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THE SPORTS BROADCASTING ACT: IS AN UPDATE NEEDED?

Thomas Moran

Introduction

Sports broadcasting contracts have become incredibly lucrative in recent years, bringing the major sports leagues massive revenues just from telecasting games. The National Football League (NFL) receives nearly \$2 billion annually from ESPN for the rights to broadcast one game each week on Monday nights.¹ Under current agreements, most of which expire after this season, the NFL collects over \$3 billion annually in broadcast rights.² Based on the new extension with ESPN, the NFL will likely expect that figure to increase substantially when it negotiates new contracts for next season. Major League Baseball (MLB) sells broadcast rights to ESPN, FOX, and Turner Sports for nearly \$650 million annually as part of a seven year deal that will end after the 2013 season.³ Though this seems like a paltry sum compared to the NFL, only a small number of games are broadcast nationally; each MLB team also negotiates its own local broadcast contracts, bringing in even more revenue.

These massive contracts help demonstrate how popular professional sports are in the United States. Though such contracts may seem too large, sports consistently provide the highest television ratings every year. In 2010, NFL games were the top five, and eight of the top

¹ Aaron Kuriloff and Alex Sherman, *ESPN, NFL Extend Broadcast Agreement Through 2021 Season*, BLOOMBERG (Sept. 8, 2011), <http://www.bloomberg.com/news/2011-09-08/espn-nfl-reach-eight-year-contract-extension-for-monday-night-football.html>.

² See *NFL Media Rights Deals For '07 Season*, SPORTS BUSINESS DAILY (Sept. 6, 2007), <http://www.sportsbusinessdaily.com/Daily/Issues/2007/09/Issue-238/NFL-Season-Preview/NFL-Media-Rights-Deals-For-07-Season.aspx>.

³ See Maury Brown, *MLB on precipice of renewed success*, VARIETY (Apr. 16, 2011), <http://www.variety.com/article/VR1118035491>.

ten, most watched programs.⁴ The 2012 Super Bowl was the most watched television program in history,⁵ just ahead of the 2010 and 2011 games.⁶ Professional sports leagues would not be able to negotiate these contracts without the help of Congress because their pooling of broadcast rights might violate antitrust law. The Sports Broadcasting Act (SBA) was passed by Congress in 1961, and exempted the professional sports leagues from antitrust scrutiny for broadcast rights.⁷ When Congress passed the statutes, it could not have contemplated how lucrative sports broadcasting rights would become; nor could it have contemplated the invention of cable television and the thousands of channels that could broadcast every game. Fifty years later, the Sports Broadcasting Act should be revisited and updated to reflect innovations in broadcasting technology and the effect they have had on sports broadcasts. Though a repeal of the antitrust exemption would likely be too great and possibly hurt consumers, the language of the SBA should be updated to clarify whether the antitrust exemption extends to cable television contracts, internet broadcasting, and other forms of media.

This comment will address the history of the Sports Broadcasting Act, its interpretation by courts, and current issues that should be resolved. Part I will outline the Sports Broadcasting Act and the Sherman Act. Part II will analyze the proliferation of cable and satellite television and the effect these media have had on the interpretation of the Sports Broadcasting Act. Part III will discuss the growth of networks owned by professional sports leagues and analyze whether the NFL Network would survive an antitrust challenge. Part IV will provide suggestions for

⁴ See *Football TV Ratings Soar: the NFL's Playbook for Success*, NIELSEN WIRE (Jan. 28, 2011), http://blog.nielsen.com/nielsenwire/media_entertainment/football-tv-ratings-soar-the-nfls-playbook-for-success/.

⁵ Richard Sandomir, *Super Bowl Nets Record Viewership*, N.Y. TIMES (Feb. 6, 2012), <http://fifthdown.blogs.nytimes.com/2012/02/06/super-bowl-nets-near-record-ratings>.

⁶ Kuriloff, *supra* note 1.

⁷ See 15 U.S.C. §§ 1291-1295 (2006) (hereinafter SBA).

updating the Sports Broadcasting Act so that it better reflects the current state of sports broadcasting.

I. HISTORY OF THE SPORTS BROADCASTING ACT AND THE SHERMAN ACT

A. History Leading to the Sports Broadcasting Act: *United States v. NFL*

Before Congress passed the Sports Broadcasting Act, the broadcast rights to sporting events were unregulated except for the Sherman Act. Because of two cases decided by the same judge about 8 years apart,⁸ Congress passed the Sports Broadcasting Act.⁹

In 1953, the United States brought suit against the NFL alleging the league violated the Sherman Act.¹⁰ Specifically, the NFL's bylaws outlawed any team from broadcasting its game within 75 miles of another team's city when that other team was playing unless the other team allowed the outside broadcast.¹¹ So, fans were essentially restricted to watching only their hometown team, because teams did not want to potentially lose fans by allowing two outside teams to broadcast a competing game. Judge Grim found this to be a clear restriction on trade and competition between the teams.¹² But, Judge Grim pointed out that the restriction on trade needs to be unreasonable in order to violate antitrust laws.¹³

Football and all other professional sports are unique in regard to restricting trade.¹⁴ Judge Grim noted that the teams in a professional league need close competition, because each team

⁸ See *United States v. Nat'l Football League*, 116 F. Supp. 319 (E.D. Pa. 1953); *United States v. Nat'l Football League*, 196 F. Supp. 445 (E.D. Pa. 1961).

⁹ See generally 15 U.S.C. §§ 1291 (2006).

¹⁰ See generally *United States v. Nat'l Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

¹¹ *Id.* at 321.

¹² *Id.* at 322 ("This, therefore, is a clear case of allocating marketing territories among competitors, which is a practice generally held illegal under the anti-trust laws.").

¹³ *Id.* at 323.

