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The Last Legal Monopoly: The NFL and its Television Contracts

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THE LAST LEGAL MONOPOLY: THE NFL AND ITS TELEVISION CONTRACTS

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Hell . . . with the game we've got, my grandmother could have negotiated those TV contracts.¹

I. INTRODUCTION

The National Football League (NFL)² has been attacked for possible antitrust violations on many occasions. Player drafts,³ the reserve clause,⁴ and arbitration agreements⁵ have all been subject to antitrust challenges.⁶ Many other cases have addressed antitrust violations concerning all professional sports.⁷ The area of professional sports that has come under recent scrutiny is the relation-

1. Carroll Rosenbloom, quoted in D. HARRIS, *THE LEAGUE: THE RISE AND DECLINE OF THE NFL* 47 (1986). Carroll Rosenbloom was the owner of the Los Angeles Rams.

2. The National Football League is an unincorporated, non-profit association. NFL CONST. art. II, § 2.2.

3. *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

4. *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

5. *Radovich v. National Football League*, 352 U.S. 445 (1957).

6. Other examples have also appeared concerning specific alleged violations. See *United States v. International Boxing Club of New York*, 348 U.S. 236 n.2 (most suitable playing facilities); *Hecht v. Pro Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1971) (doctrine of essential facilities); and *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1959) (mergers of competitors).

7. See *Flood v. Kuhn*, 407 U.S. 258 (1972) (baseball exempt from antitrust law); *United States v. International Boxing Club of New York*, 348 U.S. 236 (1955); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F. Supp. 462 (E.D. Pa. 1972); and *Deesen v. Professional Golfers Ass'n*, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966).

ship between professional sports and television.

The revenues yielded from television broadcasts have had a major impact on professional sports.⁸ No other single factor has had more impact in the profitability and marketability of professional sports. Football has developed a significant relationship with the major television networks and therefore has had the biggest impact on the attractiveness and earnings derived from broadcast of professional sports events.⁹

The NFL established extensive television coverage through lucrative contracts with the networks over the years. Their right to do so was questioned in several suits.¹⁰ In response, the NFL successfully lobbied Congress for the Sports Broadcasting Act.¹¹ This gave the NFL a limited exemption from antitrust law.¹² The NFL has relied on this exemption to establish its present level of television coverage.

The limited exemption created by the Sports Broadcasting Act has evolved to become the NFL's ultimate shield from competition.¹³ Because the NFL is one association comprised of twenty-eight member teams,¹⁴ application of the Sherman Act¹⁵ to the

8. Together, ABC, CBS, and NBC contributed more than \$700 million to the professional leagues of football, baseball, and basketball in 1986. This was roughly ten times the amount they paid for rights a decade earlier. *See Brown, New TV Deals Might Alter Outlook*, USA Today, Dec. 31, 1986, at C1, col. 3. During Super Bowl XX, January 1986, thirty seconds of advertising time sold for \$550,000. By way of comparison, thirty seconds of advertising time during "prime time" averages approximately \$118,000. Super Bowl XXI, January 1987, established a record \$600,000 for thirty seconds. *See Wash. Post*, Nov. 28, 1985, at D2, col. 1. *See also Advertising Age*, Sept. 29, 1986, at 70. Randy Vataha, a former NFL player and a USFL owner, asked "Where is the NFL going in the near future? TV is literally the heart of the NFL—much more so than any other sport. And there are a lot of ways to add up the value of the NFL to TV." *Brown, supra*.

9. For example, in 1978, total payments to the NFL from television broadcasts were \$152.5 million. In 1979, they were \$160.5 million, and in 1980, the total amount was \$166.5 million. All of these revenues were shared equally among the member teams in the league. From 1966 to 1980 the percentage of total annual revenue per team for the NFL, derived through radio and television, rose from 34.4% to 45.1%. *See Quinn & Warren, Professional Team Sports' New Legal Arena: Television and the Player's Right of Publicity*, 16 *IND. L. REV.* 487 (Spring 1983).

10. *See, e.g., United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953), *petition for construction of final judgment*, 196 F. Supp. 445 (E.D. Pa. 1961).

11. Sports Broadcasting Act, Pub. L. No. 87-331, 75 Stat. 732 (codified as amended at 15 U.S.C. §§ 1291-1295 (1976)). *See also infra* notes 51-60 and accompanying text.

12. *Id.* Other professional sports, such as hockey, baseball, and basketball, have also been granted this limited exemption.

13. The contracts act as a "shield" because network coverage of a professional football league is necessary for its survival. The NFL has contracted with all three networks. This author suggests that, despite the recent decisions, the NFL's use of the three networks is an unreasonable restraint of trade in today's economic market.

