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## Antitrust, Regulation and the “New” Rules of Sports Telecasts

Babette Boliek

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# Antitrust, Regulation, and the “New” Rules of Sports Telecasts

BABETTE BOLIEK\*

*Open almost any news source, or simply turn on the program guide of any television, and the explosive proliferation of sports telecasts is quickly evident. The amount that exhibitors pay to sports leagues has reached dizzying heights, due in large part to high demand and the unique, unrecorded nature of sports telecasts. These desirable characteristics arguably make sports telecast contracts essential to the economic viability and competitiveness of leagues and telecasters alike. Although these contracts provide many benefits to corporations and leagues, embedded within them are weighty restrictions such as “black out” rules and exclusive distributorships. These restrictions raise questions as to the ultimate effect that such contracts have on competition and overall consumer welfare. The two legal mechanisms that traditionally protect industry-wide competition and consumer welfare are antitrust law and regulation. This is no less true in the professional sports and telecast industries. The collision of these two industries has resulted in a labyrinth of regulation and uneven antitrust enforcement that diminishes consumer choice, program diversity, and competition.*

*This Article presents a novel quantitative analysis of sports league antitrust jurisprudence to counter cries for increased regulatory scrutiny of these joint ventures. The results demonstrate that antitrust is not only capable of policing joint ventures, but that the Supreme Court revitalized such review in *American Needle v. NFL*. Based on empirical review of past case law, current antitrust exemptions, and relevant regulatory policy, this Article presents several recommendations to both (1) rationalize regulatory rules that currently create disparate treatment among leagues and telecasters, and (2) clear the field for pro-consumer competition in sports telecasts.*

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## INTRODUCTION

The refrain is simple, indeed distressing to some: “Why can’t I watch my home team live on television?”<sup>1</sup> The lament is understandable: as society becomes increasingly mobile, and we live far from our childhood home teams and college alma maters, our desire to stay connected to our prior communities increases—sometimes via nostalgic fandom. But if you

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1. Regardless of the video platform used—Internet, cable, satellite or broadcast—program access to certain games might be restricted based on the viewer’s zip code.

live in Los Angeles and root for the New York Rangers, viewing access to your team's games is limited. The reasons behind these limitations implicate a thicket of statutes, regulations, judicial decisions, and private contracts. However, the fan's simple lament is arguably at the heart of a much larger concern of national importance: How and when should we govern the industry that creates and controls video content?<sup>2</sup> Are certain programs or networks of such social import that they should receive heightened legal scrutiny? For example, should the Super Bowl be "nationalized?"<sup>3</sup>

This Article analyzes sports telecast law and Congress' long-held view that such telecasts<sup>4</sup> are the economic juggernaut that should be harnessed to support the regulators' favored market structure for both the professional sports and communications industries.<sup>5</sup> However, these regulatory preferences—namely for over-the-air broadcasters—are showing their age in today's era of rapid technological development.<sup>6</sup>

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2. For example, Columbia Professor Tim Wu argues that "[i]nformation industries . . . can never be properly understood as 'normal' industries," and traditional forms of regulation, including antitrust enforcement, "are clearly inadequate for the regulation of information industries." TIM WU, *THE MASTER SWITCH* 301–03 (2010). The basis of Wu's belief is that because of the speech element inherent in information industries, they are "fundamental to democracy," and therefore should be subject to heightened regulatory treatment. *Id.* at 302.

3. See discussion *infra* notes 273–279 and accompanying text.

4. The term "telecast" is used as an umbrella for all video distribution platforms, including cable, satellite, and broadcast. "Broadcast" is reserved to refer to "free, over-the-air" transmissions, for example ABC, CBS, NBC, Fox Broadcast Network, and PBS.

5. As regulators have recently noted, sports programming is of particular importance to the economic vitality of distributors. See Revision of the Commission's Program Access Rules, 77 Fed. Reg. 66026–65 (Oct. 31, 2012) (to be codified at 47 C.F.R. pt. 76) [hereinafter Revision of Program Access Rules]. Cable access programming rules were allowed to sunset *except* for Regional Sports Networks ("RSNs"), which must by law be made available to competitors at reasonable rates. *Id.* See Hal Singer, *Program Access Reform at the FCC: Are Exclusive Programming Deals a Good Thing?*, FORBES.COM (Oct. 7, 2012, 11:27 PM), <http://www.forbes.com/sites/halsinger/2012/10/07/program-access-reform-at-the-fcc-are-exclusive-programming-deals-a-good-thing> ("[T]he FCC established a 'rebuttable presumption' that an exclusive contract involving a cable-affiliated RSN violates the Cable Act[,] [b]ecause sports programming is one of the few types of 'must have' programming."). This is consistent with past reports on video competition noting that sports programming is a key component to the program schedule for two unique reasons: (1) it generates high ratings in desirable age demographics and (2) its greatest value is in the live telecast. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 27 FCC Rcd. 8610 ¶ 372 (2012) [hereinafter Delivery of Video Programming].

6. See FCC, BROADBAND PERFORMANCE: OBI TECHNICAL PAPER NUMBER FOUR 7 (showing that per person usage of broadband internet is growing at a substantial clip of thirty percent to thirty-five percent per annum); *A World of Choice*, NAT'L CABLE & TELECOMMS. ASS'N, <http://web.archive.org/web/20130120051622/http://www.ncta.com/statistic/statistic/Consumer-Choice-Explodes.aspx> (last visited Dec. 15, 2013) (showing a correlation between the explosion of various video sources (e.g., iTunes, Hulu, Netflix, U-verse, Dish, DirecTV) and a drop in the percentage of customers served by cable from ninety-eight percent in 1992 to just fifty-seven percent in 2012).

Technology is currently capable of transmitting a greater variety of content than ever before, which increases consumer choices.<sup>7</sup> Nevertheless, it is arguably not the technology, but the legal framework for the communications industry that will either increase or retard the growth of consumer welfare.<sup>8</sup> The sports telecast industry is governed by two titans of legal authority: antitrust law and communications regulation.<sup>9</sup> Many commentators speak only of antitrust when analyzing sports telecast joint ventures.<sup>10</sup> It is tempting to do so because the issues are fascinating, but to speak only of antitrust when an industry-specific regulator is implicated is to tell only half the story.

Although the two often share the same goal—enhancement of competition—regulators have struggled to balance additional considerations that may be incompatible to competitive growth.<sup>11</sup> For example, the regulator may strive to encourage “localism,”<sup>12</sup> to preserve “free over-

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7. For example, the University of Texas and ESPN reached a twenty-year agreement to operate the “Longhorn Network” that will broadcast over two-hundred exclusive events. *UT Athletics and IMG College/Longhorn Sports Marketing Products*, TEXASSPORTS.COM, [http://www.texassports.com/sports/2013/7/25/GEN\\_0725130745.aspx](http://www.texassports.com/sports/2013/7/25/GEN_0725130745.aspx) (last visited Dec. 15, 2013). In addition, there is a full access Longhorn Network website. *Longhorn Network*, ESPN.COM, <http://espn.go.com/longhornnetwork> (last visited Dec. 15, 2013) (creating a dedicated site on ESPN.com for the University of Texas’s sports network).

8. As regulators have recently noted, sports programming is of particular importance to the economic vitality of distributors. See Singer, *supra* note 5.

9. For purposes of this Article, the terms “antitrust law(s)” or “competition law” have the meaning given them in section 1 of the Clayton Act, 15 U.S.C. § 12(a) (2006), all sections of the Sherman Act, 15 U.S.C. §§ 1–7 (2006), and the Robinson-Patman Act, 15 U.S.C. §§ 13a–13b, 21a (2006). In addition, the term includes the Federal Trade Commission Act (the “FTC Act”), 15 U.S.C. § 45 (2006), to the extent that section 5 of the FTC Act applies to unfair methods of competition. The definition is modeled on that used in other antitrust acts, such as the National Cooperative Research Act of 1984, 15 U.S.C. §§ 4301–06 (2006).

10. See generally Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009); Andrew C. Hruska, *A Broad Market Approach to Antitrust Product Market Definition in Innovative Industries*, 102 YALE L.J. 305 (1992); Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 GEO. L.J. 2055 (2012); Harry Ballan, Note, *The Courts’ Assault on the Robinson-Patman Act*, 92 COLUM. L. REV. 634 (1992); Note, *Antitrust and the Information Age: Section 2 Monopolization Analyses in the New Economy*, 114 HARV. L. REV. 1623 (2001).

11. See Stanley M. Gorinson, *Overview: Essential Facilities and Regulation*, 58 ANTITRUST L.J. 871, 872, 875–77 (1989); Mark Green & Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 876–83 (1973); Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 357–59 (2004); Robert B. von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929, 942–47 (1954); Note, *Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination*, 58 COLUM. L. REV. 673, 673–79 (1958); cf. Jessie Cheng, Note, *An Antitrust Analysis of Product Hopping in the Pharmaceutical Industry*, 108 COLUM. L. REV. 1471, 1472–73 (2008).

12. The preference for local, free, over-the-air broadcast, for example was reiterated in a recent FCC report, which noted “that the concept of localism has been a cornerstone of broadcast regulation for decades.” Broadcast Localism, 23 FCC Rcd. 667, 1324 ¶ 5 (2008). The concept was “derive[d] from Title III of the Communications Act . . . and is reflected in and supported by a number of current

the-air” broadcast, or to indulge in a technology preference for satellite over cable.<sup>13</sup> These particular regulatory objectives are intimately intertwined with sports telecasts.<sup>14</sup>

The regulatory treatment of sports telecasts is in a state of flux, which raises great concern about the status of antitrust related to sports telecasts. Interestingly, antitrust is in a state of relative maturity as evidenced by the original dataset and novel empirical analysis presented in this Article.<sup>15</sup> The market for sports telecast contracts is fascinatingly (or maddeningly) complex because it involves multi-layered, joint activity. Generally expressed, sports telecasts involve two joint ventures. First, there is the cooperation among the league itself, which may be anticompetitive. For example, under what circumstances may independent teams pool their rights to sell them to a national broadcaster? The second layer of joint activity is the contract between the sports league and the telecaster, which may also violate antitrust law. Antitrust has most frequently been criticized for lacking consistent criteria and analysis in the realm of joint ventures.

Notwithstanding these scholarly critiques, there has been no attempt to quantify past cases to identify strong trends in antitrust jurisprudence. This oversight threatens to both overstate past inconsistencies and

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Commission policies and rules. . . . [O]ur broadcast regulatory framework is designed to foster a system of local stations that respond to the unique concerns and interests.” *Id.* ¶¶ 5–6.

13. For an in-depth discussion of the disparate treatment of satellite over cable, see *infra* Part III.A–B. One example for such preferences is written within the Satellite Home Viewer Act, see *infra* note 68, which guarantees satellite operators a low cost license (per subscriber, per signal, per month royalty fee) to retransmit certain “distant” (non-local) broadcast television signals to their subscribers. See 17 U.S.C. § 119 (2006). To obtain a similar license, cable operators by contrast must pay a higher fee based on a gross receipts royalty formula. See *id.* § 111(d). Another example is the protection of local broadcast from cable over concerns that cable would “siphon” revenues away from local broadcasters. Phillip M. Cox II, Note, *Flag on the Play? The Siphoning Effect on Sports Television*, 47 FED. COMM. L.J. 571, 572 (1995). The passage of the sports black out rules is just part of Congress’ attempt to support the broadcaster over cable. *Id.* at 580–81.

14. For example, regulators consistently use sports telecasts as the economic engine for industrial engineering—either encouraging or discouraging it depending on the policy goal. Recently, for example, the cable programming access rules were allowed to sunset *except* for RSNs. These rules were established to encourage development of direct broadcast services (“DBS”) over cable by ensuring DBS has access to all cable-owned shows. See discussion *supra* note 5.

15. Antitrust law and the agencies that enforce it have been the guardians of competition in the United States since the passage of the Sherman Act, Law of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7 (2004)). The Act, notable for its brevity, has been called by some the “Magna Carta of free enterprise”—emphasizing the common law nature of defining the statute’s actual application. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); see also *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) (“Antitrust laws . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.” (quoting *Topco*, 405 U.S. at 610)); *City of Lafayette, La. v. La. Power & Light Co.*, 435 U.S. 389, 398 n.16 (1978) (same); *GTE Sylvania Inc. v. Cont’l T.V., Inc.*, 537 F.2d 980, 1015 (9th Cir. 1976) (same).

undervalue the rationality of past joint venture analyses. Here too, the analysis of sports league antitrust jurisprudence proves illustrative of the broader universe of joint venture review.<sup>16</sup> Indeed, the Supreme Court's most recent word on joint ventures involved the National Football League ("NFL").<sup>17</sup>

This Article presents a unique and novel data set that draws out several characteristics of sports league judicial history and concludes that *American Needle* is less a sea change in the law than an invigorating endorsement of past precedent. Although *American Needle* leaves much unresolved, an implicit and judicially viable two-part test for Sherman Act section 1 violations emerges when analyzed within the unique context of sports-league jurisprudence.<sup>18</sup> The Court's unique articulation of the *American Needle* holding and dicta is shown not only as consistent with past precedent,<sup>19</sup> but as a desirable interpretation that creates a disciplined and more certain judicial review of joint venture activity.

Antitrust, for all its virtue, cannot apply where it has no jurisdiction. Because antitrust jurisdiction is limited or forbidden where an industry-specific regulator has spoken, the importance of regulatory judgment and restraint is heightened.<sup>20</sup> In the arena of telecommunications, the Federal Communications Commission ("FCC") has been entrusted with the broad statutory mandate to regulate the industry for the "public interest, convenience, and necessity."<sup>21</sup> Because the FCC is not bound solely by the competitive concerns that drive antitrust authorities, regulation provides special interest lobbyists a means to gain protection or to

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16. In particular, although not greatly focused upon, sports broadcast has been mentioned by notable scholars as providing a dividing line—a potential safe zone where league restraints will be treated as unilateral action. See, e.g., Herbert J. Hovenkamp, *American Needle and the Boundaries of the Firm in Antitrust Law* (Aug. 15, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1616625>.

17. *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

18. *Id.* The Supreme Court noted, "[o]ther features of the NFL may also save agreements amongst the teams. We have recognized, for example, 'that the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important.'" *Id.* at 2217 (quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984)). Although the Court found that maintaining competitive balance would not justify treating the NFL as a single entity "when it comes to the marketing of the teams' individually owned intellectual property," it took pains to note that support of competitive balance among teams is "unquestionably an interest that may well justify a variety of collective decisions made by the teams." *Id.* The Court left open to lower courts exactly what would be the proper role for this justification in a rule of reason analysis of the exclusive deal at issue. *Id.*

19. *Texaco Inc. v. Dagher*, 547 U.S. 1, 6 (2006); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

20. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 271–75 (2007); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406, 412 (2004). See generally Babette E.L. Boliek, *FCC Regulation Versus Antitrust: How Net Neutrality Is Defining the Boundaries*, 52 B.C. L. REV. 1627 (2011).

21. Communications Act of 1934 §§ 1–719, 47 U.S.C. §§ 151–621 (2006).

advance their preferred form of industrial engineering, relatively free from antitrust scrutiny.<sup>22</sup> Indeed, antitrust in the arena of sports leagues has been directly and expressly limited at least twice: the infamous non-statutory “baseball exemption” and the statutory exemption of certain sports broadcast contracts.<sup>23</sup>

Regulators must protect consumers with heightened vigilance in areas that lack antitrust oversight.<sup>24</sup> In other words the current strength of antitrust law is properly part of the “public interest” calculus of the regulator. The converse is also true: as antitrust rises, the regulator should reassess regulations or risk overregulation and an associated decrease in consumer welfare.<sup>25</sup>

Although *American Needle* may not create a sea change in the law, it does represent a resurgence in antitrust focus with direct implications for the regulation of the sports telecast industry. But many regulatory policies and rules—especially those that support preferred content and technologies—have not been revised in decades.<sup>26</sup> Once outdated regulations are removed, sports telecasts contracts, like all other joint ventures, must face review by antitrust authorities. Reducing regulations will not guarantee that all fans can see any sports telecast in any given city, but it will at a minimum rationalize regulatory and antitrust treatment among sports leagues and other content providers. This Article addresses exactly these issues: the relative strength of antitrust in the arena of

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22. See D. Daniel Sokol, *Limiting Anticompetitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 129–30 (2009); Maurice E. Stucke, *Is Competition Always Good?*, 1 J. ANTITRUST ENFORCEMENT 162, 167 (2013).

23. *Flood v. Kuhn*, 407 U.S. 258, 285 (1972) (affirming Major League Baseball’s antitrust exemption, finding that “Congress had no intention of including the business of baseball within the scope of federal antitrust laws”) (quoting *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953)); Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2006).

24. See *infra* Part II.C.1. The comprehensive empirical analysis provides evidence to explain that if, for example, *American Needle* is read to abolish the single entity defense, that does not signify a great change in the law. The reality is that such a defense has never been relied on heavily by either the courts or the leagues themselves. See *infra* Figure 2. Therefore, antitrust has arguably always been available to remedy competitive issues in sports league markets, and the role of the regulator can be minimized given current market conditions.

25. See *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (“Since ‘the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible,’ we have insisted that the agencies consider antitrust policy as an important part of their public interest calculus.”) (citation omitted) (quoting *N. Natural Gas Co. v. Fed. Power Comm’n*, 399 F.2d 953, 959 (D.C. Cir. 1968)).

26. See *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 103–10 (1973) (recounting the legislative history of the Communications Act of 1934); see also Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 (Max D. Paglin ed., 1989); THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS 1934–1996 (Max D. Paglin ed., 1999).

sports telecast; the areas in which regulatory policy might assist or deter pro-consumer development; and recommendations for the rationalization of policy and enforcement regimes.