¹⁴ *Id.* at 323 ("Football is a unique type of business. Like other professional sports which are organized on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its

needs to be able to compete in order for the league to succeed.¹⁵ Judge Grim pointed out that there are other options the NFL could take to try to protect the weaker teams.¹⁶ While the other options would help with competitive balance, they would have little effect on the revenues that teams bring in. Instead, Judge Grim points out that weaker teams need to protect their home attendance in order to substantially increase revenues.¹⁷ If teams were allowed to fail, then the strong teams would have no one to play, and the league would inevitably collapse. During the early days of the NFL, teams faced significant financial difficulties.¹⁸ In fact, less than half of the teams were expected to succeed financially during the NFL's early years.¹⁹ Because of these financial difficulties, there was a reasonable rationale for treating sports leagues, like the NFL, differently from other industries. Allowing the NFL to restrict its broadcasting rights would actually help promote parity in the league rather than hurt competition.²⁰ Gate receipts made up the largest portion of revenue for NFL teams during the 1950s, and preventing the broadcast of

product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.”).

¹⁵ *Id.* (“If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both weaker and stronger teams, would fail, because without a league no team can operate profitably.”).

¹⁶ 116 F. Supp 319 at 324 (E.D. Pa. 1953) (Among the options were limiting sign bonuses, structure the player draft to benefit weaker teams, imposing a trade deadline, imposing a salary cap, and allowing weaker teams to take players away from perennially strong teams. While we see most of these in professional sports today, Judge Grim’s last suggestion is, thankfully, not used.)

¹⁷ *Id.* at 325 (“The greatest part of the defendant clubs’ income is derived from the sale of tickets to game. Reasonable protection of home game attendance is essential to the very existence of the individual clubs, without which there can be no League and no professional football as we know it today.”).

¹⁸ *Id.* at 323.

¹⁹ *Id.* at 323.

²⁰ *Id.* at 325 (“This particular restriction promotes competition more than it restrains it in that its immediate effect is to protect the weak teams and its ultimate effect is to preserve the League itself. By thus preserving professional football this restriction makes possible competition in the sale and purchase of television rights in situations in which the restriction does not apply.”).

competing games helped ensure that teams drew large crowds, and hence the financial stability of the league.²¹

The issue would come up again less than ten years later; Judge Grim had the opportunity to rule on the NFL's broadcast practices again in 1961.²² The NFL asked Judge Grim to hold that a contract signed with the Columbia Broadcasting System (CBS) was within the bounds of the original holding from 1953.²³ In the 1953 case, Judge Grim held that the league and teams collectively could not enter into agreements that restricted where the broadcasts of individual games occurred.²⁴ The contract gave CBS the exclusive rights to broadcast all NFL games and decide which games to broadcast.²⁵ This was an important shift for the NFL.²⁶ Prior to the contract with CBS, each team owned and sold the rights to its own games.²⁷ Such a fragmented approach obviously would result in smaller total revenues, since the less talented teams would have weak bargaining power and would get much smaller broadcast contracts than the strong teams. A pooled contract would force a network to pay a premium for the weaker teams in order to have the chance to broadcast the more attractive games. The NFL also seemed to pool the broadcasting rights because of a fear of competition from the American Football League (AFL), a start-up professional football league.²⁸ In 1960, the AFL pooled its teams' broadcast rights for

²¹ See Lacie L. Kaiser, *Revisiting the Sports Broadcasting Act of 1961: A Call for Equitable Antitrust Immunity from Section One of the Sherman Act for All Professional Sport Leagues*, 54 DEPAUL L. REV. 1237, 1244 (2005).

²² See *United States v. Nat'l Football League*, 196 F. Supp. 445 (E.D. Pa. 1961).

²³ *Id.*

²⁴ *Id.* at 447.

²⁵ *Id.* at 446.

²⁶ *Id.* at 446 ("Defendants concede that the 1961 NFL-CBS contract marks a basic change in the National Football League television policy.").

²⁷ *Id.*

²⁸ Philip M. Cox II, *Flag on the Play? The Siphoning Effect on Sports Television*, 47 FED. COMM. L.J. 571, 574 (1995).

all games that season and sold the package to the American Broadcasting Company (ABC).²⁹ The NFL quickly reacted to this new approach with its own contract with CBS.

The contract with CBS clearly restricted competition between the teams, controlling where games could be broadcast.³⁰ But, the question was whether the contract would survive under Judge Grim's narrow holding in favor of the NFL from the 1953 case. Judge Grim held in the first case that the NFL and its teams could not make agreements that intended to restrict where broadcasts of games could occur.³¹ But Judge Grim's 1953 decision did hold that an *individual team* may restrict other games in its home territory when it is playing a home game.³² The new contract with CBS avoided this by giving the broadcaster the power to restrict telecasts. Since the contract gave CBS complete power to decide which games to broadcast and where to broadcast those games, it restricted trade and competition significantly more than the holding in 1953, even though it did not seem to violate the ruling from the 1953 case. Judge Grim prohibited the performance of the contract,³³ effectively leaving the NFL and its teams without any broadcast contract for the upcoming season.³⁴

B. The Sports Broadcasting Act and its Legislative Intent

Quickly after Judge Grim's new decision, the NFL lobbied Congress to pass legislation that would help the league avoid the new antitrust problems. Congress quickly came to the NFL's rescue, passing the Sports Broadcasting Act in just seventy-two days.³⁵ The new law

²⁹ *Id.*

³⁰ 196 F. Supp. 445, 447 (E.D. Pa. 1961) ("Thus, by agreement, the member clubs of the League has eliminated competition among themselves in the sale of television rights to their games.").

³¹ *Id.*

³² 116 F. Supp. 319, 323 (E.D. Pa. 1953).

³³ 196 F. Supp. 445, 447 (E.D. Pa. 1961).

³⁴ David L. Anderson, Comment, *The Sports Broadcasting Act: Calling It What It Is-Special Interest Legislation*, 17 HASTINGS COMM. & ENT. L.J. 945, 949 (1995).

