No Trust at the NFL: League's Network Passes Rule of Reason Analysis

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I. INTRODUCTION

Last Thanksgiving, the NFL Network (the "Network"), a new television station, exclusively televised its first of eight football games for the 2006-2007 season.[1] Unfortunately, thousands missed the premiere because three of the country's largest cable companies—Time Warner Cable, Cablevision Systems Corp., and Charter Communications (the

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[1] George M. Thomas, *Cable Snag Blacks Out NFL Game*, AKRON BEACON JOURNAL, Nov. 21, 2006, at Sports.

"Companies")—declined deals with the National Football League (the "NFL" or the "League"), which owns and operates the Network.[2]

While the NFL is willing to provide the station to the Companies (for a fee),[3] the League insists that each company offer the station to its customers as part of its basic cable package.[4] Once in the basic package, the League would benefit from advertising sales.[5] Due to the Network's price (which Time Warner claims would cost a basic cable subscriber an additional $0.80/month),[6] the Companies are holding out.[7] They wish to carry the channel on exclusive tier packages, such as their premium sports packages, so they can charge only those that watch the station.[8] Time Warner's Michael Harrad explains that "Short of the 8 out-of-market games that run over six weeks, the rest of the network is niche programming [NFL replays, shows, and news][9] so only fans need to pay for it."[10]

The NFL believes that once thousands of disappointed people realize they cannot access the Network, they will pressure their cable providers to carry the station.[11] The plan has sparked Congressional

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[2] Patrick Saunders, *NFL Network Hit with Access Issue*, DENVER POST, Nov. 23, 2006, at D1.

[3] "Time Warner claims . . . that the league is seeking $137 million from its approximately 14.5 million nationwide subscribers, including about 800,000 in Houston, to carry NFL Network. That would equal a subscriber fee of about 80 cents per month." David Barron, *NFL Network Still a Time Warner Blackout*, HOUSTON CHRONICLE, Nov. 23, 2006, at Sports 2.

[4] Judd Zulgad, *NFL Network Hoping to Use Leverage in Televising Games*, STAR TRIBUNE, Nov. 22, 2006, at Sports.

[5] "[T]he NFL Network has insisted cable companies place it on one of its basic tiers alongside the likes of CNN, TNT and ESPN, making it available in more homes, which makes the commercial time it sells much more valuable." Barry Horn, *Cable Cash Clash: NFL Network Begins Live Game Schedule to Limited Audience*, DALLAS MORNING NEWS, Nov. 22, 2006, at C2.

[6] Barron, *supra* note 3.

[7] Larry Stewart and Lance Pugmire, *NFL Fans' Kicks are Blocked: Many Won't See Tonight's Game because of a Cable Dispute*, L.A. TIMES, Nov. 23, 2006, at A1.

[8] *Id.*

[9] "NFL Network is using the package of the eight live games on Thursdays and Saturdays as the appetizer to the other 357 days of programming, which includes condensed 60- or 90-minute replays of games, studio shows, coverage from the NFL combine, draft and meetings, and news conferences." Randy Covitz, *NFL Network to Get a KC Test*, KANSAS CITY STAR, Nov. 22, 2006, at Sports.

[10] Chris Isidore, *Cable Stuffing the NFL this Thanksgiving*, CNNMONEY.COM, (Nov. 22, 2006), at Commentary, *available at* http://money.cnn.com/2006/11/22/commentary/sportsbiz/index.htm.

[11] "'The NFL Network keeps the pressure on because it believes we will ultimately end up charging all our customers to satisfy the few who want these games,' Fred Dressler, executive vice president of Time Warner Cable, told Sports Business News." Saunders, *supra* note 2, at D1.

interest.[12] The Senate Judiciary Committee held a hearing this past November to examine possible antitrust violations.[13] At the hearing, NFL executive vice president and general counsel, Jeffrey Pash, insisted that the Network "does not conflict with antitrust laws because it's 'pro-competitive.'"[14] He argued that the Companies' plan to restrict the Network to an exclusive tier interferes with the NFL's mission to distribute the League's games broadly.[15] Accordingly, the League feels Congress should let negotiations proceed without government interference.[16]

This Paper defends the NFL's actions from an antitrust perspective. Part II discusses why the Sherman Antitrust Act (the "Sherman Act") applies to the NFL's case. Specifically, Part II explains why the NFL cannot assert a single-entity defense and why the Sports Broadcasting Act of 1961 (the "SBA") does not give the Network an exemption from the "Sherman Act". Part III explains why a court would analyze the NFL's case using a "full-blown" rule of reason test, as opposed to a "quick-look" or a *per se* test. Part IV argues that the NFL's plan passes a "full-blown" rule of reason test since the plan is pro-competitive—it provides the public with broader access to games, at no additional costs, and is necessary for the Network's survival. Importantly, Parts IV A and B operate under the premise that a "full-blown" rule of reason analysis should include a careful consideration of the foreseeable anticompetitive reactions by closely related parties such as the Companies.[17]

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[12] Randy Covitz, *NFL Network to Get a KC Test*, KAN. CITY STAR, Nov. 22, 2006, at Sports.

[13] *Id.*

[14] Saunders, *supra* note 2, at D1.

[15] *See* CONGRESSIONAL COMMITTEE ON COMPETITION IN SPORTS PROGRAMMING AND DISTRIBUTION: ARE CONSUMERS WINNING?, 109th Cong., 2d Sess. (C-SPAN2006) , sold at http://www.c-span.org/ (the author carefully transcribed the quoted testimony, which this Paper employs and attempts to indicate this by placing a '*see*' signal before citations to the Committee testimony. The author recently learned that the government printing office printed an official copy of the testimony, which is *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:32152.pdf).

