CENTRALIZED MARKETING OF SPORTS BROADCASTING RIGHTS AND ANTITRUST LAW

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I. INTRODUCTION

Who would think that sports on TV would involve antitrust issues 60 years ago, on May 17, 1939, when the Columbia and Princeton baseball teams battled for fourth place in the Ivy League. This game was not an important one, except that it was the first sports event televised in the United States.[1] In those days, the role which television in sports would ultimately play in the future was clearly not recognized. Rather televised sport events were skeptically seen as "baseball from a sofa!"[2] with little chance to survive.

Today, "sports from a sofa" is a big business and an integral part of professional sporting events[3] Programming is the key that opens

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1. *See* Robert Alan Garret & Philip R. Hochberg, *Sports Broadcasting and the Law*, 59 IND. L.J. 155 (1983).

2. Orrin E. Dunlap, Jr., who did *The New York Times'* coverage of radio in those days, quoted in W. JOHNSON, SUPER SPECTATOR AND THE ELECTRIC LILIPUTIANS, 36 (1971).

3. *See* Ivy Ross Rivello, *Sports Broadcasting in an era of Technology: Superstations, pay-per-view, and antitrust implications*, 47 DRAKE L.REV. 177, 178 (1998).

the door to the fans, the networks, and recently to internet providers.[4] Televising sports means revenues. They are the most important revenue source, incredibly important to the welfare of the leagues and the teams. To increase revenues leagues are thinking about running their own network companies.[5] New technology presents the leagues with additional opportunities to license their rights, including broadband and wireless internet[6] or digital channels[7].[8] The question of "who shall have the power to sell broadcasting rights" is an increasingly important one. Does the league have the right to distribute the broadcasting rights centrally, i.e. for all teams or does the distribution of the broadcasting rights remain "decentralized", i.e. in the hand of each single team? These issues cannot be explained without considering the role that antitrust law plays in the broadcasting market. The leagues' power to sell broadcasting rights could be a violation of antitrust law.

This paper (i) examines as how broadcasting rights in professional and college sports in the U.S. can be marketed consistent with U.S. antitrust laws. In the United States courts prohibit leagues from marketing all broadcasting rights centralized by the leagues, until now. (ii) The paper discusses the distribution of broadcasting rights under the antitrust laws of the European Union and Germany using soccer as an example. This comparative discussion is worthwhile because Europe and Germany recently ended a long dispute about televising of soccer, allowing TV rights to be sold as a package by soccer associations, the UEFA (Unions des Associations Europeennes de Football) and the DFB (German Soccer Association)[9]. In the opinion of the E.U. Commission, the leagues act as a "single point of sale".

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4. *See* Steve Bornstein, *Coplin, Margulis join NFL Network lineup,* NFL NEWS, June 27, 2003, *available at* http://www.nfl.com/news/story/6476362 (last visited at Nov.6,2003).

5. NFL Network shall be launched this fall. It will be on the air seven days a week, 24 hours a day on a year-round basis and will be the first TV network fully dedicated to the NFL, *see infra* note 6.

6. *See* Global Information Inc., *The Global Business of Sports Television,* Mar. 2003, *available at* http://www.gii.co.jp/english/scr12920_sports_television.html (last visited at Nov.6,2003) and *see* also the *„NFL Interactive Rights Agreement", available at* http://corporate.findlaw.com/local.html (last visited at Nov. 6, 2003).

7. *See supra* note 6.

8. *See supra* note 3, at 196.

9. Deutscher Fussball Bund.

This system serves as a model for the quite more decentralized U.S. sports market.

II. BROADCASTING OF ATHLETIC EVENTS IN THE UNITED STATES

A. Differences between professional and college sports

To examine the marketing of broadcasting rights in the United States one must first distinguish between professional and college sports. Broadcasting rights in professional sports (baseball, football, basketball, and hockey) are negotiated by their respective leagues, the NBA, the NFL, MLB and the NHL, and the single teams. The leagues negotiate national TV rights. The NBA will receive more than $5bn over the next six years for the rights to televise its games.[10] In its recent televising contract, MLB received for times more revenues than in its former deal.[11] The individual teams only control local TV viewing.[12]

In college sports, the NCAA does not sell television rights to regular league games as do the leagues in professional sports. The NCAA does not own the rights to any regular season or conference tournament college athletic footage. These rights are owned by the conferences. The NCAA owns only the rights to all 87 conference championship events.[13] Therefore, only these games are marketed by the NCAA.

