams must comply with league regulations and do partake in revenue sharing, each team is independently owned and operated.[46] In fact, the NFL constitution and bylaws prohibit any team owner from having a financial interest in any other team within the league.[47] Moreover, day to day managerial decisions are made independent of other teams and these decisions are many times in direct competition with the other teams.[48] This theory that sports leagues are actually joint ventures is important because the courts have held that single entity status is not provided to joint ventures under a section one analysis.[49] Therefore, it appears the sports leagues are subject to antitrust scrutiny absent any judicial or statutory exemption.[50]

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43. *Id.* at 769.

44. *See* Jacobs, *supra* note 31, at 31; *see also* North Am. Soccer League v. NFL, 670 F.2d 1249, 1252 (2d Cir. 1982) (finding that the NFL teams were "separate economic entities engaged in a joint venture"); Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1389 (9th Cir. 1984) (finding the league was a not-for-profit, unincorporated "association" of separate corporations).

The belief that professional sports leagues are joint ventures continues today. In *Chicago Professional Sports Ltd. Partnership v. NBA*, the court stated that the NBA was a "joint venture of its 27 professional basketball teams . . . ." Chicago Prof'l Sports Ltd. Partnership v. NBA, 754 F. Supp. 1336, 1339 (N.D. Ill. 1991).

45. NATIONAL FOOTBALL LEAGUE CONST. & BYLAWS art. III (1988). This definition of the league is similar to that found in the constitution and bylaws of the National Hockey League, Major League Baseball, and the National Basketball Association.

46. *See* Van Glish, *supra* note 15, at 89.

47. *See* NATIONAL FOOTBALL LEAGUE CONST. & BYLAWS art. IX, § 9.1(B)(1).

48. A current example of independent management is the marketing plan implemented by Jerry Jones, owner of the Dallas Cowboys football team, which effectively increases the individual wealth of the Dallas Cowboys and increases its purchasing power during the draft. *See generally* Joshua Hamilton, Comment, *Congress in Relief: The Economic Importance of Revoking Baseball's Antitrust Exemption*, 38 SANTA CLARA L. REV. 1223, 1245-46 (1998) (discussing the Jerry Jones mortality plan).

49. *See* Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 229-30 (D.C. Cir. 1986). The court in *Rothery* hinged its decision on the fact that the businesses involved were "legally separate corporations" that were engaged in tangible or possible competition. *Id.* at 229.

50. *See infra* Part III.C-D.

C. *Antitrust Exemptions*

1. *The Baseball Anomaly*

No other sport tugs at the heart strings of Americans like the sport of baseball. "Professional baseball has been described as America's national pastime, part of American folklore, and as a loveable integration with the entertainment industry."[51] More importantly, professional baseball is the only professional sport which enjoys a wide blanket of antitrust exemption.[52] In 1922, Justice Oliver Wendell Holmes granted professional baseball an exemption from the antitrust laws on the ground that baseball was not engaged in the activity of interstate commerce or trade and that baseball was not a commercial entity and only had local entertainment value.[53] With this holding, Justice Holmes effectively granted baseball a monopolistic business privilege unmatched by any other sports franchise. Although this decision has been challenged and criticized numerous times, the Court has been reluctant to overrule the decision and the exemption is still in effect today.[54] Baseball's blanket exemption, however, is starting to unravel with the passage of time and the advent of technology.[55]

In 1982, a federal district court in Texas held that the owner of a baseball team was not exempt under baseball's antitrust exemption from a claim of a radio broadcaster.[56] In a well reasoned opinion, the court stated:

> The issue in the case is not baseball but a distinct and separate industry, broadcasting . . . . "[U]nique characteristics and needs" of the game have no bearing at all on the questions presented. To hold that a radio station

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51. FREEDMAN, *supra* note 1, at 31.

52. Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922).

53. *Id.*

54. *See* Flood v. Kuhn, 407 U.S. 258, 284-85 (1972) (holding that professional baseball is a business and is engaged in interstate commerce, but that "baseball is, in a very distinct sense, an exception and an anomaly . . . . It is an aberration that has been with us now for half a century . . . ."); Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953) (stating that "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation"); Salerno v. American League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970) ("While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy dispatch."). It is somewhat amusing that although these subsequent decisions to *Federal Baseball Club* openly mocked the wisdom of the holding, they followed it to the letter.

55. *See* Henderson Broad. Corp. v. Houston Sports Ass'n, 541 F. Supp. 263, 271-72 (S.D. Tex. 1982).

56. *Id.* at 271.

> contract to broadcast baseball games should be treated differently for antitrust law purposes than a station's contract to broadcast any other performance or event would be to extend and distort the specific baseball exemption, transform it into an umbrella to cover other activities . . . and empower defendants . . . to use that umbrella as a shield against the statutes validly enacted by Congress.[57]

This holding indicates that the courts are willing to separate the business of playing baseball from the various incidental and peripheral businesses of baseball. More importantly, the exemption afforded to baseball has never been extended to any other professional sport.[58] Therefore, until such time as either the Supreme Court or Congress indicates otherwise, baseball will remain an anomaly.

