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# The Superstation Controversy: Has the NBA Slam Dunked the Superstations?

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## NOTE

### THE SUPERSTATION CONTROVERSY: HAS THE NBA SLAM DUNKED THE SUPERSTATIONS?

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#### I. INTRODUCTION

In May of 1993, the National Basketball Association (NBA) announced an unprecedented television contract in hopes of raising the league's national television ratings. The new four year \$750 million dollar contract with NBC has the potential to abolish superstation coverage of NBA games,<sup>1</sup> which, while economically beneficial for the league, could drastically limit the number of basketball games shown across the nation in both NBA local markets (cities having NBA teams) and markets where no local team exists.

A superstation is an independent television station that broadcasts in its local market area, and whose broadcast signal is picked up around the country by local cable companies for broadcast in their particular area.<sup>2</sup> From the 1986-87 basketball season through the 1991 season, the NBA's superstation rules permitted each team to broadcast up to forty-one of its games (home or away) per sea-

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1. Thomas Tyrer, *NBA, NBC Deal Limits Cable Games*, ELECTRONIC MEDIA, May 10, 1993, at 3.

2. *Chicago Pro. Sports Ltd. Partnership v. Nat'l. Basketball Ass'n.*, 754 F. Supp. 1336, 1338 (N.D.Ill. 1991) [hereinafter *Chicago Pro. Sports*].

son, of which twenty-five could be broadcast over superstations.<sup>3</sup> In 1990, however, the NBA's Board of Governors, consisting of one representative from each of the twenty-seven teams, decided to reduce the number of superstation telecasts to twenty.<sup>4</sup> The owner of the Chicago Bulls, Chicago Professional Sports Limited Partnership (Chicago Pro. Sports), and WGN Continental Broadcasting Company (WGN), the superstation that contracted with the Bulls to carry its basketball games, brought suit against the NBA seeking to enjoin enforcement of the five game reduction claiming that it "constitute[d] both an unlawful horizontal agreement among the teams to restrict output and a group boycott of superstations, in violation of Section One of the Sherman Act [15 U.S.C. § 1]."<sup>5</sup>

In a bench trial, the United States District Court for the Northern District of Illinois (Judge Will presiding) found for the plaintiffs and entered an injunction preventing the NBA from enforcing the twenty game limit.<sup>6</sup> Rejecting the NBA's argument that the Sports Broadcasting Act<sup>7</sup> exempted the sports league from the Sherman Act<sup>8</sup>, Judge Will held that under the Rule of Reason, none of the NBA's arguments for the reduction justified a restraint of trade that limited output.<sup>9</sup> On appeal, the United States Court of Appeals for the Seventh Circuit<sup>10</sup> affirmed the District Court, holding that (1) while the lower court was correct in ruling that the Sports Broadcasting Act does not protect the five game reduction, some of its reasoning was erroneous,<sup>11</sup> and (2) under *NCAA v. Board of Regents of the Univ. of Oklahoma*,<sup>12</sup> the District Court did not commit clear error in holding that the contract violated the Rule of Reason.<sup>13</sup> Circuit Court Judge Easterbrook, however, hinted in dictum that the league could have employed other legitimate means to control superstations.<sup>14</sup> These decisions resulted in the courts inviting the NBA to rewrite its contracts to control output legally, thereby ensuring the exclusivity of the national televi-

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3. *Id.*

4. *Id.*

5. *Id.* at 1349.

6. *Id.* at 1339.

7. 15 U.S.C. § 1291 (1992).

8. *Chicago Pro. Sports*, 754 F. Supp. at 1350.

9. *Id.* at 1358.

10. *Chicago Pro. Sports Ltd. Partnership v. Nat'l Basketball Ass'n.*, 961 F.2d 667 (7th Cir. 1992), *cert. denied*, 113 S.Ct 409 (1992) [hereinafter *Chicago Pro. Sports II*].

11. *Id.* at 671.

12. 468 U.S. 85 (1984) [hereinafter *Board of Regents*].

13. *Chicago Pro. Sports II*, 961 F.2d at 676.

14. *Id.* at 671.

sion contracts. The new contract, which aims to improve the league's national television ratings and boost advertising revenues, appears to follow the narrow language of the Sports Broadcasting Act, a move that both courts suggested could defeat an antitrust attack.

This comment examines the decisions in *Chicago Pro. Sports v. NBA* and analyzes the underlying tension between the sports fan's desire for maximum output (the number of games broadcast), and the sports business's desire to protect the broadcasting rights and revenues of the local market (the exclusive right to broadcast the local team's game or any game). The outcome of this case has a serious economic impact on individual basketball teams' local television markets. Because the courts refused to find that superstations harm either local or national basketball broadcasts (due to the fact that the NBA failed to produce any credible evidence to this effect), the NBA rewrote its new national television contract using the road map laid out by the court, following the narrow requirements of the Sports Broadcasting Act. If successful, the new contract will undoubtedly result in decreased output of televised NBA games across the nation and unfairly affect those fans without local professional teams. For example, superstations allow baseball and basketball fans in Billings, Montana, a town without a major league team in any sport, to enjoy nightly professional sports entertainment. Without the luxury of superstations, these fans would either have to wait for a weekend network game or purchase the right to watch a game on pay-per-view.<sup>15</sup>

Accordingly, Congress should amend the copyright laws or the Sports Broadcasting Act to deal more equitably with the problems facing both the local markets, which suffer from unfair intrusions by superstations, and basketball fans, who lose out because of decreased output. Modernizing the Sports Broadcasting Act, by allowing a professional sports league to place output restrictions upon superstation telecasts of that sport, would allow the NBA to legally control the number of superstation broadcasts of NBA games. This method, however, would only decrease the number of games shown on superstations. Moreover, it might not ensure an increase in local broadcasts nor guarantee that local markets would retain the exclusive rights to broadcast their local team's games.<sup>16</sup>

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15. Fans are also able to watch NBA games on Turner Network Television (TNT), or regional sports channels, neither of which are pay-per-view, but do require that the fan subscribe to cable.

16. See *infra* text accompanying notes 157-159.

A better result can be reached with a change in the Copyright Act of 1976.<sup>17</sup> The Act currently allows local cable companies to legally carry copyrighted superstation broadcasts without permission of the superstation, "so long as the cable company contributes a [statutorily fixed] royalty fee" to the Copyright Office.<sup>18</sup> Amending the Copyright Act of 1976 to provide that no cable operator may retransmit a superstation professional sports broadcast if that event is otherwise available on that same local cable system would ensure a restoration of fair market value to local telecast rights and eliminate redundant broadcasts of sporting events by superstations in local cable areas at below market rates.<sup>19</sup>

## II. SUPERSTATIONS AND THEIR EFFECTS

Currently, three major superstations operate in the United States, all of which broadcast NBA games.<sup>20</sup> These include WTBS in Atlanta, WGN in Chicago, and WWOR in New York.<sup>21</sup> Superstations came into existence shortly after the enactment of Section 111 of the Copyright Act of 1976.<sup>22</sup> Section 111 permits local cable companies to "retransmit copyrighted programming from any over-the-air stations across the country to their subscribers under a 'compulsory license.'" <sup>23</sup> Under the compulsory licensing program, local cable systems pay a fee into the Copyright Office (which holds the money in a fund); this payment entitles these cable systems to retransmit certain copyrighted programs to their subscribers.<sup>24</sup> The fees are then distributed to the eligible copyright owners pursuant to decisions of the Copyright Royalty Tribunal.<sup>25</sup>

Communications carriers<sup>26</sup> act as conduits between the super-

17. 17 U.S.C. § 111 (1992).

18. *Chicago Pro. Sports*, 754 F. Supp. at 1346.

19. See *infra* text accompanying notes 160-175.

20. There are many more smaller superstations operating in the United States; however, they do not broadcast NBA games nationally.

21. *Chicago Pro. Sports*, 754 F. Supp. at 1345-46.

22. 17 U.S.C. § 111 (1992).

23. *Chicago Pro. Sports*, 754 F. Supp. at 1346. See also 17 U.S.C. § 111(c)-(d) (1992) (discussing the requirements and applicability of the compulsory license).

24. *Hubbard Broadcasting v. Southern Satellite*, 777 F.2d 393, 395 (8th Cir. 1985) [hereinafter *Hubbard Broadcasting*]. See also 17 U.S.C. § 111(c)-(d) (1992) (the act places certain restrictions upon local cable systems for retransmission. For example § 111 (c)(2)(A) restricts retransmissions that are contrary to FCC rules; § 111 (c)(2)(B) restricts systems that fail to pay their fees to the royalty fund).

25. *Hubbard Broadcasting*, 777 F.2d at 395.