B. The different methods of marketing in view of the U.S. antitrust law

The reason for the creation of two broadcasting systems in the U.S. sports lies in the different legislation and the ruling of courts. Section 1 of the Sherman Act prohibits unreasonable restraints of competition. When broadcasting rights are not sold by each team, but

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10. *See supra* note 6.

11. *Baseball, ESPN Settle Suit at Eve of Trial*, SPORTSLAW NEWS, Dec. 7, 1999, *available at* http://www.sportslawnews.com/archive/articles%201999/MLBESPNsettle.htm (last visited at Nov. 6, 2003).

12. RAY YASSER & JAMES R. MCCURDY & C. PETER GOPLERUD & MAUREEN A. WESTON, SPORTS LAW CASES AND MATERIALS, 396 (5th ed.2003).

13. *See* the NCAA television guidelines, Sec. 7 - Rights and Footage Licensing., *available at* http://www.ncaa.org, Sec. 7 - Rights and Footage Licensing (last visited at Nov. 6, 2003).

by the league it can be implied that competition is reduced, because there are less sellers on the market. This could be a reduction of output and price fixing. Such conduct is ordinarily *per se* prohibited.[14] In sports, however, horizontal restraints on competition are essential if the product, a full set of games, is to be available at all. Therefore, horizontal price fixing and output restrictions are not condemned as *per se* illegal.[15] Rather, they are a matter of law under a *rule of reason* approach. The object of this approach is "to form a judgment about the competitive significance of the [challenged] restraint.[16]" The rule of reason applies to college and professional sports.[17] Anti-competitive effects are prohibited as long as they cannot be justified by prevailing pro-competitive reasons[18]. In college sports, where teams are entirely separated entities courts apply a "quick look" approach to determine whether obviously anticompetitive effects like output restrictions are justifiable. Under this approach a full analysis of market power is not required.[19] In professional sports leagues' restrictions on competition are subject to a full rule of reason analysis. This is because in the broadcasting market professional sports teams are more closely tied economically to their organizations than college teams[20].

1. College Sports

In *NCAA v. Board of Regents of the University of Oklahoma*[21], the U.S. Supreme Court struck down the NCAA's Football Television Plan and television contracts with ABC, CBS, and WTBS (worth more than $280 million) as a violation of § 1 of the Sherman Act. The plan recited that the television committee awarded rights to negotiate and contract for the telecasting of college games of members of the NCAA to two networks. The plan also contained "appearance limitations"

14. *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979).
15. *See* National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 99 (1984).
16. Chicago Professional Sports Ltd. Partnership v. NBA, 754 F. Supp. 1336, 1358 (1991).
17. *See supra* note 15 and id. at 1358.
18. *See supra* note 16, at 1358-64.
19. *See supra* note 15, at 110.
20. *See* Chicago Professional Sports Ltd. Partnership v. NBA, 95 F.3d 593, 600-1 (1996).
21. *See supra* note 15.

under which no member team was eligible to appear on television more than a total of six times and more than four times nationally.[22] The court rejected both, the argument that a pooled sale of television rights by the NCAA is necessary to protect live attendance[23] and that the NCAA should sell broadcasting rights for all teams in a package to assure equality among stronger and weaker teams[24]. This decision brought the central marketing of broadcasting rights to an end. Today, games are marketed in a "decentralized" manner by the divisions and the teams.