2. *The Sports Broadcasting Act of 1961*

Contrary to the dire prediction by The New York Times, Americans embraced televised sports with a vengeance.[59] As early as the 1960s, television became a staple in the American living room. In an effort to bring a greater quantity of televised football games into the homes of Americans—and more profit into the pocket of the NFL—the NFL tried to negotiate an exclusive television contract with CBS.[60] A federal court, however, ruled that this "exclusive" contract with CBS violated the antitrust laws by effectively eliminating competition among the member clubs of the NFL.[61] Fearing for the financial future of the NFL and the possibility of limited football on television, Congress quickly responded with the Sports Broadcasting Act of 1961.[62] The Sports Broadcasting Act essentially affords professional sports leagues the status of a "single entity"

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57. *Id.*

58. Radovich v. NFL, 352 U.S. 445, 451 (1957) (holding that the antitrust exemption provided to baseball will not be extended to the professional sport of football because of the volume of interstate business); *see also* United States v. International Boxing, 348 U.S. 236, 241-42 (1955) (finding that boxing had a high degree of interstate business and that there is "not authority for exempting other businesses [other than baseball] merely because of the circumstance that they [boxing] are also based on the performance of local exhibitions"); Washington Prof'l Basketball Corp. v. NBA, 147 F. Supp. 154, 155 (S.D.N.Y. 1956) (stating the business of basketball was interstate trade and commerce and subject to the Sherman Antitrust Act).

59. Phillip M. Cox II, Note, *Flag on the Play? The Siphoning Effect on Sports Television*, 47 FED. COMM. L.J. 571, 572 (1995) (reporting that a 1993 poll found approximately 60% of American adults watch NFL games on television).

60. United States v. NFL, 196 F. Supp. 445, 446 (E.D. Pa. 1961).

61. *Id.* at 447.

62. Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291-1295 (1994).

and allows professional baseball, football, basketball, and hockey to sell their pooled rights for "sponsored telecasting" without being subject to antitrust violations.[63] The passage of this Act has proven extremely beneficial to the success of the major league sports. By allowing the teams to pool their broadcasting rights and share revenues, Congress enabled the professional sports leagues to expand and prosper.[64] In effect, all the teams were able to demand more money per broadcast.[65] Teams in smaller markets were able to receive shared revenues with teams in larger markets, which in some instances assured the financial feasibility of struggling teams.[66] In addition, the networks realized greater revenue through higher fees paid by advertising sponsors per broadcast,[67] which in effect increased the quantity of sporting events televised.[68]

It is important to note, however, that the Sports Broadcasting Act expressly uses the term "sponsored telecasting."[69] An investigation of the legislative record shows that Congress specifically intended that the Act only apply to "free telecasting of professional sports and does not cover pay T.V."[70] This limitation to free television withstood additional legislative debate. In 1981, Representatives Pete Stark (D-Cal.) and Don Edwards (D-Cal.) introduced a bill to expand the Sports Broadcasting Act to include cable and pay television that ultimately was rejected.[71] Therefore, until Congress speaks its mind, the antitrust exemption afforded to sports leagues to enable them to pool their television rights will remain limited to sponsored (free) television.

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63. *Id.* § 1291.

64. *See* Van Glish, *supra* note 15, at 98.

65. *Id.*

66. *Id.*; *see also* NATIONAL FOOTBALL LEAGUE CONST. & BYLAWS art. X, § 10.3 (1988). This section states that all of the teams are to share equally the proceeds from the sale of pooled television rights except as provided otherwise by unanimous agreement. NATIONAL FOOTBALL LEAGUE CONST. & BYLAWS art. X, § 10.3. In addition to pooled television receipts, the NFL teams share gate receipts, with the "home" team receiving 60% of the countable gate receipts. *Id.* art. XIX, § 19.1(A).

67. Van Glish, *supra* note 15, at 98.

68. *See id.*

69. 15 U.S.C. § 1291 (1994).

70. *Telecasting of Professional Sports Contests: Hearings on H.R. 8757 Before the Subcomm. on Antitrust of the House Comm. on the Judiciary*, 87th Cong. 36 (1961).