[16] *Id.*

[17] This nuance may be particularly problematic for some antitrust scholars to digest because few antitrust cases, if any, weigh one entity's anticompetitive restraints against another entity's potentially more anticompetitive reaction should a court determine that the first entity's restraints are illegal. Otherwise, putting aside the claim that the NFL's restraint is necessary for the Network's survival, this Paper would argue that both the NFL's and the Companies' plans are illegal. *See* discussion *infra* Part IV.C.

II. THE SHERMAN ACT § 1 APPLIES TO THE NFL'S CASE

A. *The NFL Cannot Assert a Single-Entity Defense*

The Sherman Act § 1 provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.[18]

League officials and their academic defenders have argued that section one of the Sherman Act does not apply to package sales of broadcast rights by sports leagues.[19] They [have] claim[ed] that each league constitutes a 'single entity' and, because section one requires a "contract, combination . . ., or conspiracy" to restrain trade, the agreement among sports team owners to sell broadcast rights jointly is no more subject to section one than the unilateral pricing decision of a single firm.[20]

The courts have consistently and correctly held, however, that where leagues are composed of teams that are independently owned and operated and that do not share all profits and losses, they fail to qualify as 'single entities' for purposes of the antitrust laws.[21] Each team has a property right in licensing the broadcasting of games played in its home park.[22] Absent restraints, individual teams would compete not only on the playing field and for player talent, but for television viewers as well.[23]

Penn State law professor Stephen F. Ross has recognized that:

> The concern of antitrust laws with package sales is not that a particular team could charge whatever the market can bear for the rights to

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[18] Sherman Antitrust Act, 15 U.S.C. §1.

[19] Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 465 (1990).

[20] *Id.* at 465-66 (*referencing Antitrust Policy and Professional Sports: Oversight Hearings on H.R. 823, H.R. 3287, and H.R. 6467 Before the Subcomm. On Monopolies and Commercial Law of the House Comm. On the Judiciary*, 97th Cong., 1st & 2d Sess. 189 (1982); Myron C. Grauer, *Recognition of the Nat.l Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983); Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219 (1984); John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013 (1984)).

[21] *Id.* at 466 (referencing L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1389 (9th Cir. 1981), *cert. denied*, 459 U.S. 1074 (1984); NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 99 n.18 (1984); Arizona v. Maricopa Co. Medical Soc'y, 457 U.S. 332, 357-58 (1982); Hassan v. Independent Practice Assoc., 698 F. Supp. 679, 689 (E.D. Mich 1988)).

[22] *Id.* (citing Liberty Broad. Sys. v. Nat'l League Baseball Club of Boston, Inc., 1952 Trade Case. (CCH) P67, 278, at 67, 499 (N.D. Ill.))

[23] *Id.* at 466-67.

> televise its own games, but whether teams in a league can *combine* to increase the profitability of a package sale by limiting the ability of each individual team to sell rights to networks, syndicates, or individual television stations or cable operators.

Thus, most sports leagues should not be able to assert a single-entity defense.[24] If certain agreements among clubs are truly essential to promote the product, these agreements should be analyzed and sustained under the rule of reason analysis.[25]

B. *The Sports Broadcasting Act of 1961 Does Not Exempt the NFL*

The SBA does not exempt the Network from the Sherman Act either. Congress enacted the SBA to exempt the *sponsored* telecasting of professional sports from the Sherman Act.[26] The SBA states that the Sherman Act:

> shall 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 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 of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.[27]

Both the courts and past NFL commissioners have recognized that the Network would not meet this exemption. The Third Circuit has concluded that sponsored telecasting does not include "subscription television."[28] Moreover prior to the Network's existence, former NFL commissioners Pete Rozelle and Paul Tagliabue agreed with the court's conclusion.[29] "When the SBA was enacted in 1961,"[30] Rozelle told Congress that 'this bill covers the free telecasting of professional sports contests, and does not cover pay TV."[31] More than twenty years later, "Tagliabue reiterated to a Senate Committee that"[32] sponsored tele-

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[24] *Id.* at 467 (emphasis in original).

[25] *Id.*

[26] *See* PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES, PROBLEMS 635-36 (3d ed., West Group 2004).

[27] 15 U.S.C. §1291 (2006).

[28] Shaw v. Dallas Cowboys, Ltd., 172 F.3d 299, 301-02 (3d Cir. 1999) (holding that the SBA does not exempt the "NFL Sunday Ticket" available on DIRECTV, a satellite television service). Notably, the NFL settled the class action case, but the settlement does not apply "to any future satellite television schemes or to any of its television, cable, or Internet arrangements." WEILER, *supra* note 26, at 645.

[29] *Id.* at 642-643.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 643.

casting excludes "'pay and cable. This is clear from the legislative history and from the committee reports.'"[33] While a look into the legislative history and committee reports would reinforce Tagliabue's assertion,[34] both the Third Circuit's holding and the former commissioners' acknowledgments deem such an analysis unnecessary for the body of this Paper.

