

# The Economics of Professional Sports League Broadcasts

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IT HAS BEEN NEARLY TEN YEARS SINCE the Supreme Court’s *American Needle* decision,<sup>1</sup> and one might think that sports-related antitrust litigation would have generated greater clarity for both legal and economic principles relating to professional leagues generally, and those involving the output of sports leagues, specifically. But this has not been the case. Many courts continue to struggle with myriad issues relating to professional sports collaborations: defining broadcast “output,” determining what is (and is not) a venture-level product, assessing various justifications of venture-level restraints, and constructing the proper “but-for world” under a rule of reason analysis.

The economic literature on sports leagues, as well, especially from the output perspective, also remains unresolved. Some economists and academics have characterized U.S. professional sports leagues as output-reducing “cartels.”<sup>2</sup> They have also argued that European sports leagues are more responsive to consumers because they are set up as “open” ventures that relegate underperforming teams to lower tiers and promote better teams.<sup>3</sup> The fundamental economic question related to broadcast rights under any league structure, however, is how to analyze rules or policies that limit the ability of individual teams to broadcast venture-created games on their own.

## How League Collaborations Work

Professional sports leagues create and sell a professional sport: the “league product”<sup>4</sup> (e.g., NBA basketball, NFL football, NHL hockey, or MLB baseball). The fundamental output of these leagues is on-field competition leading up to the playoffs and a championship series or game. These league products can only be produced at the venture level—no one team, or subset of teams, can create its own league product independent of the venture. Likewise, and for the same reasons, no one team can create a broadcast of a league product

on its own; cooperation from other teams and the league is essential.<sup>5</sup>

As with many other collaborations, U.S. professional sports leagues operate ventures with a limited or “closed” membership that is designed to create incentives and efficiencies that could not be achieved outside the league context. Each league, for example, has a set number of teams and players as well as uniform equipment and playing rules. And the league, at the venture level, directs and coordinates the marketing and the sale of broadcast rights, which typically are distributed through league-wide agreements or those subject to restrictions determined by the venture. As with other legitimate joint ventures, the question is whether these venture-level activities and restrictions are best viewed as those of a single economic enterprise and, if not, whether they are justified, economically, as part of collective venture activity.

## The Single-Entity Debate Remains Unresolved for Broadcast-Related Restraints

A threshold question then, both legally and economically, is whether Section 1 of the Sherman Act applies to league broadcast restrictions. *American Needle* holds that Section 1 applies to an aspect of a team’s off-field conduct if, absent the restraint, the teams would or could compete against each other as fully independent competitors. In *American Needle*, the court found that granting licenses to use team logos was a competitive activity that each team could undertake on its own in the absence of their agreement to market team intellectual property collectively through a group license of all the teams.<sup>6</sup> Although *American Needle* clarifies when team-owned competitive assets may be subject to Section 1, it does not address whether the broadcast of league games fits into the same category. This naturally raises the question of how to view the league product from an economic perspective.

Professional leagues create games for live or broadcast viewing, all in the context of a schedule of games culminating in a playoff series followed by a championship game or series.<sup>7</sup> Although professional sports teams in the same league compete against other teams in some aspects (e.g., attracting player talent), only the league can create the venture-level product for broadcast. Moreover, in contrast to the licensing of team intellectual property, in order to broadcast a league

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game, a team needs the league's intellectual property and brand, other league teams to play with (and access to their intellectual property and brand), and the practical cooperation from other teams and the league as well. This economic reality was the underlying premise of *Bulls II*, where, in upholding the NBA's ability to limit an individual team's Superstation broadcasts to a national audience, the Seventh Circuit observed that the NBA operates "closer to a single firm than a group of independent firms" for game broadcasts.<sup>8</sup>

The Ninth Circuit's recent *NFL Sunday Ticket Antitrust Litigation* decision,<sup>9</sup> however, departs from the *Bulls II* reasoning, relying instead on the Supreme Court's earlier *NCAA* decision that addressed restrictions on the broadcasts of college games.<sup>10</sup> In *NCAA*, the Court affirmed the district court's conclusion that the NCAA's rules limiting the total amount of college football games, as well as the total amount of games that any one team could broadcast, constituted an unreasonable output restriction.<sup>11</sup> Some economists, as well, assert that *NCAA* is the better precedent for assessing whether professional teams are independent competitors in creating the output of games that are broadcast.

