# SPORTS BROADCASTING BLACKOUTS: A HARBINGER OF CHANGE IN A RAPIDLY EVOLVING MEDIA LANDSCAPE?

*Comment*

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## I. INTRODUCTION

Professional sports have long been a central part of American culture. For decades, leagues have entered into lucrative contracts with various providers, including commercial networks, local networks, satellite services, and cable networks for the rights to broadcast live sporting events.[1] Over time, the broadcasting of live sporting events has become a dominant revenue stream of the professional sports leagues.[2] Television consumers pay approximately 15% of their cable bill for sports programming, regardless of if they are consuming the product or not.[3]

For the major four professional sports leagues in America (football, hockey, basketball, and baseball), the structure of broadcasting rights has remained relatively unchanged for decades.[4] This is partly because professional leagues have benefitted from the Sports Broadcasting Act of 1961 (SBA), which provided some immunity from federal antitrust scrutiny regarding broadcasting rights.[5] However, since 2012, lawsuits have been filed against the National Hockey League (NHL), Major League Baseball (MLB), and the National Football League (NFL) regarding blackout restrictions based on agreements between the leagues and the broadcast providers.[6] These agreements were alleged to be in violation of federal antitrust laws because the blackout restrictions limited viewing options and inflated prices.[7]

Until recently, blackout restrictions provided leagues and television providers with a restraint that has slowed the inevitable shift in sports broadcasting.[8] However, the landscape of media programming

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1. Martin Cave & Robert W. Crandall, *Sports Rights and the Broadcast Industry*, 111 ECON.J. F4, F4-F5 (2001).

2. *See* Soonhwan Lee & Hyosung Chun, *Economic Value of Professional Sport Franchises in the United States*, SPORT J., http://thesportjournal.org/article/economic-values-of-professional-sport-franchises-in-the-united-states/ (Approximately 65% of all revenues for NFL teams is derived from television rights).

3. *See* Derek Thompson, *If You Don't Watch Sports, TV is a Huge Rip-off (So, How Do We Fix It?)*, THE ATLANTIC (Dec. 3, 2012), http://www.theatlantic.com/business/archive/2012/12/if-you-dont-watch-sports-tv-is-a-huge-rip-off-so-how-do-we-fix-it/265814/.

4. *See* Cave, *supra* note 1, at F5 (explaining the NFL, NBA, MLB, and NHL have no professional competitors and have maintained their respective dominant positions for at least two decades).

5. *See* Sports Broadcasting Act of 1961, Pub. L. No. 87-331, § 1, 75 Stat. 732 (codified as amended at 15 U.S.C. § 1291 (2006)) (proving an exemption for joint agreements by professional sports leagues to sell or transfer rights in "sponsored telecasting").

6. *See* Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465 (S.D.N.Y. 2012); Garber v. Office of the Comm'r of Baseball, 120 F. Supp. 3d 334 (S.D.N.Y. 2014); Trilogy Holding v. Nat'l Football League, Inc., 2:15CV10000 (S.D.N.Y. 2015).

7. *See* Laumann v. Nat'l Hockey League, 117 F. Supp. 3d 299, 302 (S.D.N.Y. 2015).

8. *See generally* Tomislav Žarković, *Are Blackouts the Last Obstacle for Legal Streaming?*, OVERTIME (September 7, 2016), http://promoovertime.com/blackouts-last-obstacle-legal-streaming/.

has begun to undergo significant changes due to the emergence of streaming and video-on-demand services, such as Netflix, Hulu, and Amazon Prime.[9] Since 1998, the cost of traditional cable TV has increased dramatically, outpacing the standard rate of inflation.[10] This is due in large part to the rising cost of live sports broadcasting rights.[11] As a result of the rising costs, consumers are beginning to cancel their subscriptions, or "cut the cord," at record rates.[12] This shift has been further catalyzed by the variety of alternative outlets to consume broadcast media, which was, for many years, only available through traditional TV services.[13]

This article will argue that media companies will need to change the current model for pay TV subscriptions in order to prevent a possible industry-wide decline. While a complete collapse of the pay TV industry is unlikely, a significant restructuring is likely on the horizon. Given the current trend that sees a shift away from traditional pay TV towards other internet-based providers, consumers are no longer seeing the value in maintaining pay TV subscriptions at the current rates, and the increasing cost of live sports rights will not be sustainable in the long term.[14] In the future, professional sports leagues could forego exclusive agreements with pay TV providers for more lucrative deals with alternative providers, focusing on a-la-carte product offerings because of a content driven market. In fact, the recent blackout settlements could be the catalyst for further change in how professional sports leagues generate broadcasting revenues.

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9. *See* Matthew Garrahan, *TV Networks Face Shaky Future in Changing Media Landscape*, THE FINANCIAL TIMES (August 27, 2015), https://www.ft.com/content/15f65100-4c9c-11e5-b558-8a9722977189 (explaining that in August 2015, media companies faced significant drops in share prices, triggered by Walt Disney's revision to the growth projections of ESPN. The slowed growth of ESPN revealed that live sports were no longer immune to the consumer's viewer pattern changes).

10. *See How to Save Money on Triple-play Cable Services*, CONSUMER REPORTS (March 2014), http://www.consumerreports.org/cro/magazine/2014/05/how-to-save-money-on-triple-play-cable-services/index.htm#inflation.

11. *See* Todd Spangler, *Sports Fans: Get Ready to Spend More Money to Watch Your Favorite Sports Teams*, VARIETY (August 13, 2013), http://variety.com/2013/tv/news/sports-fans-to-spend-more-money-to-watch-favorite-teams-1200577215/ (explaining that "the driver of programming cost inflation is sports.").

12. *See* Tim Stenovec, *Streaming Services Really Are Convincing People to Ditch Cable, and It's Only Going to Get Worse*, BUSINESS INSIDER (May 12, 2015), http://www.businessinsider.com/moffettnathanson-streaming-tv-report-2015-5 (explaining that paid TV subscriptions dropped at the fastest rate of decline ever recorded, despite the number of households continuing to increase).

13. *See* Ben Popper, *The Great Unbundling: Cable TV As We Know It Is Dying*, THE VERGE (April 22, 2015), http://www.theverge.com/2015/4/22/8466845/cable-tv-unbundling-verizon-espn-apple.

14. *See generally id.*; Joel Maxcy, *Antitrust Law & Live Streaming of Games over the Internet*, SPORTS LABOR RELATIONS...AND OTHER SPORTS INDUSTRY ISSUES (September 12, 2013), http://sportslaborrelations.blogspot.com/2013/09/live-streaming-games-over-internet.html.