71. H.R. 823, 97th Cong. (1981).

D. *Analyzing Antitrust Issues*

Traditionally, the Supreme Court has narrowly applied exemptions to the antitrust laws, based on Congress's commitment to a free market system.[72] In analyzing antitrust issues and exemptions, the Court has relied primarily on two tests: the per se test,[73] and the rule of reason test.[74] In addition, in recent years, the Court has adopted a new version of the rule of reason test, which commentators have labeled the "consumer welfare test" or the "undiminished output test"[75] which is founded on neoclassical theories of economics.[76] It is important to remember that these tests are not used to identify a restraint on trade, they are used to identify an unreasonable restraint on trade as forbidden by the Sherman Antitrust Act.[77]

1. *The Per Se Test*

The per se test, as used by the Court in construing and applying the Sherman Antitrust Act, looks to see if an agreement or business practice is so "plainly anticompetitive"[78] and/or "lack[ing] . . . any redeeming virtue,"[79] that it is deemed presumptively illegal and requires no further analysis. Until the mid-1970s, the courts utilized the per se analysis to find antitrust violations in only

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72. *See, e.g.*, Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 133-34 (1982) (holding that an insurer's use of a "peer review committee" to determine whether a chiropractor's fees were "necessary" and "reasonable" was not exempt from antitrust scrutiny).

73. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 (1940) (holding that price-fixing agreements in interstate commerce are unlawful per se under the Sherman Antitrust Act); Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959) (holding that although some constraints on trade must be looked at in the light of the surrounding circumstances, there are some constraints that are by nature unduly restrictive); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967) (holding that the promotion of the defendants' self interest alone does not invoke the rule of reason to immunize otherwise illegal conduct), *overruled by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Broadcast Music Inc. v. CBS, Inc., 441 U.S. 1, 1-8 (1979) (holding that the defendants' issuance of blanket licenses did not constitute price fixing per se unlawful under the Sherman Antitrust Act).

74. *See* Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 42 (1930); NCAA v. Board of Regents, 468 U.S. 85, 103 (1984).

75. *See* Jacobs, *supra* note 31, at 47-58.

76. *Id.* at 48-49.

77. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1994).

78. National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

79. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

the most egregious and blatant anticompetitive business practices;[80] such as price fixing,[81] group boycotts,[82] resale price maintenance,[83] and vertical territorial restrictions.[84] Moreover, during this time period, the Court found various joint venture rules—such as those utilized by professional sports leagues—to be per se violations even though these joint venture rules increased product quality and output, and offered consumers lower prices.[85] By the end of the 1970s, the Supreme Court, however, dramatically reversed its position on per se antitrust violations by expressly overruling or extremely limiting its application of the per se doctrine.[86] In *Broadcast Music, Inc. v. CBS, Inc.*,[87] the Court limited its approach to price fixing in such a way that is relevant to sports broadcasting.[88] The Court stated:

> [O]ur inquiry must focus on whether the effect . . . [or] the purpose of the practice [is] to threaten the proper operation of our predominately free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."[89]

Moreover, the Court further pointed out that not all agreements or business practices "among actual or potential competitors that have an [effect] on price are *per se* violations" of the antitrust laws or are unreasonable restraints on

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80. *See* WEILER & ROBERTS, *supra* note 13, at 133.

81. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

82. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

83. Dr. Miles Med. Co. v. John D. Parks & Sons Co., 220 U.S. 373 (1911).

84. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

85. WEILER & ROBERTS, *supra* note 13, at 133 (citing United States v. Topco Assocs., 405 U.S. 596 (1972); United States v. Sealy, 388 U.S. 350 (1967); Silver v. NYSE, 373 U.S. 341 (1963)).

86. *Id.*; *see also* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 298 (1985) (holding that a wholesale purchasing cooperative was not guilty of expelling a member for secretly operating a wholesale supply business in direct competition with the cooperative); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977) (overturning the per se rule against a manufacturer placing territorial restrictions on its distributors).

87. Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 24 (1979) (holding that an organization that retained the nonexclusive copyright licenses for the musical compositions of multiple composers did not violate antitrust laws per se by selling the right to play all of its licensed music to commercial broadcasters at a set price).

88. *Id.* at 19-20.

89. *Id.* (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).

trade.[90] This reasoning is similar to that used by Congress when it permitted teams to pool their television broadcast rights through the enactment of the Sports Broadcasting Act.[91]

2. *The Rule of Reason Test*

The Court has utilized the rule of reason test for analyzing antitrust questions for over 150 years. The rule of reason standard was first set forth in *Standard Oil Co. v. United States*.[92] Unlike the per se test, the rule of reason test allows the defendant to show that the procompetitive benefits an agreement or business practice creates outweighs its anticompetitive evils.[93] This allows courts to apply more flexibility in ruling on antitrust issues.[94]

The Supreme Court has held that the majority of professional sports league agreements and business practices should be reviewed under a rule of reason analysis.[95] Many commentators have theorized that because of the unique nature of professional sports leagues,[96] the use of the rule of reason test over the per se test is mandatory.[97]

One of the most important antitrust decisions affecting sports broadcasting utilized the ancillary restraint doctrine.[98] Under the common law theory of ancillary restraints, those restraints that satisfy a limited rule of reasonableness, are lawful.[99] Therefore, the ancillary restraints placed by sports leagues on individual teams may be lawful if they lead to a legitimate business purpose.[100]

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90. *Id.* at 23.