26. Communication carriers "retransmit secondarily the 'primary transmission' of a licensed television broadcast station . . . to cable systems." *Id.* at 396.

stations and the local cable systems.<sup>27</sup> According to § 111(a)(3) of the Copyright Act, communications carriers may not exercise any "direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission . . . ."<sup>28</sup> If the communications carrier exerts any control over programming, the carrier will incur copyright liability.<sup>29</sup> In other words, communications carriers merely transmit what is broadcast by the superstation to the local cable company; they have no independent decision-making power over programming.

A specific example of how superstations operate is helpful. WGN in Chicago became a superstation in 1978.<sup>30</sup> United Video, WGN's carrier, retransmits WGN's signal to local cable companies, who then pay a semi-annual fee into the Copyright Office.<sup>31</sup> The Copyright Office eventually distributes this fee back to copyright owners in the form of royalty payments for their copyrighted programs.<sup>32</sup> While the carrier may pick up the signal off-the-air, United Video has received its transmissions from WGN since 1985 in the form of a "direct microwave link-up," which allows United to retransmit WGN's signal from a microwave feed sent directly by the station.<sup>33</sup>

The use of a microwave feed permits WGN to split its signal, enabling it to broadcast one signal over the air to its Chicago audience, while at the same time televising a different signal using the microwave.<sup>34</sup> This allows the station to increase its advertising revenues by charging one rate for advertising locally, and a higher rate for national advertisers because the local-only signal is not seen nationally.<sup>35</sup> The microwave also allows for two separate programs, as well as advertising, to be broadcast simultaneously to WGN's different audiences.<sup>36</sup>

27. *Id.*

28. 17 U.S.C. § 111(a)(3) (1992).

29. *Hubbard Broadcasting*, 777 F.2d at 396.

30. *Chicago Pro. Sports*, 754 F. Supp. at 1346.

31. *Id.*

32. *Id.* The cable operators also pay a fee to receive the satellite transmission from the carrier.

33. *Id.* at 1346. See also *Hubbard Broadcasting*, 777 F.2d at 397-98 (for advantages of a direct microwave link-up such as better reception and automatic shifts from the microwave to over-the-air if one signal is impaired).

34. *Chicago Pro. Sports*, 754 F. Supp. at 1346.

35. *Id.* at 1346. In other words, a national advertiser which refused to pay national rates would find that his commercials would be limited to the Chicago audience.

36. *Id.*

In 1990, the Federal Communications Commission enacted regulations giving "local broadcast stations the right to purchase exclusive rights to syndicated programming and forbid cable operators from importing the same programming into their broadcast markets."<sup>37</sup> According to the Syndex rules, dealing with this syndicated programming,<sup>38</sup> superstations are now obligated to "cover-over," or blackout, certain syndicated programs to which a local television station has exclusive rights in its market, and substitute different programming.<sup>39</sup> The Syndex rules, however, cover only *syndicated* programs such as *Cheers* or *Murphy Brown*, not sports programs.<sup>40</sup> Although it is possible to split its feed during Chicago Bulls' broadcasts, WGN chooses not to do so, legally televising the game and commercials locally and providing the same feed to the carrier for national distribution at the same time.<sup>41</sup>

The problem the NBA has encountered with the superstations is prevalent everywhere in professional sports today.<sup>42</sup> Because the Syndex Rules do not protect against games of one sports league competing against games in the same league, superstations allow teams such as the Chicago Bulls, Cubs and White Sox, and the Atlanta Hawks and Braves to receive national coverage of their games which would not ordinarily be available to them absent WGN or WTBS. This national exposure, in turn, harms non-superstation teams and their local markets when attempting to negotiate for exclusive broadcast rights contracts.<sup>43</sup> Advertisers recognize that superstation broadcasts of sporting events detract from the exclusivity of the local market broadcast and can negotiate advertising prices accordingly.<sup>44</sup> The inevitable result is that local broad-

37. *Id.* at 1347.

38. 47 C.F.R. §§ 76.151-76.163 (1992). Syndicated programming is any television program sold to television licensees in more than one market across the United States, other than current network programming. See 47 C.F.R. § 76.5(ii).

39. *Chicago Pro. Sports*, 754 F. Supp. at 1347.

40. *Id.* For instance, if a local television station bought the exclusive rights to broadcast *Cheers* at 7:30 pm into its own broadcast area, the Syndex rules prevent a cable system from importing *Cheers* into that local area over a superstation.

41. *Id.*

42. See, e.g., Terry Blount, *Baseball's Burning Questions; Change in the Air as CBS, ESPN Squirm*, HOUS. CHRON. Feb. 28, 1993, at Sports 2, 17 [hereinafter Blount, *Baseball's Burning Questions*] (reporting that baseball's once popular "Game of the Week" is now just another game due to oversaturation of superstation games in the market); See also Gene Wojciechowski, *Q & A with Pete Rozelle*, L.A. TIMES, Jan. 24, 1993, at C1 (where the former NFL Commissioner predicts that football's number one priority in the future is controlling the entrance of superstations into the league).

43. See Bob Dart, *Vincent: End Superstation's Baseball*, THE ATLANTA J. & CONST., Apr. 30, 1992, at F5 [hereinafter Dart, *Vincent*].

44. *Id.*

casters "end up competing for viewers with games on the superstations."<sup>45</sup>

The oversaturation of superstation games on television have major economic effects on local markets' broadcasts of local professional sports teams. Although no studies have been conducted showing the local market effect of NBA superstation telecasts, studies conducted in other professional sports show a severe drop-off in viewership on nights that superstations broadcast a game or the same game as the local market.<sup>46</sup> The effect has been so great in some areas that local markets no longer can afford to broadcast the local professional team.<sup>47</sup>

### III. THE NBA BROADCAST STRATEGY AND THE BULLS/WGN CONTRACT

In 1990, the NBA sold its broadcast rights to both the National Broadcast Company (NBC) and to Turner Network Television (TNT), a cable network.<sup>48</sup> Revenues from the national television contracts were estimated to be worth up to \$6.8 million per team in 1991.<sup>49</sup> According to the NBA, the main reason for its resurgence in popularity and economic prosperity from the early 1980's "has been a sound and consistent television policy."<sup>50</sup> A major part of this television policy has been to restrict the number of local and superstation telecasts any one team may sell in order to boost ratings for network games shown nationally.<sup>51</sup>

Under the NBA's 1991 television policy, each team could broa-

45. *Id.*

46. *See infra* text accompanying notes 132-137.

47. *See id.*

48. *Chicago Pro. Sports*, 754 F. Supp. at 1340.

49. *Id.* The NBA contends that without the money generated from the national television contracts, many teams would operate at a loss for the season. *Id.*

50. *Id.* at 1342. For example, in 1981 and 1982, league revenues for both cable and over-the-air television were only \$23 million, and the 1981 the championship series was shown not on live network programming, but on tape delay. *Id.* By contrast, in 1991, the league grossed over \$180 million from its television contracts with NBC and TNT. *Id.*

One could argue that the real reason for the league's resurgence both in terms of economics and popularity was the emergence of basketball stars such as Magic Johnson, Larry Bird and Michael Jordan in the early 1980's. Combine these superstars' grip on the public with Commissioner David Stern's marketing expertise and the league's resurgence was assured.

51. *Id.* For instance, in 1980 the Board of Governors of the NBA adopted a resolution limiting each team to 41 telecasts, not including national broadcasts. *Id.* In 1985, the Board placed further restrictions on superstations, this time limiting the amount of telecasts any one team may sell to a superstation to 25 games. *Id.* at 1343. The Chicago Bulls supported both resolutions adopted by the Board. *Id.*



cast up to forty-one games, whether they be home or away. The revenues from these broadcasts were the property of the team and did not have to be shared with the NBA or the other teams.<sup>52</sup> The major restriction upon the teams, however, was that they could not broadcast any games on local television, cable or superstations at the same time NBC was televising a game, although "teams [could] telecast . . . the same game TNT [was] carrying, head-to-head with TNT, on strictly local over-the-air TV or on local cable."<sup>53</sup>

The 1989 television contract between the Bulls and WGN, when negotiated, followed the NBA broadcast policy prior to the twenty game rule. The contract permitted the station to broadcast twenty-five games for both the 1989-90 and 1990-91 seasons, with options to extend the agreement through the 1993-94 season.<sup>54</sup> The contract was set for only twenty-five games (although WGN wanted more) in accordance with the NBA's broadcasting policy, and was also made subject to any future television regulations the NBA might pass.<sup>55</sup> Additionally, the contract contained a walkaway provision: "In the event that league rules, during the term of the contract, are amended to bar the Bulls from giving WGN at least 21 games, 'due to [WGN's] status as a superstation,' either party has the option of terminating the agreement, unilaterally."<sup>56</sup>

Following the 1990 agreements with NBC and TNT, the NBA's Board of Governors, over the dissent of the Bulls and the New Jersey Nets,<sup>57</sup> voted to reduce the number of games each team may broadcast on superstations from twenty-five to twenty.<sup>58</sup> Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company then filed the antitrust suit in fed-

52. *Id.* at 1344. Teams may also show games within an "extended market," or cablecasts beyond the 75 mile radius of the home team's city, but not beyond 75 miles of this radius. *Id.* Revenues from these broadcasts must be shared with the league. *Id.*

53. *Id.*

54. *Id.* at 1347.