2. Professional Sports

In contrast to college sports, professional sports enjoy a privileged treatment under the antitrust law concerning the sale of broadcasting rights. Section 1291 of the Sports Broadcasting Act 1961 immunizes from antitrust liability the pooled sale of telecasting rights by professional football, basketball, baseball and hockey leagues[25]. The Sports Broadcasting Act was passed in response to the *United States v. NFL* decision of the United States District Court for the Eastern District of Pennsylvania[26], which ruled that the NFL's method of negotiating television broadcasting rights violated the antitrust laws.[27] Baseball enjoys immunity from the antitrust laws.[28] The Sports Broadcasting Act

22. *See id.* at 90-94.
23. *See* id.
24. *See id.* The court accepted the argument in general, but it saw not enough evidence how the challenged Television Plan produces any greater measure of equality throughout the teams of the NCAA.
25. 15 U.S.C. § 1291.
26. The court ruled that the "pooling" of rights by all the teams to enter into an exclusive contract between the league and CBS was illegal, United States v. NFL, 196 F. Supp. 445 (1961).
27. A good overview about the history of the Act gives David L. Anderson, *The Sports Broadcasting Act: Calling it what is – Special Interest Legislation*, 17 HASTINGS COMM. & ENT. L.J. 945 (1995).
28. *See* Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922); Toolson v. New York Yankees, 346 U.S. 356 (1953); Vincent M. Piazza, et al. v. Major League Baseball, et al., 836 F. Supp. 269. The scope of the immunity, however, seems to be limited to the reserve system. Thus one court has relied upon the Sports Broadcasting Act to conclude that a baseball club's decision to terminate affiliation with a radio station is not within Baseball's antitrust immunity. *See* Henderson Broadcasting Corp. v. Houston Sports Ass'n, Inc. 541 F. Supp. 263, 269-70 (S.D. Tex. 1982). But *see* Hale v. Brooklyn Baseball Club, Inc, Civ. Action No. 1294 (N.D. Tex. 1958) (holding that the baseball antitrust

allows that the American and National baseball leagues sell television rights as "packages" to networks. Pursuant to § 1291, leagues are allowed to market broadcasting rights. Furthermore, they can order so-called "blackout rules", which protect a home team from competing games broadcast into its home territory on a day when it is playing a game at home.[29] Defining the geographical areas into which the pooled telecasts may be broadcasted[30], is, however, forbidden. Despite this exemption, the Sports Broadcasting Act appears to vest the power of distributing broadcasting rights completely to the leagues. It seems to be an important piece of legislation protecting teams from antitrust scrutiny.[31] In general, courts accept this function of the act.[32] However, they interpret the Act narrowly. As the ruling of the United States District Court for the Northern District of Illinois in *Chicago Professional Sports Limited Partnership v. NBA*[33] shows, courts are reluctant to grant the leagues the full power to control the distribution of broadcasting rights.[34] The District Court rejected to interpret the Sports Broadcasting Act as a "real exemption of antitrust law" and was affirmed by the United States Court of Appeals for the Seventh Circuit.[35] Thus, leagues are allowed to negotiate broadcasting rights,

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exemption would cover such conduct). It appears difficult to reconcile the Henderson opinion with Section 4 of the 1961 Act, 15 U.S.C. § 1294, which provides that the Act shall not be "deemed" to affect the "applicability of nonapplicability" of the antitrust laws to any act.

28. *See Hearing on H.R. 8757 before the Antitrust Subcomm. of the House Judiciary Comm.*, 87th Cong., 1st Sess. 65-66 (1961) (testimony of F. Frick, Commissioner of Baseball).

29. Sportlawnews, *Sportslaw Jargon: The Sports Broadcasting Act of 1961*, SPORTSLAW NEWS, *available at* http://www.sportslawnews.com/archive/jargon/ljsportsbroadcasingact.htm (last visited at Nov. 6, 2003).

30. 15 U.S.C., § 1292.

31. *See supra* note 3, at 184 ("The passage of this Act has proven extremely beneficial to the success of the major league sports.").

32. The act was challenged by several fans in the Durkin suit, filed Aug. 29, 1994, Durkin v. Major League Baseball, No. 2:94-CV-05315 (E.D. pa.). The District Court of Eastern Pennsylvania, however, did not strike down the act (decision unpublished). The United States Court of Appeals for the Third Circuit affirmed the District Court's decision, 85 F.3d 611. The Supreme Court of the United States denied the petition for writ of certiorari (519 U.S. 825). see David L. Anderson, *supra* note 27, at 945.