91. *See* Sports Broadcasting Act of 1961, 15 U.S.C. § 1293 (1994).

92. Standard Oil Co. v. United States, 221 U.S. 1, 66-68 (1911).

93. *Id.* at 58.

94. National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

95. *See* NCAA v. Board of Regents, 468 U.S. 85, 103 (1984); *see also* North Am. Soccer League v. NFL, 670 F.2d 1249, 1259 (2d Cir. 1982) (holding that sports league agreements should not be deemed illegal per se because these agreements could have legitimate procompetitive purposes in addition to anticompetitive effects).

96. *See supra* notes 36-50 and accompanying text.

97. *See, e.g.*, Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 770 (1987); *see also* Van Glish, *supra* note 15, at 94 (concluding that the Supreme Court provides that sports league arrangements should be viewed using the rule of reason test).

98. Chicago Prof'l Sports Ltd. Partnership v. NBA, 754 F. Supp. 1336, 1359 (N.D. Ill. 1991). Ancillary restraints are those restraints which are "attached and reasonably related to an otherwise lawful purpose." Van Glish, *supra* note 15, at 94.

99. Van Glish, *supra* note 15, at 94.

100. *See* Chicago Prof'l Sports Ltd. Partnership v. NBA, 754 F. Supp. at 1357-59; *see also* Rosenbaum, *supra* note 97, at 737-38 (stating that the surrounding business circumstances that

3. *The Consumer Welfare Test*

In the past fifteen years, the Supreme Court has shifted its antitrust focus and has based a majority of its decisions on a style of analysis that is founded in the teachings of neoclassic economics.[101] In this type of analysis, the relevant inquiry for the Court is whether the challenged business practice has a negative effect on competition.[102] The Court has paralleled the term "competition" with the term "consumer welfare."[103] Therefore, another way of analyzing sports broadcasting antitrust issues is to ask whether the leagues' practices have a negative impact on consumer welfare, such as diminished output of sports broadcasts or decreased fan viewership.

Regardless of the test used by the Court, it is clear that the underlying criteria of any sports broadcasting agreement is whether or not the restrictions placed on any individual team is reasonable in light of the legitimate business purposes of the league as a whole. Moreover, "[i]f league games are the output of a professional sports league, then it is only collective decisions designed to reduce the number of such games that threaten to diminish 'consumer welfare' within the meaning of Rule of Reason analysis."[104]

IV. SUPERSTATIONS AND ANTITRUST IMPLICATIONS

A traditional superstation is an autonomous television station which broadcasts its signal into a local viewing area, and whose signal is in turn intercepted "around the country by local cable companies for broadcast in their"

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lead to the challenged practice cannot be ignored by antitrust enforcement); Van Glish, *supra* note 15, at 94-95 (noting that the court may allow the ancillary restraint "even though a reduction in competition" may occur).

101. Jacobs, *supra* note 31, at 48 (citing Business Elecs. v. Sharp Elecs., 485 U.S. 717, 726, 735 (1988); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762-63, *reh'g denied*, 466 U.S. 994 (1984); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51, 53-55 (1977)).

102. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. at 53-55.

103. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984) (stating that "the rule of the marketplace . . . promotes the consumer interests that the Sherman Act aims to foster"). It is of interest to note that although the Court has only recently adopted this position, the floor debates in 1890 about the Sherman Antitrust Act suggest "that Congress designed the Sherman Act as a 'consumer welfare prescription.'" Jacobs, *supra* note 31, at 48 n.94 (quoting ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50-89 (1978)).

104. Jacobs, *supra* note 31, at 55-56.

viewing area.[105] Currently, there are three primary superstations broadcasting within the United States: WTBS (Atlanta, Georgia), WGN-TV (Chicago, Illinois), and WOR-TV (New York, New York).[106] As of December 1983, the WTBS signal reached over twenty-eight million homes, the WGN-TV signal reached over eleven million homes, and the WOR-TV signal reached over four million homes.[107] These numbers have been escalating ever since. These three superstations share one common attribute, they all broadcast a "heavy concentration of sports programming."[108] In fact, it is this heavy concentration of sports programming which has led to the development and promotion of these three particular stations.[109]

A. *Control of Superstations*

Prior to 1976, cable operators were not compelled to make payment to the copyright owners of the programs retransmitted on their cable stations.[110] Realizing the inherent unfairness of this system, Congress sought to not only compensate the rightful copyright holder, but to increase the quantity of programming available to cable viewers.[111] The Copyright Act of 1976[112] provided a solution which has become the "legal framework applicable to the modern superstation."[113] Under the Copyright Act, cable operators were permitted to rebroadcast a station's signal if they compensated the original copyright owners.[114] Because of the volume of broadcasting, Congress realized it would be impossible—or at minimum administratively overwhelming—for the cable operators to compensate each individual copyright holder and created the

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105. Jason S. Oletsky, Note, *The Superstation Controversy: Has the NBA Slam Dunked the Superstations?*, 11 U. MIAMI ENT. & SPORTS L. REV. 173, 173 (1993). The mega-stations, WGN-TV and WTBS, do not operate in this manner.

