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REVISITING THE SPORTS BROADCASTING ACT OF 1961: A CALL FOR EQUITABLE ANTITRUST IMMUNITY FROM SECTION ONE OF THE SHERMAN ACT FOR ALL PROFESSIONAL SPORT LEAGUES

INTRODUCTION

Imagine today is Monday, a crisp fall day. After eight hours of work, two hours of commuting, and thirty minutes of waiting for the pizza delivery person, you grab a two-liter of cola, a bowl of potato chips, and a hot pizza. So what is missing? For millions of American households the answer is Monday Night Football¹ on television.² Viewers throw popcorn at the television set because their favorite five-million-dollar-a-year wide receiver dropped the football in the end zone. Meanwhile, they do not realize how much money is actually at stake in broadcasting the sporting event and how essential it is for the survival of the National Football League (NFL).³ As one court noted, "[Sporting events] provide[] a magnificent spectacle for television programs and television provides an excellent outlet and market for [sporting events]. They both can use and indeed need each other."⁴ In today's business of sports, revenue from televising games, for example on Monday Night Football, is a key piece of the revenue pie for any sport league and its teams.⁵ Professional sport leagues,

1. Monday Night Football is a weekly primetime broadcast of a National Football League (NFL) game on the American Broadcasting Company (ABC) that dates back to 1970. See generally William A. Sutton, *Marketing Principles Applied to Sport Management*, in PRINCIPLES AND PRACTICE OF SPORT MANAGEMENT 47 (Lisa Pike Masteralexis et al. eds., 1998) [hereinafter *SPORT MANAGEMENT*].

2. The top-rated network sports telecast for the third quarter of 2003 (July 1–September 30) was the September 8 Monday Night Football game featuring the Tampa Bay Buccaneers and the Philadelphia Eagles that approximately 14.14 million households watched. See *Nielsen Third-Quarter TV Report*, STREET & SMITH'S SPORTSBUSINESS J.: BY THE NUMBERS 2004, Dec. 29, 2003, at 83. Monday Night Football is "the longest-running hit show on network television." Tim Ashwell, *Sport Broadcasting*, in *SPORT MANAGEMENT*, *supra* note 1, at 380, 386.

3. The NFL is the premium professional football league. For more information, see NFL Home Page, at <http://www.nfl.com> (last visited Oct. 16, 2004).

4. *United States v. NFL*, 116 F. Supp. 319, 325 (E.D. Pa. 1953).

5. Major League Baseball (MLB) has national television rights deals, which generate on average a total of \$558.5 million dollars per year, that could have been easily used to pay for the sixty-five free agent player signings by various MLB teams during the 2002–2003 season, which totaled approximately \$206.6 million. See *Recent Television Rights Deals*, STREET & SMITH'S SPORTSBUSINESS J.: BY THE NUMBERS 2004, Dec. 29, 2003, at 84 [hereinafter *Television Rights*];

such as the NFL, pool all or some of their individual teams' broadcasting rights into contracts with national television networks.⁶ In 1962, the NFL, consisting of fourteen teams, received approximately \$325,000 per team in television revenues.⁷ In 1998, the NFL was able to command approximately \$75 million in guaranteed revenue for each of its thirty teams⁸ by pooling broadcasting rights into national packages.⁹ Currently, Major League Baseball (MLB) spreads revenue generated from its \$851 million, five-year deal with Entertainment Sports and Programming Network (ESPN),¹⁰ and its \$2.5 billion, five-year contract with Fox Broadcasting Company, equally among its member teams.¹¹

In order for professional sport leagues, such as the NFL and MLB, to spread large television revenues among their teams, the prevailing view of federal antitrust law, that anticompetitive restraints on trade and monopolies are undesirable in the U.S. free market system, must be confronted.¹² Individual teams give up the right to compete against each other for some or all of the revenue generated from their television broadcasting rights in order for the league to sell national

2002-2003 MLB Free Agent Signings, STREET & SMITH'S SPORTSBUSINESS J.: BY THE NUMBERS 2004, Dec. 29, 2003, at 111.

6. PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS 629 (2d ed. 1998).

7. See *id.*; see also NFL, NFL History, at <http://www.nfl.com/history/standings/1962> (last visited Oct. 15, 2004). In 1962, the NFL was not the only professional football league receiving revenue from television broadcasting deals. See generally *AFL v. NFL*, 323 F.2d 124 (4th Cir. 1963). The American Football League (AFL), which consisted of eight teams, competed with the NFL to be the premier provider of professional football in the United States. See *id.* at 126.

8. NFL, *supra* note 3.

9. WEILER & ROBERTS, *supra* note 6, at 629. The NFL's national packages include deals with ABC, Fox, Columbia Broadcasting System (CBS), and Entertainment and Sports Programming Network (ESPN). See *Television Rights*, *supra* note 5. For seasons played from 1998-2005, the NFL will receive \$17.6 billion from its television rights deals. See *id.* On average, the NFL receives \$2.2 billion per year. *Id.* The NFL's current television rights deals double its 1994-1997 deals with ABC, Fox, National Broadcasting Company (NBC), ESPN, and Turner Network Television (TNT), which totaled approximately \$1.1 billion per year. *Id.*

10. ESPN was founded in 1979. See ESPN, ABC Sports Customer Marketing and Sales, at http://www.espnabcsports.com/sales/adsales/portfolio/index.jsp?content=general_portfolio_expanded.html (last visited Oct. 15, 2004). ESPN was founded as a cable network dedicated to twenty-four hours of sports-related coverage, and the company has expanded to include several television networks, such as ESPN2, ESPN Classic, and ESPN Plus; a fully integrated website (www.espn.go.com) that includes live Internet radio and video highlights, and a biweekly publication, *ESPN The Magazine*. See *id.*

11. *Television Rights*, *supra* note 5, at 84. MLB's contract with ESPN runs from 2000 to 2005 and has an average annual value of \$141.8 million for the league. See *id.* MLB's contract with Fox runs from 2001 to 2006 and has an average annual value of \$416.7 million for the league. See *id.*

12. See, e.g., Sherman Act of 1890, 15 U.S.C. §§ 1-7 (2000).

broadcasting rights as a whole.¹³ The relationship between antitrust and the pooling of broadcast rights by professional sport leagues will be examined in this Comment. This area of antitrust law needs clarity and equity. As it stands now, only the four major professional sport leagues¹⁴ enjoy a limited immunity from antitrust litigation when selling horizontally pooled broadcasting rights to air channels.¹⁵ This limited immunity is unfair to other professional sport leagues. The immunity for the horizontal pooling of television broadcast rights should cover all available professional sport leagues and all television broadcasting opportunities to promote competition among professional sport leagues. Federal antitrust legislation can still be applied effectively in order to regulate the broadcasting of professional sports and to maintain an open, competitive broadcasting rights market.

Part II of this Comment explores the history of antitrust issues in sport broadcasting, including federal antitrust statutes and the Sports Broadcasting Act (SBA).¹⁶ Next, Part III demonstrates why equitable antitrust immunity for all professional sport leagues is necessary.¹⁷ Part III focuses on the expansion of the SBA's protection from section one liability for all professional sport leagues' pooling of broadcasting rights and the legitimate business justifications for section one immunity.¹⁸ Part III also evaluates how federal antitrust legislation could still be applied to broadcasting of professional sport leagues.¹⁹ Part IV explores the impact that such a change in federal antitrust law will have on the sports industry and sports broadcasting.²⁰ This Comment concludes that the expansion of federal antitrust immunity to all professional sport leagues promotes competition for broadcasting rights among leagues and provides an equal playing field for all professional sport leagues.²¹

II. BACKGROUND

In order to understand the modern antitrust problems with professional sport broadcasting, the evolution of the legal issues surrounding the industry must be explored. This section explains the applicable

13. See generally, e.g., WEILER & ROBERTS, *supra* note 6.

14. Football, basketball, baseball, and ice hockey are exempt from section one of the Sherman Act. See Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2000).

15. See *id.* §§ 1291-1295.

16. See *infra* notes 22-161 and accompanying text.

17. See *infra* notes 162-297 and accompanying text.

18. See *infra* notes 168-270 and accompanying text.

19. See *infra* notes 271-297 and accompanying text.

20. See *infra* notes 298-314 and accompanying text.

21. See *infra* note 315 and accompanying text.

federal antitrust statutes, explores the meaning and ramifications of the SBA, and concludes with the modern developments that have placed sport broadcasting in the antitrust limelight.

A. Applicable Federal Antitrust Statutes—Sections One and Two of the Sherman Act

In 1890, Congress, relying on its constitutional power to regulate interstate commerce,²² passed the first set of federal antitrust regulations in the United States.²³ "Congress 'wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements,'"²⁴ and thus "mandat[ed] for this nation a competitive business economy."²⁵ Antitrust laws are not meant to regulate the size, growth, or power of a particular business, but only meant to regulate unreasonable anticompetitive methods that may be used to obtain or maintain market power.²⁶ Of all the federal antitrust legislation enacted,²⁷ two provisions, section one and section two of the Sherman Act of 1890 (Sherman Act), most impact the sport broadcasting industry.²⁸

22. U.S. CONST. art. I, § 8, cl. 3.

23. Sherman Act of 1890, 15 U.S.C. §§ 1-7 (2000).

24. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974) (quoting *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944)).

25. *Gough v. Rossmore Corp.*, 487 F.2d 373, 375 (9th Cir. 1973). A competitive business economy "yield[s] 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." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

26. *United States v. N.Y. Great Atl. & Pac. Tea Co.*, 67 F. Supp. 626, 642 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949).

27. See 15 U.S.C. §§ 1-37 (2000) (including the Sherman Act of 1890 and the Clayton Act of 1914).

28. In order to bring an antitrust suit under the Sherman Act, a plaintiff must show standing in accordance with Article III of the Constitution. See *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 669 (7th Cir. 1992). Every plaintiff in an antitrust suit must show an injury to consumers in terms of reduction in output or higher prices. *Id.* at 670 (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990)); see also *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). The United States Court of Appeals for the Ninth Circuit summarized standing factors for private citizens, including "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1054 (9th Cir. 1999). Section four of the Clayton Act authorizes suits for damages by private parties. Clayton Act of 1914 § 4, 15 U.S.C. § 15 (2000). The Supreme Court has held that "indirect purchasers" do not have standing to bring antitrust suits against manufacturers of the product. *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1199 (S.D. Cal. 2002) (citing *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 728-29, 737-47 (1997)).

Section one of the Sherman Act states that "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."²⁹ Section one focuses on concerted activity that unreasonably restrains interstate commerce.³⁰ Claims under section one are analyzed either under the per se approach or the "rule of reason" approach.³¹ But only the rule of reason approach is used in sport-related cases because of the unique nature of sports.³² Courts have rejected applying the per se approach to the sports world.³³

A per se violation of section one occurs when a business "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."³⁴ In other words, some restraints are "presumed to have no benefit to competition in the industry."³⁵ With a per se violation, violators will not be given the opportunity to explain their particular market context.³⁶ If applying the rule of reason, professional sport leagues are given the opportunity to balance anticompetitive injuries with procompetitive benefits.³⁷ Leagues can provide business justifications for what might

29. Sherman Act of 1890, 15 U.S.C. § 1 (2000).

30. See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984) (needing a "plurality of actors . . . for a § 1 conspiracy"); *Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 484 (5th Cir. 1966) (stating that "[i]t is fundamental that at least two independent business entities are required for violation of [s]ection [one], while one alone is sufficient under [s]ection [two]"); *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1484 (D. Or. 1987) (stating that "[t]he essence of a [s]ection [one] action is concerted rather than unilateral action").

31. The dual approach to section one claims can be traced back to an 1898 opinion by Judge Taft, in which restraints on trade were placed into two categories: "contracts having no purpose but to restrain competition" and "ancillary" restraints. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 299, 291 (6th Cir. 1898), *aff'd*, 174 U.S. 211 (1899). The "rule of reason" was approved by the Supreme Court in 1911. See *Standard Oil Co. v. United States*, 221 U.S. 1, 66 (1911).

32. See *NCAA v. Bd. of Regents*, 468 U.S. 85, 98-102 (1984).

33. See *id.* at 103-04. The Supreme Court did not apply the per se analysis to college football. See *id.* The Court ruled that if it did, sport leagues would always be in per se violation of horizontal restraints on competition. *Id.* at 100-01. See also *Regents of Univ. of Cal. v. ABC*, 747 F.2d 511 (9th Cir. 1984) (criticizing the use of the rule of reason in price fixing and group boycott charges and suggesting that the per se analysis would be better).