14. The twenty-eight member teams are: Atlanta Falcons, Chicago Bears, Dallas Cow-

league has brought about mixed reviews from scholars and practitioners.

The NFL's television contracts provide a large share of each individual team's revenue which enables them to be profitable. For example, the NFL's 1977 television contracts were worth more than \$650 million.¹⁶ By contrast, in 1981 the National Basketball Association entered into a reported \$88 million television contract.¹⁷ The NFL's current billion dollar contracts with the major television networks provide huge subsidies to each team. These revenues cannot be obtained elsewhere.¹⁸

In 1986, the United States Football League (USFL)¹⁹ brought suit against the NFL.²⁰ The USFL asked for \$1.69 billion in damages and an injunction prohibiting the NFL from dealing with all three major networks.²¹ The USFL alleged, in part, that the NFL inhibited and effectively eliminated the USFL's ability to obtain national network television exposure and revenue.²²

After the trial, the jury concluded that the NFL was in fact a

boys, Detroit Lions, Green Bay Packers, Los Angeles Rams, Minnesota Vikings, New Orleans Saints, New York Giants, Philadelphia Eagles, St. Louis Cardinals, San Francisco 49ers, Seattle Seahawks, Washington Redskins, Buffalo Bills, Cincinnati Bengals, Cleveland Browns, Denver Broncos, Houston Oilers, Indianapolis Colts, Kansas City Chiefs, Los Angeles Raiders, Miami Dolphins, New England Patriots, New York Jets, Pittsburgh Steelers, San Diego Chargers, and Tampa Bay Buccaneers. *See generally* NFL CONST. art. IV, § 4.4.

15. The Sherman Act § 1, 15 U.S.C. § 1 (1976), provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ." Sherman Act § 2, 15 U.S.C. § 2 (1976), provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony. . . ."

16. *See* Quinn & Warren, *supra* note 9, at 487 n.2.

17. *Id.* This shows the NFL can command higher prices for its product.

18. The NFL is currently in its last year of a five year, \$2.1 billion contract. Television commercial sponsors pay the networks, the networks pay the sponsors, and the teams pay the players. *See* First Amended Complaint, at 25, United States Football League v. National Football League, No. 84 Civ. 7484 (S.D.N.Y.) [hereinafter USFL v. NFL].

19. The United States Football League (USFL) is a non-profit unincorporated association. *Id.*

20. The USFL originally filed suit against the NFL on October 17, 1984. On May 30, 1986, the USFL filed its First Amended Complaint. *See* USFL v. NFL, No. 84 Civ. 7484 (PKL), 605 F. Supp. 1448, 1985-1 Trade Cas. (CCH) ¶ 66,547; 634 F. Supp. 1155, 1986-1 Trade Cas. (CCH) ¶ 67,074, 1986-1 Trade Cas. (CCH) ¶ 67,075, 1986-1 Trade Cas. (CCH) ¶ 67,076, 1986-1 Trade Cas. (CCH) ¶ 67,084, 1986-1 Trade Cas. (CCH) ¶ 67,099, 1986-1 Trade Cas. (CCH) ¶ 67,100, 1986-1 Trade Cas. (CCH) ¶ 67,101, 1986-1 Trade Cas. (CCH) ¶ 67,123, 1986-1 Trade Cas. (CCH) ¶ 67,153, 1986-2 Trade Cas. (CCH) ¶ 67,195, 1986-2 Trade Cas. (CCH) ¶ 67,195 (S.D.N.Y. 1986).

21. *See* Janofsky, *Final Stages Near in USFL Trial*, N.Y. Times, July 21, 1986, at D11, col. 5.

22. *See* USFL v. NFL, *supra* note 18, at 26.

monopoly and did violate antitrust law.²³ However, the three contracts between the NFL and the networks were found not to violate the law.²⁴

The USFL case is a good example of the need to clarify the NFL's power to contract for television coverage. At the very least, the case has shown that notice must be taken of the NFL's current state of television coverage and more specifically, its relationship with the networks. The massive amounts of revenues and the sheer number of broadcasts preclude rival leagues from any chance of successfully negotiating lucrative coverage. Even though the NFL violates the law, the most significant and profitable aspect of its operation as a league is held to be legal. Clarification is necessary.

This article evaluates the NFL's relationship with the television networks as it relates to antitrust law. In order to fully evaluate this relationship, several factors must be examined. First, the historical development of the NFL's television coverage is examined. Then, legislative enactments and case law are evaluated. In this manner, the NFL's use of television to foreclose competition from rival leagues is analyzed. At some point, Congress will have to make a determination of just how far a professional sports league will be permitted to act under the antitrust law.