Part I of this Article analyzes the current and historic trends of regulation and antitrust jurisprudence giving particular attention to concerns that arise in the context of sports telecasts.<sup>27</sup> Part II examines sports telecasts as an illustrative example of the issues inherent with joint venture analysis.<sup>28</sup> Part II also analyzes the Supreme Court's most recent joint venture analysis in *American Needle*,<sup>29</sup> which held that the NFL's pooling of certain intellectual property was a violation of the Sherman Act.<sup>30</sup> This Article both presents a novel proposal—that *American Needle* is best construed as a two-part test for Sherman Act violations—and sets out a unique and novel empirical analysis of sports league antitrust jurisprudence.<sup>31</sup> This dataset provides a firm foundation from which disciplined analysis of future antitrust decisions is possible.

Part III lays out three specific examples of the interaction and often competing interests of antitrust enforcement and regulatory policy,<sup>32</sup> paying attention to the FCC's recent decision to sunset cable programming access rules, except for regional sports networks for which the rules will remain in place.<sup>33</sup> Part IV makes specific recommendations are made to Congress and governmental agencies to level the playing field for sports leagues and telecaster joint ventures and to thereby create greater certainty in the marketplace and encourage pro-consumer developments.<sup>34</sup> In particular, this Article uses novel empirical and normative analysis of the Sports Broadcast Act ("SBA") to argue that not much is lost and that much might be gained by abolishing the act in its entirety.<sup>35</sup> In addition, timely recommendations are made with respect to the FCC's sports broadcast rules and the cable programming access rules, both of which are currently up for review.<sup>36</sup> Finally, this Article concludes with a long-range view of the future of joint ventures under antitrust enforcement with sports leagues as an illustrative example.<sup>37</sup>

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27. See *infra* notes 38–78 and accompanying text.

28. See *infra* notes 79–160 and accompanying text.

29. See *infra* notes 98–135 and accompanying text.

30. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 204 (2010).

31. See *infra* notes 137–160 and accompanying text.

32. See *infra* notes 161–245 and accompanying text.

33. See *infra* notes 206–245 and accompanying text.

34. See *infra* notes 246–272 and accompanying text.

35. As a means to prevent an NFL lock-out, a bill was introduced in the 112th Congress to abolish the Sports Broadcast Act ("SBA") exemption from antitrust laws only as to the NFL. Prevent Lockout of Athletes this Year Act of 2011, H.R. 1060, 112th Cong. § 2 (2011). Such opportunistic legislation is exactly the type that can be prevented (or at least diminished) by abolishing the act.

36. See *infra* notes 71–76 and accompanying text.

37. See *infra* notes 273–279 and accompanying text.

## I. THE CURRENT RELATIONSHIP OF ANTITRUST, REGULATION, AND SPORTS BROADCAST

As noted, antitrust and industry-specific regulation are two distinct means to achieve much the same social goal—to protect consumers and encourage efficiencies in production and distribution.<sup>38</sup> However, the two regimes are by no means interchangeable, and the choice between them is itself imbued with certain social policy preferences.<sup>39</sup> Antitrust law is an enforcement regime that preserves competition across all private industries by condemning anticompetitive conduct only after it occurs.<sup>40</sup> In contrast, industrial regulation is inherently a social admission that, in a given industry, market forces are too weak to produce the consumer benefits that are realized in competitive markets.<sup>41</sup> Therefore, regulated industries are an exception to the economy at large and are subject to preemptive, regulatory rule that may actively engineer industry conduct far beyond that permitted under antitrust law.<sup>42</sup>

As the discussion below demonstrates, the Communications Act itself exhibits legislative preferences for certain telecommunications platforms that threaten to lock the United States into a pre-digital status quo.<sup>43</sup> A

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38. See generally Boliek, *supra* note 20.

39. As then-Chief Judge Stephen Breyer stated, while regulation and the antitrust laws “typically aim at similar goals—*i.e.*, low and economically efficient prices, innovation, and efficient production methods,” regulation looks to achieve these goals directly “through rules and regulations; [but] antitrust seeks to achieve them *indirectly* by promoting and preserving a process that tends to bring them about.” *Town of Concord, Mass. v. Bos. Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990).

40. Antitrust will act preemptively in the case of merger review by prohibiting the merger of entities if believed such merger will “lessen competition” in the relevant market post-merger. 15 U.S.C. § 18 (2006).

41. See The Annenberg Washington Program, *Does Regulation Have a Role in a Competitive Environment*, ANNENBERG PUBLICATIONS ONLINE (1992), <http://www.annenberg.northwestern.edu/pubs/telmar/telmar06.htm> (last visited Dec. 15, 2013).

42. This implicit tradeoff between regulation and antitrust has been long noted. As Alfred Kahn explained: “The essence of regulation is the explicit replacement of competition with government orders as the principle institutional device for assuring good performance.” ALFRED E. KAHN, *THE ECONOMICS OF REGULATION* 20 (1970). See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411–12 (2004).

43. At the inception of the telecast industry, video was broadcast with analog technology. The move to highly efficient digital technology has increased telecasters’ channel capacity exponentially. Even so, the Communications Act has not been amended to reflect these tremendous technological advances. Communications Act of 1934, 47 U.S.C. §§ 151–620 (2006). The Act is broken into “silos” delineated upon distinctions in distribution platforms—for example, wire or radio communication, 47 U.S.C. §§ 151–621; communications satellite system, 47 U.S.C. §§ 700–69; local TV, 47 U.S.C. §§ 1101–10; and broadband, 47 U.S.C. §§ 1301–05. The result is that absurd disparities in regulation exist simply due to technology differences by which identical data is transmitted. Although much complained of, little has been done to ensure regulatory parity—but in the arena of sports league telecast there is potential that regulatory change is not only possible, but desirable. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189–90 (1997) (affirming the importance of “three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair

natural “tug-of-war” arises when an industry involves an industry-specific regulator with a policy agenda in conflict with antitrust goals. To put these issues in perspective, a brief history of sports broadcast and the trade-offs made between regulation and antitrust enforcement in the sports telecast industry are discussed below.

#### A. THE FIRST SPORTS BROADCAST

In the case of sports telecasts, there exists an intriguing tale of antitrust and regulatory tradeoffs. The first televised broadcast of an athletic competition was the less-than-riveting combat between the Princeton Tigers and Columbia Lions to determine rank three and four in the Ivy College baseball league.<sup>44</sup> In 1939, the technology to capture high speed action of that game was far from perfect and it was highly uncertain that televised sport would capture fan excitement.<sup>45</sup> Of course, the technology improved and now telecast sporting events are some of the most highly rated shows available.<sup>46</sup>

The first antitrust challenge to a league’s broadcast restrictions came soon after the first broadcast.<sup>47</sup> At issue in *United States v. NFL (NFL I)* was an early version of the NFL’s blackout rules.<sup>48</sup> These rules prohibit NFL member teams from broadcasting their own games to networks in markets other than their own (as regulated by league agreement) on days

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competition in the market for television programming” (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994)); see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984) (holding that “protecting noncable households from loss of regular television broadcasting service due to competition from cable systems” is a “substantial federal interest”).

44. Lou Schwartz, *Sportscasting Firsts: 1920–Present*, AM. SPORTSCASTERS ONLINE, <http://www.americansportscasteronline.com/sportscastingfirsts.html> (last visited Dec. 15, 2013). As a Columbian, this Author must regrettably report that it was indeed a Tiger victory.

45. As NBC’s pioneering television sports director Harry Coyle put it, “[t]elevision got off the ground because of sports . . . Today, maybe, sports need television to survive, but it was just the opposite when it first started.” *Sports and Television*, MUSEUM OF BROADCAST COMMS., <http://web.archive.org/web/20130521181538/http://www.museum.tv/eotvsection.php?entrycode=sportsandte> (last visited Dec. 15, 2013).

46. To put it in perspective, last year’s Super Bowl was watched by 111.3 million viewers. Scott Collins, *Super Bowl’s on a New Ratings High, Again*, L.A. TIMES (Feb. 7, 2012), <http://articles.latimes.com/2012/feb/07/entertainment/la-et-super-bowl-ratings-20120207>. Not all leagues saw television for the opportunity it was. The NHL, for example, started broadcasting games as early as 1956. However, the majority of owners thought it a terrible idea and refused to take out arena seats to make room for the cameras. As a result, instead of being the first pro league with regularly televised games they became the last; and the league delayed the growth of its fan base for decades. See generally BRUCE DOWBIGGIN, *MONEY PLAYERS* (2007).

47. *United States v. NFL (NFL I)*, 116 F. Supp. 319 (E.D. Pa. 1953), *superseded by statute*, Sports Broadcasting Act of 1961, Pub. L. No. 87-331, § 1, 75 Stat. 732, *as recognized in* *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999).

48. *Id.*

when a team from the target market—the home team—is either playing at home or broadcasting its away game in that market.<sup>49</sup>

Employing a rule of reason analysis, the court determined that the prohibition on selling broadcast rights into another team's home market when that other team was playing at home was a valid restriction on broadcast rights.<sup>50</sup> The court accepted the justification that the restriction protected gate receipts, that gate receipts were central to team profit, and that team profit was essential to the maintenance of intra-league, competitive parity.<sup>51</sup> However, the court also decided that the NFL overreached when it attempted to restrict the sale of rights into another market when there was not another team physically playing within that market.<sup>52</sup>

Although a partial victory, the decision was problematic for the NFL. In the early 1960s the NFL—like most other professional leagues—realized that centralizing or “pooling” broadcast rights was an avenue to increase overall league broadcast revenues.<sup>53</sup> This type of cooperation often inspires antitrust concerns. Specifically, section 1 of the Sherman Act forbids independent competitors joining together to centralize output and dictate a cartel price to consumers;<sup>54</sup> in this case the direct consumer is the broadcaster.<sup>55</sup>

Nonetheless, it would of course be counterproductive to prevent all cooperation in a league. To express it in antitrust terms, a joint venture such as is the NFL has a variety of pro-competitive restraints of varying severity.<sup>56</sup> As Judge Allan Grim noted in 1953, and as the Supreme Court itself later held, “the interest in maintaining a competitive balance

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49. For example, the San Francisco 49ers could not broadcast its games to a station in Seattle when (1) the Seattle Seahawks are playing in Seattle or (2) the Seahawks are broadcasting into the Seattle market a Seahawks game that is being played elsewhere.

50. *NFL I*, 116 F. Supp. at 324.

51. *Id.* at 325–26.

52. *Id.* at 326–27.

53. See Lacie L. Kaiser, Note, *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, 1243 (2005). This of course highlights a basic economic tenet: a single entity with market power can charge greater prices for its good than can several competitors acting autonomously in the same market.

54. 15 U.S.C. § 1 (2006).

55. Concern for the occurrence of such behavior is noted by the courts and has been stated as follows: “So long as no agreement” other than one made by the cartellists sitting on the board of the joint venture, “explicitly listed the prices to be charged, the companies could act as monopolies through the ‘joint venture.’” *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring).

56. See James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 MARQ. SPORTS L. REV. 517, 520, 527, 530, 540–41 (2011).

among . . . athletic teams is legitimate and important.”<sup>57</sup> To bring an exciting league to the market, some cooperation is needed and permitted.<sup>58</sup> Rather than continue to challenge Judge Grim’s consent decree, however, the NFL decided to evade antitrust entirely. The NFL successfully lobbied for a statutory exemption specifically for the “pooling” of broadcast rights, and thus the Sports Broadcasting Act (the “SBA”) was born.<sup>59</sup> The SBA excludes from antitrust scrutiny the pooling of team broadcast rights by the NFL, National Basketball Association (“NBA”), National Hockey League (“NHL”), and Major League Baseball (“MLB”), for sale to a *broadcaster*.<sup>60</sup> As discussed below, the enactment of this statute was only the first volley in the antitrust/regulatory tug-of-war over sports telecasts.

#### B. THE REGULATORY AND ANTITRUST TUG-OF-WAR

Courts and scholars have rightfully—if not disdainfully—referred to the SBA as “special interest legislation.”<sup>61</sup> What is not noted by antitrust scholars and courts is that the SBA was, and still is, consistent with regulatory mechanisms contrived to support “localism” and other policy goals. Specifically, Congress and the FCC have stated expressly that “local” programming on “free over-the-air” broadcast is in the “public interest.”<sup>62</sup> However, the siphoning effect that national telecasts can have

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57. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984). The Court’s recent antitrust case continues to recognize this long standing principle that competitive balance in sports leagues is an “interest that may well justify a variety of collective decisions made by the teams.” *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 204 (2010).

58. It is entirely possible that what is required to insure intra-league competitive parity will change over time. As discussed, *American Needle* is one case that examines the “economic reality” of the day. *See supra* note 57. The standard of “economic reality” invites a case-by-case study of circumstances and industries at the time of the lawsuit that should make past precedents on the merits less persuasive than in other areas of the law. How past precedent is handled is of particular importance in broadcast suits where technology has enabled drastic shifts in consumer demand.

59. Sports Broadcasting Act of 1961, Pub. L. No. 87-331, § 1, 75 Stat. 732 (codified as amended at 15 U.S.C. § 1291 (2006)). The SBA carves out an exemption for a delineated class of collective agreements between some professional sports leagues and “sponsored telecasting.” Under the SBA, antitrust law “shall not apply to any joint agreement [involving] organized professional team sports of football, baseball, basketball or hockey . . . in the sponsored telecasting of the games of football, baseball, basketball or hockey.” *Id.*

60. *Id.*

61. *Chi. Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 671 (7th Cir. 1992); *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-5184, 1998 WL 419765, at \*4 (E.D. Pa. June 23, 1998), *aff’d*, 172 F.3d 299 (3d Cir. 1999); David L. Anderson, Note, *The Sports Broadcasting Act: Calling It What It Is—Special Interest Legislation*, 17 HASTINGS COMM. & ENT. L.J. 945, 947–58 (1995); Bradley W. Crandall, Note, *The DirecTV NFL Sunday Ticket: An Economic Plea for Antitrust Law Immunity*, 79 WASH. U. L.Q. 287, 309 (2001); Lacie L. Kaiser, Note, *The Flight from Single-Entity Structured Sport Leagues*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 23 (2004).

62. *See, e.g.*, 47 U.S.C. § 309 (2006) (considering the interference with local programming a factor in determining public interest for the purpose of granting licenses).

on local markets is viewed as destructive to the structural support provided local broadcasters.<sup>63</sup> Therefore, the local broadcaster is provided regulatory protection from national telecasts.<sup>64</sup>

Local broadcasters must survive on local advertising revenue.<sup>65</sup> Therefore, to support “localism” under the adopted structural method, the FCC also had to protect the revenue stream of those community-based broadcasters.<sup>66</sup> If a distant broadcaster could send its signal of duplicative, or more popular, programming into the local market, it might help consumers but jeopardize the delicate balance of “localism” created by the FCC.<sup>67</sup> Even in the early days, as the sports telecast

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63. See Inquiry into Sports Programming Migration, 9 No. 7 FCC Rcd. 1649, ¶ 11 (1994); Cox, *supra* note 13, at 572.

64. The manner by which the FCC effectuates the sports broadcast rules and provides general protection of local broadcast revenues is a series of archaic and complex systems of mandatory carriage provisions, carriage limitations in the network-program-syndicated exclusivity protection rules, non-duplication rules, and sports programming blackout rules.

*Non-duplication rules:* 47 C.F.R. §§ 76.92, 76.93, 76.106, 76.120, 76.122 (2012). Commercial television station licensees that have contracted with a broadcast network for the exclusive distribution rights to that network’s programming within a specified geographic area are entitled to block a local cable system from carrying any programming of a more distant television broadcast station that duplicates that network programming. *Id.* § 76.92(a). Commercial broadcast stations may assert these non-duplication rights regardless of whether or not the network programming is actually being retransmitted by the local cable system and regardless of when—or if—the network programming is scheduled to be broadcast. *Id.* § 76.120(b). With respect to satellite operators, the network non-duplication rule applies only to network signals transmitted by superstations, not to network signals transmitted by other distant network affiliates. *Id.* § 76.122(a).

*Ex-syndication rules:* *Id.* §§ 76.101, 76.103, 76.106, 76.120, 76.123. Cable systems that serve at least 1000 subscribers may be required, upon proper notification, to provide syndicated protection to broadcasters who have contracted with program suppliers for exclusive exhibition rights to certain programs within specific geographic areas, whether or not the cable system affected is carrying the station requesting this protection. *Id.* § 76.106(a). With respect to satellite operators, the syndicated exclusivity rule applies only to syndicated programming transmitted by superstations, not to syndicated programming transmitted by other distant broadcast stations. *Id.* § 76.123(a).

65. Deborah Potter et al., *Local TV: Audience Declines as Revenue Bounces Back*, THE PEW RES. CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM (Nov. 3, 2013), <http://stateofthemediamedia.org/2013/local-tv-audience-declines-as-revenue-bounces-back>; Brian Stelter, *Broadcasters Circle Wagons Against a TV Streaming Upstart*, N.Y. TIMES (Apr. 9, 2013), <http://www.nytimes.com/2013/04/10/business/media/aereo-has-tv-networks-circling-the-wagons.html>; Brian Stelter, *Local TV News Is Following Print’s Path, Study Says*, N.Y. TIMES, (Mar. 18, 2013), <http://www.nytimes.com/2013/03/18/business/media/local-tv-news-is-following-prints-path-study-says.html>.