34. *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979).

35. See generally Lisa Pike Masteralexis, *Antitrust and Labor Law: Professional Sport Application*, in *LAW FOR RECREATION AND SPORT MANAGERS* 664 (Doyce J. Cotton et al. eds., 2d ed. 2001). The per se test is generally applied in two situations: (1) when courts seek to avoid a long inquiry into an industry's business operations; and (2) when courts examine "agreements between traditional business competitors." *Id.*

36. See *Broad. Music*, 441 U.S. at 19-20.

37. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695-96 (1978).

appear to be an unreasonable restraint of trade.³⁸ To pass the rule of reason test, generally three elements must be shown.³⁹ First, there must be a conspiracy or an agreement among two or more persons.⁴⁰ Second, the agreement or conspiracy must be intended to restrain or harm competition.⁴¹ Finally, it must be proven that competition was actually restrained or harmed.⁴² Although sport leagues enjoy some judicial latitude by having the rule of reason applied, they often violate section one⁴³ because the application of either the per se analysis or rule of reason "does not change the ultimate focus of [the] inquiry"⁴⁴—the "competitive significance of the restraint."⁴⁵

Section two of the Sherman Act focuses on monopolies and their power to impact interstate trade.⁴⁶ The purpose of the monopoly provision is not to completely prohibit monopoly power, but to prohibit a person from maintaining or attempting to gain monopoly power in any part of commerce through the use of illegal trade practices.⁴⁷ As one court stated, "Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of [section two], provided it is coupled with the purpose or intent to exercise that power."⁴⁸

In order to prove a violation of section two, a person must have monopoly power in a defined product and geographic market.⁴⁹ Also, the person must have misused that power by using illegal means to acquire or maintain the monopoly.⁵⁰ Monopolies gained or main-

38. See *NCAA v. Bd. of Regents*, 468 U.S. 85, 104 (1984).

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

40. See *id.*

41. See *id.*

42. See *id.*

43. See generally, e.g., *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998); *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667 (7th Cir. 1992); *USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988).

44. *NCAA v. Bd. of Regents*, 468 U.S. 85, 103 (1984).

45. *Id.* (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692).

46. See *Standard Oil Co. v. United States*, 221 U.S. 1, 102-03 (1910). Section two states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty." Sherman Act of 1890, 15 U.S.C. § 2 (2000). For purposes of federal antitrust legislation, "person" is defined "to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." *Id.* § 7.

47. *United States v. Griffith*, 334 U.S. 100, 106-07 (1948).

48. *Id.* at 107 (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946)).

49. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *USFL v. NFL*, 842 F.2d 1335, 1358 (2d Cir. 1988).

50. *Grinnell*, 384 U.S. at 570-71.

tained "from growth or development as a consequence of a superior product, business acumen, or historic accident" are not illegal.⁵¹

Section two was intended to supplement section one.⁵² Although they may overlap in terms of the person's objectives, violations of section one and section two are legally distinct offenses⁵³ and the sections can be violated independently of each other.⁵⁴ But it is understood that monopoly power is a "species of restraint of trade;"⁵⁵ therefore, the "same kind of predatory practices may show violations of [both section one and section two]."⁵⁶ One of the main differences between section one and section two violations is the requirement of two or more actors for a section one violation.⁵⁷

B. Before 1961: The Early Fight Against Section One of the Sherman Act

As sporting events became more popular so did the broadcasting of such events. Until the 1950s, the right to broadcast games generally belonged to individual teams.⁵⁸ Thus, sport leagues did not have to worry about section one of the Sherman Act when their games were broadcast. As the sport broadcasting industry developed, however, professional sport leagues realized that pooling their teams' individual rights into packages to sell to national television networks would increase total league revenue and allow revenue sharing among their teams.⁵⁹ The NFL helped launch the concept of pooling broadcasting

51. *Id.* at 571.

52. *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1910). "[T]he [second] section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the [first] section be frustrated or evaded." *Id.*

53. *Am. Tobacco*, 328 U.S. at 788.

54. *Id.*; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 (1940). Conviction under both section one and section two for the same activity does not violate the Fifth Amendment's Double Jeopardy Clause. See *Am. Tobacco*, 328 U.S. at 787-88.

55. *White Bear Theatre Corp. v. State Theatre Corp.*, 129 F.2d 600, 602 n.3 (8th Cir. 1942) (quoting *Socony-Vacuum Oil*, 310 U.S. at 226 n.59).

56. *Md. & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 463 (1960). The penalties for violating section one and section two can be severe. See Clayton Act of 1914 §§ 4, 4A, 4C, 16, 15 U.S.C. §§ 15, 15a, 15c, 26 (2000). Violation of section one or section two is a felony punishable by fines up to \$350,000 for a non-corporation entity and up to \$10,000,000 for a corporation, or by imprisonment for up to three years. Sherman Act of 1890, 15 U.S.C. §§ 1-2 (2000). A private person and the U.S. Government may sue for treble damages and a State's Attorney General may bring a civil action on behalf of a natural person for treble damages. *Id.* §§ 15, 15a, 15c. Private persons can also seek injunctive relief. *Id.* § 26.

57. *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328, 332 (9th Cir. 1972); *Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 484 (5th Cir. 1966).

58. WEILER & ROBERTS, *supra* note 6, at 549.

59. *Id.* at 550.

rights, and as a reward for its forethinking, the NFL was named as the defendant in the important sport broadcasting lawsuit, *United States v. NFL (NFL I)*.⁶⁰

In 1953, the United States Department of Justice (DOJ) sought an injunction against the NFL.⁶¹ The NFL was concerned with new television technology that would allow any game to be telecasted in any part of the country, which threatened the territorial exclusivity principles included in the NFL Constitution.⁶² Therefore, the NFL sought "to limit the breadth of broadcasts of games played by any one team."⁶³ The DOJ challenged the NFL's restriction on live broadcasts of out-of-market games into the "home territory" of another team on a day that the home team was playing (either home or away).⁶⁴ Applying the rule of reason analysis under section one, the United States District Court for the Eastern District of Pennsylvania found that the NFL was "truly a unique business enterprise" and was allowed to put reasonable restraints on its teams.⁶⁵ Nevertheless, the court held that the NFL's prohibition on individual teams from selling broadcasting rights to competing television networks when the home team was playing in another market was an unreasonable restraint on trade.⁶⁶ But the court did uphold the NFL's restriction on broadcasting out-of-market games into a local market on days when the home team was playing.⁶⁷ The court found that the restriction had a reasonable business justification because the purpose was not to restrain competition.⁶⁸ Attendance at home team games could be affected when there were competing games on television and, in the 1950s, this was a big concern because gate receipts were the largest source of revenue.⁶⁹

60. 116 F. Supp. 319 (E.D. Pa. 1953).

61. *Id.* This was the first and only suit ever brought by the United States Department of Justice against any professional sport league. See WEILER & ROBERTS, *supra* note 6, at 550.

62. WEILER & ROBERTS, *supra* note 6, at 549.

63. *Id.* at 550. The NFL was concerned that more successful teams would be able to broadcast games into other teams' markets, which would impact gate revenues in the other markets. *Id.* at 549-50; *NFL*, 116 F. Supp. at 325.

64. *NFL*, 116 F. Supp. at 321. In Article X of the NFL's bylaws, a team's broadcasting "home territory" was a seventy-five mile radius from a team's city. See *id.*

65. *Id.* at 326.

66. *Id.* at 326-27.

67. *Id.* at 325.

68. *Id.*

69. *NFL*, 116 F. Supp. at 326. The court noted that "[t]he greatest part of the defendant clubs' income is derived from the sale of tickets to games." *Id.* at 325. The court did not consider the financial value of such contracts. See WEILER & ROBERTS, *supra* note 6, at 554.

In 1961, *NFL I* became a problem when the NFL decided to sell pooled broadcasting rights to Columbia Broadcasting System (CBS).⁷⁰ Fearing that the 1953 decision would have a negative effect on its ability to pool broadcasting rights, the NFL once again found itself in court.⁷¹ In the 1961 case, *United States v. NFL (NFL II)*,⁷² the NFL petitioned the United States District Court for the Eastern District of Pennsylvania to construe *NFL I* to allow its contract with CBS.⁷³ Because the CBS-NFL contract prohibited teams from selling broadcasting rights for their own games to any other television network, the court found that the NFL violated the *NFL I* decision.⁷⁴ The NFL's restriction on its member teams, which eliminated all competition for the sale of broadcasting rights, was an unreasonable restraint of trade.⁷⁵

C. Sports Broadcasting Act of 1961

In response to *NFL I* and *NFL II*, the NFL lobbied Congress to give them a special exemption from section one of the Sherman Act.⁷⁶ In granting the special interest legislation, Congress stated in section 1291 of the SBA that

[t]he antitrust laws, as defined in [s]ection [o]ne of the [Sherman] Act[,] . . . shall not apply to any joint agreement . . . by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games . . . engaged in or conducted by such clubs.⁷⁷

Legislative history of the SBA indicates that section 1291 should be read narrowly.⁷⁸ First, at the time of its enactment, the purpose of the SBA was to provide the NFL with the means to broadcast a team's

70. The NFL contract with CBS was in response to the AFL's league-wide contract with ABC. WEILER & ROBERTS, *supra* note 6, at 554. The AFL, now the American Football Conference (AFC) within the NFL, was a competitor of the NFL during the 1960s. *Id.*

71. See generally *United States v. NFL*, 196 F. Supp. 445 (E.D. Pa. 1961).

72. *Id.*

73. *Id.* at 446. The terms of the CBS-NFL contract included a two-year exclusive relationship between the NFL and CBS. *Id.* The \$4,650,000 from the contract was to be shared equally among the league and the fourteen teams in existence at that time. *Id.*

74. *Id.* at 447.

75. *NFL*, 196 F. Supp. at 447.

76. See Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291-1295 (2000).

77. *Id.* § 1291.

78. See *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-5184, 1998 U.S. Dist. LEXIS 9896, at *10-11 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999).

road games into its home territory,⁷⁹ thereby allowing the NFL to bypass the adverse 1961 federal district court decision in *NFL II*.⁸⁰ Second, the United States House of Representatives made it clear that the "[SBA] does not apply to closed circuit or subscription television."⁸¹ Third, even the NFL Commissioner, Pete Rozelle,⁸² acknowledged to the House Antitrust Subcommittee that the statute would only apply to free television.⁸³ In addition to the legislative history that indicates a narrow exemption from section one of the Sherman Act, the Supreme Court has held that exemptions from antitrust regulations should be construed narrowly.⁸⁴

The scope of the SBA is also narrowed by the statutory language itself in that it only exempts the pooled broadcasting rights of four professional sports from section one of the Sherman Act.⁸⁵ Furthermore, sections 1292–1294 of the SBA narrows the protection even more.⁸⁶ Section 1294 states that the SBA

shall [not] be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey.⁸⁷

79. *USFL v. NFL*, 842 F.2d 1335, 1347 (2d Cir. 1988) (citing S. REP. NO. 87–1087, at 1 (1961), reprinted in 1961 U.S.C.A.N. 3042, 3042).

80. *Id.*

81. *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *10–11 (quoting *Telecasting of Professional Sports Contests: Hearing Before the Antitrust Committee of the House Comm. on the Judiciary on H.R. 8757*, 87th Cong. 4 (Sept. 13, 1961)). A closed circuit television (CCTV) system consists of a finite, predetermined group of televisions that receive live or recorded signals over a closed loop. See The Museum of Broadcast Communications, Closed Circuit Television, at <http://www.museum.tv/archives/etv/C/htmlC/closedcircuit/closedcircuit.htm> (last visited Mar. 8, 2005). Technically, cable television is CCTV; however, the term CCTV is often associated with security and surveillance systems and "in house" television channels. *Id.*

82. Pete Rozelle was the commissioner of the NFL from 1960–1989. See Pro Football Hall of Fame, Pete Rozelle, at http://www.profootballhof.com/hof/member.jsp?player_id=185 (last visited Oct. 15, 2004).