Section II will examine the history of sports broadcasting from the early days under the Sherman Act through the passage of the Sports Broadcasting Act. In addition, the baseball exemption will be considered, given its unique position in the broader context of sports broadcasting rights. Section III will analyze the recent antitrust cases that have been brought before the court regarding blackout restrictions. This section will also discuss the structure of broadcasting rights that gave rise to these cases. The analysis in this section will primarily focus on the NHL, but will also briefly discuss the recent case against the MLB and the refusal to extend the baseball exemption to the current issue. Section IV will look at the settlement agreements in the MLB and NHL cases, including the lack of substantive changes to the blackout restrictions. This section will also consider the impact of these settlements on the various consumers and how these agreements could affect future broadcasting rights. Section V will provide a prediction of the future of sports broadcasting rights in light of the settlement agreements and the rapid advances in technology. It will briefly discuss the revolution of the music industry that occurred during the early 2000s in order to offer a corollary showing the disruptive power that technology can create in a media industry. Furthermore, it will argue that live sports productions possess a great deal of power in determining the future of the TV industry. In fact, the recent and rapid advancement in streaming technologies and services has placed increasing pressure on a stagnant cable TV industry by shifting the public perception of the value associated with traditional cable TV service. Furthermore, this section will argue that any long term solution for the cable industry will require some form of paradigm shift in order to keep consumers from "cutting the cord" entirely, likely in the form of a-la-carte product offerings.

## II. HISTORY OF SPORTS BROADCASTING RIGHTS

Early on in the history of sports broadcasting rights, regulation was primarily left to the Sherman Act, under which "every contract, combination in the form of a trust or otherwise, or, conspiracy, in restraint of trade" is illegal.[15] Over time, case law evolved to provide professional sports leagues with exemptions from federal antitrust laws.[16] These exemptions were intended to preserve the integrity and

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15. 15 U.S.C. § 1 (2004); *see also* Thomas Francis Moran, *The Sports Broadcasting Act: Is an Update Needed?*, LAW SCHOOL STUDENT SCHOLARSHIP, Paper 273, (2013), http://scholarship.shu.edu/student_scholarship/273.

16. *See* United States v. Nat'l Football League, 116 F. Supp. 319 (E.D. Pa. 1953); United States v. Nat'l Football League, 196 F. Supp. 445 (E.D. Pa. 1961); Federal Baseball Club of Baltimore v. National League, 259 U.S. 200 (1922).

quality of the product offered by leagues, despite conduct that can be fundamentally anticompetitive.[17]

This section will examine the evolution of antitrust laws in relation to professional sports leagues. First, it will consider the baseball exemption that has been upheld for almost a century that is not extended to other sports leagues, despite the court's acknowledgement of the apparent inconsistency.[18] Second, it will examine the cases against the NFL that ultimately led to the passage of the Sports Broadcasting Act of 1961. Third, it will consider the Sports Broadcasting Act itself and the effect of changing technology on the interpretation of the Act. In particular, the ambiguity surrounding the definition of the term "sponsored telecasting," and its relevance to modern broadcasting methods.

### *A. The Baseball Exemption*

Long known for having the status of America's favorite pastime, baseball also has a special status in federal antitrust law. In *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore*, the Baltimore Terrapins, a baseball club in the Federal League, sued the MLB for allegedly violating the Sherman Act through "reserve clauses" that bind athletes to the teams that first signed them.[19] The Supreme Court held that baseball is a game that does not constitute trade or commerce, as those terms are normally understood.[20] Because baseball is not considered to be trade or commerce, it is not subject to the antitrust laws of the Sherman Act.[21]

Since this decision in 1922, the Court has had several opportunities to revisit this questionable decision.[22] For example, in 1972, the Court declined to overturn the original decision from 1922 despite noting the law to be an aberration, reasoning that the court must respect the doctrine of *stare decisis*, and that any changes to antitrust exemptions

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17. *See* Carl W. Hittinger & Adam D. Brown, Antitrust Law Looms Over Sports Contracts Analysis, PITTSBURGH POST-GAZETTE (February 14, 2011), http://www.post-gazette.com/business/legal/2011/02/14/Antitrust-law-looms-over-sports-contracts-analysis/stories/201102140219.

18. *See* Flood v. Kuhn, 407 U.S. 258, 258 (1972) (describing the baseball exemption that is not extended to other interstate professional sports as an "aberration" and "resultant inconsistency" to be resolved by legislation).

19. *See* Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, 269 Fed. 681, 684 (D.C. Cir. 1920).

20. *See* Fed. Baseball Club of Baltimore v. National League, 259 U.S. 200, 209 (1922) ("*Personal* effort, not related to production, is not a subject of commerce.").

21. *See id.*

22. *See,* e.g., Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Flood, 407 U.S. at 258. *See generally* Radovish v. National Football League, 352 U.S. 445, 450 (1957) (criticizing the logic of the exemption as "at best of dubious validity").

should be completed through the legislative process.[23] Additionally, the scope of the decision was limited in 1988 when Congress passed the Curt Flood Act, which removed employment related agreements from the baseball exemption.[24] Ultimately however, the antitrust exemption for baseball still has a fairly large scope that is still considered good law.[25]

### *B. United States v. National Football League*

While baseball has held a unique position in American antitrust history, the exemptions for other sports leagues developed through a series of cases predominantly involving the NFL.[26] In 1953, the Department of Justice (DOJ) alleged that the NFL had violated Section 1 of the Sherman Act by prohibiting teams from broadcasting games in the territories of other teams.[27]

Under the NFL bylaws, teams were restricted from broadcasting their games anywhere within seventy-five miles of another team's territory without the permission from the other team.[28] Judge Grim explained that contracting to prevent teams from broadcasting in each other's home territories is clearly an allocation of market territories among competitors with the purpose of restraining competition.[29] However, Judge Grim argued that for this restriction to be a violation of antitrust law, the restriction must be deemed unreasonable.[30] Here, professional sports leagues are placed in a unique situation unlike a regular business, because a professional sports team cannot always compete to a level of such success that will result in the financial failure of its competitors; doing so will weaken the league, which will result in the ultimate failure of all the teams.[31]

In addition, during this time, the sale of tickets accounted for the greatest revenue for sports teams.[32] Protecting this revenue stream was

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23. Flood, 407 U.S. at 258 ("The longstanding exemption of professional baseball from the antitrust laws . . . is an established aberration, in the light of the Court's holding that other interstate professional sports are not similarly exempt, but one in which Congress has acquiesced, and that is entitled to the benefit of stare decisis. Removal of the resultant inconsistency at this late date is a matter for legislative, not judicial, resolution.").

24. *See* 15 U.S.C. §26(b)(a) (2012).

25. *See generally* 15 U.S.C. §26(b) (1995).