III. THE NFL'S CASE REQUIRES A "FULL-BLOWN" RULE OF REASON TEST

A court should analyze the NFL's case using a "full-blown" rule of reason test. A rule of reason test examines the possible pro-competitive effects of anti-competitive actions.[35] If the pro-competitive effects

[33] *Id.* Even if Congress intended that the SBA cover cable television in 1961, one could argue that professional football's changed landscape—today the NFL monopolizes the professional football market whereas it competed against the American Football League in 1961—mandates that the SBA no longer exempt NFL broadcasts. *See* Congressional Committee on Competition in Sports Programming and Distribution: Are Consumers Winning?, *supra* note 15 (Stanford University professor Roger Noll's testimony). While other professional sports leagues such as the Canadian Football League and Arena Football League exist, those leagues are not NFL competitors because they produce an inferior product. For instance, "the C[anadian] F[ootball] L[eague], [and] Arena Football League . . . are filled with players who . . . can't cover, catch, tackle or block at the NFL level." John DeShazier, *Scouting combine's value is overrated*, TIMES-PICAYUNE, Feb. 27, 2007, at Sports. I leave college football out of the equation because it is not a professional sports league. As Stanford University professor emeritus, senior fellow at the Stanford Institute for Economic Policy Research, and expert sports economist, Roger Noll, pointed out at the 2006 Congressional hearing, the decreased competition amongst professional sports leagues and the increased competition amongst television providers (which Congress did not foresee in 1961), invalidates the exemption. *See* Congressional Committee on Competition in Sports Programming and Distribution: Are Consumers Winning?, *supra* note 15.

[34] WEILER, *supra* note 26, at 643. " . . . the House Committee Report accompanying the Sports Broadcasting Act makes clear, that the narrow purpose of the Act's exemption was to permit the NFL to sell a package of league games to CBS just as the rival American Football League had sold a package to ABC." Ross, *supra*, note 19 at 469 (citing H.R. REP. No. 1178, 87th Cong., 1st Sess, 2 (1961)). "Despite some recent complaints, the Supreme Court's consistent approach to statutory interpretation suggests that even if the word 'telecast' unambiguously includes ESPN programming, the statute should nevertheless be construed in light of congressional intent as expressed in clear legislative history." *Id.* (referencing Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 451-66 (U.S. Dist. Col. 1989); Train v. Colorado Pub. Interest Research Group, 426 U.S. 1 (U.S. Colo.1976); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1953); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988)). "The legislative record established that such a package sale was necessary to ensure that all road games would be televised back to the NFL franchises' home areas." *Id.* "Thus, the House Judiciary Committee concluded that 'the public interest in viewing professional league sports warrants' an accommodation 'with minimal sacrifice of antitrust principles.'" *Id.* (citing H.R. REP. No. 1178, 87th Cong., 1st Sess. 3 (1961)).

[35] Bd. Of Trade of City of Chicago vs. U.S., 246 U.S. 231, 239-41 (1918). In this seminal Supreme Court case, the Court held that a trade regulation that temporarily fixed prices may be legal if the regulation promoted competition. The Board — in an effort to shorten the

outweigh the anti-competitive effects, the court should not find an antitrust violation.[36] As antitrust law has evolved, courts have broken the rule of reason down into a "full-blown" test, which carefully analyzes "power, purpose and effects issues," and a "quick-look" test which applies a cursory analysis of these issues.[37] On the other end of the spectrum is the per se test. If a court applies a per se test that essentially means the court has decided that the anti-competitive act in question is so contrary to law that it is automatically illegal, regardless of possible justifications.[38]

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work day — implemented a rule that limited the price of grain sold after business hours to the business day's closing price. The United States brought suit, claiming that the price restriction violated § 1 since it restricted competition. *Id.* at 237-38. "The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law." *Id.* at 238. In striking down the U.S.'s case, the Court stated:

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Id. In examining the regulation's impact on competition, the Court analyzed the regulation's purpose, power, and effect, and decided that the regulation promoted fairer competition. *Id.* at 238-41. First, the regulation did not restrict the sale of grain after work hours. *Id.* at 239. Rather, "it required [those] who desired to buy grain . . . to make up their minds" as to "how much they were willing to pay" before the business day closed. *Id.* Second, the rule applied "to a small part of the grain shipped from day to day to Chicago." *Id.* Third, "the rule helped to improve market conditions." *Id.* at 240. Among other things, the regulation "created a public market," provided "for a free and open interchange of bids and offers," and shortened the work day. *Id.* at 240-41. This in-depth analysis of the regulation's impact on competition is known as the rule of reason test.

[36] *Id.* at 239-41.

[37] "[T]he *NCAA* opinion is sometimes described by antitrust scholars as a 'quick look' application of the rule of reason . . . [because] the opinion does not present a careful analysis of power, purpose, and effects issues." KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION 129 n.30 (Cambridge University Press 2003).