From an economic perspective, however, reliance on the loose collaboration of independent college football teams to assess modern-day professional sports leagues is misplaced. One argument, for example, maintains that because some leagues historically allowed teams the right to broadcast, then the *NCAA* precedent is most relevant.<sup>12</sup> While it is true that teams in some professional leagues historically could sell broadcast rights to its games, they could not do so without the cooperation of other teams and the league. Moreover, in the earliest decades of the NFL, live attendance was the main source of revenues, and there was little focus on how the venture should address broadcast rights. But the fact that a venture permitted a team to sell broadcast rights as a matter of venture governance does not inform the question of whether, absent such approval, a team is capable of creating and selling venture output on its own as an independent market competitor.

In any event, and most importantly, individual teams of professional sports leagues cannot produce league output, including broadcasts, without cooperation of the league and other teams. In this respect, the supply of television rights is itself "a joint product with the supply of attendance at games."<sup>13</sup> In turn, it is perfectly rational for the leagues, "as joint ventures of teams," to centralize the sale of broadcast rights—including to set the number of games—and to seek the most "efficient or profit-maximizing strategies for selling [those] rights."<sup>14</sup>

### The Joint Venture Perspective of League Broadcasts

Separate and apart from the single-entity debate, the consequences of this economic reality, particularly with respect to the broadcast of venture games, have significant implications in light of the Supreme Court's joint venture decision in

*Dagher*. There, the Court held that the coordinated pricing of competing gasoline brands held by the venture cannot be viewed as an anticompetitive restraint "in an antitrust sense" because it involves a "core" function of the venture—the pricing of venture products.<sup>15</sup> The *Dagher* principle is directly relevant to the scope of sports league ventures that include the sale of broadcast rights for viewing league games. As Judge Easterbrook put it in *Bulls II* (in addressing an NBA limitation on the number of superstation broadcasts): "To say that participants in [a professional sports league] may cooperate is to say that they may control what they make [i.e., NBA games] and how they sell it. . . ."<sup>16</sup> Simply put, for professional sports leagues, only the venture can "make" a venture-level product and, in turn, should control how to sell it.

Nor is it a novel concept to treat league play (and the broadcast of that play) as essential or a core venture activity. That view in fact was previewed by Robert Bork in *The Antitrust Paradox*:

[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed . . . the league is best viewed as being the firm, and horizontal merger limitations are inappropriate. . . . The upshot is that when the integration is essential if the activity is to be carried on at all, the *integration and restraints that make it efficient should be completely lawful*.<sup>17</sup>

Professor Bork went on to explain that "when the integration may be useful but is not essential (in the sense that cooperation is not the essence of the activity)," ancillary restraints analysis is required.<sup>18</sup> In that sense, Judge Bork may have anticipated the *American Needle* decision which explained that a rule of reason analysis, even if truncated (and potentially in the league's favor), must apply to assess the group licensing of team-owned intellectual property. In contrast, because an individual team must cooperate with other league members and the league itself to create and broadcast a league game, broadcast of all league games are best viewed as "core" activities of the league venture itself.

Here, too, the *NCAA* case is not a particularly apt precedent when considering professional leagues as economically interdependent ventures. In fact, courts routinely distinguish *NCAA* from professional sports leagues because the NCAA, at least in the mid-1980s, did not produce a singular league product. For example, the Second Circuit in *Salvino* explained that MLB, in contrast to the NCAA,<sup>19</sup> is a highly integrated collaboration of teams that play against each other and compete for a championship series. In contrast, the court characterized the NCAA college programs as lacking the degree of economic interdependence that would tie the success of the NCAA collaboration to the financial success and viability of its members because the teams (at the time of the *NCAA* decision) were not connected through a single league or tournament in which all members compete.<sup>20</sup> While the NCAA's approach to coordinated broadcasts has changed significantly since the 1984 *NCAA* decision—and even college broad-

casts require multi-team cooperation—for professional sports leagues the economic interdependence underlying the creation and sale of the venture product itself is a fundamental structural aspect of their ventures.<sup>21</sup>

### The Central Justifications for Broadcast Restraints of Sports Leagues

Unless the venture is treated as a single entity outside the scope of Section 1 or the broadcast restraints at issue are considered core activities of the venture under *Dagher* (and therefore not restraints in the “antitrust sense”), broadcast restrictions imposed by leagues would be subject to the rule of reason. As to that analysis, two venture drivers—investment incentives and the avoidance of free riding—are compelling economic justifications for the intra-venture restraints of professional sports leagues, including for the broadcast and distribution of venture output.

