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Implications of the NFL lockout litigation for sports, theatre, music, and video entertainment

by
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I. Introduction

The 2011 dispute between the National Football League ("NFL" or "League"), representing the football teams, and NFL Players' Association ("NFLPA," or "Players," or "Players Association"), the union representing its football players, oscillated among the collective bargaining table, the National Labor Relations Board ("NLRB"), and the courts. The League preferred labor law as the matrix of the controversy. The Players preferred antitrust law. Ultimately, the union's most powerful weapon was not to withhold player services in a strike, but to challenge various anti-competitive arrangements wanted by the teams under the antitrust laws.

The 2011 litigation muted the players' option to choose between collective bargaining and antitrust litigation, making it somewhat less likely that players will alternate between choosing a union as their representative and then disclaiming it. It makes it clear that the labor exemption to the antitrust laws runs more broadly than the narrowest definition of collective bargaining. It also, considering the sides taken by the teams and the players, signals that there is something about the economic structure of product and labor markets in professional sports—and perhaps entertainment industries more generally[1]—that radically differs from the structure of product and labor markets in other industries.[2]

The controversy was widely publicized and undoubtedly drew more public attention than any labor-management dispute in recent years. Its notoriety provides an opportunity to review the relationship between federal labor and antitrust law, and more generally to consider how competition law should operate in the entertainment industry, which is characterized by many anti-competitive arrangements and pressure to manage new types of competition arising from a technological revolution.

"Current sports antitrust doctrine is muddled, confusing, and often incoherent. . ." [3] In other words, the law regulating entertainment labor markets is an ass:[4] it privileges anti-competitive structures in professional and college football; it leaves college athletes wholly without protection; and it is irrelevant in the lower tiers of theatre and moviemaking. The significance of the NFL lockout is not that it drew some crisp new line defining a boundary of the labor exemption to the antitrust laws. Rather the lesson it teaches is that, when the law is healthy, it accommodates itself to realities of the marketplace. Hopefully that will prove to be the case in the other

1. *See generally* HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS*,* 22-30 (8th ed. 2011) [hereinafter "VOGEL"] (comparing movies, television, music, broadcasting, cable television, publishing, the Internet, games, gambling, sports, performing arts, and amusement parts as divisions of the entertainment industry).

2. *See* PAUL D. STAUDOHAR, PLAYING FOR DOLLARS: LABOR RELATIONS AND THE SPORTS BUSINESS, 6 (1996) [hereinafter "STAUDOHAR"] (asserting that professional sports is part of the entertainment industry and that its industrial relations systems resemble those of other segments of entertainment industry).

3. Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A new Critique of the NCAA's Amateurism Rules* 6 VA. SPORTS & ENT. L. J. 51, 54 (2006) (advocating different insights and different rules for sports industry). (this needs the full citation, I don't know what it is).

4. "If the law believes that, the law is an ass . . . ." North American Soccer League v. Nat'l Football League, 505 F.Supp. 659, 659 n.21 (S.D.N.Y. 1980) (quoting Charles Dickens, Oliver Twist; and rejecting antitrust challenge to NFL rules prohibiting teams owners from owning teams in competing leagues), *aff'd and rev'd on other grounds*, 670 F.2d 1249 (2d Cir. 1982) (holding that ban on ownership of teams in competing leagues violated Sherman Act under rule of reason analysis).

entertainment industries as well. This article is intended to contribute to that accommodative outlook.

Collective bargaining, and hence the labor exemption, is of small and diminishing importance as the revolution in major parts of the entertainment industry gains momentum. In theatre and movie production, workers must seek protection politically and through the minimum-wage laws, while producers seek legitimate—and illegitimate—limits on competition under the antitrust rule of reason. Ultimately, market forces, changing with technological advances, will dominate, not law.

It is widely accepted that antitrust law regulates product markets, while labor law[5] regulates labor markets.[6] The boundary between the two is the boundary of the labor exemption to the antitrust laws. That boundary is, however, inherently artificial[7] Successful collective bargaining and compliance with other labor law increases labor costs, and this reduces output and/or increases prices in product markets.[8] Unionized employers will be driven out of business by non-union competitors unless collective bargaining is accompanied by some kind of product-market restraints. Labor market restraints can be identical to product market restraints prohibited by the antitrust laws,[9] or collateral regulation of product market competition can be indirect and subtle. In any event, "without economic refinement, rewards obtained from effect on the product market and those obtained from effect on the labor market are inextricable."[10]

The literature about the labor exemption—and on collective bargaining in general—assumes that the question is how to increase the welfare of workers without damaging the product market too much. In the context of this article, the question is different: it considers how to adapt the antitrust laws to a socially beneficial revolution that mainly affects product markets and increases consumer welfare. The revolution contracts the boundary between

5. Labor law is not just the law of collective bargaining, but also includes minimum wage and maximum-hour law, worker's compensation law, and unemployment compensation law.

6. *See* Thomas J. Campbell, *Labor Law and Economics*, 38 STANFORD L. REV. 991, 992-95 (1986).

7. *Id.* at 993.

8. *Id.* at 997.

9. *Id.* at 999 (characterizing insights of Archibald Cox).

10. *Id.* at 998.

labor markets and product markets and also makes the boundary less distinct.

In professional sports the interesting conflicts are at the top. In the other entertainment industries the interesting conflicts are at the bottom. The technological revolution is leading to disintermediation and fragmentation of production and consumption. That means that the firms and players at the top are threatened by those at the bottom.

This article describes those revolutionary phenomena and explains why the boundaries of the labor exemptions are particularly difficult to define in the entertainment industries, including professional sports. It also predicts that controversies over the scope of the labor exemptions and broader controversies over the application of antitrust law will become more frequent as technology enables employers to push more work beyond the boundaries of conventional firms and opens up new revenue opportunities for employers and some employees. Technology's tendency to blur the boundaries separating employment from entrepreneurship also will strain the line separating labor from product markets.

Technology lowers barriers to entry for performers, increasing competition, and complicating dealmaking among an increased number of market participants. At the same time, however, technology also offers new ways to facilitate market transactions, potentially reducing transaction costs. Technology permits sources of different kinds of services to find each other, to make deals for an integrated product, and then to find consumers and fans interested in it.

The effect will be to push more controversies about the legality of relevant action from the relatively certain territory of traditional interpretations of the labor exemptions into less familiar territory, testing the boundaries of the exemptions and necessitating balancing of anti-competitive and pro-competitive effects under antitrust law's rule of reason.

This article begins with a brief review of the NFL lockout litigation. Then it analyzes the special features of entertainment product and labor markets and recapitulates basic antitrust and labor-law concepts and their application to specific restrictions on competition common in entertainment markets. It argues that over-aggressive definition and enforcement of copyright is probably the greatest threat to realization of the fruits of new technologies in the entertainment field. Copyright provides an anti-competitive beachhead for extending anticompetitive mechanisms at least as strong as collective bargaining.[11]

Finally, it explores technology's revolution in major parts of the industry, and explains how there is hope for the future. The technological revolution—not the present one but the previous one—has already changed the landscape of NFL economics, shifting the most relevant revenue stream to television broadcast revenues. This is a foreshadowing of what is beginning to happen in the rest of the entertainment industry.

Defining the boundaries of the "entertainment industry" is challenging. To make the analysis manageable, the article focuses on professional football—the NFL—as representative of professional sports more generally, occasionally noting relevant developments in other sports. Professional football produced the recent litigation that invited the inquiry. It uses popular music, including rock and country, as the exemplar for music, saving symphony orchestras and dance bands for someone else or another time. It ranges more broadly with respect to theatre and movies, including the spectrum from Broadway plays to storefront community theatre, and the spectrum from Hollywood blockbuster to narrative YouTube videos. The broader scope for scripted entertainment is warranted because it is here where the impact of the technological revolution is most intense. The limited scope for music is warranted because symphony orchestras and dance bands account for a relatively small part of music consumption, and they—symphony orchestras, anyway—are organized completely differently from other parts of the music industry.

11. *See generally* Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way,* 29 HASTINGS COMM. & ENT. L. J. 259 (2007) [hereinafter "Perritt, *New Architectures for Music*]; Henry H. Perritt, Jr., *Flanking the DRM Maginot Line Against New Music Markets*, 16 MICH. ST. J. INT'L LAW 113 (2007) [hereinafter Perritt, *Flanking the DRM*]; Henry H. Perritt, Jr., *Music Markets and Mythologies, 9* J. MARSHALL REV. INTELL. PROP. L. 831 (2010) [hereinafter Perritt, *Music Markets*]; Henry H. Perritt, Jr., *New Business Models for Music*, 18 VILLANOVA SPORTS & ENT. L. J. 63 (2010) [hereinafter Perritt, *New Business Models for Music*]; Henry H. Perritt, Jr., *Cut in Tiny Pieces: Ensuring that Fragmented Ownership Does Not Chill Creativity*, 14 VANDERBILT J. ENT. & TECH.L. 1 (2011) [hereinafter Perritt, *Cut in Tiny Pieces*].

II. Background of the NFL controversy

For the last sixty years, the interplay between labor and antitrust law has shaped collective bargaining in the professional football industry.

Professional football did not establish a significant presence in the public mind until the late 1930s.[12] The Players Association emerged in the mid-1950s, but the NFL refused to deal with it until the Association threatened antitrust litigation against the League.[13] In *Radovich v. NFL*,[14] the Supreme Court held that professional football—unlike major league baseball[15]—was not categorically exempt from the antitrust laws. Eleven years later, the National Labor Relations Board ("NLRB") recognized the NFL Players

12. STAUDOHAR, *supra* note 2 at 57-58.

13. *Id*. at 65.

14. 352 U.S. 445, 451–52 (1957).

15. In Fed'l Baseball Club of Baltimore, Inc. v. Nat'l League of Professional Baseball Clubs, 259 U.S. 200, 208-09 (1922), the Supreme Court exempted professional baseball from the Sherman Act by concluding that it did not involve interstate commerce.

In Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (per curiam), the Court adhered to its decision in *Federal Baseball Club*, in a very similar baseball case, premised on the baseball industry's reliance on that decision and Congress's failure to overturn it. 346 U.S. at 79.

In Radovich v. Nat'l Football League, 352 U.S. 445 (1957), the Supreme Court declined to extend the baseball exemption beyond baseball, suggesting that Federal Baseball was wrongly decided. *Id.* at 452. The Court was unwilling to overrule it, however, because:

"[M]ore harm would be done in overruling Federal Base Ball than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years." *Id.* at 450-451.

The Curt Flood Act of 1998, Pub.L. 105-297, Oct. 27, 1998, 112 Stat. 2824 (1998), codified at 15 U.S.C. § 26b (2006), partially repealed the baseball exemption to "to state that major league baseball players are covered under the antitrust laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity." 15 U.S.C. § 26b (quoting purpose section of Curt Flood Act).

In *United States v. Shubert*, 348 U.S. 222 (1955), the Supreme Court declined to apply the baseball exemption to theatrical productions, reasoning that the baseball exemption was limited by a narrow application of stare decisis, the same reasoning applied by the Court two years later to football, in Radivitch.

Association ("NFLPA") as the exclusive bargaining representative of all NFL players, and the NFL and the NFLPA entered into their first collective bargaining agreement ("CBA").[16]

In 1972, several players filed an antitrust action against the League in *Mackey v. NFL,*[17] alleging that the League's "Rozelle Rule," restricting movement of free agents—players whose contracts with a particular team have expired—violated § 1 of the Sherman Act. The court concluded that the restriction violated § 1 because it was significantly more restrictive than necessary to serve any legitimate purpose of maintaining competitive balance in the NFL. While the *Mackey* litigation was pending, the collective agreement between the League and the Players Association expired, and seventy-eight NFL players filed a separate class action antitrust suit against the League.[18] In 1977, the League and the players entered into a settlement agreement incorporating a new collective bargaining agreement that implemented a revised system of free agency known as "right of first refusal/compensation."[19]

In December 1982, the Players engaged in a fifty-seven-day strike before agreeing to a new collective agreement that included a modified version of the "right of first refusal/compensation" system. This agreement expired in 1987, and when negotiations for a new CBA proved unsuccessful, the Players struck again and filed an antitrust suit in *Powell v. NFL*,[20] alleging among other things that the League's free agency restrictions violated the Sherman Act. On appeal, the Eighth Circuit held that the nonstatutory labor exemption applied, pursuant to *Mackey.*[21]

Two days after the *Powell* decision, in November, 1989, the Players Association abandoned collective bargaining rights in an effort to end the NFL's nonstatutory labor exemption. The Players Association disclaimed its union status, enacted new bylaws prohibiting it from engaging in collective bargaining with the League, filed a labor organization termination notice with the U.S. Department of Labor, obtained a reclassification by the Internal

16. *See* Brady v. NFL, 644 F.3d 661, 663-664 (8th Cir. 2011) (detailing history).

17. 543 F.2d 606, 610 (8th Cir. 1976).

18. *See* Reynolds v. NFL, 584 F.2d 280, 282 (8th Cir.1978); Alexander v. NFL, No. 4–76–123, 1977 WL 1497, at *1 (D. Minn. Aug. 1, 1977).

19. *Brady*, 644 F.3d at 664 (detailing history).

20. 678 F.Supp. 777, 780–81 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989).

21. *Powell*, 930 F.2d at 1298.

Revenue Service as a "business league" rather than a labor organization, and notified the NFL that it would no longer represent players in grievance proceedings.[22]

In 1990, eight individual football players brought a new antitrust action against the League in *McNeil v. NFL*,[23] contending that new player restraints imposed by the League during the 1990–1991 season violated § 1 of the Sherman Act. On September 10, 1992, following a ten-week trial, a jury found the NFL in violation § 1 of the Sherman Antitrust Act.[24] The individual players then sought injunctive relief to become free agents for the 1992 season.[25] Two new antitrust lawsuits were filed in the two-week period after the *McNeil* verdict. Ten NFL players brought suit in *Jackson v. NFL*,[26] alleging that the League's free agency restrictions violated the Sherman Act. Five other NFL players instituted *White v. NFL*,[27] a class action alleging that various practices of the League, including free agency restraints, the college draft, and the use of a standard NFL player contract, violated the antitrust laws.

In January 1993, the parties reached a tentative agreement to resolve *White* and related cases. The Players Association subsequently collected authorization cards from NFL players redesignating the organization as the players' exclusive collective bargaining representative, and the NFL voluntarily recognized the NFLPA as the players' union on March 29, 1993. The district court approved the parties' Stipulation and Settlement Agreement ("SSA") in April 1993, and the NFL and the NFLPA entered into a new collective agreement shortly thereafter, amending the SSA to conform to the provisions of the new collective agreement. The district court approved the requested amendments in a consent decree issued on August 20, 1993, retaining jurisdiction to supervise

22. *Brady,* 644 F.3d at 664-665.

23. 790 F. Supp. 871 (D. Minn. 1992).

24. 15 U.S.C. § 1 (2006). *See* McNeil v. Nat'l Football League (Plan B Free Agency), No. 4–90–476, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992).

25. *See* Jackson v. Nat'l Football League, 802 F.Supp. 226, 228 (D.Minn.1992); White v. Nat'l Football League, 822 F.Supp. 1389 (D.Minn.1993).

26. *Jackson*, 802 F.Supp. at 228–29, 234 n. 14.

27. *White*, 822 F.Supp. at 1395.

its implementation. The parties amended and extended the collective agreement in 1996 and 1998 and 2006.[28]

In 1996, the Supreme Court decided *Brown v. Pro Football, Inc.*,[29] holding that that the nonstatutory labor exemption applied to employer conduct that occurred during and immediately after a collective-bargaining negotiation when it involved a mandatory subject of bargaining that grew out of the bargaining process.

After 1993, the Players and the League operated under the *White* SSA, and the district court continued to oversee the settlement by resolving numerous disputes over the terms of the SSA and CBA. Whenever the NFL and the Players Association agreed to change a provision in the collective agreement, a conforming change was also made to the SSA. The SSA was thus amended several times, most recently in 2006, when the NFL and the NFLPA adopted a new collective agreement, which ran through the 2012–2013 football season. Either side could opt out of the final two years of the agreement upon written notice.

In May 2008, the NFL opted out of the final two years of the SSA and CBA, citing concerns about operating costs and other elements of the agreements.[30]

A major issue in the 2011 dispute was the teams' demand that the players reduce their share of television revenues.[31] Approximately half of NFL revenues come from broadcast contracts with the networks.[32] Sharing television revenues is a mandatory subject of bargaining under section 8(a)(5) of the National Labor Relations

28. White v. Nat'l Football League, 766 F. Supp. 2d 941, 944 (D. Minn. 2011) (describing history of SSA and collective bargaining agreement); 644 F.3d at 665 (detailing history).

29. 518 U.S. 231 (1996).

30. *Brady*, 644 F.3d at 666-67 (detailing history).

31. *See* Clay Moorhead, *Revenue Sharing and the Salary Cap in the NFL: Perfecting the Balanace Between NFL Socialism and Unrestrained Free-Trade*, 8 VAND. J. ENT. & TECH. L. 641, 678 (2006) [hereinafter "Moorhead"] (reporting on early negotiation stances: players want 64% of total revenues; owners refuse to relinquish more than 57%).

32. *White*, 766 F. Supp. 2d at 945; "The NFL's national media revenue is the backbone of the business;" Jake I. Fisher, *The NFL's Current Business Model and the Potential 2011 Lockout* 20 (May 4, 2010), http://harvardsportsanalysis.files.wordpress.com/2009/09/the-nfl-business-model-and-potential-lockout.pdf [hereinafter "Fisher paper"]. For example, the Green Bay Packers earned 38% of its revenue in 2009 from TV and radio broadcasting, 15% from merch sales and licensing and endorsements, and only 20% from ticket sales. *Id.* at 21.

Act.[33] The League and the Players Association negotiated for two years over a new agreement to take effect in March 2011 after the existing agreement expired. As a result, the SSA and CBA were scheduled to expire in early March 2011. Although the NFL and the NFLPA engaged in more than two years of negotiations, they were unable to reach an agreement. The League filed an unfair labor practice charge with the NLRB in February 2011, asserting that the union failed to confer in good faith.[34]

As the deadline approached, the players voted to end the Players Association status as their collective bargaining representative. On March 11, 2011—the expiration date of the SSA and CBA—the Players Association notified the NFL that it disclaimed interest in continuing to serve as the players' collective bargaining representative, effective at 4:00 p.m. The Players Association also amended its bylaws to prohibit collective bargaining with the League or its agents, filed a labor organization termination notice with the Department of Labor, asked the Internal Revenue Service to reclassify the NFLPA as a professional association rather than a labor organization, and notified the NFL that it would no longer represent players bringing grievances against the League.

The League filed an amended unfair labor practice charge on March 11, alleging that the NFLPA's disclaimer was a "sham" and that the combination of a disclaimer by the union and subsequent antitrust litigation was "a ploy and an unlawful subversion of the collective bargaining process."[35]

Individual players, funded by the Players Association, filed suit on the same day as the disclaimer—March 11, 2011—in *Brady v. NFL.*[36] They alleged that the anticipated lockout violated the Sherman Act, and that other anticipated league actions, including a limitation on the amount of compensation that can be paid to recently drafted first-year "rookie" players, a cap on salaries for current players, and "franchise player" and "transition player" designations that restrict the ability of free agents to join a team other than their

33. 29 U.S.C. § 158(a)(5) (2006). *See* Home Box Office, Inc. v. Directors Guild of Am., 531 F. Supp. 578, 607 (S.D.N.Y. 1982) (finding that share of pay television revenues was a form of profit sharing and therefore a mandatory subject of bargaining).

34. *Brady*, 644 F.3d at 666-67.

35. *Id.* at 667.

36. *Id.* (detailing history).

former team were anticompetitive practices that similarly violated the Act.[37]

On March 12, the League instituted a lockout of members of the Players Association bargaining unit, which included professional football players under contract, free agents, and prospective players who had been drafted by or entered into negotiations with an NFL team. The NFL informed players under contract that the lockout would prohibit them from entering League facilities, from receiving any compensation or benefits, and from performing any employment duties including playing, practicing, working out, attending meetings, making promotional appearances, and consulting medical and training personnel except in limited situations.

On April 25, 2011, the district court granted the Players' motion to enjoin the lockout. After staying the injunction, the United States Court of Appeals for the Eighth Circuit reversed, holding that the Norris-LaGuardia Act deprived the district court of jurisdiction to issue the injunction.[38]

On August 4, 2011, the players and the league entered into a new collective bargaining agreement to run through the end of the 2020 season.[39] It explicitly provided that it superseded any conflicting provisions in the Settlement Agreement.[40] It committed the Players Association not to file any suit against the NFL or any team or to give voluntary testimony in support of any issue covered by the agreement, unless in support of a claim of a breach of the agreement.[41]

Paralleling the antitrust litigation, the players challenged a unilateral change in the arrangements for sharing television revenue with the players. In *White v. Nat'l Football League* ("the 2011 television decision"),[42] the district court held that an agreement negotiated between the NFL and the television networks violated the White Stipulation and Settlement Agreement ("SSA"), which resolved the 1987 strike and lockout. After the NFL opted out of the

37. *Id.* at 667-68.
38. *Id.*at 661.
39. NFL Collective Bargaining Agreement, (Aug. 4, 2011), Art. 69, sec. 1.
40. *Id*. at Art. 2, sec. 1.
41. *Id.* at Art. 3, sec. 2.
42. *White*, 766 F. Supp. 2d 941.

final two years of the 2006 collective bargaining agreement and SSA,[43] the union claimed that an agreement to extend and renegotiate broadcast contracts with DirecTV, CBS, Fox, NBC, and ESPN violated the NFL's obligation under the SSA to act in good faith and use best efforts to maximize total revenues for both the NFL and the Players for each SSA playing season.[44] Shortly after that, the League negotiated extensions of its broadcast contracts to cushion its economic losses in the event of a strike or lockout.

The district court found that broadcast revenues are "an enormous source of shared revenue" for the Players and the NFL.[45] It concluded that the League violated the SSA by negotiating with the broadcasters to advance its own interests and harm the interests of the players:

> [U]nder the terms of the SSA, the NFL is not entitled to obtain leverage by renegotiating shared revenue contracts, during the SSA, to generate post-SSA leverage and revenue to advance its own interests and harm the interests of the Players. Here, the NFL renegotiated the broadcast contracts to benefit its exclusive interest at the expense of, and contrary to, the joint interests of the NFL and the players. This conduct constitutes "a design. . . to seek an unconscionable advantage" and is inconsistent with good faith.[46]

The court ordered a further hearing to determine appropriate relief that was explicitly to consider both damages and an injunction.[47] This lawsuit was settled as part of the overall resolution of the 2011 dispute.

This decades-long conflict represents not a traditional labor-management controversy, but a struggle by participants in an entertainment industry to reconcile the pro-competitive mandates of the antitrust law with the practical necessity of anti-competitive measures to enhance the attractiveness of the entertainment product. Self-interest on the part of both service providers (the players) and

43. The SSA and the collective agreement originated in 1993. The collective agreement was amended and extended in 1996, 1998, and 2006. *White*, 766 F. Supp. 2d at 944.

44. *Id.* at 943 (describing issue and arguments).

45. *White*, 766 F. Supp. 2d at 951.

46. *Id.* at 951.

47. *Id.* at 854.

entrepreneurs (the team owners) naturally operates, but that is inherent in any market.

III. Entertainment product and labor markets

The NFL lockout litigation used the labor exemption to protect anti-competitive mechanisms in the product market. Antitrust law focuses on market realities, not formalistic distinctions. Accordingly, any antitrust analysis must begin with close examination of "the economic reality of the market at issue."[48] John T. Dunlop's classic *Industrial Relations Systems* emphasizes that industry structure and the microeconomics of product and labor markets, along with the law, determine the differing shape of industrial relations systems, including collective bargaining, in different industries.[49] To explore the implications of the NFL controversy throughout the entertainment industry, one must begin with an analysis of market structure.