[38] *See* Arizona v. Maricopa County Med. Soc'y, 457 U.S. at 332; *See also* U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150 (U.S. 1940). In Maricopa, the Court held maximum fee arrangements, like price-fixing agreements, *per se* unlawful. Arizona v Maricopa County Med. Soc'y, 457 U.S. at 332. In that case, physicians agreed to set "maximum fees . . . for health services provided to policyholders of specified insurance plans." *Id.* at 335-36. While the physicians argued that the agreement limited customer fees, the State claimed that the agreement violated § 1 *per se* because it increased insurance premiums. *Id.* at 341-42. The Court sided with the State and applied a *per se* test because the physicians' "potential or actual power to dictate the terms of such insurance plans may more than offset the theoretical efficiencies upon which" the physicians rested their case. *Id.* at 354. Forty-two years earlier, in Socony, the Court held that price-fixing is illegal *per se*. U.S. v. Socony-Vacuum Oil Co., 310 U.S. at 150. That is, unlike in Bd. of Trade of City of Chicago v. U.S., no matter what pro-competitive reasons one may have, fixing prices is illegal. *Id.* at 218. In *Socony*, once the Court determined that the oil companies conspired to set prices, it determined that they violated § 1. *Id.* The Court stated, "no showing of so-called competitive

An examination of *NCAA v. Board of Regents of Univ. of Okla.*[39] reveals that a court should analyze the NFL's case under a "full-blown" rule of reason test. To start, the *NCAA* opinion explains why the NFL's case would be subject to a rule of reason analysis, as opposed to a per se test. The Court noted that both amateur and professional sports operate in markets in which the horizontal restraints on competition are essential if the product is to be available at all.[40] Some agreements can increase output—the number of viewers able to watch games—even while they restrict the independence of individual teams.[41] As the NFL successfully argued in securing passage of the Sports Broadcasting Act, for example:

> The ability to offer a package deal of all NFL games to CBS enabled the league to extract [CBS's] promise to televise every team's road games back to its local market. . .[42] Absent the opportunity to secure a league package, CBS would not have been willing to make this promise, and fans in some areas would have been unable to watch their teams play on the road.[43]

Accordingly, "[b]ecause sports leagues are necessary to provide 'the product'—telecasts of NFL football, NHL hockey, or Major League Baseball games—per se condemnation is inappropriate."[44]

Although the court applied a "quick-look" rule of reason in *NCAA*, a further examination of the case helps to reveal why the NFL's case deserves "full-blown" scrutiny.[45] While *NCAA* is a case factually similar to the NFL's in that it involved the broadcast of football games, the NFL's case is factually and legally distinct from *NCAA* in important respects. In *NCAA*, an association that regulated collegiate athletics negotiated television contracts that limited schools' rights to televise football games,[46] and two schools alleged that the restriction violated

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abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *Id.* at 254 Notably, the Court distinguished Socony from Bd. of Trade of City of Chicago by arguing that the restriction in Bd. of Trade of City of Chicago, unlike in Socony, did not "raise or depress prices.". *Id.* at 217. Rather, the rule in Bd. of Trade of City of Chicago "was somewhat akin to rules of an exchange limiting the period of trading . . . ." *Id.*

[39] 468 U.S. 85 (1984.)

[40] Ross, *supra* note 19, at 476-77 (quoting *NCAA*, 468 U.S. at 101).

[41] Ross, *supra* note 19, at 477.

[42] *Id.*

[43] *Id.* (citing *Telecasting of Professional Sports Contests: Hearings on H.R. 8757 Before the Subcomm. On Antitrust (Subcomm. No. 5) of the House Comm. On the Judiciary*, 87th Cong., 1st Sess. 36, 39-40 (1961) (Pete Rozelle's testimony)).

[44] Ross, *supra* note 19.

[45] 468 U.S. at 103, 120; *see* Hylton, *supra* note 37.

[46] 468 U.S. at 91-95

§ 1 of the Sherman Act.[47] The Court examined the allegation with a "quick-look" analysis, as opposed to a "full-blown" one, because:

> The anticompetitive consequences of this arrangement w[ere] apparent. Individual competitors los[t] their freedom to compete. Price [was] higher and output lower than they would otherwise [be], and both [we]re unresponsive to consumer preference.[48]

Notably, the Court added that the "latter point is perhaps the most significant, since 'Congress designed the Sherman Act as a 'consumer welfare prescription.'"[49] Accordingly, the Court found the NCAA's plan violated § 1.[50]

Unlike in *NCAA*, the NFL owns and operates a fledgling channel, which it uses to air some of its games.[51] Additionally, the NFL is not looking to sell its games to another station, as was the case in *NCAA*.[52] Rather, the NFL is looking to sell its Network, which carries some games, to cable providers.[53] Moreover, in the NFL's case, unlike in *NCAA*, the courts should be mindful of the Companies' anticompetitive action that might take effect if a court determines that the NFL's restrictions are illegal.[54] Furthermore, "perhaps most significant[ly],"[55] and possibly due to these factual disparities, "the anticompetitive consequences of" the Network's "arrangement"[56] are not "apparent,"[57] or "intuitively obvious."[58] This uncertainty garners the NFL a more in-depth, "full-blown" analysis. In *NCAA*, the key issue for the Court was "whether viewership is lower because of the challenged [action] than it would be if [the action] were enjoined."[59] As the next section demon-

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[47] *Id.* at 88.

[48] *Id.* at 106-07.

[49] *Id.* at 107 (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)).

[50] *Id.* at 120.

[51] *See* discussion *supra* Part I.

[52] *NCAA*, 468 U.S. at 91-95.

[53] *See* discussion *supra* Part I.

[54] *See* discussion *infra* Part IV.

[55] *NCAA*, 468 U.S. at 107.

[56] *Id.* at 106.