**The Profit-Maximizing Incentives of Closed Sports League Ventures.** As a threshold matter, economists should not be bashful about the profit-maximizing objectives of professional sports ventures. After all, where profits derive from the quality and success of the product, the quest of dominance is encouraged, at least in the U.S. courts.<sup>22</sup> As several economists have observed, U.S. professional sports leagues, in particular, provide a strong profit-maximizing investment motive that results in a venture structure that:

- Limits the number of teams;
- Coordinates the marketing and sale of broadcast rights, including exclusivity provisions; and
- Coordinates ancillary product licensing.<sup>23</sup>

While U.S. leagues differ from European leagues in the degree to which they create exclusive territorial rights (e.g., home territories), all professional leagues “determine the number of games that teams can schedule, which in turn determines the maximum quantity of television rights that can be sold.”<sup>24</sup>

Nevertheless, some economists and academics have asserted that U.S. professional sports leagues should be required—under the Sherman Act or by regulation—to adopt a relegation system more like the European professional sports model.<sup>25</sup> Under their proposed framework, leagues would allow any level of new membership that the marketplace can tolerate and use promotion and relegation, as necessary, to ensure competitive balance. This league model would also reduce restrictions on player movement to allow teams to improve more quickly.<sup>26</sup> That framework, however, does not address the economic incentives of venture formation and the fact that, in the United States, venture collaborators are free to choose the scope of their collaborations and how best to market and sell what the venture creates. This is especially the case where no individual venture member, *ex ante*, is capable of creating or broadcasting the venture product alone.

**How Broadcast Restraints Affect Investment Incentives.** All U.S. professional sports leagues, as collaborations, have an interest in providing incentives for venture-related

investment. As a leading article on joint ventures observes:

The natural objective for any joint venture as a whole is to maximize the total value that all members receive, and to this end it will want to impose rules that deter individual members from free riding on joint investments of all members for individual gains. Similarly, a venture will want to provide incentives for individual members to enhance the venture’s assets beyond the point at which they individually benefit.<sup>27</sup>

To protect venture investments (and to generate investment incentives), each league will naturally establish restraints that preclude venture members from competing individually in the sale of venture products. Absent those restraints, some ventures may not be formed at all, and certainly professional sports leagues would be of a different character—in terms of structure, governance, and, most importantly, the array of *ex ante* bargains—than one currently finds in the highly successful professional sports leagues we see today.

**Free Riding Is a Major Concern in Sports League Ventures.** The U.S. closed sports league model may increase the risk of and concern over free riding by venture members because one team can exploit the value created by other teams without fear of relegation to a lower tier.<sup>28</sup> Since the *Penn-Olin* decision in 1964, courts and economists have endorsed a venture’s ability to prevent free-riding through various ancillary restraints.<sup>29</sup> As Gregory Werden, a former economist in the Antitrust Division of the Department of Justice, explains, “As a general rule, restraints on competition between the venture and the participants are likely to be ancillary, and restraints on competition among joint venture participants outside the venture are not.”<sup>30</sup>

The overarching principle is that firms creating or joining a collaboration expect to appropriate the results of their investment, including by eliminating or reducing free-riding opportunities: “Firms must generally expect to appropriate a substantial portion of the benefits from their investment to make those investments in the first place. . . . [T]he more easily the benefits from an individual firm’s investment can be captured by other firms, the less incentive any firm has to invest.”<sup>31</sup>

Limited-membership ventures are particularly prone to free riding because the model creates the opportunity for venture members to exploit the value created by the overall venture; and a team’s exploitation of broadcast opportunities for itself is a classic example.<sup>32</sup> Courts routinely recognize this as a legitimate concern and treat league rules to protect against this type of free riding as legitimate restraints to protect the league’s investment.<sup>33</sup> With the recent exception of *NFL Sunday Ticket*,<sup>34</sup> courts also generally summarily reject a *per se* or “quick look” condemnation of professional sports-league restraints (even for group licensing of team-owned intellectual property).<sup>35</sup>

These necessary differences in outcomes may derive from a misunderstanding by a few courts as to the scope of professional sports league ventures, especially as it relates to broadcasts of venture games. By necessity, professional sports

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must be full-form ventures in that the venture's product (i.e., games in a league competition) cannot be created or sold absent venture coordination; hence, the venture's scope must include these activities. In turn, ventures naturally choose, collectively, how best to create, market and sell broadcasts, while also preventing or limiting free riding by individual teams.