66. See Potter, *supra* note 65.

67. The FCC’s first decision regarding conventional broadcast television began the long-standing commitment to promote locally oriented television programming. For instance, the protection of local broadcasters inspired one of the FCC’s first broadcast rules, the Chain Broadcasting Rules. 47 U.S.C. § 311. These rules defended the FCC’s regulatory scheme by constraining the influence of the dominant broadcast networks of the day. When challenged, the Supreme Court tacitly approved of the FCC’s rationale in enacting the rules and emphasized that “[l]ocal program service is a vital part of community life” and that regulation was required to guarantee stations were “ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events.” *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 203 (1943) (upholding the Chain Broadcasting Rules).

industry developed, it became clear that (1) there was strong consumer demand for such events,<sup>68</sup> and (2) higher powered transmissions would allow broadcasts to travel beyond the immediate localities of a given team. These developments create special problems for the FCC in particular because they could undermine the its structurally engineered licensing regime by siphoning away local advertising dollars. If local broadcasters are unable to maintain profits and leave the market, the FCC loses its chosen champion of local content promotion.<sup>69</sup>

And therein lies the tension: in the court of Judge Grim, the reach of one local team into the region of another was viewed as beneficial to sports consumers; however, in the view of the regulator, such reach is potentially destructive to the local broadcasters' revenue and, by association, destructive to FCC policy.<sup>70</sup> Therefore, the sports broadcast rules, among other regulations, were adopted to protect sports leagues and the potential erosion of local broadcasters' exhibition rights.<sup>71</sup> Also important are the cable access rules, which require sale of cable-owned networks to competitors at reasonable rates.<sup>72</sup> Although these rules have recently expired for most cable networks, competitor access to cable-owned regional sports networks remain under FCC control.<sup>73</sup>

Antitrust agencies have long recognized that markets change, business organizations evolve or disappear, and new revenue streams are

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68. See William Browning, *The History of Sports Television Broadcasting*, YAHOO! SPORTS (Sept. 3, 2010), <http://sports.yahoo.com/top/news?slug=ac-6713258>.

69. For example, effective January 1, 1990, the FCC's syndicated exclusivity rules mandated cable system blackouts of any syndicated programming carried on distant television signals at the request of any local broadcaster holding exclusive local exhibition rights. *Ex-syndication rules*: 47 C.F.R. §§ 76.101, 76.103, 76.106, 76.120, 76.123 (2013). Satellite broadcast carriage has received significant focus over the years, concentrating on distant signals beginning in 1988 with the Satellite Home Viewer Act of 1988 ("SHVA"), Pub. L. No. 100-667, 102 Stat. 3935, 3949 (1988), local signals in 1999 with the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, app. I, 1501A-521 (Nov. 29, 1999), and significantly refining the rules in the Satellite Home Viewer Extension and Reauthorization Act of 2004, Tit. IX, Div. J of the Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3393 (2004).

70. *United States v. NFL (NFL I)*, 116 F. Supp. 319, 326-27 (E.D. Pa. 1953), *superseded by statute*, Sports Broadcasting Act of 1961, Pub. L. No. 87-331, § 1, 75 Stat. 732, *as recognized in* *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999).

71. 15 U.S.C. § 1291 (2006).

72. 47 U.S.C. § 532(c)(4)(A) (2006) ("The Commission shall have the authority to . . . determine the maximum reasonable rates that a cable operator may establish."). See *FCC Encyclopedia: Evolution of Cable Television*, FCC (Mar. 14, 2012), <http://www.fcc.gov/encyclopedia/evolution-cable-television>.

73. See *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.). See Amy Schatz, *FCC Lets Cable Access Rules Expire, Keeps Some Protections for Cable Competitors*, WALL ST. J. (Oct. 5, 2012, 10:47 PM), <http://online.wsj.com/article/SB10000872396390443635404578038763502833172.html>.

discovered as technology advances.<sup>74</sup> As the dilemma just described shows, the structural format adopted by the FCC to promote localism and shield competitors from cable is showing its age and inability to adapt—a fact acknowledged by the current FCC.<sup>75</sup> The tension between antitrust and regulation revealed by sports telecasts is illustrative of the need for greater maturity in both arenas.<sup>76</sup>

The following Part focuses on the development of antitrust and joint-venture jurisprudence—with a quantitative analysis of the special case of sports leagues and sports league telecast joint ventures. The Part also briefly analyzes the Supreme Court’s recent sports league antitrust case, *American Needle*.<sup>77</sup> A normative analysis of *American Needle* reveals a judicially viable two-part test.<sup>78</sup> The consistency of this interpretive construct is confirmed and tested against the original dataset of prior sports league jurisprudence.

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74. See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM & DEMOCRACY 82–83 (6th rev. ed. 1994). Schumpeter defined the free market system as a “process of Creative Destruction.” *Id.* As Schumpeter noted, “in dealing with capitalism we are dealing with an evolutionary process” that is defined by constant “industrial mutation.” *Id.* This process “incessantly revolutionizes the economic structure *from within*” destroying old structures and “incessantly creating” new ones. *Id.* at 83 (citation omitted).

75. See, e.g., Revision of the Comm’n’s Program Access Rules, 27 FCC Rcd. 12605, 12748 (2012) (statement of Commissioner Ajit Pai), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-12-123A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-123A1.pdf) [hereinafter Statement of Ajit Pai]. “I therefore believe the exclusivity ban has outlived its statutory purpose as well as its constitutional justification. The market has changed, and our rules must follow.” *Id.* at 145 (citation omitted). See Schatz, *supra* note 73; see also Press Release, FCC, Statement of FCC Commissioner Robert M. McDowell Regarding the Media Bureau’s Request for Comment on the Petition Seeking Elimination of the Sports Blackout Rule (2012) [hereinafter Statement of McDowell], available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-311978A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311978A1.pdf). “Taking a fresh look at this 36-year-old rule could be constructive as we look for rules to streamline and modernize. . . . [T]he economics and structure of both the sports and communications industries have experienced dramatic evolutions. . . . It is appropriate for us to re-examine the rule in light of marketplace changes.” *Id.*

Cable has become the consumers’ choice as against reliance on free, over-the-air broadcast. For example, according to the Leichtman Research Group, an organization who studies entertainment and media trends, about 101 million households in the United States were cable and satellite subscribers in 2012—this is about eighty-seven percent of U.S. households—and the number has not changed since 2009. *TV Channel Blackouts Becoming More Common as Profits Stall*, USA TODAY TECH (July 16, 2012, 12:57 PM), <http://usatoday30.usatoday.com/tech/news/story/2012-07-15/television-blackouts/56236886/1>. Antitrust, in contrast to regulation, would not protect a local competitor against the very type of pro-consumer competition antitrust is intended to support.

76. There is evidence that the FCC and antitrust regulators are both well aware and responding in accordance with market changes. See, e.g., discussion, *supra* note 75 (noting the FCC’s recent sunset of the cable access rules and the proposal to repeal the sports blackout rules); see also discussion, *infra* note 84 (noting that sports telecast antitrust claim survives 12(b)(6) motion).

77. *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

78. *Id.* at 2209–12.

## II. SPORTS TELECASTS: AN ILLUSTRATIVE EXAMPLE OF JOINT VENTURE ANALYSIS

### A. THE BASICS OF JOINT VENTURE ANTITRUST ANALYSIS

As noted, antitrust as a product of common law has been able to adapt to changes in business structure. But in the face of one increasingly popular business form—the joint venture—agencies and courts have wavered and produced conflicting results. The pro-competitive reasons for joint ventures are varied: increased efficiency of production, creation of economies of scale, and research and development of new technologies are just a few examples.<sup>79</sup> The problem with joint ventures is that they involve an agreement among competitors that may create an unreasonable “restraint of trade” in violation of section 1 of the Sherman Act.<sup>80</sup>

In the realm of antitrust analysis, industry participants face various prohibitions, but the most relevant to this discussion are those found in sections 1 and 2 of the Sherman Act.<sup>81</sup> Broadly speaking, section 1 prohibits “any contract” among competitors that leads to a “restraint of trade.”<sup>82</sup> The Supreme Court has clarified that the Act applies only to “unreasonable” restraints of trade.<sup>83</sup>

To state a claim under section 1, plaintiffs must plead facts that plausibly suggest “(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.”<sup>84</sup> In addition, the plaintiff must allege that each defendant had “a conscious commitment to a common scheme designed to achieve an unlawful object.”<sup>85</sup> In its analysis of what is deemed an “unreasonable” restraint of trade, the Court has, in all but a few particular arenas, adopted a “rule of reason” standard of review.<sup>86</sup> In an oft repeated refrain, the true

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79. See, e.g., ORG. FOR ECON. CO-OPERATION & DEV., COMPETITION ISSUES IN JOINT VENTURES 9–11 (2001). See generally Carolyn Oddie, *Joint Ventures—Achieving a Balance: Assisting Pro-Competitive Ventures Without Permitting Obvious Anti-Competitive Behaviour*, 26 U. NEW S. WALES L.J. 321 (2003); Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605 (1986).

80. See 15 U.S.C. § 1 (2006).

81. *Id.* §§ 1–2.

82. *Id.* § 1 (emphasis added).

83. *Standard Oil Co. v. United States*, 221 U.S. 1, 87 (1911).

84. *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507 (9th Cir. 1989) (quoting *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988)).

85. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

86. The rule of reason has been criticized for its broad and amorphous interpretation. See, e.g., Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 315 (1986); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 11–12 (1984); Jesse W. Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 613 (2012); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1389 (2009). There is no set criteria, nor

test of legality is whether the restraint imposed is “such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition” and is therefore condemned under the Act.<sup>87</sup>

Sports league telecasts are particularly susceptible to a section 1 challenge because the league itself is a group of horizontal competitors linked together by an overarching league agreement.<sup>88</sup> In contrast, the focus of section 2 is not on “agreement” between competitors, but unilateral activities by a single entity—in particular an entity with “monopoly power.”<sup>89</sup> Here too the industry of sports telecast is potentially vulnerable to antitrust review, as it involves titans of two industries—namely “the league” (arguably the holder of monopoly power in the relevant sports market) and the telecaster (arguably the holder of monopoly power somewhere in the communications content and distribution chain). Indeed, many of the issues, concerns, and prior litigation of the sports telecast industry involve both Sherman Act sections 1 and 2 allegations against both leagues and telecasters.<sup>90</sup>

The two sections not only have different claim elements, they also have disparate levels of judicial scrutiny. The intensity of scrutiny for alleged section 1 violations is relatively high, while scrutiny for section 2

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are certain types of evidence automatically prescribed predominate weight, but courts must generally consider: “[1] the facts peculiar to the business to which the restraint is applied; [(2) the business’s] condition before and after the restraint was imposed; [(3) the nature of the restraint and its effect, actual or probable;] [(4) [t]he history of the restraint; [(5) the evil believed to exist; [(6) the reason for adopting the particular remedy;] and (7) the purpose or end sought to be attained.” *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

87. *Bd. of Trade*, 246 U.S. at 238.

88. *See, e.g.*, *L.A. Mem’l Coliseum Comm’n v. NFL*, 726 F.2d 1381, 1389–91 (9th Cir. 1984); James L. Brock Jr., Comment, *A Substantive Test for Sherman Act Plurality: Applications for Professional Sports Leagues*, 52 U. CHI. L. REV. 999, 999–1000 (1985); Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intra-League Rivalry*, 32 UCLA L. REV. 219, 229 (1984).

89. *See infra* Part III; *see also*, Hovenkamp, *supra* note 16. Hovenkamp notes that due to the contract between the NFL and Reebok, “whether the NFL is treated as a single entity or a combination of separate actors the challenge in this case would have implicated § 1 as well as possibly § 2 of the Sherman Act.” *Id.* at 7.

90. *See, e.g.*, *U.S. Football League v. NFL*, 842 F.2d 1335, 1341, 1349–50 (2d Cir. 1988) (alleging Sherman Act § 1 and § 2 claims including willful acquisition of monopoly in relevant television submarket); *Ass’n for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 590 (D.C. Cir. 1984) (*per curiam*) (alleging illegal tying arrangement for purchase of women’s and men’s championship by television network); *Laumann v. NHL*, 907 F. Supp. 2d 465, 476 (S.D.N.Y. 2012) (alleging Sherman Act § 1 and § 2 claims that leagues and cable operators are conspiring to eliminate competition by distributing only league authorized out-of-market games); *Warner Amex Cable Commc’ns, Inc. v. ABC, Inc.*, 499 F. Supp. 537, 544 (S.D. Ohio 1980) (alleging Sherman Act § 1 and § 2 claim of conspiracy and monopolization based on exclusive distributorship rights).

is relatively low.<sup>91</sup> As a result, private plaintiff attorneys look to identify section 1 violations whereas defendant attorneys are quick to seek characterization of client activity as “unilateral” rather than conspiratorial to face the less stringent standard of review under section 2.<sup>92</sup>

To succeed in a section 1 claim, a plaintiff “must first establish a combination or some form of concerted action between at least two legally distinct economic entities” since “[u]nilateral conduct on the part of a single person or enterprise falls outside the purview” of section 1.<sup>93</sup> Sports leagues are fairly unique among joint ventures in that their cooperation is essential for the very creation of the market.<sup>94</sup> As such, they are the ideal, “pure” example of joint venture antitrust analysis because the element of cooperation is, in certain instances, uncontested; therefore, the defense can easily establish that the league is not a naked cartel, but is a legitimate joint venture.<sup>95</sup> That leaves only the benefits of cooperation and the business justifications up for judicial

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91. See *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 226 (2d Cir. 2004) (“[T]he scheme as alleged threatens to become a permanent, nationwide cartel.”); *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994) (“[A]ntitrust laws seek to prevent rather than protect cartel profits.”); *Vogel v. Am. Soc’y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (“[B]uyer cartels, the object of which is to force the prices that suppliers charge the cartel below the competitive level, are illegal per se.”); *Int’l Outsourcing Servs., LLC v. Blistex, Inc.*, 420 F. Supp. 2d 860, 865–66 (N.D. Ill. 2006) (holding that a buyers’ cartel are per se violations of the Sherman Act).

92. The promise of treble damages encourages plaintiffs’ attorneys to seek out such opportunities and the sports league is an obvious, if not tempting, target. Clayton Act, ch. 323, § 7, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 15 (2006)).

93. *Capital Imaging Assocs. P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir. 1993).

94. *MLB Props., Inc. v. Salvino Inc.*, 542 F.3d 290, 316, 334 (2d Cir. 2008) (acknowledging that “[p]er se treatment is not appropriate” in considering sports leagues’ restraints). Per se rules apply where it “facially appears to be one that would always or almost always tend to restrict competition and decrease output.” See *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1187 (S.D. Cal. 2002); see also *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“Per se liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality” and should not be applied “where the economic impact of certain practices is not immediately obvious”) (internal quotation marks omitted); *United States v. Andreas*, 216 F.3d 645, 666 (7th Cir. 2000) (“Per se violations are naked restraints of trade with no purpose except stifling competition” and are characterized as “plainly anti-competitive and lacking any redeeming virtue.”) (internal quotation marks omitted).

95. There are limits of course. Joint ventures may not serve as cover to anticompetitive behavior. As noted by the Supreme Court, a “‘contract, combination . . . or conspiracy,’ that is necessary or useful to a joint venture is still a ‘contract, combination . . . or conspiracy’ if it ‘deprives the marketplace of independent centers of decisionmaking.’” *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 190 (2010) (citations omitted) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984)); see also *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 113 (1984) (“[J]oint ventures have no immunity from antitrust laws.”).

review.<sup>96</sup> It is precisely that element of essential cooperation that contributes to a fascinating judicial history of antitrust enforcement, most recently capped by the Supreme Court's decision in *American Needle*.<sup>97</sup>

#### B. *AMERICAN NEEDLE*—A TWO-PART TEST FOR JOINT VENTURES?

*American Needle* is a clothing manufacturer that for many years made clothing with NFL team logos pursuant to a nonexclusive license.<sup>98</sup> After a time, the joint venture that managed NFL intellectual property (“the NFL Properties”) changed its licensing policy and issued an exclusive license for NFL logos to Reebok—thus excluding Reebok's rival *American Needle*.<sup>99</sup> *American Needle* brought suit under antitrust law claiming in part that the NFL violated section 1 of the Sherman Act by pooling the individual member-teams' intellectual property rights in logos and merchandise.<sup>100</sup> The defendant claimed, in part, that it simply refused to deal with *American Needle* in what constituted a legitimate, unilateral act of a single entity.<sup>101</sup>

As stated previously, the first part of any section 1 claim is to establish that entities have joined in a contract, agreement or conspiracy with one another.<sup>102</sup> However, agencies and courts have struggled with how literal an interpretation to apply to these words.<sup>103</sup> Of particular relevance is the rather obvious point that it takes at least two entities to contract, agree, or conspire. If there is only one entity, there is no section 1 violation. But what constitutes a “single entity” is not obvious. For example, the Court took considerable time to acknowledge that internal divisions of a business might need to cooperate to accomplish the single goal of the corporate head.<sup>104</sup> The Court left open, however,

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96. There is a tension in antitrust law between which error is preferred: erroneous condemnation of a beneficial practice or the escape from condemnation by an anticompetitive practice. See *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 676 (7th Cir. 1992) (“Markets slowly but surely undermine practices that injure consumers. Competition does not undermine judicial decisions, so the costs of wrongly condemning a beneficial practice may exceed the costs of wrongly tolerating a harmful one.”).

97. 560 U.S. 183 (2010).

98. Complaint ¶¶ 6–8, *Am. Needle, Inc. v. New Orleans, La. Saints*, 496 F. Supp. 2d 941 (N.D. Ill. 2007) (No. 04-7806), 2004 WL 3123822.

99. *Id.* ¶¶ 11–14.

100. *Id.*

101. Memorandum in Support of NFL Defendant's Motion for Summary Judgment at 1–2, *Am. Needle*, 496 F. Supp. 2d 941 (No. 04-7806), 2005 WL 6087988.

102. 15 U.S.C. § 1 (2006).

103. For a brief, historical journey of the Sherman Act and its application by the Court, see generally Nolan Ezra Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125 (1985).