³⁵ Cox II, *supra* note 28, at 574.

gave professional sports leagues a broad exemption from antitrust scrutiny in regards to broadcast rights:

The antitrust laws, ... shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, 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 ...engaged in by such clubs.³⁶

Essentially, professional sports leagues could now pool the broadcast rights of individual teams and sell the combined rights through a national television contract. The Senate Report explains the intent behind the SBA, and reveals how powerful professional sports could be even fifty years ago.³⁷ The report outlines why the legislation was needed in view of both of Judge Grim's decisions from 1953 and 1961. Very soon after Congress passed the SBA, professional sports leagues began to pool their broadcast rights. The AFL pooled its broadcast rights in 1960 and 1961, and the National Basketball Association (NBA) and National Hockey league (NHL) followed suit, each pooling their broadcast rights for sale to a national broadcast network.³⁸ Since the Justice Department decided to go after the NFL instead of other sports leagues, an inequity existed that needed to be rectified.³⁹

One of the main reasons for passing the SBA was similar to Judge Grim's reasoning from 1953: maintaining financial viability for all the teams, ensuring a competitive sports league.⁴⁰ Without a pooled broadcast rights contract, teams with less talent and from smaller cities would

³⁶ 15 U.S.C. §§ 1291 (2006).

³⁷ See generally S. REP. NO. 87-1087 (1961), reprinted in 1961 U.S.C.C.A.N. 3042, 1961 WL 4854 (hereinafter SENATE REPORT.).

³⁸ *Id.* at 3042-43.

³⁹ *Id.* at 3043.

⁴⁰ *Id.* at 3043.

have trouble selling broadcast rights, and would suffer financially.⁴¹ Weaker teams would have trouble selling broadcast rights because television networks would refuse to televise away games to the team's home market without a package of pooled rights.⁴² In today's world of television, with thousands of channels broadcasting every type of programming imaginable, this argument feels hollow. However, at the time, Congress' belief appears valid; with few television networks in 1961, it seems likely that weaker teams would have difficulty finding a partner to broadcast games.⁴³

Congress also highlighted the importance of revenue from broadcasting rights and the effect those contracts have on other revenue streams because better exposure will result in other opportunities to gain revenue.⁴⁴ Allowing teams to pool their rights allows every team to receive an equal amount of the revenue from that single broadcast contract. Congress believed this approach was necessary to ensure that there was not a great disparity in revenues between the teams.⁴⁵ Furthermore, pooling the rights together ensured that each club would get some exposure on television, which Congress believed was necessary to keep "prestige among home territory viewers with its reflection in home attendance and for drawing power in attracting talent."⁴⁶ At least a portion of this argument seems questionable. Since the broadcast contract with CBS would have given the network the power to decide which games to air, it does not seem at all certain that all teams would get equal exposure. For example, why would CBS want to show a Detroit Lions-Minnesota Vikings game when it could broadcast a New York Giants-

⁴¹ *Id.* at 3043 ("[A] league needs the power to make 'package' sales of the television rights of its member clubs to assure the weaker clubs of the league continuing television income and television coverage on a basis of substantial equality with the stronger clubs.").

⁴² *Id.*

⁴³ SENATE REPORT, *supra* note 37, at 3043. ("[O]nly a handful of these teams will hereafter be able to secure coverage on the limited network facilities now available.").

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

Dallas Cowboys game that would have a larger fan base and should attract more advertising dollars? While the smaller teams in the league might not enjoy the exposure that Congress believed would result from the SBA, they would at least share in the revenues earned from that Giants-Cowboys telecast, seemingly helping all the teams.

Judging by the Senate Report, Congress intended to help professional sports leagues ensure a level of financial success that would benefit both the league and the public. By allowing teams to pool broadcast rights, every team could be assured of an equal portion of revenue from broadcast rights contracts, which would help competition within a league. Furthermore, the SBA would help fans by guaranteeing that every team could have its games televised,⁴⁷ thereby benefitting the public at large. In 1961, technology was much different than it is today. Because there were so few television networks, less talented teams and teams in small media markets could not bring in the same revenue from broadcast rights as successful, large-market teams. Congress hoped to help sports leagues run more efficiently and equally through the passage of the SBA. To that end, the SBA was definitely successful. The NFL grew after passage of the SBA, and the number of sold-out games increased.⁴⁸ The SBA has allowed sports leagues to enjoy huge financial growth and success. However, as technology has evolved and sports leagues have become so wealthy and powerful, it is now questionable whether the SBA really improves sports programming for the public.

C. Brief Overview of the Sherman Act

⁴⁷ This seems questionable, since CBS could have chosen to only broadcast a few games each week across the entire country.

⁴⁸ Cox II, *supra* note 28, at 575.

The purpose of antitrust law is to promote consumer welfare by preventing actions that could restrict competition.⁴⁹ The Sherman Act tries to remedy this problem by promoting competition, because “the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”⁵⁰ The Sherman Act accomplishes this goal by focusing on restraints that result in higher prices and lower output and disregard consumer preferences.⁵¹ Two areas of the Sherman Act, sections one and two, are the most important in regards to the Sports Broadcasting Act.⁵²

Section 1 provides that “every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”⁵³ There are two tests to analyze a claim under section one: a per se approach or a rule of reason test.⁵⁴ The per se test is used when the action in question would always restrict competition and result in a lower output.⁵⁵ However, the per se test is not used in sports antitrust cases because of the unique nature of sports.⁵⁶ The per se test cannot apply to sports leagues some form of restraints are necessary if the league wants to succeed;⁵⁷

⁴⁹ See Michael Jay Kaplan, *Application of Federal Antitrust Laws to professional sports*, 18 A.L.R. FED. 489 (1974).

⁵⁰ See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

⁵¹ Ethan Flatt, Note, *Solidifying the Defensive Line: The NFL Network’s Current Position Under Antitrust Law and How It Can Be Improved*, 11 VAND. J. ENT. & TECH. L. 637, 641 (2009).

⁵² Kaiser, *supra* note 21, at 1240.

⁵³ 15 U.S.C. § 1 (2008).