A. Industry structures and labor markets

1. Corporate structures

In professional sports, associations of teams, usually called *leagues*, exercise significant private regulatory power over individual teams. In *American Needle, Inc. v. National Football League*,[50] however, the Supreme Court held that the NFL was not a single enterprise entitled to the intra-enterprise exemption to the antitrust laws. It provided a useful summary of the structure of the NFL:

> The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business. . . . The teams compete with

48. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 46-467 (1992) (affirming reversal of summary judgment for defendant in tying and monopolization case after exhaustive exploration of the dynamics of supply and demand in carefully defined markets for copying equipment and service); Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 111 (1984) (agreeing with district court that college football broadcasts constitute separate market).

49. See STAUDOHAR, *supra* note 2, at 4-5 (applying Dunlop's insights to professional sports labor markets).

50. 130 S.Ct. 2201 (2010).

> one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel.[51]

Baseball and hockey are organized like football. Soccer is different. In *Fraser v. Major League Soccer, L.L.C.*,[52] the court of appeals reviewed the industry structure for professional soccer in the United States in considering a single-entity defense:

> MLS has, to say the least, a unique structure, even for a sports league. MLS retains significant centralized control over both league and individual team operations. MLS owns all of the teams that play in the league (a total of 12 prior to the start of 2002), as well as all intellectual property rights, tickets, supplied equipment, and broadcast rights. MLS sets the teams' schedules; negotiates all stadium leases and assumes all related liabilities; pays the salaries of referees and other league personnel; and supplies certain equipment.[53]

The controversy involved the league's control over player recruitment.

> In a nutshell, MLS recruits the players, negotiates their salaries, pays them from league funds, and, to a large extent, determines where each of them will play. For example, to balance talent among teams, it decides, with the non-binding input of team operators, where certain of the league's "marquee" players will play.[54]

The league contracts with investors to operate nine of the League's twelve teams. The operator/investors hire general managers and coaches and may trade players with other teams or pick players in the League draft, but pay not bid independently for players.[55] They also must comply with a salary cap.[56] A class of players claimed that the agreement not to compete for player services violated section 1 of

51. *Id.* at 2212-13.
52. 284 F.3d 47 (1st Cir. 2002).
53. *Id.* at 53.
54. *Id*.
55. *Id.* at 54.
56. *Id.*

the Sherman Act.[57] The court rejected the claims on market-definition grounds, but suggested that even outside the classic single entity situation exemplied by *Copperweld*,[58] the rule of reason might show flexibility for interdependent multi-party enterprises. Sports leagues are a primary example, but so are common franchising arrangements and joint ventures that perform specific services for competitors.[59] The Court also noted Justice Rehnquist's argument that all sports leagues be treated as single entities because they must collaborate to produce a product.[60]

The rest of the entertainment industry is even more decentralized than professional football. Corporate entities, partnerships or sole proprietorships are the units of production. Trade associations exist, but exercise no regulatory power outside the standards-setting and enforcement arena. Collective licensing of copyrights for music is the notable exception.[61]

2. Sports and the rest – similarities and differences

Entertainment industry product markets have characteristics that distinguish all of them from other industry product markets. Each entertainment industry also has product-market features that distinguish it from other entertainment-industries.

The structure of the markets for professional sports is dramatically different from that of non-entertainment industries. Ethan Lock identified the following attributes of product markets in professional football:

1. No real substitutes exist for the NFL product;
2. The NFL regulates intra-league competition for fans and players, in the interest of competitive balance;
3. The NFL competes with no other football league for either players or fans.[62]

57. *Id.* at 54-55.

58. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 762 (1984).

59. *Fraser*, 284 F.3d. at 58.

60. *Id.* at 55, citing NFL v. N. Am. Soccer League, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari).

61. See Perritt, *Cut in Tiny Pieces*, supra note 11, at 64 (detailing history and operation of copyright collectives).

62. Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 354-59 (1989) (explaining uniqueness of employer-employee relationships in professional sports).

The peculiar economics of the professional sports industry make application of antitrust- and labor-law doctrines developed for manufacturing and most service industries awkward. In most industries, each firm seeks to avoid competition. In professional sports, a team cannot gain fans unless it has credible competition. In most industries, a firm seeks to extinguish its competitors. In professional sports, a team has an incentive to build up its competitors; if the competition is too weak, games will not be interesting, and the audience will fall off. Leagues such as the NFL developed to management these problems. "Sports leagues are . . . cartels that exist to allocate and control the [product] and [labor] and to eliminate within the cartel competition over . . . players and . . . fans."[63]

In a series of cases, the Supreme Court and lower federal courts have recognized the salience of unique product-market features in construing the antitrust laws. In *NCAA v. Board of Regents,*[64] the Supreme Court held that restrictions by the NCAA on broadcasts of college football games violated the Sherman Act:

> By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another. . . . By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade.[65]

Nevertheless, it noted the special characteristics of sports:

> "Some activities can only be carried out jointly. . . . What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define

63. ROBERT C. BERRY ET. AL., LABOR RELATIONS IN PROFESSIONAL SPORTS at text accompanying n.10, (1986) [hereinafter Berry, Labor Relations].

64. 468 U.S. 85 (1984).

65. *Id.* at 99-100.

> the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football. . . . In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.[66]

These pro-competitive tendencies could offset anti-competitive effects in a rule of reason analysis.[67] Finding no pro-competitive effects to offset the anti-competitive effects of the NCAA rules limiting television broadcasts of games, however, the Court affirmed the lower courts' finding of a Sherman Act violation.[68]

In *American Needle*,[69] the Supreme Court acknowledged that the single-entity theory might shield certain types of NFL conduct:

> Football teams that need to cooperate are not trapped by antitrust law. "[T]he special characteristics of this industry may provide a justification" for many kinds of agreements. The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is

66. *Id.* at 101-02.
67. *Id.* at 103-04 (distinguishing per-se from rule-of-reason analysis).
68. *Id.* at 120.
69. 130 S. Ct. 2201 (2010).

> still concerted activity under the Sherman Act that is subject to § 1 analysis.
>
> . . . .
>
> We have recognized, for example, that the interest in maintaining a competitive balance" among "athletic teams is legitimate and important. While that same interest applies to the teams in the NFL, it does not justify treating them as a single entity for § 1 purposes when it comes to the marketing of the teams' individually owned intellectual property. It is, however, unquestionably an interest that may well justify a variety of collective decisions made by the teams.[70]

Ethan Lock identified the following attributes of the labor market in professional football:

1. The value of a player depends not only on skills, but also on the player's attitude, conduct, age, and relationship with teammates;
2. Players have limited community of interest;
3. Players have limited job security and short working lives;
4. The NFL is the only buyer of player skills, which are not generally transferrable to other industries.[71]

Professional sports share most of these characteristics. That baseball is treated differently from other sports is an anomalous result of the doctrine of *stare decisis*.[72]

Each of these attributes applies to the labor markets in other entertainment industries such as theatre and movies. Each of them, except the last, applies to the popular music industry, where there is sharp competition among record labels and other, newer intermediaries that link the labor market to the product market. Collective bargaining in the popular music industry, unlike professional sports, theatre, and movies is of only marginal

70. *Id.* at 2216-17.

71. Lock, *supra* note 62 at 354-359 (explaining uniqueness of employer-employee relationships in professional sports).

72. Major League Baseball v. Crist, 331 F.3d 1177, 1188 (11th Cir. 2003) (applying baseball exemption but noting "dubious" application of stare decisis to preserve it).

importance because most musicians—particularly those performing popular music—are not traditional employees entitled to engage in collective bargaining.

Labor costs are important in all of the entertainment industries. Player payrolls consume more than half of total NFL revenue.[73] In the movie industry, cast expenses comprise slightly less than 20% of the budget.[74] Broadway's "Spiderman" reported that artistic labor costs account for 19% of production costs and 33% of running costs.[75] In indie theatre, the percentages are a good bit lower, because personnel often are unpaid. One study of off-off-Broadway products concluded that about 16% of the total budget was for artistic labor.[76]

Though professional sports and other entertainment industries share some characteristics, they also differ in important ways. They are similar in that they depend on celebrity to draw audiences. They are similar in that their production is episodic: fans consume[77] specific performances, games, movies, or musical works.[78]

They are similar in that most players or performers have relatively short careers. They are similar in that they employ institutional frameworks to aggregate and concentrate the selection of talent: the draft in professional football; auditions for movies and plays. In this respect the labor markets are more highly organized than in most other industries, in which employment decisions occur on a purely ad-hoc basis, involving individual employees.

73. Fisher Paper, *supra* note 32 at 21 (reporting 57% in 2008).

74. *See* RALPH S. SINGLETON, FILM BUDGETING 7, 62 (1996) (detailing cost categories and cast costs for $15 million movie; "cast unit" accounting for 19.67% of total); DEKE SIMON, FILM AND VIDEO BUDGETS 230 (2010) (budget line items for $5 million feature film; "cast" and "extra talent" categories accouning for 17.98% of total).

75. Letter from Christopher A. Cacace Gen. Mgr. of Rosenberg, Neuwirth, & Kuchner to Elizabeth Block, Assisstant Attorney General of the Office of the New York Attorney General, Attaching Financial Statements (June 2, 2011), http://s3.documentcloud.org/documents/206114/8-legged-productions-llc-2011-01-02-financial.pdf.

76. *Statistical Analysis of Off-Off-Broadway Budgets*, NEW YORK THEATRE FOUND., 8 (April 2008), http://www.nyitawards.com/survey/OOBBudgetStudy.pdf (7% for actors, including productions that did not pay actors; 4% for designed, including unpaid designers, 5% for director, stage manager, and crew).

77. "Consumption" of entertainment includes attending a live event such as a football game, performance of a play, or music concert, and watching or listening to a game, a movie, or a music recording.

78. The more episodic the delivery of services to the audience, the more likely independent contractor status is rather than employee status. See § IV.B.9 (detailing criteria for distinguishing employees from independent contractors).

Professional sports, theatre, and live music also are similar in that the product is consumed as it is produced. Football games, plays, and concerts can be recorded of course, but there is little market for such recordings. Movies and recorded music are similar in that production and consumption are separated. Capital is invested in making a studio recording or a movie on speculation, in the hope that consumption will be sufficient to provide a return on the investment.

In all of the relevant industries, the supply of labor greatly exceeds the demand. Many more people would like to play professional football than there are slots on teams.[79] Many more actors would like to be in movies or stage plays than there are roles in productions. Many more musicians would like to perform than there are opportunities—although it is relatively easy for a musician to perform locally at small venues or at open-mic events. At the same time, professional athletes, actors, and musicians are not fungible. Each has unique characteristics that make him desirable or undesirable for a particular role. A football team would not recruit Tim Tebow to play guard. A casting director would not select Anthony Hopkins to play one of the young lovers in *Brokeback Mountain* or Justin Bieber to play a heavy in a gangster movie. Those distinguishing characteristics, however, are not all objectively measurable. One can measure the velocity of a quarterback's pass, the size of his hands and feet,[80] and time how fast he runs the 40-yard dash, but one can only guess at his leadership ability, pain threshold, charisma, and determination to win. Likewise, it is not difficult to determine if a singer has accurate pitch and a good sense of rhythm, but how truly he will portray the director's idea of a particular character in a musical is a matter of artistic judgment. One therefore would not expect labor markets to be organized by mechanical rules common in other industries, such as seniority systems or selection or promotion strictly according to objective test results.

79. Each of the 32 teams in the NFL are allowed 53 players on its roster. NFL Collective Bargaining Agreement, *supra* note 39, at art. 25 § 4 available at https://images.nflplayers.com/mediaResources/files/2011CBA.pdf (limiting total on each team's active and inactive player lists to 53 players); http://www.nfl.com/teams (listing 32 teams comprising NFL).

80. *See* Thomas Jackson, *QB's Hands: does Size really matter...?*, EAGLES EYE, (June 19, 2010, 17:24) http://www.eagleseyeblog.com/qbs-hands-does-size-really-matter.html (reporting hand size of different NFL quarterbacks and discussing why hand size might matter)

In the most visible parts of entertainment industries[81] the labor input comprises sharply differentiated skills and personalities. No one would consider Tom Brady fungible with Brett Favre in terms of personality or leadership styles. No one would view Casey Matthews[82] as equivalent to Brian Urlacher[83] in terms of skills and experience. No one would imagine Zac Efron or Jensen Ackles well suited for the same roles on stage or screen at as Anthony Hopkins or Jack Nicholson. A beginning actor cannot provide the star quality that many movie and theatre producers believe is necessary to attract an audience for a large-budget production.

The bargaining structures for entertainment industries reflect the differing characteristics of the relevant labor markets. Bargaining structures are similar for different sports involving multi-employer bargaining; comprehensive player representation and membership; and two-tier bargaining in which the collective agreement provides a comprehensive framework for regulation of the labor market for each sport. Bargaining structures also regulate certain aspects of the product market to assure competitive stability, while salaries are negotiated with individual players.[84]

Professional sports labor markets share common characteristics:

1. Careers of players are short—3-5 years;
2. Rules limit player mobility from team to team;
3. Television broadcast revenues are important;[85]
4. Vertical integration is limited, although there may be a trend for entertainment conglomerates to acquire teams;
5. Anti-trust law plays a disproportional role in regulating labor markets and their interaction with product markets; and
6. Non-union intermediaries such as agents are important.[86]

81. In other less visible parts, many conventional employees toil away at performing accounting, marketing, information-technology, property-management, human-resource and scheduling functions. There is nothing particularly unusual about the labor markets for their services.

82. 2011 draft-pick rookie linebacker for Philadelphia Eagles.

83. Veteran middle linebacker for the Chicago Bears.

84. *See* STRAUDOHAR, *supra* note 2, at 10-11 (describing bargaining structure in professional sports).

85. For example, in 2000, close to 60% of the Green Bay Packers' revenue came from television, 20% from tickets to games, and about 20% from "other"—mainly licensing of logos and paraphernalia. VOGEL, *supra* note 1, at 454.

Theatrical and movie labor markets also share common characteristics, but also exhibit differences:

1. Careers of actors are short, either because their celebrity status wanes, or, in lower ends of the market, because they give up on being able to make a living from their art;[87]
2. Product markets are highly stratified,[88]
3. With the bottom tier growing in importance;
4. Most actors and production personnel work on a project-by-project basis;
5. The workforce for each project is assembled on an ad-hoc basis; while there are repeat players, they must compete anew for each new project through auditions,
6. Collective bargaining governs labor markets in the upper tiers, but even there, many workers are not covered by collectively bargained terms.

The differing product-market characteristics of professional sports as compared with other entertainment industries result in differences in labor markets. Professional athletes have relatively long term relationships with their teams, and theatre actors have relationships with their producers for the run of a play; in the movie industry, actors have only fleeting relationships with their producers, where actor employment is terminated after a movie is shot—long before any consumers pay to see it. Until recently, musicians had relatively long-term relationships with their record labels, but the

86. STAUDOHAR, *supra* note 2, at 168-173 ("Commonality of Sports Models").

87. See generally Perritt, *New Business Models for Music*, *supra* note 11, at 111-36 (describing life cycle of indie musician). The life cycle of most actors is similar; they go to Chicago, study at Second City, Steppenwolf, the Artistic Home, or at dozens of other acting studios, get some roles in off-Loop theatre, and then go to New York or Hollywood, wait tables, and eventually come home to take up other careers, perhaps continuing to act on the side.

88. In 2009, there were some 1825 regional non-profit theatres, compared with Broadway theatres numbering in the dozens. VOGEL, *supra* note 1, at 497 n.7. The non-profit theatre segment of the industry, comprising mainly off-Broadway and regional theatres earned $811 million in revenue in 2009. *Id.* at 497 n.7. Contributions exceeded revenue, comprising $969 million, or 54%. Id. Broadway shows earned $939 million from Broadway productions in 2007, and $950 from road shows, often performed by regional producers. *Id.*. at 482.

model is changing, so that the relationship between a musician and a producer may end once a song or album is recorded.

3. Proximity of labor and product markets: thickness of the production function

The labor markets differ in other important ways. The proximity of labor markets to product markets, reflected in the thickness of the enterprises that connect, varies dramatically. The firms connecting athletes to sports fans—football, baseball, or basketball teams—are sophisticated enterprises. The same is true for movie production, distribution, and exhibition enterprises. Music lies at the other extreme: many singers and instrumentalists *are* the business entities that perform for audiences. They arrange their own live gigs and record and release their own music. In music, there is little distinction between product and labor markets and existing distinctions are diminishing. Live drama occupies an intermediate position, ranging on a continuum from Broadway producers to storefront theatre ensembles.[89] Technology is slimming down the entrepreneurial intermediation for music and video entertainment, but not sports.

The thickness of intermediation represents the distinction between product and labor markets, which, in turn defines the boundary between antitrust law and labor law. The robustness of the boundary between labor and product markets depends on the thickness of the production function:[90] how many other inputs are involved, and how important, relatively, is a particular labor input? The scope of the labor exemptions to the antitrust laws depends on separating product from labor markets, but that becomes more difficult the thinner the production function.

In the lower strata of the popular music industry, there is little distinction between a worker and entrepreneur. In the top strata of the professional sports and movie industries there is a major distinction between the owners, coach, and general manager of a

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89. A theatre ensemble is a group of actors who participate in the management of a theatre, expecting that they will be given priority in the casting of plays the theatre produces.

90. A production function is a theoretical equation that specifies output as a function of different combinations of inputs. In basic microeconomics, the traditional inputs are labor, land, and capital. See DONALD STEVENSON WATSON, PRICE THEORY AND ITS USES 198 (1963) (illustrating production functions); Perritt, *New Architectures for Music*, *supra* note 11 at 301 (specifying production function for production of popular music).

team and the players, and between the Hollywood producer and the actor. The thicker the intermediation, the more likely is employee status for the talent as opposed to independent contractor status. The most interesting cases are when the production function is relatively thick—as in professional sports—but collective-bargaining and enforcement of other labor laws is weak—as in indie movies and indie theater.

4. Geographic scope

The geographic scope of the relevant labor markets differs. Labor markets for theatre are predominantly regional. To be sure, many actors relocate to New York or Los Angeles, because that is where they think they will find opportunities to make it big. But most actors and casting directors direct their attention to the metropolitan area in which they live and work.

Labor markets for professional sports, on the other hand are national—international in the case of soccer and baseball.

Labor markets for movies are predominantly regional, given the historic concentration of moviemaking enterprises in the Los Angeles area, and of television enterprises in Los Angeles and New York. But moviemaking involves—at least since the breakup of the studio system, beginning in the 1970s—principal photography at locations all over the world, and some recruiting of talent takes place in or near shooting locations. The technological revolution, by dispersing movie production dramatically, means that far more opportunities to work in moviemaking will be sought and filled locally—within particular metropolitan areas. Internet-based casting calls are inherently international, but the likelihood that an applicant will travel a long distance for an audition is small.

5. Strength of worker attachment

The length of employment is different. Actors and other talent for theatre and movies are recruited for particular projects—one run of a play, one movie. Athletes are recruited to sports teams for periods of several seasons, or at least one season. Recruiting a professional football player to play only one game is unheard of.

6. Bifurcation of live performances and recordings

In music, the recording and live-concert markets are sharply distinguished, although the same musicians often participate in both.

In professional sports, consumption of broadcast games and live games is distinct, but the same event provides the content for both.

7. Day jobs

Participants in music, theatre, and movie labor markets typically hold other employment—"day jobs" are the norm.[91] Day jobs are rare in professional sports during the season, but many professional athletes engage in a variety of non-sports employment off season, often related to investments made with their substantial salaries. Outside employment is often closely related to the athlete's identity as an athlete, as with product endorsements, which may involve work during the season.

8. Stratification

Stratification of the sub-industries differs dramatically. Professional sports is not very stratified: most of the relevant activity is centered on the NFL for football, the NBA for basketball, and so on. Few fans consciously choose between going to an NFL game and going to a local league game, although some choose between professional and college football games. College sports are an enigma analytically. They are considered further in § III(B).

Other entertainment industries are hugely stratified, ranging in music from Sony to singer-songwriter Trevor Shandling, in movies from Dreamworks to Troglodyte Productions, and in theatre from the Schuman theatre chain on Broadway to the Weekend Theatre in Little Rock.

One might try to force an apples-to-apples comparative analysis by equating the NFL in professional sports to big Hollywood studios in moviemaking, big recording labels in music, or Broadway theatre and Live Nation for concert music. A separate analysis would address storefront theatre, indie musicians, indie moviemakers, and/or community football leagues.

The weakness, however, of this apparently tidier horizontal comparison is that it would obscure important phenomena: the fluid

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91. Professor Caves calls them "humdrum jobs." RICHARD E. CAVES, CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE 79-80 (2002) (reporting empirical studies concluding that approximately seventy-five percent of artists of all kinds have humdrum jobs; income from art produced at most forty-six percent of total income; and for many, was negative).; *see* Perritt, *New Business Models for Music*, *supra* note 11 at 63 (analyzing life-cycle of indie musicians and the role of day jobs to supplement music income).

movement of capital and labor vertically within the music, video entertainment, and movie industries, and the lack of such movement in professional sports. It is the increasing possibility of such vertical movement that poses the greatest likelihood of legal controversies, considered more fully in § VI(A)(4).

9. Cross subsidization

Sports leagues force redistribution of revenue among the teams, especially revenue from broadcasting.[92] They allocate players to clubs through mechanisms such as drafts of new talent, restrictions on player movement, and compensation to teams losing players to other teams.[93] While some goals, such as the salary cap, are intended to limit competition in the labor market, others, such as the draft system, are intended as a way of channeling subsidies to the weaker teams.[94]

10. Sources of revenue

Professional football and the movie industry share the characteristic that most of the revenue comes from channels that might be thought ancillary to the main products. Television revenues account for about 60% of football revenues, compared with only about 20% for attendance at live games.[95] Movie theatre ticket sales account for only about 20% of the revenue for the movie industry, compared with 40% for video and DVD rentals and about 40% for television.[96]

Historically, it has been employees who have insisted on a share of collateral revenue streams, such as television revenues in professional sports. In the movie industry, it has been the employers who wanted to share revenue realized after employee performance was complete, in order to defer employee compensation payments.

As new streams of revenue develop because of new Internet technologies,[97] the struggle to allocate a share to employees will come from the employees, but it also may come from employers, to the

92. BERRY ET. AL., *supra* note 61 at text following n.10.

93. *Id.*

94. See Richard A. Epstein, *Stop the Football Merry-Go-Round*, HOOVER INSTITUTION (Mar. 29, 2011) http://www.hoover.org/publications/defining-ideas/article/72996.

95. VOGEL, supra note 1, at 454 (Green Bay Packers in 2000).

96. *Id.* at 98.

97. *See* § VI.A.

extent that the effect is to shift total revenue from early to later periods of time.

11. Stickiness of demand

Professional sports differ from other entertainment industries in that professional sports teams have loyal followers, who can be counted on to attend games and watch games on television. In the theatre, movie, and popular music industries, by contrast, each new product offering is completely speculative: most of the costs must be incurred in advance, to rehearse a play, to shoot and edit a movie, or to record a song or an album, with no assurance that any significant number of consumers will pay to see it or hear it.

12. Financing

The relative importance of capital investment and operating costs differ sharply among the industries. In professional sports, operating costs for each season are large in comparison with upfront capital costs. At the opposite end of the spectrum, capital costs dwarf operating costs in the movie and popular music industries. Theatre falls somewhere in between.

Theatre differs from professional sports, popular music, and movies in that it receives most of its funding from subsidies or charitable contributions.[98]

13. Attitude toward collective bargaining

In most industries, employers fight ferociously to avoid unionization and regulation of their workplaces through collective bargaining. Unions fight equally ferociously to maintain unionization and collective bargaining. In professional sports, employers want collective bargaining to shield them from antitrust liability. The employees sometimes oppose collective bargaining when they think they can gain more from antitrust litigation.