83. *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *1 (citing *Telecasting of Professional Sports Contests: Hearing Before the Antitrust Committee of the House Committee on the Judiciary on H.R. 8757*, 87th Cong. 36 (Aug. 28, 1961)). While testifying before the United States House of Representatives, NFL Commissioner Pete Rozelle was asked: "You understand, do you not, Mr. Rozelle, that this Bill covers only the free telecasting of professional sports contests, and does not cover pay T.V.?" *Id.* Pete Rozelle replied: "[A]bsolutely." *Id.*

84. See, e.g., *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982).

85. Only football, basketball, baseball, and ice hockey are protected from litigation in cases involving pooled broadcasting rights. There is no protection for other professional sports or amateur sports. See Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291, 1294 (2000).

86. See *id.* §§ 1292–1294.

87. *Id.* § 1294.

Section 1292 also states that "black outs" of games in a "home territory" are only allowed when the home team is playing a home game that particular day.⁸⁸ Furthermore, section 1293 puts more restrictions on professional football leagues when broadcasting games on Friday nights and Saturday.⁸⁹

D. After the Sports Broadcasting Act of 1961—Trying to Clarify the SBA and Section One of the Sherman Act with Modern Developments

At the time Congress passed the SBA, air channels, for all intents and purposes, were the only broadcast option available for leagues to sell broadcast rights.⁹⁰ Thus, any television contract involving the four professional sport leagues fell under the "sponsored telecasting of the games" language of section 1291.⁹¹ But as broadcasting technology has evolved, so have the antitrust issues affecting the sport broadcasting industry.⁹² The narrow interpretation of the SBA is also problematic in light of new broadcasting developments, such as the proliferation of cable and satellite television.⁹³ Along with professional sport leagues not protected by the SBA, the four major professional leagues were again faced with antitrust challenges under section one.⁹⁴

The first antitrust challenges testing the section one exemption in the SBA dealt with air channels.⁹⁵ Only three issues have surfaced when broadcasting over air channels. First, a federal district court found the antitrust exemption applies to the pooling of broadcasting

88. *Id.* § 1292. This is consistent with the basis for the decision in *United States v. NFL* that game receipts and attendance were "reasonable" reasons for limiting telecasts when a team is playing at home. See *United States v. NFL*, 116 F. Supp. 319, 325–26 (E.D. Pa. 1953).

89. 15 U.S.C. § 1293. This provision was enacted to protect "intercollegiate and interscholastic football" from professional football broadcasting games after six o'clock on Friday nights and all day Saturday from the second Friday in September to the second Saturday in December on stations within seventy-five miles of any college or high school football contest. *Id.* Essentially, professional football is banned from playing games on Friday nights and Saturdays, unless they are willing to forego broadcasting revenue from those games. *Id.*

90. For a picture of a 1961 primetime television programming guide, which lists ABC, NBC, and CBS as the only options available for viewers, see *Television History—The First 75 Years, 1960–2000 TV Guide (USA)*, at http://www.tvhistory.tv/1961_TV_Programs.jpg (last visited Oct. 15, 2004).

91. 15 U.S.C. § 1291.

92. See generally, e.g., *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999); *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667 (7th Cir. 1992); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002).

93. See cases cited *supra* note 92.

94. See cases cited *supra* note 92.

95. See, e.g., *Blaich v. NFL*, 212 F. Supp. 319 (S.D.N.Y. 1962). For the purposes of this Comment, "air channels" means free, over-the-air, local broadcasts.

rights of playoff and championship games along with regular season games.⁹⁶ Second, "black outs" in "home territories" apply to television stations whose signals penetrate the "home territory."⁹⁷ Third, the SBA is not only limited to pooled broadcasting packages that sell every contest the league produces, but also allows leagues to sell packages for a certain number of games.⁹⁸ Thus, the league may sell a set number of games for national television and allow teams the right to sell their broadcasting rights on an individual basis to local television stations.⁹⁹

The meaning of "sponsored telecasting of the games" in section 1291 of the SBA, however, has been narrowly construed in cases not involving air channels.¹⁰⁰ In a series of court battles, all entitled *Chicago Professional Sports Ltd. Partnership v. NBA*,¹⁰¹ WGN, a superstation¹⁰² in Chicago, Illinois, challenged the policy of the National Basketball Association (NBA) to pool national broadcasting rights and the effects of this policy on the Chicago Bulls's ability to sell its broadcasting rights to WGN.¹⁰³ The cases revolved around a restriction on superstations from broadcasting the same night as Turner Network Television (TNT), a cable network that purchased a pooled broadcasting game package from the NBA.¹⁰⁴ Although the litigation ended in a settlement between the parties, the courts still had an opportunity to consider whether the SBA's exemption applied to cable broadcasting.¹⁰⁵ The district court found, and the United States Court

96. *Id.* at 319 (examining whether section 1292's "black out" provision could be used to black-out a championship game in a "home territory").

97. *WTWV v. NFL*, 678 F.2d 142, 145-46 (11th Cir. 1982) (noting that even if stations are physically located outside the defined "home territory," a game can still be "blackened out" when its signal penetrates the "home territory").

98. See *Chi. Prof'l Sports*, 961 F.2d at 670.

99. See *id.*

100. See, e.g., *Shaw*, 172 F.3d at 301-02; *Chi. Prof'l Sports*, 961 F.2d at 670; *Kingray*, 188 F. Supp. 2d at 1183.

101. *Chi. Prof'l Sports*, 95 F.3d 593 (7th Cir. 1996), *rev'g* 874 F. Supp. 844 (N.D. Ill. 1995); *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667 (7th Cir. 1992), *aff'g* 754 F. Supp. 1336 (N.D. Ill. 1991); *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 808 F. Supp. 646 (N.D. Ill. 1992).

102. For the purpose of this Comment, "superstations" are local television stations (air channels in their home area) televised nationally over cable programming or satellite television.

103. See generally *Chi. Prof'l Sports*, 754 F. Supp. 1336.

104. See *id.*

105. *Chi. Prof'l Sports*, 95 F.3d 593, *rev'g* 874 F. Supp. 844 (looking at the single entity defense to section one of the Sherman Act); *Chi. Prof'l Sports*, 961 F.2d 667, *aff'g* 754 F. Supp. 1336 (holding that the NBA's reduction of the number of games individual teams could sell to superstations was an unreasonable restraint of trade); *Chi. Prof'l Sports*, 808 F. Supp. 646 (denying the NBA's partial summary judgment motion to the antitrust challenge of the "NBA Superstation Same Night Rule"). At the center of all of the courthouse visits was the NBA's \$180 million contract for the 1991-92 season with NBC and TNT. See WEHLER & ROBERTS, *supra* note 6, at 558.

of Appeals for the Seventh Circuit agreed, that cable stations are not "sponsored" broadcasts and limited SBA's application to "free commercial television" and not "subscription television."¹⁰⁶ The Seventh Circuit stated that "[w]hat the industry obtained, the courts enforce; what it did not obtain from the legislature—even if similar to something within that exception—a court should not bestow."¹⁰⁷ Applying the rule of reason, the court held that the NBA must allow individual teams to sell their rights to games that were not included in the national package; therefore, the NBA could not limit the number of games teams are allowed to telecast on superstations, although broadcasting on a superstation might "compete" with the national broadcasting package.¹⁰⁸

Like the analysis used in cable broadcasting, section 1291's "sponsored telecasting" provision has been interpreted narrowly to limit the SBA's exemption to air channels in cases involving satellite companies.¹⁰⁹ Satellite companies provide a broadcast alternative to cable programming by selling television programming through the use of satellites, satellite dishes, and receivers.¹¹⁰ As of August 2003, one in five American households with televisions received their programming through satellite television.¹¹¹ Leagues sell broadcasting rights for all of their season's games to a satellite television company.¹¹²

In *Shaw v. Dallas Cowboys Football Club, Ltd.*,¹¹³ three private citizens filed a class action suit against the NFL claiming that the NFL's satellite programming package of all league games broadcast under the pooled national television contracts¹¹⁴ violated section one.¹¹⁵ The plaintiffs claimed that "NFL Sunday Ticket" reduced competition

106. *Chi. Prof'l Sports*, 808 F. Supp. at 649–50.

107. *Chi. Prof'l Sports*, 961 F.2d at 671.

108. *Id.* at 667.

109. See generally, e.g., *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97–5184, 1998 U.S. Dist. LEXIS 9896, at *1 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002).

110. See Satellite Broadcasting and Communications Association, Satellite Services Overview, at <http://www.sbca.com/mediaguide/satservices.htm> (last visited Oct. 15, 2004).

111. Satellite Broadcasting and Communications Association, *U.S. DBS Satellite Television Subscribers Tops 20 Million Mark* (Aug. 20, 2003), at <http://www.sbca.com/press/082003.htm>.

112. E.g., "NFL Sunday Ticket," "NBA League Pass," and "NHL Center Ice." See DirecTV, NFL Sunday Ticket, at <http://www.directvsports.com/Subscriptions/NFLSundayTicket> (last visited Oct. 15, 2004); NBA, NBA League Pass, at http://www.nba.com/nba_tv/league_pass.html (last visited Feb. 4, 2005); NHL, NHL Center Ice, at <http://nhl.com/nhlhq/centerice/index.html> (last visited Oct. 15, 2004).

113. No. 97–5184, 1998 U.S. Dist. LEXIS 9896, at *1 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999).

114. The NFL pools all of its games into national broadcasting packages. Ashwell, *supra* note 2, at 385. The individual teams retain no right to sell broadcasting rights for regular season and playoff games. *Id.*

and artificially raised prices because it restricted the options available for non-network broadcasts of NFL games.¹¹⁶ The United States District Court for the Eastern District of Pennsylvania¹¹⁷ rejected the NFL's argument that the SBA's exemption applied because the NFL retained partial rights to games broadcasted on "sponsored" television, and held that a satellite television package was only one way to sell those retained rights in "sponsored telecasts."¹¹⁸ In an interlocutory review, the United States Court of Appeals for the Third Circuit held that the SBA did not protect the NFL's sale of games for satellite programming packages.¹¹⁹ The district court, in denying the NFL's motion to dismiss, held that the plaintiffs could have a claim under federal antitrust laws.¹²⁰ The case was later settled without resolving the antitrust challenges at issue.¹²¹

In *Kingray, Inc. v. NBA*,¹²² however, a court examined the question left open in *Shaw*—whether the practice of selling "out-of-market" game packages to satellite companies was a violation of antitrust laws.¹²³ The plaintiffs, private individuals and commercial establishments, brought a class action against the NBA and DirecTV¹²⁴ over the satellite programming package of "NBA League Pass."¹²⁵ The plaintiffs alleged four theories under section one of the Sherman Act, all of which were rejected by the court.¹²⁶ First, the plaintiffs argued that the contract between the NBA and DirecTV was a vertical price-fixing scheme.¹²⁷ Because the NBA did not advise DirecTV on the

115. See generally *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *1. In order to receive the NFL's satellite-packaged games, a household must own a satellite dish, subscribe to a satellite provider, and pay a flat fee of \$139 for the entire season. *Id.* at *2-3.

116. *Id.* at *14-15.

117. The same court found that the pooling of broadcasting rights by the NFL violated section one. See *United States v. NFL*, 196 F. Supp. 445 (E.D. Pa. 1961); *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953).

118. *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *7.

119. *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 303 (3d Cir. 1999).

120. *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *14.

121. The parties looked to settle this dispute, but the settlement agreement was not approved by the court. See *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 564 (E.D. Pa. 2001).

122. 188 F. Supp. 2d 1177 (S.D. Cal. 2002).

123. *Id.*; see *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *2.

124. DirecTV is a satellite subscription service. See *Satellite Broadcasting and Communications Association*, *supra* note 110.

125. *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177, 1188 (S.D. Cal. 2002).