Yet the underlying premise of some economists seems to be that if a sports league achieves alleged "monopoly" status in terms of unique consumer demand for the broadcast of the venture's games (a topic we address below), then the Sherman Act should be invoked to require intra-venture competition for the sale of the venture's broadcasts.<sup>36</sup> This would be analogous to requiring a manufacturer that has intra-brand distribution restraints to abandon those restraints once the product becomes "too successful." Subjecting a league to this framework would be more in the nature of a regulatory-like intervention than an application of antitrust principles. Not only does distribution exclusivity promote the very quality that makes sports programming so popular, any suggested counterfactual would have to assess venture formation, levels of investment, demand, supply, and quality with the assumption that exclusivity never existed.

In addition, exclusivity arrangements, such as those involving the distribution of broadcast content, generally expand output and quality.<sup>37</sup> Exclusivity increases the incentives of distributors (e.g., networks or cable operators) to support content that makes them better competitors for "eyeballs" and subscribers. This is the underlying premise of platform competition in pay television,<sup>38</sup> and from that perspective one readily sees the benefit to consumers in the form of new and innovative content across distribution platforms.

The principle applies equally to sports league content, which also is dependent on quality programming and services. Long gone are the days of having only a single, far-away camera tracking play from some unknown height. Today's products are highly sophisticated orchestrations of cameras, producers, announcers, editors, and ancillary programming and services. And the professional leagues facilitate those investments in broadcast because of the bargained-for exclusive arrangements for televising the league product. (Likewise,

where distributors—such as a team's local Regional Sports Network (RSN)—are making those investments, they, too, expect exclusivity). Indeed, because all broadcasts ultimately must flow from the creation of games at the venture level, it makes sense, economically, to view the broadcast restrictions (and various forms of distribution exclusivity) as vertical restraints of league ventures rather than as a horizontal restraint among independent firms. Again, no single team can create the league product or the consumer demand for it.

***Transactional Efficiencies of Pooled Broadcasting.*** Finally, the U.S. professional sports league model of collective selling of broadcast rights also creates enormous transactional (and likely output-enhancing) benefits. Without it, teams, producers, and distributors would engage in an untold number of bilateral negotiations. Not only would these negotiations be highly inefficient, such a counterfactual would raise serious questions concerning the venture-level objective of ensuring a consistent, high-quality production of all games that would be made available to all fans (including those residing "out-of-market") in at least one form of distribution.

### **An Effects Analysis of Broadcast Restraints of Sports Collaborations Includes Several Distinct Steps**

If one has to apply a traditional rule of reason analysis, there are three primary areas of economic inquiry relating to broadcast restraints. The first typically is market definition, which must be addressed in any analysis of effects. The second inquiry considers the meaning of broadcast output and whether U.S. sports leagues are already producing all of the output they can for the broadcast of venture games. Finally, and perhaps the most overlooked subject area, is the assessment of league output in the absence of the restraint (the "but-for world" analysis).

***Threshold Inquiries into Market Definition and Market Power.*** A critical starting point for assessing market definition (and market power) involving professional sports leagues is to identify the plaintiff. If the plaintiff is anything other than the ultimate consumer—e.g., an allegedly foreclosed distributor—then the market definition and market power inquiry inevitably centers on other forms of content that would be attractive to advertisers and ultimate consumers. Once properly centered, the market definition inquiry becomes fairly straightforward.

One focus in these circumstances is on the content options of advertisers to access the desired eyeballs—i.e., demographics that those advertisers wish to reach. Whether undertaken as a hypothetical monopolist test or from the perspective of reasonable interchangeability, the elasticity of demand for advertisers is likely quite high for sports-related demographics, especially if the plaintiff is attempting to define a market around the broadcast rights for the sale of one professional sport.

In cases where the plaintiff is the viewer, however, the market definition and market power inquiry become some-

what more complex, as many fans are relatively inelastic in their demand compared to advertisers seeking content to deliver a certain demographic (although even that appears to be changing in the world of fantasy sports). It can reasonably be assumed that, for all major U.S. professional sports, there are some fans who are extremely loyal to their chosen team (not even the league) and whose demand would be susceptible to narrowly drawn markets under a hypothetical monopolist test. This does not end the inquiry, however, especially where that inelasticity is in the context of broadcast content.

