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Table of Contents

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Introduction

The impetus for the enactment of the Sports Broadcasting Act[1] (the SBA) occurred eight years before its 1961 enactment. In the 1953 case *United States v. NFL*[2] (*NFL 1953*), Judge Grim of the Eastern District Court of Pennsylvania allowed contractual restriction on the telecasting of games into a member club's "home territory" when that team played at home.[3] However, the court prohibited other restrictive measures used by the NFL and its officials.[4] In the 1961 case *United States v. NFL*[5] (*NFL 1961*), Judge Grim used the 1953 decision to hold that the National Football League (NFL) was prohibited from entering into an agreement to sell the pooled rights of its member clubs.[6]

Congress enacted the SBA to overcome the effects of the 1961 ruling, and passed an exemption to the antitrust laws to permit a league to sell package deals to broadcasting companies for the exclusive telecast or transmission of league games.[7] Congress cited the danger of League failure and the interest of sports fans in its decision to enact the exemption.[8]

In late August 1994, three sports fans filed a class action lawsuit against all of the major sports leagues and networks in *Durkin v. Major League Baseball*.[9] The complaint alleges that the leagues violated the SBA by selling broadcast rights to cable networks ESPN and Turner Broadcasting. The plaintiffs contend that the SBA specifically covers only "free" broadcast networks.[10] The complaint also claims that every league, except the NFL, fails to share its network broadcast profits as anticipated.[11] Finally, the fans claim that, considering the advances in broadcast technology, the SBA is no longer necessary to ensure that a team's away games are broadcast in their home market.[12]

1. Sports Broadcasting Act, Pub. L. No. 87-331 (15 U.S.C. §§ 1291-95 (1988)).
2. 116 F. Supp. 319 (E.D. Pa. 1953).
3. *Id.* at 330.
4. *Id.*
5. 196 F. Supp. 445 (E.D. Pa. 1961).
6. *Id.*
7. S. Rep. No. 1087, 87th Cong., 1st Sess. 3 (1961), *reprinted in* 1961 U.S.C.C.A.N. 3042 [hereinafter Senate Report].
8. *Id.*
9. Durkin v. Major League Baseball, No. 2:94-CV-05315 (E.D. Pa. filed Aug. 29, 1994).
10. Emily Culbertson, *Broadcasting Act Still Necessary?; Fans File Suit*, LEGAL INTELLIGENCER, Aug. 30, 1994, Bus. L., at 9.
11. *Id.*
12. *Id.*

This Note will discuss the fans' contention that the SBA has failed to benefit fans as it was intended.[13] The *Durkin* suit provides the court the opportunity to clarify the following issues: Is the SBA meant to benefit the league or the fans?[14] Is the SBA applicable to cable contracts or only "free" broadcast networks? And, are the leagues supposed to share the revenue generated by the league-wide television contracts the SBA authorizes? The viability of the suit hinges the intent of Congress in drafting the SBA. Mainly, this Note will focus on the fans' contentions and Congressional intent, while discussing different theories regarding the SBA.

Section I provides a brief history of the SBA, beginning with the two court decisions that led Congress to pass the SBA. Section II discusses several theories challenging the necessity of the SBA, including the single-entity theory, interpretations of congressional intent, and an extension of the Supreme Court's reasoning in *NCAA v. Board of Regents of the University of Oklahoma*,[15] in which the Court, addressing a Sherman Act challenge to the broadcast restrictions on the NCAA, stated that the broadcasting rights to college football were a "unique product."[16] Section III focuses on theories supporting the SBA, discusses an alternate interpretation of congressional intent, and examines the special interest nature of the SBA. Section IV concludes that the *Durkin* court should continue the tradition of finding that sports leagues are not single-entities and that the SBA is special interest legislation meant to protect the professional sports leagues for which it was passed.

I
The History of The Sports Broadcasting Act

In 1953, the Department of Justice brought an antitrust action against the NFL,[17] alleging a violation of section 1 of the Sherman Act.[18] The action focused on Article X of the NFL by-laws.[19] The four relevant provisions of Article X were: 1) the prohibition against

13. Whether the fans have standing or have suffered antitrust injury will not be addressed. Instead, the focus will be solely on the substantive issues raised.