⁵⁴ Kaiser, *supra* note 21, at 1241; see also *U.S. v. Addyston Pipe & Steel Co.*, 85 F. 271, 291, 299 (6th Cir.1898); *Standard Oil Co. v. U.S.*, 221 U.S. 1, 66 (1911).

⁵⁵ See *Nat’l Collegiate Athletic Ass’n v. Bd. Of Regents*, 468 U.S. 85, 99 (1984) (quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979)).

⁵⁶ Flatt, *supra* note 51, at 643.

⁵⁷ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 101, 104 S. Ct. 2948, 2960, 82 L. Ed. 2d 70 (1984) (“Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all. ... What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be

otherwise, stronger teams will force the weaker teams out of business by buying up available talent which would destroy revenues for the weaker teams.

Courts, therefore, will use the rule of reason test to decide whether a sports league incurs liability under antitrust law.⁵⁸ The rule of reason test typically has three factors that must be met:⁵⁹

(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition.⁶⁰

In terms of pooling broadcast rights, the teams in a league will always violate the first factor. However, because courts will balance all the factors, the true test becomes one of consumer welfare; so, the question becomes whether the practice taken will be detrimental to consumer welfare.⁶¹

A good example of the consumer welfare test in practice is *NCAA v. Board of Regents*.⁶² A per se test was inappropriate because the “case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.”⁶³ Instead, the Court outlined two situations where a restraint on trade would be considered unreasonable: (1) the nature of the contract imposing the restraint, or (2) the surrounding circumstances show that the intent was to restrain trade and increase prices.⁶⁴ The NCAA’s pooled contract cut down on the

completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed.”)

⁵⁸ Flatt, *supra* note 51, at 643.

⁵⁹ Kaiser, *supra* note 21, at 1242.

⁶⁰ *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988).

⁶¹ Flatt, *supra* note 51, at 642-43.

⁶² 468 U.S. 85 (1984) (hereinafter NCAA).

⁶³ *Id.* at 101. This view can be carried over to professional sports as well. If a professional league had no power over the competition of its teams, then it seems all but certain that the league would collapse.

⁶⁴ *Id.* at 103.

number of games televised and artificially raised prices to a point that hurt consumer welfare; if the NCAA did not have the agreement, more football games would have been televised.⁶⁵ Since the NCAA was not protected by the SBA, it had no antitrust protection. The Court found that the NCAA violated the Sherman Act because its restraint on the broadcasting of sporting events hurt consumer welfare.⁶⁶ This case laid out an efficient, though not decisive way to look at broadcast practices in terms of the Sherman Act: if the actions result in an increase in games televised and available to the public, it will likely pass the consumer welfare test. However, if there is a decrease in the number of games available to fans, then the antitrust concerns are strong.⁶⁷

Section two of the Sherman Act deals with monopolies. Its goal is to prevent individuals from gaining monopoly power through illegal practices.⁶⁸ The violator must have monopoly power in a given market or product and have taken some illegal action to build the monopoly.⁶⁹ If, however, the monopoly formed organically because of “a superior product, business acumen, or historic accident,”⁷⁰ then there is no Sherman Act violation. Section two has not been applied to professional sports leagues a great deal. Clearly the NFL, MLB, NBA, and NHL are all monopolies—they are the only viable leagues in their respective sports. However, monopolies are not consistently bad for consumers—for example, credit card systems and the cable industry are other examples of monopolies that are beneficial to the public, since the national scope allows for easier use by individuals.⁷¹ Similarly, professional sports leagues provide fans with positive experiences, generating fan interest in many cities and allowing for a more entertaining

⁶⁵ Ross C. Paolino, *Upon Further Review: How The NFL Network Is Violating The Sherman Act*, 16 SPORTS LAW. J. 1, 16 (2009).

⁶⁶ Flatt, *supra* note 51, at 644.

⁶⁷ Paolino, *supra* note 65, at 16.

⁶⁸ Kaiser, *supra* note 21, at 1242.

⁶⁹ *Id.*

⁷⁰ *United States v. Grinnell Corp.*, 384 U.S. 563, 571, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)

⁷¹ Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. Rev. 889, 898 (1999)

league.⁷² Since antitrust actions against sports teams have typically been analyzed under Section one, courts have not discussed Section two and professional sports teams a great deal, but it appears that they would likely be considered natural monopolies.⁷³

II. THE PROLIFERATION OF CABLE TELEVISION AND SATELLITE TELEVISION AND ITS EFFECT ON THE SPORTS BROADCASTING ACT

A. Interpreting the Sports Broadcasting Act: What Does “Sponsored Telecast” Mean?

For nearly thirty years, few challenged the SBA and its reach. Only minor aspects of the statute were litigated, dealing with issues like the blackout provisions,⁷⁴ and rival leagues or teams.⁷⁵ As technology evolved, though, the wording of the statute became more important. The SBA provides an exemption from antitrust scrutiny for agreements made for “the sponsored telecasting of the games of football, baseball, basketball or hockey.”⁷⁶ Congress did not define *sponsored telecasting*, so this phrase has caused confusion. When Congress passed the SBA in 1961, television was much more limited than today. Since network television channels were the only ones available, sponsored telecasting appeared to apply to all television channels. But today, with thousands of cable channels available for consumers to watch, and leagues to market their rights towards, the question is whether the SBA protects leagues that sell broadcast rights to cable television networks. A series of cases involving the Chicago Bulls and the superstation

⁷² *Id.* at 898-99.

⁷³ *See generally*, Smith v. Pro Football, Inc., 593 F.2d 1173, 1209 (D.C. Cir. 1978) (MacKinnon, J., concurring in part and dissenting in part).

⁷⁴ *See generally*, Blaich v. Nat'l Football League, 212 F. Supp. 319 (S.D.N.Y. 1962) (holding that the SBA applied to championship games and regular season games, so the NFL championship game could be blacked out in a team's home territory); WTWV, Inc v. Nat'l Football League, 678 F.2d 142 (11th Cir. 1982) (finding that a game can be blacked out on a station that is outside the team's home territory if the station penetrates that home territory).