55. *Id.* at 1347-48. As a result of the District Court decision in this case, WGN actually broadcast 30 Bulls games in the 1991-1992 season. *Chicago Pro. Sports II*, 961 F.2d 669 (7th Cir. 1992). Judge Will has said that he will rule on the Bulls bid to show up to forty-one games on WGN in the fall of 1993. See Steve Nidetz, *CBS' Surprise Bid Stirs Up Einhorn*, CHI. TRIB., May 17, 1993, at C13 [hereinafter Nidetz, *CBS' Surprise*]. As of publication of this article in the Spring of 1994, the District Court had not rendered a decision on the right to show forty-one games.

56. *Chicago Pro. Sports*, 754 F. Supp. at 1348.

57. The Nets contracted with WWOR in New York to cover six of their games. *Id.* at 1349. Ironically, since the Nets broadcast only six games over WWOR, the rule would not have affected the team.

58. *Id.* at 1343.

eral court seeking to enjoin the twenty game rule. The Bulls and WGN alleged that the NBA's five game reduction "constitute[d] both an unlawful horizontal agreement among the teams to restrict output and a group boycott of superstations, in violation of Section 1 of the Sherman Act [15 U.S.C. § 1]."<sup>59</sup>

#### IV. THE SPORTS BROADCASTING ACT

The NBA responded first and foremost that its contract was exempt from the antitrust laws under the Sports Broadcasting Act of 1961 (SBA),<sup>60</sup> and therefore its move to reduce five superstation broadcasts could not be attacked under the Sherman Act.<sup>61</sup> The SBA provides:

The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sport of . . . basketball . . . by which any league of clubs . . . sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games . . . engaged in or conducted by such clubs.<sup>62</sup>

The SBA was passed by Congress at the request of the National Football League (NFL) after a District Court in Pennsylvania in 1953 first invalidated, as an illegal restraint under the Sherman Act, an NFL by-law on broadcasting rights, and then in 1961 voided a television contract between the NFL and the Columbia Broadcast Company (CBS) on similar grounds.<sup>63</sup> In both cases the league, and not the individual teams, transferred its broadcast rights. "The immediate effect of the SBA was to establish that the CBS contract was lawful and to overrule the 1961 decision."<sup>64</sup> In other words, the SBA was a grant of power to the sports leagues allowing them to circumvent the antitrust laws if the leagues followed the narrow requirements of the Act.

The District Court rejected the NBA's argument that it fell within the narrow terms of the SBA. According to the Court, the SBA protects only transfers of broadcast rights *by a league* as a

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59. *Chicago Pro. Sports*, 754 F. Supp. at 1349.

60. 15 U.S.C. §§ 1291-1295 (1992).

61. *Chicago Pro. Sports*, 754 F. Supp. at 1349.

62. 15 U.S.C. § 1291 (1992).

63. See *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953); *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961) (holding the CBS contract invalid because the network had full power to decide which games it would telecast and where they would be televised).

64. *Chicago Pro. Sports*, 754 F. Supp. at 1351.

whole, and not transfers made by the individual teams.<sup>65</sup> In the WGN contract, the Bulls, not the NBA, possessed the licensing power to transfer the broadcast rights.<sup>66</sup> Therefore, the transaction could not fall under the literal terms of the SBA because the transfer of broadcast rights was not a transfer *by a league*, but rather a transfer by a team participating in a league.<sup>67</sup>

The NBA also contended that if the SBA covered the NBC contract, then it should also protect the twenty game restraint proposed to protect the "exclusivity" of that contract.<sup>68</sup> The Court found this theory unpersuasive. Looking to the SBA's original purpose,<sup>69</sup> the District Court stated that "[i]f the NBA were to transfer rights in all of its games and guarantee that all of them would be televised, which is what the NFL did in 1961 and continues to do today, the transfer would be protected by the SBA and immune from antitrust attack. . . ."<sup>70</sup> As this was not done, any limitations placed upon the games not covered by the NBC contract would not be protected by the SBA.<sup>71</sup>

The Court went on to say that the SBA only protected transfers by a league, not the prohibitions of transfers by a league, as the NBA argued.<sup>72</sup> The Court held that the SBA should be read narrowly, and any "arguments that the SBA should have been

65. *Id.* at 1350.

66. *See supra* text accompanying notes 52-56.

67. *Chicago Pro. Sports*, 754 F. Supp. at 1350. The NBA also raised a number of arguments to counter the literal effect of the statute. For instance, the NBA argued that the broadcasting rights sold to WGN were really transferred by the league rather than the Bulls. *Id.* The Court responded that the NBA never owned the rights to the twenty-five games transferred to WGN; the Bulls were the true owners. The superstation simply paid the Bulls for the rights to show the games, with the NBA receiving only a small portion of the fees distributed by the Copyright Royalty Tribunal. *Id.* Furthermore, the Court held that the NBA possessed little authority to block a transfer of games by the individual teams. *Id.* The twenty-seven teams in the NBA agreed among themselves to contract in accordance to the league's by-laws and constitution. *Id.* However, nowhere in that agreement, nor in the constitution or by-laws for that matter, was it required that the teams share their separately owned broadcast rights with the league. *Id.*

According to the terms of the 1991 NBC contract, NBA teams would lose their licensing rights to telecast any of the twenty-two games NBC planned to carry nationally in 1991. *Id.* In other words, the teams had "ceded their rights in those games to the league, and the league, as owner of the rights to those games, licensed them to NBC." *Id.* (emphasis in original). The SBA, therefore, only protected those games transferred to NBC. Any games not sold to NBC by the NBA remained the property of the individual teams.

68. *Id.* at 1351.

69. *See supra* text accompanying notes 63-64. A review of the legislative history reveals little public purpose behind the SBA.

70. *Chicago Pro. Sports*, 754 F. Supp. at 1351.

71. *Id.* at 1351-1352.

72. *Id.* at 1352.

written more broadly should be addressed to the Congress not the federal courts."<sup>73</sup>

On appeal, the Seventh Circuit disagreed with part of Judge Will's reasoning. It held that the SBA might protect prohibitions of transfers by a league. Stating that it was the Court's duty to read exceptions to the antitrust laws "narrowly, with beady eyes and green eyeshades,"<sup>74</sup> Judge Easterbrook wrote that the Sports Broadcasting Act must restrict output to have any antitrust effect at all.<sup>75</sup> "The statute allows the transfer of 'all or any part of' the rights in games; 'part of' implies fewer than all."<sup>76</sup> Contrary to what the District Court suggested, the SBA would have no relevant antitrust application if a sports league could not keep some of its games off the air.<sup>77</sup> Even the National Football League, the sports league with the most extensive broadcasting program, bars broadcasts of some of its games.<sup>78</sup>

In the end, however, the Seventh Circuit came to the same conclusion as the District Judge — that the SBA was limited only to those games that NBC and TNT contracted to show and none other:

[T]he Sports Broadcasting Act applies only when the league has "transferred" a right to "sponsored telecasting." Neither the NBA's contract with NBC nor its contract with Turner Network Television transfers to the network a right to limit the broadcasting of other contests. Both contract and . . . the league's articles and bylaws, reserve to the individual clubs the full copyright interests in all games that the league has not sold to the networks. As the "league of clubs" has not transferred to the networks either the right to show, or the right to black out, any additional games, the Sports Broadcasting Act does not protect its 20-game rule.<sup>79</sup>

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73. *Id.*

74. *Chicago Pro. Sports II*, 961 F.2d 667, 672 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 409 (1992). It appears that Judge Easterbrook traditionally interprets special interest legislation, like the SBA, extremely narrowly. See Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts With Cable Networks*, EMORY L.J. 463, 470 n. 29 (1990).

75. *Id.* at 670. Easterbrook characterizes the SBA as special interest legislation or "a single industry exception to a law designed for the protection of the public." *Chicago Pro. Sports II*, 961 F.2d at 671. See also Frank Easterbrook, *The Supreme Court, 1983 Term - Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984).

76. *Id.* at 670.