26. *See generally* United States v. Nat'l Football League, 116 F. Supp. 319 (E.D. Pa. 1953); *see also* United States v. Nat'l Football League, 196 F. Supp. 445 (E.D. Pa. 1961).

27. *See Nat'l Football League*, 116 F. Supp. at 321.

28. *See id.*

29. *See id.* at 322.

30. *See id.* at 323.

31. *See id.* ("[T]he stronger teams would be likely to drive the weaker ones into financial failure. If this should happen . . . eventually the whole league . . . would fail, because without a league no team can operate profitably.").

32. *See id.* at 325.

essential to the preservation of sports leagues.[33] Judge Grim used the data for college football television to reason that allowing other teams to broadcast their games will reduce local team revenues by reducing the number of ticket sales.[34] Therefore, by allowing this immediate restriction, the league is actually preserved in the grand scheme and competition is actually promoted.[35]

The structure of sports broadcasting rights further changed in the 1960's, beginning with another ruling by Judge Grim regarding television contracts.[36] In 1961, the NFL sought to further increase its profits by creating an exclusive television contract with Columbia Broadcasting System (CBS), which would increase the number of televised games.[37] At the time, televisions had become a staple in most American households.[38] Judge Grim argued that according to the 1953 ruling, individual teams were permitted to restrict other games in their home territory while a home game is being played.[39] However, this was distinct from the restriction in the 1961 case because in the agreement with CBS, the broadcasting company was given the full authority to determine where, and which, games will be televised.[40] This exclusive agreement was found to be an unreasonable restraint that eliminated competition between the teams, and thus violated Section 1 of the Sherman Act.[41]

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33. *See id.* ("Reasonable protection of home game attendance is essential to the very existence of the individual clubs, without which there can be no League and no professional football as we know it today.").

34. *See id.*

35. *See id.* at 325–26 ("This particular restriction promotes competition more than it restrains it in that its immediate effect is to protect the weak teams and its ultimate effect is to preserve the League itself. By thus preserving professional football this restriction makes possible competition in the sale and purchase of television rights in situations in which the restriction does not apply.").

36. *See* United States v. Nat'l Football League, 196 F. Supp. 445, 446 (E.D. Pa. 1961) ("Defendants concede that the 1961 NFL-CBS contract marks a basic change in National Football League television policy. Prior to this contract each member club individually negotiated and sold the television rights to its games to sponsors or telecasters with whom it could make satisfactory contracts. The NFL-CBS contract sharply departs from this practice.").

37. *See* Ivy Ross Rivello, *Sports Broadcasting in an Era of Technology: Superstations, Pay-Per-View, and Antitrust Implications*, 47 DRAKE L. REV. 177, 185 (1998).

38. *See id.*

39. *See Nat'l Football League*, 116 F. Supp. at 447 n.5 (explaining that the limiting restrictions for telecasting games in a home territory while there was a home game were subject to the permission of the home team).

40. *See id.* at 447 ("defendants have by their contract given to CBS the power to determine which games shall be telecast and where the games shall be televised.").

41. *See id.* ("Thus, by agreement, the member clubs of the League have eliminated competition among themselves in the sale of television rights to their games.").

### C. The Sports Broadcasting Act of 1961

In response to the two rulings by Judge Grim, federal legislation was quickly enacted that reversed the effects of these cases: the Sports Broadcasting Act of 1961 (SBA).[42] Under this Act, professional sports leagues were exempt from Section 1 antitrust claims.[43] According to the SBA, the antitrust laws in section 1 of the Sherman Act:

> [S]hall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league . . . 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 by such clubs.[44]

The SBA provided leagues the ability to pool together the broadcasting rights of individual teams in order to sell the combined rights through television contracts.[45]

Applying to only four professional sports (football, basketball, baseball, and hockey), the scope of the SBA was to be construed narrowly.[46] However, some have argued Congress intended a broader interpretation, such as in defining the phrase "sponsored telecasting."[47] In the 1980's, based on hearings from 1961, both the Federal Trade Commission and the Justice Department concluded that cable television was likely not a form of "sponsored telecasting."[48] In fact, courts have held that the term is limited to network broadcast television.[49] While the inclusion of cable TV was debated, it was clear that satellite subscription service was more definitively excluded from the definition of sponsored telecasting.[50]

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42. *See* Mathew J. Mitten & Aaron Hernandez, *The Sports Broadcasting Act of 1961: A Comparative Analysis of its Effects on Competitive Balance in the NFL and NCAA Division I FBS Football*, 39 OHIO N.U. L. REV. 745, 745 (2013); *see also* United States Football League v. Nat'l Football League, 842 F.2d 1335, 1347 (2d Cir. 1988) (citing S. REP. No. 87-1087, at 1 (1961), reprinted in 1961 U.S.C.C.A.N. 3042. 3042).

43. *See* David C. Moran, *Illegal Procedure? The Antitrust Implications of NFL Sunday Ticket*, 18 J.L. & COM. 397, 404 (1999).

44. 15 U.S.C. § 1291 (2012).

45. *See* Moran, *supra* note 15.

46. *See* 15 U.S.C. § 1294 (2012).

47. *See* Dean A. Rosen, *Back to the Future Again. An Oblique Look at the Sports Broadcasting Act of 1961, 13 No. 5.* ENT. L. REP. 3, at *5 (1991) (positing that Congress deliberately ignored a more definitive statement regarding cable TV as part of its legislative consideration).

48. *Id.*; *see also* Brett T. Goodman, *The Sports Broadcasting Act: As Anachronistic As the Dumont Network?*, 5 SETON HALL J. SPORT L. 469, 482–83 (1995).

49. *See* Kingray, Inc. v. Nat'l Basketball Ass'n, Inc., 188 F. Supp. 2d 1177, 1183 (S.D. Cal. 2002) ("'Sponsored telecasting' under the SBA pertains only to network broadcast television and does not apply to non-exempt channels of distribution such as cable television, pay-per-view, and satellite television networks.").

50. While debates as to whether the intent of Congress was to include cable TV as part of the definition of "sponsored telecasting" due to unforeseen technological advancements, cable TV had

Therefore, the pooled broadcasting agreements the leagues have with cable networks, such as ESPN, as well as their own proprietary networks (NFL Network, NHL Network, MLB Network, and NBA TV) are excluded from the definition and subject to potential antitrust scrutiny.[51] However, the Justice Department has not brought an action against a professional sports league for broadcasting rights contracts violating the Sherman Act.[52]

Despite significant changes and innovations to the structure and market for sports broadcasting, the SBA has not been updated in over 50 years.[53] Given the rapid technological advances in the television, internet, and broadcasting industries, the ambiguity in the definition of "sponsored telecasting" has become less clear, effectively expanding the blind spot for potential antitrust violations.[54] If it is not updated to provide clearer definitions that are applicable to the changes occurring in the communications industry, the viability of the current cable TV structure may be in jeopardy.[55] The following cases brought against the MLB and NHL may serve as an indicator of the disruptive changes to come.