33. *See supra* note 16, at 1351.

34. With a similar perception Ivy Ross Rivello, *supra* note 3, at 196.

35. Chicago Professional Sports Ltd. Partnership v. NBA, 961 F.2d 667 (1992).

but they are not allowed to enjoin single teams from individual sales. This has led the teams to enter into individual broadcasting contracts.[36] Hence, the U.S. televising system in professional sports cannot be qualified as an entirely centralized system. Rather it can be described as a system, including centralized and decentralized elements.

III. BROADCASTING OF SPORTS IN EUROPE

A. Broadcasting of the UEFA Champions League in the E.U.

In the season 1992/1993 the UEFA[37] Champions League was established as a championship between the leading European soccer teams[38]. Before the establishment of the Champions League broadcasting rights were either sold by the national soccer federations or directly by the teams. Today, UEFA markets soccer broadcasting rights in championship games. UEFA has the exclusive rights to sell two main live rights packages for free-TV or pay-TV each comprising two matches per match night. These two packages cover 47 games out of a total of 125. The remaining matches are sold for live pay-TV/pay-per-view exploitation. UEFA also has the exclusive right to sell these matches. However, if UEFA has not managed to sell the rights within one week after the draw for the group stage of the UEFA Champions League, UEFA will lose its exclusive right to sell these TV rights. Thereafter, UEFA will have only a non-exclusive right to sell these rights in parallel with the individual home clubs participating in the match.[39] Moreover, UEFA has the right to market a highlight package covering all matches.[40] Besides, UEFA is entitled to provide content in respect to all games via internet and via UMTS (Universal Mobile Telecommunication System).[41] The teams have the right to provide such content in respect of matches in which they participate in parallel. However, these additional rights are made available for the soccer clubs

36. *See* Leonard F. Feldman, *The Chicago Bulls win again: Antitrust, Sports and Broadcasting*, 1 SPORTS LAW J. 51, 76 (1994).
37. Unions des Associations Europeennes de Football Unions des Associations Europeennes de Football
38. *See* COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League: Commission Decision, C(2003) 2627 final at 7.
39. *Id.* at 13.
40. *Id.* at 14.
41. *Id.* at 14-5.

only in games with less viewer interest and only in compliance with strict presentation rules.[42] UEFA's joint selling agreement can, thus, be described as a "single point of sale" agreement encompassing TV and other media rights.[43]

B. The joint selling agreement under E.U. antitrust law

Normally, joint selling agreements infringe art. 81 (1) of the EC Treaty and art. 53 (1) of the EEA Agreement (Agreement creating the European Economic Area).[44] The European Court of Justice has ruled that sports are subject to a scrutiny under European antitrust law, when it constitutes an economic activity within the meaning of art. 2 of the EC Treaty[45]. This is the case, when soccer clubs sell their broadcasting rights.[46] However, pursuant to EC Treaty art. 81 (3) the Commission is vested with the power to grant an exemption provided that the following prerequisites are met: the agreement must cause (i) objective economic benefits (i.e., efficiencies), (ii) the benefits must be referred to the consumers (so-called pass-on of efficiencies), (iii) the restriction must be indispensable, and (iv) the agreement should not eliminate competition (so-called "dynamic efficiencies"). The Commission has to consider the benefits generated by the restrictive arrangement, and it has to balance them against the harm to consumers and the negative effects for the harmonization of the European market.

In 2003 the Commission granted the UEFA an exemption based on EC Treaty art. 81 (3) allowing UEFA to sell media rights in the UEFA Champions League jointly as above mentioned[47]. One core argument for the grant of the exemption was that the jointly sold media packages are split up into several different right packages. This allows several media operators to acquire media rights in the UEFA Champions League from UEFA.[48] The Commission restricted the