77. *Id.*

78. *Id.*

79. *Chicago Pro. Sports II*, 961 F.2d at 671. The Seventh Circuit never defined the phrase "sponsored telecasting." According to Professor Stephen F. Ross at University of Illinois Law School, the SBA applies only to the contracts with NBC, because the act's

Under the Seventh Circuit's reading of the SBA, any transfer made by the league is sheltered from antitrust scrutiny. This sent a clear message to the NBA to restructure its national network contract. If the league transferred all broadcasting rights over to NBC, both the network and the league could legally restrict superstation broadcasts of NBA games.<sup>80</sup>

## V. ANTITRUST ANALYSIS

### A. *The District Court*

Because both Courts found that the SBA did not apply, the plaintiff's antitrust claims had to then be assessed. The District Court began its antitrust analysis by noting that, by its terms, the five game reduction represented a significant restraint on trade. The Court labelled the proposed rule as a "horizontal agreement among competitors to divide markets and control output, with the stated purpose of raising prices."<sup>81</sup> Judge Will noted that, under

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legislative history suggests that sponsored telecasting means "free, over-the-air telecasts." Gene Kimmelman and Stephen F. Ross, Brief for Consumer Federation of America As Amicus Curiae at 5, *Chicago Pro. Sports II*, 961 F.2d 667 (7th Cir. 1992) [hereinafter *Amicus Brief*].

As Ross points out, because the NFL was the principal interest group and sponsor for the SBA, former NFL Commissioner Pete Rozelle's comments during hearings on the SBA are helpful:

. . . Rozelle unequivocally conceded that the legislation was not intended to apply to games shown on pay or cable television. During hearings before the House Antitrust Subcommittee, the committee's counsel directly asked whether Commissioner Rozelle . . . understood "that this bill covers only the free telecasting of professional sports contests, and does not cover pay T.V.." The Commissioner responded, "Absolutely."

*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 (1961). See also Stephen F. Ross, An Antitrust Analysis of Sports League Contracts With Cable Networks*, 39 EMORY L.J. 463, 470 (1990) (discussing the above quoted language).

But see Philip R. Hochberg, *The Case of the Lost Exemption*, SPORTS INC., May 2, 1988 at 38 (arguing that because the definition of "sponsored telecasting" has never been defined by Congress, the term's meaning is unclear and could technically invalidate the existing television contract between the NFL and the cable network ESPN). Hochberg points out that even the Justice Department and Federal Trade Commission are not in agreement on the matter. *Id.*

80. See *infra* text accompanying notes 138-151 for details on the NBA's new network contracts with NBC and TNT.

81. *Chicago Pro. Sports*, 754 F. Supp. at 1355. The court went on to say:

By confining teams to broadcast no more than 20 games, the agreement places an artificial limit on supply and reduces it below the level which would prevail in a market where the teams and the league were competing in the national market and each team was free to match demand with supply.

*Id.*

the agreement, ten fewer games would be shown on national television in 1991, five less on WGN and five less on WTBS, a reduction of output in the national market that by itself could trigger anti-trust concerns.<sup>82</sup>

The District Court found that restraints employed by the NBA (in the form of limiting superstation broadcasts) could be justified as long as the league could show that the five game reduction possessed pro-competitive aspects.<sup>83</sup> However, this was not a normal Rule of Reason analysis.<sup>84</sup> Because Judge Will found that

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82. *Id.* at 1355-56. Moreover, the District Court viewed the NBA's policy as a form of group boycott. *Id.* at 1350. See *Keifer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (holding that the Sherman Act makes it illegal for competing businesses to agree among themselves to stop selling to particular customers and to fix maximum resale prices).

The NBA argued that the reduction was aimed at the superstations, and since superstations are not considered competitors with the league or the teams, the rule could not be viewed as a boycott. *Chicago Pro. Sports*, 754 F. Supp. at 1356. The Court rejected this argument stating that boycotts apply whether aimed at customers (the NBA's characterization of superstations) or competitors. *Id.*

83. *Id.* at 1357-58. Although the District Court saw the five game reduction as a "significant restraint on trade," it declined the Bulls' and WGN's request to declare the NBA's proposal as illegal per se. "Per se rules are invoked when surrounding circumstances make the likelihood of anti-competitive conduct so great as to render unjustified further examination of the challenged conduct." *Board of Regents*, 468 U.S. at 103-04. See generally *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

Judge Will stated that not every horizontal agreement that eliminated some competition was automatically illegal. *Chicago Pro. Sports*, 754 F. Supp. at 1357. Rather, in the wake of the Supreme Court's decision in *Board of Regents*, the NBA's twenty game rule could not be deemed illegal per se, and should be examined under the Rule of Reason. *Id.* Where the competitive impact of the restraint "is not immediately obvious" and could be capable of "enhancing competition rather than suppressing it," the Rule of Reason applies. *Id.*

In other words, the twenty game rule on its face simply denied fans maximum access to sports events. Thus, under a per se analysis, the restraint would be declared illegal with no further examination. The Court, however, allowed the NBA the opportunity to prove that the reduction possessed legitimate competitive objectives, such as the protection of local markets. Unfortunately for the NBA, the league never took full advantage of this opportunity.

84. "If a particular restraint under attack is arguably 'ancillary' to a lawful purpose, and seems capable of enhancing competition rather than suppressing it, then the Rule of Reason applies." *Chicago Pro. Sports*, 754 F. Supp. at 1357 (citations omitted). In the present case, the District Court could not say with certainty that the five game reduction was a "naked restraint" with "no purpose except of stifling competition." *Id.* at 1358. Accordingly, the court would examine the restraint to find if any redeeming, pro-competitive values existed. *Id.*

Under a normal Rule of Reason analysis, the burden of proof initially lies with the plaintiff to show that the activity causes a significant restraint of trade. See Phillip Areeda, *The Rule of Reason - A Catechism on Competition*, 55 ANTITRUST L.J. 571 (1986) [hereinafter Areeda, *Catechism*]. Once the plaintiff has satisfactorily shown that a significant re-

the challenged restraint clearly reduced output, the Court followed *Board of Regents*,<sup>85</sup> and employed a modified, or intermediate Rule of Reason, placing the burden on the NBA to prove that the five game reduction promoted, rather than restricted competition.<sup>86</sup>

The NBA argued that the five game reduction was necessary to protect the team's local markets from superstition intrusions and to protect the exclusivity of the NBC and TNT national television contracts.<sup>87</sup> Judge Will appeared to be sensitive to both arguments stating, "The league's concern that superstitions buy on the cheap the same product that the national networks pay millions for, and through sales which currently generate no shared revenues for the teams . . . is understandable."<sup>88</sup> Furthermore, the District Court believed that a reduction of output for the protection of local markets was the NBA's strongest defense of the twenty game rule.<sup>89</sup> For instance, the NBA argued that superstitions, by encroaching into local NBA markets, hurt ratings and ad-

straint exists, the burden then shifts to the defendant to produce evidence justifying the challenged restraint. *See id.* at 582. If the defendant shows that the restraint is justifiable, the plaintiff must show that the intended goal of the challenged restraint could have been achieved by a less restrictive alternative. *Id.* If successful, the defendant must then prove that this alternative is not adequate or that it is not "substantially less restrictive." *Id.* In other words, "[a]lthough the burden of coming forward may shift, the burden of persuasion on these issues, one put into dispute, remains on the plaintiff." *Id.*

85. 468 U.S. 85 (1984). *See infra* text accompanying notes 102-113.

86. *Chicago Pro. Sports*, 754 F. Supp. at 1358. In other words, a restraint that is not entirely naked (as the twenty game rule was here), "will be treated as naked unless the defendant first persuades [the Court] that a legitimate objective is served. . . ." Areeda, *Catechism*, *supra* note 84. The initial burden of proof is not with the plaintiff, as in a normal Rule of Reason analysis.

87. *Id.* at 1358-59. The NBA also argued that the five game reduction would allow both the league and teams to make more money. The court rejected these arguments in principle saying, "Maximizing revenues and 'protecting the value' of individual team and or NBA contracts are not legitimate justifications by themselves for restraining trade by limiting output." *Id.* at 1359. The Court went on to comment that the argument "[w]e do it because it's more profitable" is not a defense under the Sherman Act. *Id.*

On appeal, the NBA would make a similar argument in that the five game reduction precluded the teams from "misappropriating a property right that belongs to the NBA: the right to exploit its symbols and success." *Chicago Pro. Sports II*, 961 F.2d at 674. The Seventh Circuit rejected this reasoning because the argument interpreted the NBA's rules and by-laws incorrectly in that the teams, and not the league, own the intellectual property to their games. *Id.* Further, the NBA's attempt to dictate to teams which stations they could contract with and for how many games, gave the NBA the appearance of a cartel, which could not be used as a pro-competitive justification for a reduction in output. *Id.* According to the Court, a "cartel could not insulate its agreement from the Sherman Act by giving certain producers contractual rights to sell to specified customers." *Id.*

88. *Chicago Pro. Sports*, 754 F. Supp. at 1359.