14. Clearly, a benefit to the league will indirectly benefit the fans by allowing them to continue viewing professional sports. The question remains, however, whether the SBA sought to keep sports leagues financially viable in the long run or merely make it easier for fans to watch sports competition.

15. 468 U.S. 85 (1984).

16. *Id. See also infra* notes 92-96 and accompanying text.

17. United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953).

18. Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988).

telecasting outside games into the home territory of a team on days when that team is playing at home;[20] 2) the prohibition against telecasting outside games into the home territory of a team on days when that team is playing away from home while permitting the telecast of its game into its home territory;[21] 3) the prohibition of radio broadcasting outside games into the home territory of a team on days when that team is playing at home, or when it is away and permitting the game to be broadcast or televised into its home territory;[22] and 4) a grant of unlimited power to the Football Commissioner to prevent any and all clubs from televising or broadcasting any or all games.[23]

Judge Grim had "little doubt" that Article X constituted a contract in restraint of trade.[24] The purpose and effect was to restrict outside competition on the part of other teams in the home area of each club.[25] Judge Grim refused, however, to find the provisions illegal on that basis alone. Instead, he examined whether the imposed restraint merely regulated, and thereby "promote[d] competition[,] or whether it [was] such as may suppress or even destroy competition."[26]

To be illegal, a contract must cause "both a restraint of trade and an unreasonable restraint of trade."[27] Citing the unique nature of the league,[28] Judge Grim determined that, while it is vital that the teams compete vigorously on the field, if the teams were to compete against each other as "hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure."[29] If this were to happen, the entire league could fail. Thus, "without a league no team can operate profitably."[30]

19. Article X provided that no club "shall cause or permit a game in which it is engaged to be telecast or broadcast by a station within 75 miles of another League City on the day that the home club of the other city is either playing a game in its home city or is playing away from home and broadcasting or televising its game by use of a station within 75 miles of its home city . . . ." United States v. NFL, 116 F. Supp. at 321.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 321-22.

24. *Id.* at 322.

25. *Id.*

26. *Id.* (quoting Chicago Bd. of Trade v. United States, 246 U.S. 231 (1917)).

27. *Id.* at 323; United States v. American Tobacco Co., 221 U.S. 106 (1911); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

28. United States v. NFL, 116 F. Supp. 319, 323 (E.D. Pa. 1953).

29. *Id.*

30. *Id.*

Applying the rule of reason,[31] Judge Grim found the outside blackout when a team is at home to be a legal restraint of trade, because it "adds to their home game attendance by preventing potential spectators from staying at home to watch on television exciting outside head-on games between strong teams."[32] Judge Grim found the other three provisions unreasonable, and therefore illegal, restraints of trade.[33] The court struck down the first two restrictions because they could not be shown to protect a home team's gate revenue.[34] The court struck down the final restriction because it granted the League Commissioner "unlimited and arbitrary power."[35]

In April 1961, the NFL and Columbia Broadcasting Systems (CBS) entered into a contract which required that each "club will pool its television rights with those of all of the other clubs, and that only the resulting package of pooled television rights will be sold to a purchaser."[36] The member clubs had agreed to eliminate competition among themselves. In construing his 1953 decision, Judge Grim found the new television contract to be illegal as an unreasonable restraint of trade.[37]

This decision immediately sent fans into an uproar about their inability to view the upcoming football season.[38] Congress reacted quickly to overrule the effect of Judge Grim's decision. Just two months after the decision, Congress passed the SBA.[39] The exemp-

31. The rule of reason was first announced by the Court in Standard Oil Co. v. United States, 221 U.S. 1 (1911). The rule examines whether a restraint of trade is reasonable. If so, the restraint is not a violation of section 1 of the Sherman Act.

32. United States v. NFL, 116 F. Supp. at 325. *See* Cori Jan Ching, Note, *A Critique of the National Football League's "Blackout" Exemption from the Antitrust Laws*, 8 J. OF LEG. 104, 108 (1981).

33. United States v. NFL, 116 F. Supp. at 326-28; Ronald Waldman, Note, *Antitrust Law—Signal-Penetration or Station-Location: The Scope of the National Football League's Television Blackout Antitrust Exemption*, 6 W. NEW ENG. L. REV. 877, 878 (1984); Michael J. Kaplan, Annotation, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. FED. 489 (1993).