104. The Sherman Act was signed into law in 1890. The Sherman Act, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7 (2006)). It was not until 1984, nearly one-hundred years later, that the *Copperweld* Court addressed the business and affiliates question. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–69 (1984). *Copperweld* held that a wholly owned

how attenuated the subsidiary-parent relationship could be in order to constitute a single entity incapable of the concerted activity that violates section 1.<sup>105</sup> In *American Needle*, the Court determined that the thirty-two member teams did not rise to the level of a “single entity” for the purpose of selling intellectual property.<sup>106</sup>

To some, *American Needle* ostensibly stands for the end of the “single entity” defense for sports leagues.<sup>107</sup> But this overstates *American Needle* and understates the judicial history of concerted action analysis.<sup>108</sup> In the face of prior antitrust claims, sports leagues and other joint ventures have asserted that for *certain purposes* the members of the venture act as one independent decisionmaking center and should therefore be shielded from section 1 scrutiny.<sup>109</sup> However, as seen in *Copperweld Corporation v. Independence Tube Corporation*, *United States v. Sealy*, and *Broadcast Music Inc. v. Columbia Broadcasting System, Inc.*, the Court has neither accepted nor discarded these arguments automatically.<sup>110</sup> As stated in *American Needle*, the Court has “long held” that it will look to “substance” of the business and to the “economic realities” of the operations to determine single entity status.<sup>111</sup> In this regard, it appears that *American Needle* merely affirms, rather than redirects, prior precedent holding that the proper analysis of joint ventures begins by a “functional analysis” of the alleged concerted action.<sup>112</sup>

But exactly how the Court proceeds with this analysis and how the Court describes that process is confused and has arguably already raised

subsidiary could not “conspire” with its parent as the two together acted as the functional equivalent of a single economic entity. *Id.*

105. *See id.*

106. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 201 (2010).

107. McKeown, *supra* note 56, at 517; Judd E. Stone & Joshua D. Wright, *Antitrust Formalism Is Dead! Long Live Antitrust Formalism! Some Implications of American Needle v. NFL*, *CATO SUP. CT. REV.* 369, 371 (2010); Daniel A. Schwartz, Note, *Shutting the Back Door: Using American Needle to Cure the Problem of Improper Product Definition*, 110 *MICH. L. REV.* 295, 314 (2011).

108. *See infra* notes 109–113 and accompanying text.

109. *Copperweld*, 467 U.S. at 767, 769–70; *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1036 (9th Cir. 2005) (affirming single entity status granted to certification authority); *Williams v. I.B. Fischer Nev.*, 999 F.2d 445, 448 (9th Cir. 1993) (granting single entity status to restaurant chain franchises with anticompetitive agreement); *S.F. Seals, Ltd. v. NHL*, 379 F. Supp. 966, 971 (C.D. Cal. 1974) (granting single entity status to the NHL).

110. *Copperweld*, 467 U.S. 752; *Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (BMI)*, 441 U.S. 1 (1979); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

111. *Am. Needle*, 560 U.S. at 191; *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466–67 (1992); *Copperweld*, 467 U.S. at 773 n.21; *Sealy*, 388 U.S. at 352.

112. *See Am. Needle*, 560 U.S. at 192 (“[S]ubstance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1.” (alteration in original)); *BMI*, 441 U.S. at 14 (noting that the Court will look to the economic realities of the venture); *Copperweld*, 467 U.S. at 769 (noting that the relevant inquiry is if “independent centers of decisionmaking” are joined together); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 834 (3d Cir. 2010); *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1132 (3d Cir. 1995).

problems of interpretation for the lower courts.<sup>113</sup> Indeed, the “single entity” dicta is truly unfortunate because it misleads courts to examine the necessity of cooperation of the organization in general rather than the cooperation of the organization in relation to the necessity of the activity at issue. The Supreme Court itself spoke of general cooperation of the NFL but decided the case based on the importance of the restraint at issue—exclusive merchandising rights—to the NFL’s core purpose.<sup>114</sup>

To unravel *American Needle*, and to give clear, uncomplicated instruction to the lower courts and certainty to joint venture participants, this Article argues that *American Needle* dictates (or at least permits) a two-part test. The test comes into play after there is a plausible argument that there is an agreement, contract or conspiracy.<sup>115</sup> For example, almost any professional league that permits independent team ownership would meet this threshold. The test first makes the following inquiry: Given that there is plausible concerted action, does the challenged activity constitute a core or central activity of the joint venture? Importantly, the focus of this inquiry is on the relation of the activity to the joint venture, not on the nature of how the entities cooperate or need cooperation in general. In other words, to the extent that there is a “single entity” inquiry, it is made only in connection to the challenged activity and not to the general operation of the venture. This first prong of the test must of course employ a rule of reason analysis but it has the advantage of limiting that analysis by keeping it tethered to the challenged activity.

The answer to the first inquiry will be either “yes it is a core activity” or “no it is not,” but neither conclusion will end the section 1 analysis. This is different than the classic single entity analysis for which a finding that defendant is a single entity will terminate the section 1 analysis and leave the plaintiff the option to launch a more challenging section 2 claim. The answer will, however, determine the standard by which the second question is assessed. The second part of the test inquires: Is the restraint at issue unreasonable and therefore an illegal one?<sup>116</sup> If the restraint has been found to be “core” to the joint venture, then for this second question the court should treat the restraint as almost per se reasonable. If the restraint was not found to be core, then this second question should be answered by use of traditional rule of reason standards.

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113. See *Laumann v. NHL*, 907 F. Supp. 2d 465 (S.D.N.Y. 2012).

114. *Am. Needle*, 560 U.S. at 201.

115. *Am. Needle*, 560 U.S. at 186 (“The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade.”).

116. *Id.* at 203.

The Court does not describe its analysis in such a formulized manner.<sup>117</sup> But the narrow holding of *American Needle* is consistent with the two-part test described here. The Court noted that the NFL's licensing activities constituted concerted action within the meaning of section 1.<sup>118</sup> The Court noted that "[a]lthough NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."<sup>119</sup> In other words, using a quick rule of reason analysis the Court found this particular agreement was not core to the NFL's "common interests."<sup>120</sup> Next, the Court noted that given that conclusion, the restraint examined under a rule of reason analysis was found unreasonable.<sup>121</sup>

The advantage of formulizing the test is that it quickly and easily demonstrates that the same league may be permitted to agree for certain "core" activities and yet found to illegally cooperate for other activities.<sup>122</sup> For example, consider the NFL's practice of pooling all member broadcast rights for sale as nation-wide telecasts.<sup>123</sup> The first part of the test would inquire as to whether the production of telecast rights is "core" to the NFL's business. The NFL produces games for exhibition; arguably in today's world "exhibition" means video exhibition as much as tickets for in-person viewing.<sup>124</sup> Indeed, given the overwhelming importance of

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117. *Id.* at 196. If the restraint does join independent centers of decisionmaking "the court must [*then*] decide whether the restraint is an unreasonable and therefore illegal one." *Id.* It is consistent to read this as a two-part test. First the court decides if the restraint impermissibly joins together independent centers *and then* (if the answer to part one is yes) the unreasonableness of the restraint is considered. An example of possible confusion and improper conflation of these two parts may be seen in *Laumann*, 907 F. Supp. 2d at 485–86 (utilizing stare decisis to preempt more full rule of reason analysis).

118. *Am. Needle*, 560 U.S. at 195.

119. *Id.* at 198.

120. *See id.*

121. *See id.* at 200–01.

122. Hovenkamp, *supra* note 16. This is also exactly the question Judge Easterbrook asked in *Chicago Professional Sports Ltd. Partnership v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996). Looking specifically at broadcast restraints the NBA adopted, Judge Easterbrook noted that sports "are sufficiently diverse that it is essential to investigate their organization and ask *Copperweld's* functional question one league at a time—and perhaps one facet of a league at a time." *Id.* Indeed, Easterbrook commented that "an organization such as the NBA is best understood as one firm when selling broadcast rights" where it competes with thousands of entertainment producers, "but is best understood as a joint venture when curtailing competition for players who have few other market opportunities." *Id.*

123. See Phillip Miller, *An Overview of NFL Revenues and Costs*, in *THE ECONOMICS OF THE NATIONAL FOOTBALL LEAGUE* 55, 64–66, 89 (Kevin G. Quinn ed., 2012).

124. See Kevin Clark, *Game Changer: NFL Scrambles to Fill Seats*, *WALL ST. J.* (July 2, 2012, 3:00 PM), <http://online.wsj.com/article/SB10001424052702303561504577495083707417526.html>; Miranda Green, *Why Rising Ticket Prices and Technology Lead NFL Fans to Stay Home*, *DAILY BEAST*

broadcast revenue to the NFL, it is fairly easy to assert that the centralized sale of broadcast rights is central to the “economic reality” of providing competitive football.<sup>125</sup>

Because the first part of the test confirms the centrality of broadcast revenue, the second part of the test should be a less intrusive rule of reason analysis—almost invoking the per se legality of a section 2 single entity review without dismissing the section 1 inquiry entirely.<sup>126</sup> To continue the example of the NFL’s pooling rights for national broadcast, the second part of the test would consider if the restraints on pooling are reasonable to attain the stated goal: the exhibition of league competition.<sup>127</sup>

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(Dec. 23, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/12/23/why-rising-ticket-prices-and-technology-are-leading-nfl-fans-to-stay-home.html>.

125. STEPHEN F. ROSS & BENJAMIN WOODWORTH, PENN STATE LAW, MORE LIKE THE UNITED NATIONS THAN McDONALD’S: ECONOMIC AND POLICY ASPECTS OF THE NFL LABOR DISPUTE 3 (2010) (stating that all NFL broadcast TV and radio, and licensing revenue is shared equally among teams; ticket revenue is partially shared with sixty-six percent staying with the home team and thirty-four percent split evenly among all teams (not including luxury box suite sales)).

126. In *American Needle*, the intellectual property rights at issue (the marketing of logos and merchandise) was a small percentage of the revenue stream for the NFL as an entity. Brief for Petitioner at 4, *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010) (No. 08-661), 2009 WL 3004479, at \*4 (reporting \$2.9 billion in NFL merchandise sales in 2001). See Jake I. Fisher, *The NFL’s Current Business Model and the Potential 2011 Lockout* (May 4, 2010) (unpublished student work, Harvard University), available at <http://harvardsportsanalysis.files.wordpress.com/2009/09/the-nfl-business-model-and-potential-lockout.pdf>. Using the Green Bay Packers as a case study, Fisher compiled data showing that in 2009, NFL Properties accounted for \$36.5 million of the team’s total revenue versus radio and television deals (\$94.5 million), pro shop sales (\$43.7 million) and ticket sales (\$47.3 million) among other things. *Id.* at 20.

Arguably, in the two-part analysis advocated for here, the first part of the two-part test would result in exactly the finding of the Court—that merchandising of intellectual property is not a “core activity.” Indeed, the Court itself seemed not to analyze the restraint in connection to the league but rather just how important the cooperation was to the league in general. *Am. Needle*, 560 U.S. at 195-203. Again, this confuses the relevant issue—how important the restraint is to the particular league. The Court mentioned that teams have separate ownership and revenue streams and compete for “fans, for gate receipts and for contracts with managerial and player personnel.” *Id.* at 184. But these examples speak more to the general enterprise of league activity rather than to any analysis of how the activity at issue relates to the enterprise—the consolidation of the intellectual property of team logos, ostensibly to build the NFL brand. Moreover, with the decision in *NCAA v. Board of Regents of the University of Oklahoma*, the Court indicated that the first part of the two-part test may not be a separate question at all but merely a means to establish the standard of review for, what is called here, the second part of the test, 468 U.S. 85, 113-20 (1984).

But, in the alternative, it is also feasible that given the particular facts of the case the Court was able to perform the first part of the two-part test in “the twinkling of an eye.” *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 780 (1999); *Bd. of Regents*, 468 U.S. at 109 n.39. It is also consistent to conclude that certain facts with respect to other types of restraints will demand more extensive inquiry. This interpretation will leave open ended the definition of a “safety zone” from section 1 scrutiny and leaves the defining of the boundaries to the courts for a case-by-case assessment.

127. If the activity at issue is truly core to the industry, to adopt an inquiry of whether the restraint is the “least restrictive” would dilute industry incentives to experiment with new business models and new ways of maximizing revenue streams as consumer demand shifts. See Claire E. Trunzo, *Ancillary*

Here the inquiry would be slightly different: an almost rebuttable presumption that the restraint was reasonably ancillary to the “core activity.” In this hypothetical, the NFL would likely assert that the pooling of rights was necessary to guarantee an even split of revenue among teams which, in turn, is intended to provide each team the resources to maintain competitive parity. This is a rational—but not unassailable—justification that will ultimately turn on an empirical analysis of each team’s market power. The advantage of such an approach, however, is that it incorporates the rigor of the section 1 analysis and the more permissive approach of section 2 analysis in the same test. If done correctly, the test will identify anticompetitive areas of greatest concern and embolden industry to make pro-competitive innovations in their areas of core activity.

Antitrust results under this test may vary based on the activity and they may also vary depending on the league being examined. For example, MLB does not divide revenues from broadcast equally.<sup>128</sup> MLB depends on a “taxation” system and other mechanisms to support competitive parity among teams.<sup>129</sup> Therefore, if MLB attempts to centralize broadcast rights, it may face vastly different antitrust liability compared to the NFL. This league-by-league, activity-by-activity analysis is consistent with the decades of antitrust jurisprudence examined below.

Indeed, this basic approach may be loosely applied to all legitimate joint ventures and is not the sole reserve of sports leagues.<sup>130</sup> Such an approach is consistent with a more comprehensive view of joint ventures that has gradually been developing in antitrust jurisprudence.<sup>131</sup> Rather than articulating a pure “zone of protection” for all restraints by joint ventures, once the legitimacy of the venture itself is established, the restraint’s relation to the purpose of the joint venture is the focus for determining the level of antitrust scrutiny. The result is a continuum of scrutiny rather than a bifurcation between “per se” and “rule of reason” analysis.<sup>132</sup> This framework is consistent with past precedent on joint

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*Restraints in a Competitive Global Economy: Does the Possibility Exist for an Ancillary Restriction to be Reasonable in Light of Section 1 of the Sherman Act?*, 29 DUQ. L. REV. 291, 301 (1991).

128. ALBERT THEODORE POWERS, *THE BUSINESS OF BASEBALL* 226 (2003).

129. See Dan Messeloff, Note, *The NBA’s Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521, 560–67 (2000).

130. The requirement that there is a “legitimate” joint venture speaks to a threshold determination that the joint venture is not merely a sham. *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005).

131. See *infra* notes 133–137 and accompanying text.

132. This is consistent also with the Supreme Court’s analysis in *California Dental Ass’n*, where the Court itself stated “our categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.” *Cal. Dental Ass’n*, 526 U.S. at 779. One commentator has declared that “the time has come for the courts and agencies to abandon these outmoded phrases, which artificially limit fact finders’ discretion.” Thomas A. Piraino, Jr.,

venture analysis found in the much-cited *Dagher*.<sup>133</sup> It also resurrects to some extent the analysis first applied by Chief Justice William Taft in *United States v. Trenton Potteries*,<sup>134</sup> a case of increasing popularity. Interestingly, as discussed below, this analysis is also consistent with the majority of the Sherman Act sports association jurisprudence of the past ninety years.<sup>135</sup>

### C. AN EMPIRICAL ANALYSIS OF SPORTS LEAGUE ANTITRUST JURISPRUDENCE

Some commentators question whether *American Needle* has killed the single entity defense.<sup>136</sup> The empirical question to consider here is whether the single entity defense ever lived? Moreover, the validity of the two-part test described above is analyzed against past precedent. To examine these questions, consider again that an antitrust plaintiff will be most likely to prevail if her claim can be brought as a section 1 rather than section 2 claim.<sup>137</sup> From this perspective, sports leagues that are already susceptible to claims of cartel-like conduct due to the necessity of cooperation in their markets may look to the “single entity” defense as a means to imbue certain activities with a presumption of per se legality.<sup>138</sup> To the extent that *American Needle* abandons this potential protection, leagues like all other joint ventures face a rule of reason analysis. A key question for agencies, leagues, and plaintiffs’ attorneys is whether this is

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*Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 367 (2007); see Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 55 (1995); Thomas A. Piraino, Jr., *An Antitrust Common Law for the Twenty-First Century*, 2009 UTAH L. REV. 635, 644 (2009).

133. 547 U.S. 1.

134. 273 U.S. 392 (1927). See Marc Edelman, *Does The NBA Still Have “Market Power?” Exploring the Antitrust Implications of an Increasingly Global Market for Men’s Basketball Player Labor*, 41 RUTGERS L.J. 549, 553–54 (2010); Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105, 136 (1989); Stucke, *supra* note 86, at 1399–1400.

135. See *Chi. Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 672 (7th Cir. 1992) (“The merits of the case turn on the characterization of the NBA. Is a sports league a single entity? In that event its decisions about telecasting are *effectively unreviewable*.” (emphasis added) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 758 (1984))).

136. See McKeown, *supra* note 56, at 517; Stone & Wright, *supra* note 107, at 371; Schwartz, *supra* note 107, at 314.

137. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978) (horizontal price fixing); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (tying arrangements); *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457, 468 (1941) (group boycotts); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210 (1940) (price fixing); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899) (division of markets).

138. See *Am. Needle, Inc. v. NFL*, 538 F.3d 736, 743 (7th Cir. 2008), *rev’d*, 560 U.S. 183 (2010).

a radical change that will “change sports law” or simply a continuation of past practices.<sup>139</sup>

This is largely an empirical question. If the “single entity” theory truly shielded sports leagues before *American Needle*, then there will be evidence of that in sports league jurisprudence.<sup>140</sup> To establish if that is the case, data were collected from all the federal courts for cases filed against certain leagues that referenced the single entity defense. Specifically, the data encompass section 1 and section 2 challenges that involve the MLB, NBA, NHL, NFL, and Major League Soccer (“MLS”).<sup>141</sup> In addition, data were collected for Sherman Act cases that named the National Collegiate Athletic Association (“NCAA”) as a defendant. The honors go to the MLB for the first antitrust decision in 1922, and the data presented end with cases filed in 2012.<sup>142</sup>

In examining the raw number of filings, the NCAA is a lightning rod for litigation, with thirty-one cases filed against it beginning in 1973 and the last recorded in 2012.<sup>143</sup> This is a rather remarkable distinction given that all of the entities—with the exception of the NBA—have been in existence for roughly the same period of time.<sup>144</sup> MLS is the quietest with a mere four total cases—one of which it appeared as plaintiff against the NFL.<sup>145</sup> Although these numbers have their own appeal, they tell a story that is utterly consistent with a modern, *American Needle* analysis—the more dispersed the “independent centers of decisionmaking” and the less identifiable the “core activity,” the more susceptible it will be to

139. See, e.g., Irwin A. Kishner & Julie Albinsky, *Very Much Ado About . . . Nothing*, 29 ENT. & SPORTS LAW. 1, 3 (2011).