Congress should consider whether the Sports Broadcasting Act was intended to limit a league to one network and thereby subject a league with three network contracts to liability. The courts have ruled that leagues are not limited in the number of networks they may contract with. A league can effectively eliminate competition by contracting with three networks. The time has come to realize that the NFL is enjoying a full exemption from antitrust laws in terms of its ability to contract for television coverage. This must be acknowledged and acted upon.

II. HISTORICAL BACKGROUND

From the early 1950's through the 1960's, television popularity grew at an astounding pace. In 1961, for example, approximately 88 percent of the homes in the United States had television sets. This is contrasted with the approximately 33 percent in 1951.²⁵

23. 634 F. Supp. 155, 1986-1 Trade Cas. (CCH) at ¶ 67,077.

24. *Id.* In moving for a new trial, the USFL also asserted that this finding was an impermissible inconsistency. Judge Leisure ruled, however, that the jury's verdict was not inconsistent. *Id.*

25. As of 1961, 47 million of the 53 million U.S. homes had T.V. sets, as contrasted to the 15 million T.V. homes (out of a potential 45 million) of a decade earlier. See Horowitz,

The teams in the NFL wanted to take full advantage of this new medium of exposure. During the initial development of the NFL, individual teams contracted with television networks to cover their games. For example, in 1951, the Chicago Bears contracted with the DuMont network,²⁶ and then, in 1952, they switched to the American Broadcasting Company (ABC).²⁷

The NFL's television contracts have raised the spectre of anti-trust violations in the past. In 1953, the Justice Department filed suit against the NFL in *United States v. NFL*.²⁸ The government contended that portions of the NFL's constitution and bylaws were illegal under the Sherman Act.²⁹ Specifically, the Justice Department alleged that the NFL's broadcasting policies were unreasonable and illegal restraints of trade.³⁰ The NFL argued that inherent in the maintenance of the league is the ability to protect the weaker teams, a key to league success.³¹ The decision ultimately enjoined the NFL and its member clubs³² from affecting or re-

The Implications of Home Box Office for Sports Broadcasts, 23 ANTITRUST BULL. 743, 746 (Winter 1978).

26. The Chicago Bears Football Club, Inc. is an Illinois corporation. *Antitrust Policy and Professional Sports, 1981: Hearings on H.R. 523 and 3287 Before the Subcomm. on Monopoly and Commerce of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 176, 180 (December 10, 1981) (testimony and statement of George S. Halas).

27. *Id.* In 1960, Pittsburgh and Baltimore also reached an agreement with NBC for nationwide telecasts of their regular season games. *Id.*

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

29. *Id.* See also Sherman Act, 15 U.S.C. §§ 1-7.

30. 116 F. Supp. at 321. Specifically at issue was Article X of the league's bylaws. Article X, § 10.8 has been amended to include the court's ruling.

The Commissioner will not approve any contracts that do not contain a provision stating that the contract is subject to Article X as now or hereafter in effect. . . . Television Income. 10.3 All regular season (and pre-season network) television income will be divided equally among all member clubs in the League regardless of the source of such income, except that the member clubs may, by unanimous agreement, provide otherwise in a specific television contract or contracts. . . . Championship Games. 10.5 The sale of radio and television and film rights for the World and Conference Championship Games shall be under the sole jurisdiction of the Commissioner and be subject to the provisions of Article X. . . . Judgment 10.8 All provisions of Article X are intended to conform to and be subject to the Final Judgment of the United States District Court for the Eastern District of Pennsylvania entered December 28, 1953, and as thereafter modified, against the National Football League and certain of its member clubs; in the event of any conflict between the Constitution and By-laws and said judgment, the provisions of said Final Judgment, as modified, shall prevail.

NFL CONST. art. X.

31. *United States v. NFL*, 116 F. Supp. at 326.

32. In 1953, the NFL consisted of Cleveland, Philadelphia, Washington, Pittsburgh, New York Giants, Chicago Cardinals, Detroit, San Francisco, Los Angeles Rams, Chicago Bears, Baltimore, and Green Bay. See B. RIPPENBURGH, *THE OFFICIAL NFL ENCYCLOPEDIA* 39 (4th ed. 1986).

stricting the area within which they could telecast games.³³

The court noted that "[t]he market for the public exhibition of football no longer is limited to the spectators who attend the games. Since the advent of television and radio, the visual and aural projections of football games can be marketed anywhere in the world where there are television or radio facilities."³⁴ The court stated that "professional football is a unique type of business."³⁵ The court finally found that all professional sports which are organized on a league basis have "problems which no other business has."³⁶ Fierce intra-league competition off the field could lead to its downfall. The court recognized this by stating:

It is particularly true in the National Football League that the teams should not compete too strongly with each other in a business way. . . . Under these circumstances it is both wise and essential that rules be passed to help the weaker clubs in their competition with the stronger ones and to keep the league in fairly even balance.³⁷

Thus, as early as 1953 it was recognized that the NFL is a league comprised of individual entities³⁸ and that special attention was necessary to establish parity among its teams in order to assure success.³⁹

The NFL realized that competition for the sale of broadcast rights reduced its potential revenues and that by having teams combine their ability to sell the broadcasting rights to games as a league, it would be able to negotiate for larger contract prices. In 1961, each member team in the NFL pooled its television rights with those of the other clubs, and the resulting package was sold to the Columbia Broadcasting System, Inc. (CBS).⁴⁰ The agreement

33. See *United States v. NFL*, 196 F. Supp. 445, 447 (E.D. Pa. 1961); *Sports Broadcasts-Cable Television Report and Order*, F.C.C. 75-819, 54 F.C.C.2d 265 (1975).

34. *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953). The court also recognized that football and television shared a unique relationship. "Football provides a magnificent spectacle for television programs and television provides an excellent outlet and market for football. They both can use and indeed need each other." *Id.* at 325.

35. *Id.* at 325.

36. *Id.* at 323.

37. *Id.* at 323.

38. "Individual entities" in this context means business organizations in general—corporations, partnerships, limited partnerships. The NFL today consists of 21 corporations and 7 limited partnerships. Normally, business organizations strive to be better than all the competition. A league, however, needs cooperation from its members in order to be successful. *Id.* at 322.

39. *Id.* at 323.

40. All the teams would be covered under one agreement and individual teams no longer had to negotiate for their own coverage. It is important to note that as a package the

authorized CBS to televise all league games, not just those negotiated for by the individual teams.⁴¹ This would not only benefit the league but the networks as well because they could demand higher rates from the sponsors for advertising that was broadcast during league games.⁴²

Concerning this new agreement, the Justice Department advised the NFL that:

[A]rrangements contemplated by the NFL and its member clubs for the pooling of the television rights of all the clubs and the sale of the resulting package of pooled television rights to a purchaser raised serious questions under the antitrust law and would probably be illegal under those laws for reasons including the elimination of competition among the member clubs in the sale of television rights, the fixing of prices, tie-ins, and the allocation of telecasting territories.⁴³

In order to ensure that the league package agreement did not violate the 1953 decision, the NFL asked the federal district court which heard the case whether the terms of its agreement conformed to the court's earlier ruling.⁴⁴ The court held that its 1953 decision prohibited the execution and performance of the contract.⁴⁵

The court nullified the NFL's agreement on several grounds. First, the nature of the agreement granted CBS the sole and exclusive right to televise league games for a two-year period.⁴⁶ Second, the court believed that the agreement eliminated competition among the teams.⁴⁷

The 1961 ruling in *United States v. NFL*⁴⁸ imposed a severe limitation on the NFL. The attempt to pool its rights and negotiate a lucrative contract was stricken down as illegal. In light of this decision, the NFL concentrated its efforts towards congressional action. Congress responded by enacting the Sports Broadcasting

NFL could demand a higher price from the networks.

41. See, e.g., *United States v. NFL*, 196 F. Supp. 445, 446 (E.D. Pa. 1961).

42. See Horowitz, *supra* note 25, at 747.

43. Memorandum in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion in Limine, at 14, *USFL v. NFL* (S.D.N.Y. 1986).

44. See *supra* note 32 and accompanying text.

45. *United States v. NFL*, 196 F. Supp. at 445. The court also noted that the contract granted CBS two years of exclusive rights to televise all league games. This agreement was worth \$4,650,000 annually to the NFL. *Id.* at 446.

46. *Id.*

47. *Id.* at 447.

48. 196 F. Supp. 445 (E.D. Pa. 1961).

Act.⁴⁹ The Act granted a limited antitrust exemption to professional sports leagues.⁵⁰ Individual teams within a league could now pool and sell their rights to televise their games⁵¹ and rights to league games as a whole could now be offered to the networks. Congress effectively reversed Judge Grim's 1961 judgment.⁵² The NFL's reliance on the Sports Broadcasting Act has allowed it to create and develop its present state of television coverage.⁵³

The legislative history behind the Sports Broadcasting Act has been a factor in the NFL's ability to contract with the three networks. The stated purpose of the Act was to enable individual teams within professional sports leagues to pool their separate rights in sponsored telecasting of games and to permit the leagues to sell the package to a purchaser.⁵⁴ The Senate Committee felt that public interest in league sports warranted recognition of antitrust principles⁵⁵ and allowed individual teams to pool their rights to sell television coverage. The Commissioner indicated this would result in the minimal sacrifice of antitrust law.⁵⁶

The legislative history of the Act indicates that the antitrust exemption is not absolute. Members of the various committees were concerned with the possibility of one league entering into contracts with all three networks. This would put competitors at a disadvantage.⁵⁷ When a subcommittee suggested expressly to

49. 15 U.S.C. §§ 1291-95 (1976). See also S. REP. NO. 1087, 87th Cong., 1st Sess., reprinted in U.S. 1961 CODE CONG. & AD. NEWS 3042.