106. Garrett & Hochberg, *supra* note 12, at 174.

107. *Id.* (relying on CABLEVISION, Dec. 19, 1983, at 195).

108. *Id.* at 175.

109. *Id.* at 175 n.78 (relying on BROADCASTING, June 27, 1983, at 68, 70).

110. Leonard F. Feldman, *The Chicago Bulls Win Again: Antitrust, Sports and Broadcasting*, 1 SPORTS LAW. J. 51, 59 (1994).

111. *Id.*; *see also* Hubbard Broad., Inc. v. Southern Satellite Sys., Inc., 777 F.2d 393, 396 (8th Cir. 1985) (describing that the intent of Congress was to enable cable systems to retransmit programming carried on distant broadcast signals so as to allow the public "wider dissemination of works carried").

112. Copyright Act of 1976, 17 U.S.C. § 111 (1994).

113. Feldman, *supra* note 110, at 59.

114. 17 U.S.C. § 111.

Copyright Royalty Tribunal to oversee the issuing of licenses, collecting royalty fees, and dividing the royalties among the respective copyright holders.[115]

This regulatory scheme resulted in syndicated exclusivity, or syndex.[116] Basically, the syndex rules afford protection to the superstations that hold the rights to syndicated programs by granting these stations the ability to prevent cable operators in the local viewing area from televising the same programming, resulting in what is commonly known in the sports world as a "black-out."[117] This was not, however, the original purpose of the rules. The rules were intended to permit local stations, who bought syndicated programming, to have superstations blocked out.[118] It is this application of the syndex rules, which has lead to the ongoing antitrust litigation among the Chicago Bulls, WGN-TV, and the NBA.[119]

B. *The Case of the Chicago Bulls*

Interestingly enough, the saga of the Chicago Bulls began in 1990, when the NBA sold its broadcast rights to both a sponsored television network (NBC) and to a superstation (TNT), which resulted in upwards of $6.8 million of revenue per NBA team in 1991.[120] The NBA contends that this form of marketing has led to the resurgence and economic welfare of the league as a whole.[121]

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115. Feldman, *supra* note 110, at 59-60.

116. *Id.* at 60. The syndex rules have taken a rather interesting rollercoaster ride over the years. The rules were first promulgated in 1965, rescinded in 1980, and reintroduced in 1990 in an effort to promote diversity in syndicated programming. *Id.* at 61 n.45 (citing United Video v. FCC, 890 F.2d 1173, 1177-78 (D.C. Cir. 1989)).

117. *Id.* The syndex rules state: "[A] cable community unit located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal." Syndicated Program Exclusivity: Extent of Protection, 47 C.F.R. § 76.151 (1997).

The ability to "black-out" a television signal is accomplished through the use of a microwave feed which enables one signal to be broadcast to a local viewing area, while simultaneously televising a different signal in a remote area. Chicago Prof'l Sports Ltd. Partnership v. NBA, 754 F. Supp. 1336, 1346 (N.D. Ill. 1991). This ability to split signals has an enormous impact on the superstations' revenue by increasing advertising revenues. *Id.* In effect, a superstation not only can broadcast two different programs, but can also sell a segment of air time to multiple advertisers. *Id.*

118. Feldman, *supra* note 110, at 61 & n.45.

119. Chicago Prof'l Sports Ltd. Partnership v. NBA, 754 F. Supp. at 1347.

120. *Id.* at 1340.

121. *Id.* at 1342. The NBA offers as evidence of the financial benefit of this form of marketing the fact that in 1981, total league revenues for both cable and free television totaled $23

A major component of this marketing strategy has been to restrict the number of local and superstation telecasts that any individual team may sell on its own.[122] Specifically, the NBA's 1991 television policy, permitted each team to broadcast up to forty-one games—either home or away—with all the revenue received from these broadcasts going directly to the individual team.[123] The only major restriction imposed by this policy is that an NBA team could not broadcast any game on free television, cable television, or on a superstation at the same time NBC was televising an NBA game as part of the national contract.[124]

In accordance with this policy, the Bulls and WGN-TV entered into a contract which permitted WGN-TV the right to broadcast twenty-five games for both the 1989-1990 and 1990-1991 seasons, with the option to extend the contract from the 1991-1992 season through the 1993-1994 season.[125] This contract was highly beneficial to both the Bulls and WGN-TV, however, prior to the 1990-1991 season the NBA Board of Governors proposed to reduce the number of permitted superstation broadcasts to twenty games, which in effect could terminate the contract.[126] The NBA proposed this reduction because they feared that the Bulls would continue to increase its superstation broadcasts "into a huge, coast-to-coast phenomenon that would operate to the detriment of the other NBA clubs."[127] The stakes on both sides of this dispute were enormous. WGN-TV and the Bulls risked losing a profitable commodity, revenues from five broadcasts, and the NBA risked losing its omnipresent control over the individual teams.[128]