126. *Id.*

127. *Id.* Vertical price fixing "occurs when a supplier attempts to fix the prices charged by those who resell its products." *Id.* For the difference between vertical and horizontal restraints, see *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal

amount to charge for the service, but only stipulated a wholesale price to be paid by DirecTV to the NBA, the United States District Court for the Southern District of California found that the plaintiffs failed to show vertical price fixing by the defendants.¹²⁸ Second, the plaintiffs argued that the NBA and DirecTV vertically conspired to limit the output of live broadcasts.¹²⁹ Given that "black outs" only occurred when the game was available on another channel, the court found that the defendants did not limit the number of games normally available on television.¹³⁰ Third, the plaintiffs alleged that the NBA and DirecTV unlawfully restrained trade by entering into an exclusive distributorship of "NBA League Pass."¹³¹ The court found that trade was not restrained because an exclusive agreement is not a per se anti-trust violation.¹³² DirecTV was not the exclusive provider of "NBA League Pass,"¹³³ and the agreement between DirecTV and the NBA did not intend to harm competition.¹³⁴ An exclusive agreement is not a violation unless it is "intended to or actually does harm competition in the relevant market."¹³⁵ Finally, the plaintiffs claimed that the defendants horizontally conspired to fix prices and divide the market.¹³⁶ The court found that the NBA and DirecTV were not competitors; therefore, they could not horizontally conspire.¹³⁷ The court also noted that the plaintiffs did not allege a tying agreement;¹³⁸ therefore, the court left the issue open.¹³⁹

Antitrust litigation involving pooled broadcasting rights has not been limited to the four professional sports referred to in the SBA.¹⁴⁰ College football, like the other professional sport leagues, does not enjoy the limited protection of the SBA.¹⁴¹ *NCAA v. Board of Re-*

restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.").

128. See *Kingray*, 188 F. Supp. 2d at 1191.

129. See *id.* at 1188.

130. *Id.* at 1195.

131. *Id.* at 1188.

132. Per se analysis is generally not applied to sport cases because of the nature of the business. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 103-04 (1984).

133. "NBA League Pass" was also available to cable customers through iN Demand, a pay-per-view system. See *Kingray*, 188 F. Supp. at 1198.

134. *Id.* at 1197-98.

135. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987).

136. *Kingray*, 188 F. Supp. at 1188.

137. *Id.* at 1198.

138. Tying agreements occur when one party conditions the sale of his product upon the purchase of another product. See, e.g., *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 549, 605 (1953).

139. *Kingray*, 188 F. Supp. 2d at 1200.

140. See generally *NCAA v. Bd. of Regents*, 486 U.S. 85 (1984).

141. See Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2000).

gents of the University of Oklahoma¹⁴² played a key role in shaping the broadcasting of college sports.¹⁴³ In that case, the University of Oklahoma and the University of Georgia challenged television broadcasting restrictions for Division I football¹⁴⁴ imposed by the National Collegiate Athletic Association (NCAA).¹⁴⁵ The restrictions at issue included the number of football games each member university could televise during a particular season, the number of football games made available to the public, and the ban on universities contracting with broadcasting outlets on their own.¹⁴⁶ The United States Supreme Court ruled that the NCAA's rules were unreasonable horizontal restraints that resulted in higher prices and lower output of televised games.¹⁴⁷

E. Sport Broadcasting and Section Two of the Sherman Act

Section two of the Sherman Act also plays an important role in sport broadcasting antitrust litigation. Under the SBA, section 1291 specifically states that its antitrust exemption only applies to section one of the Sherman Act.¹⁴⁸ Therefore, section two applies equally to all sport leagues.¹⁴⁹ In *USFL v. NFL*,¹⁵⁰ the United States Football League (USFL) filed suit against the NFL claiming that the NFL monopolized the television market and that its broadcasting contracts were unreasonable restraints of trade.¹⁵¹ The United States Court of Appeals for the Second Circuit affirmed the jury's decision that the NFL willfully acquired or maintained monopoly power in professional football within the United States and that the USFL was injured by the NFL's monopoly power.¹⁵² But the jury only awarded the USFL

142. 486 U.S. 85 (1984).

143. See generally *id.*

144. See *NCAA*, 468 U.S. at 85.

145. The National Collegiate Athletic Association (NCAA) is a non-profit association that acts as the governing body for college athletics at more than 1,250 schools, conferences, and organizations. See *NCAA, Membership*, at http://www2.ncaa.org/about_ncaa/membership (last visited Oct. 15, 2004).

146. *NCAA*, 468 U.S. at 90-94.

147. *Id.* at 104, 107.

148. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2000).

149. Cf. Sherman Act of 1890, 15 U.S.C. § 2 (2000) (exempting professional football, basketball, baseball, and ice hockey from section one claims).

150. 842 F.2d 1335 (2d Cir. 1988), *aff'd* 634 F. Supp. 1155 (S.D.N.Y. 1986). The United States Football League (USFL) competed with the NFL for three seasons during the 1980s. *Id.* at 1340.

151. See *id.* at 1341. At the time of the case, the NFL had contracts with three major television networks. See *id.*

152. See *id.*

one dollar in damages (trebled to three dollars).¹⁵³ The jury declined to find that the NFL's television contracts restrained trade, and that the contracts interfered with the USFL's lack of a television contract.¹⁵⁴ The NFL did not deny the USFL access to the "essential facility" of network television because

television contracts [are] not unreasonable restraints of trade[,] . . . the NFL did not control access to the three major television networks[,] . . . and . . . the NFL did not interfere either with the USFL's ability to obtain a fall television contract or with its spring television contracts.¹⁵⁵

Although the NFL had a monopoly in professional football, the NFL did not monopolize the television market or attempt to do so.¹⁵⁶

F. Baseball's Antitrust Exemption

It is important to note that professional baseball enjoys a unique status in federal antitrust law.¹⁵⁷ In 1922, baseball won a major Supreme Court victory in *Federal Baseball Club v. National League*,¹⁵⁸ when the Court ruled that professional baseball was immune from antitrust legislation.¹⁵⁹ In 1972, the Supreme Court acknowledged that the immunity might be "unrealistic, inconsistent, or illogical," but the Court refused to overrule the exemption, stating that it is up to Congress to fix the inconsistency.¹⁶⁰ In 1998, Congress finally confronted and removed baseball's antitrust exemption for issues dealing with "employment of major league baseball players."¹⁶¹

153. See *id.* A private person may "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Clayton Act of 1914, 15 U.S.C. § 15 (2000).

154. See *USFL*, 842 F.2d at 1341.

155. *Id.*

156. See *id.*

157. See generally Roger I. Abrams, *The Curt Flood Act: Before the Flood: The History of Baseball's Antitrust Exemption*, 9 MARQ. SPORTS L.J. 307 (1999).

158. 259 U.S. 200 (1922).

159. *Id.* Congress included baseball as an exempt sport in the Sports Broadcasting Act (SBA) although it already enjoyed blanket antitrust immunity. This hints that Congress did not completely agree with the judicially created immunity for baseball. See Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2000).

160. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). The scope of the exemption has been challenged on several occasions. See, e.g., *Piazza v. MLB*, 831 F. Supp. 420 (E.D. Pa. 1993).

161. Curt Flood Act of 1998, 15 U.S.C. § 26b (2000). See generally J. Philip Calabrese, *Recent Legislation: Antitrust and Baseball*, 36 HARV. J. ON LEGIS. 531 (1999); Joshua P. Jones, Note, *A Congressional Swing and Miss: The Curt Flood Act, Player Control, and the National Pastime*, 33 GA. L. REV. 639 (1999).

III. ANALYSIS

A professional sport league should have the right to horizontally pool its individual teams' rights into a television broadcasting package. Furthermore, the SBA should be expanded to cover all forms of television broadcasting mediums. Leagues' legitimate business interests justify the expansion of the SBA's immunity from section one of the Sherman Act to all professional sport leagues.

The current state of law regarding the horizontal pooling of broadcasting rights for professional sport leagues is confusing and difficult to apply. Currently, only certain leagues enjoy immunity in particular broadcasting mediums.¹⁶² However, all professional sport leagues operate in essentially the same manner,¹⁶³ and leagues should be free to compete effectively with each other for television contracts regardless of which sport they govern. When certain sports are given protected status while others are not, disparity is created and anticompetitive situations are allowed to flourish without judicial restraint.¹⁶⁴

Expansion of the SBA does not mean professional sport leagues will be completely immune from antitrust liability. Section one could still be applied to the actual contracts between professional sport leagues and broadcasting networks to prevent vertical restraints on trade.¹⁶⁵ Also, section two of the Sherman Act would still be present as a source of liability for professional sport leagues.¹⁶⁶ Leagues can still be liable for illegally maintaining a monopoly or illegally attempting to monopolize television broadcasting opportunities.¹⁶⁷

162. 15 U.S.C. § 1291.

163. Professional sport leagues seek to have all of their teams financially viable and competitive on the playing field regardless of whether the league is structured as a single entity or teams are individually owned. See *Fraser v. MLS, L.L.C.*, 284 F.3d 47, 53 (1st Cir. 2002); Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 24 (1982).

164. See Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 893, 923-24 (1999) (stating that every team has an opportunity to compete for a championship because of league rules such as revenue sharing, salary restrictions, and the player draft system); *United States v. NFL*, 116 F. Supp. 319, 323 (E.D. Pa. 1953) (acknowledging that "[i]f all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure"); Grauer, *supra* note 163, at 24 (suggesting that "one of the major causes of the failure of the All-America Conference, a league that competed with the NFL in the 1940's, was the near-total domination of the Conference by the Cleveland Browns").

165. See, e.g., *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002).

166. See Sherman Act of 1890, 15 U.S.C. § 2 (2000).

167. See *id.*

A. *Sport Broadcasting Under Section One of the Sherman Act*

Antitrust legislation has always focused on the effects that restraints of trade have on the free market and consumers.¹⁶⁸ Not all restraints of trade are "unreasonable" and not all restraints negatively affect the free market.¹⁶⁹ Thus, section one of the Sherman Act allows for reasonable and procompetitive restraints, and cases involving horizontal pooling of broadcasting rights are just that.¹⁷⁰ One of the main intentions of the SBA was to give consumers more opportunities to view sporting events.¹⁷¹ Expanding immunity to all professional sport leagues that wish to horizontally pool their individual teams' television broadcasting rights will increase competition on and off the field. Even recent court decisions recognize that professional sport leagues' practice of pooling broadcasting rights does not harm consumers.¹⁷² On several occasions, courts have acknowledged that the sports business is different from any other economic venture.¹⁷³ Professional sport leagues have legitimate business justifications for wanting to control individual teams' broadcasting rights.

I. *Expansion of the Sports Broadcasting Act's Immunity from Section One Liability*

A broader understanding is needed under the SBA for all professional sport leagues that decide to horizontally pool their individual teams' broadcasting rights. All television broadcasting opportunities, such as cable, pay-per-view, and satellite, should be made available,

168. See *Lee-Moore Oil Co. v. Union Oil Co.*, 441 F. Supp. 730, 735-36 (M.D.N.C. 1977) ("The antitrust laws were designed to prevent restraints to free competition in business and commercial transactions . . . which tend to restrict production, raise prices, or otherwise control the market place to the detriment of the purchaser or consumers of goods and services.").

169. For a discussion on reasonable restraints of trade on employment in terms of state antitrust laws, see Jeb Boatman, Note, *Contract Law: As Clear as Mud: The Demise of the Covenant Not to Compete in Oklahoma*, 55 OKLA. L. REV. 491, 499 (2002). See generally Peter Nealis, Note, *Per Se Legality: A New Standard in Antitrust Adjudication Under the Rule of Reason*, 61 OHIO ST. L.J. 347 (2000).

170. See *Bd. of Trade v. United States*, 246 U.S. 231, 238 ("The true test of legality is whether the restraint imposed is such [that it] merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

171. See Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 469 (1990). One of the purposes of the SBA was to allow the NFL to package games in order to ensure that a team's territory would receive broadcasts of its road games. *Id.*

172. See, e.g., *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-5184, 1998 U.S. Dist. LEXIS 9896, at *1 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002). Consumers claimed injuries from horizontal and vertical price fixing, output limitation, and exclusive dealing due to league-held contracts with television broadcasting outlets. See, e.g., *id.*

173. See generally, e.g., *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953).

and all professional sport leagues should be able to explore those opportunities without fear of liability under section one of the Sherman Act.

Expansion of section 1291's immunity for the four major professional sports of baseball, basketball, football, and ice hockey beyond "sponsored" telecasts would not be enough.¹⁷⁴ The anticompetitive effect would be much greater than the SBA's narrow interpretation, and it would not even the playing field for the other professional sport leagues.¹⁷⁵ Such leagues would have to deal with section one of the Sherman Act while the four monopolistically minded professional leagues¹⁷⁶ would enjoy even greater protection for their business decisions. Struggling leagues like Major League Soccer (MLS),¹⁷⁷ the Women's United Soccer Association (WUSA),¹⁷⁸ and professional minor leagues would still be potentially liable for holding a national network television deal. Although not a professional sport league, the NCAA has faced such liability.¹⁷⁹ Because of the adverse decision in *Board of Regents*, the NCAA stepped out of the broadcast contracting business, except for some championship games.¹⁸⁰ Leagues that compete with the four professional leagues still cannot pool any broadcast rights, regardless of the buyer.¹⁸¹ If the SBA exemption is expanded to include all professional sport leagues, it would promote competition among all of the professional sport leagues. It is harder for the other professional sport leagues to compete with the four major pro-

174. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2000).