42. *Id.* at 15 and 43.
43. *See id.* at 39.
44. *Id.* at 29.
45. *See* Case 36/74, Walrave v. Union Cycliste Internationale, 1974 E.C.R. 1405 para. 4; Case 13/76, Dona v. Mantero, 1976 E.C.R. 1333 para. 12; Case C-415/93, URBSF v. Bosman, 1995 E.C.R. I-4921, para. 73; Case C-176/96, Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Federation royale belge des societes de basketball ASBL (FRBSB), 2000 E.C.R. I-2681 para. 32-33.
46. *See supra* note 38, at 30.
47. *See* paragraph C. 1 of this paper.
48. *See supra* note 38, at 50.

power of the UEFA only in two points attaching the following conditions to the exemption: (i) When UEFA has lost its exclusive right to sell the TV rights in the remaining matches because it has not managed to sell the rights within one week after the draw for the group stage of the UEFA Champions League[49], UEFA is only allowed to prevent individual European soccer clubs from selling their broadcasting rights in remaining matches to free-TV broadcasters when there is no reasonable offer from any pay-TV broadcaster. (ii) The duration of the UEFA arrangements may not exceed three years[50].

C. Marketing of Broadcasting Rights of athletic events in Germany

The distribution of broadcasting rights in athletic team events in Germany is organized similarly to the UEFA arrangements. Rights are marketed centralized through the leagues. This is especially true for the sale of broadcasting rights of the German Soccer League (Bundesliga)[51]. The competing teams have delegated their rights to the German Soccer Association (DFB), which is responsible for the organization of the League[52]. In 1966/67 the German Soccer Association (DFB) distributed the broadcasting rights for the first time. Since then the pooling of broadcasting rights has been a common practice.[53]

D. Centralized Marketing of Broadcasting Rights and the German antitrust law

The German soccer teams formed a cartel with regard to soccer broadcasting rights by authorizing the German Soccer Association (DFB) to be its single distributor. Under § 1 of the GWB (Act against Restraints of Competition) this was considered as unlawful price fixing

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49. *See* id.

50. *See supra* note 38, at 51.

51. The German Soccer League was established in 1963. *See* http://www.bundesliga.de/40bundesliga (last visited at Nov. 7, 2003).

52. The German Football Association (DFB) was founded on January 28, 1900 in Leipzig. *See* (http://www.dfb.de/dfb-info/eigenprofil/index.html (last visited at Nov. 7, 2003).

53. The rights were bought by the German public televisions, ARD and ZDF for around €325.000. *See* J. Kruse & J. Quitzau, *Fussball-Fernsehrechte: Aspekte der Zentralvermarktung [Soccer TV rights: Aspects of centralized marketing]*, Aug. 2003, Diskussionspapier (Paper) Nr. 18, p. 4, *available at* www.unibw-hamburg.de/WWEB/vwl/kruse/paperno18.pdf.

and output restriction. Despite the fact that centralized marketing infringed German antitrust law, no enforcement measures were taken by the Bundeskartellamt (German Federal Trade Commission, German FTC) until 1994. One former president of the German FTC said, that the FTC did not break up the cartel since on the other side of the market public funded television formed a very strong counterpart[54]. This market structure has changed completely after the broadcasting market became more competitive because of the technical improvements which led to the emergence of new private TV channels beside the public funded networks ("dualization")[55].

Consequently, the German FTC changed its attitude in view of the enforcement of the centralized marketing of the German soccer broadcasting rights and opened an infringement proceding against the DFB. In September 1994 the German FTC decided that this practice violated § 1 of the Act against Restraints of Competition[56]. The DFB appealed this decision and the BGH (German Federal Court of Justice) affirmed the decision of the German FTC in 1997[57]. Due to the pressure by powerful sports lobbyists the German legislature promulgated an exemption, as a reaction to this ruling.[58] Section 31 of the Act against Restraints of Competition, the so-called "DFB-clause" enacted in 1999 provides: "Section 1 shall not apply to the central marketing of rights to television broadcasting of sport competitions organized according to by-laws, by sports asocciations, which in the performance of their socio-political responsibilities, are committed also to promoting youth and amateur sports activities, and which fulfill this commitment by allocating an adequate share of the income from the central marketing of these televisions rights." This rule allows centralized marketing of the German soccer broadcasting rights.