In theatre, producers perceive that equity productions have higher credibility, and that equity actors are better than non-equity

98. The non-profit theatre segment of the industry, comprising mainly off-Broadway and regional theatres earned $811 million in revenue in 2009. VOGEL, *supra* note 1, at 497 n.7. Contributions exceeded revenue, comprising $969 million, or 54%. *Id*. Broadway shows earned $939 million from Broadway productions in 2007, and $950 from road shows, often performed by regional producers. *Id*. 482.

actors. These perceptions mute the incentive to remain non-union for cost and flexibility reasons.

14. Defining the boundary between product and labor markets

Any analysis of the interaction between antitrust and labor law strains to distinguish product markets from labor markets. Antitrust law focuses on product markets, while labor law focuses on labor markets. But the two markets are intertwined. That is why it so difficult to define the boundaries of the labor exemptions to the antitrust laws. Labor costs must be reflected in the prices for products and services, and so better employment terms tend to reduce demand in product markets. Conversely, reduced revenues in an employer's product market diminish the resources available to improve workplace conditions and employee compensation. So an employer's product market strategy legitimately is concerned with labor market developments, while employees and their representatives are legitimately concerned with product market developments.

Analysis of the boundaries between the two markets must consider issues such as:

1. Use of contracts rather than integration within the firm.

2. Continued employment versus project-by-project employment.

3. Horizontal interdependency—whether firm success depends on interaction with competitors. (The Chicago Bears are more profitable when they can play teams like the Green Bay Packers but the attractiveness of Steppenwolf's plays do not depend on what Goodman is putting up).

4. Need for vertical integration: high in entertainment (Schubert; CBS; CAMU; Paramount Pictures); low in sports.

5. Whether employees work at multiple levels: sports players also functioning as coaches; actors directing plays or movies; writers acting, directing, or producing.

6. Whether independent contractors are firms or individuals.

7. Sources of controversy.

The reasons for friction between antitrust and labor law differs between sports and other forms of entertainment. In sports, producing a good product requires limits on competition so that the best teams do not drive out the bad. Labor law is used essentially as a shield for these limits, but it also comes into play because so much of the competition between teams is driven by whom they have on their rosters.

In music, theatre, and movies, the friction occurs because the talent often performs entrepreneurial functions, and, conversely, entrepreneurial activities represent competition to the labor market for talent. It is difficult to say when a rock band is acting in its business capacity and when the members are participating in a labor market. In low-budget moviemaking, the producer is often indistinguishable from the director or cinematographer, who often are the actors as well. As technology fuels the DIY[99] phenomenon, this conflation of roles becomes more prominent.

B. College sports—the enigma

College sports are an anomaly in the entertainment industry. Big-time college football, for example, is nearly indistinguishable from professional football. Revenue from broadcast of college games rivals revenue from broadcast of NFL games. NFL teams recruit almost exclusively from the ranks of college football players. Yet college athletes are not considered employees, and therefore fall completely outside the labor exemptions. Nevertheless, tight restrictions that the NCAA imposes on competition mostly have escaped antitrust liability.

A number of commentators argue that college players should be entitled to engage in collective bargaining.[100] "The NCAA's real role is to oversee the collusion of university athletic departments, whose goal is to maximize revenue and suppress the wages of its captive labor force."[101] "Judicial opinions examining antitrust claims against

99. Do-It-Yourself.

100. *See* Robert A. McCormick & Amy Christian McCornick, *The Myth of the Student Athlete: The College Athlete as Employee*, 81 WASHINGTON L. REV. 71 (2006) (arguing that college athletes are employees under traditional tests under NLRA); Rohith A. Parasuraman, *Unionizing Division I Athletics: A Viable Solution*? 57 DUKE L.J. 727 (2007).

101. Joe Nocera, *The College Sports Cartel*, N.Y. TIMES, Dec. 31, 2011 at p.A21 (arguing in favor of an antitrust challenge to NCAA). *See also* Lawrence M. Kahn, *Cartel Behavior and Amateurism in College Sports*, 21 J. ECON. PERSPECTIVES 209, 211 (2007)

NCAA rules are even more confused than decisions involving the intraleague rules of professional leagues."[102]

In *NCAA v. Board of Regents*,[103] analyzed more fully *infra* in section III(A)(2), the Supreme Court found that the NCAA plays a vital role in preserving the competitive character of college football, broadening consumer choice and the options available to athletes.[104] Nevertheless, it found these pro-competitive effects insufficient under the Sherman Act to offset the anti-competitive effects of NCAA rules limiting television broadcasts of games.[105]

Most of the antitrust challenges to NCAA restrictions have foundered on the proposition, usually accepted by the courts, that college athletics do not involve commercial product or labor markets. In 2011, a district court dismissed an antitrust class action challenging the NCAA's bylaws prohibiting NCAA members from offering multi-year athletic scholarships and imposing a cap on the number of athletic-based discounts a school can offer per sport each year.[106] The district court relied on *Banks v. NCAA*,[107] in which the Seventh Circuit affirmed a district court's decision to grant the NCAA's motion to dismiss a plaintiff's complaint regarding the no-agent and no-draft rules.[108] At issue in *Banks* were rules prohibiting college athletes from participating in intercollegiate sports if they agreed to be represented by an agent or asked to be placed on the draft list of a professional league.[109] The district court in *Agnew* found that the plaintiffs had adequately pleaded that the geographic market was the

(arguing that NCAA is a classic cartel, enforcing collusive restrictions on payments for factors of production, including player compensation, on output, and on potential competitors); Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA's Amateurism Rules*, 6 VA. SPORTS & ENT. L. J. 51 (2006) (arguing that "NCAA's amateurism rules, which prevent players from being paid and impose restraints on their ability to move between schools, violate the antitrust laws because they function as collusive agreements between competing college sports leagues that limit consumer choice and lower product quality"); GET See also Robert Brown, *Research Note: Estimates of College Football Player Rents*, 12 BROWN J. OF S.E. 200 (2011).

102. Kreher, *supra* note 101, at 67.

103. 468 U.S. 85 (1984).

104. *Id*. at 101-02.

105. *Id.* at 103-04 (distinguishing per-se from rule-of-reason analysis).

106. Agnew v. Nat'l Collegiate Athletic Ass'n, No. 1:11-cv-0293-JMS-MJD, 2011 WL 3878200 (S.D. Ind. Sep. 1, 2011).

107. 977 F.2d 1081, 1085–86, 1094 (7th Cir.1992).

108. Id. at 1081.

109. Id. at 1083–84.

entire United States,[110] but failed to plead relevant product markets. The complaint alleged that two product markets were relevant: the market for the sale of bachelor's degrees and the labor market for the purchase of student athlete services.[111] The court rejected the labor market allegation because *Banks* rejected the idea that NCAA member schools could be purchasers of labor because the NCAA eligibility and recruiting requirements prohibit member colleges from engaging in price competition for players.[112] It rejected the product-market allegations because:

> [P]eople cannot simply purchase bachelor's degrees at Division I colleges and universities. Notwithstanding pop culture lyrics to the contrary, you can't just mess around and get a college degree. Instead, earning a bachelor's degree requires the student to attend class, take required courses, and maintain certain grades, among many other things.[113]

The conclusion with respect to the product market allegations is plausible, but the conclusion with respect to the alleged labor market is tautological. The reasoning would defeat any Sherman Act claim in which a cartel is effective in prohibiting competition.

In *Gaines v. NCAA,*[114] the district court denied a preliminary injunction against NCAA denial of eligibility to a former college football player because he participated in the NFL draft. The court held that the NCAA's eligibility rules (as distinct from other NCAA activities) were not subject to the antitrust laws because they were not commercial activities.[115] It also held that even if those NCAA activities were subject to antitrust scrutiny they would be privileged under a rule of reason analysis because they have the socially beneficial effect of preserving amateurism in college sports.[116] It embraced the district court's decision in *Banks*.

In *Bassett v. NCAA*,[117] the Sixth Circuit affirmed dismissal of a Sherman Act claim by a former football coach who challenged

110. *Agnew*, 2011 WL 3878200 at *6.
111. *Id*.
112. *Id*. at *7 (quoting Banks, 977 F.2d at 1091).
113. *Id*. at *8 [internal quotations and citations omitted].
114. 746 F.Supp. 738 (M.D. Tenn. 1990).
115. *Id*. at 744.
116. *Id*. at 746-47.
117. 528 F.3d 426 (6th Cir. 2008).

NCAA recruiting rules. The plaintiff coach alleged a group boycott to prevent him from coaching at NCAA member schools: "The restraint at issue here is NCAA's boycott of coaches unjustly or excessively punished because of its disciplinary system. These bans affect interstate commerce by preventing schools across America from hiring boycotted coaches to generate sports revenue and by preventing these coaches from seeking gainful employment with NCAA institutions."[118] The court began with the proposition that a commercial activity must be implicated in order for the Sherman Act to apply.[119] "NCAA's rules on recruiting student athletes, specifically those rules prohibiting improper inducements and academic fraud, are all explicitly non-commercial . . . and designed to promote and ensure competitiveness amongst NCAA member schools."[120]

In *in re NCAA I-A Walk-On Football Players Litigation*,[121] a class action later dismissed for failure to satisfy class-action standards,[122] the district court denied a motion to dismiss antitrust claims against NCAA scholarship restrictions. The NCAA argued that the plaintiffs "failed to allege a legally cognizable relevant market because there is no 'commercial' or 'employment market' for the services of Division I-A football players, and because Plaintiffs fail to define or identify consumer substitutability, interchangeability, or cross-elasticity of demand."[123]

The court reasoned:

> By-law 15.5.5 does not clearly implicate student-athlete eligibility in the same manner as rules requiring students to attend class and rules revoking eligibility for entering a professional draft. . . . [They] were developed to contain costs, not to advance amateurism. Accordingly, the numerical scholarship limitation at issue in this case is not on all fours

118. *Id*. at 431 (quoting plaintiff's brief).
119. *Id.* at 433.
120. *Id*. at 433.
121. 398 F. Supp. 2d 1144 (W.D. Wash. 2005).
122. In re NCAA I-A Walk-On Football Players Litig., No. C04-1254C, 2006 WL 1207915 (W.D. Wash. May 3, 2006) (denying motion to certify class).
123. *In re NCAA*, 398 F. Supp. 2d. at 1150 (characterizing NCAA argument on motion to dismiss).

> with those cases which hold that NCAA eligibility rules are not subject to the Sherman Act.[124]

It also found that the plaintiffs alleged a sufficient market, one in which NCAA member schools compete for skilled amateur football players as necessary inputs to the production of Division I football.[125] "The market alleged here is a monopsony. Injury to competition can occur by monopsony just as it may result from monopoly."[126]

In *Agnew v. NCAA,*[127] the Seventh Circuit also recognized reality—a commercial labor market does exist for the services of college athletes:

> The proper identification of a labor market for student-athletes, on the other hand, would meet plaintiffs' burden of describing a cognizable market under the Sherman Act. As an initial matter, labor markets are cognizable under the Sherman Act. The *Banks* majority, in dicta, opined that the market for scholarship athletes cannot be considered a labor market, since schools do not engage in price competition for players, nor does supply and demand determine the worth of student-athletes' labor. We find this argument unconvincing for two reasons. First, the only reason that colleges do not engage in price competition for student-athletes is that other NCAA bylaws prevent them from doing so. The fact that certain procompetitive, legitimate trade restrictions exist in a given industry does not remove that industry from the purview of the Sherman Act altogether. Rather, all NCAA actions that are facially anticompetitive must have procompetitive justifications supporting their existence. Second, colleges do, in fact, compete for student-athletes, though the price they pay involves in-kind benefits as opposed to cash. For instance, colleges may compete to hire the coach that will be best able to launch players from the NCAA to the National Football League, an attractive component for a prospective college football player. Colleges also engage in veritable arms races to provide top-of-the-line training

124. *Id.* at 1149-1150.

125. *Id.* at 1150 [internal quotations and citations omitted].

126. *Id.* at 1151.

127. 683 F.3d 328, 348 (7th Cir. 2012) (affirming dismissal of Sherman Act suit challenging limitation on athletic scholarships)

> facilities which, in turn, are supposed to attract collegiate athletes. Many future student-athletes also look to the strength of a college's academic programs in deciding where to attend. These are all part of the competitive market to attract student-athletes whose athletic labor can result in many benefits for a college, including economic gain.[128]

It affirmed dismissal of a Sherman Act complaint, however, challenging NCAA restrictions on athletic scholarships, which it found not clearly pro-competitive, unlike NCAA eligibility restrictions. The plaintiffs had unaccountably failed to allege existence of the market.

Although universities hate the idea of collective bargaining for their athletes because it would increase costs and diminish control, ironically it would offer them broader protection against antitrust liability.

IV. Analytical approach

A. Antitrust generally

1. The antitrust laws

The goal of antitrust law is to enhance consumer welfare by ensuring that competition regulates markets:[129]

> The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[130]

128. *Id.* at 346 (internal citations and footnotes omitted).

129. Compare MCI Communications Corp. v. Am. Tel. and Tel. Co., 708 F.3d 1081, 1113 (7th Cir. 1983) ("antitrust laws are designed to encourage vigorous competition, as well as to promote economic efficiency and maximize consumer welfare") with ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 7, 9 (1978) (arguing that antitrust's basic premises are mutually incompatible because some of its doctrines preserve competition, while others suppress it).

130. *NCAA*, 468 U.S. at 104 n.27 (quoting Northern Pacific R. Co. v. United States, 356 U.S. 1, 4-5 (1958)).

The Sherman Antitrust Act prohibits horizontal agreements (agreements among competitors) that restrain trade and more narrowly prohibits unilateral action that threatens monopolization. Section 1 of the Sherman Act[131] prohibits contracts that restrain trade or commerce. Section 2[132] prohibits monopolization of trade or commerce. The Robinson-Patman Act prohibits price discrimination likely to lessen competition unless price differences are justified by differing costs.[133] The Clayton Act prohibits acquisition of another enterprise when it may "substantially" lessen competition or tend to create a monopoly.[134] Labor organizations and their "lawful" conduct in carrying out their "legitimate objects" are immunized from these prohibitions.[135]

Section one treats concerted activity more strictly than section two treats unilateral activity because concerted activity deprives the marketplace of independent centers of decision-making. Restricting it leaves untouched vast arenas for private economic decisions.[136] In the years after enactment of the Sherman Act in 1884, judicial decisions interpreting the law drew distinctions between agreements among competitors ("horizontal agreements") and agreements among firms providing inputs and consuming outputs of either other's production activities ("vertical agreements"). Those concessions crafted two tests for determining illegality under the Act: a *per se* test for the most egregious restraints such as naked price fixing or output restrictions, and a more flexible *rule of reason* test for agreements that have both anti-competitive and pro-competitive effects.

Monopolization is different from market dominance. "Simply possessing monopoly power and charging monopoly prices does not violate § 2; rather, the statute targets the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[137] In another case, the Court stated:

131. 15 U.S.C. § 1 (2006).

132. 15 U.S.C. § 2 (2006).

133. 15 U.S.C.§ 13 (2006) (derived from § 1 of Robinson-Patman Act, 49 Stat. 1526).

134. 15 U.S.C. § 18 (2006) (derived from § 7 of the Clayton Act, 38 Stat. 731 (1914)).

135. 15 U.S.C. § 17 (2006) (§ 6 of the Clayton Act, 38 Stat. 731).

136. *Am. Needle*, 130 S.Ct. at 2201 (holding that National Football League was not a single entity and that agreements among teams to restrict distribution of sports paraphernalia violated section 1) (internal quotations and citations omitted).

137. Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 448 (2009) (internal quotations and citations omitted).

> "The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. Thus, this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it. It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by § 1, which inherently is fraught with anticompetitive risk. For these reasons, § 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so, . . . [necessitating] inquiry into the relevant product and geographic market and the defendant's economic power in that market.[138]

2. Rule of reason

Even if a labor exemption does not apply, the restrictions on competition nevertheless may be justified under rule-of-reason analysis. When anti-competitive measures involve an industry in which horizontal restraints on competition are essential if the product is to be available at all, careful definition of relevant markets and analysis of the dynamics in those markets is necessary under the rule of reason.[139]

The rule of reason recognizes that "a restraint in a limited aspect of a market may actually enhance marketwide competition."[140] Both the *per se* rule and the rule of reason are employed "to form a judgment about the competitive significance of the restraint."[141] In *NCAA v. Board of Regents of University of Oklahoma,*[142] the Supreme Court observed that the antitrust laws prohibit only unreasonable restraints of trade, since "every contract is a restraint of trade."[143] Although horizontal price fixing and restraints on output,

138. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59 (1993).

139. *NCAA*, 468 U.S. at 85 (1984) (rejecting per se treatment of horizontal price fixing in market for college football game broadcasts, but finding that anti-competitive effects outweighed pro-competitive effects).

140. *Id*. at 103.

141. *Id.*

142. *Id.* at 85.

143. *Id*. at 98.

such as those contained in the plan, typically are unreasonable as a matter of law, under the per-se approach, the Court found that rule of reason rather than per se analysis was appropriate because collegiate football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all."[144] Also, the Court stated:

> The NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as pro-competitive.[145]

Because the NCAA television plan on its face restrained the operation of a free market, the antitrust defendants had the burden of establishing a pro-competitive justification.[146] The majority found that no pro-competitive efficiencies existed to justify the restrictions; NCAA football could be marketed just as efficiently without the television plan.[147] Nor was the plan necessary to enable the NCAA to penetrate the market, because college football broadcasts "constitute a unique product for which there is no ready substitute."[148] Nor did it effectively protect the market for attendance at live football games.[149] Significantly, it held that "The rule of reason does not support a defense based on the assumption that competition itself is unreasonable."[150] The Court reasoned:

> The NCAA's argument that its television plan is necessary to protect live attendance is not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games. At

144. *Id*. at 100.
145. *Id.* at 101-02 (internal quotations and citations omitted).
146. *Id*. at 113.
147. *Id*. at 114.
148. *Id*. at 115.
149. *Id*. at 115-116.
150. *Id*. at 117 (internal quotation and citation omitted).

> bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market. The television plan protects ticket sales by limiting output—just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act.[151]

The Court recognized pro-competitive legitimacy of the goal of maintaining a competitive balance among amateur athletic teams, but found that the plan did not promote that goal.[152]

The dissenters[153] questioned the majority's assessment of anti-competitive effect[154] and argued that the plan's positive effect on the NCAA's fundamental goal of preserving amateurism and integrating athletic and education[155] were "sufficient to offset any minimal anticompetitive effects . . . ."[156]

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.[157] also illustrates rule of reason analysis, but it came out the other way, validating a collective licensing system for musical works. The court of appeals, disagreeing with the district court, held that the blanket licenses, which uniformly charged fees based on a percentage of total revenue or a flat fee, constituted price fixing, a *per se* violation of the Sherman Act. The Supreme Court disagreed, finding per se treatment inappropriate, in significant part because the courts lacked experience with arrangements of the sort being challenged.[158] It found pro-competitive effects because of the impracticability of direct licensing by thousands of copyright owners, thousands of users, and millions of compositions. The costs would be prohibitive without blanket licenses. Furthermore, the challenged arrangement was not a naked restraint of trade; it was accompanied by "the integration of

151. *Id*. at 116-17.
152. *Id*. at 117-18.
153. *Id*. at 120 (White, Rehnquist, JJ, dissenting).
154. *Id*. at 130-31.
155. *Id*. at 124.
156. *Id*. at 136.
157. 441 U.S. 1 (1979).
158. *Id*. at 10.

sales, monitoring, and enforcement against unauthorized copyright use."[159]

Justice Stevens agreed that rule-of-reason analysis was appropriate rather than *per se* illegality, but he dissented on the outcome of the majority's rule of reason analysis.[160] He noted that a practice that might be permissible for a small vendor may become illegal when employed by a dominant firm because of its greater impact on competition in the latter case.[161] He concluded that the anti-competitive effects of the challenged arrangement outweighed its pro-competitive benefits. His conclusion rested in large part on identifying less anti-competitive alternatives such as negotiation of music-performing rights on a per-composition or per-use basis, either with the composer or publisher directly or with an agent such as ASCAP."[162]

He cautioned that antitrust policy requires close scrutiny of great aggregations of economic power, especially when the aggregation is based on statutory monopolies such as copyright.[163] That, of course, is precisely the starting point for many of the restrictions on competition in entertainment markets.

B. Labor law

1. Collective bargaining

Collective bargaining is intended to result in private agreements to restrain competition in labor markets. The most traditional trade union objective is to restrict the supply of labor—to establish a monopoly in the labor market.[164] Union security clauses such as closed-shop agreements and union-shop agreements are means used to achieve that objective with respect to the employer covered by the agreement: that employer cannot employ anyone who is not already a member of the union (a closed shop agreement), or anyone hired by the employer must become and remain a member of the union as a condition of continued employment (a union shop agreement).

159. *Id*. at 20.
160. *Id*. at 25 (Stevens, J., dissenting).
161. *Id*. at 29-30.
162. *Id*. at 33.
163. *Id*. at 38.
164. *See* Campbell, *supra* note 6, at 1012 (explaining legitimacy of creating a monopoly of labor supply).

These clauses give the union a monopoly on the labor supply for that particular employer.[165]

Almost as common an objective in a traditional unionized industry is the objective of restricting the demand for labor—to establish a monopsony in the relevant labor market.[166] The union ensures that no employer will employ any worker who is not represented by the union—or, to divorce the monopsony concept from the monopoly concept—to ensure that no employer employs anyone under terms less favorable than the union-negotiated terms.

At the pole, a union may seek the establishment of a product market cartel with input restrictions, so that the product markets for unionized employers are protected from non-union competition.[167]

A variety of means can be used to pursue these objectives. The union can withdraw labor (a strike); it can publicize the conduct of a recalcitrant employer by picketing and/or other forms of publicity,[168] it can cause other firms that supply factors of production or that purchase products or services to withhold their patronage.[169] The availability of all of these means depends on the union having a beachhead from which to extend the pressure: a group of employees already represented by the union who have enough solidarity to make the sacrifice in wages involved in a strike or to incur the opportunity cost and other costs of picketing or publicizing a dispute.

2. Economic weapons

Negotiation involves leverage. Rational negotiators accept any negotiated solution that is better than their best alternative to a negotiated agreement (BATNA).[170] Various weapons exist to influence an adversary's BATNA. In traditional collective bargaining

165. The agreement may cover only certain crafts or classes of work, in which case the agreement gives the union a monopoly on the supply of that particular kind of labor.

166. *Cf.* Campbell, *supra* note 6, at 2022, 1040 (recognizing legitimacy of union efforts to seek anti-competitive arrangements to assure demand for labor).

167. *See id.* at 1047 (noting labor law's suspicion of union efforts to help create product market cartels, even though it helps protect union standards).

168. *See, e.g.* Area standards picketing, privileged by 29 U.S.C. § 158(b)(7) (2006).

169. This is a secondary boycott, restricted by 29 U.S.C. § 158(b)(4).

170. *See* Lucent Technologies, Inc. v. Microsoft Corp., 837 F. Supp. 2d 1107 (S.D. Cal. 2011), (characterizing BATNA theory as well-accepted); Henry H. Perritt, Jr. *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L. J. 1625, 1637 (1986) (explaining BATNA concept).

the paradigm is a strike, a lockout, or unilateral imposition by the employer of new terms and conditions of employment.