[57] *Id.* Moreover, legally speaking, the NFL's case is more akin to Cal. Dental Ass'n v. F.T.C., 526 U.S. at 763-8, Broad Music Inc. v. Columbia Broad. Sys., 441 U.S. 1, 14-15 (1979), and Cont'l T.V., Inc. v. GTE Sylvania Inc, 433 U.S. 36 (1977), where the Court applied "full-blown" rule of reason analyses. *See also* discussion *infra* Part IV. In Cal. Dental Ass'n, an association restricted dentists' advertising rights. Cal. Dental Ass'n v. F.T.C., 526 U.S. at 760-61. When the Federal Trade Commission alleged the association's restriction violated § 1, the association claimed that while the restriction appeared anticompetitive on its face, A closer look revealed that the restriction was actually pro-competitive. *Id.* at 759. Consequently, the Court analyzed the restriction under a "full-blown" rule of reason test. *Id.* at 781. BMI and Sylvania focus on the legality of restrictions for necessary business purposes. *See* discussion *infra* Part IV.C.

[58] Cal. Dental Ass'n v. F.T.C, 526 U.S. at 759.

[59] Ross, *supra* note 19, at 478.

strates, not only are the anti-competitive consequences of the NFL's insistence that cable companies carry the Network on their basic cable packages unclear, their pro-competitive justifications outweigh any anti-competitive effects.[60]

IV. THE NFL'S PLAN IS PRO-COMPETITIVE

The NFL's insistence that the Companies carry the Network on their basic cable packages is pro-competitive. Under a "full-blown" rule of reason analysis a court would carefully examine the NFL restraint's purpose, power, and effect.[61] First, the somewhat counterintuitive purpose of the NFL's requirement is to ensure that the public will have broader access to games.[62] Somewhat counterintuitive because courts should keep in mind the Companies' anticompetitive actions that would take effect if a court were to deem the NFL's restrictions illegal.[63] Second, as far as power, the NFL's requirement only applies to a small number of games.[64] Third, when examining the restraint's effects—in addition to providing the public will broader access to games[65] empirical evidence demonstrates that basic cable subscribers will not have to pay an additional fee to receive a channel that they currently do not receive.[66] Finally, and perhaps most importantly,[67] purpose, power, and effect aside, the NFL's requirement abides by antitrust law as it is necessary for the Network's survival.[68]

A. *Broader Public Access to a Small Number of Games*

The NFL prides itself on providing its games to as many people as it can.[69] "The centerpiece of NFL television policy is free, over-the-air broadcasting of NFL games. Every NFL regular season game and

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[60] *See* discussion *infra* Part IV.A.

[61] *See* discussion *supra* Part III; *see also California Dental*, 526 U.S. at 759; *Chicago Bd. of Trade*, 246 U.S. at 238-41.

[62] *See* discussion *infra* Part IV.A.

[63] As stated earlier, this Paper operates under the premise that a "full-blown" rule of reason analysis should include a careful consideration of the foreseeable anticompetitive reactions by parties closely related to the issue at hand (*e.g.*, the Companies).

[64] The Network broadcasted eight games. *See* Thomas, *supra* note 1. For simplicity's sake, this Paper addresses the power and purpose prongs together. *See* discussion *infra* Part IV.A.

[65] *See* discussion *infra* Part IV.A.

[66] *See* discussion *infra* Part IV.B.

[67] This may prove to be the most important part of the analysis for those that reject the premise that a "full-blown" rule of reason analysis should include a careful consideration of the foreseeable anticompetitive reactions by parties closely related to the issue at hand.

[68] *See* discussion *infra* Part IV.C.

[69] *See Congressional Committee on Competition in Sports Programming and Distribution: Are Consumers Winning?*, *supra* note 15 (Jeffrey Pash's testimony).

every post-season game is televised on free, over-the-air television."[70] The NFL typically provides every game that a club plays on broadcast television in each club's home market, regardless of whether a cable or satellite station also carries the game nationally.[71]

As a general matter, a fan in a particular city will have available 90 or more games on free television during the course of the year. That will include all of that local team's away games, all of the home games if they are sold out, a wide range of other NFL games, and all playoff games. . . . This is true even of games that are shown on ESPN, or [the eight games] on the NFL Network [or on DIRECTV's Sunday Ticket]. Those games are simultaneously broadcast over-the-air in the home cities of the participating teams.[72]

Last season, every game was sold out and "televised locally."[73] Accordingly, if the New York Giants play the Dallas Cowboys, and the NFL Network airs the game, the game will be available on over-the-air television in both communities so long as the game is sold out.[74] This is a unique requirement that the League has imposed on itself—no other professional sports league does the same.[75]

The NFL's insistence that cable companies carry the Network on their basic cable packages, as opposed to their more exclusive sport tiers, aligns with the League's mission to provide its fans with broad access. The Network "is currently available on approximately 40 million homes, both on cable as well as DIRECTV and Echostar."[76] While the League "ha[s] allowed cable companies to launch the network on widely-distributed digital tiers, [it has] not been willing to do

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[70] *Id.* (Jeffrey Pash's testimony).

[71] *Id.* (Jeffrey Pash's testimony).

[72] *Id.* (Jeffrey Pash's testimony). With NFL Sunday Ticket a fan:

can see any NFL game being played. . . . NFL Sunday Ticket is structured to supplement but not displace the broadcast packages. No fan has to purchase Sunday Ticket in order to see the local team games, the prime-time contests, any of the post-season games, or a wide range of other games. Those 90 games I referred to are available without regard to whether a fan purchases Sunday Ticket or not. It does not displace the primary role of broadcast networks or local affiliates. It expands output and enhances consumer choice, which is precisely what the antitrust laws encourage firms to do.

Id. (Jeffrey Pash's testimony).

[73] *Id.* (Jeffrey Pash's testimony).