175. See *USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988).

176. See, e.g., *id.*

177. The MLS tried to immunize itself from all section one liability by structuring as a "single entity." See *Fraser v. MLS, L.L.C.*, 97 F. Supp. 2d 130, 131-32 (D. Mass. 2000), *aff'd*, 284 F.3d 47 (1st Cir. 2002). However, the United States Court of Appeals for the First Circuit strongly suggested that the MLS's business structure was not a "single entity," but avoided the issue by focusing on the lack of a relevant market. See *Fraser*, 284 F.3d at 53 (reviewing an antitrust challenge to the MLS's player reserve system).

178. In September 2003, the Women's United Soccer Association (WUSA) suspended its operations indefinitely. See WUSA, About WUSA, at <http://wusa.com/about> (last visited April 20, 2005). It had received "insufficient revenue from . . . core areas of the business" and had not achieved the sponsorship levels needed to attain its plan to break even by its fifth season. See WUSA, *WUSA Suspends Operations* (Sept. 15, 2003), at <http://www.mysoccer.com/wusa3/wusa0915.phtml> (quoting John Hendricks, Chairman of the WUSA Board of Governors); see Jennifer Lee, *Thin Ratings, Lack of Sponsors Trip WUSA*, STREET & SMITH'S SPORTSBUSINESS J., Sept. 22-28, 2003, at 4. In December 2004, the Women's Soccer Initiative, Inc. was formed to assist the re-launch of the league in 2005 and beyond. See WUSA, *Women's Soccer Initiative, Inc. (WSII) to Steer WUSA Re-launch* (Dec. 7, 2004), at <http://wusa.com/news/?id=1723>.

179. See generally *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

180. See *NCAA, Television: A Brief History of NCAA Television Coverage*, at <http://www.ncaa.org/about/tv.html> (last visited Mar. 17, 2005).

181. This is so because the SBA only exempts the four major professional sport leagues. See Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2000).

fessional sport leagues when they are not allowed to pool broadcast rights without fearing antitrust liability.

The United States Olympic Committee (USOC), although not a professional sport league, is run much in the same way as professional sport leagues.¹⁸² The USOC is comprised of National Governing Bodies (NGBs) overseeing each Olympic sport.¹⁸³ Each NGB can be considered an individual "team" for the "USOC league." Presently in the United States, one network and its affiliates, including cable networks, broadcast the Olympic Games under the direction of the USOC.¹⁸⁴ If the "USOC league" was not able to pool its "teams" into one national broadcasting package, then some "teams" would be able to command more and better network time while other "teams" would receive little or no media coverage.¹⁸⁵ As such, should networks be allowed to bid on certain Olympic events and not others? In the spirit of the Olympic movement and its promotion of amateur sport, the answer should be "of course not." It would destroy the competitive balance needed for sports to survive.¹⁸⁶ Like the USOC, all professional sport leagues should be allowed to promote all of their teams through the use of broadcasting packages without fear of federal antitrust liability.

There is no doubt that the SBA was special interest legislation sought by the NFL.¹⁸⁷ Legislative history clearly indicated that the SBA should only apply to free television, not subscription televi-

182. The United States Olympic Committee (USOC) oversees the Olympic movement within the United States. See James M. Gladden & Mireia Lizandra, *International Sport*, in *SPORT MANAGEMENT*, *supra* note 1, at 208, 223. The U.S. government chartered the USOC in the Amateur Sports Act of 1978. See Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501-220512 (2000).

183. See Gladden & Lizandra, *supra* note 182, at 225-26.

184. Each set of Olympic Games is played every four years with the Summer Games and the Winter Games operating on a staggered two-year plan. See International Olympic Committee, Olympic Games, at http://www.olympic.org/uk/games/index_uk.asp (last visited Oct. 15, 2004); International Olympic Committee, Organisation, at http://www.olympic.org/uk/organisation/index_uk.asp (last visited Mar. 30, 2005). For example, NBC bought the broadcasting rights for 2004 Olympic Summer Games in Athens, Greece that provided twenty-four hour coverage by televising events on NBC, MSNBC, and CNBC. Sports Illustrated, *NBC Plans Extensive Olympic Coverage*, available at http://sportsillustrated.cnn.com/olympics/news/2003/02/05/olympics_tv/ (posted on Feb. 5, 2003).

185. Certain Olympic events draw more viewers than others and help boost television viewership. See generally Richard Sandomir, *Ratings Win Gold for NBC*, N.Y. TIMES, Aug. 28, 2004, at D3.

186. Competitive balance is the concept that all teams can compete evenly on and off the field. See Grauer, *supra* note 163, at 24.

187. See *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-5184, 1998 U.S. Dist. LEXIS 9896, at *10-11 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999); *USFL v. NFL*, 842 F.2d 1335, 1347 (2d Cir. 1988).

sion.¹⁸⁸ But Congress could not have been aware of the technological advances that have produced the vast opportunities for pooling television broadcasting rights that exist today.¹⁸⁹ Presently, there is little difference between a professional sport league selling its pooled broadcasting rights either to the National Broadcasting Company (NBC), a free air channel, or to ESPN—a basic cable network.¹⁹⁰ For example, one in five television-watching households in the United States has a subscription to satellite programming, which includes ESPN as a standard channel.¹⁹¹ By contrast, in the 1960s there were only three national networks.¹⁹² And although there are many more broadcasting opportunities available to professional sport leagues and more viewing options for consumers, in cases such as *Chicago Professional Sports* and *Shaw*, the courts have narrowly construed “sponsored” to cover only “free commercial television.”¹⁹³

In *Chicago Professional Sports*, one of the main concerns was an individual team’s right to compete for broadcasting revenue with other teams in the same league.¹⁹⁴ But the court only alluded to an important aspect of the relationship between a league and its individual teams.¹⁹⁵ When a team owner decides to purchase a team, he or she agrees to follow the league’s rules and to keep the league’s greater welfare in mind.¹⁹⁶ In exchange, an owner receives the benefits that accompany having exclusive rights within a “home territory” for his or her team.¹⁹⁷ A professional sports team owner enters into a league

188. See Bradley W. Crandall, Note, *The DirecTV NFL Sunday Ticket: An Economic Plea for Antitrust Law Immunity*, 79 WASH. U. L.Q. 287, 309 (2001).

189. Although legislative records do indicate that Congress was aware of the existence of pay and cable television, the proliferation of cable networks and programming could not have been anticipated by Congress. See *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *10–11.

190. The expanded opportunities for television broadcasting are discussed *infra* Part III.A.2.b.

191. Satellite Broadcasting and Communications Association, *supra* note 111.

192. See Television History—The First 75 Years, *supra* note 90.

193. *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 673–76 (7th Cir. 1992), *aff'g* 754 F. Supp. 1336 (N.D. Ill. 1991); *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97–5184, 1998 U.S. Dist. LEXIS 9896, at *1 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999).

194. See *Chi. Prof'l Sports*, 961 F.2d at 669. The Chicago Bulls were able to demand higher prices for their broadcasts because at the time they were the most popular and winningest team in the NBA. See *id.*

195. The court noted that

[t]he persons denominated owners of teams may not own them in an economic sense. Many of their actions are subject to review by the league's board, so that the “owners” may be no more than financier-managers of the league's branch offices. How much cooperation at the league level is beneficial is an interesting question in economics as well as law.

Id. at 672–73.

196. WEILER & ROBERTS, *supra* note 6, at 549–50.

197. *Id.*

aware of his or her unique business relationship with the league and the other teams, and that the nature of the business might justify certain restraints on both management and players.¹⁹⁸

2. *Nature of the Business and Legitimate Business Justifications for Protection from Section One*

The nature of the sports business is unique. Certain business justifications, such as the nature of the industry and competitive balance, may be reasonable in the sports context but not in any other business situation.¹⁹⁹ The need to balance the teams competitively in a professional sport league, the expanded opportunities for television broadcasting, the existence of natural monopolies, and some indifference by courts are considered below.

a. *Competitive Balance*

Competitive balance is the concept that all teams can compete evenly on and off the field.²⁰⁰ The pooling of individual teams' broadcasting rights is one way of keeping a competitive balance among teams. Rightfully so, competitive balance is the main reason leagues cite when justifying alleged restraints of trade.²⁰¹

Although federal antitrust laws are designed for "the protection of competition, not competitors,"²⁰² the nature of the professional sport league business is different from other economic and business ventures in the United States.²⁰³ Even the United States District Court for the Eastern District of Pennsylvania acknowledged the unique nature of sports before ruling against the NFL in *NFL I*.²⁰⁴ The court explained that "[i]f all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the

198. There have been many justifiable restraints put on management, such as revenue-sharing and luxury taxes, and players, such as salary caps and drafts, since the advent of the professional sports world. For an overview of sports law, see Timothy Davis, *What Is Sports Law?*, 11 MARQ. SPORTS L.J. 211 (2001). For a discussion on growing issues, see Steve Underwood & Christopher Whitson, *Symposium Transcript: Emerging Issues in Sports Law*, 4 VAND. J. ENT. L. & PRAC. 120 (2002).

199. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984); *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-5184, 1998 U.S. Dist. LEXIS 9896, at *1 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002).

200. See Grauer, *supra* note 163, at 24.

201. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175-76 (D.C. Cir. 1978).

202. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

203. See *United States v. NFL*, 116 F. Supp. 319, 323 (E.D. Pa. 1953); Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 893, 923-24 (1999).

204. *NFL*, 116 F. Supp. at 323.

weaker ones into financial failure.²⁰⁵ Teams seek to beat each other on the playing field, but they are completely dependent upon one another for their survival off the playing field.²⁰⁶ A professional sport league depends on each of its member teams to add value in terms of financial contribution and entertainment value.²⁰⁷ Teams need other teams to play.²⁰⁸ For example, the NFL sells all regular season and playoff games at a national level instead of letting individual teams market their own rights.²⁰⁹ Leagues need to have the ability to pool resources to promote competitive balance and to insure survival of all its teams.²¹⁰

As stated in the introduction, the horizontal pooling of broadcasting rights for professional sport leagues and their subsequent contracts with television networks has become a major piece of total revenue for professional sport leagues.²¹¹ If teams are left to their own devices, a great disparity can result.²¹² Because market size greatly influences the price of the broadcasting deals, a team, such as the MLB's New York Yankees could demand \$57 million per year when a team like the MLB's Montreal Expos could only demand \$536,000 per year.²¹³

Although the NCAA is not a professional sport league, it is a prime example of how competitive balance can be thrown off when the horizontal pooling of broadcasting rights is not allowed.²¹⁴ For example, in Division I football,²¹⁵ the NCAA has no role in broadcasting

205. *Id.* at 323-24.

206. See generally Grauer, *supra* note 163.

207. See, e.g., *id.* at 24 (suggesting that "one of the major causes of the failure of the All-America Conference, a league that competed with the NFL in the 1940's, was the near-total domination of the Conference by the Cleveland Browns").

208. *NFL*, 116 F. Supp. at 323.

209. The NFL only allows its member teams to sell the broadcasting rights locally for preseason games. See generally *NFL Preseason: Kicking It Up*, STREET & SMITH'S SPORTSBUSINESS J.: BY THE NUMBERS 2004, Dec. 29, 2003, at 90-92.

210. See *NFL*, 116 F. Supp. at 323; Grauer, *supra* note 163; Piraino, *supra* note 164.

211. *Id.*; see also text accompanying notes 5-13.

212. This was a main concern in the NFL when it first decided to pool broadcasting rights back in the 1950s. See Ashwell, *supra* note 2, at 385.

213. See *MLB*, News, at <http://mlb.com/hearings/overview.html> (last visited Apr. 4, 2005). The New York Yankees's monetary figure predates the development of its own network, which launched on March 19, 2002. See YES Network, About YES Network, at <http://www.yesnetwork.com/network/aboutyes.asp> (last visited Mar. 17, 2005). In 2004, the Montreal Expos moved to Washington, D.C., and became the Washington Nationals. See Washington Nationals, Nationals Timeline, at <http://washington.nationals.mlb.com/NASApp/mlb/was/history/timeline4.jsp> (last visited Apr. 4, 2005).