In *Brown v. Pro Football, Inc.*,[171] the Supreme Court held that unilateral imposition of a fixed salary for developmental football players after an impasse in collective bargaining fell within the non-statutory labor exemption. The Court considered the issue to be whether the exemption "appl[ies] to an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer."[172] It noted that unilateral implementation of proposed terms of employment after an impasse in multi-employer bargaining was a "familiar practice" in multi-employer bargaining, as well as in single employer bargaining.[173] It concluded that the non-statutory exemption applied.[174]

A more recent case, probably decided incorrectly, is *California ex rel Harris v. Safeway, Inc.*[175] It involved a mutual strike assistance agreement (the "RSP") among California grocery-store chains. Under the agreement, any grocer that earned revenues above its historical share relative to the other chains during strike or lockout period would pay fifteen percent of those excess revenues as reimbursement to the other grocers to restore their pre-strike shares.[176] The agreement was intended to ameliorate the effects of a selective strike, also known as "whipsawing." The grocers argued that the non-statutory exemption immunizes employers' agreements related in time and circumstance to the collective-bargaining process, and that the economic weapons parties use to advance their positions in a labor dispute—like an agreement to share revenue to weaken the effects of a whipsaw strike—are 'as much a part of the collective bargaining process as are negotiations over terms.'"[177] The *en banc* court of appeals rejected the argument, finding no body of regulatory or judicial decisions that establishes employer revenue sharing as an "an accepted economic weapon during a labor dispute."[178] The court also noted that the challenged agreement primarily affected the product market, while most of the non-statutory labor exemption

171. 518 U.S. 231 (1996).
172. *Id.* at 238.
173. *Id*. at 239-240.
174. *Id*. at 250.
175. 651 F.3d 1118 (9th Cir. 2011)
176. *Id*. at 1123.
177. *Id*. at 1128 (summarizing employer position).
178. *Id*. at 1129.

cases involved employer activity primarily directed at the labor market.[179]

The decision is wrong because the mutual assistance pact concerned collective bargaining; its only purpose was to enhance employer bargaining power by reducing the injury that could be inflicted by a strike or lockout. The dissent pointed to a number of NLRB and court cases validating a variety of economic weapons to combat whipsaw strike tactics: strike insurance provided by unions, employer strike insurance plans, and, in *Air Line Pilots Ass'n International v. Civil Aeronautics Board.,*[180] an employer mutual aid pact containing a provision "almost identical to the RSP" at issue in the *Harris* case.[181]

In *Air Line Pilots Ass'n International*,[182] cited by dissenting circuit judge Kozinski in *Harris*, airline unions challenged the Civil Aeronautics Board approval of a mutual aid pact entered into by airlines. The pact provided for strike payments. A strikebound company received payments from other pact members equal to their increase in revenues resulting from the strike minus their added operating expenses in servicing the new business.[183] Upholding the pact, the court reasoned that "[t]he national labor policy rests on the principle that parties should be free to marshal the economic resources at their disposal in the resolution of a labor dispute, consistent with the specific rights and prohibitions established by the labor statutes."[184] It aligned itself with the Second Circuit, which, in *Kennedy v. Long Island Railroad Co.*,[185] approved an employer strike insurance plan in the railroad industry.[186]

3. The labor exemptions to the antitrust laws—in general

Much of the history of collective bargaining in professional football was shaped by the statutory and non-statutory exemptions to the antitrust laws. These exemptions similarly determine the scope of

179. *Id*. at 1131.
180. 502 F.2d 453 (D.C.Cir.1974)
181. *Harris*, 651 F.3d. at *17, *19 (Kozinski, C.J. dissenting).
182. *Air Line Pilots*, 502 F.2d 453 (D.C. Cir. 1974).
183. *Id*. at 456.
184. *Id.*
185. 319 F.2d 366 (2d Cir. 1963),
186. *Id.* at 374.

permissible workplace regulations in all sectors of the entertainment industry.

4. The labor laws

The labor laws comprise the Norris-LaGuardia Act;[187] which divests federal courts of jurisdiction to issue injunctions in "labor disputes;" the National Labor Relations Act ("NLRA");[188] The Labor Management Relations Act;[189] and the Railway Labor Act.[190] Section 7 of the NLRA[191] and section 2 of the Railway Labor Act[192] grant broad rights to employees to engage in collective bargaining through representatives of their choice. Means and ends in collective bargaining are not unlimited in scope, however. Labor law restricts use of these weapons, but only when they are used by union actors.[193]

A number of other statutes regulate aspects of the employment relationship, but the ones named here provide the basic statutory framework for collective bargaining, which is the core of the labor exemption.

5. Statutory exemption

A "statutory" labor exemption, derived from the Clayton Act and the Norris-LaGuardia Act, shields labor unions from antitrust liability.[194] Without the exemption, labor unions would be a paradigmatic combination to fix wages. When labor unions enter into agreements with others such as employers, however, they are outside the statutory exemption.[195]

187. 29 U.S.C. §§ 101-115 (2006).
188. *Id*. at §§ 151-169 (2006).
189. *Id*. at §§ 171-183 (2006).
190. 45 U.S.C. §§ 151-188 (2006).
191. 29 U.S.C. § 157 (2006).
192. 45 U.S.C. § 152 (2006).
193. The chapeau to 29 U.S.C. sec. 158(b) says, "(b) Unfair labor practices by labor organization.
"It shall be an unfair labor practice for a labor organization or its agents—"
194. H. A. Artists & Associates, Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 715 (1981).
195. *Id*.

6. Non-statutory exemption

Agreements among businessmen are subject to the antitrust laws. *Columbia River Packers Ass'n v. Hinton*[196] involved a suit for an injunction brought by a fish-packing enterprise, claiming that the defendants violated the Sherman Act. The defendant, styling itself the "Pacific Coast Fishermen's Union," actually was a fishermen's association. The fishermen owned or leased fishing boats, and carried on their business as independent entrepreneurs.[197] The "union" acted as an agent for sale of fish caught by its members. It prohibited members from selling fish outside of the agreement, and prohibited purchasers from purchasing fish from nonmembers.[198]

The court of appeals, reversing the district court, held that the Norris-LaGuardia act foreclosed an injunction, because a labor dispute was involved. The Supreme Court reversed, concluding that "a dispute among businessmen over the terms of a contract for the sale of fish" is different from "controversy concerning terms or conditions of employment, or concerning the association of persons seeking to arrange terms or conditions of employment."[199] The Norris-LaGuardia Act applies, the Court held, only when "the employer-employee relationship [is] the matrix of the controversy."[200] The Court Reasoned

> The controversy here is altogether between fish sellers and fish buyers. The sellers are not employees of the petitioners or of any other employer nor do they seek to be. On the contrary, their desire is to continue to operate as independent businessmen, free from such controls as an employer might exercise.[201]

Nevertheless, union agreements with non-union parties may be within a "nonstatutory" exemption if the agreement is "intimately related to the union's vital concerns of wages, hours, and working conditions."[202] The non-statutory exemption is necessary because the

196. 315 U.S. 143 (1942).
197. *Id*. at 144-45.
198. *Id*. at 145.
199. *Id*.
200. *Id*. at 147.
201. *Id.*at 147.
202. H. A. Artists & Associates, 451 U.S. at 716.

statutory exemption does not exempt concerted action by non-labor parties or agreements between labor unions and non-labor parties.[203]

The early cases recognized this non-statutory exemption but found it to be inapplicable.

> The Supreme Court has never delineated the precise boundaries of the [non-statutory labor] exemption, and what guidance it has given as to its application has come mostly in cases in which agreements between an employer and a labor union were alleged to have injured or eliminated a competitor in the employer's business or product market.[204]

The Court first addressed the non-statutory labor exemption in *Allen Bradley Co. v. Local Union No. 3 International Brotherhood of Electrical Workers,*[205] involving a series of agreements between an electrical workers union and several manufacturers and contractors, in which the manufacturers and contractors agreed not to do business with non-union firms. Congress did not intend to bestow on unions "complete and unreviewable authority to aid business groups to frustrate [antitrust legislation's] primary objective."[206]

In *United Mine Workers of America v. Pennington*[207] the Supreme Court similarly declined to apply the exemption to insulate a wage agreement between a union of mine workers and large coal companies. There were, the Court explained, "limits to what a union or an employer may offer or extract in the name of wages."[208] Measures adopted with the purpose of eliminating smaller coal companies and permitting larger companies to control the market were outside those limits.[209] "[A] union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units."[210] The Court held that the challenged agreement was not exempt from the antitrust laws.[211]

203. Harris, 651 F.3d at *3 fn 19.
204. *Id.*.
205. 325 U.S. 797 (1945).
206. *Id* at 810.
207. 381 U.S. 657 (1965).
208. *Id.* at 665.
209. *Id.* at 660.
210. *Id.* at 665.
211. *Id.* at 669.

The leading early case finding that conduct fell within the exemption is *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co*.[212] The union representing butchers in Chicago reached a collective-bargaining agreement with a multi-employer bargaining unit of food retailers that included a marketing hours restriction, which prohibited the sale of meat before nine a.m. and after six p.m., and on Sundays.[213] The plurality opinion explained that "the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision . . . falls within the protection of the national labor policy and is therefore exempt from the Sherman Act."[214]

The basic outlines of the non-statutory exemption were visible in these early cases: direct restrictions on product markets lay outside the exemption; indirect effects on product markets from terms closely related to wages and working conditions lay within the exemption.

The term "nonstatutory" was first used by the Supreme Court in *Connell Consruction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*.[215] In that case, the Court declined to apply the non-statutory exemption to a union-employer agreement.[216] A building trades union entered into a multi-employer bargaining agreement with a large group of mechanical contractors.[217] The union asked Connell Construction—a general building contractor that was outside the bargaining agreement and whose workers were not represented by the union—to agree to subcontract mechanical work only to firms covered by the multiemployer agreement.[218] Connell initially refused to sign the agreement but acquiesced when the unions picketed one of its construction sites.[219] The exemption did not shield the agreement from the antitrust laws because such a "direct restraint on the business market has substantial anticompetitive effects, both

212. 381 U.S. 676 (1965).
213. *Id.* at 679–80
214. *Id.* at 689–90.
215. 421 U.S. 616, 622 (1975) (using term "nonstatutory exemption).
216. *Id*. at 621.
217. *Id*. at 619.
218. *Id*. at 619.
219. *Id*. at 620.

actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions."[220]

In separate opinions, Circuit Judge Harry Edwards said this about the non-statutory exemption:

> [O]ne principle that seems clear: restraints on competition lawfully imposed through the collective bargaining process are exempted from antitrust liability so long as such restraints primarily affect only the labor market organized around the collective bargaining relationship.[221]
>
> ….
>
> [T]here may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing.[222]

7. Congruence of labor exemption with scope of NLRA and Norris-LaGuardia

The scope of a labor dispute under Norris-LaGuardia has the same boundaries as the labor exemption because the labor exemption is based on Norris-LaGuardia.[223] Likewise, the labor exemption should have the same boundaries as employee status under the NLRA, because otherwise the employees do not have the right to engage in collective bargaining. Promotion of collective bargaining is the labor policy that trumps antitrust policy.

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220. *Id*. at 625. The analysis of Connell follows the court's summary in *Harris*, 651 F.3d at 1118 (reviewing history of non-labor exemption). Professor Campbell argues that Connell was correctly decided because the union focused on product market effect. Campbell, *supra* note 6, at 1060 (noting inconsistency between tests used in Jewel Tea and Connell).

221. Brown v. Pro Football, Inc., 50 F.3d 1041, 1045 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996).

222. Conley Motor Express v. Russell, 500 F.2d 124, 126 (3d Cir. 1974).

223. *See* Carroll v. American Fed'n of Musicians, 241 F. Supp. 865, 891-92 (S.D.N.Y. 1965) (suggesting that scope of labor exemption is same as scope of "labor dispute" under Norris-LaGuardia). The Supreme Court ultimately agreed with the district court's analysis. American Federation of Musicians v. Carroll, 391 U.S. 99 (1968).

Judge Edwards derived two principles from the decided cases:

> First, the exemption must be broad enough in scope to shield the entire collective bargaining process established by federal law. Second, the case for applying the exemption is strongest where a restraint on competition operates primarily in the labor market and has no anti-competitive effect on the product market.[224]

There is no collective bargaining process to shield if the workers involved in a dispute are not statutory "employees" entitled to participate. Nevertheless, there may be some statutory non-employees who are so closely tied to a labor market in which collective bargaining operates that restrictions on their competition may be within the exemption.[225]

> [N]ot all combinations of unions with entrepreneurs or independent contractors fall outside the statutory exemption. The second part of the *Hutcheson* requirement of unilateral conduct authorizes a broad interpretation of "labor group." Even though a challenged combination includes independent contractors or entrepreneurs, it may come within the statutory exemption if the non-employee parties to the combination are in job or wage competition with the employee parties, or in some other economic interrelationship that substantially affects the legitimate interests of the employees.[226]

There must be some statutory employees involved, however.

> We recognize, of course, that, as a general matter, the antitrust laws may apply to restraints on competition in non-unionized labor markets. However, we think the inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime. Once employees organize a union, federal labor law necessarily limits the rights of individual employees to enter into negotiations with their employer. Indeed, employers are positively prohibited from seeking to bargain with individual

224. *Brown*, 50 F.3d at 1051.
225. See § 2.4[D].
226. *Home Box Office*, 531 F. Supp. at 589.

> employees, absent consent from the union. Moreover, employers may lawfully reduce competition in the labor market by forming multi-employer bargaining units, allowing for standardization of wage rates and working conditions within an industry. Thus, once collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation—a paradigm that itself contemplates collusive activity on the parts of both employees and employers. Stubborn adherence to antitrust principles in such a market can only result in "a wholesale subversion" of federal labor policy.[227]

In *Brady v. NFL*,[228] however, the court of appeals accepted the parties' stipulation that "the Act's restrictions on equitable relief are not necessarily coextensive with the substantive rules of antitrust law. . ."[229] It held that a "labor dispute" may exist under Norris-LaGuardia even if no union exists.[230] Rejecting the plaintiffs' argument that the Act only prohibits injunctions against unions and employees, it also held that a lockout is covered by the specific activities shielded from injunctions by the Act.[231]

When either labor exemption applies, it is likely that the NLRB has primary jurisdiction, displacing the authority of the courts, to decide the merits of any dispute over interpretation of the labor laws.[232]

8. Means and ends

The extent of the labor exemptions depends on the objectives (ends) of the challenged arrangement and the means used to achieve them. The Clayton Act refers to *lawful* means to achieve *legitimate* objectives[233] in taking collective bargaining outside the scope of antitrust law. Analysis of these factors frequently overlaps

227. *Brown*, 50 F.3d at 1054-1055 [internal quotations and citations omitted].

228. 644 F.3d 661 (8th Cir. 2011).

229. *Id.* at 682, *citing* Burlington Northern, 481 U.S. at 435 n.3.

230. *Id.* at 673.

231. *Id.* at 680-681.

232. When the NLRB has jurisdiction, it enjoys primary jurisdiction, subject only to narrow judicial review. McDermott v. Amersand Pub., LLC, 593 F.3d 950, 957 (9th Cir. 2010) (finding broader scope for judicial inquiry when NLRB seeks injunction).

233. 15 U.S.C. § 17 (2006).

assessment of the anti-competitive and pro-competitive effects in antitrust rule-of-reason analysis.

9. Coverage of independent contractors

The general view is that independent contractors may not benefit from the labor exemption by banding together and calling themselves a labor union.[234] In *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*,[235] the Supreme Court reviewed the evolution of the statutory definition of employee, noting that Congress had amended the statute explicitly to exclude "independent contractors," after the Supreme Court, in *NLRB v. Hearst Publications*,[236] agreed with the NLRB that newspaper street vendors were statutory employees.[237]

The prohibition is not absolute, however:

> Even though a challenged combination includes independent contractors or entrepreneurs, it may come within the statutory exemption if the non-employee parties to the combination are in job or wage competition with the employee parties, or in some other economic interrelationship that substantially affects the legitimate interests of the employees.[238]

In *Taylor v. Journeymen Horseshoers*,[239] the *en banc* Fourth Circuit, relying heavily on *Columbia River Packers*, reversed the district court and held that farriers (workers that shoe horses) were independent contractors and therefore outside the labor exemption. The case arose when a union representing Maryland farriers insisted that trainers and owners of race horses use only union farriers and further threatened to expel any union member who worked for less than union scale. The court of appeals found that the non-union farriers were independent contractors because they set their own working hours, because they worked for more than one trainer and

234. Los Angeles Meat and Provision Drivers Union v. United States, 371 U.S. 94, 102-03 (1962) (holding that independent grease peddlers not immune from antitrust injunction requiring them to disband); *Columbia River Packers*, 315 U.S. at 147 (holding that association of independent fisherman who wanted to fix prices were not covered by labor exemption).

235. 404 U.S. 157 (1971).

236. 322 U.S. 111 (1944).

237. 404 U.S. at 167.

238. *Home Box Office*, 531 F. Supp. at 589.

239. 353 F.2d 593 (4th Cir. 1965).

owner, and because the trainers and owners did not concern themselves with how the task of shoeing a horse was accomplished but only with the end result.[240] Their status as independent contractors led to the conclusion that no labor dispute was involved, and therefore that the Norris-LaGuardia Act and the labor exemption did not foreclose an injunction against the violation of the Sherman Act:

> The only interests sought to be advanced by the activities of these defendants are the interests of those independent horseshoers who render services to trainers and owners for a certain fee, unilaterally fixed, per horse. They are independent businessman, specialists in their line, who have banded together and who act in concert for their mutual benefit and improvement. We fail to discover the existence of any employer-employee relationship which is the 'Matrix' of this controversy or any condition which, under the provisions of either the Clayton Act or the Norris-LaGuardia Act, would protect the activities of the defendants.[241]

Circuit judges Sobeloff and Bell dissented:

> The dispute between the farriers and the owners concerns the reward paid the farriers for their labor. The refusal to handle the Canadians' horses grows out of the latter's use of labor which undercut wage standards the union deemed fair. The defendants' conduct involves nothing more than the withholding of their labor in order to coerce the owners to have all work performed under minimum union standards. Such a withholding of labor does not violate the antitrust laws.[242]

Home Box Office, Inc. v. Directors Guild,[243] holding the free-lance directors were employees, discussed *infra* in this section, distinguished *Taylor*.

When no labor union and no statutory employees are involved at all, the non-statutory exemption is unavailable. *Conley Motor*

240. *Id.* at 597-98.
241. *Id.* at 606.
242. *Id.* at 607-8.
243. 531 F. Supp. 578 (S.D.N.Y. 1982).

Express, Inc. v. Russell,[244] involved an association of owner-operator truck drivers that had been denied status as a labor union by the NLRB. The association picketed a trucking company that employed its members, seeking recognition as bargaining agent and obtained a more favorable financial arrangement. The existing arrangement paid the drivers a share of the fee that the trucking company received for hauling steel.[245] The trucking company's legal theory was violation of the antitrust laws, a position that the truckers did not contest. They argued that they were shielded from injunctive relief by Norris-LaGuardia.[246] The court of appeals affirmed grant of a preliminary injunction against the picketing, finding that the primary prerequisite for exemption from the anti-trust laws was lacking, "i.e., that their dispute with Conley involves an employer-employee relationship."[247]

Whether someone performing work is an employee or independent contractor is determined under the general common law of agency, which requires evaluation of the hiring party's right to control the manner and means by which the product is accomplished, which involves analysis of the following factors:

1. The skill required;[248]
2. The source of the instrumentalities and tools;[249]
3. The location of the work;[250]
4. The duration of the relationship between the parties;[251]
5. Whether the hiring party has the right to assign additional projects to the hired party;[252]
6. The extent of the hired party's discretion over when and how long to work;[253]

244. 500 F.2d 124 (3d Cir. 1974).

245. *Id.* at 125.

246. *Id*. at 125-26 (summarizing positions of parties).

247. *Id*. at 126.

248. Lower-skilled workers are more likely to be employees.

249. If the worker provides his own tools, he is more likely to be an independent contractor.

250. If work is performed only at the hiring party's facilities, the worker is more likely to be an employee.

251. The longer the relationship, the more likely is employee status.

252. If the hiring party does have the right to assign, employee status is more likely.

253. If the worker defines the times and durations, he is more likely to be an independent contractor; if he punches a time clock, he is more likely to be an employee.

7. The method of payment;[254]
8. The hired party's role in hiring and paying assistants;[255]
9. Whether the work is part of the regular business of the hiring party;[256] consider using bullet points
10. Whether the hired party is in business;[257]
11. The provision of employee benefits;[258] and
12. The tax treatment of the hired party.[259]

In *Home Box Office, Inc. v. Directors Guild of America, Inc.*,[260] HBO filed an antitrust action against an association of freelance directors. The directors defended based on the labor exemption. The district court decided that the statutory exemption applied. Its reasoning is especially pertinent to the subject of this article, because it emphasizes a trend of shifting work from traditional employees to freelance workers:

> Several characteristics of freelance directors' activities tend to suggest that they are independent contractors in the sale of their services. Freelance directors may accept or reject offers to direct particular shows. They usually contract to work on an individual program rather than for a fixed period. Under Guild agreements, they are paid flat fees for work up to a certain number of days and may accept more than one assignment simultaneously from different employers. They have considerable discretion over who will serve as their assistants, particularly the associate director and technical crew; often these assistants work repeatedly with the same director. Freelance directors also have special skills, based on substantial training and experience. They necessarily have considerable discretion in exercising their skills, working

254. Periodic payment by the hour, week, month, or year makes employee status more likely. Payment by project makes independent contractor status more likely.

255. If the worker hires her own assistants and pays them directly, she is more likely to be an independent contractor.

256. If it is part of her regular business, then employee status is more likely.

257. If the hired party is in business, independent contractor status is more likely.

258. Payment of benefits, such as health care insurance and pension benefits, makes employee status more likely.

259. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989) (applying common-law test in copyright case; citing Restatement of Agency § 220(2)).

260. 531 F. Supp. 578, 589 (S.D.N.Y. 1982),

> closely with all the talent associated with a show, contributing creatively to all the elements of a show, and working to mold those elements into a coherent whole that has the "look" sought by the individual in charge of the production. A producer may specify the desired result, but the director usually decides initially how that result is to be achieved.[261]

Nevertheless, the court identified other characteristics of the labor market that suggested treatment as employees: freelance directors risked no monetary capital in shows and did not share in any profits. They did not get paid for a defined output, instead receiving additional compensation for each additional day of work, reimbursement for their expenses, and fringe benefits. Many were treated as employees for tax purposes. They did not control either the time or place of their work.[262]

These characteristics combined to drive the outcome of application of the right-to-control test:

> "Freelance directors have no '"right to control'" the creative elements of shows they direct. Guild agreements expressly reserve to employers the power to supervise and control freelance directors. Producers have complete discretion in determining what revisions, deletions, or abridgements to make on directors' work product . . . Where directors are left with substantial control and creative authority, it is because producers decide that such a policy is appropriate for the show involved or necessary to accommodate a particularly powerful director. Even famous, award-winning directors, however, are often closely supervised by their producers.... Thus, although freelance directors may independently contract for their work, once engaged they perform their tasks, albeit with skill and creativity, as employees.[263]
>
> "* * *

Relevant to the theme of this article, the court found:

261. Id. at 594.
262. Id. at 594-95.
263. *Id.*

> The trend to freelance status for directors has not been the result solely of a desire by directors for greater creative independence. Rather, it is the product of many forces, and particularly . . . pressures to surrender control over programming, pressures that have led to the establishment of numerous independent production companies. These smaller entities have less need and capacity to retain full-time staff directors. Furthermore, the need for directorial services was reduced in all production entities by the advent of tape and other filming techniques; live television programming, which created a great need for directorial services, has now been substantially abandoned in many areas. The networks and production companies have retained full-time staff directors chiefly to work on programs produced on a regular basis, and they have reduced the number of such directors in large part because they need fewer full-timers.[264]

Even if the directors were not employees,

> [T]he similarity of functions and overlap of capacities among staff and freelance directors creates a mutuality of interest that readily justifies their bargaining collectively. If minimum wages or other conditions of employment differed materially for these two groups, the terms of employment enjoyed by the more advantaged group could well be affected by the availability of directorial services in the other group at lower prices. Staff and freelance directors are to a considerable extent interchangeable; indeed, employer decisions more than anything else determine throughout the industry whether a set of directors is staff or freelance. Thus, staff and freelance directors are in much stronger job competition than were the musicians and bandleaders in *American Federation of Musicians v. Carroll*, *supra*, which permitted a bargaining combination of the two groups."[265]

In *Julien v. Society of Stage Directors and Choreographers, Inc.*,[266] the district court determined that stage directors were entitled to

264. *Id.* at 596.
265. *Id.* at 595 -97 (internal quotations and citations omitted).
266. No. 68 Civ. 5120, 1975 U.S. Dist. LEXIS 15839, (S.D.N.Y. Oct 7, 1975).

labor exemption because they were employees. The producer exercised control over every aspect of work. One with experience in theatre might dispute the general validity of this assertion. In many productions, the director is the boss.