## III. ANALYSIS OF RECENT RESTRAINT VIOLATION CASES

In 2012, viewers brought a lawsuit against both the NHL and MLB, as well as the various broadcasters involved in televising games, including the regional sports networks (RSNs) that televised games, and the multichannel video programming distributors (MVPDs), i.e., the cable television provider, Comcast, and satellite service provider, DirecTV.[56]

The plaintiffs alleged that the defendants had created agreements that violated the Sherman Act by eliminating competition through exclusive territories protected by anticompetitive blackouts.[57] The complaint additionally alleged that the defendants colluded to

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been "on the scene" for a decade prior to the Act's passage. *See* Goodman, *supra* note 48, at 484; *see also* Moran, *supra* note 43, at 408.

51. *See* Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 620 (2015); *see also* Moran, *supra* note 43, at 408.

52. Moran, *supra* note 15.

53. *See* Moran, *supra* note 15.

54. *See* Moran, *supra* note 15 ("Congress should revisit the statute to help clear up confusion and allow professional sports leagues to take advantage of new technology without fear of possible antitrust violations.").

55. *See* Goodman, *supra* note 48, at 484 ("[I]f the Act is to survive continuing advances in the communications industry, legislators may be wise to amend the Act with a clearer, more modernized definition of "sponsored telecasting.").

56. *See* Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465, 471 (S.D.N.Y. 2012).

57. *See id.*

exclusively sell "out-of-market" (OOM) packages through each league, which resulted in supra-competitive prices.[58]

The claims against MLB were eventually split off into a separate case.[59] The analysis in Subsection A is applicable to both the MLB and NHL. Subsection B will discuss the separate issues and distinctions for the MLB.

### A. *Laumann v. National Hockey League*

#### 1. Relevant Markets

There are two relevant product markets alleged in the complaint: "the provision of major league professional ice hockey [and baseball] contests in North America" and "live video presentations of [professional baseball and hockey] games over media such as cable and satellite television and the Internet."[60] Currently being the exclusive providers of these professional sports, the barriers to entry in this market are high.[61] In addition, the leagues can exercise market power in the live video market.[62]

#### 2. Agreement Structure

A majority of telecasts are based on agreements between individual teams and RSNs for the rights to broadcast said team's games within the local territory of the RSN.[63] Most RSNs are owned by MVPDs (primarily Comcast and DirecTV), to whom the RSNs sell the produced games.[64] The MVPDs sell the local games to consumers through territorialized packages, while blacking out games that are in unauthorized territories.[65] The MVPD packages only televise games that are "in-market", i.e., games played by teams inside the home television territory (HTT) within which subscribers reside.[66]

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58. *Id.*

59. *See generally* Garber v. Office of the Comm'r of Baseball, 120 F. Supp. 3d 334 (S.D.N.Y. 2014).

60. *Laumann*, 907 F. Supp. 2d at 475.

61. *See id.*

62. *See id.* at 475-76 ("NHL's and MLB's dominance in the production of professional hockey and baseball games 'give [them] the ability, together with [their] television partners, to exercise market power in the market for live video presentations of [professional baseball and hockey] games.").

63. There is a small minority of games that are broadcast nationally. The agreements are between the Leagues and national networks. *See id.* at 473–74.

64. There are two RSNs that are not owned by an MVPD, but do share ownership with an individual club. *See id.* at 474.

65. *See id.* (explaining that unauthorized territories for blackouts are determined by the agreements between RSNs and the leagues).

66. *Id.* at 475 (noting, however, the "limited exception of nationally televised games.").

Aside from the limited number of nationally televised games, consumers who reside outside of an HTT are left with limited options for watching OOM games: television packages and internet packages.[67] The television packages made available from MVPDs (Center Ice for NHL and Extra Innings for MLB) require a general subscription with the MVPD, and do not permit choice in selection of individual games.[68] Like the television packages, the internet packages available directly through the leagues (NHL Gamecenter Live and MLB.tv) require the purchase of all OOM games.[69] However, unlike television, internet-only subscribers are unable to watch nationally or locally televised games to protect the monopolies of the RSNs and MVPDs.[70]

This type of broadcasting structure indicates a lack of competition between RSNs or MVPDs with internet-based subscriptions. By preventing the internet packages from including HTT games, the blackouts substantially limit the competition that could exist.[71]

3. Antitrust Standing

For the court to review a federal antitrust case, the plaintiff must first establish Article III standing.[72] Next, the plaintiffs must also establish that they have antitrust standing based on the following criteria: (1) the plaintiffs must be a direct purchaser of the product (or qualify for an exception); and (2) the injuries must not be too remote from the alleged conduct to qualify as antitrust harms.[73]

The general rule governing the first criterion establishes that "only direct purchasers have standing to bring civil antitrust claims."[74] However, courts have also recognized two exceptions to the *Illinois Brick Co.* rule: (1) the ownership of control exception; and (2) the co-conspirator exception.[75] In *Illinois Brick Co.*, the Court directly expressed the first exception, stating that the general rule does not apply "where

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67. *See id.*

68. *See id.* ("These packages require the purchase of all out-of-market games even if a consumer is only interested in viewing a particular game or games of one particular non-local team. They also require a subscription to the standard digital television package.").

69. *See id.*

70. *See id.* ("The alleged purpose of the limitation on Internet programming is to protect the RSNs' regional monopolies and insulate MVPDs that carry them from Internet competition.").

71. *See id.* (alleging this is done by "reducing output of live MLB and NHL game presentations, raising prices, and rendering output unresponsive to consumer preference to view live [MLB and NHL] games, including local games, through both Internet and television media.").

72. *See* Ross v. Bank of America, N.A. (USA), 524 F.3d 217, 222 n. 1 (2d Cir. 2008) ("A court proceeds to an antitrust standing analysis only after Article III standing has been established.").

73. *See* Laumann v. Nat'l Hockey League, 105 F. Supp. 3d 384, 398 (S.D.N.Y 2015).

74. Simon v. KeySpan Corp., 694 F.3d 196, 201–02 (2d Cir. 2012) (citing Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)).