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54. Dieter Wolf, Zentrale Vermarktung oder Einzelvermarktung von Mannschaftssport im Fernsehen? Die Sicht des deutschen und europäischen Kartellrechts [Centralized Marketing or Individual Marketing of TV rights in Team Sports? The view of German and European Antitrust Law], 7 SCHRIFTEN ZUR RUNDFUNKOEKONOMIE 87, 91 (2000).

55. Public television was suddenly confronted with new private commercial televisions, which were willing to pay a high price to get the prestigious german soccer broadcasting rights. In 2001/2002 a private channel paid more than €350 million. J. Kruse & J. Quitzau, *see supra* note 42, at 4.

56. FTC Decision, B6 - 747000-A-105/92 (9.2.1994).

57. BGH, 51 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 756, 756-60 (1998).

58. *Available at* http://www.bundeskartellamt.de/GWB01-2002.pdf (last visited at Nov. 7, 2003).

IV. SHOULD THE EUROPEAN SYSTEM STAND AS A MODEL FOR THE BROADCASTING OF U.S. AMERICAN SPORTS?

The core difference between the U.S. and European soccer broadcasting models is that television rights in the E.U. are marketed centrally by the leagues. Soccer leagues work as a "single point of sale". The U.S. market shows some centralized features in professional sports, but the leagues' power to act as a "single point of sale" is extremely weakened as individual teams make their own contracts with local TV networks. Baseball teams are also allowed to sell national broadcasted superstation games individually.[59] In college sports marketing of broadcasting rights is even more decentralized: the NCAA has no right to sell ordinary season games.

The situation in the E.U. and in Germany confirms that a centralized broadcasting system is a beneficial system for media operators, viewers and teams. The system facilitates bargaining with networks and internet providers. This is increasingly important where markets are larger and the difficulties in selling the rights are greater. If contracts are made with "one single point of sale", broadcasters are able to provide coverage to fans of the league as a whole and over the course of an entire season without huge transaction costs.[60] Viewers benefit because broadcasters cannot only acquire the rights to a single match but also need to provide certain coverage of the other matches played on that day.[61] Teams profit from the joint selling arrangement as they can share revenues and avoid having to build up own commercial departments of the magnitude, that is necessary to deal with the complexity of executing their rights.

The European and German general centralized broadcasting system is consistent with antitrust rules. An exemption is justified by the legitimate reason to protect the viability of teams and leagues and thus to protect competition in sports. If one only looks at the number of broadcasted games and at the number of competing purchasers, competition is restricted. But if one recognizes in its inquiry that weaker teams receive more revenues when rights are broadcasted as a package, competition among teams, is enhanced.[62] Moreover, a mainly

59. *See supra note* 16, at 1344.
60. *See supra* note 38, at 39-40.
61. *See supra* note 38, at 41.
62. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S.

centralized broadcasting system works as a guardian for amateurism and the promotion of the youth. This legal purpose is explicitly stated in § 31 of the Act against Restraints of Competition.
Besides those justifications, there exist enough presumptions that restrict the leagues power: contracts have time limits, member institutions remain entitled to sell the rights individually if the leagues fail in doing so and the leagues have to market each media-package (TV rights, internet rights, and UMTS licenses) separately.[63] Hence, the European and the German broadcasting systems can be qualified as centralized broadcasting systems of "competitive balance".

Such systems need not be limited to Europe. Rather they appear to be applicable analogously in U.S. American sports law. The core prerequisite of an analogy is that the European antitrust laws and the media structure on the one side and U.S. American antitrust law and the media structure on the other side are comparable. Price-fixing, group boycotts and a restriction of output are generally prohibited, unless pro-competitive aspects can prevail those anti-competitive effects. Moreover, the reasons to exempt sports from a strict application of antitrust rules mentioned in the European laws are similar to the questions raised under U.S. law. All laws exempt sports partly from antitrust law in order to protect weaker teams and therefore assure the continued operation of the leagues.[64]

The question remains what would such a transfer of the European and the German system to U.S. broadcasting cases look like. Generally, it would mean that sports are "really" exempt from antitrust law concerning the broadcasting of sports events. Leagues would be allowed to sell broadcasting rights centrally. They would be allowed to enjoin single teams from entering in individual negotiations with broadcasting companies and they would be allowed to control the sharing of revenues. These same considerations are applicable to the NCAA. That weaker teams must be kept financially viable is an even

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1, 18-23 (1979) holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be pro-competitive.