50. In pertinent part the Act reads:

The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

Sports Broadcasting Act, Pub. L. No. 87-331, 75 Stat. 732 (codified as amended at 15 U.S.C. §§ 1291-95 (1982)).

51. *Id.*

52. See note 33 and accompanying text.

53. See note 18 and accompanying text. Unchecked by the courts or by Congress, the NFL has been able to take full advantage of the antitrust exemption provided by the Sports Broadcasting Act.

54. S. REP. NO. 1087, 87th Cong., 1st Sess., reprinted in U.S. 1961 CODE CONG. & AD. NEWS 3042. See generally *USFL v. NFL*, 634 F. Supp. 1155 (S.D.N.Y. 1986).

55. S. REP. NO. 1087, 87th Cong., 1st Sess., reprinted in U.S. 1961 CODE CONG. & AD. NEWS at 3044.

56. *Id.*

57. See generally *Telecasting of Professional Sports Contests: Hearings on H.R. 8757 before the Antitrust Subcomm. (Sub-comm. No. 5) of the House Committee on the Judiciary*, 87th Cong., 1st Sess. 35 (1961).

amend the bill to prohibit a league from entering into a contract with more than one network, the NFL stated it had no intention of using more than one network.⁵⁸

While lobbying for the Act, Hamilton Carothers, counsel for the NFL, stated that "the objective of this legislation is to give us the right to go on a single network."⁵⁹ The Act was often informally referred to as the "single network plan."⁶⁰

The House Report on the bill states:

Some concern has been expressed that the language of this section might be considered to give an absolute exemption for the antitrust laws for any kind of television arrangements entered into by a league, and particularly an arrangement which might involve several networks and might thus exclude a competing league from all television coverage. This is not the intent of H.R. 9096 which is designed to permit the sale of television rights by a league and its member clubs to a single network. The Committee does not intend that an exemption from the antitrust laws should be made available to a league or its members where the intent or effect of a joint agreement is to exclude a competing league or its members from the sale of any of their television rights.⁶¹

This history shows that Congress recognized the possibility of misapplication of the Act and also that committee members were reluctant to allow one league to tie up all three networks.⁶² It is significant that when Congress enacted the Sports Broadcasting Act it expressly stated that the usual antitrust laws would apply.⁶³

The NFL currently enjoys television coverage of its games on all three major networks.⁶⁴ This development effectively precludes other professional football leagues from sharing in the benefits of

58. *Id.* (Statement of Hamilton Carothers).

59. *Id.* at 302 (Deposition of Alvin R. Rozelle).

60. *See supra* note 55.

61. *See* H.R. REP. No. 1178, 87th Cong., 1st Sess. 4 (1961).

62. *See* USFL v. NFL, 634 F. Supp. 1155, 1164 (S.D.N.Y. 1986).

63. 15 U.S.C. § 1294, in pertinent part, reads:

Nothing contained in this Act [15 U.S.C. §§ 1291 et seq.] shall be deemed to change, determine or otherwise affect the applicability or nonapplicability of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey except the agreements to which section 1 of this Act [15 U.S.C. § 1291] shall apply.

15 U.S.C. § 1294 (1982).

64. *See supra* notes 18 and 53 and accompanying text.

major network television coverage.⁶⁵ All three networks televise NFL games. As a practical matter, this leaves no network available for a new rival league. The development of television coverage of professional football has far outgrown that which was originally conceptualized by the courts, Congress, and the NFL.

III. ESTABLISHING TELEVISION COVERAGE

History has made it apparent that the development of a professional football league is necessarily linked to television. Individual teams in the NFL originally contracted for coverage of their own games.⁶⁶ After the enactment of the Sports Broadcasting Act and after the agreement with CBS became exempt from antitrust liability, however, the teams were able to pool their rights to the broadcasting of games.⁶⁷ The National Broadcasting Company (NBC) then acquired the rights to televise the NFL Championship games⁶⁸ and further extended the relationship between television and the NFL.