75. *See Laumann*, 907 F. Supp. 2d at 481.

the direct purchaser is owned or controlled by its customer."[76] The second exception permits suits in which the dealer "has conspired illegally with the manufacturer with respect to the very price paid by the consumer."[77] The courts have not applied the exceptions with a uniform scope.[78] However, the purpose of these exceptions is to prevent situations where the reasoning for the general rule is no longer effective, namely when the plaintiffs are the first or only victims of the alleged anticompetitive agreements in a multi-tiered distribution chain.[79]

In the NHL case, the RSNs and MVPDs were the intermediate purchasers in the distribution chain, coming before the consumers.[80] In the live video presentation market, the intermediate purchasers received benefits from arrangements with the sports clubs or league which made them co-conspirators.[81] The plaintiffs were the first purchasers that were not involved in the alleged conspiracy, and therefore met the first prong required for standing.[82]

In addition to the *Illinois Brick Co.* rule, plaintiffs must also follow the factors in *Associated General Contractors* to establish they are "efficient enforcers."[83] In the NHL case, the court determined that purchasers of the OOM packages were the most efficient enforcers to bring suit because: (1) they were in the relevant markets of professional hockey and baseball programming; (2) alleged a price increase; (3) alleged reduced consumer choice from lack of competition; and (4) there were no innocent parties between the OOM package purchasers and the alleged agreements.[84] The plaintiffs who did not subscribe to an OOM package were dismissed because they did not meet the second prong required for Article III standing, i.e., their injuries were too

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76. Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 n. 16 (1977).

77. *Laumann*, 907 F. Supp. 2d at 481 (quoting *In re* ATM Fee Antitrust Litig., 686 F.3d 741, 750 (9th Cir. 2012)).

78. *See* Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 631–32 (7th Cir. 2002) (avoiding the term "co-conspirator exception" as used in *Illinois Brick Co.*, and instead characterizing it as "allocat[ing] to the first non-conspirator in the distribution chain the right to collect 100% of the damages."); *see also* Dickson v. Microsoft Corp., 309 F.3d 193, 215 (4th Cir. 2002) (narrowing the exception to price-fixing conspiracies).

79. *See Laumann*, 907 F. Supp. 2d at 481.

80. *See id.* at 482.

81. *See id.* (explaining that the RSNs "are affiliated with the clubs for whom they provide programming and/or are owned by MVPDs which ultimately sell programming to consumers" and that MVPDs "benefit directly from the agreements that limit internet broadcasting of games.").

82. *See id.* at 483 ("Where all middlemen are alleged to be co-conspirators, the problems of apportioning recovery among all potential plaintiffs and duplicative recovery simply do not arise, and the principle of permitting the purchasers who have been most directly injured is honored.").

83. *Id.*; *see also* Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 (1983) (requiring evaluation of "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.").

84. *See Laumann*, 907 F. Supp. 2d at 484.

remote from the alleged conduct.[85] Those who did, however, had sufficiently established standing and could move forward.[86]

3. Section One Claims

In order to determine whether an agreement unreasonably restrains trade in violation of Section 1, the court must first decide whether an agreement is a "contract, combination, or conspiracy."[87] The court examined the role played by each potential violator in the alleged conspiracy: the leagues, the RSNs, and the MVPDs.[88]

The league is comprised of individual clubs, which have created agreements as a league to provide exclusive local telecast territories for each club, and also give the league the exclusive rights for marketing games outside the HTT.[89] The clubs owned the initial rights to these games, but ceded the rights to the leagues.[90] In *American Needle, Inc. v. National Football League*, the Supreme Court held that the individual clubs comprising a professional sports league do not have common objectives, nor do they have "the unitary decision making quality or the single aggregation of economic power characteristic of independent action."[91] The court determined that these agreements are not exempt from Section 1 scrutiny and can be challenged under the rule of reason.[92]

In the NHL case, the RSNs participated in the relevant market by purchasing the rights to broadcast games from the clubs, while also producing the video presentation that was subject to the territoriality restrictions.[93] Plaintiffs alleged that this horizontal agreement is anticompetitive because it divided the market.[94] Courts have held that coordinating horizontal agreements that restrain trade through identical vertical agreements at the next distribution level can injure competition through collusion, and therefore, is subject to antitrust scrutiny.[95] Here, the court determined that the RSNs have knowledge of

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85. *See id.* ("Their alleged injuries are both speculative and difficult to identify and apportion in light of the packaged nature of television services, not to mention their remoteness from the primary agreements among League defendants, which makes determination of the causal connection even more difficult.").

86. *See id.*

87. *Id.* at 485 ("The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade") (quoting *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S 183, 186 (2010)).

88. *Id.* at 485–87.

89. *Id.* at 485.

90. *See id.*

91. *American Needle, Inc.*, 560 U.S at 196.

92. *See Laumann*, 907 F. Supp. 2d at 485–86.

93. *See id.* at 486.

94. *Id.*

95. *See, e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226–27 (1939) (finding an agreement between movie distributors that were each aware of the restraint on commerce was

the analogous agreements with other RSNs, and that it is plausible to assume these agreements are in some part, contingent upon that knowledge.[96] This provided enough reason for the court to allow the plaintiffs to include the RSNs in the alleged antitrust conspiracy.[97]

In contrast to the horizontal agreements between the RSNs, the MVPDs were alleged to conspire by engaging in vertical agreements that were responsible for divisions through the horizontal market agreements.[98] The plaintiffs alleged that MVPDs were actively engaging in anticompetitive behavior because: (1) The MVPDs were the ones who largely owned and controlled the RSNs; and (2) the MVPDs were the parties who actively implemented the geographic divisions in television programming.[99] Essentially, the RSNs would have had knowledge of agreements for other RSNs because each RSNs' agreement would have been similarly divided in restraint of competition.[100] These factors indicated a "meeting of the minds in an unlawful arrangement," which would be subject to section 1 scrutiny.[101]

The court further refuted the defendants' argument that the "all-or-nothing" packages available were not harmful to competition because the packages increased output, reasoning that a positive effect on price or output does not, as a matter of law, eliminate harm to competition.[102] The only agreements exempt from antitrust scrutiny were those that fell under the "sponsored telecasting" definition.[103] However, the term only applies to network broadcast television, not cable television, pay-per-view, or satellite television networks.[104] Therefore, RSNs would not be included in such a definition.

The court ultimately concluded that the agreements between the leagues, RSNs, and MVPDs were plausibly subject to scrutiny for

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sufficient to establish an unlawful conspiracy under the Sherman Act); *see also* Toys "R" Us, Inc. v. Fed. Trade Comm'n, 221 F.3d 928, 930 (7th Cir. 2000).

96. *Laumann*, 907 F. Supp. 2d at 487.

97. *Id.*

98. *See id.* at 487–88.

99. *Id.*

100. *See id.* at 486.

101. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984) ("A § 1 agreement may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.").