89. *Id.*

vertising for local NBA broadcasts.<sup>90</sup> The NBA, however, presented no credible evidence to support these theories.<sup>91</sup>

Because the NBA produced no evidence supporting the local market defense, the Court adopted WGN's argument that, contrary to what the NBA believed, up to half of WGN's viewing audience for any particular Bulls' game came from markets where no home NBA team existed.<sup>92</sup> Further, the Court did not believe that a Bulls game on WGN had the ability to divert fans from watching their own NBA team on nights these telecasts conflicted with Bulls' telecasts.<sup>93</sup> The NBA also failed to produce any evidence indicating that the five game reduction was necessary to protect the exclusivity of the NBC and TNT national contracts.<sup>94</sup> The Court reasoned that both NBC and TNT had the opportunity, but declined to include provisions in their contracts providing for a cap on superstation broadcasts.<sup>95</sup> Further, the NBA produced no competent evidence showing that superstation broadcasts lower national ratings for games shown by the networks.<sup>96</sup> The Court even went as far as calling NBA Commissioner David Stern's testimony that fans who watch basketball games every night on superstations were "less likely to watch the Sunday afternoon match-up on NBC," as "almost sheer fantasy."<sup>97</sup>

90. *Id.*

91. For instance, no representatives from any NBA teams or their local markets testified that superstations hurt local NBA ratings. *Id.*

92. *Id.*

93. *Id.* The court used the Los Angeles Lakers as an example. One could argue, however, that given the fact that the Bulls have dominated the rest of the NBA from 1990 to 1993, many viewers would rather watch an exciting Bulls game than their own mediocre team.

94. *Id.* at 1360.

95. *Id.* Both networks also could have shortened the duration of the national contracts in order to study the effects superstations had on the national ratings structure. *Id.* The resulting contracts with the two networks failed to even mention the superstations, which tended to prove that superstations did not have the negative effects that the NBA maintained the stations had. *Id.*

96. *Id.* The only testimony supporting the NBA's theory came from the former President of NBC Sports, who opined that superstations were "of importance to NBC because the more restrictive a product is to others, the more valuable it is to us now . . . and from an advertising standpoint." *Id.* No evidence was produced to support this statement, however.

97. *Id.* The Court stated:

WGN only televises Bulls games and only those Bulls games that NBC and TNT have not selected for themselves. Likewise for WTBS' telecasts of the Hawks. Consequently, a viewer who wants to watch the best games, rather than just watch basketball, would tend to watch the games on NBC or TNT . . . and compulsive viewers will probably watch everything anyway. Thus, because NBC and TNT are carrying the very best games, or trying to, they are less likely to be losing viewers to the superstations than they otherwise might be. . . .



Finally, the NBA failed to prove, by credible evidence, that, "but for the superstations," NBC and TNT would have either bought more games or paid more for the exclusive rights to broadcast NBA games.<sup>98</sup> In fact, the Court found little evidence of price negotiations at all between the networks and the NBA; "the NBA put a figure on the table and NBC snapped it up."<sup>99</sup> The Court concluded that the NBA failed to meet its burden of showing that the five game reduction promoted competition, rather than restricting it.<sup>100</sup> Because the NBA failed to present any evidence that the twenty game rule promoted competition, the District Court found the reduction unlawful.<sup>101</sup>

### B. The Seventh Circuit

The Seventh Circuit could have affirmed the lower court without resorting to its own reasoning by simply citing to *Board of Regents*.<sup>102</sup> In *Board of Regents*, the NCAA's television plan for the 1982-1985 seasons was at issue. The plan, restricted to the NCAA's member institutions, was passed in order to combat the adverse effects live television had on the home gate at NCAA football

*Id.* at 1361.

98. *Id.* at 1361.

99. *Id.* at 1362.

100. *Id.* As its final defense, the NBA argued that in any Rule of Reason analysis, the Court must first assess market power. *Chicago Pro. Sports II*, 961 F.2d at 673. See also *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 191 (7th Cir. 1985). "Market power is the ability to raise prices above those that would be charged in competitive market." *Board of Regents*, 468 U.S. at 109, n. 38 (citing *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. at 27, n. 46). "The purpose for defining a market is to help estimate market shares, and the purpose for estimating market shares is to estimate the potential for adverse effects." *Chicago Pro. Sports*, 754 F. Supp. at 1363.

The District Court rejected the NBA's argument, quoting from the Supreme Court case of *Board of Regents*:

[A]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output . . . and requires some competitive justification even in the absence of a detailed market analysis. . . . We have never required proof of market power in such a case.

*Id.* at 1363 (citations omitted). See also *Indiana Dentists*, 476 U.S. at 85.

According to the Court, the NBA's twenty game rule fell into the same category as *Board of Regents* and *Indiana Dentists*. *Id.* at 1363. In other words, as the negative effects of the five game reduction were obvious, there was no need for an assessment of market power. The Seventh Circuit would affirm the lower court's market power ruling, as it was not clearly erroneous. See *Chicago Pro. Sports II*, 961 F.2d at 674.

101. *Chicago Pro. Sports*, 754 F. Supp. at 1364.

102. 468 U.S. 85 (1984). It should be noted that Judge Easterbrook argued and lost in front of the Supreme Court as chief counsel for the NCAA. This may be indicative of why he wrote the opinion for the Court of Appeals.

games.<sup>103</sup> The plan placed a limit on the number of college football games in general that could be televised nationally per season, and restricted the number of games any one college could televise in any one season.<sup>104</sup>

The plaintiffs/respondents in *Board of Regents* were members of the College Football Association (CFA).<sup>105</sup> Because the powerhouse conferences comprising the CFA believed they should have a greater voice in formulating the television policy,<sup>106</sup> the CFA negotiated an independent plan with NBC, allowing for both increased television appearances and increased revenues for CFA member institutions.<sup>107</sup> The NCAA responded by threatening "disciplinary action against any CFA member that complied with the CFA-NBC contract."<sup>108</sup> In response to the NCAA's public threat, the CFA, through the Universities of Oklahoma and Georgia, brought suit.

Distinguishing traditional illegal per se antitrust cases,<sup>109</sup> the Supreme Court found that, although the NCAA's television plan restrained trade, the case "involve[d] an industry in which horizontal restraints on competition [were] essential if the product [was] to be available at all."<sup>110</sup>

The Court concluded that although the NCAA plan restrained its member institutions' competition in both terms of price and output, the restraints were not illegal per se, and a "fair evaluation of their competitive character require[d] consideration of the NCAA's justifications for the restraints."<sup>111</sup> Thus, the Court ap-

103. *Board of Regents*, 468 U.S. at 91.

104. *Id.* at 94.

105. These were colleges and universities, who in addition to being member teams of the NCAA, were also members of the CFA, and were concerned with promoting the "interests of major football-playing colleges within the NCAA structure." *Id.* at 85. The CFA consists of five major football conferences, including the University of Oklahoma in the Big Eight, traditionally a strong football school and conference. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* The NCAA made it clear that the action taken would not only apply to the offending school's football program, but to other sports programs within the school as well.

109. *See supra* note 83.

110. *Board of Regents*, 468 U.S. at 101. The Court pointed out that there exist cases where joint agreements actually increase output and enhance competition. *Id.* at 103. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). In other words, limited restraints and regulations promulgated by the NCAA could and do enhance competition among its member institutions, and the sports in which they participate. This appears to be endemic in professional sport leagues. *See R. BORK, THE ANTITRUST PARADOX 278-279* (1978) (where Bork concludes that many activities in league sports can only be carried out jointly. Therefore, "horizontal merger limitations" placed upon the leagues are inappropriate).

111. *Board of Regents*, 468 U.S. at 103.

plied the modified Rule of Reason analysis,<sup>112</sup> placing the burden of justifying the anti-competitive television policy on the NCAA; a burden too heavy for the NCAA to prove.<sup>113</sup> It was against this legal background that both Judge Will and Judge Easterbrook operated.<sup>114</sup>

Judge Easterbrook and the Seventh Circuit, after completing its own antitrust analysis (substantially the same as the lower court's reasoning, but using different terminology) affirmed the District Court's antitrust analysis as not clearly erroneous.<sup>115</sup> The only argument that Judge Easterbrook felt deserved closer attention was the NBA's contention that the twenty game rule helped control free-riding. The concept of free-riding is "the diversion of value from a business rival's efforts without payment."<sup>116</sup> Restrictions, such as the proposed five game reduction, if properly justified, could be used by the NBA to protect the league from free-riders who destroy any incentives for the league to promote its product.<sup>117</sup> Control of free-riding is therefore a good argument to exempt oneself from antitrust scrutiny.<sup>118</sup>

The NBA argued that the Bulls and WGN were free-riding off the league's commercial product. Most importantly, the Bulls and WGN were benefitting from NBA advertisements that NBC and TNT were contractually required to run during other broadcasts, without paying for this benefit.<sup>119</sup> The Court responded, however,

112. See *supra* note 86.

113. The NCAA could not demonstrate that its television policy served any legitimate pro-competitive purpose. As it proved to be unreasonable, the plan was condemned. *Id.* at 113.