63. *See supra* note 38, at 51.

64. *See* H.R. REP. NO. 87-1178, 2-3 (1961) showing Congress' intent to enact the Sports Broadcasting Act. *See also* National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 99 (1984); § 31 of the Act against Restraints of Competition; *supra* note 38.

more compelling argument in college sports[65] because the NCAA has to protect amateurism and to foster educational purposes.

A mainly centralized broadcasting system similar to Europe and Germany could be introduced to professional U.S. sports in two ways: (i) either the Sports Broadcasting Act is construed broadly as a "real exemption of antitrust law", or (ii) courts either apply the rule of reason in a way which lets the pro-competitive effects of a centralized distribution of broadcasting rights prevail.

(i) A broad construction of the Sports Broadcasting Act demands that leagues are seen as the only power to control the distribution of broadcasting rights. But such a rule construction is against the ruling in the *Chicago Bulls decision*. In this decision leagues have not been seen entitled to prohibit the individual sale of broadcasting rights by a single team.[66] However, that leagues are allowed to prohibit individual sales lies within the meaning of the Sports Broadcasting Act. The expression "contracts of leagues are exempt" has to be read in the sense that the league has the "complete power" to sell broadcasting rights jointly. Such a construction is within the scope of the Act that Congress has intended, because the Act was introduced because Congress was concerned that absent pooling, weaker teams would flounder, while could impair the structure of the league and imperil its continued operation.[67]

However, "complete power" does not mean "without any limitations". It means only that the negotiation power lies primarily in the hands of the league. If the leagues are not able to sell the rights at a reasonable price, teams remain allowed to sell the rights themselves. Moreover, "complete power" does not mean unlimited contracts. Rather the term of contracts should be limited (e.g. up to three years as in Europe) in order to maintain competition among networks. Besides, "complete power" must not entitle the leagues to order "block outs". As fans are attracted by live games anyway today, it is not longer necessary to inhibit, that games can be watched in the team's home market, to assure gate revenues[68].

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65. *See also* National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 99, 133 (1984) (White, J., dissenting).

66. *See supra* note 16, at 1351.

67. S. REP. NO. 87-1087, at 3 (1961), reprinted in 1961 U.S.C.C.A.N. 3042, at 3043.

68. In the season 2000 28,839,284 people attended Division I-A football

(ii) As an alternative to a broad construction of the Sports Broadcasting Act, a centralized distribution of broadcasting rights could also be accomplished, if courts give the pro-competitive effects of a centralized distribution more weight in their rule of reason approach than they were given according to the *Chicago Bulls*[69] decision. This means that courts should accept the fact that centralized broadcasting and, therefore, a system of shared revenues increases the stream of revenues that goes to weaker teams. Against the ruling in *Chicago Bulls*[70] there is enough evidence that pooling has those effects. First, it is often argued that package sales negotiated by leagues have pro-competitive effects because weaker teams can also receive revenues[71]. Thus, from an economic point of view a collective sale is more efficient.[72] Second, the example of the University of Notre Dame proves that un-pooled sales of broadcasting rights can have negative effects for weaker teams. "Notre Dame capitalized on its popularity, and in doing so, took money from the coffers of its fellow schools and put it in its own".[73] In a market where the leagues are authorized to negotiate broadcasting rights for all teams, however, weaker teams do not have to threaten to be suppressed by stronger teams. Rather, they would profit from the bargaining power of the league and the shared revenues.[74] This is especially important today as new markets and technologies emerge and bargaining gets more and more challenging. Thus, sophisticated business strategists are needed, who might not be available for weaker teams, but for the leagues. Hence, a centralized broadcasting system helps weaker teams.

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games, for an average attendance of 43,630, only 59 per game short of the all time average of 43,689 set in 1982. *See* Richard Billingsley, BCS formula not nearly as confusing as it seems, Oct. 21, 2003, *available at* http://espn.go.com/ncf/s/explainbcs.html (last visited at Nov. 7, 2003).