214. See generally *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

215. For more information about the NCAA and its Divisions, see Carol A. Barr, *Collegiate Sport*, in *SPORT MANAGEMENT*, *supra* note 1, at 171, 171-81.

games, including the Bowl Championship Series (BCS).²¹⁶ In 1998, the four most prestigious and lucrative bowl games joined with the six biggest Division I college football conferences and the University of Notre Dame to form the BCS.²¹⁷ This left the institutions in the other five conferences to compete for two "at-large" bids for one of the four bowl games.²¹⁸ The BCS, and not the NCAA, ultimately controls the bowl game system and the annual Division I championship game.²¹⁹

The current situation in college football was created because the NCAA was not allowed to maintain control over television revenue for Division I college football due to the Supreme Court's decision in *Board of Regents*.²²⁰ The Knight Foundation Commission on Intercollegiate Athletics,²²¹ an organization dedicated to reform in college athletics, reported that

[t]he television money, when parceled around, never seems to be enough, and the benefits are never evenly distributed. The rich – that is, the schools more in demand by network schedule-makers – get richer, the poor go deeper into debt. Disparities have widened to the point where many underfunded programs trying to compete at the top level are perpetual losers, both on and off the field.²²²

The NCAA has been unable to maintain competitive balance for its member universities and colleges.

Furthermore, the *Board of Regents* decision forced the NCAA to step back from overseeing the broadcasting of the other sports it governs.²²³ The NCAA summed up its role in television broadcasting of college athletics by stating, "Today, the NCAA's television involve-

216. See Bowl Championship Series, Home Page, at <http://www.bcsfootball.org> (last visited Mar. 17, 2005).

217. In 1998, the Atlantic Coast, Big East, Big 12, Big Ten, Pacific-10, and Southeastern Conferences, and the University of Notre Dame, along with the Nokia Sugar Bowl, Tostitos Fiesta Bowl, FedEx Orange Bowl, and Rose Bowl formed the Bowl Championship Series (BCS) for NCAA Division I football. See Bowl Championship Series, About the BCS, at <http://www.bcsfootball.org/index.cfm?page=about> (last visited Mar. 17, 2005).

218. See Bowl Championship Series, *supra* note 217. The six BCS conferences are granted "consideration tie-ins" with the bowl games, which essentially guarantee at least one team from each conference will play in a BCS bowl game. *Id.*

219. *Id.*

220. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

221. The Knight Foundation was established in 1950 as an institute to promote the "furthering [of the] ideals of service to community, to the highest standards of journalistic excellence and to the defense of a free press." John S. & James L. Knight Foundation, Statement of Purpose, at <http://www.knightfdn.org/default.asp?story=about/purpose.asp> (last visited Mar. 17, 2005). In 1989, the John S. and James L. Knight Foundation started a Commission on Intercollegiate Athletics directed at reform in collegiate athletics. See Barr, *supra* note 215, at 170.

222. KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION (June 2001), available at http://www.knightfdn.org/athletics/reports/2001_report/KnightCommission2001.pdf.

223. NCAA, *supra* note 180.

ment includes broadcast and cable presentations of several championship events, [sic] however, the Association generally is not involved with any regular-season television programs."²²⁴ As a result, the NCAA lost a valuable tool to help facilitate competitive balance for any sport it governs.

Of course, professional sport leagues have more than one mechanism for controlling competitive balance, but these mechanisms operate differently than the horizontal pooling of broadcasting rights.²²⁵ Certain mechanisms, such as revenue sharing, salary restrictions, a reserve system, and the player draft system, give every team an opportunity to compete for a championship.²²⁶ But these mechanisms are legally different from the pooling of the broadcasting rights. Mechanisms that restrict player movement, such as reserve clauses among teams, salary restrictions, and drafts, all fall under the labor exemption from federal antitrust laws.²²⁷ If the players' unions agree to these restrictive mechanisms in a collective bargaining agreement, they are legal.²²⁸ The pooling of broadcasting rights cannot be placed in the safe harbor of a collective bargaining agreement because it does not involve the employer-employee relationship.²²⁹ Revenue sharing occurs because there is an agreement among the team owners, as part of either a professional sport league's constitution or bylaws.²³⁰

224. *Id.* Overall, the NCAA oversees the broadcasting of eighty-eight championship events. See NCAA, *Broadcasting*, at http://www2.ncaa.org/media_and_events/broadcasting (last visited Jan. 19, 2005).

225. See Piraino, *supra* note 164, at 931-48.

226. See generally *id.* For cases involving professional sport leagues' reserve clauses, see *Flood v. Kuhn*, 407 U.S. 258 (1972) (baseball's "reserve clause"); *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979) (ice hockey's reserve system); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (football's "Rozelle rule" limiting player mobility); *Bridgeman v. NBA*, 675 F. Supp. 960 (D.N.J. 1987) (basketball's draft, salary cap, and right of first refusal); *Smith v. Pro-Football*, 420 F. Supp. 738 (D.D.C. 1976) (football player draft), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

227. See Clayton Act of 1914, 15 U.S.C. §§ 6, 17 (2000) ("[L]abor of human being is not a commodity or article of commerce."); *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996) ("[T]he implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.").

228. *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 664-65 (1965).

229. See *Mackey*, 543 F.2d at 623 (holding that in order for the non-statutory labor exemption to apply, "parties [of] collective bargaining agreements pertaining to mandatory subjects of bargaining . . . [and] the agreement [is] the product of bona fide arm's-length negotiations").

230. For example, MLB imposes a "luxury tax" on its owners that spend over a certain amount on player salaries. See Jason B. Myers, *Shaking Up the Line-Up: Generating Principles for an Electrifying Economic Structure for Major League Baseball*, 12 MARQ. SPORTS L. REV. 631 (2002).

All of these rules help professional sport leagues to competitively balance their teams. Immunity for pooling broadcasting rights for all professional sport leagues would not only help promote competitive balance among member teams, but also it would help to balance competition between professional sport leagues. Immunity provides equitable opportunities to pursue the various television-broadcasting avenues that are now available and were not available when the SBA was enacted.

b. Today's Expanded Broadcasting Opportunities

The understanding of what a television network is and the overall television environment has radically changed since 1961 and the enactment of the SBA.²³¹ The main purpose of the SBA was to address the issue of professional sport leagues horizontally combining to pool the broadcast rights of its member teams for the sale of packaged television rights to television networks.²³² As the number of television networks has grown, so has the opportunity for professional sport leagues to broadcast their games. With the increase in television broadcasting opportunities, the revenue generated from television broadcasts has also increased.²³³ No longer are there three national over-the-air networks with "subscription television" as a minor part of the television landscape; today, there is an abundance of choice for television viewers.²³⁴ And consumers, who are the reason the anti-trust laws were enacted, are also no longer confined to a few television networks for viewing. The number of over-the-air networks has increased since 1961 to include networks such as Fox Broadcasting Company (Fox),²³⁵ United Paramount Network (UPN),²³⁶ and the

231. See, e.g., Satellite Broadcasting and Communications Association, *supra* note 111.

232. See Crandall, *supra* note 188, at 309.

233. See The Museum of Broadcast Communications, *Cable Networks*, at <http://www.museum.tv/archives/etv/C/html/C/cablenetwork/cablenetwork.htm> (last visited Mar. 17, 2005).

234. See *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-5184, 1998 U.S. Dist. LEXIS 9896, at *10-11 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999) (citing *Telecasting of Professional Sports Contests: Hearing Before the Antitrust Committee of the House Committee on the Judiciary on H.R. 8757*, 87th Cong. 36 (Aug. 28, 1961)). Now, sixty cable networks are considered "basic." See The Museum of Broadcast Communications, *supra* note 233.

235. The Fox Broadcasting Company was founded in 1985. See The Museum of Broadcast Communications, *Fox Broadcasting Company*, at <http://www.museum.tv/archives/etv/F/html/F/foxbroadcast/foxbroadcast.htm> (last visited Apr. 1, 2005).

236. The United Paramount Network was founded in 1994 and debuted in 1995. See The Museum of Broadcast Communications, *United States: Networks*, at <http://www.museum.tv/archives/etv/U/html/U/unitedstatesn/unitedstatesn.htm> (last visited Mar. 17, 2005).

WB Television Network (WB).²³⁷ The concept of television networks has expanded to include not only over-the-air channels but also "basic cable" networks.²³⁸ No longer are professional sport leagues and their member teams confined to compete for contracts with just over-the-air networks. By 1994, the number of options on cable television included up to ninety-four basic networks and twenty premium channels.²³⁹ From 1983 to 1994, weekly over-the-air networks' viewing audience shares²⁴⁰ dropped from sixty-nine to fifty-two, and during the same time period basic cable networks' viewing audience shares rose from nine to twenty-six.²⁴¹ Because of the expansion of "television networks" to include both over-the-air networks and cable networks, in today's television market, the sale of pooled broadcasting rights includes contracts with cable networks such as ESPN,²⁴² TNT,²⁴³ and the Fox Sports Network (FSN).²⁴⁴ The focus has shifted from gaining an affiliation with an over-the-air network to gaining affiliations with cable networks.²⁴⁵ Leagues should be able to contract with cable networks for league-wide contracts because cable television is the equivalent to 1961's options for television programming and outlets.²⁴⁶ Instead of the three national networks available back in 1961,²⁴⁷ consumers today have over 150 networks to choose from,

237. The WB Television Network was the United States's fifth over-the-air broadcast network. See The WB Television Network, About The WB Television Network, at <http://thewb.com/AboutUs/Index/0.8258..00.html> (last visited Mar. 17, 2005).

238. See The Museum of Broadcast Communications, *supra* note 236; The Museum of Broadcast Communications, *supra* note 233.

239. See The Museum of Broadcast Communications, *United States: Cable Television*, at <http://www.museum.tv/archives/etv/U/htmlU/unitedstatesc/unitedstatesc.htm> (last visited Mar. 17, 2005).

240. "Share is an audience measurement term that identifies the percentage of television households with sets in use which are viewing a particular program during a given time period." See The Museum of Broadcast Communications, *Share*, at <http://www.museum.tv/archives/etv/S/htmlS/share/share.htm> (last visited Mar. 17, 2004).

241. The Museum of Broadcast Communications, *supra* note 239.

242. See generally ESPN, *supra* note 10.

243. TNT broadcasts NBA games on Thursdays and also broadcasts some National Association for Stock Car Auto Racing (NASCAR) events. See TNT, We Know Drama, at <http://www.tnt.tv/sports> (last visited Mar. 17, 2005).

244. Fox Sports operates several affiliates across the United States, and offers both local sports programming and national sports programming. See FSN, Fox Sports, at <http://msn.foxsports.com/story/1636002> (last visited Mar. 17, 2005).

245. See generally *NBA Television Deals*, STREET & SMITH'S SPORTSBUSINESS J.: BY THE NUMBERS 2004, Dec. 29, 2003, at 88 (showing that for the 2003-2004 season seven teams did not have any plans to broadcast games through affiliations with over-the-air local networks); *NHL Television Deals*, STREET & SMITH'S SPORTSBUSINESS J.: BY THE NUMBERS 2004, Dec. 29, 2003, at 89 (showing that for the 2003-2004 season nineteen out of thirty teams had no intention to broadcast games through a local over-the-air broadcast network affiliation).

246. See Satellite Broadcasting and Communications Association, *supra* note 111.

247. See *Television History—The First 75 Years*, *supra* note 90.

available through cable programming and packaged satellite television.²⁴⁸

Television viewers have more choices in deciding how they wish to receive cable networks.²⁴⁹ Packaged satellite television has expanded cable programming to rural areas of the country where cable television service is unlikely to be available. It has also given consumers another option to consider when purchasing cable television networks.²⁵⁰ The proliferation of satellite broadcasting services has made the broadcasting of professional sports games on cable channels even more lucrative.²⁵¹

With the advent of packaged satellite television and digital cable, the opportunity for consumers to purchase out-of-market games has also increased. Season packages, such as "NBA League Pass," "NFL Sunday Ticket," and "NHL Center Ice," have provided consumers the opportunity to purchase games they normally would not have received on over-the-air and cable networks.²⁵² As questioned in *Shaw* and explained in *Kingray*, such packages are not anticompetitive because they do not limit the number of games consumers would normally see in their local markets.²⁵³ Today, season-game packages, such as "NBA League Pass" and "NHL Center Ice," are available through both the major satellite television providers of DirecTV and Dish Network and the digital cable subscribers through iN DEMAND.²⁵⁴ As the NBA explains: "With NBA LEAGUE PASS, you will be able to see up to [forty] out-of-market regular season games a week. Games included in NBA LEAGUE PASS are in addition to those available on ABC, TNT, NBA TV, ESPN, ESPN2 and your local networks (such as a regional sports network and/or over-the-air station)."²⁵⁵ The NFL tells viewers, "Tune to your local FOX or CBS station to

248. See The Museum of Broadcast Communications, *supra* note 233.

249. See Satellite Broadcasting and Communications Association, *supra* note 111.

250. *Id.* Cable television service is available to ninety-five percent of all television households in the United States. See The Museum of Broadcast Communications, *supra* note 239.