102. *Laumann*, 907 F. Supp. 2d at 491; *see also* Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 399 (S.D.N.Y.2004) ("[A]n effect on price or output is a sufficient but not a necessary element of antitrust injury. Antitrust injury may arise from other anticompetitive effects, including barriers to market entry."), *rev'd on other grounds,* 369 F.3d 124 (2d Cir. 2004).

103. *See Laumann*, 907 F. Supp. 2d at 489.

104. *See id.* at 489 n.141 (quoting Kingray, Inc. v. NBA, Inc., 188 F. Supp. 2d 1177, 1183 (S.D. Cal. 2002).

potentially violating antitrust law.[105] However, the case never made it to trial, as the parties agreed to a preliminary settlement in June 2015.[106]

### B. *Garber v. Office of the Commissioner of Baseball*

In addition to the defenses used by the NHL, the MLB defendants in the suit used the baseball exemption as an argument to preclude their liability.[107] Using the Supreme Court's holding in *Toolson v. New York Yankees, Inc.*, the MLB argued that the Court's dismissal of all claims, including a factual allegation related to territorial broadcasting restrictions, indicated the Court's intent to include such restrictions under the baseball exemption.[108] This argument was struck down on the grounds that television broadcasting is an interstate industry by nature, and therefore falls outside of the exemption defined in *Federal Baseball*, which did not involve any broadcasting-related allegations.[109]

Furthermore, the court found Congress' intent in drafting the SBA to be instrumental in this situation.[110] By including baseball as a part of the SBA, Congress did not intend for all baseball broadcasting agreements to be exempt because otherwise, the baseball common law exemption would render the provision in the SBA that limited such agreements to be meaningless.[111] Additionally, geographic broadcasting territorial agreements were expressly excluded from the antitrust exemption, indicating that Congress intended for such agreements to be subject to scrutiny.[112]

Finally, the court referred to the only federal case since the enactment of the SBA to consider this issue for broadcasting restrictions: *Henderson Broadcasting Corp. v. Houston Sports Association*.[113] The court in *Henderson* reasoned that broadcasting was not central enough to be included under the baseball exemption; it was "related to but separate and distinct from baseball."[114]

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105. *See* Laumann v. Nat'l Hockey League, 56 F. Supp. 3d 280, 307 (S.D.N.Y. 2014) (denying defendants' motions for summary judgment).

106. Max Stendahl, *NHL Settlement Approved in Broadcast Antitrust Case*, LAW360 (Sep. 1, 2015, 2:18 PM), https://www.law360.com/articles/697822/nhl-settlement-approved-in-broadcasting-antitrust-case.

107. *Laumann*, 56 F. Supp. 3d at 295.

108. *Id.*

109. *Id.*

110. *See id.*

111. *Id.*

112. *See id.*

113. *Id.* at 296.

114. Henderson Broad. Corp. v. Houston Sports Ass'n, 541 F. Supp. 263, 265 (1982).

Ultimately, the MLB did not receive special treatment for the baseball exemption because the court made it clear that it did not apply to the issues at hand.[115]

## IV. SETTLEMENT AGREEMENTS

In September 2015, the District court approved a settlement agreement reached between the plaintiffs and the NHL.[116] Under the agreement, the NHL will offer an unbundled version of its internet subscription package (GameCenter Live) for five years, allowing consumers to purchase single-team packages for at least 20 percent less than the price of the bundled package.[117] In addition to reduced rates, the NHL will also offer MVPDs the option to provide consumers with single-team packages, though it is not guaranteed that the MVPDs will choose to do so.[118]

In a similar manner approximately six months later, the MLB reached a settlement for its own blackout case.[119] Like the NHL, the MLB agreed to offer single-team packages available through MLB.TV, provide cable and satellite providers with the option to carry the single-team packages, and provide a reduced rate for both the single-team and league-wide packages for the next five years.[120]

### A. *A Hollow Triumph?*

The settlement agreements, while providing progress on the bundling front, did little to address the primary concern that initially spearheaded the cases: blackouts and territorial exclusivity.[121] The settlement agreements keep the existing broadcast territories untouched, leaving the cord-cutters and cable subscribers unable to access their local team's RSN, and with little to gain from the settlement besides a temporary price reduction.[122]

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115. *Laumann*, 56 F. Supp. 3d at 297.

116. Stendahl, *supra* note 106.

117. *Id.*

118. *See* Vin Gurrieri, *NHL, Subscribers Reach Deal to End Broadcast Antitrust Row*, LAW360 (June 11, 2015), https://www.law360.com/articles/666908/nhl-subscribers-reach-deal-to-end-broadcast-antitrust-row.

119. *See* Bob Van Voris & Gerry Smith, *MLB Settlement Gives Baseball Fans New Viewing Options*, BLOOMBERG (Jan. 19, 2016, 5:20 PM), https://www.bloomberg.com/news/articles/2016-01-19/major-league-baseball-settles-with-fans-over-game-telecasts.

120. *See* Nathaniel Grow, *More Details on the MLB TV Lawsuit Settlement*, FANGRAPHS (January 20, 2016), http://www.fangraphs.com/blogs/instagraphs/more-details-on-the-mlb-tv-lawsuit-settlement/.

121. *See* Christina Davis, *NHL Broadcast Antitrust Action Settlement Gets Initial OK*, TOP CLASS ACTIONS (June 19,2015), http://topclassactions.com/lawsuit-settlements/lawsuit-news/58430-nhl-broadcast-antitrust-class-action-settlement-gets-initial-ok/.

122. *See* Grow, *supra* note 120.

However, the settlement can be seen as a victory for OOM fans, for whom the newfound access to single-team packages is a significant change. For these consumers, the number of options to watch their favorite team has expanded and can be seen as a move in the right direction.[123] In addition, the judge's rulings prior to the settlement indicate that the plaintiffs had a legitimate case to bring regarding the anticompetitive nature of these broadcasting agreements.[124] While settling seemed to be a more secure solution to quell consumer frustration at the time, leagues can likely expect more lawsuits to follow if changes are not made in the future.[125]

## V. THE FUTURE OF SPORTS BROADCASTING RIGHTS

For decades, live sports have played an instrumental role in influencing the television industry.[126] This role has maintained its influence due to bundling: a critical component of the cable TV structure which is largely responsible for the profitability of the industry.[127] Bundling forces consumers to purchase packages of channels, rather than individually selecting the channels they want.[128] It can be an effective method when the consumer feels like they are getting a bargain, and can also have some positive benefits, such as reducing transaction costs and providing option value.[129] However, consumers are no longer seeing such value in bundling, as the industry is beginning to see a decline in growth, losing current subscribers and seeing a lower percentage of all TV owners subscribing to a pay TV service.[130]

In fact, for the past 10 years, the cost of cable TV has exceeded the rate of inflation every year.[131] Despite the seemingly endless rise in

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123. *See* Voris, *supra* note 119.