34. United States v. NFL, 116 F. Supp. at 326-27.

35. *Id.* at 327.

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

37. *Id.*

38. Ching, *supra* note 32, at 110.

39. 15 U.S.C. §§ 1291-95 (1988). Blaich v. NFL, 212 F. Supp. 319, 321 (S.D.N.Y. 1962); Ching, *supra* note 32, at 110-11; *See* Senate Report, *supra* note 7.

The relevant sections of the SBA for the purposes of this Note are 1291 and 1292. Section 1291 provides:

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

tion applies to transfers by the league, and not to league prohibitions of transfers by individual teams.[40]

The Senate Report provides some insight into the rationale for the exemption.[41] According to the Senate, the SBA was meant to "enable" professional sports leagues to pool their "sponsored" telecasting rights into a "package" and sell this package to a purchaser, such as a television network.[42] The legislation was purportedly needed to overrule Judge Grim's 1961 decision,[43] which barred the NFL from selling the pooled television rights of its member clubs, while other leagues such as the National Basketball Association (NBA), the National Hockey League (NHL), and the American Football League (AFL), were engaging in substantially similar agreements.[44] The "apparent inequity" of this result was a chief concern for the Senate when it considered the enactment of the SBA.[45]

The Senate Report further describes the importance of "package" sales in order to maintain the continued operation of the league.[46] As in *NFL 1953*, the report focuses on maintaining the income of the weaker teams of the league. Without the "package" sale, the Senate feared, only a "handful" of teams would "be able to secure coverage on the limited network facilities now available."[47]

Finally, the report states that the committee is "of the opinion that the public interest in viewing professional league sports warrants some accommodation of antitrust principles."[48] Essentially, the report mentions fan viewership only after extensively discussing the requirements to keep the NFL financially stable.[49]

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15 U.S.C. § 1291 (1988).

Section 1292 excludes from the section 1291 antitrust exemption "any joint agreement described in . . . [section 1291] which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home." 15 U.S.C. § 1292 (1988).

40. Chicago Prof. Sports Ltd. Partnership v. NBA, 754 F. Supp. 1336 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir. 1992) (league rule restricting the number of games that an individual team could sell to a "superstation" found to be an illegal restraint of trade).

41. Senate Report, *supra* note 7, at 3042-44.

42. *Id.* at 3042.

43. *Id.*

44. *Id.* at 3043.

45. *Id.*

46. *Id.* "[T]here is danger that the structure of the league would become impaired and its continued operation imperiled." *Id.*

47. *Id.*

48. *Id.* at 3044.

49. *Id.*

II
Theories Criticizing The Sports Broadcasting Act

Several theories criticize the SBA. The single-entity theory posits that, because a professional sports league is a single entity, it cannot violate the antitrust laws.[50] The two other criticisms focus on the intent of Congress when it passed the SBA. One theory states that the SBA applies only to free television, and not to cable contracts.[51] The other theory states that congressional intent was to benefit the fans, which the SBA currently fails to do.[52]

A. The Single-Entity Theory

Because of the unique economic characteristics of a professional sports league, some scholars argue that member teams must be treated as a single entity.[53] The theory focuses primarily on the unique nature of the product that a league produces. Essentially, a league produces competition.[54] Supporters of the single entity theory argue that the professional sports league is unique in its "unusual but necessary" mixture of cooperation and competition between members, not normally found in any other kind of joint venture or partnership.[55] The supporters base their reasoning largely on the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*[56]

In *Copperweld*, the Court held that a parent corporation and its wholly owned subsidiary are not legally capable of conspiring with each other in violation of section 1 of the Sherman Act.[57] Proponents of the single-entity theory argue that the reasoning in *Copperweld*

50. Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L. J. 25, 30 (1991) (compiling the single-entity articles both pro and con); Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751 (1989); Myron C. Grauer, *Recognition of the National Football League as A Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983); Gary R. Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562 (1986).

51. This is an argument that the fans assert in their class action suit. Culbertson, *supra* note 10, at 9.

52. *See infra* text accompanying notes 77-90.

53. *See supra* note 50.