140. Such evidence would at least take the form of defensive arguments if not in dispositive use of the argument in judicial determinations.

141. For purposes of this Article, Major League Soccer (“MLS”) will be used to refer to the professional soccer league in the United States.

142. *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922).

143. *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).

144. The NCAA was founded in 1906 with the first NCAA bowl championship played in 1921. *History, NCAA* (Aug. 13, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/History>. There is dispute about the exact founding date of MLB but the National League has been around since 1876 and the American League since 1901. *History of the Game: Doubleday to Present Day*, MLB.COM, [http://mlb.mlb.com/mlb/history/mlb\\_history\\_teams.jsp](http://mlb.mlb.com/mlb/history/mlb_history_teams.jsp) (last visited Dec. 15, 2013). The NFL traces its official origin to 1920. NFL, 2012 NFL RECORD & FACT BOOK 353–55, available at [http://static.nfl.com/static/content/public/image/history/pdfs/History/Chronology\\_2011.pdf](http://static.nfl.com/static/content/public/image/history/pdfs/History/Chronology_2011.pdf). The NHL arrived in the United States in 1924, *The History of the Hub of Hockey*, BOSTON BRUINS, <http://bruins.nhl.com/club/page.htm?id=39032> (last visited Dec. 15, 2013). The American Professional Soccer League (progenitor of the MLS) originated in 1921. *U.S. Soccer Timeline*, U.S. SOCCER, <http://www.ussoccer.com/About/History/Timeline.aspx> (last visited Dec. 15, 2013). The NBA is the rookie of the lot, harkening back less than sixty years to 1946. *NBA Season Recaps*, NBA.COM, <http://www.nba.us/history/seasonreviews/season-recaps/index.html> (last visited Dec. 15, 2013).

145. See generally *Fraser v. Major League Soccer, LLC*, 284 F.3d 47 (1st Cir. 2002); *N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982); *N. Am. Soccer League v. NLRB*, 613 F.2d 1379 (5th Cir. 1980); *ChampionsWorld LLC v. U.S. Soccer Fed’n, Inc.*, 890 F. Supp. 2d 912 (N.D. Ill. 2012).

antitrust scrutiny and, therefore, predictably attractive to private plaintiff antitrust claims.<sup>146</sup>

Of the entities examined here, the NCAA is least likely to be considered a single entity. As the Supreme Court itself has noted, the “core” activity of schools that participate under the NCAA umbrella is not the production of college sporting events, but the production of education.<sup>147</sup> Therefore, in a broad sense, the NCAA is most aptly described as an independent accreditation program for those involved in college sports—much like the American Bar Association provides an accreditation program for university law schools.<sup>148</sup> It should therefore be expected that when the NCAA stands in as a de facto players union that protects the amateur nature of the game and athletes, and thereby protects the educational goals of the colleges, the NCAA is at its most impervious to antitrust scrutiny. This is exactly what the data show: of the thirty-one claims levied against the NCAA, twenty touched upon player or personnel limitations.<sup>149</sup> Of those twenty, courts overwhelmingly held that in the arena of setting athlete eligibility standards, the NCAA is acting “outside the scope” of antitrust law and is therefore not subject to antitrust review.<sup>150</sup> The NCAA is at its weakest legally when it attempts to assist the flow of sports telecast revenues to universities by controlling the output of televised games.<sup>151</sup>

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146. See *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 190 (2010).

147. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 121–22 (1984).

148. Compare ABA, THE LAW SCHOOL ACCREDITATION PROCESS (2013), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_revised\\_accreditation\\_brochure\\_web.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_revised_accreditation_brochure_web.authcheckdam.pdf), with *About the NCAA: Membership*, NCAA (Aug. 13, 2012), available at <http://ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/membership+new>. The NCAA is purely a voluntary organization that is not “necessary” for fielding a sports program—although the absence of membership would be a de facto limitation on competitive opportunity. In some states (although not California) ABA accreditation is required to sit for the state bar exam making ABA accreditation a de facto requirement for any would-be law school.

149. See, e.g., *Agnew*, 683 F.3d 328; *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977).

150. See *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008) (holding NCAA’s recruitment provisions not commercial and therefore outside reach of antitrust); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 497 (D.N.J. 1998) (“Sherman Act does not apply to the NCAA’s promulgation of eligibility requirements.”); *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (holding NCAA eligibility rules not subject to antitrust analysis).

151. See, e.g., *Bd. of Regents*, 468 U.S. 85. To put it in perspective, imagine Harvard Law School’s reaction if the ABA attempted to control the number of conferences Harvard could broadcast because the ABA wanted to ensure that Harvard did not crowd out revenue opportunities for Yale Law School and other ABA accredited schools. Note, however, that college sports conferences are more unassailable in this regard than is the NCAA. College sports conferences are organized by universities themselves to raise interest in their sports programs and attract broadcast revenues.

Conversely, MLS is highly centralized compared to other leagues.<sup>152</sup> But even given the high concentration of the soccer league, the single entity defense has proved tricky. The only court to address it found that the single-entity claim was weak, but the case was decided on other grounds.<sup>153</sup>

Most antitrust claims against the entities studied overwhelmingly involve personnel (player) restraints. The next category involves ownership restraints such as relocation rights, expansion teams, or ownership limitations by status.<sup>154</sup> Broadcast rights cases represent a relatively small share of cases but the highest potential revenue streams.<sup>155</sup> In percentage terms, approximately 56% percent of claims fall into the category of personnel (player) issues, 21% relate to ownership, and 22% are in the general pool comprised primarily of broadcast disputes and other contractual claims.<sup>156</sup>

Figure 1: Sherman Act Claims by Category

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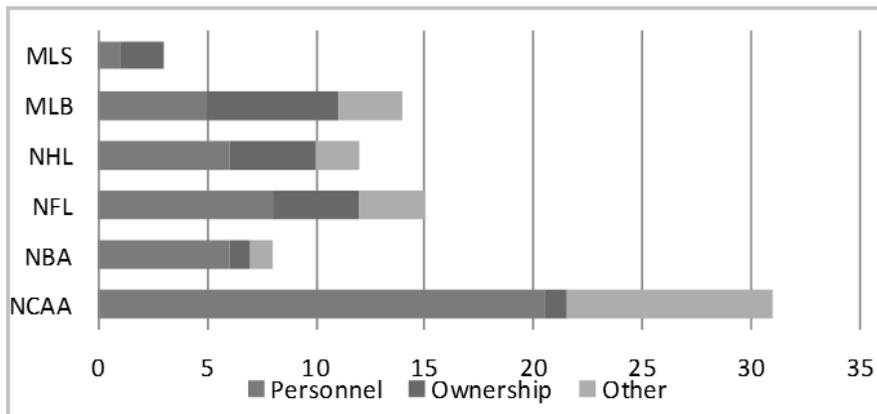
152. Arguably, MLS was structured specifically to avoid antitrust scrutiny. *See Fraser v. Major League Soccer, LLC*, 97 F. Supp. 2d 130, 132 (D. Mass. 2000); *see also Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 53 (1st Cir. 2002) (describing MLS's "unique structure" in which MLS "owns all of the teams" and exerts "significant centralized control over both league and individual team operations").

153. *Id.* at 59–60, 71 (finding no violation of the Sherman Act given the jury finding that there was no relevant market for player services).

154. *See, e.g., N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982); *Piazza v. MLB*, 831 F. Supp. 420 (E.D. Penn. 1993); *S.F. Seals, Ltd. v. NHL*, 379 F. Supp. 966 (C.D. Cal. 1974).

155. In *Bd. of Regents*, for example, both ABC and CBS had agreed to pay a minimum of \$131.75 million each to participating schools over a four-year period. 468 U.S. at 92–93; *see Laumann v. NHL*, 907 F. Supp. 2d 465 (S.D.N.Y. 2012). In 2011, MLB charged \$200 per subscriber for their "Extra Innings" package through DirecTV and Dish Network and between \$99.99 and \$119.99 for Internet subscriptions to MLB.TV. Class Action Complaint ¶¶ 77, 88, *Laumann*, 907 F. Supp. 2d 465 (No. 12-3704), 2012 WL 1609215.

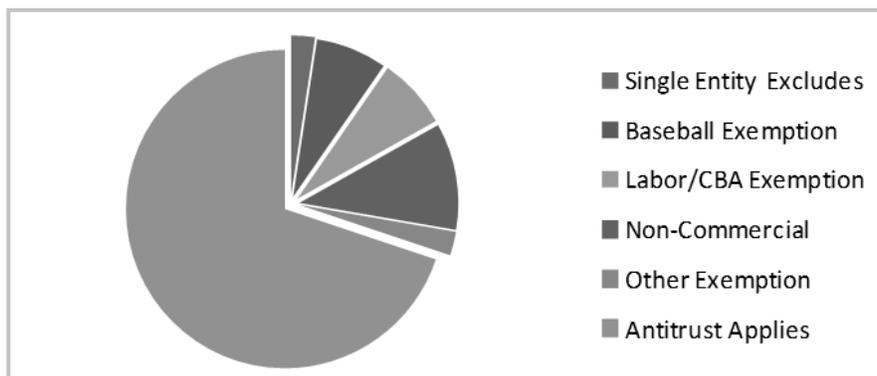
156. *See, e.g., Chi. Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593 (7th Cir. 1996) (broadcasting rights); *Baum Research & Dev. Co. v. Hillerich & Bradsby Co.*, 31 F. Supp. 2d 1016 (E.D. Mich. 1998) (baseball bat standards).



Looking specifically at the use of single entity defense, the defense has been raised relatively few times and has succeeded even less frequently.<sup>157</sup> Rather than the single entity defense, what stands as a true bar to antitrust scrutiny are the non-statutory labor exemptions which excluded approximately 7% of the cases in the entire dataset and 12% percent in the league-only dataset (excluding the NCAA). Likewise, the non-statutory baseball exemption excluded 7% of cases in the entire dataset and 12% percent in the league-only dataset. As one would expect, the 11% of cases found outside the purview of antitrust because the activity was “non-commercial” were claims against the NCAA. The results of this analysis are depicted graphically below in Figure 2.

Figure 2: Sherman Act Judicial Decisions

<sup>157</sup> Because the single entity issue is at focus, the most expansive interpretation of the courts’ analyses was recorded. Arguably, of the two cases listed as “success” on single entity, there is potential controversy that the courts’ holdings (not dicta) relied merely on finding a “joint venture” core activity at issue, not a true single entity unassailable on all fronts. See *Chi. Prof’l. Sports*, 95 F.3d at 599–600; *Fraser*, 284 F.3d at 58. Also, only the final determination was included for analysis—lower or overturned opinions are not considered. See *Chi. Prof’l Sports Ltd. P’ship*, 95 F.3d 593.



For all its critics, the joint venture jurisprudence of sports leagues has been sufficiently rigorous to recognize that antitrust applies and must be considered. Baseball is the notable exception because the court took a rocky first step and excluded much of baseball's commercial activity from antitrust review.<sup>158</sup> Although the Court has never remedied this, it has also never extended the standard to other professional leagues.

What should be immediately evident from Figure 2 is that courts historically give little weight to the single entity defense and that *American Needle* is therefore not likely to change sports law in a meaningful way.<sup>159</sup> If, however, the baseball exemption were to fall by the judicial wayside, or if the non-statutory labor exemption were somehow curtailed, then there would be a potentially significant rise in antitrust action.<sup>160</sup>

### III. ANTITRUST ANALYSIS AND REGULATORY POLICY INTERTWINED: THREE EXAMPLES

Two of the most common antitrust challenges to sports telecasts can be broadly categorized as follows: (1) the overarching claim that the telecast contract restricts overall output;<sup>161</sup> and (2) the telecaster is using

158. *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922). The judicial baseball exemption has been eroded in part by statute. *See* Curt Flood Act of 1998, 15 U.S.C. § 26b (2006).

159. *See supra* Figure 2.

160. This is merely an empirical observation, not an argument for either position. Much has been written, however, on the desirability of removing the baseball exemption to place baseball on equal antitrust footing with other professional leagues. *See, e.g.*, Morgen A. Sullivan, Note, "A Derelict in the Stream of the Law": *Overruling Baseball's Antitrust Exemption*, 48 DUKE L.J. 1265 (1999). The creation of such judicial parity is consistent with this Article's conclusion that the SBA should be abolished in the name of antitrust parity among comparably situated entities. *See infra* Part V.A.

161. As almost a corollary to this claim, a charge is often levied that the league alone or the league with the telecaster is using telecast contracts to fix prices. Such a claim of "multi-level" conspiracy is not analyzed here except to note its possible existence. To antitrust enthusiasts, an example of such a conspiracy was found in *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000), where the purchaser

exclusive distributorships to attempt to monopolize the market or at least to reduce the vigor of competition. Many of these allegations overlap and can be brought in the same complaint. On the regulatory front, the concerns usually focus on the promotion of local, free, over-the-air broadcasts that may negate or curb the impact of an otherwise unrestricted antitrust analysis.<sup>162</sup> The Subpart below discusses select sports telecast cases to elucidate the instances where antitrust and regulatory policy is most commonly in tension.

#### A. RESTRAINTS ON OUTPUT—*NFL I* AND *CHICAGO PROFESSIONAL SPORTS*

As stated earlier, it is common practice among leagues to regulate team broadcast rights.<sup>163</sup> Although each league has different rules, the home team is generally permitted to retain the rights to license its own games within its designated home territory and to assign the rights to its out-of-market games to a single seller. The argument follows that, but for this prohibition, “rival [teams] would compete with one another and offer their out-of-market game broadcasts to consumers, placing downward pressure on the price of the [centralized package] and result in increased output and [greater] competitive choice for consumers.”<sup>164</sup> In other words, fans would not be presumptively aligned with their “local” team of the moment. Each team, regardless of geography, would be free to compete for the hearts and minds of every fan, in every location across the nation: a true “nationalization” of local sports.<sup>165</sup>

It is certainly a compelling claim that in this brave new world of almost limitless transmission potential, league blackout rules are a bald, anticompetitive restriction by which individual teams can avoid intra-league competition and protect their respective local broadcast

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(Toys ‘R Us) used its influence to coerce toy manufacturers to dramatically reduce their respective supply relationships with discounters. *Id.* at 931–32. Because the toy manufacturers were aware that Toys ‘R Us had asked all its suppliers to comply with this practice, they were held to be in a horizontal, price fixing conspiracy with each other as well as a vertical conspiracy with Toys ‘R Us. *Id.* at 935–36.

162. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (reaffirming that Congress’ interest in preserving benefits of free, over-the-air local broadcast television was an important government interest for First Amendment purposes); *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1193 (S.D. Cal. 2002); Owen M. Fiss, *The Censorship of Television*, 93 Nw. U. L. REV. 1215, 1226 (1999).

163. See *supra* Part I.A.

164. *Kingray*, 188 F. Supp. 2d at 1198.

165. In *Laumann v. NHL*, MSG Network and the New York Rangers argued that “[i]n a fully competitive marketplace, the [individual clubs] could and would . . . increas[e] the opportunity to view [their] games throughout the country, whether through cable, satellite or on the internet.” Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion to Dismiss the Complaints at 24–25, *Laumann v. NHL*, 907 F. Supp. 2d 465 (S.D.N.Y. 2012) (No. 12-1817), 2012 WL 5272340. As courts have recognized, “a horizontal agreement that allocates a market between competitors and restricts each company’s ability to compete for the other’s business may injure competition.” *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012) (internal quotation marks omitted).

revenues.<sup>166</sup> This classic geographic market division violates section 1.<sup>167</sup> It is not a claim that a court has yet decided upon as the stringent plaintiff standing requirements have not been established in most cases.<sup>168</sup> Moreover, even if standing were properly established, there is arguably regulatory complicity that would affect, and perhaps deter, any antitrust remedy. This seems, at least, to be problematic public policy as the leagues are hardly in a position of precarious financial viability.<sup>169</sup> In addition, given the extensive tax revenues provided to bolster stadium expenditures, it is questionable whether taxpayers (sports consumers) should also provide regulatory cover for potential anticompetitive restraints, thereby paying the price but not reaping the benefit. The FCC itself is concerned that its policy is outdated and the agency is in the process of considering removing the sports broadcast rules or adapting them to reflect the vibrancy of today's sports markets.<sup>170</sup>

### I. NFL I

Consider again the case presented in *NFL I* that examined the legality of a version of the NFL's blackout rules.<sup>171</sup> The NFL's rules prohibited its member teams from broadcasting their own games to

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166. It is tempting to so argue, but it is not facially evident. There are strong efficiency arguments for some type of limiting and regulating mechanism for determining each team's property rights. Because each game involves two teams at a minimum, rights vis-à-vis these two teams must be rationalized for an efficient market in property rights to exist.

167. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972).

168. See *Kingray*, 188 F. Supp. 2d at 1179; see also *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983) (arguing that "the judicial remedy" for an antitrust violation "cannot encompass every conceivable harm that can be traced to alleged wrongdoing"); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 735 (1977) ("[A]ntitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.").