⁷⁵ *See generally*, Mid-South Grizzlies v. Nat'l Football League, 720 F.2d 772 (3rd Cir. 1983) (holding that a league does not exercise illegal monopoly power prohibited under the SBA when it rejects a team's application to join the league).

⁷⁶ SBA, *supra* note 7, at §1291.

WGN provide an informative look at the definition of *sponsored telecast* and how the SBA should be treated today.

B. The Chicago Bulls Cases—A Narrow Construction of the SBA

Throughout the 1980s, the Chicago Bulls, an NBA team, licensed 25 games per season to WGN, a superstation based in Chicago.⁷⁷ A superstation is a unique network, because it is essentially both a local, over-the-air channel and a cable television channel.⁷⁸ Superstations broadcast over the air in their home markets and transmit via a cable network throughout the rest of the country.⁷⁹ There are superstations all over the country that project their signals to millions of homes.⁸⁰ Since a station like WGN has a much farther reach than the typical broadcast network, sports teams would prefer to broadcast on a superstation, thereby transmitting their games to many more homes.⁸¹ For the 1990-91 season, the NBA reduced the number of games a team could broadcast on a superstation from 25 to 20.⁸² In order to maximize revenue, all NBA teams pooled their broadcast rights together and the NBA sold the rights on behalf of the teams to NBC and Turner Network Television (TNT).⁸³ These contracts with NBC and TNT constituted the biggest portion of shared revenues for each team.⁸⁴ Each team received about

⁷⁷ Chicago Professional Sports Ltd. v. Nat'l Basketball Ass'n, 754 F. Supp. 1336, 1338 (N.D. Ill. 1991) (hereinafter NBA I)

⁷⁸ Brett T. Goodman, *The Sports Broadcasting Act: As Anachronistic As The Dumont Network?*, 5 SETON HALL J. SPORT L. 469, 485-86 (1995).

⁷⁹ *Id.*

⁸⁰ NBA I, *supra* note 77, at 1338 (Other examples of popular superstations include WTBS (Atlanta) and WWOR (New York).).

⁸¹ Goodman, *supra* note 78, at 487.

⁸² *Id.*

⁸³ *Id.* at 1340.

⁸⁴ NBA I, *supra* note 77, at 1340.

\$8.5 million from the league that year; about 80% of that total, \$6.8 million, came from the television contracts with NBC and TNT.⁸⁵

As a result, the Bulls and WGN sought an injunction preventing the NBA from enforcing the new 20 game limit.⁸⁶ They argued that the new limit violated Section 1 of the Sherman Act because it restricted output and essentially boycotted superstations.⁸⁷ The Bulls wanted to supplement their income from the national broadcast contract by selling broadcast rights for 25 games to WGN, thereby expanding their reach nationally.⁸⁸ At the time, the Bulls had the NBA's best player, Michael Jordan, and hoped to capitalize on his popularity.⁸⁹ While this strategy would obviously be beneficial to the Bulls, other NBA teams were worried.⁹⁰ Less successful teams and teams from smaller markets feared that Jordan and the Bulls would draw away their own fans if the Bulls were allowed to broadcast more games nationally.⁹¹ The NBA seemed to have a valid argument here. Shared revenues did not constitute the primary source of income for many NBA teams; revenues from the national television contract made up only 15-20% of revenue for the richest NBA teams.⁹² Successful, talented teams tended to be the richer teams, and their success helped breed more opportunities to increase revenues.⁹³ This was the NBA's fear with the Bulls; Chicago already had the best player in the league, and a contract with WGN to nationally broadcast Bulls games would only increase Chicago's exposure and help increase revenues for the team. The weaker, poorer teams in the NBA would have no chance to

⁸⁵ *Id.*

⁸⁶ *Id.* at 1338-39.

⁸⁷ *Id.* at 1339.

⁸⁸ *Id.* at 1338-39.

⁸⁹ Goodman, *supra* note 79, at 488.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² NBA I, *supra* note 77, at 1341.

⁹³ *Id.*

compete with the financial titans like the Bulls and Los Angeles Lakers, which would eventually hurt the league as the weaker teams failed to be financially viable.

Unfortunately for the NBA, the class-warfare strategy seemed weak when one looked at the financial growth of the NBA. For the 1990-91 season, the league made over \$180 million from the broadcast contracts with NBC and TNT.⁹⁴ Comparatively, the NBA made only \$23 million from broadcast rights for the 1981-82 season; total revenue went from \$128 million to about \$700 million over the same time span.⁹⁵ The NBA argued that its incredible growth during that ten-year span could be attributed primarily to its television policy, which became more restrictive to the individual teams.⁹⁶

Through the 1980s, the NBA took a number of measures to ensure control over the number of games any individual team could televise.⁹⁷ Individual team broadcast contracts had to be approved by the league, and the league prohibited teams from entering into broadcast contracts with cable networks to televise games outside of the team's home territory.⁹⁸ The league further restricted teams by prohibiting them from broadcasting more than 41 of a team's 82 regular season games over the air.⁹⁹ The NBA also negotiated national cable contracts during this period with cable television stations USA and ESPN, giving each the right to broadcast 40 games.¹⁰⁰ By consolidating much of the negotiating power to sell broadcast rights with the league, revenues increased dramatically.¹⁰¹

⁹⁴ *Id.* at 1342.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 1342 (“A significant strategic part of the league’s television policy since 1982 has been to restrict the number of games in the market which compete with the league’s national contracts.”).

⁹⁸ NBA I, *supra* note 77, at 1342.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1344.

The court first attempted to define sponsored telecasting by looking at traditional differences between over the air television and cable television. Both parties and the court agreed that Bulls games on WGN were sponsored telecasts because WGN was not a cable station, and obtained revenue through advertising sales rather than cable subscription fees.¹⁰² This seemingly implies that sponsored telecasting must mean over the air television and paid cable television would not qualify under the SBA. However, the opinion then obfuscated this unclear issue even more. Judge will wrote that the distinction between sponsored telecasting and pay television is meaningless today because almost every channel has advertising.¹⁰³ However, since the issue could be decided for other reasons, the term continued to be vague.