In *Ring v. Spina*,[267] the court determined that playwrights were not entitled to the labor exemption:

> Here not only are the disputing parties not in an employer-employee relationship, but, unlike the *Allen Bradley* case, the controversy cannot concern itself with conditions of employment, since none of the parties affected are in any true sense employees. An author writing a book or play is usually not then even in any contractual relation with his producer. If and when he does contract, he does not continue in the producer's service to any appreciable or continuous extent thereafter. Normally the author appears more nearly like the fishermen entrepreneurs of the *Hinton* case or the doctors in the *American Medical Association* case than workmen banded together in a union. The minimum price and royalties provided by the Basic Agreement, unlike minimum wages in a collective bargaining agreement, are not remuneration for continued services, but are the terms at which a finished product or certain rights therein may be sold. And no wages or working conditions of any group of employees are directly dependent on these terms. We think the exception therefore inapplicable.[268]

This line of cases suggests the following rules of thumb for combinations involving persons nominally characterized as independent contractors: some independent contractors are shielded by the labor exemption if they are substitutes for employees. Independent contractors who are truly independent, however, such as indie musicians, independent theatre companies or producers, or indie movie-makers, enjoy no labor exemption.

267. 148 F.2d 647 (2d Cir. 1945).
268. *Id*. at 652.

10. Statutory anti-competitive approaches—FLSA

Even when collective bargaining does not operate, the federal Fair Labor Standards Act[269] puts a floor under labor-market competition, by prohibiting employers from paying less than the minimum wage[270] and by limiting the number of hours per week that employees may work without being paid a premium—usually time and a half their regular wage for hours worked in excess of forty.[271] These limits on competition, however, are not comprehensive in scope. The Act excludes independent contractors; professionals and managers, in particular actors and writers; and students.

The six-factor Silk test[272] is used to determine whether someone is a covered employee under the FLSA.[273] Actors, even participants in reality television shows, usually qualify as employees rather than independent contractors.[274]

11. FLSA exemption for actors, writers, and directors

The FLSA exempts certain professional employees from the minimum wage and overtime provisions of the act.[275] State labor standards regulation typically provides a similar exemption.[276]

269. 29 U.S.C. §§ 201-219 (2006).

270. 29 U.S.C. § 206 (2006).

271. 29 U.S.C. § 207 (2006).

272. United States v. Silk, 331 U.S. 704, 712-18 (1947) (holding that workers were employees in payroll tax case); see Schultz v. Capital Intern. Sec., Inc., 466 F.3d 298, 305 (4th Cir. 2006) (referring to "Silk factors").

273. Adam P. Greenberg, *Reality's Kids: Are Children Who Participate on Reality Television Shows Covered Under the Fair Labor Standards Act*? 82 S. CAL L. REV. 595, 612-17 (2009) [hereinafter "Greenberg"] (arguing that federal FLSA covers child actors; explaining each of the six factors and citing cases).

274. *See* Greenberg, *supra* note 273, at 632-638 (working through each of the six factors). Mr. Greenberg's analysis of child actors in reality shows leads, *a fortiori*, to the conclusion that adult actors on scripted shows are employees, because they are subject to even great control by producers and directors. He admits however that involvement for less than a full season might cause the permanence-of-employment factor to militate against employee status. Greenberg, *supra* note 273, at 644 (participating in only one episode is not permanent enough).

275. *See* 29 U.S.C. § 213(a)(1) (2006); 29 CFR § 541.302(c) (2012) (noting that actors generally meet the requirements of professional exemptions from FLSA).

276. *See CALIFORNIA INDUSTRIAL WELFARE COMMISSION ORDER NO. 10-2001 REGULATING WAGES, HOURS AND WORKING CONDITIONS IN THE AMUSEMENT AND RECREATION INDUSTRY*, http://www.dir.ca.gov/IWC/IWCArticle10.pdf (requiring $8 per hour and time and a half for overtime) (2001). See *Id*. at sec. 2(A)(defining "amusement and recreation industry" to include theatres); *Id*. at sec. 1(A)(3)(b)(ii) (exempting original and creative work in a

Arguments persist, however, over when performers and writers perform sufficiently creative work to qualify for the artist exemption.[277]

12. Coverage of volunteers and students

The effect of the FLSA in the entertainment industries is further limited because it does not cover most volunteers, thus exempting many participants in small-scale theatre and moviemaking. It also does not cover students, thus exempting college athletes.[278] In *Purdham v. Fairfax County School Board*,[279] the court of appeals affirmed a holding by the district court that a high-school golf coach was a "volunteer," and thus was not entitled to overtime compensation under the FLSA. Like other coaches in the school system, the plaintiff held a regular, salaried job with the school system and coached on the side. He received reimbursement of expenses and a $2,100 "stipend" for his coaching activities.[280] As the dispute was developing, the Department of Labor issued a "guidance opinion letter," concluding that certain school coaches were volunteers instead of employees.[281]

> Under the FLSA, " 'employ' [means] to suffer or permit to work."[282] To be sure, this definition was "not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own

recognized field of artistic endeavor, to be construed pursuant to 29 C.F.R. Sections 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, and 541.310).

277. *See* Alexis Miller, *Reality Check for Production Companies: Why Writers on Reality Television Are Entitled to Overtime Pay*, 27 LOY. L.A. ENT. L. REV. 185 (2007) (arguing that reality television writers are not sufficiently creative to quality for the FLSA artist exemption; also reviewing possibility of representation by Writers Guild); Greenberg, *supra* note 273, at 612-17. Mr. Greenberg argues that child performers on reality television shows should not qualify as exempt actors for policy reasons that should, in his view, narrow the actor exemption for reality show child participants. *Id*. at 642 (noting that producers often deny "actor" status to avoid union representation for AFTRA and SAG).

278. *But see* Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOW. L.J. 259, 279-80 (1993) (proposing litigation claiming that college athletes are employees within the meaning of the Fair Labor Standards Act and state workers compensation statutes).

279. 637 F.3d 421 (4th Cir. 2011).

280. *Id.* at 426.

281. *Id.* at (describing, but not citing, DOL letter).

282. 29 U.S.C. § 203(g) (2006).

> advantage on the premises of another," nor should it be interpreted so as to 'sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, work[s] in activities carried on by other persons either for their pleasure or profit.
>
> ….
>
> The FLSA does not itself define volunteer, but pursuant to a Department of Labor regulation promulgated under the FLSA, a volunteer is an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered. At the same time, '[v]olunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.'[283]

The usual definition of "employee" is not helpful in the volunteer context, says the Fourth Circuit:

> Other courts have looked to the economic realities test in the FLSA context in determining whether an individual is an employee or a volunteer. However, they have concluded that the test is best suited to determine whether, as a matter of economic reality, an individual is in business for himself or herself as an independent contractor, or is an employee of another. As a result, the economic realities test is of limited utility in determining whether an individual is an 'employee,' as opposed to a 'volunteer.'[284]

The likelihood that college athletes are protected by the FLSA is low because of the pervasive view that they qualify as "students." While some courts have used the economic reality test from independent-contractor controversies to assess student status, most examine whether the individual performing the work or the institution for which he works receives the primary benefit of the

283. *Id.* at 427-28 (internal quotations and citations omitted).
284. *Id.* at 433-34 (internal quotations and citations omitted).

work.[285] If the individual receives the benefit, student status is more likely; if the institution receives the benefit, employee status is more likely.

The challenges for anyone wishing to assert FLSA protection for college athletes are manifold. First, the athletes are formally classified as students; indeed NCAA eligibility rules require student status as a pre-requisite for playing college sports.[286] In *Agnew v. NCAA*,[287] the court emphasized the centrality of NCAA eligibility rules in defining the nature of college sports.

On the other hand:

> No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program. Despite the nonprofit status of NCAA member schools, the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a result of these transactions. FN5 Indeed, this is likely one reason that some schools are willing to pay their football coaches up to $5 million a year rather than invest that money into educational resources. . . . Thus, the transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act.[288]

In evaluating NCAA limitations on scholarships, however, it is recognized that scholarships are a form of payment for services, in effect recognizing that playing sports is performing "work" for the sponsoring college:

285. *See* Solis v. Laurelbrook Sanitarium and School, Inc., 642 F.3d 518, 532 (6th Cir. 2011) (affirming denial of injunction for violation of FLSA child-labor provisions by school that emphasized practical work for training purposes; reviewing cases and applying primary benefit test).

286. NCAA Division I Manual § 12.01.1, (2012), http://www.ncaapublications.com/productdownloads/D1_2012_01.pdf ("Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport").

287. 683 F.3d 328, 343 (7th Cir. 2012) (affirming dismissal of Sherman Act suit challenging limitation on athletic scholarships).

288. *Id.*

> It is true that the prohibition against multi-year scholarships is, in a sense, a rule concerning the amount of payment a player receives for his labor, and thus may seem to implicate the split between amateur and pay-for-play sports. After all, student-athletes are paid, but their payment is limited to reimbursement for costs attendant to receiving an education. For the purposes of college sports, and in the name of amateurism, we consider players who receive nothing more than educational costs in return for their services to be 'unpaid athletes.'[289]

It is clear from this and other language quoted from the opinion in § III(B) that the Seventh Circuit thought that a labor market subject to the Sherman Act could be alleged, but it found that the plaintiff's complaint did not allege it.[290] If a labor market exists, that presupposes that the services performed are "work," thus opening the door to FLSA claims.

V. Tolerance of certain anti-competitive arrangements

Despite their identification with the promotion of competition, the antitrust laws tolerate certain anti-competitive arrangements likely to enhance efficiency and therefore consumer welfare. Prominent among these are restrictions on competition in labor markets. Others include anti-competitive regimes that also have pro-competitive effects outweighing the diminution in competition.

Some of these anti-competitive arrangements may be within the labor exemptions, when the employer-employee relationship is the matrix of the controversy. Others are outside them, but are nevertheless permissible because their pro-competitive effects outweigh their harm to competition. This part of the article analyzes typical anti-competitive arrangements in the entertainment industries, asking whether they are within the labor exemptions and, regardless of whether they are, the strength of their pro-competitive justifications within the rule of reason.

Because the distinction between labor markets and product markets[291] is almost as indistinct as the boundaries of the labor

289. *Agnew*, 2011 WL 3878200 at *12.
290. *Id.* at *15 hn 19, 20.
291. *See* § III.A.3. (explaining variability of the thickness of intermediation between product and labor markets).

exemptions, this part makes no attempt to classify restrictions as product-market restrictions or labor market restrictions.

A. Supreme Court touchstones for anti-competitive labor market arrangements

The law privileges anti-competitive labor market arrangements under the labor exemptions to the antitrust laws and under labor standards legislation.

Synthesizing from the most prominent Supreme Court cases considering the labor exemptions, one can conclude:

1. An agreement by employers to do business only with union subcontractors is outside the exemption (*Allen Bradley*).[292]
2. An agreement to put smaller employers out of business is outside the exemption (*Pennington*).[293]
3. An agreement by a non-union firm to subcontract work only to union firms is outside the exemption (*Connell*).[294]
4. Independent contractors may be covered by the exemption if they compete with employees (*H. A. Artists*).[295]
5. An agreement to limit hours of operation is within the exemption (*Jewell Tea Co.*).[296]
6. An agreement by employer-association members to provide strike benefits to each other may be inside or outside the exemption (*Safeway, Inc.*).[297]
7. Unilateral imposition, after impasse, of a fixed salary is within the exemption (*Brown*).[298]

B. Concerted refusals to deal

Refusals to deal with workers in a particular class or concerted refusals to deal with firms in a particular class are mainstream limitations on competition. Indeed, every contract represents an indirect refusal to deal. When a supply contract, say with an ISP for an Internet connection, is exclusive, it expressly constitutes a refusal

292. *Allen Bradley Co.*, 325 U.S. at 797.
293. *Pennington*, 381 U.S. at 657.
294. *Connell*, 421 U.S. at 616.
295. *H.A. Artists*, 451 U.S. at 704.
296. *Jewel Tea Co.*, 381 U.S. at 676.
297. *Safeway, Inc.*, 651 F.3d at 1118.
298. *Brown*, 518 U.S. at 231.

to deal with other ISPs for the term of the contract. Even when it is not exclusive—as most are not—it lessens the demand for Internet connections through other sellers because most Internet users need only one connection at a particular facility. Such contracts enhance the functioning of competitive markets because they provide certainty of supply and price and strengthen the position of both parties to the contract.[299]

Concerted refusals to deal are more suspect than unilateral ones, because they have stronger anti-competitive effect: they foreclose more of the market for those who are locked out of the deal. Concerted refusals are suspect under the antitrust laws because they limit competition by excluding persons or entities from the agreement. At the highest level of abstraction, concerted refusals to deal involve networks that controls access to a resource—jobs or product market channels. The network denies access to anyone who is not a member of the network. This could involve a horizontal labor network such as a union membership agreement that prohibits members from working for a non-union employer, or it could be a horizontal product network, such as a collective bargaining agreement that prohibits an employer from using non-union labor. But even concerted refusals to deal can have sufficient pro-competitive effects to withstand antitrust attack.[300]

Concerted refusals to deal thrive in labor and product markets in the entertainment industries—as they indeed do in every industry. Virtually every collective bargaining arrangement in the entertainment industries provides an absolute or limited preference for certain employees.[301] The NFL collective bargaining agreement[302]

299. *E.g.*, "One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets-indeed, a competitive economy-to function effectively." City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 385 n.1 (1991) (rejecting antitrust challenge to municipality's restrictions on outdoor advertising).

300. *See* Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1335 (Fed. Cir. 2010) (holding that pro-competitive effects of horizontal agreements among patent holders to set standards for writable CDs was valid under rule of reason).

301. Compare *Agreement and Rules Governing Employment: Chicago Theaters*, ACTORS EQUITY ASSOCIATION (2011), http://www.actorsequity.org/docs/rulebooks/CAT_Rulebook_09-11.pdf., Rule 11(A) with *Agreement and Rules Governing Employment: Chicago Theaters*, ACTORS EQUITY ASSOCIATION (2011), http://www.actorsequity.org/docs/rulebooks/CAT_Rulebook_09-

requires players either to become members of the union or to pay the union a "service fee,"[303] and prohibits teams from entering into contracts with players except on form contracts provided in the collective agreement.[304] Television labor agreements limit employment to union members.[305] Actors Equity, the union for stage actors, prohibits working except under an Equity contract,[306] and provides for expulsion of members who work without a contract or Equity approval.[307] Equity controls the hiring process for Equity productions through its regulated audition process.[308]

All of these are concerted refusals to deal with those not given a preference.

11.pdf., Rule 44 (prohibiting employment of "non-professionals" until specified number of Equity actors have been employed) with *Agreement and Rules Governing Employment: Chicago Theaters*, ACTORS EQUITY ASSOCIATION (2011), http://www.actorsequity.org/docs/rulebooks/CAT_Rulebook_09-11.pdf., Rule 40 (explicitly permitting employment of "non-professionals").

302. NFL Collective Bargaining Agreement, *supra* note 39.

303. *Id.* at Art. 47, sec. 1.

304. *Id.* at Art. 4.

305. AFTRA 2010-2011 Interactive Media Agreement § 13, www.sagaftra.org/production-center/documents (prohibiting employer signatory from employing performers who are not members of AFTRA or who make application for membership within 30 days).

306. "[I]f you are an Equity member, you may not accept any work in Equity jurisdiction without the appropriate contract. Even if the project is not listed here; you are still obligated to call Equity if you are offered any stage work without a union contract." *Equity 4A's "Do Not Work" Notice*, ACTOR'S EQUITY ASS'N, http://www.actorsequity.org/NewsMedia/TakeAction/Feb14.4As.asp (Apr. 2, 2012) (listing theatres and production company for which Equity members may not work).

307. Actors' Equity Ass'n Bylaws art. X, sec. 1.1(d).

"A member may be expelled, suspended, fined or otherwise disciplined for any of the following offenses:

* * *

(d) engaging in any business, enterprise or activity which may directly or indirectly conflict with the purposes or objects of the Association or any of its members, including by way of example, work as a per former or stage manager in any form of theatre under the jurisdiction of the Association without benefit of an Equity employment contract or code, unless prior written consent by the Association has been granted."

Actors Equity Ass'n Bylaws, ACTOR'S EQUITY ASS'N, art. X, sec. 1 & 1(d), http://www.actorsequity.org/docs/about/AEA_ConstitutionBylaws.pdf.

308. *See* Mark D. Meredith, *From Dancing Halls to Hiring Halls: Actors' Equity and the Closed Shop Dilemma*, 96 COLUM. L. REV. 178 (1996) (explaining and justifying Equity's role as a hiring hall, and reviewing its evolution from a pre-entry closed shop to an operation allowing non-union actors to audition). *Id.* at 182 (advocating extension1 of the immunity for closed shop hiring halls in the construction industry under 29 U.S.C. sec. 158(f) to Actors Equity).

Wood v. NBA[309] involved an antitrust action challenging, among other things, the college draft provisions of the national basketball collective bargaining agreement as an illegal horizontal agreement to eliminate competition for players' services. The court held that the horizontal agreement was so clearly shielded by the non-statutory exemption that it need not decide whether the draft was a per se violation or subject to rule of reason analysis.[310]

The court likened the draft to a hiring hall arrangement:

> [C]ollective agreements in a number of industries provide for the exclusive referral of workers by a hiring hall to particular employers at a specified wage. The choice of employer is governed by the rules of the hiring hall, not the preference of the individual worker. There is nothing that prevents such agreements from providing that the employee either work for the designated employer at the stipulated wage or not be referred at that time. Otherwise, a union might find it difficult to provide the requisite number of workers to employers. Such an arrangement is functionally indistinguishable from the college draft.[311]

In *Genser v. International Brotherhood of Electrical Workers*,[312] the district court held that a hiring hall arrangement was shielded from antitrust liability by the non-statutory labor exemption:

> The Seniority System is basically a 'hiring hall.' When an electrical contractor who is a party to the Principal Agreement wishes to hire an additional electrician, he applies to the System and the electrician with the greatest seniority is referred to him. Such a System fills the legitimate labor objective of providing job security in a labor market that is both highly mobile and subject to underemployment.[313]

309. 809 F.2d 954 (2d Cir. 1987).
310. *Id.* at 959.
311. *Id.* at 960 (internal quotations and citations omitted).
312. 522 F. Supp. 1153 (N.D. Ill. 1981).
313. *Id.* at 1160.

In *Associated General Contractors v. Otter Tail Power Co.*,[314] the district court held that hiring hall arrangements are not prohibited closed-shop arrangements under section 14(b) of the Taft-Hartley Act:[315]

> [A]greements that merely require an affiliation with a labor union, such as a non-discriminatory, exclusive hiring-hall arrangement, do not come within § 14(b)'s exception to Board jurisdiction, for such an agreement does not require Membership in a union.[316]

Other concerted refusals to deal do not involve hiring halls, but still protect the collective bargaining process. In *H. A. Artists & Associates, Inc. v. Actors' Equity Ass'n*,[317] the Supreme Court considered whether Equity violated the antitrust laws by prohibiting its members from doing business with agents who did not pay Equity a fee and agree to Equity's rules limiting agent compensation.

> The essential features of the regulatory scheme are identical: members are permitted to deal only with agents who have agreed (1) to honor their fiduciary obligations by avoiding conflicts of interest, (2) not to charge excessive commissions, and (3) not to book members for jobs paying less than the union minimum. And as in Carroll, Equity's regulation of agents developed in response to abuses by employment agents who occupy a critical role in the relevant labor market. The agent stands directly between union members and jobs, and is in a powerful position to evade the union's negotiated wage structure.[318]

The Court found that the practical realities of the theatre industry made it impossible for Equity to defend the integrity of the minimum wage scale it negotiated with theatre producers without regulating agency fees.[319] It concluded, therefore, that the agents were a "labor

314. 457 F. Supp. 1207 (D. N.D. 1978) *aff'd,* 611 F.2d 684 (8th Cir. 1979) (finding lack of standing in antitrust action).
315. 29 U.S.C. § 164(b).
316. *Associated Gen. Contractors*, 457 F. Supp. at 1217.
317. 451 U.S. 704 (1981).
318. *Id*. at 719-720.
319. *Id.* at 720.

group" and that the agreement between Equity and the agents fell within the statutory exemption.[320] Equity's franchise system for agents essentially functioned as a substitute for Equity maintaining a hiring hall.[321]

Labor law circumscribes hiring hall arrangements, however. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,[322] the Supreme Court evaluated a case about carpenters picketing Sears after the company refused to agree to limit its employment of carpenters to those that had been dispatched from the union hiring hall.[323]

> If an object of the picketing was to force Sears into assigning the carpentry work away from its employees to Union members dispatched from the hiring hall, the picketing may have been prohibited by § 8(b)(4)(D). Alternatively, if an object of the picketing was to coerce Sears into signing a pre-hire or members-only type agreement with the Union, the picketing was at least arguably subject to the prohibition on recognitional picketing contained in § 8(b)(7)(C).[324]

Outside the collective bargaining context, concerted refusals to deal are not likely to be shielded by the labor exemptions, but they nevertheless may sufficiently promote competition or other aspects of social welfare that they do not result in antitrust liability.[325]

C. Salary caps and other limitations on compensation of employees

Employers have an inherent interest in limiting their costs. Labor costs are an important component of total costs in any entertainment

320. *Id.* at 721.

321. *Id.*

322. 436 U.S. 180 (1978) (holding that a state-law action for trespass was not preempted by National Labor Relations Act).

323. *Id.* at 182.

324. *Id*. at 185-86 (internal footnotes omitted).

325. *See* Broadcast Music, Inc.. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979), (approving horizontal arrangement for collective licensing of copyrights); Ticketmaster Corp. v. Tickets.com, Inc., 127 Fed. Appx. 346 (9th Cir. 2005) (affirming denial of preliminary injunction for concerted refusal to deal; evidence showed competitive bidding and exclusive contracts with duration no longer than six years); Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 131 Cal. Rptr. 3d 519, 532 (2011) (reversing district court and allowing discovery in state antitrust action by single movie theatre alleging that exclusive film exhibition contracts violated rule of reason).

industry. The possibility of the richest employers bidding up the prices for stars is a phenomenon not only of professional sports, but also of the movie and theatre industries. Concerted restrictions on wage levels reduce competition in the labor market and are thus subject to antitrust scrutiny unless they are shielded by the labor exemption, or unless they escape per se illegality and pass muster under rule of reason analysis. One possible justification for salary caps is that they increase the possibility for weaker employers to attract stars—or at least to conserve their resources in order to remain competitive with stronger employers.[326]

D. Employee mobility

In a competitive labor market, employees are free to change jobs to seek better terms of employment, and employers are free to try to hire employees from competitors. Firms have an interest in restricting this mobility because when the demand for labor exceeds the supply, competition will lead to employers bidding up wage rates, resulting in higher labor costs. If an employer can contractually bind existing employees to continue their services rather than seeking other jobs, the employer limits wage inflation.

Moreover, competitive labor markets present the risks that an employee with inside knowledge of an employer's practices, including but not limited to trade secrets, may take that knowledge to a competitor. Covenants not to compete are common mechanisms to reduce this risk.[327]

The reserve clause and the free-agent system in professional football represent important limitations on athletes' power to change teams, justified by the need to promote competitive balance. If athletes were free to move around as they wished, they could all flock to richer teams, leaving weaker teams unable to compete successfully.

Restrictions on "contract jumping"—the privilege of an employee to move from one employer to another—is a source of controversy

326. *See* NBA v. Williams, 857 F. Supp. 1069, 1079 (S.D.N.Y. 1994) (finding salary cap, among other restrictions valid under rule-of-reason analysis because it promoted maintenance of competitive balance).