169. The average NFL team is now worth \$1.1 billion and the NFL is set to receive \$6 billion annually in television revenue alone. Mike Ozanian, *Dallas Cowboys Lead NFL with \$2.1 Billion Valuation*, FORBES.COM (Sept. 5, 2012, 8:31 AM), <http://www.forbes.com/sites/mikeozanian/2012/09/05/dallas-cowboys-lead-nfl-with-2-1-billion-valuation>. The average NBA team has increased in value by thirty percent to \$509 million, and league wide revenues are expected to top \$5 billion in 2013. Kurt Badenhausen, *Billion-Dollar Knicks and Lakers Top List of NBA's Most Valuable Teams*, FORBES (Jan. 23, 2013, 11:56 AM), <http://www.forbes.com/sites/kurtbadenhausen/2013/01/23/billion-dollar-knicks-and-lakers-top-list-of-nbas-most-valuable-teams>. The average NHL team is worth \$282 million, an eighteen percent increase, however half of the teams are operating in the red; nevertheless, the overall revenue for the league hit \$3.4 billion for the 2011-12 season. Mike Ozanian, *NHL Teams Values 2012: Toronto Maple Leafs are First Hockey Team Worth \$1 Billion*, FORBES (Nov. 28, 2012, 11:52 AM), <http://www.forbes.com/sites/mikeozanian/2012/11/28/nhl-team-values-2012-maple-leafs-first-hockey-team-worth-1-billion>.

170. See Statement of McDowell, *supra* note 75.

171. *United States v. NFL (NFL I)*, 116 F. Supp. 319 (E.D. Pa. 1953), *superseded by statute*, Sports Broadcasting Act of 1961, Pub. L. No. 87-331, § 1, 75 Stat. 732, *as recognized in* *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999)

networks in markets other than its own on days when a team from the target market was either playing at home, or broadcasting its away game in that market.<sup>172</sup> In *NFL I*, the court employed a rule of reason analysis and determined that the prohibition on selling broadcast rights into another team's home market when that other team was playing at home was a valid restriction on broadcast rights.<sup>173</sup> However, the court also decided that the NFL overreached when it attempted to restrict the sale of rights into another market when there was not another team physically playing within that market.<sup>174</sup>

The court's analysis permitted one justification for the restriction: an explanation of how the restriction optimized the objective of the joint venture—the promotion of professional football.<sup>175</sup> The justification the NFL gave was that a home team's gate receipts would be jeopardized by the intrusion of the broadcast of a competitor's game.<sup>176</sup> The NFL feared

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172. Although all leagues regulate their broadcast rights distinctly, some leagues (for example the NBA, NHL, and MLB) assign each member club a "home territory," which impacts where the league's blackouts occur. The teams have two territorial privileges: (1) a team can sell the broadcast license to its games; and (2) a team controls its home territory where it plays. The NFL is distinct among leagues as all its games are sold as national packages. That said, even in the NFL several Sunday games are localized and only televised in the home territories of the two teams playing against each other.

173. *NFL I*, 116 F. Supp. at 325–26; see *Laumann v. NHL*, 907 F. Supp. 2d 465, 488 (S.D.N.Y. 2012). It is possible that the court in *Laumann*, a post-*American Needle* case, relies on *NFL I* in error. The *Laumann* court concluded rather boldly that "the notion that 'the exhibition of league games on television and the Internet' is clearly a 'league issue' is contrary to longstanding precedent that agreements limiting the telecasting of professional sports games are subject to antitrust scrutiny, and analyzed under the rule of reason." *Id.* (citation omitted) (citing *NFL I* as supporting precedent).

To the extent the court came to this conclusion because the particular procedural posture (a motion to dismiss) had not yet permitted sufficient discovery to conduct a rule of reason analysis on the merits, the dicta is understandable. However, to the extent the court states that telecast cannot be a core activity on the merits, perhaps as a "quick look" rule of reason analysis (step one of the two-step analysis) the ruling is simply incorrect. Judge Scheindlin relied heavily on two cases: *NFL I* and *NCAA v. Board of Regents of the University of Oklahoma*. *Id.* at 488 n.134. Reliance on *NFL I* to determine the merits of *Laumann* short circuits the review of the changed economic realities in league finance. *NFL I* was decided in an era before the national telecast market was fully developed; a time when gate receipts were relatively more important than broadcast revenue in securing intra-league competitive parity. There is a strong argument that *NFL I* itself would be decided differently today given the heightened importance of broadcast revenue versus gate receipts.

Likewise, Judge Scheindlin's reliance on *Board of Regents* is misplaced. In that case, the NCAA was attempting to smooth broadcast revenues among all teams in part by limiting the telecast output of the most popular programs. 468 U.S. at 109. Unlike professional leagues, the NCAA is a joint venture without profit-maximizing "core" goals and its protection of college sports' revenue streams is arguably not analogous to the parallel concerns of pro sports leagues for its club members. See *id.* at 121 (White, J., dissenting).

174. *NFL I*, 116 F. Supp. at 326–27. It is important to note that the telecaster is also a potential defendant under similar fact patterns. See *Laumann*, 907 F. Supp. 2d at 474–75 (alleging that the distributor DirecTV and co-defendant NHL restrained output by an agreement to prevent the airing of an NHL game simultaneously on local television and on DirecTV's "NHL Center Ice").

175. *NFL I*, 116 F. Supp. at 326.

176. *Id.* at 325.

that fans would prefer to watch any game on television—even though not “their” team’s game—rather than brave the expense and inconvenience of going to the stadium.<sup>177</sup> Rather than give fans the choice, the owners collectively agreed not to televise a game into any market with live play to increase ticket sales.<sup>178</sup>

Given the “economic reality” of the day—that the majority of a team’s profit was derived from gate receipts—the split in the court’s decision (restriction when the home team is playing allowed, and the restriction when no one is playing disallowed) is internally consistent.<sup>179</sup> Another holding might jeopardize the revenue of a less popular but local team that in turn might lead to further erosion of that team’s competitive prowess vis-à-vis the rest of the league.<sup>180</sup> This is in large part due to the fact that the NFL splits its telecast revenues evenly across the league to support competitive parity and preserve the intensity of the sport—the central object of the joint venture.<sup>181</sup> This is not, however, true across leagues and may be a boundary that is determinative of antitrust outcomes.<sup>182</sup>

Because *NFL I* was problematic for the NFL, they lobbied for and received a special exemption from antitrust law for pooled broadcast rights.<sup>183</sup> The legislation enacted is not only a tribute to special interests; it is the poster child for why such legislation is problematic. The SBA creates disparity in antitrust treatment in not one, but two major markets.<sup>184</sup> It carves out protection only for the NFL, NHL, NBA, and MLB and only when contracting with broadcasters (not cable or satellite).<sup>185</sup> A contract by any of these leagues that sells pooled rights to a broadcaster will be

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177. *Id.*

178. *Id.*

179. *Id.* at 326.

180. This is, of course, ultimately an empirical question.

181. See John Vrooman, *The Economic Structure of the NFL*, in *THE ECONOMICS OF THE NATIONAL FOOTBALL LEAGUE* 7, 10 (Kevin G. Quinn ed., 2012); Matthew Futterman et al., *NFL: The League that Runs TV*, *WALL ST. J.* (Dec. 15, 2011), <http://online.wsj.com/article/SB10001424052970204026804577098774037075832.html>.

182. For example in *Chicago Professional Sports Ltd. Partnership v. NBA*, Judge Easterbrook gave great weight to the fact that the league (1) did not pool all its broadcast rights but permitted individual contracting and (2) to the extent individual contracts siphoned funds from the NBA, the NBA could recoup some funds by “taxing” the individual team and dividing those funds to financially troubled teams. 961 F.2d 667, 671, 675–76 (7th Cir. 1992).

183. Michael McCann, *Seven Years In, NFL Network Still Battling Cable Companies*, *SPORTS ILLUSTRATED* (May 27, 2010, 10:40 PM), [http://sportsillustrated.cnn.com/2010/writers/michael\\_mccann/05/26/nfl/index.html](http://sportsillustrated.cnn.com/2010/writers/michael_mccann/05/26/nfl/index.html).

184. See *supra* Part III.A.1–2.

185. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2006). See *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 303 (3d Cir. 1999) (finding subscription satellite to not fit the sponsored telecast exemption of the SBA); *Chi. Prof'l Sports*, 808 F. Supp. at 650 (finding that cable television broadcasting was not sponsored telecasting within the SBA exemption).

excluded from antitrust review.<sup>186</sup> This raises the question of whether the SBA itself causes anticompetitive disruptions in either or both of the protected markets.

As noted, if brought today, *NFL I* would be barred from antitrust review by the SBA. As regrettable as this may be, as described in Part IV, the SBA excludes very few cases in today's telecast market.<sup>187</sup> Nonetheless, for reasons of sound policy and general parity among sports leagues and telecasters alike, it would be best to abolish the SBA in its entirety and let antitrust take us where it will.<sup>188</sup>

### 2. *The FCC's Sports Blackout Rules*

The potential for the type of national, intra-league competition envisioned by *NFL I* is more than mere conjecture. In the world of Internet, digital cable, and satellite transmission, the ability to provide consumers a multitude of channels is both technically and economically feasible in a way that the free, over-the-air broadcasters of the past never were.<sup>189</sup> Technically, the regional networks and superstations can reach into the home broadcast zone of a different team and put pressure on the league's blackout policies for satellite and cable programs. However, the FCC rules support the contractual, geographic limitations imposed on telecasters by the league itself.<sup>190</sup> In the simplest terms, the FCC's sports blackout rules permit leagues to use their blackout policies for local television channels that are available for carriage in the same television market by cable and satellite systems.<sup>191</sup>

### 3. Chicago Professional Sports

Compared to *American Needle*, *Chicago Professional Sports* was a photo finish. Unlike the intellectual property of team insignias—which

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186. See 15 U.S.C. § 1291.

187. See *infra* Part IV.

188. See *infra* Part V.

189. For example, in the pre-digital world, over-the-air broadcasters broadcast on one channel only. Today a "network" such as the MLB network, may occupy several channels, such that simultaneous broadcast (and viewing) of conflicting games is imminently possible.

190. It should be noted that in the entertainment industry it is common practice to grant exclusive rights to broadcasters based on geography—this is true for all programming, even for non-sports programs. CHARLES GOLDFARB, CONG. RESEARCH SERV., RL33034, TELECOMMUNICATIONS ACT: COMPETITION, INNOVATION, AND REFORM 41 (2006). Thus, in some situations where the regulatory framework allows satellite (or cable) operators to retransmit the signals of a distant (non-local) broadcast station, subject to obtaining the permission of the broadcast station, that station may be—and in practice often is—contractually prohibited from granting the multichannel video programming distributor ("MVPD") retransmission rights.

191. The regulatory process by which this is accomplished is by a complex implementation of the FCC's non-duplication and ex-syndication rules that were established to protect local broadcast revenues. See discussion *supra* note 64.

by definition highlight a single team—at issue in *Chicago Professional Sports* was the intellectual property of game broadcasts that always include at least two potential rights holders.<sup>192</sup> Not only is the NBA concerned in regulating the property rights among its team members, it also has an independent interest in maximizing the revenue of the NBA as a whole.<sup>193</sup> This last interest is justified to the extent that revenues assist competitive balance in the league.<sup>194</sup> In *Chicago Professional Sports*, the very popular Bulls made an independent contract for the broadcast of its games with superstation WGN.<sup>195</sup> This contract threatened to diminish revenue from the pooled broadcast rights sold by the NBA.<sup>196</sup> The court noted that although the pooling of rights for the NBA broadcasting contract was acceptable, competition for individual contracts was also possible, and the court rejected the charge that the Bulls were free riding on the NBA and thereby harming competition.<sup>197</sup> In particular, the court noted approvingly that intra-league competition could be preserved by an NBA “tax” on individual team contracts.<sup>198</sup>

As fascinating as the antitrust issues in this case are, so too are the regulatory issues. Superstations are independent broadcast television stations whose broadcast signals are picked up and redistributed by satellite to local cable television operators and to satellite television operators all across the United States.<sup>199</sup> The superstation with which the Bulls contracted is one of six such stations in the country.<sup>200</sup> In this regard, a superstation is more akin to a “network” than a local broadcaster and because of this, these stations receive special regulatory consideration.<sup>201</sup> Specifically, satellite operators are required to permit a

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192. *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 670 (7th Cir. 1992).

193. *See id.* at 672; *see also* John Lombardo, *Inside NBA's Revenue Sharing*, SPORTSBUSINESSDAILY (Jan. 23, 2012), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/01/23/Leagues-and-Governing-Bodies/NBA-revenue.aspx>; Patrick Rishe, *Savvy and Shrewd Summarize Stern's Leadership Legacy as NBA Commissioner*, FORBES (Oct. 25, 2012, 7:27 PM), <http://www.forbes.com/sites/prishe/2012/10/25/savvy-and-shrewd-summarize-sterns-leadership-legacy-as-nba-commissioner>.

194. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117–18 (1984).

195. *Chi. Prof'l Sports*, 961 F.2d at 669.

196. *Id.* at 675.

197. *Id.* at 675–76.

198. *Id.* at 671. Not greatly explored in this case is the importance of inter-league branding by the NBA. Although courts have underappreciated the importance of branding, it may become increasingly relevant in the context of entertainment telecasts.

199. This process is governed by the Satellite Home Viewer Act and the 1992 Cable Act. *See* discussion *supra* notes 69, 59.

200. The six superstations are WWOR and WPIX, New York; WSBK, Boston; WGN, Chicago; KTLA, Los Angeles; and KWGN, Denver. FCC, *Fact Sheet: Satellite Home Viewer Improvement Act of 1999*, FCC (2000), <http://transition.fcc.gov/mb/shva/shviafac.html>.

201. 17 U.S.C. § 119 (2006); Press Release, FCC, Commission Implements Satellite Home Viewer Improvement Act Sports Blackout and Program Exclusivity Rule Provisions for Satellite Carriers

local broadcaster to safeguard their specific distribution rights for syndicated programming and network programming “against duplicating programming carried on a nationally distributed superstation by a satellite carrier.”<sup>202</sup> The crucial takeaway is that most households that can receive the signals of local broadcast stations—whether over-the-air or as a local-into-local satellite service—are legally ineligible to receive distant network signals (such as from a superstation).

Some of the many competing regulatory goals in the telecommunications industry support localism, the preservation of free over-the-air broadcast television, and the attempt to balance the interests of the satellite, cable, and broadcast industries.<sup>203</sup> In this regard, the prohibition on the retransmissions of distant signals, coupled with the mandatory carriage of local signals, is a perfect example of the structural engineering used by the FCC to protect “localism.”<sup>204</sup> The Commission hopes that a station located in a particular area will, by extension, be most likely to promote local interests. Regardless of the actual effectiveness of that strategy, the prohibition on distant signals is the rule of the day.<sup>205</sup> Therefore, even after the antitrust analysis finds that NBA broadcast restrictions on the club member are anticompetitive, a Bull’s fan in Florida may still be unable to receive the superstation’s signals due to the regulatory preferences given to local broadcasters over out-of-market superstations. What antitrust giveth, regulation taketh away.

#### B. EXCLUSIVE DISTRIBUTORSHIP AND NETWORK JOINT VENTURES

Perhaps the contractual device most troubling to telecommunications policy watchers is the use of exclusive distributorships. An exclusive distributorship is the contractual agreement of one entity to buy (or sell) only to another.<sup>206</sup> The key concern with vertical restraints—either by contractual exclusivity, joint ownership or, in the extreme, vertical merger<sup>207</sup>—is the thought that such restraints lead to foreclosure of rivals

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(Nov. 2, 2000) [hereinafter Press Release], available at [http://transition.fcc.gov/Bureaus/Cable/News\\_Releases/2000/nrcb0024.txt](http://transition.fcc.gov/Bureaus/Cable/News_Releases/2000/nrcb0024.txt).

202. Press Release, *supra* note 201.

203. See *supra* Part I.

204. See *Background on Localism in Broadcasting*, FCC, <http://transition.fcc.gov/ownership/materials/newly-released/localismbroadcasting.pdf> (last visited Dec. 15, 2013).

205. The effect of many of these rules, including the mandatory carriage rules, is to provide increased bargaining power to the local broadcaster vis-à-vis the cable and satellite transmitter.

206. See BLACK’S LAW DICTIONARY 544 (9th ed. 2009).

207. Vertical mergers are analyzed under the Clayton Act § 3 (an incipency statute) as well as under the Sherman Act § 1 in the non-merger context. Analysis of the two is virtually indistinguishable. ROBERT BORK, *THE ANTITRUST PARADOX* (2d ed. 1993).

from an essential input (or output), and that the harm to rivals—increases in input costs—in turn leads to reduced competition.<sup>208</sup>

Consider once again our lamenting fan. This time our fan is annoyed because she is a Laker fan and a Cox Communications cable customer. The Lakers signed an exclusive deal with Time Warner Cable and she will not have access to the games unless Cox purchases the new network from Time Warner (Cox's competitor).<sup>209</sup> Although understandably annoyed, there may be larger competitive issues at work than the foreclosure of access to Laker games.<sup>210</sup> The exclusive deal may make Time Warner more competitive as against DirecTV, for example, a process by which even our disgruntled fan will eventually prosper. Indeed, DirecTV has arguably become a more viable substitute to cable due to the use of exclusive dealerships with the NFL.<sup>211</sup> This process of competitive innovation in turn puts competitive pressure on cable operators to satisfy consumer demand, to keep prices low, and generate quality transmissions. In other words, it disciplines the cable operators to optimize consumer welfare by free market mechanisms rather than by regulation.

To place our hypothetical in antitrust terms, if we assume for the moment that the sports entity that sells its telecast rights is a single entity,<sup>212</sup> then the antitrust and regulatory concerns will focus on the levels of foreclosure in the telecast market. The key issue is whether the use of exclusive rights facilitates the accrument or exploitation of monopoly power.<sup>213</sup> However, because exclusive distributorships may have myriad pro-competitive rationales, the courts most often uphold them under antitrust scrutiny.<sup>214</sup>

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208. See Paul H. Brietzke, *Antitrust Paradox*, 13 VAL. U. L. REV. 403 (1979) (reviewing ROBERT BORK, *THE ANTITRUST PARADOX* (2d ed. 1993)). "There are of course other concerns such as strategic control of inputs in an oligopoly market, potential ability to price discriminate and foreclosure that creates entry barriers." *Id.*; see HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 421–24 (4th ed. 2011).

209. *Time Warner Cable Signs First Major Lakers Deal*, NBA.COM (OCT. 27, 2012 5:58 PM), <http://www.nba.com/2012/news/10/26/time-warner-cable-lakers.ap/index.html>.