[74] *Id.* (Jeffrey Pash's testimony). This is true if the game is sold out. If the game is not sold out, only the visiting team's community would receive the game on free over-the-air television. This Paper does not assert this in the above statement because it would be hard to imagine a Giants/Cowboys game (a game between two conference rivals) not selling out (especially in light of the fact that every game sold out last season).

[75] *Id.* NFL executive vice president and general counsel, Jeffrey Pash, stated, the unique requirement is "not imposed by any other League. It is not imposed, to my knowledge, in the context of any other sports television product." *Id.*

[76] *Id.* (Jeffrey Pash's testimony).

so on the sports tiers."[77] The League does not "believe . . . the very narrow distribution of those sports tiers is consistent with the" fans' "or the League's interests."[78] Put simply, the NFL "ha[s] always tried to have broad-based distribution of [its] product and those sports tiers are not broadly based."[79] As Jeffrey Pash convincingly argued, "The interest of fans . . . is best served by broad distribution. That's why so many cable channels are covered on the basic tier."[80]

The Companies feel that placing this "very targeted"[81] programming "in a sports package"[82] benefits all customers because only "those who actually want to see the programming"[83] will "pay for it."[84] This position, however, restricts the number of people who will have access to the games. Additionally, it ignores the fact that the Companies may force many customers who want the NFL Network to pay for a sports package, which may carry channels that the customers do not want and cost them more than the basic package.[85]

Professor Ross, who has argued against the sports leagues' packaging of games outside of a league network setting,[86] sets forth a logical test to determine whether a league's cable packaging is illegal:

How should a court reviewing a challenged contract determine if output is "lower than [it] would otherwise be"? To prevail in an antitrust challenge, the plaintiff should have the burden of showing that, were the contract at issue to be held illegal, the league or its members would probably enter into an alternative contract (or contracts) that would result in an increase in the number of persons viewing the game.[87]

A court could analyze the NFL's restriction under this test in two different ways that lead to two different conclusions. On the one hand, a court could (and probably should) reason that if the NFL's restriction is held illegal, the Companies will place the Network on their sports tiers, as opposed to their basic tiers. Since fewer people have access to

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[77] *Id.* (Jeffrey Pash's testimony).
[78] *Id.* (Jeffrey Pash's testimony).
[79] *Id.* (Jeffrey Pash's testimony).
[80] *Id.* (Jeffrey Pash's testimony).
[81] *Id.* (Chief Operating Officer, Time Warner Cable, Landel C. Hobbs' testimony).
[82] *Id.* (Landel C. Hobbs' testimony).
[83] *Id.* (Landel C. Hobbs' testimony).
[84] *Id.* (Landel C. Hobbs' testimony).
[85] The League does not "believe the pricing of those sports tiers . . . is consistent with the interests of [its] fans . . . ." *See* CONGRESSIONAL COMMITTEE ON COMPETITION IN SPORTS PROGRAMMING AND DISTRIBUTION: ARE CONSUMERS WINNING?, *supra* note 15 (Jeffrey Pash's testimony).
[86] Ross, *supra* note 19 at 478.
[87] *Id.*

the Companies' sports tiers,[88] a court's declaration that the NFL's restraint is illegal will limit the number of people that can watch the Network and its games. On the other hand, a court could conclude that if the NFL's actions are illegal, the Companies, whose customers currently cannot access the Network, will carry the Network on their sports tiers, which would allow at least some of the Companies' customers to see the Network's games (as opposed to none). While both interpretations are feasible, the first is more appropriate because it more fully addresses the public good, which is a primary purpose of antitrust laws.[89] The long-term (negative) consequences of declaring the NFL's actions illegal outweigh the minimal benefit that very few cable customers who have sports packages will gain.[90] In sum, the NFL's plan to provide its Network to cable companies on their basic tiers, and not their sports tiers, is pro-competitive since it will provide the public with broader access to the League's games.

B. *No Additional Cost*

The Companies argue that carrying the Network on their basic tiers will increase consumer costs, yet the NFL has provided empirical evidence to refute this point.[91] Comcast executive vice president David Cohen claims, "The NFL is trying to force cable companies to charge many consumers for programming they don't want."[92] Landel C. Hobbs, Time Warner's chief operating officer, adds:

> [T]he programming is too expensive . . . The value equation is out of whack. . . . Compared to everything else we carry, this would be in the top 5 in expense and yet, the ratings at this point, are not even in the top 30.[93]

Despite these contentions, the NFL has pointed out that,

> DIRECTV and Echostar, for example, as is also true of the telephone companies that carry the NFL Network, have included [the

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[88] *See* discussion *supra* Part I.

[89] *See, e.g.*, Howard A. Shelanski, *Antritrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 Cal. L. Rev. 371, 381 (2006) (calling antitrust law a "protector of the public interest.").

[90] While some may argue that the NFL may eventually broadcast more than eight games on the Network, or possibly every game, a court can always deem such action illegal if and when the League takes such action.

[91] *See* CONGRESSIONAL COMMITTEE ON COMPETITION IN SPORTS PROGRAMMING AND DISTRIBUTION: ARE CONSUMERS WINNING?, HEARING BEFORE THE COMMITTEE ON THE JUDICIARY, *supra* note 15 (Landell C. Hobb's and Jeffrey Pash's testimonies).

[92] Judd, *supra* note 4, at Sports.

[93] *See* CONGRESSIONAL COMMITTEE ON COMPETITION IN SPORTS PROGRAMMING AND DISTRIBUTION: ARE CONSUMERS WINNING?, HEARING BEFORE THE COMMITTEE ON THE JUDICIARY, *supra* note 15.