327. *See* Eichorn v. AT&T Corp., 248 F.3d 131, 146 (3d Cir. 2001) (holding that covenants not to compete that barred employees of subsidiary from being employed by seller of subsidiary satisfied antitrust rule of reason; limitation was necessary to assure workforce continuity incident to corporate sale, and eight-month restrict was not too broad).

for most entertainment industries. Employers want to restrict movement; employees want to facilitate it.[328]

In *Mackey v. NFL*,[329] the court of appeals held that the Rozelle Rule[330] violated the Sherman Act. It held that the non-statutory labor exemption did not apply because the Rozelle Rule did not satisfy three criteria for pre-eminence of labor policy over antitrust law:

1. The restraint on trade primarily affects only the parties to the collective bargaining agreement;[331]
2. The agreement must concern a mandatory subject of bargaining; and
3. The agreement must be the product of bona-fide arm's-length bargaining.[332]

While the Rozelle Rule affected only the parties to the agreements and involved a mandatory subject of bargaining, it did not involve bona fide arm's-length bargaining, because it had remained essentially unchanged since it was unilaterally imposed by the teams in 1963.[333]

Because the labor exemption was unavailable, the court moved to apply antitrust principles. Finding that per se illegality was inappropriate,[334] the Eighth Circuit agreed with the district court's analysis of the anti-competitive effect of the Rule:

> [T]he Rozelle Rule significantly deters clubs from negotiating with and signing free agents; that it acts as a substantial deterrent to players playing out their options and becoming free agents; that it significantly decreases players' bargaining

328. BERRY, *supra* note 64, at n. 7.

329. 543 F.2d 606 (8th Cir. 1976).

330. "The Rozelle Rule essentially provides that when a player's contractual obligation to a team expires and he signs with a different club, the signing club must provide compensation to the player's former team. If the two clubs are unable to conclude mutually satisfactory arrangements, the Commissioner may award compensation in the form of one or more players and/or draft choices as he deems fair and equitable." *Id.* at 609 n.1.

331. *Id*. at 614-15 (citing Connell Co. v. Plumbers and Steamfitters, 421 U.S. 616, 621-22 (1975);; Meat Cutters v. Jewel Tea, 381 U.S. 676 (1965); Mine workers v. Pennington, 381 U.S. 657 (1965).

332. *Id*.

333. *Id.* at 615-16.

334. *Id.* at 620.

> power in contract negotiations; that players are thus denied the right to sell their services in a free and open market; that as a result, the salaries paid by each club are lower than if competitive bidding were allowed to prevail; and that absent the Rozelle Rule, there would be increased movement in interstate commerce of players from one club to another.[335]

As to the alleged pro-competitive effects of the Rule, the court rejected the NFL's assertion of the Rule's necessity for maintenance of competitive balance within the league:

> We need not decide whether a system of inter-team compensation for free agents moving to other teams is essential to the maintenance of competitive balance in the NFL. Even if it is, we agree with the district court's conclusion that the Rozelle Rule is significantly more restrictive than necessary to serve any legitimate purposes it might have in this regard. First, little concern was manifested at trial over the free movement of average or below average players. Only the movement of the better players was urged as being detrimental to football. Yet the Rozelle Rule applies to every NFL player regardless of his status or ability. Second, the Rozelle Rule is unlimited in duration. It operates as a perpetual restriction on a player's ability to sell his services in an open market throughout his career. Third, the enforcement of the Rozelle Rule is unaccompanied by procedural safeguards. A player has no input into the process by which fair compensation is determined. Moreover, the player may be unaware of the precise compensation demanded by his former team, and that other teams might be interested in him but for the degree of compensation sought.[336]

Employees retain more mobility in the theatre industry, where the need to promote competitive balance is attenuated. For example, the master agreement between Actors Equity and Chicago Area Theatres explicitly allows actors to accept "more remunerative

335. *Id.*
336. *Id.* at 622.

employment" from other productions, even when they are under contract to another production.[337]

E. Assuring a stream of new talent

In purely competitive labor markets, the transaction costs of matching employers with employees (or independent contractors) can be high, especially when the markets are regional or national in scope rather than local. Both buyers and sellers of labor have an interest in such markets of supporting intermediaries that reduce the costs. Depending on how the intermediation is structured, however, it may have anti-competitive effects in product markets that go beyond what is necessary to improve labor market efficiency.[338]

The draft system in professional football is intended, on the one hand, to assure competitive balance by steering new talent to different teams equitably. But it also serves the interests of new talent by establishing a transparent "hiring hall" in which all players entering the professional sports arena are assured of visibility.[339]

In *Smith v. Pro Football, Inc.,*[340] the court of appeals held that the draft [341] violated the Sherman Act under rule of reason analysis. The

337. Agreement and Rules Governing Employment: Chicago Theaters, *supra* note 300.

338. An antitrust challenge by medical students to the mandatory residency match program was interrupted by a federal statute giving the match program an exemption to the antitrust laws. *See* Jung v. Assoc. of Am. Med. Colleges, 339 F. Supp .2d 26, 31 (D.D.C. 2004) (describing claim and legislation).

339. *See generally* NFL Collective Bargaining Agreement, *supra* note 39 at Art. 6 (providing for and regulating team choices in "College Draft").

340. 593 F.2d 1173 (D.C. Cir. 1978).

341. The NFL draft, which has been in effect since 1935, is a procedure under which negotiating rights to graduating college football players are allocated each year among the NFL clubs in inverse order of the clubs' standing. Under the draft procedures generally followed, the team with the poorest playing-field record during the preceding season has the first opportunity, as among the NFL teams, to select a college player of its choice; the team with the next poorest record has the next choice, and so on until the team with the best record (the winner of the previous year's "Super Bowl") has picked last. At this point, the first "round" of the draft is completed. In 1968 there were 16 succeeding rounds in the yearly draft, the same order of selection being followed in each round. Teams had one choice per round unless they had traded their choice in that round to another team (a fairly common practice). When Smith was selected by the Redskins there were 26 teams choosing in the draft.

The NFL draft, like similar procedures in other professional sports, is designed to promote 'competitive balance.' By dispersing newly arriving player talent equally among all NFL teams, with preferences to the weaker clubs, the draft aims to produce teams that are as evenly-matched on the playing field as possible. Evenly-matched teams make for closer games, tighter pennant races, and better player morale, thus maximizing fan

NFL did not appeal that part of the district court's ruling that the labor exemption did not apply.[342]

The court of appeals rejected the district court's conclusion that the draft constituted a group boycott, which is per se illegal,[343] and concluded that the draft differed from a classic group boycott:

> [The teams are] not Competitors in any economic sense. The clubs operate basically as a joint venture in producing an entertainment product football games and telecasts. No NFL club can produce this product without agreements and joint action with every other team. To this end, the League not only determines franchise locations, playing schedules, and broadcast terms, but also ensures that the clubs receive equal shares of telecast and ticket revenues. These economic joint venturers 'compete' on the playing field, to be sure, but here as well cooperation is essential if the entertainment product is to attain a high quality: only if the teams are "competitively balanced" will spectator interest be maintained at a high pitch. No NFL team, in short, is interested in driving another team out of business, whether in the counting-house or on the football field, for if the League fails, no one team can survive.[344]

The per se prohibition of group boycotts is properly restricted to concerted attempts by competitors to exclude horizontal competitors; it does not apply to concerted refusals to deal aimed at some other goal.[345]

Under rule of reason analysis, the court accepted the district court's findings of severe anti-competitive effect: [346]

> The draft inescapably forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in

interest, broadcast revenues, and overall health of the sport." *Id*. at 1175-76 (internal quotations and citations omitted).

342. *Id*. at 1177 n.11. It found the labor exemption inapplicable because the draft was not the product of collective bargaining and did not constitute a mandatory subject of bargaining. Smith v. Pro-Football, 420 F. Supp. 738, 742-43 (*aff'd in part, rev'd in part Smith*, 593 F.2d at 1173).

343. *Id.* at 1178, 1181(rejecting per se analysis).

344. 593 F.2d 1173, 1179 (D.C. Cir. 1978).

345. *Id.* at 1180

346. *Id.* at 1183-84.

> any monopsonistic market, of any real bargaining power. The draft leaves no room whatever for competition among the teams for the services of college players, and utterly strips them of any measure of control over the marketing of their talents. The predictable effect of the draft . . . was to lower the salary levels of the best college players. There can be no doubt that the effect of the draft as it existed in 1968 was to suppress or even destroy competition in the market for players' services.[347]

The court then proceeded to consider—and to reject—the pro-competitive justification for the draft:

> The draft is precompetitive, if at all, in a very different sense from that in which it is anticompetitive. The draft is anticompetitive in its effect on the market for players' services, because it virtually eliminates economic competition among buyers for the services of sellers. The draft is allegedly procompetitive in its effect on the playing field; but the NFL teams are not economic competitors on the playing field, and the draft, while it may heighten athletic competition and thus improve the entertainment product offered to the public, does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost. . . . In strict economic terms, the draft's demonstrated procompetitive effects are nil.[348]

The court suggested alternatives that would have less anti-competitive effect:

> Without intimating any view as to the legality of the following procedures, we note that there exist significantly less anticompetitive alternatives to the draft system which has been challenged here. The trial judge found that the evidence supported the viability of a player selection system that would permit more than one team to draft each player, while restricting the number of players any one team might sign. A less anticompetitive draft might permit a college player to

347. *Id*. at 1185-86 (internal quotations and citations omitted).
348. *Id*. at 1186-87 (internal quotations and citations omitted).

> negotiate with the team of his choice if the team that drafted him failed to make him an acceptable offer. The NFL could also conduct a second draft each year for players who were unable to reach agreement with the team that selected them the first time. Most obviously, perhaps, the District Court found that the evidence supported the feasibility of a draft that would run for fewer rounds, applying only to the most talented players and enabling their 'average' brethren to negotiate in a 'free market' The least restrictive alternative of all, of course, would be for the NFL to eliminate the draft entirely and employ revenue-sharing to equalize the teams' financial resources a method of preserving 'competitive balance' nicely in harmony with the league's self-proclaimed 'joint-venture' status.[349]

The court then remanded for consideration of damages.[350]

In the theatre and movie industries, the initial hiring process is less comprehensive. Anyone may try out at an open audition, but only Equity Members and Equity Candidates may participate in Equity-run auditions. The Equity agreement requires a certain number of days of open auditions for Equity members and candidates, without restricting auditions for non-equity members.[351]

The movie industry has more explicit provisions to assure entry-level opportunity. The Screen Actor's Guild ("SAG") agreement has specific non-discrimination provisions to enhance casting opportunities for disadvantaged groups, including the disabled and older actors.[352] It also prohibits excluding actors without agents from auditions.[353]

F. Contracting out

In a perfectly competitive market, firms can decide whether to "make or buy."[354] Hiring contractors to do the work that employees otherwise can do, however, obviously has an adverse effect on present or potential employees. Workers have an interest in

349. *Id.* at 1187-88 (internal footnotes omitted).
350. *Id.* at 1191.
351. CAT Agreement, *supra* note 300, at Rule 5(B)(2).
352. Screen Actors Guild, 2005 Theatrical Agreement Art. 26(a)(4) and (5), http://www.sag.org/files/sag/2005TheatricalAgreement.pdf.
353. *Id.* at Art. 26(a)6(b).
354. *See* discussion of Coase Theorem in § VI.B.

restricting that competition between independent contractors and employees.

In *Fibreboard Paper Products Corp. v. NLRB*,[355] the Supreme Court agreed with the NLRB that contracting out work previously performed by members of the bargaining unit constituted a mandatory subject of bargaining.[356] In *First National Maintenance Corp. v. NLRB*,[357] however, the Supreme Court held that an employer has no duty under the NLRA to bargain with a union over a decision to terminate a relationship with an important customer and to close a part of its business. It distinguished pure business decisions from decisions about employment conditions:

> The present case concerns a . . . type of management decision . . . , that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but [also] had as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship.[358]

The Court concluded that the harm to the employer's need to make a management decision to shut down part of its business outweighed the incremental benefit of requiring bargaining with the union.[359] It left undisturbed, however, the basic holding of *Fibreboard* and declined to express a view on whether other types of management decisions such as subcontracting or automation might be subject to the duty to bargaining.[360]

G. Regulating channels for reaching audiences

In a perfectly competitive product market, competition exists at every stage of the supply chain: each potential purchaser of goods or servers can compete to get the best deal, and every potential seller of goods and services can compete for the business of every purchaser. Exclusive distribution and supply arrangements are common,

355. 379 U.S. 203 (1964).
356. *Id.* at 209.
357. 452 U.S. 666 (1981).
358. *Id*. at 676-77 [internal quotations and citations omitted].
359. *Id*. at 686.
360. *Id*. at 686 n.22 (citing Dan Dee West Virginia Corp., 180 N.L.R.B. 534 (1970) (decision to change method of distribution, under which employee-drivers became independent contractors).

however, in most industries. The entertainment industries are no exception.

In the movie industry, completing a movie does not ensure that anyone will ever see it. Distribution and exhibition are necessary to connect movies with audiences. Major studios perform not only production, but also distribution functions. The *Paramount* decision[361] prohibits them from also being in the exhibition business. Independent producers, however, often contract with others for distribution. The terms of distribution deals affect the capacity of a producer to pay actors and other employees, so the SAG agreement contains detailed regulations for distribution enterprises and the agreements with them.[362]

In *Flash Electronics, Inc. v. Universal Music & Video Distribution Corp.*,[363] independent distributors of home videos and DVDs of movies and TV shows filed a section 1 Sherman Act challenge against exclusive distribution contracts between the major movie studios and the plaintiffs' competing distribution firms. The district court began its analysis by noting that vertical restraints, such as one between movie studios and firms that distribute their product to retailers, typically are evaluated under the rule of reason rather than treated as per se violations.[364] The court noted the kinds of pro-competitive effects that vertical deals can have:

> [V]ertical restrictions on intrabrand competition often have the procompetitive effect of increasing interbrand competition in the relevant market. . . . Accordingly, manufacturers should be given wide latitude in determining the profile of [their] distributorships. Indeed . . . , absent a showing of price-fixing or an anticompetitive effect on the market as a whole, run-of-the-mill exclusive distributorship agreements are presumptively legal.[365]

This is a less important issue in professional sports, where the teams and the leagues directly perform marketing and organize games, or in the theatre industry, where a production rarely proceeds

361. United States v. Paramount Pictures, 334 U.S. 131 (1948).
362. Screen Actors Guild, *supra* note 351 at Art. 6 (responsibility for payments).
363. 312 F. Supp. 2d 379 (E.D.N.Y. 2004).
364. *Id.* at 386.
365. *Id.* at 386-387 (internal quotations and citations omitted).

beyond the script stage unless theatre space for the performance has already been arranged.

H. Sharing new product-market revenue streams

Technology driven revolutions produce new sources of revenue for entertainment. Whether and how to share those new revenue streams with employees is a frequent source of controversy. The 2011 *Television Decision*[366] forced the NFL to share additional television revenues from its deal to protect itself from the adverse effects of a strike or lockout. The 2007 strike by the Writers' Guild over shares of DVD and Internet revenue for television shows and movies[367] is another example. In 2011 a class action lawsuit over collection and distribution of statutory royalties for sales of blank DVDs and tapes was settled.[368] The 2010 *American Needle* Supreme Court decision, discussed below, involving licensing fees for sales of sports paraphernalia, is yet another example.[369]

The *Safeway* case, analyzed in § IV(B)(2), observed that, under *Citizen Publishing Co. v. United States*, [370] revenue sharing arrangements usually are per se antitrust violations. *Safeway* distinguished the strike-benefits provision in the case before it however, because of its short-term nature and its limited coverage, holding that it must be evaluated under the rule of reason.[371] It should also have included its obvious relationship to a labor dispute as part of the rule of reason analysis, but it did not.

In *American Needle, Inc. v. NFL*,[372] a case involving licensing of intellectual property in sports paraphernalia, the Supreme Court rejected the Seventh Circuit's conclusion that the NFL functioned as a "single entity" with respect to licensing intellectual property.

366. *See* § 2.2(D).

367. *Times Topics*, N.Y. TIMES (Feb. 10, 2008) http://topics.nytimes.com/topics/reference/timestopics/organizations/w/writers_guild_of_america/index.html.

368. *See Notice*, SCREEN ACTORS GUILD, http://www.sag.org/notice.

369. *See generally* STAUDOHAR, *supra* note 2 at 58 (noting the increasing importance to football of licensing fees).

370. 394 U.S. 131 (1969) (holding that profit pooling by competing newspapers constituted a per se violation of section 1).

371. 651 F.3d at 1134-36.

372. *American Needle,* 130 S.Ct. 2201 (2010).

> Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the common interests" of the whole league but is instead pursuing interests of each corporation itself; teams are acting as "separate economic actors pursuing separate economic interests, and each team therefore is a potential independent center of decision making. Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that deprive the marketplace of independent centers of decision making, and therefore of actual or potential competition.[373]

The Supreme Court remanded for rule of reason analysis of NFL exclusive licensing arrangements for team logos and paraphernalia.[374]

The technological revolution impacts professional athletics by opening up new streams of revenue from videogames and Internet fantasy sports involvement. College football players have challenged, under the Sherman Act, the practice of colleges under NCAA rules requiring college athletes to give colleges the exclusive power to license athlete images and personal identifying information.[375]

I. Limiting competition by independent contractors

A competitive market for independent contractors threatens employees with established market positions in two ways. First, it undercuts employee wage standards when an employer can get work done more cheaply by hiring independent contractors instead of hiring or retaining employees. Second, it undercuts product-market positions when firms, rather than individuals, are active in the same product market as employees.

Three kinds of competitive restrictions on independent contracts arise to limit competition. Unions may bargain for limitations on contracting out in collective bargaining agreements. Firms may seek

373. *Id.* at 2212-13.
374. *Id.* at 2217.
375. *See* In re NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-1967 CW, 2012 WL 1745593 (N.D. Cal. May 16, 2012) (denying motion to dismiss Sherman Act complaint).

to exclude independent contractors from the product market by making deals with customers or suppliers of essential factors of production. Independent contractors may seek to band together to limit competition among themselves.

The general view is that independent contractors may not benefit from the labor exemption by banding together and calling themselves a labor union.[376] In *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*,[377] the Supreme Court reviewed the evolution of the statutory definition of "employee," noting that Congress had amended the National Labor Relations Act explicitly to exclude "independent contractors," after the Supreme Court, in *NLRB v. Hearst Publications*,[378] agreed with the NLRB that newspaper street vendors were statutory employees.[379]

The prohibition is not absolute, however:

> Even though a challenged combination includes independent contractors or entrepreneurs, it may come within the statutory exemption if the non-employee parties to the combination are in job or wage competition with the employee parties, or in some other economic interrelationship that substantially affects the legitimate interests of the employees.[380]

In *Home Box Office, Inc. v. Directors Guild of America, Inc.*,[381] already analyzed in § IV(B)(9) HBO filed an antitrust action against an association of freelance directors. The directors defended based on the labor exemption. The district court decided that the statutory exemption applied, because the directors qualified for employee status, rather than independent contractor status, and because they competed with salaried employees.[382]

376. Los Angeles Meat and Provision Drivers Union v. United States, 371 U.S. 94, 102-03 (1962) (holding that independent grease peddlers not immune from antitrust injunction requiring them to disband); *Columbia River Packers*, 315 U.S. at 147 (holding that association of independent fisherman who wanted to fix prices were not covered by labor exemption).

377. 404 U.S. 157 (1971).

378. 322 U.S. 111 (1944).

379. *Allied Chemical*, 404 U.S. at 167.

380. *Home Box Office*, 531 F. Supp. at 589.

381. *Id.*

382. *Id.* at 595 -97 (internal quotations and citations omitted).

In *Julien v. Society of Stage Directors and Choreographers, Inc.*,[383] the district court determined that stage directors were entitled to labor exemption because they were employees. The producer exercised control over every aspect of work. One with experience in theatre might dispute the general validity of this assertion. In many productions, the director is the boss.

In *Ring v. Spina*,[384] the court determined that playwrights were not entitled to the labor exemption:

> Here not only are the disputing parties not in an employer-employee relationship, but, unlike the *Allen Bradley* case, the controversy cannot concern itself with conditions of employment, since none of the parties affected are in any true sense employees. An author writing a book or play is usually not then even in any contractual relation with his producer. If and when he does contract, he does not continue in the producer's service to any appreciable or continuous extent thereafter. Normally the author appears more nearly like the fishermen entrepreneurs of the *Hinton* case or the doctors in the *American Medical Association* case than workmen banded together in a union. The minimum price and royalties provided by the Basic Agreement, unlike minimum wages in a collective bargaining agreement, are not remuneration for continued services, but are the terms at which a finished product or certain rights therein may be sold. And no wages or working conditions of any group of employees are directly dependent on these terms. We think the exception therefore inapplicable.[385]

This line of cases suggests the following rules of thumb for agreements among persons nominally characterized as independent contractors. Some independent contractors are shielded by the labor exemption if they are substitutes for employees. Independent contractors who are truly independent, however, such as indie musicians, independent theatre companies or producers, or indie movie-makers, enjoy no labor exemption.

383. No. 68 Civ. 5120, 1975 U.S. Dist. LEXIS 15839 (S.D.N.Y. Oct 7, 1975).
384. 148 F.2d 647 (2d Cir. 1945).
385. *Id.* at 652.

J. Controlling other labor-market intermediaries

The Supreme Court's decision in *H.A. Artists*[386] shielded collectively bargained restrictions on booking agents in the theatre industry, finding that the union had a legitimate interest in regulating agents in order to protect the union's wage bargain with theatres. The NCAA has even more comprehensive regulations for sports agents, outside the collective bargaining context. (College athletes are not employees, and thus not entitled to engage in collective bargaining under the NLRA).[387]

Rule of reason analysis is likely to validate such restrictions.[388] Rules forbidding payments to athletes and requiring athletes to attend class are necessary for the product (college athletic contests) to exist at all.[389] Regulation of agent payments to college athletes can be justified as necessary to protect the more fundamental rules of forbidding payments to athletes.[390] The Tenth Circuit, however, found that NCAA limitations on coaches' salaries did not survive "quick-look" rule of reason analysis because its adverse effect on competition in the labor market for coaches outweighed its pro-competitive effect.[391]

VI. The revolution and the rule of law

The football wars of 2011 played out old controversies over how to restrict competition in labor and product markets that might unravel structures needed to present a particular form of entertainment—football games—to the public. The 2011 football conflicts also illustrated jostling over how to split new forms of revenue. The technological revolution is upending old structures for presenting entertainment far more broadly than in the professional football industry. It is changing how performers compete and how they coordinate their activities.

386. 451 U.S. 704 (1981).

387. *See* Blake Nielsen, *Misconduct in Intercollegiate Sports: Inappropriate Benefits and Communications Between Agents and Collegiate Athletes* (2010), http://www.kentlaw.edu/perritt/courses/seminar/nielsen%20final%20sport%20agent.pdf, at 20-21 (discussing antitrust restrictions on NCAA).

388. *See generally* Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998).

389. *Id*. at 1018.

390. *See* United States v. Walters, 711 F. Supp. 1435, 1442 (N.D. Ill. 1989) (holding that NCAA eligibility rules did not violate antitrust law in prosecution of sports agents for post-dating contracts with college athletes to evade NCAA rules).

391. 134 F.3d at 1024.

Even in professional football, where fundamental changes in the way the industry is structured are unlikely, new revenue streams, some attributable more to individual celebrity than to the Sunday afternoon performances on the field, are shaping new arenas for conflict. In other entertainment industries, the changes in fundamental structure are profound. How the law should respond to these changes is far more than a matter of adjusting the boundary between labor and antitrust law (the definition of the labor exemption). It involves grappling with the question of when competition improves overall welfare and when it diminishes it.