114. See *supra* text accompanying note 83 and *infra* text accompanying notes 124-125.

115. *Chicago Pro. Sports II*, 961 F.2d at 672-674.

116. *Id.* at 674. A simplified example is as follows: "A" manufactures a product which requires an explanation or demonstration to show its superiority over similar products. "B", a retailer, displays the product in his showroom to exhibit its superiority over the competition. The demonstration costs "B" extra money in labor and space. As "B" may not charge his customers for this added service, the cost is made up in the purchase price. Realistically, however, a customer may leave the store with knowledge of the product's superiority and purchase it at "C's" store for a lesser price due to the fact that "C" does not offer the demonstration. See *Id.* at 674-76 for a more detailed discussion on free-riding. See also Lester G. Telser, *Why Should Manufacturer's Want Fair Trade?*, 3 J.L. & ECON. 86 (1960) [hereinafter Telser, *Fair Trade*].

Thus, "retailers who do not provide the special services get a free ride at the expense of those who have to convince consumers to buy the product." Telser, *Fair Trade* at 91.

117. See Ernest Gellhorn and Teresa Tatham, *Making Sense Out of the Rule of Reason*, 35 CASE W. RES. REV. 155 (1985).

118. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-56 (1977) (holding that free-rider and related economic effects justified the abandonment of the per se rule against vertical territorial restrictions).

119. *Chicago Pro. Sports II*, 961 F.2d at 675.

that as long as payment for this benefit was possible (i.e. nothing precluded the NBA from charging a fee for the benefit) free-riding could not be a defense:

[The NBA] may . . . charge members for values delivered. As the NBA itself emphasizes, there are substantial revenue transfers, propping up the weaker clubs in order to promote vigorous competition on the Court. Without skipping a beat the NBA may change these payments to charge for the Bulls' ride. If the \$40 million of advertising time that NBC will provide during the four years of its current contract also promotes WGN's games, then the league may levy a charge for each game shown on a superstation, or require the club to surrender a portion of its revenues.<sup>120</sup>

Put simply, because the NBA had, and still has, the right to levy a fee on superstation broadcasts, as is done by Major League Baseball,<sup>121</sup> there was no free-riding that justified the restriction.<sup>122</sup> The NBA, however, would take advantage of Easterbrook's advice, and adopt a program in the new national contract, charging the teams (in what has widely been characterized as exorbitant) fees for the right to broadcast NBA games on superstations.<sup>123</sup>

In concluding its substantive analysis, the Seventh Circuit pointed to the futility of the NBA's case. The arguments were no different than the arguments rejected in *Board of Regents*.<sup>124</sup> Until the Supreme Court was willing to modify *Board of Regents*, or the NBA was prepared to present credible evidence that superstations unfairly affect both local and national television ratings, the Seventh Circuit was not prepared to reverse the lower court's findings as clearly erroneous.<sup>125</sup> The NBA could not satisfy its burden

120. *Id.*

121. Baseball has also attempted to limit superstation broadcasts. See *infra* text accompanying notes 160-173.

122. *Chicago Pro. Sports II*, 961 F.2d at 675. Judge Easterbrook did sympathize with the NBA's plight and apparently warned the Bulls and WGN not to ask the District Court to ban all revenue sharing procedures for telecasting:

[W]e do not suppose that the Bulls are going to ask the court to hold that the draft of college players, the cap on their payroll, the distribution of revenues from the NBC and TNT contracts, and other sharing devices all violate the Sherman Act. Sharing is endemic in league sports. The prevalence of what is otherwise a hallmark of a cartel may suggest the shakiness of treating the clubs, which must cooperate to have any product to sell, as "rival producers" in the first place.

*Id.* at 676.

123. See *infra* text accompanying notes 138-151.

124. *Chicago Pro. Sports II*, 961 F.2d at 676-77.

125. *Id.*

under the modified version of the Rule of Reason. The Supreme Court of the United States denied certiorari.<sup>126</sup>

## VI. ANALYSIS OF THE COURTS' DECISIONS

The fan's desire for maximized television output of NBA games endured the battle in the court system. However, both courts made it clear that if the NBA had presented evidence that superstations harm the local markets, the five game reduction might have survived antitrust scrutiny. The courts even exhibited some apprehension towards superstations. At one point in his decision, Judge Will stated that he sympathized with the NBA's concern that "superstations buy on the cheap the same product that the national networks pay millions for. . . ."<sup>127</sup> In concluding the opinion, the District Court invited Congress to modernize the copyright laws and the Sports Broadcasting Act to deal more equitably with the problem.<sup>128</sup>

The Seventh Circuit stated that it would not have been adverse to issuing a preliminary, rather a final, injunctive order as the District Court had done.<sup>129</sup> According to Judge Easterbrook, it might have been more reasonable to tolerate a harmful practice for a while, than to condemn what may turn out to be a beneficial practice, given more time.<sup>130</sup>

However, because the NBA presented no evidence of harm to the local markets at trial, it was virtually impossible to show that the benefits of the twenty game rule in the local market outweighed the burdens to the consumers and national market in general; hence the Courts condemned the rule under an antitrust analysis. But imagine the effect of this decision on smaller markets in the NBA with weaker teams. The judgment says that, although the small market owns the exclusive rights to broadcast its home team's games, the current statutory scheme condones the invasion of superstations into the local market to either broadcast a different game, or even the same game.<sup>131</sup>

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126. 113 S.Ct. 409 (1992).

127. *Chicago Pro. Sports*, 754 F. Supp. at 1359.

128. The court found little distinction between what the SBA called sponsored television and pay television as advertising on both types of broadcasts had become increasingly commercial and competitive. *Id.* at 1364. Further, § 111 of the Copyright Act of 1976 was born in an era before the creation of superstations. *Id.* See *supra* note 79.

129. See *Chicago Pro. Sports II*, 961 F.2d at 676.

130. *Id.*

131. *But see* 47 C.F.R. § 76.67 (1992) (noting that no systems may import a live game into the market where the game is being played if that sporting event is not otherwise avail-

## VII. THE LOCAL MARKET EFFECT

The effect of superstations' intrusions can be devastating on local markets. Take, for instance, WBFS-TV, channel 33 in Miami, Florida. WBFS bought the exclusive over-the-air rights to broadcast both Miami Heat basketball games and Florida Marlins baseball games. When the Heat plays the Atlanta Hawks in Atlanta, there is a good chance that channel 33 will be carrying the game. But, in addition to channel 33's broadcast, WTBS in Atlanta may carry the game and be picked up by cable in the Miami area as well. According to WBFS-TV's Program Director and Executive Producer of Sports, Stan Wasilik, this result may be great for the sports fan, but this type of duplication hurts the station's ratings, which in turn affects the price WBFS can charge for advertising.<sup>132</sup> Even on nights where WBFS broadcasts games not in direct competition with games on WTBS or WGN, Wasilik suspects the station's ratings go down, even though he says there is no way to quantify this.<sup>133</sup>

A recent survey by A.C. Nielsen studying the superstation controversy does quantify the effect. On a survey for KPLR TV, which broadcasts St. Louis Cardinals baseball games, the study showed that viewership dropped thirty percent on nights WGN broadcast baseball games and up to twenty percent on nights games were shown on WTBS.<sup>134</sup> ESPN found that their ratings were up to sixty-nine percent higher for baseball games on nights when they did not have to compete with superstations.<sup>135</sup> Furthermore, the Kansas City Royals, who used to broadcast their baseball games in smaller markets such as KRJH-TV in Tulsa, now only show five games per season there, because of the impact that superstations have on the local market.<sup>136</sup> David Alworth, Major League Baseball's Executive Director of Broadcasting, stated that, "[l]ocal television distributors feel the superstations have so di-

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able in the form of a live television broadcast by the local market station).

132. Interview with Stan Wasilik, Program Director and Executive Producer of Sports of WBFS-TV, in Miami, Fla. (Feb. 2, 1993). Wasilik added that the superstations' impact on local ratings cannot be quantified.

133. *Id.*

134. Richard Sandomir, *Just How Super Are These Stations*, N.Y. TIMES, Sept. 1, 1992, at B13. One could argue that the reason ratings have dropped so much in baseball is because the season and games are longer than the basketball season and games. Compared to baseball's 162 game schedule, basketball's quicker pace and 82 game schedule leaves less likelihood for burn-out of the average sports fan.

135. *Id.*

136. See David Alworth, *Superstations Cater to Select Teams' Fans, Ignore Local Favorites*, USA TODAY, June 30, 1992, at 10C.

luted the market that it doesn't make economic sense for them to televise more local games."<sup>137</sup> The evidence clearly shows that superstations hurt both local and national broadcasts, but the court system was powerless to intervene because of the NBA's failure to present any credible evidence.