In 1960, the American Football League (AFL)⁶⁹ entered the picture. The AFL initially reached a pooled rights agreement with ABC.⁷⁰ The first league-wide television contract for the NFL was negotiated by Pete Rozelle in 1962.⁷¹ In 1964, the AFL switched to the NBC network and agreed to a five-year pact.⁷² The NFL merged with the AFL in 1966.⁷³ With the merger, the NFL obtained the use of a second network through which it could televise

65. Sharing should be mandated for Sundays in the fall, which are the most valuable time slots.

66. See *supra* note 26 and accompanying text.

67. See *supra* note 50 and accompanying text.

68. In 1951 the championship game was televised for the first time on the DuMont Network. The network paid \$75,000 for the rights. In 1955, NBC replaced DuMont as the network carrying the title game. NBC paid \$100,000 for the rights. See B. RIPPENBURGH, *supra* note 32, at 41.

69. The AFL was formed in 1959-1960. The league commenced play during the 1960 season.

70. In July 1960, the AFL signed a five-year pooled rights agreement with ABC to televise its games. See *supra* note 67.

71. D. HARRIS, *supra* note 1, at 5. It was worth \$326,000 to each franchise. *Id.*

72. In 1964 the AFL signed a five-year, \$36 million television contract with NBC. The agreement assured each team approximately \$900,000 per year. Interestingly, the NFL, in 1964, signed a new contract with CBS television for a total of \$14.1 million for the next two years. Each club received more than \$1 million and CBS acquired the rights to the 1964 and 1965 N.F.L. championship games for which it paid \$1.8 million each. Riffenburgh, *supra* note 31, at 42-43. See also N.Y. Daily News, July 30, 1985, at 5, col. 2.

73. The merger was given express consent by Congress. See 15 U.S.C. §§ 1291-95 (1982).

its games.⁷⁴ The NFL also negotiated with ABC to televise Monday night football games.⁷⁵ By 1970, the NFL was broadcasting its games on all three major networks.⁷⁶

The success of the AFL can largely be attributed to its ability to negotiate a television contract during viable time periods and with an available major network.⁷⁷ Commissioner Foss of the AFL believed that the success of the AFL was tied to its access to network television.⁷⁸ In addition, the revenues and the notoriety derived from television exposure helped the AFL to be successful and enabled the new league to establish itself. These factors led to the merger with the NFL.⁷⁹ Television and professional football grew and expanded together. As television became a powerful medium to reach the public at large, the NFL took full advantage of its accessibility.⁸⁰ The Sports Broadcasting Act was designed to establish parity between the NFL and other potential leagues.⁸¹ The NFL, however, has become the primary beneficiary of the law.⁸²

For example, the Canadian Football League (CFL), the World Football League (WFL),⁸³ and the USFL⁸⁴ were not and have not been able to establish a lucrative major network contract for their respective seasons and therefore were unsuccessful.⁸⁵ The USFL

74. See *USFL v. NFL*, No. 84-7484, at 13.

75. *Id.* at 15. In 1969 the NFL contracted with ABC for Monday night games.

76. *Id.* at 25. The television contracts negotiated by the NFL, which terminated after the 1973 season, were worth \$1.7 million a year to each team. See also D. HARRIS, *supra* note 1, at 6.

77. See *USFL v. NFL*, No. 84-7484. See also *American Football League v. NFL*, 204 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). See also *supra* notes 68 and 70.

78. *Id.* See also Memorandum in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion in Limine, at 12, *USFL v. NFL*, No. 84-7484.

79. *Id.* Marketability of players such as Joe Namath gave the AFL high visibility. See N.Y. Daily News, July 30, 1986, at C2, col. 2.

80. Originally the member teams of the NFL arranged their own television coverage, but eventually the league itself negotiated a contract with a network on behalf of all the member teams. Today, all three major networks have contracts with the NFL.

81. Hochberg, *Congress Kicks a Field Goal: The Legislative Attack in the 93d Congress on Sports Broadcasting Practices*, 27 FED. COMM. B.J. 70 (1974). See also *supra* notes 51-59.

82. *Id.* at 70.

83. The World Football League was formed in 1973-1974 and it started play in 1974. It is important to note that the WFL contracted with an independent network, T.V.S. Television Network, for one WFL game to be broadcast per week. In 1975, however, T.V.S. did not renew the contract.

84. See *supra* note 19 and accompanying text.

85. The CFL has no network coverage in the United States and only limited access to cable television. The WFL had only one year of independent network coverage. USFL games are played in the spring, whereas football is traditionally played in the fall.

did have limited coverage with ABC and the Entertainment and Sports Programming Network (ESPN) cable network for its spring season.⁸⁶ Howard Cosell, a prominent sports figure, noted that any football league playing in the spring would be labeled "bush league" because spring is not the historical time of year when professional football is played.⁸⁷

Mere access to television, then, is not enough. Practical and viable access is required. The exposure television affords to professional sports leagues and its necessity to continued growth cannot be overlooked. Any new football league must depend on television to be an integral part in the advertising and development of that league's product in order for it to survive. Without effective access to major television networks and the revenues which such access can generate, serious competition to the NFL is unlikely.