From an economic perspective, there are two additional questions to explore. First, in pricing their products (e.g., an out-of-market package), can leagues identify, separate out, and target these inelastic fans versus the relatively elastic fans (i.e., those more sensitive to price)? If they cannot, the marginal consumers who are more susceptible to switching will drive the pricing decisions, which means that the demand substitutes must include the closest demand substitutes for those marginal consumers (whether other sports content, other programming, or perhaps other entertainment activities).

Second, even for relatively inelastic consumers, economists must be careful not to confuse “monopolistic competition”<sup>39</sup> among differentiated products with monopoly power for any one of those products. For many decades, economists have recognized that differentiated products still compete with each other, even if each of the products in question—here, viewing content—is priced well above marginal cost because of its relative quality and other factors. In more practical parlance, differentiated product competition is still competition, which is reflected at any one time in an equilibrium or resting point that reflects a combination of quality-adjusted prices and the ability of consumers to switch freely among functional substitutes (here, how to spend discretionary income for entertainment purposes).

**What Is the Relevant Output?** Defining the relevant output and determining the metric for its measurement are important steps in determining whether the challenged restrictions of professional sports leagues reduce output when compared to the “but-for world.” Where the output is the broadcast of games, the output typically is measured by the number of games that are broadcast.<sup>40</sup> Some antitrust plaintiffs have suggested that courts adopt a “viewership” measure, citing the dissent in *NCAA*, but most courts, including the majority in *NCAA*, have not done so.<sup>41</sup>

Using the number of broadcasted games (on any platform) to measure output makes more economic sense than any alternative. A professional sports league venture “makes” sports contests for viewership (live and broadcast), and there is a finite number of them. The question, then, is whether these games are available to consumers in one form or another (free or pay); it is not a restriction of output if, for example, a consumer decides only to watch contests that are free on network television.<sup>42</sup> Indeed, treating the free and paid forms of broadcast as separate “output” would conflate the

availability of output with the cost of consuming the *distribution* of that output. Under that logic, multi-channel distribution arrangements (which are extremely common) would be deemed to restrict output because not all viewers have access to the paid form. And by extension, that also would mean that anything short of providing free access to all games across all platforms would be considered a restriction of output, which makes no economic sense.

**An Ex-Ante Assessment of the But-for World Is a Critical Part of Any Effects Analysis.** One of the most critical issues in a rule of reason review of broadcast restrictions is understanding the proposed (or assumed) but-for world and whether consumers would actually be better off in it. Economists who favor using antitrust law to force individual teams to sell broadcast rights in competition with the league and other teams tend to discount or ignore league investment and bargaining decisions, including in seeking exclusive broadcast arrangements, that are dependent on pre-existing venture structure and incentives. Some prominent economists also assume that the league investments and bargaining outcomes made today would be the same in the but-for world, and that teams would have the opportunity to broadcast league games at little or no marginal cost: “We will begin with the case in which the home team is the seller of television rights. Because matches are staged in any case for a live audience, the direct cost to the home team in allowing its game to be televised is very close to zero.”<sup>43</sup>

Working under that assumed state of play, the notion is that, but for the league restraints on broadcast rights “[a] team should be willing to sell its television rights for out-of-market telecasts . . . for virtually nothing.”<sup>44</sup> The only apparent caveat—a large one—is the recognition that broadcasters would have to acquire the home game rights for several teams to ensure that each week it can offer an attractive match.

But that essential *ex post* view of team broadcast options does not address the *ex ante* world in any meaningful sense. For example, in a proper but-for world, any attempt by a team to sell the television rights to its “own” games (without centralized coordination) would necessarily involve fundamentally different bargains between and among teams, if not a completely different venture altogether. It is also highly unlikely that teams would offer the league product at or near marginal cost, because a team with complete autonomy and an unfettered ability to distribute games would itself exploit the value of those broadcasts, including through exclusive distribution arrangements.

Instead, in a proper *ex ante* but-for world, a number of key issues would have to be addressed:

- How would the current production and distribution bargains be reset and at what equilibrium?
- Would every team have the incentive and ability to create distribution for every fan on every platform?
- What alternative exclusivity arrangements may one or more teams make, and would that lead to a comparative reduction in output?

- Would prices necessarily go down, especially for the most popular teams that could target out-of-market fans?
- Would the quality of broadcasts be maintained across all teams?

These are just the primary issues that would have to be considered in assessing a claim that a sports league venture should be forced by antitrust law to give up its venture-level broadcast arrangements; and while these economic issues are complex, and they cannot be ignored.