### VIII. THE NEW NBA CONTRACT

In May of 1993, after exhausting its legal resources in court, the NBA announced an unprecedented new national television contract effective for the 1994-95 season through the 1997-98 season. The contract's stated goal is to improve the league's national television ratings. At the same time, however, the contract aims to end the superstations' reign in sports.<sup>138</sup> The new four year \$750 million dollar contract with NBC has the potential of abolishing superstation coverage of NBA games.<sup>139</sup> However, all the league essentially has done is take the advice of Judge Easterbrook<sup>140</sup> and transferred all the "broadcast and cable rights to all of the league's teams to NBC."<sup>141</sup> The contract further provides that NBC will then revert the right to "negotiate cable rights to all the league's teams back to the NBA," allowing the NBA to control the national cable rights.<sup>142</sup>

The NBA believes that the new contract follows the narrow requirements of the Sports Broadcasting Act (SBA),<sup>143</sup> because, not only are all the broadcast rights to all the games now transferred to NBC, but it is NBC, and not the league, which seeks the ban on superstation broadcasts.<sup>144</sup> Furthermore, according to the NBA, the league is simply following the NFL's model under the SBA, the model the SBA has allowed for over thirty years to escape antitrust examination.<sup>145</sup> Because NBC holds the rights to all

137. *Id.*

138. See Gene Kimmelman, *TV Sports: Fans Lose, Cartel Wins*, USA TODAY, May 13, 1993, at 15A. Baseball also announced a new national television contract in May with similar goals. Although baseball's contract does not directly refer to the demise of the superstations, the contract has the effect of "blacking out local broadcasts, including WTBS, WGN and WWOR, as part of [the] national television deal," thereby effectively "eliminat[ing] competition for its national telecasts . . . driv[ing] up advertising rates." *Id.*

139. See Thomas Tyrer, *NBA, NBC Deal Limits Cable Games*, ELECTRONIC MEDIA, May 10, 1993, at 3 [hereinafter Tyrer, *Cable Games*].

140. See *supra* text accompanying note 79-80.

141. Tyrer, *Cable Games*, *supra* note 139 at 3.

142. *Id.*

143. See *supra* section "Sports Broadcasting Act" accompanying notes 60-80.

144. See Doug Mittler, *Superstations Lose in NBA's TV Deal*, WASH. TIMES, May 8, 1993, at D6 [hereinafter Mittler, *Superstations Lose*].

145. See Steve Nadetz, *Cable Rights Spur Renewal of NBA-WGN Battle*, CHI. TRIB.,

of the NBA games, the network essentially has the ability to veto any broadcast, including superstation broadcasts.<sup>146</sup>

Only after the NBA negotiates the national cable deal with TNT may the remaining games be purchased by the superstations.<sup>147</sup> Moreover, whereas before the superstations paid little for the rights to show basketball games, superstation games will now reportedly cost the Bulls and Hawks \$250,000 for each game the teams authorize the stations to show.<sup>148</sup> The teams, however, will still enjoy the rights to negotiate their own local broadcast and cable deals with one major limitation: all contracts will be subject to the approval of the NBA and NBC.<sup>149</sup>

Judge Will said he would rule on the legality of the new contract in October of 1993, after a trial was held on the issue of WGN's right to broadcast up to as many as forty-one Bulls games nationally.<sup>150</sup> Even if Judge Will finds the new contract illegal, the superstations still have to worry about the broadcasting fee that the NBA has said it will institute, regardless of the outcome of the pending litigation.<sup>151</sup>

Interpreting the language of the SBA as the Seventh Circuit did,<sup>152</sup> it appears as if the NBA has followed the formalities of the Act. According to Judge Easterbrook, the SBA only applies when the "league has 'transferred' a right to 'sponsored telecasting'" to the networks.<sup>153</sup> Disregarding the debate on what constitutes

May 10, 1993, at C13 [hereinafter Nadetz, *NBA-WGN Battle*].

146. *Id.*

147. See Tyrer, *Cable Games*, *supra* note 139 at 3.

148. See Nadetz, *NBA-WGN Battle*, *supra* note 145 at C13. Attorneys for WGN believe that the fee is so high that it will prevent WGN from broadcasting basketball games nationally. *Id.*

According to WGN attorney Chuck Sennet:

They're [NBA] trying to fit this square peg into the round hole of the [S]ports [B]roadcasting [A]ct. The NBA isn't taking these games for the purpose of broadcasting them [on NBC]. There are 1,107 games per season. NBC's going to televise 26 of those. They're just sort of filtering the broadcast rights up through the NBA and up through the network. And then they go back down to the league, which then gives them back to the teams - minus the superstations. It's a Rube Goldberg device to screen out the superstations.

*Id.*

149. *Id.*

150. See Nadetz, *CBS' Surprise*, *supra* note 145 at C13. The case has now run over into 1994. As of publication of this article in the spring of 1994, no decision had been rendered on the legality of the new contract.

151. See Terry Blount, *NBA Wins Latest Battle in the Superstation War*, *Hous. Chron.*, May 9, 1993, at Sports 2, 24.

152. See *supra* text accompanying note 79.

153. *Chicago Pro. Sports II*, 961 F.2d at 671.



“sponsored telecasting,”<sup>154</sup> the NBA has accomplished in 1993 exactly what the Seventh Circuit ruled that the NBA failed to do in 1991 when it passed the twenty game rule.<sup>155</sup>

Whether or not the contract is ultimately held to be legal, the NBA has learned from its mistakes in court. With the new contract, the NBA’s posture is that if it can not achieve to a lesser degree what the now defunct twenty game rule attempted to achieve, then the league can go to the extreme and simply cut out superstation broadcasts completely. And if the NBA’s twenty game rule can not be justified under the theory of free-riding, then the league will heed the advice of Judge Easterbrook and follow Major League Baseball’s path by charging the superstations for the right to broadcast an NBA game.<sup>156</sup>

The new contract alleviates the problem that local sports markets have experienced in the past in regard to superstations. No longer will these markets have to compete directly with WGN or WTBS. However, what a small populace and some local stations will gain is at the expense of the rest of the nation who will lose nightly national coverage of basketball games.

The underlying tension between the local markets’ bid for exclusivity and the sports fan’s desire for as much sports coverage as possible remains; only now, it appears as if the local market will prosper at the expense of the sports fan. Basketball fans, used to nightly NBA exposure, will fear this result. If the new contract is as foolproof as the NBA believes, then the court system will be powerless to intervene. To go from one extreme of an unprotected local market to the other extreme of a nationwide drastic reduction in output is unacceptable.

## IX. ADDRESSING THE SUPERSTATION CONTROVERSY

Assuming that Judge Will finds that the new NBA contract follows the requirements of the SBA, sport fans will be denied the nightly NBA entertainment they have become accustomed to watching. On the other hand, the NBA will have succeeded in protecting and controlling its national television market with both

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154. See *supra* note 79.

155. According to the Seventh Circuit, “As the ‘league of clubs’ has not transferred to the networks either the right to show, or the right to black out, any additional games, the Sports Broadcasting Act does not protect its 20-game rule.” *Chicago Pro. Sports II*, 961 F.2d at 671. With the new contract, there not only has been a transfer by a league a network, but NBC now has the right to black out superstation broadcasts. See *Mittler, Superstations Lose*, *supra* note 144 at D6.

156. See *supra* text accompanying note 121.

NBC and TNT. But if the NBA was concerned with protecting its teams' local markets, there were, and still are, less drastic means in achieving this end, allowing both the local markets broadcast exclusivity and the sport's fan maximum output.

#### A. *The Sports Broadcasting Act*

Modernizing the SBA, to allow the NBA to legally place output restrictions upon superstation telecasts of NBA games does not cure the problem.<sup>157</sup> True, there would be less saturation from superstation broadcasts, but this does not necessarily mean that local markets will directly benefit. Limiting superstation broadcasts offers the NBA a better opportunity to increase the number of games shown nationally.<sup>158</sup> Local markets may benefit some, but more national games mean less games shown locally, as local markets are prohibited from broadcasting their own games during national NBA telecasts on NBC.<sup>159</sup> This, compounded with local markets still having to compete with superstations on the nights superstations retain the right to broadcast NBA games, makes any change in the SBA less significant. There is a viable alternative to this problem, but only with Congress' intervention will a middle ground be reached.

#### B. *Congressional Action and the Fay Vincent Hearings*<sup>160</sup>

In 1992, while Congress was in the process of considering a new cable bill (which subsequently was passed) and new copyright legislation (which did not pass), Major League Baseball (MLB), through its former Commissioner, Fay Vincent, testified before a Senate Commerce Subcommittee in support of changes to the copyright law in the form of an amendment to limit the effect of the compulsory license.<sup>161</sup> Baseball's original position was to limit

157. This could be achieved, for example, by providing for limited transfers to the networks to blackout a certain number of games on superstations, or by allowing NBC an option to show up to a certain number of games per season in addition to the games already contracted for, thereby blacking-out those available dates from superstation broadcasts.