69. *See supra* note 16, at 1358-1364.

70. *See id.* at 1359-64.

71. *See* David M. Van Glish, *The Future of Sports Broadcasting and Pay-per-view: An Antitrust Anlaysis*, 1 SPORTS LAW. J. 79, 104 (1994). Negative effects on competition, if weak teams are led without support, are also seen by Leonard F. Feldman, *supra* note 34, at 76.

72. *See* Tina Heubeck, *The Collective Selling of Broadcasting Rights in Team Sports – A Complementary Approach* 15-16 (Sept. 8, 2003) (unpublished doctoral paper, University of Hamburg) (on file with author).

73. *See supra* note 34, at 76.

74. As an example for the bargaining power of MLB, quadrupling its fees at the end of a new contract with ESPN, *see supra* note 11.

On the other hand, stronger teams need not fear significant disadvantages. They get less revenues from television rights when revenues are shared. However, strong teams receive a huge amount of revenues, which they do not have to share, e.g. gate and advertisement revenues. Besides sharing revenues with weaker teams does not mean "losing revenues", from a long range point of view. Rather stronger teams profit, because weaker teams stay viable and therefore are able to develop new talented players for stronger teams.[75]

Moreover, pooling broadcasting rights, must not necessarily lead to an output restriction[76], as it was the case in both, the *NCAA*[77] and the *Chicago Bulls*[78] decision.

Thus, due to the pro-competitive effects of a centralized broadcasting system, the European system should be seen as a model for U.S. professional sports. The European system should also be applied to college sports. This would imply two choices. First, new law could be introduced, entrenching the scope of the Sports Broadcasting Act to college sports. However, this would mean to go through a presumably long legislative process. Therefore, the second alternative, to make the European system fertile for U.S. college sports is to apply the rule of reason like in professional sports as above mentioned (ii). Courts should weigh the pro-competitive effects of pooling by the NCAA higher than the fact that the number of purchasers decreases.

Lastly, the right of leagues to sell broadcasting rights centrally should be construed broadly, encompassing communication means as the internet or cell phones. In regard to professional sports the dispute how "sponsored telecasting" in the Sports Broadcasting Act is to be construed, should be solved in favor of a broad understanding. "Sponsored telecasting" should be interpreted as "broadcasting means where advertisement occurs". As new media were already known in the sixties, the history of the Act proves no narrow understanding limited to television.[79] Rather, the Act's title "Sports Broadcasting Act", and not "Telecasting Act" can be interpreted as a sign that Congress did not intend to restrict the scope of the Act to television. In order to maintain

75. *See* also Don Shacknai, *Sports Broadcasting and the Antitrust Laws: Stay tuned for Baseball after the Bulls romp in Court*, 1 SPORTS LAW. J. 1, 38 (1994).
76. *See id.* at 39.
77. *See supra* note 15.
78. *See supra* note 16.
79. *But see* Ivy Ross Rivello, *supra* note 3, at 186.

different markets and, therefore, competition, however, TV, internet and digital broadcasting rights should not be sold in one package, but in different ones. In regard to this point the European system of "competitive balance" also offers a transferable solution.

X. CONCLUSION

Sports are a big business. This is true not only for professional sports, but also for college sports.[80] In order to achieve the core goal to keep weaker teams and therefore the league viable, a system of centralized broadcasting seems to be the best system. As such a system maintains sports ongoing on a high standard, protects equity among teams, and fosters the proliferation of the youth, it is lawful under antitrust policies. Moreover, a centralized system allows managing the challenges of new medias because smaller teams become able to receive revenues from internet, pay-per-view and digital broadcasts. Consequently, U.S. Courts should accept centralized broadcasting systems similar to the E.U. Commission and the German FTC, if the terms of contracts are limited, if teams are allowed to broadcast the rights when the leagues fail to do so and if the scope of the contract is limited only to one media, to either free-air-television, internet, pay-per-view, cable TV or UMTS.

80. *See supra* note 12, at 797.