As mentioned above, teams still had the right to sell the broadcast rights to a certain number of games. Among those were the 25 games the Bulls were attempting to sell to WGN. Since the SBA allows transfers of broadcast rights by a league,¹⁰⁴ the SBA did not control in this case, since an individual team, the Bulls, rather than the NBA, sold the broadcast rights.¹⁰⁵ Such a holding resulted in a somewhat odd result. If the NBA took control of the rights to every game and prevented each team from selling the rights to any games, the restriction would have been permissible under the SBA. However, since the league chose to let teams sell a portion of their games individually, the league had no power to restrict how the teams sold those broadcast rights. This sort of reasoning seems to fly in the face of the goal of antitrust law: in order to obtain immunity from antitrust scrutiny and the Sherman Act, it is in the best interests of a league to hold the broadcast rights of all games rather than release a portion of the games to the teams and let the teams take advantage of the marketplace.

¹⁰² *Id.* at 1350.

¹⁰³ *Id.* at 1364.

¹⁰⁴ SBA, *supra* note 7, at §1291.

¹⁰⁵ NBA I, *supra* note 77, at 1351.

On appeal, the Seventh Circuit affirmed the holding of the lower court.¹⁰⁶ Judge Easterbrook agreed that the NBA's restriction on superstations "regulated the activities of individual clubs, to which the Act does not apply."¹⁰⁷ However, Judge Easterbrook disagreed with the district court's finding that the SBA applies only when a league controls the broadcast rights of every game.¹⁰⁸ If this were the case there would be no need for the SBA at all, because there would be no antitrust violation since every game would be available.¹⁰⁹ Judge Easterbrook adopted the district court's odd belief that the NBA *should* have taken control of all games if it wanted to restrict where the games were broadcast.¹¹⁰ These two cases managed to cause more confusion about the phrase "sponsored telecast" and provided a way for sports leagues to ensure that they were protected under the SBA: take control of the rights to every game. As time passed, courts again dealt with the idea of a "sponsored telecast."

C. *Shaw v. Dallas Cowboys*—What About Satellite Television?

A more recent case looked at satellite television and sports broadcasts, and helped provide a better working definition of "sponsored telecast." *Shaw v. Dallas Cowboys Football Club* involved an antitrust suit brought against the NFL.¹¹¹ The NFL entered an agreement to sell the rights to all NFL games to DIRECTV, a satellite television distributor, who could then sell a package that included every NFL game to subscribers.¹¹² The individuals claimed that this arrangement violated Section 1 of the Sherman Act because it restricted options for fans to watch

¹⁰⁶ See *Chicago Professional Sports Ltd. v. Nat'l Basketball Ass'n*, 961 F.2d 667 (7th Cir. 1992).

¹⁰⁷ *Id.* at 670.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ("Unless the Act allows the league to bar broadcasting of at least some games, it is hard to see why it is cast as an exemption from the antitrust laws. Only a reduction in output allows producers to raise price. If the league arranges for the broadcast of every game (or if the clubs may broadcast every game the league does not), there is no reduction in output. To have any (antitrust) effect at all, the Act must allow the league to keep some games off the air.")

¹¹⁰ *Id.* at 671.

¹¹¹ 172 F.3d 299 (1999) (hereinafter *Shaw*).

¹¹² *Id.* at 300.

every NFL game.¹¹³ ‘The league countered that its actions fell within the exemption provided by the SBA.’¹¹⁴

The court and the NFL both agreed about the definition of “sponsored telecasting”: “[it] refers to broadcasts which are financed by business enterprises (the “sponsors”) in return for advertising time and are therefore provided free to the general public.”¹¹⁵ However, the NFL argued that the sale to DIRECTV was made up of residual rights in the sponsored telecasts (i.e., the rights to the games that the NFL already sold to free television networks).¹¹⁶ However, the court did not agree with this argument, and found that the NFL has residual rights to the images of the games themselves, not the sponsored telecast it already sold to the free networks.¹¹⁷ This holding shows a rather narrow reading of the phrase “sponsored telecast,” one which does not seem to include cable networks. The legislative history of the SBA seems to help bolster the court’s decision.¹¹⁸

D. Modern Innovations in Television and Their Relationship to “Sponsored Telecast”

When crafting the SBA in 1961, paid cable television was obviously not a large form of broadcasting, and Congress did not address it in the statute.¹¹⁹ Though unclear whether Congress wanted to apply the SBA to over the air television or all television, some argue that the act clearly applies only to free television.¹²⁰ During hearings on the bill, the NFL Commissioner

¹¹³ *Id.* at 300-301.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 301.

¹¹⁶ *Id.*

¹¹⁷ Shaw, *supra* note 111, at 301-02.

¹¹⁸ The legislative history, admittedly, could not have considered whether the SBA included cable networks since they were in their infancy in 1961.

¹¹⁹ David C. Moran, Note, *Illegal Procedure? The Antitrust Implications of NFL Sunday Ticket*, 18 J.L. & COM. 397, 406 (1999).

¹²⁰ See generally Stephen F. Ross, *An Antitrust Analysis Of Sports League Contracts With Cable Networks*, 39 EMORY L.J. 463, 471 (1990).

stated that the SBA should only cover free television and should not be applied to cable television.¹²¹ This seems straightforward if even the NFL Commissioner agreed that the SBA doesn't extend to cable television, but is it best to use reasoning from the 1960s and fail to adapt it to today's significantly different television landscape? Modern legislative and regulatory interpretation seem to affirm the view from the 1960s: cable television should not be included in the SBA exemption. During the 1980s, the Federal Trade Commission and Justice Department looked at whether cable networks should be considered sponsored telecasting.¹²² Both looked at the hearings from 1961 and concluded that cable television should not be considered a form of sponsored telecasting.¹²³

It is certainly questionable whether restricting the SBA to over-the-air television truly hurts consumers today. As of 2008, nearly 90% of American households had either cable or satellite television.¹²⁴ It seems that a narrow reading of the SBA has the potential to hurt consumers, because professional sports leagues would violate the Sherman Act every time they signed a new national cable network contract. Even though it appears that the SBA does not exempt contracts with cable networks, the Justice Department has not brought action against any of the sports leagues for violation of the Sherman Act in regards to broadcast rights. If there were such a suit and a sports league lost, a huge portion of the public end up being hurt by the decision, because that league would no longer sell broadcast rights to cable networks. It appears that the SBA is very much in need of an update to help clarify whether cable networks should be included.