54. *See* Chicago Prof. Sports Ltd. Partnership v. NBA, 961 F.2d 667, 672 (7th Cir. 1992) ("Cooperation off the field is essential to produce intense rivalry on it—rivalry that is essential . . . for audience."). *See* Jacobs, *supra* note 50, at 32.

55. Jacobs, *supra* note 50, at 29.

56. 467 U.S. 752 (1984).

57. *Id.* at 777. *See* Jacobs, *supra* note 50, at 36.

should be extended to encompass "unique" joint ventures.[58] Professional sports leagues are purportedly "unique" because the member teams cannot produce their product without complete "integration and cooperation of each and every member of the league."[59] Also, "a league member team does not and cannot lawfully have any relevant independent productive function outside its existence as a wholly integrated member of the league."[60] Supporters of the single-entity theory claim that such characteristics are enough to make the leagues "unique," thus entitling them to different treatment by the antitrust laws.[61] Adoption of the single-entity theory would render the SBA moot. There would be no point in granting the leagues an antitrust exemption if professional sports leagues were deemed single entities.

However, the supporters' reliance on the so-called unique mix of competition and cooperation required by professional sports leagues seems to be unfounded. All joint venturers need to cooperate with one another in order to produce and sell their product.[62] The Court recognized this and, when examining allegations of section 1 violations, simply chose to apply the rule of reason rather than find the challenged agreements per se illegal.[63] The supporters, however, contend that the reasoning of *Copperweld* should be extended to encompass professional sports leagues.[64]

The proponents argue that *Copperweld*'s holding that section 1 of the Sherman Act does not apply to a parent and its wholly owned subsidiary because they always have "a unity of purpose or a common design"[65] should be extended to professional sports leagues. They argue that although each team is independently owned, the members of

58. Jacobs, *supra* note 50, at 35. *See, e.g.*, Goldman, *supra* note 50; Roberts, *supra* note 50.

59. Roberts, *supra* note 50, at 120.

60. *Id.*

61. Jacobs, *supra* note 50, at 29.

62. *See* Jacobs, *supra* note 50, at 34.

63. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979); NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984). *But see* United States v. Topco Assocs., 405 U.S. 596 (1972) (market division by grocery stores of their jointly made product found to be per se illegal as price fixing).

The *Topco* decision has been criticized because the Court failed to recognize that the grocery stores had combined to produce a product that they would be incapable of producing alone. *See, e.g*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 275-79 (1978); Edward Brunet, *Streamlining Antitrust Litigation by "Facial Examination" of Restraints: The Burger Court and the Per Se-Rule of Reason Distinction*, 60 WASH. L. REV. 1, 5-6 (1984); Richard Schmalensee, *Agreements Between Competitors*, *in* ANTITRUST, INNOVATION AND COMPETITIVENESS 98 (Thomas M. Jorde & David J. Teece eds., 1992).

64. *See* Jacobs, *supra* note 50, at 35.

65. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

the league share a "unity of interest."[66] Namely, the league members strive to promote league competition and maintain the economic well being of every club.[67]

Again, the reliance on *Copperweld* seems to be misplaced. *Copperweld* focused solely on a parent corporation and its wholly owned subsidiary.[68] It made no mention of joint ventures.[69] In *Rothery Storage & Van Co. v. Atlas Van Lines Inc.*,[70] the District of Columbia Circuit Court held that joint venturers could not take advantage of the single-entity theory, in part because they were "legally separate corporations," possibly competing against one another.[71] Since each team in a professional sports league is "financially, legally, and managerially distinct" from the other members, the *Copperweld* requirement of complete unity of interest and control is missing.[72]

Courts considering antitrust allegations against sports leagues have often assumed that the league was not a single-entity.[73] In two cases in which the NFL asserted the single-entity theory as a defense to the alleged antitrust violations, the Second and Ninth Circuits rejected the defense.[74] Finally, in *Chicago Professional Sports Ltd. Part-*

66. *See* Jacobs, *supra* note 50, at 33.

67. NASL v. NFL, 670 F.2d 1249, 1253 (2d Cir. 1982) ("[T]he economic success of each franchise is dependent on . . . the economic strength of other league members. Damage to or losses by any league member can adversely affect the stability, success and operation of other members."); United States v. NFL, 116 F. Supp. 319, 323 (E.D. Pa. 1953) ("If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league . . . would fail.").