210. Consider the impact the NFL and DirecTV deal has on customer demand for Comcast, for example.

211. See Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 27 FCC Rcd. 8776 (2012) [hereinafter *Status of Competition*], available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-13-99A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-99A1.pdf) (citing various statistics on the development of DBS penetration rates versus cable).

212. American Needle itself could have selected Reebok to be the focus of its claim rather than the NFL. After all, American Needle's problems revolved around the exclusive deal involving its rival, Reebok. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 187 (2010).

213. See, e.g., Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc., 26 FCC Rcd. 4238, 4253 (2011) (noting that "vertical integration of certain video program networks [including RSNs] with a particular MVPD [c]ould harm MVPD competition and enhance the integrated MVPD's market power").

214. For example, exclusive distributorships can guarantee supply chains, prevent promotional free riding, and promote inter-brand competition. Judge Easterbrook noted these possible benefits in

But if antitrust scrutinizes the exclusive distributorship and still upholds the restraint, should the regulator nonetheless enter to supervise exclusive arrangements and engineer desired outcomes? Historically, the answer has been “yes”—sometimes.<sup>215</sup> Congress and the FCC have shown concern for developing markets in telecommunications over and above that of antitrust “referees.”<sup>216</sup> In an example of the type of protection afforded nascent technology, Congress granted great protection to direct broadcast services (“DBS”) as against cable operators when it comes to the treatment of programming—sports programming in particular.<sup>217</sup>

Specifically, in the 1992 Cable Act, Congress demanded that cable operators be compelled to: (1) sell any cable-affiliated programming to DBS and other cable operators in the area, and (2) sell such programming at “reasonable” rates.<sup>218</sup> Except under the most extreme of cases, antitrust law cannot compel a company to sell to a competitor.<sup>219</sup> The intent of this provision was to insure that cable operators did not use exclusive distributorships to “lock-up” must-have content and thereby

*Chicago Professional Sports Ltd. Partnership v. NBA* when he asked the following question: “Is the NBA instead a joint venture adopting strategies that foster its competition with other entertainments? In that event pro basketball on TV is not fundamentally different from *Star Trek: The Next Generation*, a series created by cooperation among many persons who are competitors at other times. Producers of a television series commit the episodes exclusively to one network (or one station in a local market) in order to compete against the offerings of other ventures. No program, indeed no producer’s entire menu of programs, commands a substantial share of the market in televised entertainment. Marketing strategies such as exclusivity and limits on the number of episodes produced per year then must be understood as ways to compete rather than ways to exploit consumers.” 961 F.2d 667, 672 (7th Cir. 1992); see also *Paddock Publ’ns, Inc. v. Chi. Tribune Co.*, 103 F.3d 42, 44, 47 (7th Cir. 1996) (upholding a licensing contract of the *New York Times* to the *Chicago Tribune*).

215. The recent Comcast-NBC merger agreement revealed an interesting example of the different goals of the FCC and FTC. Although both approved the merger and issued consent decrees, the FCC added several programming requirements, including educational and Spanish language programming as well as programming of interest to the local community. *United States v. Comcast Corp.*, No. 1:11-0106, 2011 WL 5402137 (D.D.C. Sept. 1, 2011).

216. It is not only concern for the development of nascent technologies that may motivate the regulator to intervene. In addition, some scholars argue that information services are unique because of the content they carry—and therefore merit heightened scrutiny. For example, Tim Wu argues that vertical restraints that combine content creators with content transmissions are particularly problematic. Wu, *supra* note 2, at 164. This is consistent in part with the FCC’s attitude toward RSNs—the opportunity for foreclosure is important to competition but, in this market, it also forecloses a potential outlet for democratic expression. In response, Wu advocates for extensive regulatory intervention to address “the corrupting effects of vertically integrated power” in the information sectors. Wu, *supra* note 2, at 307.

217. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

218. *Id.*

219. See *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414–16 (2004) (reasoning that judges cannot compel interconnection under antitrust laws); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985) (noting the general rule is that a company may unilaterally refuse to deal with any competitor.).

render the growing DBS competition unattractive.<sup>220</sup> The rules, subject to a sunset provision, were renewed twice even though the DBS market had developed leaps and bounds in the decades since the law was first enacted.<sup>221</sup> Scheduled to sunset by statute in 2012, the FCC allowed the rules to run their course—except for RSNs, for which the FCC extended the rules.<sup>222</sup>

Moreover, in addition to RSNs, the sunset order included a new Notice of Inquiry asking commentators to recommend other programs or networks that may also lead to problematic use of market power.<sup>223</sup> The continued concern of anticompetitive behavior with exclusive contracts is revealed in the trepidations expressed by Senate Commerce Committee Chairman John Rockefeller who fears that the FCC's new complaint process against cable companies that lock up programming may not be enough.<sup>224</sup> He warns that “if [the FCC's] process does not deter anticompetitive behavior that harms consumers, Congress will need to consider whether it should restore appropriate safeguards.”<sup>225</sup>

The words of Senator Rockefeller acknowledge that exclusive deals, even if often pro-consumer, have their legal limits—both in antitrust and in regulation. To the extent we look at such exclusive distributorships as pro-consumer—perhaps welfare enhancing to all telecast consumers, not just sports content consumers—the next question is what are the antitrust and regulatory limits on such relationships.<sup>226</sup> The following Subpart discusses two examples of common exclusive distributorships: the sale of league rights to RSNs and the NFL's sale of rights to DirecTV for NFL Sunday Ticket.

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220. 138 CONG. REC. S16979-02 (daily ed. Oct. 5, 1992) (statement of Senator DeConcini).

221. INDUSTRY HISTORY, SBCA, <http://www.sbca.com/receiver-network/history-satellite-providers.htm> (last visited Dec. 15, 2013).

222. Revision of Program Access Rules, *supra* note 5, at 66026-27.

223. *Id.* at 66052-54; see also Seth A. Davidson & Arthur H. Harding, *FCC Allows Prohibition on Exclusive Contracts to Sunset and Makes Changes to Program Access Procedural Rules; Seeks Comments on Additional Revisions to Program Access Rules*, MARTINDALE.COM (Oct. 10, 2012), [http://www.martindale.com/communications-media/article\\_Edwards-Wildman-Palmer-LLP\\_1603282.htm](http://www.martindale.com/communications-media/article_Edwards-Wildman-Palmer-LLP_1603282.htm).

224. Press Release, Democratic Press Office, Rockefeller on FCC Action to Sunset Program Access Rules (Oct. 5, 2012), available at [http://www.commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord\\_id=1950c17a-f000-4337-854e-74e293bb4523&ContentType\\_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group\\_id=4b968841-f3e8-49da-a529-7b18e32fd69d&YearDisplay=2012](http://www.commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=1950c17a-f000-4337-854e-74e293bb4523&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=4b968841-f3e8-49da-a529-7b18e32fd69d&YearDisplay=2012).

225. *Id.*

226. It is difficult to establish antitrust injury of indirect purchasers of the content. See *Laumann v. NHL*, 907 F. Supp. 2d 465 (S.D.N.Y. 2012) (finding no antitrust injury to consumers of sports programming because it was too “difficult to identify and apportion in light of the packaged nature of television services”).

### I. Regional Sports Networks

The national discourse (at least on sports and telecast) has been preoccupied by the ever-escalating rates paid by networks to individual sports teams for exclusive rights or joint venture agreements to produce a sports network featuring that team.<sup>227</sup> Such agreements embody both regulatory policy and antitrust concerns. First, as a matter of regulatory policy, control of a content provider by a cable operator might result in the cable operator refusing to sell the network to its competitors and thereby foreclose content access to DBS consumers—destabilizing regulatory, structural engineering. Traditional antitrust concern is similar, but not identical. For example, antitrust would be concerned if the cable operator foreclosed access to competitors entirely in an attempt to monopolize the market. Alternatively, concerns would arise if the competitor sold the network to competitors at highly elevated rates to either (1) effectively foreclose the market or (2) raise rivals' costs to make them less attractive to consumers.<sup>228</sup>

In general, RSNs are networks (often comprised of several channels) dedicated to sports teams in a particular region.<sup>229</sup> In a nutshell, sports telecast contracts assign or license content rights of a team or league (1) to a network operator (such as ESPN) who in turn markets the product to a distributor (such as Comcast or Time Warner), (2) to a broadcaster (such as Fox or NBC) who both produces and distributes the content, or (3) to distributors (such as Comcast or Time Warner) who produce and distribute a network and sell it to other distributors. Different regulatory provisions and antitrust concerns are implicated depending on the particular entity that sells the rights and the specific platform used to distribute the content.<sup>230</sup>

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227. Time Warner agreed to pay an average of \$150 million per season for twenty seasons to broadcast the Lakers. Joe Flint,  *DirecTV Reaches Deal with Time Warner Cable for Lakers Channel*, L.A. TIMES (Nov. 15, 2012), available at <http://articles.latimes.com/2012/nov/15/entertainment/la-et-ct-lakers-directv-20121115>.

228. The Regional Sports Network Marketplace, 27 FCC Rcd. 154, 155 (Jan. 6, 2012), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-12-18A1\\_Red.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-12-18A1_Red.pdf) (expressing concern over joint ownership of content and distribution for RSNs as it may facilitate (1) the “temporary or permanent withholding of programming” and (2) a “stealth discrimination” strategy, raising the price of affiliated RSNs for rival MVPDs in a discriminatory manner.”).

229. See, e.g., DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6:142.50 (2013); Richard Sandomir, *Regional Sports Networks Show the Money*, N.Y. TIMES (Aug. 19, 2011), available at [http://www.nytimes.com/2011/08/20/sports/regional-sports-networks-show-teams-the-money.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/08/20/sports/regional-sports-networks-show-teams-the-money.html?pagewanted=all&_r=0).

230. Interestingly, there are contractual limitations that restrict the ability of vertically integrated firms to show content slated for one division on another national outlet. For example, Fox has both a cable network and a broadcast network. William Launder, *Does Fox Dream of an ESPN?*, WALL STREET J. (Dec. 16, 2012, 7:34 PM), <http://online.wsj.com/article/SB10001424127887324677204578183260129173592.html>.

RSNs have a multitude of different ownership structures.<sup>231</sup> Some are contractual, exclusive deals in the form previously discussed. However, others are true joint ventures with ownership stakes shared between the network producer (such as ESPN, MSG, and Time Warner Cable) and the content provider (the teams).<sup>232</sup> As noted, if the RSN is a cable-affiliated program (and only a cable-affiliated program) that network will, by law, be made available to competing distributors.<sup>233</sup> Negotiations are mandated, but the ultimate price is in part a matter of private contract. That said, the purchaser may ultimately fall upon the FCC as arbiter of the “reasonable price” mandated by law.<sup>234</sup>

## 2. *NFL Sunday Ticket*

An example of a popular and yet often maligned exclusive deal is DirecTV’s NFL Sunday Ticket.<sup>235</sup> Since its inception in 1994, the Sunday Ticket is an exclusive contract by which the NFL has sold DirecTV certain exclusive broadcast rights.<sup>236</sup> The NFL Sunday Ticket is an out-of-market sports package that features all of the NFL games carried by Fox and CBS.<sup>237</sup> Instead of being restricted to the games being telecast by the local Fox and CBS affiliates, this package allows a viewer to watch any of the NFL Sunday games.<sup>238</sup> The exclusive contract with DirecTV expired in 2002 and several cable companies offered large sums for *nonexclusive*

The Fox broadcast network has rights to broadcast certain NFL games, as Fox develops its sports network it cannot simply start showing these games on the cable network; that involves a different bucket of contractual rights and may also implicate distinct regulatory and statutory provisions. *Id.* Likewise, if Fox has NBA games slated only for local broadcast on its regional sports network it could not display those games nationally or on another Fox regional sports network. *Id.* See, e.g., FOX SPORTS ON MSN, <http://msn.foxsports.com> (last visited Dec. 15, 2013).

231. See BRENNER ET AL., *supra* note 229, § 6:142.50; Diana Moss, *Regional Sports Networks, Competition, and the Consumer*, 21 LOY. CONSUMER L. REV. 56, 56–59 (2008) (discussing regional sports networks and ownership structures).

232. This is exactly the type of relationship feared by Wu. See generally Wu, *supra* note 2.

233. See *supra* notes 227–230 and accompanying text.

234. 47 U.S.C. § 532(c) (2006).

235. See, e.g., Joe Flint, *DirecTV’s Next Dilemma: Punting or Keeping Sunday Ticket Package*, L.A. TIMES (May 10, 2013, 8:00 AM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-directv-nfl-sunday-ticket-20130509,0,1988730.story>.

236. Mike Reynolds, *NFL Scores with \$4 Billion DirecTV Sunday Ticket Extension*, MULTICHANNEL NEWS (Mar. 23, 2009, 7:08 PM), <http://www.multichannel.com/content/nfl-scores-4-billion-directv-sunday-ticket-extension>.

237. *NFL Sunday Ticket*, DIRECTV, <http://www.directv.com/sports/nfl?lpos=Header:3> (last visited Dec. 15, 2013).

238. *Id.* Note, however, that home games of a local market team will be blacked-out to even a DirecTV subscriber in accordance with league rules. *What are the NFL Blackout Rules for My Home Team?*, DIRECTV, [http://support.directv.com/app/answers/detail/a\\_id/484/related/1/session/L2F2LzEvdGltZS8xMzYyNDY5MjA4L3NpZC9SeDJueW5rbAzEvdGltZS8xMzYyNDY5MjA4L3NpZC9SeDJueW5rbA%3D%3D](http://support.directv.com/app/answers/detail/a_id/484/related/1/session/L2F2LzEvdGltZS8xMzYyNDY5MjA4L3NpZC9SeDJueW5rbAzEvdGltZS8xMzYyNDY5MjA4L3NpZC9SeDJueW5rbA%3D%3D) (last visited Dec. 15, 2013).

broadcast rights to the programming.<sup>239</sup> However, the NFL rejected these bids and instead chose to renew with DirecTV, granting it a five-year exclusive rights deal at approximately the same rates offered for the nonexclusive rights.<sup>240</sup> Why would the NFL give exclusive rights when it could make the same amount twice over by selling to cable? Is there anticompetitive conduct afoot?<sup>241</sup>

As the contract is private, the reason for the NFL's persistence in working with DirecTV is largely unexplained. If challenged under an antitrust suit, however, some of the justifications could be as follows. The NFL's objective is to promote its brand as against all other entertainment sources, so as to widen its product market. The objective of cable or satellite providers is simply to attract more subscribers and they are indifferent as to *which* entertainment source attracts those customers. Thus, the NFL and video operator's incentives are misaligned, and the NFL may need to compensate the operator for the brand promotion the NFL desires.<sup>242</sup> Arguably, the NFL believes that its contract with DirecTV best assures that it is getting the promotion that it paid for; the exclusivity may guarantee that other comparable products (say from other leagues) do not receive the same promotional attentions. In this respect, exclusivity may be a way to prevent telecaster opportunism and to promote inter-brand competition among entertainment sources. DirecTV, under this argument, is not in a homogeneous market space with other cable and satellite operators; rather, DirecTV provides a differentiated product that is superior for the NFL's goals.

Unlike cable operators, DirecTV is under no obligation to sell rights to this programming. Again, this regulatory disparity reflects the distinctions in market maturity between cable and DBS, and the preference provided the latter. The disparity seems to have worked in developing the DBS market. In recent years, DirecTV has grown in penetration rates by leaps and bounds, and has positioned itself in the market as the place for sports.<sup>243</sup> However, this concentration opens opportunities for competitors, rather than only diminishing opportunities. For example, with the rise in sports programming costs,

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239. Cable companies offered a reported \$400–500 million for nonexclusive rights. Richard Sandomir, *Cable Plays Hardball with the N.F.L.*, N.Y. TIMES (Nov. 14, 2007), <http://www.nytimes.com/2007/11/14/sports/football/14sandomir.html>.

240. The estimated price paid was about \$400 million per year. *Id.*

241. *See, e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985)

242. *See generally* Howard P. Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1 (1982); *see also* Benjamin Klein, *Exclusive Dealing as Competition for Distribution "on the Merits"*, 12 GEO. MASON L. REV. 119, 139–40 (2003).

243. Alex Sherman, *DirecTV Profit Rises 8.5% as U.S. Customer Growth Slows*, BLOOMBERG (May 8, 2012), <http://www.bloomberg.com/news/2012-05-08/directv-earnings-exceed-estimates-on-pay-tv-subscriber-growth.html>.

non-sports viewers in particular are becoming increasingly disgruntled with rising costs.<sup>244</sup> Dish has taken this as an opportunity to position itself as the lower cost alternative with fewer sports networks.<sup>245</sup>

#### IV. POLICY RECOMMENDATIONS: CLEAR THE PLAYING FIELD

##### A. IT'S TIME TO MAKE THE SPORTS BROADCAST ACT UNIVERSAL OR ABOLISH THE SPORTS BROADCAST ACT

There is no doubt that the SBA was a triumph in special interest legislation. As such, the courts have narrowly interpreted the exemption it provides and have permitted extensive challenges around the edges of the terms.<sup>246</sup> The exemption has been construed to mean exactly what it says—it excludes from antitrust review pooled negotiations of the MLB, NHL, NBA, and NFL for the transfer of exhibition rights to “supported telecasts,”—free, over-the-air broadcasters.<sup>247</sup> In today’s world, that means that the exemption is essentially irrelevant as the vast majority of negotiations occur with pay services such as MVPD and DBS channels that are not exempted.<sup>248</sup> Indeed, jointly negotiated contracts have been challenged a variety of times, most recently in *Laumann v. NHL*.<sup>249</sup>

There are several policy implications spawned from the two-market disparity memorialized by the SBA. In the first market, roughly defined as professional league sports, there is disparity among expressly exempt and non-exempt leagues as to the treatment of their pooled broadcast rights. For example, MLS and NASCAR do not enjoy the same exemption.<sup>250</sup> In

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244. The cost of sports programming is largely borne by all the telecaster’s consumers. Distributors are increasingly pushing back on content providers by placing new networks in “sports tiers” (for cable) and in other premium spots so that the distributor can price discriminate between sports and non-sports viewers. Joe Flint & Meg James, *Rising Sports Programming Costs Could Have Consumers Crying Foul*, L.A. TIMES (Dec. 1, 2012), <http://articles.latimes.com/2012/dec/01/business/la-fi-1202-ct-sports-cost-20121202>.