¹²¹ *Id.* at 470.

¹²² Goodman, *supra* note 79, at 482.

¹²³ *Id.* at 482-83.

¹²⁴ See *Household TV Trends Holding Steady: Nielsen's Economic Study 2008*, NIELSEN WIRE (Feb. 24, 2009), http://blog.nielsen.com/nielsenwire/media_entertainment/household-tv-trends-holding-steady-nielsen%E2%80%99s-economic-study-2008/

III. THE NFL NETWORK—THE NEXT STEP FOR SPORTS LEAGUES, BUT DO LEAGUE NETWORKS SURVIVE ANTITRUST ANALYSIS?

In order to expand its reach, the NFL launched the NFL Network in 2003.¹²⁵ At its launch, the NFL Network reached 11.5 million homes.¹²⁶ By September 2006, that number had grown to 70 million, with 41 million subscribers.¹²⁷ This number is far lower than the estimated 114.7 million homes in the United States with television.¹²⁸ While the channel originally showed only original content and not live games, the NFL decided to broadcast some live games on the network in 2006.¹²⁹ This was problematic, since some cable operators did not carry NFL Network, and the games were not available to everyone.¹³⁰ It appears that broadcasting games on the NFL Network would violate the Sherman Act since it would prevent millions of Americans from seeing these games that would normally be broadcast on free network television. Furthermore, it does not seem like the NFL Network would be protected under the SBA.

A. Would the SBA apply to the NFL Network?

Looking at the issue from a basic standpoint, it appears that the NFL Network would not fall under the SBA exemption. The NFL Network is a cable television channel that individuals

¹²⁵ Paolino, *supra* note 65, at 3. The other major professional sports leagues also have their own television networks now. *See, e.g.*, MLB Network, <http://mlb.mlb.com/network>; NBA TV, <http://www.nba.com/nbatv/>.

¹²⁶ NFL.com, About NFL Network, <http://www.nfl.com/nflnetwork/fastfact>.

¹²⁷ *Id.*

¹²⁸ *Nielsen Estimates Number of U.S. Television Homes to be 114.7 Million*, NIELSEN WIRE (May 3, 2011), http://blog.nielsen.com/nielsenwire/media_entertainment/nielsen-estimates-number-of-u-s-television-homes-to-be-114-7-million.

¹²⁹ Paolino, *supra* note 65, at 3.

¹³⁰ Though the games were not available to all viewers, fans in the local markets of the teams playing can watch because the NFL broadcasts the games via broadcast television. *See* Anthony Crupi, *Delay of Game: Time Warner Cable-NFL Network Talks Break Down*, ADWEEK (Oct. 17, 2011), <http://www.adweek.com/news/television/delay-game-time-warner-cable-nfl-network-talks-break-down-135870>.

must subscribe for.¹³¹ This does not appear to qualify as sponsored telecasting, which has been considered free network television. Furthermore, the NFL has agreed in the past that pay television like the NFL Network should not be included in the SBA.¹³² However, since the NFL launched its own network, it seems to have changed its opinion. The NFL has claimed recently that “We believe that the Sports Broadcasting Act already covers the joint sale of television rights to cable and satellite providers, whose offerings can and should be viewed as ‘sponsored telecasts...’”¹³³ This is a similar view to the one the NFL took in *Shaw*,¹³⁴ which the NFL lost. The league could always argue that the fact that the Justice Department has not brought antitrust violations against any sports league for selling broadcast rights to cable networks is evidence that the SBA should protect the NFL Network. However, it does not seem to have any case law to bolster the claim. Similarly, Congress has had 50 years now to amend the statute to include cable networks, and has decided to not take any action.

B. Does the NFL Network violate the Sherman Act?

If the SBA does not protect the NFL Network, the league would have a difficult time proving that it does not violate the Sherman Act. The Supreme Court held that the NFL is not a single entity in 2010.¹³⁵ Since it seems that the NFL would be considered a natural monopoly,¹³⁶ a Sherman Act violation under Section two seems unlikely. When analyzing a Section one violation, one must decide which test to apply to the conduct in question: the per se test or the

¹³¹ *Supra* note 126.

¹³² *Supra* note 121.

¹³³ Competition in Sports Programming and Distribution: Are Consumers Winning?: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 17 (Nov. 14, 2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:32152.wais.pdf (hereinafter Committee Meeting).

¹³⁴ *Shaw*, *supra* note 111.

¹³⁵ *See generally* American Needle Inc. v. Nat'l Football League, 130 S.Ct. 2201 (2010).

¹³⁶ *Supra* note 73.

rule of reason test.¹³⁷ Since sports leagues should not be analyzed under the per se test,¹³⁸ a rule of reason test is appropriate.

The rule of reason test looks at the three factors mentioned earlier: some agreement between two or more people, an intent to restrain or harm competition, and proof that there was actual restraint or harm.¹³⁹ The first element, a collective action or agreement, is rather easy to satisfy because of a recent Supreme Court decision. In *American Needle v. National Football League*,¹⁴⁰ the Court found that the NFL could not be considered a single entity. Though there are some areas where teams have a unified interest, “[e]ach of the teams is a substantial, independently owned, and independently managed business.”¹⁴¹ The decision clearly leaves the door open to an argument that broadcast rights are an area where there is a unified interest. Though the NFL could argue that the league is a single entity specifically with regards to broadcast rights, it seems unlikely that any single entity argument would succeed, so it appears that the NFL would be better off arguing that one of the other factors does not apply.