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million compared with total league revenues in excess of $180 million from the 1991 contracts with NBC and TNT. *Id.*

122. *Id.* The reasoning offered by the NBA for this restriction is to increase the ratings and advertising revenues of those games broadcast as part of the pooled broadcasting agreement of which all teams share in the profits. *Id.*

123. *Id.* at 1344.

124. *Id.*

125. *Id.* at 1347. Although both the original contracts and the contemplated options were for a total of 25 games, because of the increasing popularity of the Chicago Bulls—thanks to Michael Jordan—WGN-TV was more than willing to increase the amount of aired Bulls games at any time. *Id.*

126. *Id.* at 1347-48. The original contract contained a provision which stated, "In the event that [NBA] league rules, during the term of the contract, are amended to bar the Bulls from giving WGN at least 21 games, 'due to [WGN's] status as a superstation,' either party has the option of terminating the agreement . . . ." *Id.* at 1348.

127. *See* Goodman, *supra* note 12, at 487.

128. *Id.* Commentary in the sports world feared that if the NBA lost the litigation that any further restraints on the activities of the individual teams would be considered an illegal restraint. *Id.*; *see also* Steve Nidetz, *WGN-NBA Suit Could Be Landmark*, CHI. TRIB., Dec. 21, 1990, § 4, at 7 (discussing the implications of a pro-superstation ruling within the sports arena);

With the NBA holding firm to its decision to reduce the allowable quantity of games that any individual team could sell to a superstation, WGN-TV and the Chicago Bulls filed an antitrust action against the NBA alleging that the NBA's five game reduction constituted "a horizontal agreement among the NBA teams to restrict output and to boycott superstations, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1."[129]

The crux of the NBA's defense can be broken down into three arguments; (1) that the five game reduction was protected from antitrust challenge by the Sports Broadcasting Act, (2) the five game reduction had no meaningful restraining effect on trade, and (3) assuming that a restraint was found, that it was not an unreasonable restraint.[130] The court considered the threshold issue to be whether the superstation rules as proposed by the NBA are exempt from antitrust attack by virtue of the Sports Broadcasting Act of 1961.[131] The relevant portion of the Sports Broadcasting Act, which affords antitrust immunity states, "[A]ny joint agreement . . . by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the right of such league's member clubs in the sponsored telecasting of . . . games."[132] The court concentrated on the fact that the "Bulls, not the NBA, owned and licensed the rights to the five games that were transferred to WGN and which the five-game reduction would eliminate."[133] More importantly, the court found that "[t]his was not a sale or transfer by 'any league of clubs' but rather by the Bulls themselves, though subject to league approval, and the antitrust laws apply."[134] This finding is of immense importance to individual sports teams because if the Sports Broadcasting Act does not apply to sales or transfers of broadcasting rights made by an individual team, then any restraint placed on those sales will be subject to antitrust scrutiny.

As to the issue of whether a reduction of five games could be construed as a restraint on trade, the court points out that not only do the Bulls and WGN-TV

Richard Sandomir, *Bulls, Superstations and Power Moves*, N.Y. TIMES, Apr. 16, 1991, at B11 (discussing the ruling of a federal district court that the NBA could not impose a limit of 20 games on superstations without violating the Sherman Antitrust Act).

129. Chicago Prof'l Sports Ltd. Partnership v. NBA, 754 F. Supp. at 1339.

130. *Id.* at 1349.

131. *Id.* at 1349-50.

132. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (1994).

133. Chicago Prof'l Sports Ltd. Partnership v. NBA, 754 F. Supp. at 1349.

134. *Id.* The NBA's arguments that the rights sold to WGN-TV were transferred by the league rather than the Bulls were unpersuasive to the court. *Id.* at 1350. The court reasoned that WGN-TV bought a license from the Bulls and that the Bulls, as the legal copyright holder of that license, individually transferred the license and retained all allowable revenues from the transfer. *Id.*

face the loss of revenue, but each are facing the threat of nonmonetary ramifications.[135] In response, the NBA argued, unconvincingly, that any potential or actual harm was "self inflicted" by the Bulls and WGN-TV because of "their failure to take advantage of reasonable business options open to them."[136]

The next defense presented by the NBA was that even if the court did in fact find a restraint on trade, the restraint was not in itself unreasonable.[137] The court held that the five game reduction represented a concerted effort to directly control where Bulls games are shown, correlating the NBA's actions to that of a group boycott.[138] The court further clarified this comparison by stating that "[b]oycotts are boycotts, however, even when they target customers [viewers] rather than competitors."[139]