Making competition difficult does not, in itself, violate anti-trust law.⁸⁸ However, the NFL's effective lock on the television market calls into question the propriety of its contracts.⁸⁹ Competition for access to the airwaves was practically eliminated once the networks were thoroughly committed to the NFL. The networks are afraid of losing programming or getting stuck with inferior game schedules, thus endangering their lucrative relationship with the league.⁹⁰ Preventing rival leagues' access to television coverage eliminates competition and may well constitute a violation of the antitrust laws.

The protection of competition is the essence of the Sherman Act.⁹¹ This statute was enacted to prevent unreasonable restraint of trade by way of injury to or elimination of competitors.⁹² The

86. ABC entered into a two year (1983-1984) contract with the USFL for \$18.3 million. ABC also has two option years worth \$15.5 million in 1985 and \$19.5 million in 1986. See *Newsday*, July 11, 1986 at C2, col. 2; *USA Today*, Oct. 18, 1984 at C2, col. 2. In addition, the USFL contracted with the ESPN Cable network for \$7 million. *Newsday*, July 30, 1986, at 3, col. 3.

87. Memorandum in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion in Limine, *USFL v. NFL*, No. 84-7484 (S.D.N.Y. 1986), at 36. See also Janofsky, *Trump Describes Talks with Rozelle*, *N.Y. Times*, June 24, 1986, at B7, col. 3. Pete Rozelle reportedly stated that the "USFL was 'doomed to failure' as a spring league and that there was 'no way possible' the league could get a television contract for the fall, when NFL games are telecast on all three networks." *Id.*

88. See *Ben Hur Coal Co. v. Wells*, 242 F.2d 481, 486 (10th Cir.), cert. denied, 354 U.S. 910 (1957).

89. The market for major television coverage is limited, and too much influence and dominance are wielded by the NFL.

90. See *supra* note 85 and accompanying text.

91. The Sherman Act is intended to protect competition. See *supra* note 87.

92. *Redwing Carriers v. McKenzie Tank Lines*, 443 F. Supp. 639, 642-43 (N.D. Fla. 1977).

NFL's use of television has exceeded the limited exemption granted by the Sports Broadcasting Act, and more importantly, it has eliminated competition. Preventing rival leagues' access to television coverage eliminates competition. An examination of the three major networks' dealings with the NFL show how and why rival leagues have been effectively precluded from negotiating for television rights to their games.

IV. THE TELEVISION CONTRACTS

The NFL's original contracts with the three networks covered the 1970-1973 seasons⁹³ and brought the league \$185 million.⁹⁴ This figure rose to \$268 million for the 1974-1977 seasons,⁹⁵ and to \$646 million for the 1978-1981 seasons. Under the terms of the most recent contracts, the NFL was to receive approximately \$2.1 billion over the five-year period between 1982-1986.⁹⁶

A. CBS and NBC

Two essentially identical contracts cover the broadcast rights of most NFL games. Under one of these contracts, CBS received the rights to most National Football Conference (NFC) games. NBC was to carry most American Football Conference (AFC) games under their contract with the league. The contracts specified the number and time of the games each network had the rights to broadcast, the amount of commercial time the networks could sell, and the league's scheduling obligations.⁹⁷ The league received \$100

93. Joint Pretrial Order, at 11, *USFL v. NFL*, No. 84-7484 (S.D.N.Y. 1986).

94. *Id.* at 20.

95. *Id.*

96. *Id.* Three separate contracts were executed between the NFL and CBS, NBC, and ABC. On March 16, 1982, ABC and the NFL signed their contract. On March 17, 1982, CBS signed its contract with the NFL. On March 22, 1982, NBC entered into its contractual agreement with the NFL. *See also* N.Y. Times, July 30, 1986, at D20, col. 1.