68. *Copperweld*, 467 U.S. at 755.

69. Jacobs, *supra* note 50, at 37.

70. 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

71. *Id.* at 214; Jacobs, *supra* note 50, at 39.

72. Jacobs, *supra* note 50, at 40.

73. Wood v. NBA, 809 F.2d 954 (2d Cir. 1987) (antitrust action based on league collective bargaining policy); Smith v. Pro Football, Inc., 593 F.2d 1173, 1177 n.11 (D.C. Cir. 1978) ("Professional football, like all professional sports, excepting baseball, is subject to the antitrust laws."); Kapp v. NFL, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (the NFL is an unincorporated association consisting of member clubs); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (the NFL is an unincorporated association); Linesman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977) (the World Hockey Association rule setting age restriction on players is a group boycott); Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975) (the NBA is a joint venture); Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D. Pa. 1972) (the NHL violated the Sherman Act, section 2, in its efforts to preclude players from joining WHA teams); United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953).

74. Jacobs, *supra* note 50, at 39. *See* NASL v. NFL, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982) (NFL assertion of the single entity theory rejected when defending NFL's prohibition of cross-ownership preventing league members from owing a team in another league); Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984) (rejecting NFL assertion that it is a single-entity). *But see* San Francisco

nership v. NBA,[75] the Seventh Circuit simply declined to consider the single-entity theory and assumed that the NBA was a joint venture.[76]

Thus, while the debate may continue among scholars, it appears that the courts have decided the issue correctly, and that professional sports leagues will be considered joint ventures, not single-entities. Under these circumstances, the SBA remains important. If sports leagues were found to be single-entities, plaintiffs would be unable to attack them under section 1 of the Sherman Act, and the SBA would not be needed.

B. Congressional Intent

1. The Sports Broadcasting Act Only Applies to "Free" Television

The fans in *Durkin* and commentators have argued that the SBA only applies to "free" television and not to contracts with cable television.[77] This argument apparently hinges on the use of the term "sponsored" television in the SBA.[78]

One commentator focuses primarily on the testimony of then NFL Commissioner Pete Rozelle during hearings before the House Antitrust Subcommittee: specifically, Rozelle's apparent knowledge that the bill "covers only the free telecasting of professional sports contests, and does not cover pay TV."[79] The author concludes that because of Rozelle's assertion, the SBA must not apply to package sales to cable networks, such as ESPN and SportsChannel.[80] Instead, the SBA should be "narrowly construed" to exclude package sales to cable stations.[81] Ross' "beady eyes and green eyeshades"[82] focus only on the Committee's statement that the "public interest in viewing professional league sports warrants some accommodation of antitrust principles."[83]

Seals, Ltd. v. NHL, 379 F. Supp. 966 (C.D. Cal. 1974) (the NHL is a single entity incapable of conspiring in violation of section 1 of the Sherman Act).

75. 961 F.2d 667 (7th Cir. 1992).

76. *Id.* at 673.

77. Culbertson, *supra* note 10, at 9; Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463 (1990).

78. Ross, *supra* note 77, at 470.

79. *Id.* (citing *Telecasting of Professional Sports Contests: Hearings on H.R. 8757 Before the Subcomm. on Antitrust (subcomm'n Np. 5) of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 36 (1961)).

80. Ross, *supra* note 77, at 470.

81. *Id.* at 471. Courts have consistently stated that antitrust exemptions are to be construed narrowly with minimal compromise to the antitrust laws. Chicago Prof. Sports Ltd. Partnership v. NBA, 754 F. Supp. 1336, 1352 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir. 1992) (citing Group Life & Health Ins. v. Royal Drug Co., 440 U.S. 205, 231 (1979)).