245. Dish Network’s cheapest package is currently \$49.99 per month. The sports channels included in this package are: ESPN, ESPN 2, ESPN News, ESPN U, HRTV, and TVG. *American’s Top 120*, DISH, <http://www.dish.com/entertainment/packages/americas-top-120/?WT.svl=at120details-button> (last visited Dec. 15, 2013).

246. See *Chi. Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 671 (7th Cir. 1992) (“Special interest laws do not have ‘spirits,’ and it is inappropriate to extend them to achieve more of the objective the lobbyists wanted.”); see also *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646–47 (1990); *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987); *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373–74 (1986); *In re Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987).

247. See *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 302–03 (3d Cir. 1999); *Chi. Prof’l Sports Ltd. P’ship v. NBA*, 95 F.3d 593, 596 (7th Cir. 1996); *U.S. Football League v. NFL*, 634 F. Supp. 1155, 1164–65 (S.D.N.Y. 1986).

248. Status of Competition, *supra* note 211, at 8672 (citing penetration rates).

249. 907 F. Supp. 2d 465 (S.D.N.Y. 2012).

250. This is because NASCAR is not one of the narrowly defined leagues that are written into the SBA.

the second market, roughly defined as the market of telecast platforms, there is disparity between over-the-air, free networks and cable and satellite networks.<sup>251</sup> If the goal is to rationalize these disparities in both markets, there are two alternatives: (1) make the SBA more universally applicable (shield all pooled rights contracts by any sports league with any telecaster from antitrust inquiry), or (2) eliminate the SBA entirely.

At the time of the SBA's enactment, the four enumerated leagues were largely the only games in town. Although present, college sports had not developed to the level of ferocity of today's college rivalries; that demand has been driven largely by the development of telecasts. In fact, the SBA noted this fact and placed extensive protections for college sports in the SBA itself.<sup>252</sup> But today, that is not the case and the list of protected entities includes only a few of the choicest leagues in the nation. In the parlance of antitrust, could the SBA be considered as an institutionalized means for the protected leagues to "raising [their] rivals' costs"<sup>253</sup> and, therefore, indirectly decrease the ferocity of any competitive challenge?

Before indulging in such theoretical intrigue, the relevant empirical question is whether the SBA currently creates disparities between protected and non-protected leagues and, correlatively, between broadcasters and non-broadcasters? A survey of federal trial court filings from 1995 to 2012 reveals few references to the exception.<sup>254</sup> Likewise, judicial opinions that reference the SBA—traced back to the inception of the statute in 1961—are few in number and only once is the SBA dispositive to the case. A summary of SBA citations in judicial pleadings and the impact on the ultimate decision is set forth in Figure 3.

Figure 3: SBA References

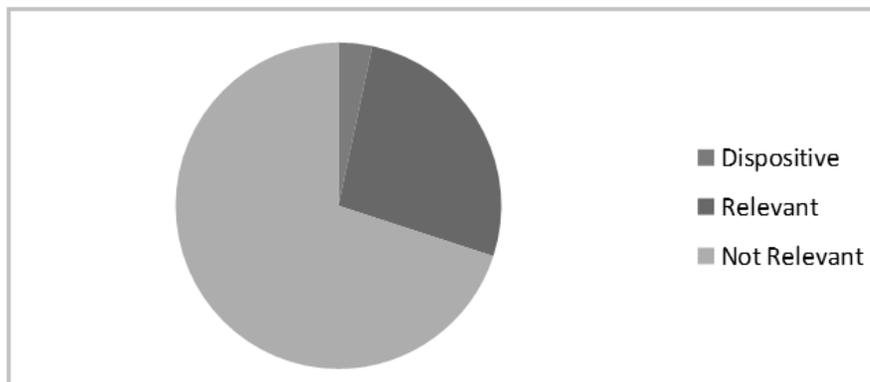
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251. Cable and satellite do not fall within the statutory language of the Act.

252. 15 U.S.C. § 1291 (2006).

253. See generally Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983).

254. A Westlaw search of all trial filings to reference the SBA uncovered documents associated with only nine separate events. A PACER search of the same time frame has yet to reveal conflicting results.



Specifically, the original dataset reveals that the SBA was referenced only thirty times in the relevant time period.<sup>255</sup> Out of those thirty references, the courts' decisions most often found the SBA to be irrelevant (twenty-one times, or in 70% of the cases). The courts considered the SBA to be relevant but not dispositive eight times, or in about 27% of the cases.<sup>256</sup> And in only one case (3% of the cases)—a case heard right after the SBA's enactment—did the court clearly hold that the SBA was dispositive and, therefore, that antitrust did not apply.<sup>257</sup>

In theory, the SBA makes the broadcast stations more attractive sports league partners than cable or satellite because of the minimal antitrust exposure associated with the pooling of rights. This is of particular importance to the NFL, which unlike the other leagues sells its media rights exclusively on a national level.<sup>258</sup> In other words, the NFL always pools the rights of its member clubs and thus benefits the most from the express carve-out of such action set forth in the SBA. Perhaps unsurprisingly, the NFL receives the bulk of its revenues from transactions with broadcasters—CBS, FOX, NBC, and ESPN paid the NFL a combined total of nearly \$25 billion for the right to air NFL games from 2006 to 2013.<sup>259</sup> But not all leagues have stayed so firmly with broadcasters. There is today a strong migratory trend of major leagues,

255. See, e.g., *Championsworld LLC v. U.S. Soccer Fed'n, Inc.*, 726 F. Supp. 2d 961 (N.D. Ill. 2010). Omitted from the dataset were references to the statute clearly made in error.

256. See, e.g., *id.*

257. *Blaich v. NFL*, 212 F. Supp. 319 (S.D.N.Y. 1962).

258. See *Status of Competition*, *supra* note 211, at 8776.

259. ESPN has been paying \$1.1 billion per year, totaling \$8.8 billion for 2006–13. Richard Sandomir, *ESPN Extends Deal with N.F.L. for \$15 Billion*, N.Y. TIMES (Sept. 8, 2011), <http://www.nytimes.com/2011/09/09/sports/football/espn-extends-deal-with-nfl-for-15-billion.html>. The contract was renewed for \$15.2 billion for rights through 2021. *Id.*

such as the NBA and MLB, away from broadcast toward cable,<sup>260</sup> even though these contracts are outside the protection of the SBA, again indicating that the “protection” of the SBA is not taken seriously.

The central reason is one of simple economics: sports programming is exceptionally expensive to produce.<sup>261</sup> Broadcasters generally lose money on sports and purchase such programming to the extent that they need to develop their brand and promote non-sports programming.<sup>262</sup> Unlike broadcasters, cable and satellite operators earn revenues from both advertising *and* subscription fees; these operators are thus better positioned to turn a profit on sports networks.<sup>263</sup>

The implication for the SBA is simple: because of its narrow limitation to “sponsored telecast” the explosion of alternative telecast formats (like cable and satellite) renders the SBA irrelevant. Moreover, there is ample evidence that the original policy goal of the SBA—to protect the revenues of incipient sports leagues—has been fully accomplished.<sup>264</sup> To the extent that vestiges of concern remain for sports teams’ revenues, times have changed since enactment of the SBA; the expense of defending against any antitrust claim has diminished for all commercial actors in the face of increased pleading requirements set forth by *Bell Atlantic Corp. v. Twombly*<sup>265</sup> and *Ashcroft v. Iqbal*.<sup>266</sup>

In short, the changes to the broadcast market, the sports entertainment market, and to antitrust law itself all support the conclusion that the SBA is already a functional nullity. Before the act is used for mischievous purposes,<sup>267</sup> prudent legislators should certainly not expand it and would be well advised to repeal it. A repeal of the law would not change the antitrust environment for sports leagues; it would

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260. See, e.g., John Ourand & John Lombardo, *NBA Ready to Discuss Rights Deal*, SPORTSBUSINESS DAILY (May 13, 2013), <http://www.sportsbusinessdaily.com/Journal/Issues/2013/05/13/Media/NBA-TV-rights.aspx>.

261. Another reason is that the MLB and NBA pool only a portion of their rights. The remaining rights are sold individually by member clubs where the SBA is simply inapplicable and unnecessary. The most vibrant market for these individual team sales are cable RSNs. See Flint, *supra* note 227; *Time Warner Wins Dodgers TV Deal*, ESPN (Jan. 22, 2013, 8:31 PM), [http://espn.go.com/los-angeles/mlb/story/\\_id/8870267/los-angeles-dodgers-tv-broadcast-carried-time-warner-cable-starting-2014-report](http://espn.go.com/los-angeles/mlb/story/_id/8870267/los-angeles-dodgers-tv-broadcast-carried-time-warner-cable-starting-2014-report).

262. Status of Competition, *supra* note 211, at 8777.

263. *Id.* What may surprise many is that on cable networks, sports networks (both national and regional) earn less profit for the operator than do other entertainment genres. *Id.* Because of the low profit margins involved, the combination of operators and leagues in RSNs, for example, appears much more likely to be for efficiency reasons and “branding” purposes than for anticompetitive rationales such as “foreclosure” and “raising rivals’ costs.” *Id.*

264. *Id.* at 8776.

265. 550 U.S. 544, 555 (2007).

266. 556 U.S. 662, 677 (2009).

267. See, e.g., *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 300 (3d Cir. 1999).

merely dispose of the corpse of special interest legislation that no longer even serves those special interests.

#### B. TIME TO CLEAR THE REGULATORY PLAYING FIELD

This Article has touched upon several regulatory issues in connection with sports telecasts, but at least two are in the midst of reconsideration: the sports blackout rules and the cable programming access rules.<sup>268</sup> In the first instance, the FCC is considering abolishing the blackout rules, and in the second, the FCC will consider instances to extend the access rules. As stated at the outset of this Article, the balance of antitrust and regulation is important to prevent the over deterrence of innovation. In that spirit, it is long past time to also abolish the sports blackout rules and to refrain from expanding the cable programming access rules.

As previously stated, a blackout generally occurs when a specific media market will not broadcast a televised program at the request of the rights holder. Cable and satellite carriers are both subject to sports blackout rules.<sup>269</sup> Basically, the blackout rules are implemented through byzantine regulatory mechanisms such as syndicated exclusivity and non-duplication.<sup>270</sup> Under the blackout rules, the FCC has upheld its strong interest in protecting and preserving the local broadcasters.<sup>271</sup> But it does so arguably at the expense of sports fans in a highly developed sports telecast market.

To the extent antitrust might thwart, or at least diminish, some league blackout rules, why should the regulator protect the league? To the extent the restraint is a necessary means for the league to regulate property rights, or even to the extent it is a justified means to ensure intra-league parity by revenue sharing schemes, then antitrust will uphold it. If it is not, it will not be upheld and the league will be forced to find other pro-competitive (and thereby pro-consumer) means to meet its internal goals. The sports broadcasting rules are thus an anachronism from industrial engineering schemes of the past. It is time to abolish them and move forward.

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268. See discussion *supra* note 75.

269. 47 C.F.R. §§ 76.111, 76.120, 76.127, 76.128 (2013).

270. Syndicated exclusivity rules were formulated by the FCC to shelter local television stations' rights to syndicated programs by giving special and restricted rights for the programs to the particular station in the local market as opposed to allowing the programs to be carried on a superstation and distributed on a national basis. See discussion *supra* note 64. Additionally, network non-duplication rules were created to give a local television station the exclusive distribution rights for television programs and prevent duplicate programming carried on a national superstation. *Id.*

271. If the broadcaster, which maintains the other team's rights, is televising the game, and if the television market is not included in the television home zone for the visiting team, then the game results in a blackout on the local MVPD. See discussion *supra* note 13.

The cable programming access rules likewise came from an attempt to engineer the industry to support a competitor to cable.<sup>272</sup> Although perhaps warranted at their inception, it has been evident for some time that the original objective has been accomplished. As the FCC discussed at length, the satellite industry has matured and is fully capable of competing against cable without assistance from the FCC. Despite the general sunset of the access rules, the choice to continue regulation of RSNs should be watched carefully. Again, if unregulated property rights in RSNs did present a high risk that cable providers will abuse market power, antitrust would provide the backstop. Regulation of RSN access may, on the other hand, chill innovation in ways that we do not fully appreciate simply because the FCC has short-circuited such market experimentation.

### CONCLUSION

Consider if DirecTV had exclusive rights to the Super Bowl—would antitrust and/or the regulator step in?<sup>273</sup> Do we want them to?<sup>274</sup> The first potential antitrust violator may be the NFL itself, which may have violated section 1 by centralizing the telecast rights to the Super Bowl. However, under the two-part *American Needle* test, the NFL is arguably engaged in its most “core activity” when it produces and sells the centralized, telecast rights for the Super Bowl.<sup>275</sup> The Super Bowl represents the culmination of league play and the game derives much of its value from the season of competition among all teams. This single telecast, above all others, is arguably “league” (not individual team) property for the league to do with what it will. Therefore, the first inquiry of the *American Needle* test—whether the production of the Super Bowl is a “core activity” of the NFL joint venture—is answered yes. The NFL also

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272. The cable industry’s very strength is itself largely attributable to regulatory interference that crippled land-line telephone industry in its potential rivalry with cable. See, e.g., Thomas W. Hazlett & Anil Caliskan, *Natural Experiments in U.S. Broadband Regulation* 9–10 (George Mason Univ. Law & Econ. Res. Paper Series, Paper No. 08-04, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1093393](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093393).

273. Several countries have adopted strict limits on the sale of sports broadcast. For example, in Italy there are strict controls on the sale of soccer telecasts. Martin Cave & Robert W. Crandall, *Sports Rights and the Broadcast Industry*, *ECON. J.*, Feb. 2001, at F4, F17. Specifically, there is a prohibition on the collective selling of rights by the league and another regulation that prohibits a single broadcaster from controlling more than seventy percent of live matches. *Id.* In addition, each member of the European Union may “list” certain sporting events of national interest to give the rights’ holders additional protection against potential revenue siphoning by distant broadcasters; much like our sports blackout rules protects local broadcasters. *Id.*

274. See Michael McCann, *Antitrust, Governance, and Postseason College Football*, 52 B.C. L. REV. 517, 527–41, (2011). See Communication Act of 1934, 47 U.S.C. § 307(b) (2006) (explaining licensing rules); 47 C.F.R. § 76.56 (2013) (explaining “must carry” rules).

275. See *supra* Part II.B.

easily survives the second inquiry—the rebuttable presumption that a restraint is reasonable when highly correlated to the “core activity.”

If the NFL’s pooling of the telecast rights is not problematic for the league, is the exclusive deal between the NFL and DirecTV of antitrust or regulatory concern for DirecTV? Does it provide excess market power to DirecTV?<sup>276</sup> This is, of course, an empirical question rather than a theoretical one. That said, it is hard to imagine that a single show—not a network or even a programming series—would be dispositive of telecaster market power. The most inelastic demand for the Super Bowl is likely exhibited by sports bars (the core consumer). Other than that core group of consumers, whether sufficient numbers of consumers will switch to DirecTV such that it is profitable to maintain Super Bowl exclusivity (rather than license the show on a non-exclusive basis to other telecasters) is questionable. Because this is only a single show, it is easy for consumers who want to watch the Super Bowl not to buy DirecTV, but rather to simply substitute communal viewership for private viewing—for example, Comcast Cable consumers will go to sports bars or Super Bowl parties where DirecTV is available instead of switching providers themselves. Given the probable lack of market power that the Super Bowl rights would bestow, the exclusive deal is an unlikely antitrust violation.

However, to the extent we as Americans simply cannot tolerate the thought of being excluded from viewing our “national treasure,” then regulators (and legislators) may be compelled to step in.<sup>277</sup> Under the FCC’s broad mandate to promote the “public interest,” it is possible that the NFL might be forced to sell its product only to free over-the-air television; thereby ensuring revenues for Congress’ preferred technology, broadcast.<sup>278</sup> Of course this implicitly transfers bargaining power to the broadcaster and limits, by fiat, the NFL’s right to maximize the price it demands for the product it has created.

Taken to this extreme, the regulatory control of a single show seems a bit contrived and ultimately, unproductive. However, is it not this exact type of analysis that the FCC invites in the context of cable programming access rules? Even after the FCC determined that the market is strong enough to discipline the sale of cable networks, there are still FCC commissioners, scholars, and even Congressmen, apprehensive that the regulators’ *ex post* complaint system will be less effective than the former *ex ante* structural remedy.<sup>279</sup>

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276. *See supra* Part III.B.

277. *See supra* Part III.B.

278. This is not dissimilar to the regulatory policies adopted by several European nations. *See generally* Cave & Crandall, *supra* note 273.

279. *See supra* Part III.B.

The policy suggestions made by this Article are aimed at rationalizing the regulation of sports telecast. At the heart of the FCC's sports black out rules and cable access rules, the policy question is not necessarily whether we should "deregulate" sports telecasts. The better articulation of these recommendations is whether it is time to create *regulatory symmetry*. That is, does it make sense to maintain asymmetric regulation for one select segment of the industry (local broadcasters for example) under current market conditions? The answer is no.

Indeed, the anxiety expressed by some in the face of regulatory sunset is largely misplaced. Now, more than ever, antitrust is better positioned to fill the gap left by the regulator in addressing anticompetitive conduct by joint ventures. As developed here, *American Needle* may be interpreted to stand as an adaptable two-part test that provides sound guidance to practitioners and the courts. The adoption of this Article's policy recommendations will not ensure certain outcomes, but they will guarantee more level and equitable treatment of sports league joint ventures under both regulatory and antitrust regimes.

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