124. *See* Laumann v. Nat'l Hockey League, 56 F. Supp. 3d 280, at 307 (S.D.N.Y. 2014).

125. Just before the settlement with the NHL was announced, a similar antitrust action was brought against the NFL for its exclusive package with DirecTC, NFL Sunday Ticket. Mike Florio, *NFL, DirecTV Sued Over Sunday Ticket*, PRO FOOTBALL TALK (June 19, 2015, 10:24 AM), https://profootballtalk.nbcsports.com/2015/06/19/nfl-directv-sued-over-sunday-ticket/.

126. *See* Gerry Smith & Brian Womack, *Yahoo's $17 Million Bet on NFL Streaming Gets Tested Sunday*, BLOOMBERG LAW (Oct. 23, 2015, 8:00 AM), https://www.bloomberg.com/news/articles/2015-10-23/yahoo-s-17-million-bet-on-nfl-streaming-gets-tested-sunday.

127. David Carr, *New Challenges Chip Away at Cable's Pillar of Profit*, N.Y. TIMES (Apr. 27, 2014), https://www.nytimes.com/2014/04/28/business/media/new-challenges-chip-away-at-cables-pillar-of-profit.html?_r=0.

128. James Surowiecki, *Bundles of Cable*, THE NEW YORKER (January 25, 2010), http://www.newyorker.com/magazine/2010/01/25/bundles-of-cable.

129. *Id.*

130. *See* Nathan McAlone, *Americans Are Paying 40% more for TV Than They Were Five Years Ago*, BUSINESS INSIDER (Sept. 23, 2016, 1:53 PM), http://www.businessinsider.com/pay-tv-prices-up-40-from-5-years-ago-2016-9?r=US&IR=T.

131. *See* In the Matter of Implementation of Section 3 of the Cable Television Consumer Prot. and Competition Act of 1992, 31 FCC Rcd. 11498, 11513 (2016) (noting an average annual price

costs, live sports have been widely regarded as a cornerstone for the television industry.[132] As a result of their monopolistic position in this market, leagues have had considerable market power in negotiating the agreements with networks.[133] Armed with the power to raise prices and increase revenue, leagues effectively force all cable TV subscribers to pay for their product, regardless of if the consumer watches sports or not.[134]

### A. *The Music Industry: A Cautionary Tale?*

The current structure of cable TV is not unlike the music industry at the dawn of the 21st century before Apple revolutionized how consumers purchase music with the invention of iTunes.[135] Prior to the emergence of the internet, music was predominantly purchased as physical albums.[136] However, in the 1990s, the MP3 file format began gaining ground, marking the start of the digital music era.[137]

Meanwhile, as digital music began its ascent, peer-to-peer("P2P") services, such as Napster, emerged as a threat to the music industry by allowing users to share and download songs by using a searchable, central music-specific platform.[138] Many record labels responded with lawsuits and copy-resistant formats, but these tactics proved ineffective in slowing the revolution that had begun.[139] Fearful of the effects of the digital music revolution and reeling from losses at the hands of online piracy, record labels struck deals with Apple Inc. for the digital distribution and sale of music, which provided labels with an entry into

increase of 4.8 percent between 2005 and 2015 for cable service, despite an inflation rate of only 2 percent for the same period).

132. *See* Garrahan, *supra* note 9 ("In the TV industry, the prevailing argument has always been that live sport is immune to changes in viewing patterns.").

133. *See* Grow, *supra* note 51, at 577.

134. *See,* e.g., Derek Thompson, Mad About the Cost of TV? Blame Sports, THE ATLANTIC, (Apr. 2, 2013, http://www.theatlantic.com/business/archive/2013/04/mad-about-the-cost-of-tv-blame-sports/274575/ (estimating that on a $90 monthly cable bill, approximately $76 is spent annually on the NFL alone).

135. *See* Steve Kovach, *Apple and Others Have Failed to Revolutionize TV, So I Went Back to Cable Instead*, BUSINESS INSIDER (Sept. 23, 2017, 8:45 AM), https://www.businessinsider.com/apple-tv-is-not-the-future-of-tv-2017-9.

136. In the years leading up to its highest point in 1999, recorded music revenues were predominantly composed of CDs, cassettes, and other physical formats. *See* Recording Industry Association of America, *U.S. Sales Database*, RIAA, https://www.riaa.com/u-s-sales-database/ (last visited Feb. 1, 2017).

137. Brad Hill, *The iTunes Influence, Part One: How Apple Changed the Face of the Music Marketplace*, ENGADGET (Apr. 29, 2013), https://www.engadget.com/2013/04/29/the-itunes-influence-part-one/.

138. *See id.*

139. *See id.*

the digital music marketplace.[140] These deals led to the emergence of iTunes as the embodiment of digital music sales.[141]

One of the most significant changes that iTunes brought to the structure of the music industry was the "unbundling" of the album.[142] By instituting the ability to purchase individual singles in addition to full albums, and by offering both at a reduced price point, consumers perceived value in the product once again.[143] This unbundling was indicative of consumer preferences that Steve Jobs noticed and was able to capitalize on. However, on a whole, the music industry has struggled to adapt to the changes in consumer demands and preferences.[144] The record labels, who once held an oligopoly position, lost some control over the power to dictate price because profits became redistributed as the industry underwent significant transformation.[145]

### *B. The Content Driven Market*

In 2015, the NFL and Yahoo! Inc. agreed to a deal giving Yahoo the rights to live stream one Sunday game played in London, for $17 million.[146] This deal involved the first NFL game broadcast on the internet across the world for free, becoming a harbinger for future changes to the sports broadcasting industry.[147] In addition, it provided the initial evidence that leagues could use this new platform to serve two goals: increase revenues and reach unserved segments or markets, including those outside of the US.[148] Furthermore, this deal was also important because through these over-the-top (OTT) packages, leagues were able to use online distribution channels to bypass the cable TV providers and sell the content directly to consumers.[149] The impact

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140. *See* Ashraf El Gamel, *The Evolution of the Music Industry in the Post-Internet Era*, CMC SENIOR THESES PAPER 532, 18 (2012), http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1501&context=cmc_theses.

141. *See id.*

142. Hill, *supra* note 137.

143. Prior to iTunes, consumers had to pay for a full album with an average of 12 songs, despite containing only 1 or 2 singles. *see* Hill, *supra* note 137. *see also* Brandon Griggs & Todd Leopold, *How iTunes Changed Music, and the World*, CNN (Apr. 26, 2013, 4:40 PM), http://www.cnn.com/2013/04/26/tech/web/itunes-10th-anniversary/ ("sales of songs far outpaced sales of whole albums on iTunes.").