82. Chicago Prof. Sports Ltd. Partnership v. NBA, 961 F.2d 667, 671-72 (7th Cir. 1992).

83. Senate Report, *supra* note 7, at 3044. *See* Ross, *supra* note 77, at 469.

The focus on Rozelle's statement, however, is misplaced. Rozelle's statement was made over thirty years ago, at a time when cable television was a relatively rare form of transmission.[84] Today, cable television is the way in which the majority of television owning households receive their broadcasts.[85] The nature of broadcasting has changed since the SBA was first passed, and to argue that "sponsored" television only applies to over-the-air broadcasting ignores the profound changes in the broadcast industry that have occurred in the thirty-four years since the passage of the SBA.[86] Instead, it would seem that the court in *Chicago Professional Sports* was correct in stating that the distinction between "sponsored" television and pay television is "meaningless today, since virtually all over-the-air and cable TV broadcasts carry advertising from commercial sponsors."[87]

2. *The Primary Intent of Congress Was to Benefit the Fans*

Ross further argues that the SBA should be interpreted according to the clear intent of Congress.[88] According to Ross, the SBA was meant to promote the viewership of games.[89] More specifically, the SBA was meant to allow viewers to view the games that most interested them, the games of their local team.[90] However, as will be discussed below, another (and more plausible) reading of congressional intent is that Congress intended to keep the NFL (and other professional sports leagues) financially viable, and remove inequities that might have existed between the various leagues and their broadcasting contracts.[91]

84. By 1960, there were approximately 640 cable services serving 650,000 subscribers. SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE 31 (1971). These were purely local services which "left television as a whole unruffled." *Id.* at 24.

85. There are approximately 92 million television households in the United States. ESPN, a cable station, reaches approximately 53 million homes, roughly 58% of all homes with televisions. *See* Ross, *supra* note 77, at 497 n.64 (citing NIELSON MEDIA RESEARCH, NIELSON STATION INDEX 1 (Sept. 1989) and CHANNELS, 1990 FIELD GUIDE 78 (Dec. 1989)).

86. *See supra* notes 84-85.

87. Chicago Prof. Sports Ltd. Partnership v. NBA, 754 F. Supp. 1336, 1364 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir. 1992).

88. Ross, *supra* note 77, at 469.

89. *Id.*

90. *Id.*

91. *See infra* part III.A. *See generally* Senate Report, *supra* note 7, at 3042-44.

3. *Extending the Reasoning of* NCAA v. Board of Regents of the University of Oklahoma

In *NCAA* the Court declined to find the NCAA's limitations on a member's television contract to be per se illegal, instead choosing to adopt the rule of reason.[92] The University of Oklahoma challenged the NCAA's restrictions on the number of television appearances its football team would be allowed to make over a two year span.[93] The Court held that the agreement had the effect of raising prices and reducing output,[94] and that the restrictions on competition were unreasonable.[95]

The Court also stated that "[s]ince broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its nonexistent competitors."[96] Applying this reasoning to professional sports, the argument could be made that each individual sport is a unique product. Hockey is unique, and therefore basketball is not a substitute. Thus, extending the reasoning of *NCAA*, there is no reason for the NHL to negotiate a collective television contract. This argument, however, contradicts the very existence of the SBA. The SBA was passed because Congress felt that collective action on the part of professional sports leagues was necessary to maintain their financial viability.[97] Thus, if a court were to extend the reasoning from *NCAA*, it would directly contradict the intent of Congress in passing the SBA. Also, in cases subsequent to *NCAA*, courts have not extended the reasoning of the Court, and have instead focused on interpreting the SBA and not invalidating it.[98]

III
Theories Supporting The Sports Broadcasting Act

There are at least two theories which support the SBA, both of which focus on Congress. The first theory focuses on Congress' intent when enacting the law, and the second focuses on the very nature of the SBA.

92. NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 100-04 (1984).

93. *Id.* at 94-95. The plan limited the number of appearances to no more than six, four of which could be national, in a two year period. *Id.*

94. *Id.* at 113.

95. *Id.* at 120.

96. *Id.* at 115 (footnote omitted).

97. *See generally* Senate Report, *supra* note 7, at 3043.

98. *See generally* Chicago Prof. Sports Ltd. Partnership v. NBA, 754 F. Supp. 1336 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir. 1992).