> Network] on their basic tier[s] at no additional cost to consumers—no up-charge whatsoever from any of those homes.[94]

Pash explained that assuming that the cable companies must increase prices in order to carry the Network is "a false dichotomy":[95]

> When Echostar added the NFL Network earlier this year, there was no increase in charge to the consumers. There was no increase in charge to the subscribers for DIRECTV. The telephone companies that are carrying [the Network] on their basic tier, they don't charge the consumers anything extra for it. That's a false dichotomy. That's not how it has to work out. It can be part of the basic cable charge, or it can be part of the basic digital tier charge. There's no reason why there has to be a separate package. And four of the five largest distributors in the country carry the NFL Network without imposing a separate charge. It's a false dichotomy.[96]

Moreover:

> [T]here's no additional per subscriber fee pass through on COX, on Comcast" and "[t]here was not on Adelphia before Time Warner took over the Adelphia Systems and dropped the NFL Network.[97]

Stanford University economics professor Roger Noll offered a strong argument against the League's position.[98] At the Congressional meeting, he explained why companies that carry the Network may not have had to increased consumer prices just yet:

> When you're looking at adding another channel there's two things going on. On the one hand, your costs go up on a per viewer basis. All else equal . . . that causes you to raise price and, indeed, the economics . . . do show . . . there's a strong correlation between cost and price. The second thing that happens, however, if you can get it exclusively, like, for example, if DIRECTV succeeds in having . . . the NFL Network without Comcast . . . DIRECTV's market share goes up and Comcast's goes down, and that means . . . DIRECTV can earn its current markup on a larger number of customers, and so it could be the case that its profits would not be undermined by taking on an expensive channel. But, in the long-run, what's going to happen is Time Warner or Comcast have to respond with something in-kind to attract those viewers back. The nature of the competitive process is to drive prices to cost, and, in the long-run, if the programming becomes more expensive, prices will go up.[99]

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[94] *Id.* (Jeffrey Pash's testimony).

[95] *Id.* (Jeffrey Pash's testimony).

[96] *Id.* (Jeffrey Pash's testimony).

[97] *Id.* (Jeffrey Pash's testimony).

[98] *See* CONGRESSIONAL COMMITTEE ON COMPETITION IN SPORTS PROGRAMMING AND DISTRIBUTION: ARE CONSUMERS WINNING?, HEARING BEFORE THE COMMITTEE ON THE JUDICIARY, *supra* note 15 (Roger Noll's testimony).

[99] *Id.*

When Senator Arlen Specter pressed Pash on this point at the hearing, Pash re-emphasized the evidence:

> I don't think that the NFL Network and price increases automatically go hand-in-hand, and the experience of many other cable companies demonstrates that, and the experience of the satellite companies demonstrate that, and . . . that is the current state of the record.[100]

While Noll raised an excellent point, he failed to balance the NFL's plan against the Companies. Noll nor a court should ignore the Companies' possibly perverse incentives. For one:

They may feel that an underutilized sports tier that has relatively unattractive programming on it today will become much more attractive and bought at a much higher rate for much more money if all of the sudden it includes NFL programming, which is the most attractive programming out there on the sports world. Last week, the highest rated broadcast television program was an NFL game, and the highest rated cable television program was an NFL game, and if those are forced onto a sports tier it may well be that you'll see consumers paying more money for it.[101]

The Companies' potential incentives to carry the Network on their exclusive tiers would harm the public[102]—the Companies may use the Network to make their sports tiers more attractive, and significantly increase their sports tier pricing.[103] Consequently, the Companies' argument that the NFL's plan harms consumers by increasing costs is hypocritical — if the Companies carry the Network on their sports tiers as they desire, they will have to pass the Network's cost off to smaller groups who subscribe to their sports packages, which means the Network will cost subscribers more so long as it stays on the sports tiers.[104]

Moreover, while estimates predict that the Network would cost basic cable subscribers approximately $0.80 more per month if the Companies carried the Network on their basic tiers, this increase does not seem "out of whack"[105] when compared to ESPN, another sports channel that the Companies carry on their basic tier, which currently charges cable providers about $2.50/month.[106] Furthermore, the fact that the League has already negotiated with nearly 200 cable compa-

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[100] *Id.*

[101] *Id.* (Jeffrey Pash's testimony).

[102] *See* discussion *supra* Part IV A.

[103] *Id.*

[104] CONGRESSIONAL COMMITTEE ON COMPETITION IN SPORTS PROGRAMMING AND DISTRIBUTION: ARE CONSUMERS WINNING?, HEARING BEFORE THE COMMITTEE ON THE JUDICIARY, *supra* note 15 (Jeffrey Pash's testimony).

[105] *Id.*

[106] Barron, *supra* note 3, at Sports 2.

nies (the vast majority of which probably have fewer resources than the Companies), demonstrates that the NFL is offering the Network at an affordable price.[107]

C. *The NFL's Plan is Necessary for the Network's Survival*

As *BMI v. CBS*[108] and *Continental T.V. v. GTE Sylvania*[109] explain, the NFL's plan is pro-competitive because it is practically necessary for the Network's survival. In *BMI*[110] and *Sylvania*,[111] the Court, using rule of reason analyses, decided that certain restrictions may be legal if they are reasonably necessary for businesses.[112] In *BMI*, two music companies granted CBS blanket licenses to perform all copyrighted musical compositions as often as CBS desired for a set time period at a negotiated fee.[113] CBS claimed that "the blanket license [wa]s illegal price fixing, an unlawful tying arrangement, [and] a concerted refusal to deal . . . ."[114] The Court explained:

> The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities . . . This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.[115]

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[107] "[T]he league has so far managed to strike 173 carriage deals with other cable carriers willing to see its side." Sanford Nowlin, *Cable Giant v. NFL in Clash of the Titans*, SAN ANTONIO EXPRESS-NEWS BUS WRITER, Nov. 22, 2006, at 1A.