251. See The Museum of Broadcast Communications, *supra* note 233. Although referred to as "basic cable" networks, satellite television provides a comparable channel selection with cable services. *Id.*

252. *Shaw v. Dallas Cowboys Football Club*, 172 F.3d 299, 300 (3d Cir. 1999); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177, 1184 (S.D. Cal. 2002).

253. *Shaw v. Dallas Cowboys Football Club*, No. 97-5184, 1998 U.S. Dist. LEXIS 9896, at *1, 5 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177, 1194 (S.D. Cal. 2002).

254. *Id.* "NFL Sunday Ticket" is only available on satellite television through DirecTV. See DirecTV, *supra* note 112.

255. NBA, *supra* note 112. The National Hockey League (NHL) has a program, "NHL Center Ice," that provides consumers with over one thousand games per season including some playoff games. See NHL, *supra* note 112. The NFL's "NFL Sunday Ticket" provides the 1:00 p.m. and

view [local] games."²⁵⁶ These types of packages increase consumer choice, rather than restrict the broadcasting market like the plaintiffs alleged in *Shaw* and *Kingray*.²⁵⁷ They help the professional sport leagues maintain competitive balance by splitting the revenues generated by such season packages among member teams.²⁵⁸

c. Existence of Natural Monopolies in Professional Sports

As with the unique business notion of competitive balance in the sports industry, natural monopolies and restraints of trade also exist in the sports industry.²⁵⁹ Restraints of trade on team owners and players are placed immediately upon them when they enter into the professional sports ranks. Individual-team owners must agree to restrictions placed in the league's Constitution and bylaws, but they are rewarded with territorial exclusivity.²⁶⁰ A team owner is allowed to maintain a monopoly in his or her respective sport within a "home territory," unless they grant the league permission to allow another team to enter into their local market.²⁶¹

When antitrust laws break up a league's ability to pool broadcast rights, sets of "mini-monopolies" naturally form. For example, when the Supreme Court broke up the NCAA's ability to sell its Division I football games, the ability to sell football games went to the conferences.²⁶² Instead of the NCAA selling their games as a package deal and controlling the competitive balance among various colleges and universities, conferences act as "mini-NCAAs" when selling the broadcast rights to their games. Instead of most individual schools competing against each other for broadcasting rights, the conferences handle the broadcast deals.²⁶³ These broadcast deals horizontally

4:00 p.m. (Eastern Standard Time) Sunday broadcasts on CBS and Fox to consumers. See *DirectTV*, *supra* note 112.

256. *DirectTV*, *supra* note 112.

257. *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *4-5; *Kingray*, 188 F. Supp. 2d at 1185.

258. See *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *4-5; *Kingray*, 188 F. Supp. 2d at 1185.

259. *NCAA v. Bd. of Regents*, 468 U.S. 85, 103-04 (1984) (applying the rule of reason because if per se analysis was applied, sport leagues would always be in violation of horizontal restraints); *USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988) (finding that the NFL was a monopoly).

260. *WEILER & ROBERTS*, *supra* note 6, at 549-50.

261. For example, in Article X of the NFL's bylaws, the broadcasting "home territory" of a team was defined as the seventy-five mile radius from a broadcasting station of a team's city. See *United States v. NFL*, 116 F. Supp. 319, 321 (E.D. Pa. 1953).

262. See generally *NCAA*, 468 U.S. 85; *Ass'n of Indep. Television Stations, Inc. v. Collegiate Football Ass'n*, 637 F. Supp. 1289 (W.D. Okla. 1986).

263. For example, the Big Ten Conference sells all of its home games to ABC, ESPN, and its affiliates. In contrast, the University of Notre Dame, which has no conference affiliation for football, sells the rights to its home games to NBC. See *Broadcast Rights to Major Sports Properties*, STREET & SMITH'S SPORTSBUSINESS J.: BY THE NUMBERS 2004, Dec. 29, 2003, at 84.

pool television broadcasting rights at a smaller level. Although one might think that this would promote more football coverage and allow the less influential conferences to bargain for television broadcasting deals, the current situation in college football suggests otherwise.²⁶⁴ Instead, BCS conferences are able to demand more money and able to compete every year for the championship.²⁶⁵ Meanwhile, lesser conferences are excluded.²⁶⁶ When these conferences are left out of contention for a high-profile bowl game, the product markets for their games are weakened.²⁶⁷ If the NCAA was able to pool television broadcasting rights, the NCAA could distribute wealth more evenly among the hundred-plus Division I schools; thus, allowing more competition among the schools instead of only a few conferences and universities.²⁶⁸

d. Judicial Indifference

Some courts have shown judicial indifference when looking at anti-trust issues involving professional sport leagues' pooling of broadcasting rights not covered by the SBA.²⁶⁹ For example, although the court in *Kingray* found that "NBA League Pass" was not exempt from section one of the Sherman Act under the SBA, the court found no violation of the federal antitrust laws.²⁷⁰ But it is unknown whether such judicial indifference will continue or if courts will find violations of section one for the pooling of broadcasting rights not protected under the SBA.

Several cases have dealt with challenges to conferences pooling broadcasting rights. See, e.g., *Ass'n of Indep. Television Stations*, 637 F. Supp. at 1309 (finding "a dangerous probability that [College Football Association] and the Big Eight [Conference] can or will be able to control prices and exclude competition in a relevant market"); *Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511 (9th Cir. 1984) (affirming a preliminary injunction that prohibited two universities from withholding consent to broadcast their games on CBS solely based on the universities' ABC contract that restricted crossover broadcasts).

264. For more information on how the Bowl Championship Series works and how the money is distributed to conferences, see ABC Sports, About the BCS, at <http://sports.espn.go.com/sports/tvlistings/abcStory?page=aboutbcs> (last visited Mar. 11, 2005).

265. KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, *supra* note 222.

266. See *id.*

267. Although antitrust laws are intended for the "protection of competition, not competitors," the existence of organized sporting competitions is fundamentally tied to the existence of competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

268. For example, the University of Notre Dame has a contract with NBC for broadcasting of all of its home football games nationally. See *supra* note 263.

269. See, e.g., *Kingray, Inc. v. NBA*, 188 F. Supp. 1177 (S.D. Cal. 2002).

270. The court held that it is acceptable under section one to pool broadcasting rights into a season-game package. *Id.*

B. Antitrust Legislation that Should Be Applied to Professional Sport Leagues for Broadcasting

The expansion of the SBA would not affect other aspects of federal antitrust law. Even if all professional sport leagues are allowed to horizontally pool their television broadcasting rights without fear of violating section one of the Sherman Act, there are two other ways leagues could be liable for anticompetitive restraints. First, section one could still be applied for vertical restraints placed on the broadcasting market by a professional sport league's contract with a television network. Second, section two, the monopoly provision, would still be applicable to television broadcasting contracts.

1. Section One of the Sherman Act Can Still Be Applied to the Actual Contracts for Vertical Restraints

By allowing all professional sport leagues to horizontally pool broadcasting rights of member teams, the immunity would not preclude section one from still being applied. Section one could still apply to the actual contracts with the television networks for vertical restraints. Vertical restraints are agreements that restrict competition on different levels of the distribution chain.²⁷¹ The SBA was enacted in response to the Court for the Eastern District of Pennsylvania's 1953 and 1961 decisions that the NFL could impose horizontal agreements on its teams to be able to broadcast games in a national package.²⁷² By monitoring professional sport leagues for vertical restraints placed on the television broadcasting market, leagues would still face consequences for unreasonably restraining trade.²⁷³

In *Kingray*, the United States District Court for the Southern District of California found that the NBA and DirecTV did not violate section one of the Sherman Act.²⁷⁴ DirecTV could broadcast all regular season games over satellite programming because they were not vertically restraining trade.²⁷⁵ The court found that because the NBA did not tell DirecTV what to charge consumers for the programming, but merely set a wholesale price and DirecTV decided the cost to consumers, they did not conspire to inflate prices.²⁷⁶ If the NBA had told

271. See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988).

272. See *Sports Broadcasting Act of 1961*, 15 U.S.C. §§ 1291-1295 (2000); *United States v. NFL*, 196 F. Supp. 445, 446 (E.D. Pa. 1961); *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953).

273. See *Sherman Act of 1890*, 15 U.S.C. § 2 (2000); *Clayton Act of 1914* §§ 4, 4A, 4C, 16 (codified at 15 U.S.C. §§ 15, 15a, 15c, 26 (2000)).

274. See generally *Kingray*, 188 F. Supp. 2d at 1201.

275. *Id.* at 1192, 1196, 1198.

276. *Id.* at 1191-92.

DirecTV what to charge consumers, it would have violated section one.²⁷⁷

Therefore, vertical agreements between a sport league and a broadcasting network or outlet could be analyzed under section one of the Sherman Act for a conspiracy between the two entities. For example, if the contract itself is a restraint on the network from broadcasting any other professional sport league's sporting events, then section one could be applied to find a tying agreement.

The purpose of the SBA was to allow leagues to pool teams' broadcasting rights horizontally, but not to restrain the trade of other leagues.²⁷⁸ A vertical restraint does not help competitive balance across individual teams like the horizontal pooling of television broadcasting rights. Allowing liability for vertical restraints would not disrupt the original intent of the SBA.

2. *Section Two of the Sherman Act and Monopolizing the Broadcasting Opportunities by a Professional Sport League*

Immunity from section one of the Sherman Act for professional sport leagues when pooling broadcasting rights would not affect liability under section two.²⁷⁹ Section one and section two are separate violations.²⁸⁰ The SBA itself was only meant to address liability under section one of the Sherman Act. Even the four major professional sport leagues, exempt from section one under the SBA, have always been liable for violations of section two.²⁸¹

When analyzing television contracts under the monopoly provision of the Sherman Act, the concern is generally about the impact the contract has on competing leagues.²⁸² This is a different concern than the SBA's exemption from section one. The SBA concerned competition among teams, not leagues.²⁸³

It can be argued that a professional sport league's television broadcasting contract in an oversaturated television market creates a high barrier of entry for competing leagues. Today's television landscape is broader than it has ever been. More networks and broadcasting options are available than ever before.²⁸⁴ Moreover, professional sport

277. *Id.* at 1188.

278. *See Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-5184, 1998 U.S. Dist. LEXIS 9896, at *10-11 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999).

279. *See Am. Tobacco Co. v. United States*, 328 U.S. 781, 788 (1946).

280. *Id.*

281. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2000).

282. *See USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988), *aff'g* 634 F. Supp. 1155 (S.D.N.Y. 1986).

283. *See* 15 U.S.C. § 1291 (2000).

284. The Museum of Broadcast Communications, *supra* note 233.

leagues have found these other avenues of broadcasting, such as pay-per-view, satellite, and team-owned networks, conducive to their needs.²⁸⁵

There will always be a limited number of programming hours on a limited number of television networks and the more leagues can charge broadcasters, the less networks will be able to pay other competing leagues for their products. Unlike over-the-air channels, consumers pay a basic fee for such programming. Thus, the more that networks spend on sports programming, the more the consumers must pay.²⁸⁶ In today's atmosphere of media conglomerates, television contracts are offered as multi-network deals.²⁸⁷ For example, ABC and ESPN have the same parent company and television contracts with either could involve both networks.²⁸⁸ These types of contracts can be analyzed for violations of section two.²⁸⁹ This would not interfere with a professional sport league horizontally pooling broadcasting rights.²⁹⁰

A professional sport league has a difficult time surviving without striking a competitive broadcasting television deal with a highly visible network.²⁹¹ For example, in September 2003, the WUSA²⁹² closed down, in part, due to the loss of television viewership after moving to Pax-TV.²⁹³ Yet, there is judicial indifference to the need for a television-broadcasting contract and to the monopolistic nature of the sports world.²⁹⁴ In *USFL*, the United States Court of Appeals for the

285. The NHL offers games to consumers through local broadcasts, national broadcasts on ABC and ESPN, and season packages on satellite television and digital cable. See NHL, Home Page, at <http://www.nhl.com> (last visited Mar. 11, 2005).