***A Cursory “Less Restrictive Alternative” Analysis Is Not a Proxy for Reasonableness or Effects.*** Analyzing less restrictive, but equally effective, alternatives to the current restraint can be somewhat confusing, especially when analyzing intra-venture restraints. From an economic perspective, however, they are more straightforward. The easy case is when a proposed less restrictive alternative cannot meet the same legitimate or procompetitive objective of the challenged restraint.<sup>45</sup> Determining whether an alternative is less restrictive than the status quo becomes more challenging when it could achieve approximately the same objective. From an economic perspective, a proposed less restrictive alternative is essentially a hypothetical but-for world asserted to be just as beneficial to consumers, but with materially reduced harmful effects.

The critical point here is that, as a hypothetical counterfactual, a proposed less restrictive alternative must be assessed for its effects on venture members (including investment incentives), on supply, on demand, and on quality. There appears to be a tendency, however, to hold everything else constant while considering a less restrictive alternative, including in the analysis of a less restrictive alternative in a sports league antitrust case. Yet the proposed less restrictive alternative often may alter the market and materially change the marketplace outcomes. Thus, while it may be useful to have more balancing in a less restrictive alternatives analysis,<sup>46</sup> it is equally important to assess whether any asserted less restrictive alternative would alter—for good or bad—the current equilibrium of demand, supply, and quality including in the but-for world. ■

genuine competition on the playing field. One team alone cannot produce that. Indeed, one can go farther than this. Even two teams, or a small number of teams, cannot create the product that is produced by a sports league. *That product is a series of games in the context of a league season.* The elements of standings, playoffs, and championships, are a very large part of what creates fan interest. Those elements require a league with a non-negligible number of teams.” (emphasis added)).

- <sup>5</sup> See, e.g., *Ass’n of Indep. Television Stations, Inc. v. Coll. Football Ass’n*, 637 F. Supp. 1289, 1297 (W.D. Okla. 1986) (“In the marketing of television rights, just as in the management of the live contest itself, some cooperation is necessary if the product, live college football television, is to be available at all.”).
- <sup>6</sup> *American Needle*, 560 U.S. at 200.
- <sup>7</sup> See, e.g., Fisher et al., *supra* note 4, at 5. For a court’s perspective, see, for example, *Chicago Prof’l Sports Ltd. Partnership v. NBA (Bulls II)*, 95 F.3d 593, 597–600 (7th Cir. 1996). In *Bulls II*, the court highlighted, from a functional standpoint, that only a league can make a league product and, therefore, the NBA does “not deprive the market of independent centers of decision making” when making decisions on how to distribute NBA broadcasts. *Id.* at 598–99; see also *id.* at 599 (“[O]nly [the NBA] can make ‘NBA Basketball’ games . . .”).
- <sup>8</sup> *Bulls II*, 95 F.3d 593.
- <sup>9</sup> *In re NFL Sunday Ticket Antitrust Litig.*, 933 F.3d 1136 (9th Cir. Aug. 13, 2019).
- <sup>10</sup> *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).
- <sup>11</sup> *Id.* at 120.
- <sup>12</sup> Roger G. Noll, *Broadcasting and Team Sports*, 54 SCOTTISH J. POL. ECON. 400, 409–10 (2007).
- <sup>13</sup> *Id.* at 409 (emphasis added).
- <sup>14</sup> *Id.* at 414.
- <sup>15</sup> *Texaco Inc. v. Dagher*, 547 U.S. 1, 6–8 (2006).
- <sup>16</sup> See *Bulls II*, 95 F.3d at 598 (emphasis added).
- <sup>17</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 278–79 (1978) (emphasis added).
- <sup>18</sup> *Id.* at 279.
- <sup>19</sup> *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 327–28 (2d Cir. 2008) (distinguishing MLB as a highly integrated entity of teams playing against each other to compete for a championship series from NCAA, which lacks interdependence among the teams connected through a single league or tournament in which all the members compete).
- <sup>20</sup> *Id.* at 332 (“The production of this entertainment requires the joint efforts of the 30 Clubs; it cannot be produced by any one Club individually or even by a few Clubs. In creating the MLB Entertainment Product, the Clubs plainly do not operate separately or independently . . .”).
- <sup>21</sup> See, e.g., Fisher et al., *supra* note 4, at 6.
- <sup>22</sup> *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004).
- <sup>23</sup> See, e.g., Noll, *supra* note 2, at 541.
- <sup>24</sup> *Id.* at 409.
- <sup>25</sup> See, e.g., Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald’s and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 213 (2006).
- <sup>26</sup> See, e.g., Stefan Szymanski & Stephen F. Ross, *Governance and Vertical Integration in Team Sports*, 25 CONTEMP. ECON. POL’Y 616 (2007).
- <sup>27</sup> Howard H. Chang, David S. Evans & Richard Schmalensee, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 COLUM. BUS. L. REV. 223, 244.
- <sup>28</sup> For a discussion of free riding, see, for example, DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 414 (4th ed. 2005).
- <sup>29</sup> *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964); see also *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455 (LAP), slip op. at 20 (S.D.N.Y. Nov. 2, 2007).