A. Congressional Intent to Keep Sports Leagues Financially Viable

Examining the legislative history of the SBA, it appears that the main concern of the Committee on the Judiciary was keeping the NFL financially viable.[99] During hearings before the Antitrust Subcommittee of the House Judiciary Committee, the discussion revolved around the need to make package sales by leagues.[100] The NFL argued that they had to make package sales "to assure the weaker clubs of the league continuing television income . . . on a basis of substantial equality with the stronger clubs."[101] Also, the television revenues were "such a significant part of the overall financial success of a professional football team . . . ," that it was "necessary to prevent too great disparity in the television income of the various clubs."[102] The legislative history also recognizes that "should the weaker teams be allowed to flounder, there is danger that the structure of the league would become impaired and [the NFL's] continued operation imperilled."[103] Not only did Congress focus on the need to keep the leagues financially viable, they also focused on the "inequity" of forbidding the NFL from using package sales when other sports leagues employed package television contracts.[104]

The legislative history also mentions that fan interest in viewing professional sports warrants the exception to the antitrust laws.[105] Throughout the report, however, the fan interest appears as an ancillary benefit to the primary goal of keeping the league financially viable.[106] The report recognizes that maintaining the league itself is the best way to ensure that fans may view the games of their local club.[107] The primary goal of the SBA, however, was to keep professional sports leagues from financial failure; ensuring fan viewership was a secondary objective.

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99. Senate Report, *supra* note 7, at 3043.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* The report states that the American Football League, the National Basketball Association, and the National Hockey League had all employed package television contracts. *Id.* at 3042-43.

105. *Id.* at 3044.

106. The SBA is necessary "to assure the weaker clubs . . . television *income* and television coverage . . . ." *Id.* at 3043 (emphasis added). "[V]iewers . . . may be unable to see the road games of their home team on television." *Id.*

107. *Id.*

B. The Sports Broadcasting Act is Special Interest Legislation

The SBA is special interest legislation.[108] The Seventh Circuit described the SBA as a "single-industry exception to a law designed for the protection of the public."[109] The implications of this statement are enormous. As an exception to the antitrust laws, Congress decided that there was sufficient justification to enact the SBA even though it would not necessarily protect (or benefit) the public.[110] As discussed above, the SBA was passed to ensure league viability and equity.

The argument that the SBA was meant to benefit the fans runs contrary to the very nature of the SBA.[111] The SBA is an exemption. The antitrust laws themselves are meant to protect the public; exemptions are not. Rather, the exemption is meant to protect the special interest. It is difficult to see how an exemption to laws meant to protect the public could also benefit the public. Thus, as special interest legislation, it would seem that the SBA is meant primarily to protect the sports leagues.

IV
Conclusion

The *Durkin* suit presents an opportunity for the District Court of Eastern Pennsylvania to review many of the different theories surrounding the SBA. In general, controversy over the SBA has been difficult for the courts to understand. The Seventh Circuit, in affirming the Northern District of Illinois' opinion in *Chicago Professional Sports*, specifically stated that the lower court had misinterpreted the SBA.[112] Also, courts seem unable to decide whether the SBA was meant to benefit the fans or the league itself.[113] Finally, the *Durkin* court could decide whether *Copperweld* and the single-entity theory should be applied to professional sports leagues.

Durkin presents these opportunities because it is one of the first cases in which the SBA has been challenged. The court should find, however, that the SBA is special interest legislation meant to benefit the leagues and not the fans. Thus, the argument that the SBA is not

108. Chicago Prof. Sports Ltd. Partnership v. NBA, 961 F.2d 667, 671 (7th Cir. 1992).
109. *Id.*
110. *See supra* notes 98-103 and accompanying text.
111. *See generally* Ross, *supra* note 77, at 469.
112. *Chicago Prof. Sports*, 961 F.2d at 670 ("We therefore disagree with the district court to the extent it thought that the Sports Broadcasting Act applies only when the league arranges for (or permits) telecasting of every contest.").
113. *See* Blaich v. NFL, 212 F. Supp. 319 (S.D.N.Y. 1962) (the SBA helps the weaker teams financially and the public interest in viewing).

benefitting the fans as it was intended is moot. The SBA allows the leagues to sell broadcast packages which result in a large portion of the leagues' income, thereby helping to maintain their financial viability. Also, it is clear that due to the changes in television broadcasting, the SBA is equally applicable to cable package sales as it is to broadcast package sales. As for the issue of the single-entity theory, the court should find that the leagues are not single-entities. They do not work with a single unity of purpose, and therefore the *Copperweld* principles are not applicable.