158. The main reason for the new contract and restricting the number of superstation broadcasts in the first place was to increase the NBA's national ratings and revenues. This, in turn, would mean more money for teams.

159. See *supra* text accompanying note 53. The other side to this argument is that there are over 1,000 NBA games per season. NBC is going to show so few of these games that local telecasters should not be affected. Even if some markets will be affected, since NBA schedules are made in advance, the league, networks and local stations should be able to work around each other. Telephone Interview with Phil Hochberg (July 23, 1993).

160. Major League Baseball's former Commissioner.

161. See *supra* text accompanying notes 23-29. According to Executive Director of

“distant signal importation of major league games generally.”<sup>162</sup> When it appeared that Baseball’s plan was unpopular with not only Congress, but fans as well, MLB fell back on its second position—disallowing the importation of a superstition game into a local market, if that local market had the exclusive right to broadcast the same game.<sup>163</sup>

The former<sup>164</sup> Baseball Commissioner told the Senate subcommittee that superstitions dilute both the local and national television markets by severely limiting the “broad range of baseball programming that could be offered to consumers nationwide.”<sup>165</sup> The amendment that Major League Baseball proposed read:

Provided, however, that no cable operator shall retransmit the signal of a superstition while that superstition is broadcasting a game of a professional sports league if a live telecast of that game is otherwise available for reception by the subscribers to such cable system, except this provision shall not apply when such a game is only available on a pay-per-view basis.<sup>166</sup>

The amendment would not have blacked out any games, but simply would have ended superstition duplication of the same game in the local market, thereby ensuring the exclusivity of the local market broadcast.<sup>167</sup>

There were many in the television industry who believed that Vincent was merely attempting to exhibit the attributes of his pay-per-view television plan, despite language in the amendment to the contrary.<sup>168</sup> Pay-per-view critics argued that the amendment really

Broadcasting for Major League Baseball, David Alworth, “The NBA approach in limiting games was an approach we shied away from simply because we thought it might be challenged as an antitrust violation.” Rich Brown, *High Court Rules for WGN in NBA Case*, BROADCASTING, Nov. 9, 1992, at 54.

162. Telephone interview with Phil Hochberg, Washington-based attorney for the NBA and NHL (June 30, 1993)[hereinafter Hochberg]. The original position would limit superstition broadcasts to their own local cable markets. *Id.*

163. *Id.* This situation would occur, for instance, when the Chicago Cubs were playing the Florida Marlins and both Channel 33 in Miami and WGN were showing the game. WGN’s signal would not be seen in the areas where Channel 33 purchased the exclusive rights to broadcast Marlins games. However, the game would otherwise be available nationally.

164. One of the leaders of the group who forced Vincent to resign is the Tribune Company, the owner of the Cubs who also happens to own WGN. See Jack Craig, *Battle Stations For Superstations*, THE BOSTON GLOBE, Sept. 9, 1992, at 82.

165. Dart, *Vincent*, *supra* note 43 at F5.

166. Details of the Proposed Baseball Amendment to Pending Cable T.V. Legislation from the Office of the Commissioner of Major League Baseball, New York, N.Y. (Aug. 6, 1992) (on file with author).

167. *Id.*

168. See e.g. Jerome Holtzman, *Vincent Tries a Little Tenderness, Seeks Middle*

aimed to limit superstation telecasts to only their local markets (e.g., WGN would only be seen in the Chicago area), so that the sports leagues could then sell certain select games to the cable companies or networks on a pay-per-view basis.<sup>169</sup>

Consumer advocates joined the fight against Vincent and baseball. Gene Kimmelman, legislative director of the Consumer Federation of America,<sup>170</sup> and Professor Stephen Ross<sup>171</sup> warned that absent superstations, many fans who live in areas without major league teams would have to resort to pay-per-view to watch their favorite sports teams.<sup>172</sup> For example, superstations allow baseball and basketball fans in Fargo, North Dakota, a town without any major league sporting teams, to enjoy nightly professional sports entertainment. Without the luxury of superstations, these fans would either have to wait for a weekend network game or purchase the right to watch a game on pay-per-view. With this black cloud hanging over MLB's head, the superstation lobbyists and consumer advocates were more influential than Major League Baseball, and when Vincent resigned as Commissioner, "the amendment went south."<sup>173</sup>

Complying with the terms of the proposed amendment would not have been overly burdensome. Local stations owning the exclusive contracts with sports teams only had to inform the local cable companies to blackout the superstation broadcast of the same sporting event in the affected area;<sup>174</sup> something the stations and cable companies do everyday in order to comply with Syndex.<sup>175</sup> This way, local broadcasters could ensure the exclusivity of their baseball and basketball contracts, while the rest of the nation, especially smaller areas without professional sports teams, would enjoy nightly sports entertainment.

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*Ground To Defuse Superstation Dilemma*, CHI. TRIB., June 21, 1992, at C5. According to Phil Hochberg, this criticism was really in response to MLB's original position of simply ending superstation broadcasts altogether. See Hochberg, *supra* note 162.

169. See Dart, *Vincent*, *supra* note 43 at F5. The NCAA has already begun experimenting with pay-per-view.

170. The Consumer Federation of America is a non-profit corporation which seeks to represent the viewpoints and interests of consumers before Congress, regulatory agencies and the courts.

171. See *supra* note 79.

172. Dart, *supra* note 43, at F5.

173. Telephone Interview with Phil Hochberg, Washington based attorney for the NBA and NHL (Apr. 7, 1993). One could speculate that if MLB had started with its fall-back position, criticism might have been less and the amendment could of had a better chance of passing through Committee.

174. See *supra* text accompanying notes 37-41.

175. See *id.*

## X. CONCLUSION

The NBA has been forced to go to extremes with its new contract. Justifiably or not, if the contract is found to fit within the narrow requirements of the SBA, it will be ruled legal. However, from a policy standpoint, the superstition controversy still exists, only now adversely affecting the sports fan to the point that pay-per-critics and consumer groups are up in arms. It may be time for Congress to step in and take some kind of control. Former Baseball Commissioner Fay Vincent's fall-back position, in the form of a proposed amendment to the compulsory license under the Copyright Act, is by far the most equitable solution to the superstition dilemma. With this middle ground, no one is deprived of anything. Local markets can exclusively broadcast in their areas the games for which they paid for the rights to show. Cable subscribers around the country would not be deprived of any televised superstition games, unless these games conflict with that particular market's broadcast rights. If this occurs, the game is simply shown on a different channel.

Even the NBA, which way back in the District Court claimed it instituted the original five game reduction partly for the protection of the local markets, can feel some satisfaction. Although the league is really concerned with its national ratings and advertising revenues, output of NBA games would remain high and it would be Congress' first major step in regulating the superstitions, which have basically enjoyed *carte blanche* in television industry since shortly after the Copyright Act of 1976 was enacted. If still worried about league revenues, the NBA always has the option of adopting MLB's charging system for every superstition game shown; something the NBA has already threatened to do.

With any notions of pay-per-view aside, it is hard to imagine how anyone, even a consumer advocate, could argue against ending needless duplication in local markets that end up damaging advertising for local broadcasters. Arguments by sport fans that they should be able to have the freedom to select which version of the basketball game to watch (i.e. a selection between the play-by-play announcer they want to hear) is economically unsound.<sup>176</sup> This type of argument leads to less local team games in the local

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176. It is not persuasive that basic cable costs a fee to watch and if one pays for it, one should have a choice. The imbalance between the unfair economics that is occurring here and viewers freedom of choice argument is so immense, it is hard to take it seriously. It is difficult to see how Congress could have taken it so seriously in the Fay Vincent hearings.

market.<sup>177</sup>

Unfortunately, the game we used to watch is no longer a game, but a multi-million dollar enterprise. With the passage of the new basketball contract, and the NBA's desire to boost its national television ratings and advertising rates, local broadcasters are now limited to the games the league and networks allow the locals to telecast. An amendment to § 111 of the Copyright Act, impacting the effect of the compulsory license, would simply restore the fair market value to local telecast rights and eliminate the below market, unnecessary, redundant broadcasts of sporting events in a local cable area. It is a fair business practice and gives back to local sporting broadcasts some of what they lost when the superstations came to town.

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177. See *supra* text accompanying note 137. The worst case scenario, of course, is that the local market will cease to broadcast all home team games, and the viewer will have to settle for watching somebody else's local favorite on the superstations.

\* J.D., 1994, University of Miami School of Law. The author would like to thank Professor Marc Fajer of the University of Miami School of Law and Philip R. Hochberg of Baroff, Koerner, Olender & Hochberg, P.C. in Washington, D.C. for all of their help in writing this Article.