The labor exemptions to the antitrust laws reflect a national policy that favors collective bargaining. That national policy, in turn, is premised on the idea that employees lack bargaining power vis-à-vis employers unless they band together.[392] The concern about disparate bargaining power is appropriate more broadly in the entertainment industries as the technological revolution fragments production entities and blurs the distinction between labor markets and product markets.

In many cases, the new, more atomized markets will function just fine under competition. In such cases, aggressive antitrust enforcement is socially beneficial. In other cases, production of the particular product requires restraints on competition, such as subsidies flowing from the richer firms to the poorer ones—as in the professional football market. In large-scale sports, such arrangements and subsidies are a mainstay. In other areas they are completely absent.

Moreover, any assessment of the operation of revolutionary labor markets in entertainment is incomplete without considering what has become one of the most powerful tools to suppress competition: overaggressive interpretation and enforcement of copyright law.

A. Implications for the future of the labor exemption

As the Introduction pointed out, Internet-related technologies are likely to shift controversies between workers and those hiring them from relatively certain territory involving long-standing definitions of the labor exemptions into less certain territory where the boundaries of the exemptions must be tested. Technology also is likely to push

392. New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519, 552 (1979) (observing that motivation for NLRA was to equalize bargaining power between employers and employees).

controversies beyond the boundaries of the labor exemptions into antitrust territory where the antitrust rule of reason will require balancing anti-competitive effects against pro-competitive effects arising from the peculiar structural characteristics of the particular industry sector.

Two paradigmatic extremes illustrate the continuum along which the labor exemption operates. At one extreme is a market in which individual performers—say performance artists—band together to set theatre rental prices. At the other extreme is a market in which the cast of a stage play bands together to insist on limits on rehearsal schedules.

Changes in industry structure may give rise to controversies that resemble union-management conflict, and which therefore invite further litigation over the scope of the labor exemption. Indie musicians could organize to put pressure on performance venues to agree to minimum terms for public performances by indie musicians and bands. It is unlikely that such concerted action would qualify for either labor exemption. Indie musicians do not look like employees under the well-established tests and they would be hard pressed to argue that the purchase of their services by venues qualifies as a labor market rather than a product market. Nevertheless, it is true that venues wanting to provide their customers with live music can either hire musicians as employees or retain the services of independent musicians. In this sense the relevant market is a labor market.

Actors and production crafts could band together to put pressure on theatres and movie production companies to guarantee a certain number of slots for early-career-state personnel. The Equity agreements already seek to open up opportunities for new talent in specific categories, especially the disabled. If such efforts to accommodate new talent are part of the collective bargaining process, it almost certainly is exempt from antitrust scrutiny. Likewise, if the new talent acts in concert with non-union sectors of the movie and theatre industries, exemption from antitrust liability also is likely depending on the craft. Actors and directors look like employees under the traditional tests; writers, producers, lighting and sound designers, and set designers look more like independent contractors. Cinematographers fall somewhere in between, especially on indie productions.

Itinerant theatre companies could band together to achieve more favorable terms from performance spaces renting theatre space. Exemption is unlikely because even the poorest theatre company is a business rather than an individual offering labor services. Any rule of reason argument would have to establish the pro-competitive effect of assuring the survival of independent theatre.

Indie movie producers could band together to put pressure on distribution companies, including new Internet distribution firms, to achieve access. Eligibility for a labor exemption is unlikely because indie movie producers, like itinerant theatre companies, look like firms rather than individuals. They could also band together to license such movies to major content providers such as iTunes, Amazon, YouTube, and Vimeo, and to social networks such as MySpace. The problem here is that no labor market is involved. Producers of indie movies are classic businessmen; as independent contractors, they do not substitute for employees and compete with them; they compete with and hope to substitute for larger movie producers. The pro-competitive argument would be stronger however, if Amazon, iTunes, Hulu, and social networks begin to strike more deals that provide exclusivity or especially favorable terms to large studios.

Retired professional football players could break with the Players Association and organize a separate concerted effort to bargain with teams over retiree benefits. In *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*,[393] the Supreme Court, disagreeing with the Board, held that retirees are not statutory employees, and therefore the benefits of already-retired persons are not mandatory subjects of bargaining.[394] This makes application of a labor exemption unlikely. The retirees would also be hard-pressed to marshal a pro-competitive argument under the rule of reason because they are no longer competing in either product or labor markets.

The popularity of reality television shows has created stress on traditional scope of union representation and the FLSA artist exemption.[395]

Regardless of the likelihood of these patterns developing, the AFL/CIO is adapting to these changes in labor markets by launching an initiative focused on jobs that do not fit the traditional model of

393. 404 U.S. 157 (1971).

394. *Id.* at 158.

395. Christopher C. Cianci, *Entertainment or Exploitation?: Reality Television and the Inadequate Protection of Child Participants Under the Law*, 18 S. CAL. INTERDISC. L. J. 363, 363-64 nn. 4-5 (2009) (citing data suggesting that reality television has eroded union penetration of television production industry).

full-time, long-term, attachment of employees to one employer.[396] More, smaller units of production are becoming the norm. Fragmentation of both product and labor markets, however, makes collective bargaining more difficult. Fragmentation makes concerted action more difficult because it increases the transaction costs of organizing anti-competitive arrangements in the first place and of policing them once they have been established.[397] Entertainment-industry unions know this. Thus the AFM makes no effort to unionize indie rock bands, Actors Equity makes no effort to pressure store-front theatres (except to restrict their use of Equity Actors), and AFSCME and SAG mostly ignore the indie movie phenomenon.

One way to deal with the antitrust problem for the lower strata is to think harder about impact on interstate commerce, particularly after the Supreme Court's decision on the Healthcare Reform Act,[398] which suggests that for legislation to be valid, federal legislation must persuasively link small-scale conduct to interstate commerce.[399] The impact of a storefront theatre production on interstate commerce is quite small. Exhibition of an indie movie on the Internet, however, obviously involves interstate commerce, because the Internet is global in its reach. Storefront theatre, garage bands, YouTube content producers, and indie moviemaking have minimal direct impact on interstate commerce, unlike concert tours by Linkin Park, a Chicago Bears football game, the Broadway production of Death of a Salesman, or the opening of the Avengers. But that will not solve the problem of state competition law.

When no labor union is involved, the scope of the labor exemption is extremely small: the core policy underpinning both exemptions is the public-policy decision to promote collective bargaining. When there is no collective bargaining to regulate the labor market, and no prospect of its coming into existence, defenders of an anti-competitive arrangement are hard-pressed to argue that a labor exemption is available. If an employment relationship must be the "matrix of the controversy" for an exemption to be available, and less of the commerce occurs through employment relationships, the operation of the exemptions diminishes.

396. Presentation by Richard Trumka, President of AFL/CIO at Chicago-Kent College of Law, Oct. 6, 2011 (citing as examples taxi drivers and domestic workers).

397. Mancur Olsen, (The Logic of Collective Action) 44-50 (1965).

398. Nat'l Fed'n of Indep. Bus. v. Sebelius,132 S. Ct. 2566 (2012).

399. *Id.* at 2600.

That means that more business arrangements that allegedly interfere with competition are subject to antitrust analysis. The central questions involve not a reshaping of the labor exemption in the context of something that looks like traditional collective bargaining, but a broader assessment of how the law and market competition should interact in a world in which market structures are determined largely by the Internet.

B. Beyond the labor exemption

The "Coase Theorem" postulates that a firm's decision whether to produce an input internally, with resources such as employees bound to it over the course of time, or externally, with contracts negotiated at arms' length in the marketplace—often referred to as a "make or buy" decision— is driven by the relative efficiency (cost) of the alternative approaches.[400]

Internet-linked technologies have increased the relative efficiency of much work being performed outside traditional physical workplaces.[401] The Coase Theorem accurately predicts that this causes the boundaries of firms to contract and for a greater share of labor to be performed under independent contracts rather than through employment relationships. This trend is particularly pronounced in the popular-music[402] and video entertainment industries.[403] Fewer musicians reach their markets through long-term deals with record labels and more musicians are proceeding independently and finding their audiences through the Internet. The studio system for producing Hollywood movies is long dead, and the current trend is to look to independent moviemakers for movies to be distributed through new channels.

The technological revolution has fragmented production systems in certain parts of the entertainment industry—especially movies, popular music, and some aspects of television—causing more

400. *See* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Alan Devlin & Michael Jacobs, *Joint-Venture Analysis After American Needle*, 7 J. COMPETITION L. & ECON. 543, 548 & n.29 (2011) (criticizing American Needle's analysis of single entity in antitrust law; referring to Coase Theorem).

401. *See* Mirian A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951 (2011) (assessing implications for labor law of trend toward work being performed over the Internet rather than from fixed workplaces).

402. Perritt, New architectures for music*, supra* note 11; Perritt New Business Models for Music, *supra* note 11.

403. Perritt, Technologies of Storytelling, *supra* note 11.

coordination of inputs to take place through contracts negotiated in markets and fewer to take place within firms. Technology has driven this fragmentation in large part because it has reduced the barriers to entry.[404] Lower barriers to entry, in turn, have led to a more competitive market with many more participants on the supply side. Technology has also made it easier to make deals in the marketplace, and this, in turn, is fragmenting units of production – shrinking firm boundaries. That leads to increased transaction costs in the market, which would tend to force an equilibrium that keeps firm boundaries from shrinking further – except for one thing. The same technologies can also reduce the transaction costs of market arrangements. Technology permits sources of different kinds of services to find each other, to make deals for an integrated product, and then to find consumers and fans interested in it.

1. Professional football

Technology is less likely to cause changes in the industry structure for professional football, but the technological revolution is likely to set off battles over ownership of new revenue streams for professional sports. For example, fan capture and re-broadcast of live games is both increasingly feasible and of uncertain status under copyright, trademark, and right-of-publicity doctrines.[405] Revenues from fantasy football and football-oriented video games is growing.

Broadcasts of football games not licensed by the NFL or the teams are more likely because it is so easy to make a good video recording with a cellphone and to upload it to YouTube, Vimeo, Facebook, or an independent website. Whether a "guerrilla" making and distributing of a video recording of a live football would infringe copyright is an interesting question. In *Baltimore Orioles, Inc. v.*

404. *Compare* VOGEL, *supra* note 11 at 15-17 (analyzing the traditionally high barriers to entry in entertainment industries) *with* Perritt, New architectures for music, *supra* note 11 (explaining how Internet and PC technologies have reduced barriers to entry for musicians) *and* Perritt, New Business Models for Music, *supra* note 11 (same) *and* Perritt, Technologies of Storytelling, *supra* note 11 (same for moviemakers).

405. *See* Dryer v. NFL, 689 F. Supp. 2d 1113 (D. Minn. 2010) (denying motion for summary judgment for defendant on claim that use of promotional video footage of live football games infringed common law and statutory right of publicity, which were not preempted by copyright act); Univ. of Alabama Bd. of Trustees v. New Life Art Inc. 677 F. Supp. 2d 1238 (N.D. Ala. 2009) (granting summary judgment to defendant on claim that paintings and prints depicting live football games infringed college trademark in colors and player uniforms).

Major League Baseball Players Ass'n,[406] the court of appeals suggested that a game itself is not copyrightable, but that as soon as it is recorded, as it usually is by those with explicit broadcast rights, the fixation element would be satisfied and the performance of the game, along with the audiovisual work, would be copyrighted. The court's analysis of the question focuses on the issue of copyright preemption of player publicity rights in the game. It also concerns the court's earlier emphasis on the creative originality of the authorized video capture that led to the resulting audio visual work. These contextual aspects cast doubt on the robustness of its conclusion that game performances are not copyrightable.

NFL v. McBee & Bruno's, Inc.[407] involved a claim that display of blacked out football games by bar owners infringed copyright. The court of appeals agreed with the district court that it was the football game itself—"the game action, the noncommercial elements of the game" that constituted the work of authorship, fixed when it was broadcast by cable to non-blacked out areas.[408] The defendants claimed that they copied no protected elements because they stripped out commentary and advertisements, and reproduced, distributed and performed only the game itself.[409]

> The fixation, therefore, is the "original 'works' of authorship" which is the opera, the dance ensemble, the address and the game. The fact that the performance is replete with network commercial insertions does not so restructure the program as to make it a new original work or to give it a new or final fixation.[410]

These are questionable conclusions in light of the copyright act's explicit mandate that facts are not copyrightable[411] and the Supreme Court's holding in *Feist*[412] that the "sweat of the brow" expended in making facts available does not make the facts—as opposed to

406. 805 F.2d 663 (7th Cir. 1986).
407. 792 F.2d 726 (8th Cir. 1986).
408. *Id.* at 732.
409. NFL v. McBee & Bruno's, 621 F. Supp. 880, 885-86 (E.D. Miss. 1985) (characterizing and rejecting defendant arguments).
410. *Id*. at 886.
411. 17 U.S.C. § 102(b).
412. Feist Pub. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

selection and arrangement—copyrightable. Live football games are facts.

These skirmishes over copyright law will channel the new forms of competition. Whether a guerrilla broadcast of the football game infringes copyright will determine the likelihood of the League, the team, and the players getting a new share of the revenue generated by such broadcasts.

Other technologies also are opening up new revenue opportunities. In professional sports the growth in fantasy football has been enabled by the Internet and is a potential source of revenue for players and teams.[413] Similarly, more sophisticated video games feature celebrities of all kinds, including college and professional athletes, resulting in a new stream of revenue the celebrities are eager to tap.

The market for player publicity rights may fragment if a trend develops in fantasy football and video games to allow fans to match players from different teams. If that occurs the valuable commodity is the individual player, not the team of which he is a member. Such a phenomenon will increase pressure for individual players to retrieve licensing power for their own personas. The Players Association could band together to license player images and personalities to fantasy football providers or video game developers. The problem here is that the market for player publicity rights is not a labor market; it is a product market. Already, the commercial importance of new forms of media providing fans access to sports celebrities is generating controversy. In *Keller v. Electronic Arts, Inc.*,[414] the district court denied a motion to dismiss a right-of-publicity claim by a former college football player against a video-game producer. Based on the facts alleged, the court found:

> In the game, the quarterback for Arizona State University shares many of Plaintiff's characteristics. For example, the

413. *See* Michael J. McSherry, *The Right of Publicity and Fantasy Sports: Should Professional Athletes Wield Control Over Their Identities or Yield to the First Amendment?* (2009), (unpublished seminar paper, Chicago-Kent College of Law) *available at* http://www.kentlaw.edu/perritt/courses/seminar/papers%202009%20fall/mike%20mcsherry%20-%20final%20-%20The%20Right%20of%20Publicity%20and%20Fantasy%20Sports.pdf (explaining fantasy sports and reviewing cases giving athletes rights).

414. Keller v. Elec. Arts, Inc., No. 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

> virtual player wears the same jersey number, is the same height and weight and hails from the same state. . . . EA does not depict Plaintiff in a different form; he is represented as he what he was [sic]: the starting quarterback for Arizona State University. Further, . . . the game's setting is identical to where the public found Plaintiff during his collegiate career: on the football field.[415]

Under these circumstances, the challenged depiction was not sufficiently transformative to escape liability under California's right of publicity.[416] The district court granted a stay pending appeal of related cases to avoid fragmenting litigation of similar issues.[417]

In *Hart v. Electronic Arts, Inc.*,[418] the district court dismissed an action by a college football player against a video game developer for violating his state-law right of publicity. The player alleged that a player in the video game had the same height, weight, jersey number, type of wrist band, and helmet visor as the actual player, also using statistics on playing success identical to those of the actual player.[419] Because the specific similarities were not pleaded, the court dismissed with leave to file a second amended complaint setting forth the specific similarities.[420]

In the *Keller* case and in a related case, *O'Bannon v. NCAA,*[421] college football and basketball players claimed that the NCAA violated the antitrust laws by requiring college athletes to authorize the NCAA to use their names and likenesses to promote NCAA activities and to relinquish their rights to the commercial use of their images.[422] Such requirements, the athletes claimed, excluded them from the collegiate licensing market. Denying a motion to dismiss, the district court held that the plaintiffs had pleaded an agreement that restrained competition,[423] and that they made out a case under

415. *Id.* at *5.
416. *Id.*
417. *See* In re NCAA Student-Athlete Name & Likeness Litigation, No. C 09-1967 CW, 2010 WL 5644656 (N.D. Cal. Dec. 17, 2010).
418. 740 F. Supp. 2d 658 (D. N.J. 2010).
419. *Id.* at 661.
420. *Id.* at 669.
421. O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09-3329, 2010 WL 445190 at *5 (N.D. Cal. Feb. 8, 2010).
422. *Id*. at *1 (summarizing allegations).
423. *Id*. at *4.

the rule of reason.[424] A multi-district panel in California reached a similar conclusion.[425]

As the market for new technologies to exploit the popularity of entertainment industry celebrities builds, the likelihood of antitrust scrutiny of collective licensing arrangements[426] will intensify. Because the licensing market is a product market, not linked at all directly to any labor market, application of the labor exemption is unlikely, but rule of reason analysis may nevertheless privilege the arrangements.

Although the technological revolution is not likely to have much impact on labor markets in professional sports, it has already had profound impact on product markets. The first battleground focused on television broadcasts, as exemplified by the Supreme Court's decision in NCAA, considered in § III(A)(2) and the separate lawsuit filed by the NFL Players Association over television revenues during the 2011 lockout.

Copyright protection for football games and other athletic contests, at least when the games are captured on video, gives the leagues and teams a strong lever to control exploitation of revenue potential from broader electronic distribution of actual games through the Internet. Fantasy sports and video games, however, need not use actual game footage. As to them, leverage is available only under a common-law or statutory "right of publicity."[427]

The phenomenon of fantasy sports is rapidly growing, with nearly $1 billion in annual revenues.[428]

> [F]antasy football refers to a game in which participants simulate management responsibilities of the roster of a NFL

424. *Id*. at *5.

425. *See* In re NCAA Student-Athlete Name & Likeness Licensing Litigation, , No. C 09-1967 CW, 2012 WL 1745593 (N.D. Cal. May 16, 2012) (denying motion to dismiss Sherman Act complaint).

426. Collective licensing of any rights enhances market efficiency by reducing transaction costs for both rights holders and licensees. *See generally* Perritt, Cut in Tiny Pieces, *supra* note 11 (reviewing economics and caselaw for copyright collectives).

427. *See Hart*, 808 F. Supp. 2d at 772-74 (reviewing history of common-law right and referring to state statutes; granting summary judgment to video-game developer on First Amendment grounds in right-of-publicity action brought by former college football player)

428. *See* Anthony Crupi, *Billion Dollar Draft Some 27 Million Americans Play Fantasy Football—and Media Companies Are Cashing in on Their Obsession*, ADWEEK, (Nov. 7, 2011) http://www.adweek.com/news/advertising-branding/billion-dollar-draft-136370 (reporting nearly $1 billion in revenues for fantasy football in 2010).

> team by, among other things: (1) scouting, drafting, and trading players on their teams; (2) adding and dropping players; and (3) otherwise manipulating the team's roster over the course of the season-long competition. To facilitate the competition among the participants in a given fantasy football league, the standard fantasy football game utilizes the actual statistics generated by NFL players during the course of the regular season.[429] The NFL has embraced fantasy football to the extent that it has a link on its website.[430]

No similar link exists for video games.

The professional sports leagues, teams, and players naturally have an interest in tapping some of this revenue—or, less progressively, in trying to shut it down because of a fear that it will drain market share from the activities of the leagues. The NFL Players Association claims exclusive group licensing rights for players' rights of publicity.[431]

In *C.B.C. Distributing & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*,[432] the court of appeals held that a provider of fantasy baseball games could use baseball players' names and statistics without violating their right of publicity and, moreover, had a First Amendment right to use them.[433] In *CBS Interactive Inc. v. NFL Players Ass'n, Inc.,*[434] the district court applied the Eighth Circuit holding to fantasy football, holding that use of football player identities is protected by the First Amendment.[435] The state of the law on this question is, however, unsettled.[436] In *Dryer v. Nat'l Football League*,[437] however, the district court distinguished actual video footage of football players from the data used in fantasy

429. CBS Interactive Inc. v. Nat'l Football Players Ass'n, Inc., 259 F.R.D. 398, 403 (D. Minn. 2009) (describing phenomenon) (internal citations omitted).

430. *See* http://www.nfl.com/fantasyfootball (last visited Oct. 5, 2012).

431. *CBS Interactive*, 259 F.R.D at 402-03 (explaining NFLPA licensing activities covering individual players' names, signatures, facsimile, voices, pictures, photographs, likenesses, and biographical information).

432. 505 F.3d 818 (8th Cir .2007).

433. *Id*. at 824 (explaining why interests usually advanced to support right of publicity do not apply to professional athletes who already are handsomely compensated).

434. 259 F.R.D. 398 (D. Minn. 2009).

435. *Id*. at 419.

436. *Id.* at 413-14 (noting Florida district court case and commentary disagreed with Eighth Circuit).

437. *Dryer*, 689 F. Supp. 2d at 1113.

football, and denied a motion for summary judgment on First Amendment grounds in a class action brought by former professional football players against the NFL for using promotional video footage of them playing.[438]

Significantly, for purposes of this article, the fantasy sports producers claimed antitrust monopolization by the NFLPA.[439] Congress has granted fantasy sports an exemption on prohibitions against Internet gambling in Unlawful Internet Gambling Enforcement Act of 2006,[440] by excluding fantasy sports from the definition of "bet or wager."[441]

Videogames based on professional sports teams and players are also proliferating.[442] The legal issues are the same regarding videogames as for fantasy sports.

As the technological revolution continues, controversies over who is entitled to make money from the celebrity of professional athletes surely will grow.

2. Beyond football

Regardless of theoretical analysis of liability when entertainment industry participants limit new forms of competition enabled by the technological revolution, passivity or impracticability in enforcing the law is likely to leave large arenas available for participants to do as they please.

The reality is that the Labor Department does not enforce the FLSA against the small players, and neither is the Internal Revenue Service very aggressive about challenging independent-contractor classifications.

If they are all employees, they are entitled to minimum wage, unemployment compensation, and workers compensation. There are, of course, some carve-outs for part time and casual employment, and—importantly—for actors and writers.[443]

438. *Id*. at 1118.

439. *CBS Interactive,* 259 F.R.D. at 412 (dismissing, under Noerr Pennington doctrine, claim that enforcement efforts violated antitrust law).

440. 31 U.S.C. § 5362 (2006).

441. *Id.* (conditioning exemption on fantasy games not being based on the "current membership of an actual team that is a member of an amateur or professional sports organization").

442. *See Madden 13*, EA SPORTS, http://www.easports.com/madden-nfl/features (last visited Oct. 5, 2012) (describing features of NFL videogame).

443. See § III.B4

Nor is trade unionism likely to be a particularly effective means for limiting competition. As § VI(A)(2) explains, the transaction costs of establishing and enforcing anti-competitive arrangements becomes too high when the units of production are fragmented, and that is precisely the effect that technology is having. Even fairly large movies—those with budgets in the range of $2 million-$10 million, as a very rough approximation—use significant amounts of freelance labor. In theater, Actors Equity only penetrates approximately ten to fifteen percent, measured by number of productions, although the figure would be much higher measured by percentage of total audience. AFSCME and SAG have little sway in indie movie production. The AFM is perhaps the strongest example, when one looks at the full range of musical performances and music recording activity in an urban area. The AFM does community service work for all musicians but attempts to organize the smaller entities and fluid groups of musicians who are unknown.

The reality is that many of the producing entities are simply not on anyone's radar screen. In some cases they are not formal business entities, but sole proprietorships or common-law partnerships. Even in those cases when the entities have registered as corporations or LLCs, there are too many of them for any trade union to organize them cost effectively. So the unions do not try. And any rational administrative agency is going to set enforcement priorities. It is hard to conceive of a rational enforcement strategy that would devote significant resources to targeting the low-end. The result is a formal regime that bears little resemblance to the actual structure of labor markets in the entertainment industry.

Moreover, the enforcement strategies of administrative agencies in the labor field have always been influenced heavily by what trade unions think is important. So what will trade unions think is important? Equity, SAG/AFTRA, and the AFM are reasonably strong unions. So are the AFL Players Association and its counterparts in other sports.