In applying an antitrust analysis to determine the reasonableness of a restraint, the main question to ask is whether the pro-competitive benefits of a business agreement or practice outweighs its anticompetitive evils.[140] In the case of the Bulls, the court held that the NBA's five game reduction resulted in a significant restraint on trade for the following reasons: 1) it constrained competition between the teams and the league; 2) it reduced competition between basketball on superstations and basketball on free television; 3) it placed an artificial limit on the number of games in the market; and 4) it keeps viewers from deciding if the games they will watch are on superstations or free television.[141] "In short, it [the five game reduction] interferes with the ordinary

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135. *Id.* at 1353. As to nonmonetary injury, the court points to the fact that five fewer games means "less exposure and fewer opportunities to build a strong and permanent following" for the Bulls. *Id.* Additionally, the court stated that for "WGN it means lost opportunities to run high-profile, on-air promotions for the rest of its programming during Bulls telecasts which draw big audiences." *Id.* Moreover, the court found that both the Bulls and WGN-TV each stand to suffer injury to their reputations and "the good will their broadcasts generate among viewers." *Id.*

136. *Id.* at 1353 (quoting in part NBA's Rule 41 Motion to Dismiss at 5). The court was so unconvinced by this argument that in its opinion, it stated as an analogy "[i]f I swing my fist at your face, you may decide to duck. But if you stand still, and I deck you, I am the cause of your injury. You did not have to punch yourself." *Id.*

137. *Id.* at 1349.

138. *Id.* at 1356.

139. *Id.*

140. *See supra* Part III.D.

141. Chicago Prof'l Sports Ltd. Partnership v. NBA, 754 F. Supp. at 1356-57. Judge Will further found that the five game reduction "preempts market mechanisms by deciding for viewers, broadcasters and advertisers that they do not need games that they are currently demanding and . . . 'impairs the ability of the market to advance social welfare by ensuring the provision of desired goods.'" *Id.* at 1357 (quoting FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986)).

give and take of the marketplace. Output is lower than it would be in a competitive environment. Prices may be higher."[142]

Although this decision was affirmed on appeal, Judge Easterbrook's majority opinion did leave the door open for a different outcome in future cases.[143] Specifically, Judge Easterbrook hints that the question of whether a professional sports league is a joint venture or single entity is still open to interpretation, suggesting that perhaps "the NBA is a joint venture only in the production of games; in the hiring of inputs (from basketballs to players) and in the sale of their product, the owners are competitors."[144] If that was the case, then the NBA would be working as a cartel because of the reduction in output, and only an express exemption from the antitrust laws would permit the NBA to act cooperatively.[145] Because all parties in this litigation treated the NBA as a joint venture, Judge Easterbrook declined to address the issue. In dicta, however, he proffered that the issue of "[w]hether a sports league is a single entity for antitrust purposes has significance far beyond this case."[146]

Even with this decision, the litigation among the Bulls, WGN-TV, and the NBA continued. In two separate actions litigated between October 1993 and April 1994, and again in June 1995, the Bulls and WGN-TV sought to not only continue the injunction against the NBA but to expand the injunction and broadcast additional games on WGN-TV.[147] This dispute continued for over six years until all outstanding points of contention were settled out of court.[148]

The case of the Bulls, however, leaves many issues concerning broadcasting agreements in a state of flux—primarily the issue of under what circumstances will the court find applicable the antitrust exemption provided in the Sports Broadcasting Act.[149] Clearly any transfer of broadcast rights initiated by an individual team will not be covered by the Act. The question remains whether a transfer by a sports league to a superstation will be protected. Additionally, superstations are not the only form of technology cashing in on sports mania. Pay-per-view is quickly expanding into the lucrative arena of airing professional sporting events.

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142. *Id.*

143. *See* Chicago Prof'l Sports Ltd. Partnership v. NBA, 961 F.2d 667, 672-73 (7th Cir. 1992).

144. *Id.* at 672.

145. *Id.*

146. *Id.* at 673.

147. Teri L. Vlasak, *NBA BULLS SUIT: Chicago Bulls and NBA Settle Antitrust Suit; Bulls Increase Games on "Free TV" and Reinstate Nationwide Cable Coverage*, BUS. WIRE, Dec. 12, 1996, *available in* WESTLAW, BUSWIRE database, sports industry keyword.

148. *Id.*

149. Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291-1295 (1994).