144. *See* David Goldman, *Music's Lost Decade: Sales cut in half*, CNN MONEY (Feb. 3, 2010, 9:52 AM) http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/.

145. *See* El Gamel, *supra* note 140, at 21.

146. Smith & Womack, *supra* note 126.

147. Zachary Zagger, *NFL-Yahoo Dealings Signal Changing Sports Media Landscape*, LAW360 (Nov. 24, 2015, 5:05 PM), https://www.law360.com/articles/729946/nfl-yahoo-dealings-signal-changing-sports-media-landscape.

148. *Id.*

149. Greg Satell, *How the Collapse of the Cable Business Model Will Bring A New Era of Television*, FORBES (Aug. 16, 2015, 10:48 PM),

could be disastrous for cable TV providers; even ESPN, once deemed immune to the changes in the TV industry, is now feeling the effects of the changing media landscape.[150]

Sports programming distributers will need to reexamine the deals with leagues before negotiating future contracts because the current trend away from live television will have a significant impact on the future of content distribution.[151] Like the album in the music industry, the unbundling of TV packages will be the inevitable future of the cable industry.[152] By 2025, many of the leagues contracts with current broadcast providers will end, leaving the door open to a variety of possibilities for broadcasting rights.[153] Cable TV providers' ability to pass on the rising cost of sports broadcasting rights to consumers is starting to be met with opposition, with consumers defecting from cable TV service in large numbers.[154] In the future, cable companies may be forced to unbundle sports networks such as ESPN. However, because bundling subsidizes the cost of the network by obtaining payment from even those who do not watch the channel, the cost of subscribing to such channels alone will likely increase dramatically in order to cover the lost revenue from the reduced number of subscribers.[155] If the costs can no longer be recouped from higher subscription fees, cable TV networks will need to find other areas to make cuts—or else they may find it difficult to negotiate broadcasting rights agreements when competing with internet-based providers in the future.[156]

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http://www.forbes.com/sites/gregsatell/2015/08/16/how-the-collapse-of-the-cable-business-model-will-bring-a-new-era-of-television/#3e83f3a413de.

150. *See* Becky Sullivan, *Once Immune to Cord-Cutting, 'King of Live Sports' Finds Throne Shaken*, NPR (Jul. 19, 2015, 5:36 PM), http://www.npr.org/2015/07/19/424447488/once-immune-to-cord-cutting-king-of-live-sports-finds-throne-shaken (explaining ESPN has lost 7 percent of its subscription base since 2011, and the trend is accelerating).

151. *See* Hassan A. Kanu, *TV Sports Bubble Looms Over Future NBA Labor Regulations*, BLOOMBERG BNA (Jan. 6, 2017), https://www.bna.com/tv-sports-bubble-n73014449424/.

152. *See* Jon Wertheim, *As More Viewers Cut Cable, What Will Happen to Sports?*, SPORTS ILLUSTRATED (Dec. 16, 2014), http://www.si.com/,ore-sports/2014/12/17/future-cable-sports-tv#.

153. *See* Michael Colangelo, *Future of Sports TV: Digital, A La Carte and Increased Competition*, THE FIELDS OF GREEN (Sep. 15, 2015), http://thefieldsofgreen.com/2015/09/15/future-of-sports-tv-digital-a-la-carte-and-increased-competition/ (explaining that the NFL's deal runs until 2022, the NBA until 2023, and both the NHL and MLB in 2021); Mark Newman, *MLB Reaches Eight-Year Agreement with FOX, Turner*, MLB (Oct. 2, 2012), *http*://m.mlb.com/news/article/39362362/.

154. *See* Brian Fung, *One of Disney's Most Popular Brands has Investors Really Worried*, THE WASHINGTON POST (December 9, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/12/07/one-of-disneys-most-popular-brands-has-investors-really-worried/?utm_term=.e503f5e2d33d.

155. *See generally* Brian Stelter, *Rising TV Fees Mean All Viewers Pay to Keep Sports Fans Happy*, N.Y. Times (Jan. 25, 2013), http://www.nytimes.com/2013/01/26/business/media/all-viewers-pay-to-keep-tv-sports-fans-happy.html.

156. *See* Kevin Draper, *Is The Live Sports Rights Bubble Finally Bursting?*, DEADSPIN (May 03, 2016, 6:10 PM), http://deadspin.com/is-the-live-sports-rights-bubble-finally-bursting-

With a plethora of internet-based providers available, there is a high likelihood that leagues will create lucrative agreements with internet companies to provide a-la-carte programming. This could take the form of time-based subscriptions, such as a monthly access to all live games of a particular sport, or team-specific packages, such as those seen in the settlement agreements.[157] This type of agreement is most probable because it provides fans with access to content when desired, while also providing a constant stream of revenue to the leagues. RSNs will likely suffer, as their limited, team-based programming offers little variety when leagues are in off-season.[158] Network television providers will be more prepared to cope due to a wide variety of programming, which can be promoted during broadcasts.[159]

In addition, there is the possibility of seeing a direct-to-consumer pay-per-view type structure. One problem that could arise with this kind of structure is that certain teams or games which do not have high viewership numbers may suffer under this model. As a result, teams will likely need to increase prices in order to stay afloat.[160] This model is more likely to work in a league such as the NFL, where there are a lower number of games, with each team only playing once a week. For leagues with a higher number of games, this model may need to be adjusted, such as packaging an MLB series between two teams as a single purchase.

While it is unclear what the exact structure of what sports broadcasting rights will look like in the future, it is clear that the current structure is no longer sustainable. Similar to how the emergence of music sharing online changed the album, the emergence of internet streaming options will ultimately change the structure of sports broadcasting rights.

## VI. CONCLUSION

The nature of sports broadcasting rights has been relatively unchanged for several decades. Over the years, sports leagues have enjoyed certain immunities from federal antitrust laws. Certain cases and legislation, such as the Sports Broadcasting Act, have allowed leagues to create agreements with broadcasting services that are inherently anticompetitive, yet have been argued to ultimately lead to stability and competition in the long term. The recent blackout challenges brought before the court, while not a groundbreaking victory

1774516030 (explaining although rights fees are set, production costs and salaries still have the potential to be trimmed).

157. Stelter, *supra* note 155.

158. Wertheim, *supra* note 152.

159. *Id.*

160. *See id.*

in itself, do mark a potential change in the future of broadcasting rights, given the recent surge in internet based streaming of video, including live events. The court's decision to allow the challenge can be seen as a signal to leagues that the tide is shifting to a content driven market, with power being redistributed to consumers. The relatively stable cable TV industry is about to undergo a serious change in structure and sports broadcasting rights will be at the heart of it.

*Josh Mathews*