Finding an intent to restrain competition is fact-sensitive. Past antitrust suits dealing with broadcast rights, such as *NCAA v. Board of Regents* and the Chicago Bulls cases,¹⁴² dealt with restrictions on the number of games that could be broadcast.¹⁴³ Those cases were more straightforward, since a restraint on broadcasts is a clearer example of restrictive behavior. However, the NFL’s argument here would likely be different. The NFL would likely argue that the NFL Network is meant to increase output of NFL games to more viewers.¹⁴⁴ This pro-

¹³⁷ *Supra* note 54.

¹³⁸ Flatt, *supra* note 51.

¹³⁹ *Supra* note 60.

¹⁴⁰ *Supra* note 135.

¹⁴¹ *Supra* note 135, at 2212.

¹⁴² *Supra* notes 55 and 77.

¹⁴³ *See* Flatt, *supra* note 51, at 658.

¹⁴⁴ *See* Flatt, *supra* note 51, at 658.

consumer argument would shift attention to cable television providers and allow the NFL to claim that those providers are preventing the NFL from bringing games to more fans.¹⁴⁵ The NFL could further argue that if the NFL Network did not carry the games, then the free television networks would broadcast them. In the free television scenario, though, they would be restricted to the areas those networks chose to broadcast them; the NFL could have an argument that putting the game on the NFL Network increases exposure.¹⁴⁶ This seems like the strongest argument for the NFL. The league can claim that it wants to help expand football coverage, supplementing its Sunday broadcasts by bringing football to Americans during the week, but cable providers are preventing that from happening because they refuse to offer the NFL Network.

The final element is actual restraint of competition or harm to consumer welfare. The NFL would likely argue again that having the game on a Thursday on the NFL Network would result in higher viewership than if it were broadcast on CBS or FOX on a Sunday, since the game would likely only be shown regionally. The issue at question here is whether the availability of the game would be greater on the network in question or if the agreement did not exist.¹⁴⁷ Since viewers are restricted in the number of games they can watch through sponsored telecasting, there is a legitimate argument that output is increased, and more fans can see the game if it is broadcast on the NFL Network.¹⁴⁸ The NFL Network games are still shown on an over the air, free network in the cities of the teams playing in the game.¹⁴⁹ If there were a way to guarantee that the NFL Network games would remain on free television on Thursday nights, the NFL's argument would quickly fall apart since everyone would have access to it instead of just NFL

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Ross, *supra* note 121, at 478.

¹⁴⁸ *Id.*

¹⁴⁹ Committee Hearing, *supra* note 133, at 6

Network subscribers and the cities of the competing teams. However, it does not seem likely that CBS or FOX would keep the game on a Thursday, but would instead make it a Sunday game, where only the two cities of the competing teams would be likely to see it. Even with such a move, though, the access might still increase, especially if the game had an attractive matchup that would be broadcast nationally on CBS or FOX.

IV. BRINGING THE SBA INTO THE 21ST CENTURY

Despite the explosion of options for sports programming today, the SBA has not been touched since it was passed in 1961. While radical changes to the statute seem unnecessary, Congress should revisit the statute to help clear up confusion and allow professional sports leagues to take advantage of new technology without fear of possible antitrust violations.

The SBA should either define sponsored telecast to include cable television or be rewritten, removing the sponsored telecast language, instead applying the exemption to all broadcasts. Currently, professional sports leagues are aware that broadcast contracts signed with cable networks could violate the Sherman Act. Though the issue has not been litigated, updating the SBA to include modern forms of broadcasting would benefit both fans and the leagues. Cable television has become such a standard broadcast medium that there is no reason to prevent professional sports leagues from taking advantage. Leagues could then work to maximize the number of games shown to a national audience without fear of antitrust litigation. As leagues could sell more broadcast rights, fans could see more games on more networks. Leagues would also have a greater number of networks competing for the rights to broadcast their sports.

Another area that an updated SBA should reference is internet broadcasting. The NBA, MLB, and NHL all provide online services that allow viewers to watch every game of those

leagues, with the exception of local team broadcasts.¹⁵⁰ The internet has provided an excellent way for fans to see as many games as they would like, but this is another example of the leagues pooling broadcast rights to sell a retransmission in a manner similar to *Shaw*.¹⁵¹ Since the NFL lost in *Shaw*, it seems possible that a challenge to these services might also result in an antitrust violation. These services provide a clear benefit to fans who live in a different city as their favorite teams, and allows them to watch their team every night even if they live across the country. An updated SBA should include internet broadcasting rights in the exemption.

The SBA only covers the NFL, MLB, NBA, and NHL, and should probably be expanded to cover other professional sports, at least including Major League Soccer (MLS). Because it does not have antitrust immunity under the SBA, MLS attempted to organize as a single entity in order to avoid antitrust scrutiny, though this has proved problematic.¹⁵² Extending antitrust immunity to at least the MLS would allow the league to sell broadcast rights to multiple stations, and could help the league bring in greater revenues.

CONCLUSION

The Sports Broadcasting Act has not been updated in 50 years despite huge innovations in television. The Act was originally passed to help professional sports leagues, specifically the NFL, survive by pooling broadcast rights and selling them to a network. The market for sports programming has exploded since the 1960s, earning each league billions of dollars every year. While the SBA still serves a useful purpose by allowing the professional sports leagues to collectively sell broadcast rights, it should be updated and clarified. Congress should clarify

¹⁵⁰ See generally MLB.TV, <http://www.mlb.tv>, NBA LEAGUE PASS BROADBAND, <http://account.nba.com/leaguepass/broadband>, NHL GAMECENTER LIVE, <http://gamecenter.nhl.com>.

¹⁵¹ *Supra* note 111.

¹⁵² Kaiser, *supra* note 21, at 1271-72.

what a *sponsored telecast* is, and allow sports leagues can sell broadcast rights to cable networks with an antitrust exemption.