286. Cable fees depend on the number of subscribers the cable system has and what each basic cable network charges the cable company. See The Museum of Broadcast Communications, *supra* note 233. A typical basic network costs about three to twenty-five cents per month for each subscriber. See *id.* More popular cable networks, such as ESPN, can charge more than less popular cable networks, such as Nostalgia Television. See *id.*

287. Both Fox and ESPN have television broadcasting rights contracts with MLB, and the NFL has deals with ABC, Fox, CBS, and ESPN. *Recent Television Rights Deals*, STREET & SMITH'S SPORTSBUSINESS J.: BY THE NUMBERS 2004, Dec. 29, 2003, at 84.

288. See ESPN, *supra* note 10.

289. See Sports Broadcasting Act of 1961, 15 U.S.C. § 1295 (2000).

290. The broadcasting contract as a whole should be analyzed, and not the pooling of broadcasting rights among the teams that forms only one party of the contract.

291. For example, compare the \$4.6 billion the NBA will receive for its 2003-2004 season from ABC to the \$40 million, plus production costs, paid by MLS to have its games broadcast on ABC, ESPN, and ESPN2. See *Broadcast Rights to Major Sports Properties*, STREET & SMITH'S SPORTSBUSINESS J.: BY THE NUMBERS 2004, Dec. 29, 2003, at 84. In addition, MLS is responsible for all sales of advertisements. *Id.*

292. The WUSA was founded in 2000 and played its inaugural game in 2001. See Melissa Sedlak, *WUSA Timeline*, STREET & SMITH'S SPORTSBUSINESS J., Sept. 22-28, 2003, at 4.

293. Lee, *supra* note 178, at 4.

294. *USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1998).

Second Circuit laughably affirmed damages of one dollar (trebled to a whopping three dollars) to the USFL because the NFL was found to be a monopoly.²⁹⁵ But the court refused to find that the monopoly power the NFL enjoyed interfered with the USFL's ability to get a television broadcasting contract of its own.²⁹⁶ The judiciary assumed that leagues with television contracts received them because of their superior business practices.²⁹⁷

IV. IMPACT

Congress should grant all professional sport leagues equitable immunity from section one of the Sherman Act when those leagues decide to horizontally pool broadcasting rights into a national package. Expanded immunity would impact competition for television contracts among all professional sport leagues, clarify how federal antitrust law handles television contracts and professional sport leagues, expand opportunities for professional sport leagues to explore other broadcasting mediums besides air channels, and possibly influence views on how collegiate athletics should be televised.

A. *Promotion of Competition and Clarity*

By leveling the playing field for the pooling of broadcasting rights among professional sport leagues, all leagues can strike business deals with broadcasters without fear of antitrust liability under section one of the Sherman Act. They will be free to decide whether pooling broadcasting rights is a pertinent course of action for their particular league.²⁹⁸ Leagues will be able to better compete against each other and produce more opportunities for consumers to enjoy their events.

For example, some professional sport leagues, such as MLS and the Women's National Basketball Association²⁹⁹ (WNBA), have tried to circumvent section one liability completely by structuring themselves as single entities.³⁰⁰ Recently, the single-entity structured sport league

295. *Id.* at 1380.

296. *Id.* at 1341.

297. *Id.* at 1361.

298. A league such as the NFL could decide that it is in its best interests to control all broadcasting rights during the regular season and playoffs while a different league, such as the NBA, could decide to allow its teams some control over local broadcasts while offering national games on over-the-air and cable networks.

299. It is unclear whether the WNBA is included within the meaning of "any league of clubs participating in professional . . . basketball . . . contests." Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2000). Arguably, the plain language of the statute would include professional basketball played by either men or women.

300. A single-entity structured sport league is one in which all of the teams, player contracts, and coaching contracts are owned by the league itself. *Fraser v. MLS, L.L.C.*, 97 F. Supp. 2d 130,

has become difficult to operate and maintain.³⁰¹ With newer professional sport leagues, such as the WNBA and MLS, moving towards the more traditional structure, they have opened themselves up to liability for their broadcasting contracts. An expansion of the SBA to include newer professional leagues would prevent future legal problems for these leagues and promote competition among the various leagues.

Expansion would also produce a clearer application of section one to professional sport leagues. It would be easier to apply an exemption to all professional sport leagues pooling their teams' broadcasting rights. Antitrust analysis can be complex, especially when it may not apply depending on which professional sport league is in front of the court and on whether the network broadcasting the league's games is over-the-air or not.

B. Consumer's Choice

Unlike other natural monopolies, such as utility companies, sports and sports broadcasting is a luxury, not a necessity, although some fans would argue otherwise. Ultimately, the consumers choose whether to watch for free or pay to watch. With the explosion of broadcasting mediums since the enactment of the SBA in 1961, such as cable television and packaged satellite television, consumers have more choice than ever.³⁰² Yet, consumers' choices are limited by the unequal playing field among professional sport leagues and the ability to pool broadcasting rights. Evening the playing field among the leagues should produce greater consumer choice.

C. Future Mediums

An expansion of the SBA to include all professional sport leagues and modern forms of television broadcasting would only allow federal antitrust law to catch up to the most popular forms of broadcasting

131-32 (2000), *rev'd*, 284 F.3d 47 (1st Cir. 2002). The traditional structure of sport leagues, including the MLB, NBA, NFL, and NHL, consists of teams independently owned and operated. *Id.* Because a single-entity structure sport league would be considered a single economic actor, section one of the Sherman Act would not apply to its internal business operations such as selling national broadcasting packages to its games. See *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328, 332 (9th Cir. 1972); *Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 484 (5th Cir. 1966).

301. The WNBA decided to restructure its league to include independently owned teams. See Sarah Talaly, *WNBA Takes on New Look*, SUN-SENTINEL, May 4, 2003, at 10C. In 2002, MLS's structure was scrutinized by the United States Court of Appeals for the First Circuit. See *Fraser*, 284 F.3d at 47.

302. See Satellite Broadcasting and Communications Association, *supra* note 111.

available today. But if antitrust issues are so outdated and complicated now, what will happen when technology revolutionizes the broadcasting of sports yet again? When the SBA was enacted in 1961, the proliferation of cable and satellite television involved a futuristic imagination.³⁰³ A simple, equitable rule will help deal with emerging broadcasting antitrust issues, such as the NFL's new league-owned networks.³⁰⁴ Professional sport leagues would be free to explore any television broadcasting opportunity that could arise in the future, even if that allows individual teams to broadcast locally through team-owned networks.³⁰⁵

In addition, technology, such as "internet broadcasting" and wireless communication devices, such as cellular phones, has grown tremendously in the past few years.³⁰⁶ In December 1999, there were approximately 2.8 million broadband subscribers in the United States.³⁰⁷ By June 2002, the number had risen to 16.2 million broadband subscribers.³⁰⁸ Today, professional sport leagues offer consumers the option to listen to free radio broadcasts of games.³⁰⁹ The next step in internet broadcasting will likely be live streaming video broadcasts of games.³¹⁰ Along with internet broadcasting, wireless capability is now more advanced.³¹¹ Currently, cellular phones are capable of surfing the Internet, receiving live information such as game scores, and even allowing consumers to listen to live audio from sporting events.³¹² Immunizing all professional sport leagues from section one

303. The first cable network, Home Box Office (HBO), was founded in 1972. See The Museum of Broadcast Communications, *supra* note 233.

304. In 2003, the NFL launched its own network dedicated to the NFL and football. See NFL, About NFL Network, at <http://www.nfl.com/nflnetwork/faq> (last visited Mar. 11, 2005). The NFL Network is available to basic subscribers of DirecTV and other cable companies. *Id.*

305. For example, the New York Yankees and other New York teams broadcast their games on their own local network. See YES Network, *supra* note 213.

306. Many professional sport leagues offer live radio and video broadcasts of their games over the Internet. See, e.g., NHL, NHL Radio, at <http://nhl.com/intheslot/listen/radio/index.html> (last visited Mar. 11, 2005).

307. *Broadband Growth*, STREET & SMITH'S SPORTSBUSINESS J.: BY THE NUMBERS 2004, Dec. 29, 2003, at 84.

308. *Id.*

309. For example, the NHL allows the public to listen to the official local radio broadcasts of each team for free. NHL, *supra* note 306.

310. Current technology makes live streaming video a viable option for sport leagues. See Stephan M. Astor, Comment, *Merging Lanes on the Information Superhighway: Why the Convergence of Television and the Internet May Revive Decency Standards*, 29 SW. U. L. REV. 327, 345-46 (2000).

311. See John D. Penn, *Mobile Computing: Wireless Computer Networks' Convenience and (In)Security*, 21-5 AM. BANKR. INST. J. 28 (2002).

312. Nextel Communications, a cellular phone company, offers its customers the options of receiving "daily news updates, driver stats, live race leaderboards, qualification and race results, standings, and schedules" and listening "to drivers and their crew members talking pit strategy,

liability for pooled television broadcasting rights will modernize the SBA to today's broadcasting issues and give insight on how leagues should control "broadcasts" in a technology-driven world.

D. Collegiate Athletics

Currently in collegiate athletics, the NCAA is barred from pooling broadcasting rights for regular season events under *Board of Regents*.³¹³ The NCAA only controls the television broadcasting rights of some championship events.³¹⁴ If all professional sport leagues gained an equitable immunity from section one of the Sherman Act, it would provide a steppingstone for collegiate athletics to pursue similar immunity and be able to gain the competitive balance it lost after the *Board of Regents* decision.

V. CONCLUSION

Expanding the federal antitrust immunity of the SBA is necessary. Expansion would promote competition for all television broadcasting rights deals, not merely "sponsored telecasts,"³¹⁵ among all professional sport leagues, and it would provide an equal playing field for all professional sport leagues. An equal playing field provides smaller and newer professional sport leagues the opportunity to horizontally pool television broadcasting rights without having to worry about section one antitrust liability.

The unique business nature of sports provides legitimate business justifications, such as competitive balance, for granting equal protection from section one to all professional sport leagues that wish to horizontally pool individual teams' rights into any television broadcasting package, including packages for cable and satellite television.

Expanding the limited section one immunity for pooling broadcasting rights does not mean professional sport leagues will be completely immune from federal antitrust liability. Section one could still be applied to the actual contracts between professional sport leagues and

conditions, handling and timing, live during each NASCAR Nextel Cup Series race." See Nextel, Experience NASCAR on Your Nextel Phone, at http://www.nextel.com/phones_plans/nextelcup/wireless_content.shtml (last visited Mar. 11, 2005). The impact of wireless technology on the sports industry can be shown by NASCAR's deal with Nextel. *Id.*

313. See *supra* notes 142-147.

314. See *id.*; NCAA, *supra* note 224. The revenue from broadcasting championship events is extremely important to the NCAA. See KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, *supra* note 222, at 19. For example, the NCAA has an eleven-year, \$6.2 billion contract with CBS for the Division I men's basketball tournament. *Id.* Broadcasting rights, such as the CBS deal, account for nearly eighty percent of the NCAA's revenue. *Id.*

315. Broadcasting Act of 1961, 15 U.S.C. § 1291 (2000).

broadcast networks for vertical restraints on trade. Also, section two of the Sherman Act would still be present as a source of liability for professional sport leagues. Leagues can still be held liable for monopolizing or attempting to monopolize television broadcasting opportunities.

If an equitable immunity is granted, then perhaps in the future, instead of coming home to a Monday Night Football game after a long day's work, millions of Americans could be enjoying pizza and throwing popcorn at their television sets while watching Monday Night Soccer or Monday Night Softball.

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* J.D. candidate, DePaul University College of Law, 2005; B.A., Sport Management & Communication, University of Michigan, 2002. I dedicate this paper to my parents. Thank you to my brother and my grandparents for their love and support. Thank you to Professor Ray Waters for taking his valuable time to edit and give advice. Also, thank you to my roommate Michelle Fowler who edited by candlelight during a blackout the night before a draft was due. Finally, thanks to all my friends at DePaul University College of Law for their encouragement and understanding.