[108] Broad Music Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979).

[109] Cont'l T.V., Inc. v. GTE Sylvania Inc, 433 U.S. 36 (1977).

[110] Broad Music Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979).

[111] Cont'l T.V., Inc. v. GTE Sylvania Inc, 433 U.S. 36 (1977).

[112] *Supra* note 110 at 14-15 ("The Court analyzed the facts under the rule of reason and concluded that there was no violation because the marketing arrangements the defendants adopted appeared 'reasonably necessary' for the development and marketing of rights granted to composers under copyright laws. . . . [A]s a general matter, the rule of reason does not require the least restrictive alternative.)" *See also* Sylvania at 128.

("*Sylvania* suggests rule of reason analysis should apply because the rules make a differentiated product which can compete more effectively with others.").

[113] Broad Music Inc. v. Columbia Broad. Sys., 441 U.S. at 5.

[114] *Id.* at 6.

[115] *Id.* at 14-15 (quoting Memorandum for United States as amicus curiae on Pet. for Cert. in K-91, Inc. v. Gershwin Publishing Corp., O. T. 1967, No. 147, pp. 10).

In *Sylvania*,[116] a television manufacturer, facing financial difficulties, limited the number of vendors who could sell its televisions in a geographic area in order to increase its market share.[117] Accordingly, the manufacturer denied some vendors the right to sell its product.[118] One vendor claimed the scheme violated § 1.[119] The Court, relying on the appellate court's rule of reason analysis,[120] ruled in the manufacturer's favor since the restrictions were necessary for the manufacturer's survival.[121]

> The NFL Network was started three years ago. It is a year-round channel devoted to football."[122] In offering cable companies the opportunity to carry the Network on their basic sports tier, the League is "trying to develop the NFL Network. . . . [and] trying to build [it] as a new entrant into the television world.[123]

The NFL believes that their plan promotes the public interest by providing them with broad access to games[124] at reasonable prices.[125] Additionally, as in *BMI*[126] and *Sylvania*,[127] antitrust law should protect the League's additional interest in developing the Network — its plan can promote the Network's popularity, which can ensure its survival. As a new and unique product, the Network offers the public a comprehensive look inside the NFL. Accordingly, power, purpose, and effect aside, the League should have the right to broadcast its games on the Network, so long as the broadcasts do not significantly undermine the League's commitment to the public.[128]

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[116] Cont'l T.V., Inc. v. GTE Sylvania Inc, 433 U.S. 36 (1977).

[117] *Id.* at 38.

[118] *Id.* at 39-40.

[119] *Id.* at 40.

[120] *Id.* at 41-42.

[121] *Id.* at 59.

[122] *See* CONGRESSIONAL COMMITTEE ON COMPETITION IN SPORTS PROGRAMMING AND DISTRIBUTION: ARE CONSUMERS WINNING?, HEARING BEFORE THE COMMITTEE ON THE JUDICIARY, *supra* note 15 (Jeffrey Pash's testimony).

[123] *Id.* Pash explained the NFL's position:

> We think it's got a lot of high quality programming. It's growing. It's getting better in terms of the quality of the programming and the quality of the offerings. We think by having the games on the NFL Network it's a good value proposition. We obviously have disagreements with some cable carries. With other cable carriers and with satellite carriers we don't have those disagreements. But we do think there's a good value proposition here.

Id.

[124] *See* discussion *supra* Part IV.A.

[125] *See* discussion *supra* Part IV.B.

[126] Broad Music Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979).

[127] Cont'l T.V., Inc. v. GTE Sylvania Inc, 433 U.S. 36 (1977).

[128] The League could have sold the 8 games that it broadcasts on the Network to cable carriers, but "there were a number of reasons why [the League] didn't want to do so, including the fact that the cable carriers . . . did not want to simultaneously broadcast [the games] on over the air . . . They wanted to have them exclusively on cable." *See* Congressional

V. CONCLUSION

Unfortunately for the NFL, it cannot assert a single entity defense to the Sherman Act § 1 and the SBA does not exempt the Network from the law.[129] However, the NFL's plan still survives antitrust scrutiny.[130] A court should analyze the NFL's case using a "full-blown" rule of reason test, as opposed to a "quick-look" or a per se test since competitive effects of the NFL's plan are unclear and possibly pro-competitive.[131] Moreover, the NFL's plan passes a "full-blown" rule of reason test since the plan is pro-competitive: it provides the public with broader access to games, at no additional cost, and is further necessary for the NFL's survival.[132]

Committee on Competition in Sports Programming and Distribution: Are Consumers Winning?, *supra* note 15 (Jeffrey Pash's testimony). Consequently, the League was looking out for the Network and the public.

[129] *See* discussion *supra* Part II.

[130] *See* discussion *supra* Parts III and IV.

[131] *See* discussion *supra* Part III.

[132] *See* discussion *supra* Part IV.