V. PAY-PER-VIEW AND ANTITRUST IMPLICATIONS

It is no surprise to anyone who reads the sports section of their local newspaper that salaries of athletes have reached a new all time high. As professional sports leagues continue to see players' salaries rise, and revenues continue to stabilize, league management is actively looking into alternative forms of broadcasting to increase revenues.[150] One possible alternative is the utilization of pay-per-view broadcasting. The growth of pay-per-view has increased significantly in the past few years. For example, in 1991, only three percent of all households in the United States were wired to receive pay-per-view transmissions.[151] Commentators have speculated, however, that in the near future, technology will enable viewers to have access to up to fifty different pay-per-view sporting events in any given week.[152] In fact, in 1995, the approximated revenues from pay-per-view broadcasts were predicted to be in excess of $781 million.[153] From these figures and predictions, it seems evident that the utilization of pay-per-view broadcasting affords professional sports leagues an additional source of revenue.

It has been argued that pay-per-view, superstations, and free television can happily co-exist.[154] The basis of this argument is founded in the fact that currently sporting events offered on pay-per-view systems are not usually aired over free television or superstations.[155] As technology continues to improve and advance, however, Congress is worried that sporting events will be "siphoned" away from free television.[156] In an effort to assure that Americans will always have access to the sports they love on free television, Congress, in section 26 of the Cable Television Consumer Protection and Competition Act of 1992,[157] directed the Federal Communications Commission to "conduct an ongoing study on the carriage of local, regional, and national sports programming by broadcast stations, cable programming networks, and pay-per-view services."[158]

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150. Van Glish, *supra* note 15, at 82.

151. Steve Nidetz, *Pay-Per-View: Monster or Mint?*, HOUS. CHRON., Nov. 24, 1991, at Sports 14.

152. *Id.*

153. Van Glish, *supra* note 15, at 83.

154. Ira Horowitz, *The Implications of Home Box Office for Sports Broadcasts*, 23 ANTITRUST BULL. 743, 768 (1978).

155. *See* Nidetz, *supra* note 151, at Sports 14.

156. *Id.*

157. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as 47 U.S.C. § 521 (1994)).

158. *Id.* §§ 26, 28, 106 Stat. at 1502, 1503.

A couple of public interest problems arise from the siphoning of sporting events from free television: 1) siphoning limits the viewing audience to only those who can afford pay television; 2) events will be available to fewer viewers because not all homes are adapted to receive pay-per-view signals; and 3) sports broadcasting will risk losing its antitrust exemptions.[159] The possibility that the professional sports leagues would lose its antitrust exemptions is well founded. Representative Peter H. Kostmayer introduced the Fairness to Fans Act in July of 1991.[160] This bill, had it passed, would have required sports leagues to broadcast a percentage of games on network television or lose its immunity from antitrust laws for pooled league sales.[161] From all this congressional activity, it seems clear that Congress intends to keep a close eye on sports broadcasting—pay-per-view in particular—to see that major sporting events are not siphoned away from the public airways.

VI. CONCLUSION

The antitrust laws were enacted to protect consumers against injury from business practices or agreements in restraint of trade. Because sports broadcasting agreements directly effect the logistics and quantity of sports broadcasts available for consumption, they fall within the purview of the antitrust laws, unless expressly exempted through congressional action. The rule of reason test will continue to be implemented by courts when analyzing sports broadcasting contracts because of the potential for these agreements to either increase or reduce the availability of sporting events available for consumption by the viewing audience.

As illustrated in the case of the Bulls, the Sports Broadcasting Act of 1961 does not apply where an individual team transfers its right to broadcast to a cable station.[162] Judge Easterbrook did, however, hint at the possibility that a sports league might still be considered a single entity, which would greatly challenge an individual team plaintiff in bringing an antitrust action against the league.[163]

This inquiry by Congress did not put the issue to sleep. The following year, in an address to the Federal Communications Bar Association Sports Siphoning Seminar on the role of Congress in sports programming, Representative Edward Markey (D-Mass.) stated, "[M]y job is to preserve free over-the-air television." *Free Agent Frenzies: Markey Says His Job is to Protect the Fan and Free TV Sports*, COMM. DAILY, Sept. 29, 1993, at 3.

159. Van Glish, *supra* note 15, at 104-05.

160. H.R. 2976, 102d Cong. (1991).

161. *Id.*

162. Chicago Prof'l Sports Ltd. Partnership v. NBA, 95 F.3d 593, 595-96 (7th Cir. 1996).

163. *Id.* at 598.

Yet, for the time being, it seems clear that an individual team has the right to enter into agreements with superstations to broadcast its games to its own economic advantage.

Although pay-per-view will remain a viable alternative for professional sports leagues seeking additional sources of revenue, Congress is closely monitoring the situation. If a time should come in the future where more and more sporting events are leaving free television for pay-per-view services, Congress is likely to step in and proclaim that such agreements violate section 1 of the Sherman Antitrust Act if fewer fans will have access to the broadcasts. Die-hard sports enthusiasts can rest assured, for the time being, that the Super Bowl, World Series, Stanley Cup, and the NBA finals will remain on free network television or on generally available cable stations.

Ivy Ross Rivello

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