Some ideas can be gleaned from tensions between union and nonunion construction, union and nonunion trucking, and heavily unionized and nonunion, or only partially unionized airlines. And for all of these cases, the threat to collectively bargained labor standards and union security appeared not in the form of new labor market phenomena (contracting out being a notable exception). Rather, it appeared in the form of new product market competition.

So where is this most likely in the entertainment industry? It is not at all likely in professional football. The notion that arena football could begin to steal market share from the NFL is ludicrous. On the other hand, newly rising sports like soccer could begin to gain market share at the expense of other sports, making it a threat.

In music, the product market transformation is probably too far gone for the union movement to do anything about it. The recording industry is still clinging on to some established celebrities, but the relationship between artists and recording studios has never been understood to be an employment relationship.[444] That means that the AFM has no beachhead from which to operate with respect to recorded music.

Likewise, in theater, something like the current market structure is likely to persist. The much greater audience drawing-power of larger equity theaters compared with smaller storefront theaters is profound, and the migration from the lower stratum for the higher strata is very much a part of the ambition of actors and other theater people.

It is in video entertainment where the changes are likely to be most dramatic. The possibility for crowd sourcing of important functions in moviemaking,[445] the entry of new Internet-oriented entities like Amazon, Google, Hulu, and Netflix, and the ease with which truly indie moviemakers can use the same tools now being embraced by the large players to distribute video entertainment products all portend significant turmoil in the years to come as the technological revolution continues.

It has always been the case that well-established enterprises uses every tool at their disposal—labor law, antitrust law, aggressive business and litigation credit strategies—to crush or at least defer the success of new entrants using new business models. These enterprises will do so in this case, also.

In dealing with its increasing inventory of disputes, antitrust law must balance certain fundamental marketplace realities. Economies of scale are likely for Internet Service Providers, social networks such

444. *But see* Wendy N. Davis, *Reliving the Golden Oldies: Rockers Reclaim Tunes After Revised Copyright Laws,* ABA JOURNAL (May 1, 2012 3:20 AM), http://www.abajournal.com/magazine/article/reliving-the-golden-oldies-rockers-reclaim-tunes-after-revised-copyright-la/.

445. *See* Perritt, Technologies of Storytelling, *supra* note 11 (discussing crowd sourcing as movie production strategy to reduce costs); Henry H. Perritt, Jr., Crowd Sourcing for Moviemaking (forthcoming).

as Facebook, web search engines such as Google, and movie and music portals such as NetFlix and iTunes. These parts of the industry will attract large aggregations of capital and may engage in cross subsidization of new product lines. They will find themselves pitted against the desire of fading establishments to throw up barriers to new, more efficient competitors on the one hand, and the desire of artists to be able to support themselves with their art by offering it to consumers through the large intermediaries.

Fragmentation of production is only one aspect of the technology-driven market structure changes. Some activities enjoy considerable economies of scale. The Internet increases economies of scale for sales of tickets to entertainment events, and increases economies of scope for linking ticket sales to exhibition of the related events. One result was the merger of Ticketmaster with Live Nation, approved by United States Department of Justice in 2010.[446]

The dominance of such intermediaries naturally leads to controversies over monopolization and commercial relations.[447]

As Internet-based coordination networks proliferate to manage transaction costs in a fragmented marketplace, controversies over who gets access to these networks will increase.

3. Two hypothetical scenarios

Two closely related fictional scenarios help integrate the analysis of the types of disputes likely to arise in the entertainment industries under pressure from the technological revolution.[448]

Amory Richards is a young cinematographer employed by Walt Disney Studios. He is represented by the International Cinematographers Guild, part of the International Alliance of

446. *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc.*, JUSTICE DEPARTMENT OFFICE OF PUBLIC AFFAIRS, (Jan. 25, 2010) http://www.justice.gov/opa/pr/2010/January/10-at-081.html (requiring, as condition of merger approval, licensing of ticketing software, divestiture of ticketing assets and anti-retaliation provisions).

447. *See, e.g.* McMillan v. Live Nation Entm't, Inc., No. 11-732, 2012 Ark. 166 (Ark. Sup. Ct. May 24, 2012).(answering certified question as to whether claim that Ticketmaster fees exceeded ticket price violated state statute prohibiting excessive fees); Live Nation Worldwide, Inc. v. Hillside Prod., Inc., No. 10-11395. 2012 WL 1239844 (E.D. Mich. Mar. 30, 2011) (granting summary judgment to plaintiff in dispute over accounting for revenues from exhibitions of entertainment).

448. The good analysis in this section was written by Jeremy B. Abrams, research assistant to the author.

Theatrical Stage Employees ("IATSE"), of which he is a member. A collective bargaining agreement covers his employment.

Selnick Edwards is a young video editor employed by the production division of Comcast. The National Association of Broadcast Employees and Technicians ("NABET"), part of the Communications Workers of America ("CWA") represents Comcast video editors, but Selnick has elected not to become a member, electing instead to pay an agency fee to the union under an agency-shop agreement. A collective bargaining agreement covers Selnick's employment with Comcast.

Amory and Selnick studied filmmaking at Columbia College in Chicago with Kendrick Marshall. Kendrick has entered into an agreement with a recent graduate of Chicago-Kent College of Law, Andrew Zeer, to produce Andrew's screenplay, *No Fun League*. Kendrick has worked out a shot list and shooting schedule and is ready to begin principal photography. He contacts Amory and asks him to be the cinematographer. Amory is excited and agrees to take part in the project "on spec;" i.e., he won't get paid anything unless the movie makes money. If it does, he will get five percent of the net profits. Kendrick makes a similar deal with Selnick to be the editor of *No Fun League.*

Disney has heard about *No Fun League* and is quite worried that it will dilute the audience for Disney's new blockbuster, *Mouseketeers Retreaded Again,* featuring Justin Timberlake, Keri Russell, and Ryan Gosling. The budget for *Mouseketeers Retreaded Again* is $200 million. The budget for *No Fun League* is $75,000. Disney figures that *No Fun League* will never get made if Marshall has to pay Amory the same compensation he is entitled to from Disney.

The cinematographers are concerned about the impact on their wage levels. They also understand that if the market for Disney's movie is reduced, that will undermine employment opportunities. Disney communicates its fear to the cinematographers. The cinematographers pick up the ball. They tell Disney to fire Amory and tell Amory the union will expel him and make sure Disney fires him if he continues to work for Kendrick for any less than Disney pays him.

Comcast is likewise worried that *No Fun League* will prove so popular that Comcast subscribers will drop their subscriptions and flock to see *No Fun League* on the Internet, paying for it through their Amazon accounts. It tells Selnick that he will be fired if he works for Kendrick for any less than what he is paid by Comcast.

What legal claims might Amory and Selnick have against Disney, the Cinematographers Guild, Comcast or NABET? How strong are they?

In order to determine whether Amory, Selnick, or Marshall could recover against the IATSE, Disney, or Comcast, one must understand: (1) whether the conduct they object to is exempt from antitrust law; (2) whether it would survive rule-of-reason scrutiny if it is not exempt; (3) whether any of them have antitrust standing; and (4) whether the conduct constitutes a secondary boycott under the NLRA.

Plaintiffs could argue that neither the actions of the IATSE or Disney fall within the statutory exemption provided by the Clayton Act and Norris-LaGuardia, or the non-statutory labor exemption created by the judiciary. Thus, if they have standing, Amory and Marshall would be in a strong position to prevail against IATSE and Disney for violating the Sherman Act by colluding with each other to restrain trade.

In the case at hand, there are two ways Amory's activity could negatively impact the wages of Disney's union employees: (1) the union's bargaining position could be weakened, eventually driving down the wages of union members; (2) the success of *No Fun League* could increase competition in the product market, thereby driving down Disney's revenue and, eventually, the wages, and even job security, of union members.

Protecting the union's bargaining position is a legitimate objective that fails the rule of reason test.

The IATSE would argue that its action to prevent Amory from working for Marshall at anything less than Disney standards falls within the exemption because it is necessary to protect its collectively bargained standards. Amory is not likely to be unique. If he is willing to work for Marshall for less than his compensation at Disney, others will do the same thing—for Kendrick and others like him. Disney could reduce its costs by laying off its employees, including Amory, and hiring Marshall and others like him to do their work. Every employer wants to buy labor at the lowest possible price. Without a wage floor, competition between potential employees will drive down wages—at least when the labor supply exceeds the demand. Preventing the driving down of wages is the central goal of collective bargaining. Thus, if a large number of workers on the job market seek to work below union wages, Disney could replace union employees with the cheaper alternatives.

Seeking to maintain this form of "uniformity of labor standards" is a "legitimate aim" of the IATSE. It thus appears that this side agreement is subject to the non-statutory labor exemption.

If, however, it is found that the antitrust laws do apply, the question becomes whether the IATSE's side agreement with Amory is a per se violation or, if not, whether it passes the rule of reason. Non-compete agreements between employers and their employees are not per se violations of the Sherman Act.[449] A non-compete agreement prohibits an employee of one company from working for a competitor under any conditions. It follows fortiori that a less stringent agreement between an employer and an employee (such as the one between Disney and Amory) that prohibits an employee from working for a competitor if certain conditions are not met is also not a per se violation of the Sherman Act.

While the IATSE's side agreement with Amory may not be a per se violation of the Sherman Act, it is a violation under the rule of reason. Large production companies like Disney can afford to pay more to their employees than their independent competitors can. Allowing unions to forbid members from working below the high standards set by these companies would risk putting independent production companies out of business. Such a result would have a devastating effect on the competitive nature of the product-market. The benefit provided to the union (strengthened bargaining position) does not outweigh the harm caused to independent producers (elimination).

Decreasing competition in the product-market in order to protect the labor market is not a legitimate objective; even if it were, it fails the rule of reason test.

Plaintiffs would argue that IATSE does not have the power to stay within the labor exemption while preventing the impact that *No Fun League*'s financial success would have on union wages. While a union's direct activities on the labor market may have an indirect impact on the product market, any activity taken by a union to impact

449. Haines v. Verimed Healthcare Network, 613 F. Supp. 2d 1133, 1137 (2009) (explaining that non-compete agreements are "a common feature of countless independent contractor relationships in any number of industries" and does not constitute a per se violation of the Sherman Act); Eichorn v. AT&T Corp., 248 F.3d 131, 144-47 (3d Cir. 2001) (explaining that non-compete agreements that are reasonable in scope do not violate antitrust laws under the rule of reason).

the product market directly constitutes an illegitimate objective that is not exempt from antitrust law.

Plaintiffs would argue that the IATSE could prevent harm to union wages due to increased competition in the product market only by actually limiting competition in the product market. In this case, it is known that Amory is essential to the existence of Disney's competitor in the product market (i.e., *No Fun League*). IATSE's conduct would not be exempt from antitrust law if it intended to shut down *No Fun League* by making Amory unaffordable.

Even if IATSE's objective is legitimate, IATSE's conduct would not pass the rule of reason. Once again, the minor benefit such side agreements would have on the labor market does not outweigh the potentially "significant adverse effects on the market and on consumers-effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions."[450]

The side agreement between Comcast and Selnick requires a simpler analysis. Comcast is a non-labor organization seeking to negotiate with a member of a labor group (e.g., Selnick) for the sole purpose of manipulating the product market. Thus, as with Amory, plaintiff's would argue that Comcast's objective is illegitimate and does not pass the rule of reason.

While a union's direct activities on the labor market may have an indirect impact on the product-market, any activity taken by a union to impact the product-market directly constitutes an illegitimate objective that is not exempt from antitrust regulations.

As with IATSE, even if Comcast has a legitimate objective, its conduct would not pass the rule of reason. Once again, the minor benefit such side agreements would have on the labor market does not outweigh the potentially "significant adverse effects on the market and on consumers-effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions."[451]

Simply establishing an agreement that falls outside the exemptions and fails rule of reason analysis, however, is not enough to allow Amory, Selnick, or Marshall to recover for the antitrust violation; they must also have standing. Amory, Selnick, and

450. *Connell Const. Co., Inc.* 421 U.S. at 624 (holding that union's attempt to force contractor to not subcontract work to firms that did not already have a contract with the union is not exempt from antitrust laws because "it contravenes antitrust policies to a degree not justified by congressional labor policy").

451. *Id.*

Marshall are going to have a hard time establishing standing to sue for antitrust violations. The class of plaintiffs capable of establishing antitrust standing is limited to consumers and competitors in the restrained market.[452]

CBC Companies, Inc. v. Equifax, Inc.[453] involved section 1 and 2 Sherman Act claims against Equifax for hiking the fees it imposed on the plaintiff for reselling Equifax credit data. The plaintiff claimed monopolization and attempted monopolization of the market for credit reports sold to mortgage lenders.[454] The court of appeals agreed with the district court that the plaintiff had failed to plead antitrust injury.

> To prove antitrust injury, the key inquiry is whether competition—not necessarily a competitor-suffered as a result of the challenged business practice. One competitor may not use the antitrust laws to sue a rival merely for vigorous or intensified competition. . . . An antitrust plaintiff [must] demonstrate that the alleged violation tended to reduce competition overall and that the plaintiff's injury was a consequence of the resulting diminished competition.[455]

Although the complaint alleged that the plaintiff and other resellers were the principal victims of Equifax's conduct, it "never identifies any of these other resellers, and never establishes whether any of these resellers signed a contract similar to the Reseller Agreement."[456]

> Essentially, CBC disagrees with the price terms of the contract that Equifax proposed and CBC later signed. But even where a business carries a significant portion of the market share, antitrust law is not a negotiating tool for a plaintiff seeking better contract terms. Section 2 of the Sherman Act does not give plaintiffs the exclusive right to

452. West Penn Allegheny Health Sys, Inc. v. UPMC, 627 F.3d 85, 102 (3d Cir. 2010) (reversing summary judgment for defendant in part and holding that an agreement with the dominant hospital artificially to depress prices paid by a monopsonist health insurer by the second hospital established antitrust injury).

453. 561 F.3d 569 (6th Cir. 2009).

454. *Id.* at 571 (summarizing legal theory).

455. *Id.* at 571-572 (internal quotations and citations omitted).

456. *Id.* at 572.

> dictate the terms on which they will deal, nor does it require the defendant to accede to every demand of the plaintiffs.[457]

That means that Amory and Selnick cannot establish antitrust standing merely by showing that they, as individuals, were deprived of the opportunity to sell their services to Marshall; they would have to show that the conduct by Disney, Comcast, and the unions reduced competition in the market for indie cinematographers and editors generally and that they were injured as a result. Likewise, Marshall cannot establish antitrust injury unless he pleads and proves that the conduct diminished competition in the movie production market and that he was injured as a result.

Sterling Merchandising, Inc. v. Nestle, S.A.[458] involved sections 1 and 2 Sherman Act claims against the dominant supplier of ice cream in Puerto Rico for its acquisition of a distributor that competed with the plaintiff and its subsequent pricing and contracting policies. The plaintiff was dependent on the defendant for its most popular brand of ice cream. The court of appeals, agreeing with the district court, held that the plaintiff failed, at the summary judgment stage, to show antitrust injury, because the evidence showed that the plaintiff's market share and profits had increased during the period of the allegedly illegal conduct and that the defendant continued to make ice cream available to it. The plaintiff argued that it would have done even better but for the defendant's conduct, but the court found evidence supporting that proposition unpersuasive:

> The lack of evidence of antitrust injury in the form of either increased consumer prices or reduced output is consistent with the lack of evidence that Sterling itself has been negatively affected by Nestlé PR's purported violations. It is axiomatic that antitrust laws are concerned with protecting against impairments to a market's competitiveness and not impairments to any one market actor. It is also true that an antitrust plaintiff's post-violation successes do not necessarily preclude compensation for damages proximately caused by an antitrust violation. Nonetheless, that Sterling's sales, profits, and market share have increased during the relevant period

457. *Id.* at 573 (internal quotations and citations omitted).
458. 656 F.3d 112 (1st Cir. 2011).

> provides further indication that no antitrust injury exists here.[459]

That suggests that Amory, Selnick, and Marshall could establish antitrust injury only if they offered evidence that competition in the movie production market and in the markets for indie cinematographers and editors was declining, resulting in declining revenues and market share for indie producers and declining demand for indie cinematographers and editors.

Moreover, Amory and Selnick may have difficulty establishing the directness of any injury to them. In *Associated General Contractors v. California State Council of Carpenters*,[460] the Supreme Court cautioned against allowing antitrust injury to be established by a long chain of causation:

> In this case . . . the Union was neither a consumer nor a competitor in the market in which trade was restrained. It is not clear whether the Union's interests would be served or disserved by enhanced competition in the market. . . [T]he chain of causation between the Union's injury and the alleged restraint in the market for construction subcontracts contains several somewhat vaguely defined links.[461]
>
> . . . .
>
> Partly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union's damages claim is also highly speculative. There is, for example, no allegation that any collective bargaining agreement was terminated as a result of the coercion, no allegation that the aggregate share of the contracting market controlled by union firms has diminished, no allegation that the number of employed union members has declined, and no allegation that the Union's revenues in the form of dues or initiation fees have decreased. Moreover, although coercion against certain firms is alleged, there is no

459. *Id.* at 122-23 (internal quotations and citations omitted).
460. 459 U.S. 519 (1983) (reversing court of appeals and holding that union claiming a conspiracy to shift work from union to non-union contracts could not establish antitrust injury).
461. *Id*. at 539-40.

> assertion that any such firm was prevented from doing business with any union firms or that any firm or group of firms was subjected to a complete boycott.[462]

Amory and Selnick would have to establish that they lost employment opportunities because they were forced to demand higher compensation. If other indie cinematographers and editors remain free to work for less, that would help them establish individual injury but would undercut their argument that competition in general had been limited. Marshall would have to establish that he, along with other indie producers, lost business as a result of the limitations on wage competition. To do that, he would have to marshal evidence that: (a) Disney and Comcast had sufficient market power to drive up wages in the indie producer market; (b) the increased wages adversely affected Marshall's ability to earn revenue; and (c) any economic misfortune suffered by Marshall was not due to other factors.

All of this is a very tall order, necessitating heroic econometric analysis, unlikely to be available to any of the plausible plaintiffs.

It is likely that both the agreement between the IATSE and Amory or the agreement between Comcast and Selnick violate United States antitrust law. Neither agreement falls within the statutory or non-statutory labor exemptions to antitrust law. Amory, Selnick and Marshall would have a very hard time, however, establishing standing to sue IATSE, Disney, or Comcast for antitrust violations.

If the conduct violates §§ 8(b)(4) or 8(e) of the NLRA, Amory, Selnick, and Marshall can sue for damages[463] under labor law, but coverage by § 8(b)(4) prevents a direct antitrust claim under the doctrine of primary jurisdiction.[464]

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462. *Id.* at 542.

463. 29 U.S.C. § 187.

464. *Compare* Baker v. IBP, Inc. 357 F.3d 685, 688 (7th Cir. 2004) (explaining that preemption has nothing to do with federal claims filed in federal court but that doctrines of primary jurisdiction and abstention may require federal court to defer exercise of jurisdiction pending action before NLRB) *and* Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 56 (1998) (holding that district court lacked jurisdiction over duty-of-fair-representation claim by actress denied a movie role because she did not pay union dues in advance; compliance with union-security clause proviso in 29 U.S.C. § 158(a)(3) was within primary jurisdiction of NLRB) *with* Smart v. Local 702, IBEW, 562 F.3d 798, 808-09 (7th Cir. 2009) (holding that state antitrust claim was completely preempted because

The § 8(b)(4)B)(ii) argument with respect to both Amory and Selnick is that the union is: "forcing or requiring any person [Amory and Selnick] . . . to cease doing business with any other person [Kendrick] . . . .[465] The elements are: (a) whether the union is (b) "forcing or requiring" [466] (c) someone to cease doing business with someone else, and (d) whether a literal violation is an actual violation, given that the target of the subsection is "secondary" pressure. What's the primary dispute?

VII.Hope for the future

The technology-driven revolution in the entertainment industries has enormous potential to enrich art, broaden the entertainment choices available to everyone, and increase the probability that artists can earn the personal fulfillment that comes from exposing their art to people who enjoy it. For that potential to be realized, however, legal and political institutions must embrace certain propositions about the revolution and its likely outcomes and be guided by certain other propositions about government intervention.

Economies of scale yield larger and larger bottlenecks that have the power to erect barriers to entry and are few enough in number to be organized effectively.[467]

The most promising fountains of creative innovation are too small to challenge the barriers and too numerous to be organized.

non-union contractor fired by construction project due to union pressure had arguable claim under section 8(b)(4)).

465. 29 U.S.C. § 158(b)(4)(B)(ii).

466. *See* Limbach Co. v. Sheet Metal Workers Int'l Ass'n, 949 F.2d 1241, 1255-56 (3d Cir. 1991) (finding that threat to cancel pre-hire agreement may constitute coercion under 8(b)(4); Sheet Metal Workers, Local Union No. 91 v. N.L.R.B., 905 F.2d 417, 421 (D.C. Cir. 1990) (finding coercion under 8(b)(4) from union threatening to withhold wage concessions unless employer agreed to terminate relations with non-union firms in violation of section 8(e)); N.L.R.B. v. Local 825, A,B,C,D, Int'l Union of Operating Engineers, 659 F.2d 379, 385 (3d Cir. 1981) (finding that warning by union business agent about non-union contractor coming on job site did not constitute "threat" under 8(b)(4)).

467. The Federal Circuit recognized the legitimacy of considering economies of scale on the pro-competitive side of the balancing in rule of reason analysis. Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1335 (Fed. Cir. 2010). The case involved a claim of patent misuse by an importer, alleging that horizontal agreements among patent holders to set standards violated the rule of reason. 616 F.3d at 1335. The court of appeals, agreeing with the Int'l Trade Commission, held that the pro-competitive effect of the standards for writable CDs past muster under rule of reason analysis; *See also* Golden Bridge Tech. Inc. v. Motorola, Inc., 547 F.3d 266, 273 (5th Cir. 2008) (rejecting Sherman Act claim that standards-enforcement activity violated rule of reason; considering economies of scale).

Governmental institutions are, for the most part, unlikely to fill the breach because they have been captured by the defenders of the old, who are terrified by the new and emerging empires that want to protect and enhance their market dominance. Because of this, the safest course is a presumption of legal abstention and reliance on markets to sort out supply and demand for new products. So far, the Internet has proven its capacity to facilitate largely unregulated markets in the entertainment and in other industries. Most of the threats to innovation have come from expansive interpretations of the scope of overaggressive enforcement of copyright and other forms of intellectual property. Traditional labor unions have played a miniscule role, and antitrust litigation has operated only at the margins. For the benefits of innovation in all forms of entertainment to enrich the future, the following four principles should guide policy:[468]

1. Enact Net Neutrality legislation and defend its principles against copyright-enforcement overreaching.

2. Do not try to break up Google, Amazon, or Netflix merely because they are big and dominate their markets. In *United States v. Falstaff Brewing Corp*.,[469] the Supreme Court recognized that technology may produce increasing economies of scale that lead to concentration in an industry—legitimate under the antitrust laws—while also making it easier for the smaller number of competitors to engage in "parallel policies of mutual advantage" rather than letting competition flourish.[470]

3. Re-educate the public, the judiciary, and the bar about copyright, trademark, and rights-of-publicity to counter the propaganda of the old guard.

4. Hope for more grassroots Internet-oriented movements such as the Net Neutrality movement and the anti-PROTECT IP SOPA movements.

468. *See* Henry H. Perritt, Jr., *The Internet at 20: Evolution of a Constitution for Cyberspace*, 20 WM. & MARY BILL RTS.J.. 1115, 1179 (2012) (arguing that the Internet's "constitution" has been validated by the Internet's success).

469. 410 U.S. 526 (1973).

470. *Id*. at 550-51 (reversing judgment for defendant in Clayton Act suit to enjoin acquisition of competing beer producer).

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