<sup>1</sup> In *American Needle*, the U.S. Supreme Court held that when marketing their independently owned intellectual property (there, licensing their separately owned marks and logos for use on apparel), NFL teams were separate economic actors pursuing separate economic interests who are capable of violating Section 1 of the Sherman Act. *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

<sup>2</sup> See, e.g., Rodney Fort & James Quirk, *Cross-subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 33 J. ECON. LITERATURE 1265 (1995); see also Roger G. Noll, *The Organization of Sports Leagues*, 19 OXFORD REV. ECON. POL’Y 530, 541 (2003).

<sup>3</sup> See, e.g., Noll, *supra* note 2, at 537; see also Stephen F. Ross & Stefan Szymanski, *Open Competition in League Sports*, 2002 WIS. L. REV. 625.

<sup>4</sup> See, e.g., Franklin M. Fisher, Christopher Maxwell & Evan Sue Schouten, *The Economics of Sports Leagues—The Chicago Bulls Case*, 10 MARQ. SPORTS L.J. 1, 5 (1999) (“The real reason that a single team cannot produce the product of a sports league is that an essential part of that product involves

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- <sup>30</sup> Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 707–08 (1998).
- <sup>31</sup> See Chang et al., *supra* note 27, at 238.
- <sup>32</sup> See, e.g., Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1, 97.
- <sup>33</sup> See, for example, the court’s acceptance of superstition fees as reasonable in *Bulls II*, 95 F.3d at 597–600.
- <sup>34</sup> See *NFL Sunday Ticket Antitrust Litigation*, 933 F.3d at 33–34.
- <sup>35</sup> See, e.g., *American Needle*, 560 U.S. 183.
- <sup>36</sup> See, e.g., Noll, *supra* note 12.
- <sup>37</sup> For a general discussion of the procompetitive benefits created by exclusivity, see CARLTON & PERLOFF, *supra* note 28, ch. 1; see also Benjamin Klein, *Exclusive Dealing as Competition for Distribution “On the Merits,”* 12 GEO. MASON. L. REV. 119 (2003). For the quality enhancing benefits of exclusivity, see, for example, Ilya R. Segal & Michael D. Whinston, *Exclusive Contracts and Protection of Investments*, 31 RAND J. ECON. 603 (2000).
- <sup>38</sup> For an overview discussion of the distribution of content via pay television, see, for example, Gregory S. Crawford & Ali Yurukoglu, *The Welfare Effects of Bundling in Multichannel Television Markets*, 102 AM. ECON. REV. 643 (2012).
- <sup>39</sup> For a discussion of monopolistic competition, see CARLTON & PERLOFF, *supra* note 28, ch. 7.
- <sup>40</sup> Indeed, this was the measure used by the Court in *NCAA* (when not all college games were broadcast). See *NCAA*, 468 U.S. at 99; see also *Chi. Prof’l Sports Ltd. P’ship v. NBA (Bulls I)*, 961 F.2d 667 (7th Cir. 1992); *Bulls II*, 95 F.3d at 598; *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002).
- <sup>41</sup> See *NFL Sunday Ticket Lit.*, 933 F.3d at 32 (discussing *NCAA*).
- <sup>42</sup> See, e.g., *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 235 F. Supp. 2d 1269, 1283 (M.D. Fla. 2002), *aff’d*, 364 F.3d 1288 (11th Cir. 2004).
- <sup>43</sup> Noll, *supra* note 12, at 411.
- <sup>44</sup> *Id.* at 412.
- <sup>45</sup> See, e.g., *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997).
- <sup>46</sup> See, e.g., C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927 (2016).