97. CBS received the telecast rights to two pre-season night games, one pre-season day game, all regular season intra-conference games, all regular season NFC "away" games against AFC opponents, all post season NFC games, except the NFC championship, and the right of first refusal to any games NBC was unable to broadcast. Plaintiff's Exhibit 162, *USFL v. NFL*, No. 84-7484 (S.D.N.Y. 1986). CBS was limited to 24 minutes of commercials during any telecast in the 1982, 1983, and 1984 seasons. *Id.* at 8, 11. The network was allowed to sell an additional minute of ads per game in 1985. *Id.*

In return, the league was obligated to schedule sixteen weeks of regular season games on Sunday afternoons; one Thanksgiving Day game, two Saturday afternoon games in December; one divisional playoff qualifying game, and semifinal divisional playoff games. The NBC contract included similar terms for AFC games. Plaintiff's Exhibit 166, *USFL v. NFL*, 84-7484 (S.D.N.Y. 1986). NBC and the league entered into a separate contract for the conference championship games. *Id.*

million from CBS for the right to carry NFC games in 1982. In 1983, the network paid \$120 million; in 1984, \$140 million; \$145 million in 1985, and \$160 million in 1986.⁹⁸ CBS generated massive revenues from these contracts.⁹⁹ Although the terms of the NFL-NBC contract were similar, they differed in one significant respect: NBC paid the league \$75 million less than CBS for its contract rights.¹⁰⁰

B. ABC

The American Broadcasting Company television contract with the NFL was different from those of the other networks. ABC contracted with the NFL for a "Monday Night Package" and certain "specials" during the 1982-1986 seasons.¹⁰¹ Specifically, ABC obtained coverage for sixteen regular-season Monday night prime time games each year.¹⁰² In addition, ABC obtained the broadcast rights for five regular-season prime time games each season to be played on a combination of Sunday and Thursday evenings¹⁰³ and for two pre-season night games each year.¹⁰⁴ The quality of the games to be televised by ABC would be those deemed "important" ones, presumably to ensure the network high ratings during prime time.¹⁰⁵

The regular season payment schedule¹⁰⁶ called for a \$110 million payment in 1982, \$120 million in 1983, \$130 million in 1984, \$140 million in 1985, and \$150 million in 1986.¹⁰⁷ In addition, it is important to note that for the 1986 season the league and the network shared the net revenues from the sale of commercial minutes during regular-season games.¹⁰⁸ Any revenue from sales above \$340,000 per average minute was divided so as to give the NFL 40% and ABC 60% of that revenue.¹⁰⁹

98. NBC paid \$90 million in 1982, \$106 million in 1983, \$120 million in 1984, \$130 million in 1985, and \$145 million in 1986. *Id.*

99. See *supra* note 8 and accompanying text.

100. Plaintiff's Exhibit 166, USFL v. NFL, 84-7484 (S.D.N.Y. 1986).

101. See Plaintiff's Exhibit 161, USFL v. NFL, No. 84-7484.

102. *Id.* at 1.

103. *Id.*

104. *Id.* Each pre-season game was worth \$500,000 to the NFL. *Id.*

105. *Id.*

106. *Id.* at 19.

107. *Id.* In addition, ABC paid the NFL \$15 million for the rights to Super Bowl XIX and \$14 million for the five AFC-NFC Pro Bowl games covered under the terms of the contract. For each Hall of Fame game, ABC paid \$500,000 to the Pro Football Hall of Fame. *Id.*

108. *Id.*

109. *Id.*

One of the most significant features of all three contracts was that they had to conform to the Sports Broadcasting Act.¹¹⁰ The Sports Broadcasting Act today plays a major part in the NFL's scheme of negotiating for television coverage. The exemption provided for by the Act was applicable to all three contracts. One reason why the contracts covered different conferences and different days and times¹¹¹ was to avoid the appearance that the League was monopolizing the networks. Given the varying terms in each of the contracts, the appearance was that of a pooled rights agreement with a network which is legal under the Act.¹¹²

The network contracts were non-exclusive and did not preclude the networks from broadcasting other professional football leagues.¹¹³ This does not justify, however, the NFL's effective lock over each network. The networks televise many games and invest large amounts of money into those telecasts. Neal Pilson, President of CBS Sports, stated that the NFL was the biggest supplier CBS deals with.¹¹⁴ The networks obviously have a huge interest in keeping their contracts with the NFL. In addition, there is substantial exposure generated from the coverage by the three networks. Sunday games, Saturday games, Thursday night games, and Monday night games all afford the NFL phenomenal exposure to the public. Rival professional football leagues should have access to this exposure and publicity. More notably, rival professional football leagues should be afforded the opportunity to reap some of the monetary benefits that the networks confer on the NFL.

In March 1987, the NFL negotiated new deals worth \$1.438 billion dollars for the television coverage of its games.¹¹⁵ Under the terms of the new contracts, the NFL will receive \$479 million dollars a year for the next three years.¹¹⁶ Not only will NBC, CBS and ABC continue their broadcast of NFL games, but additional games

110. See *supra* note 11 and accompanying text.

111. The distinct features include: (1) CBS televises the NFC; (2) NBC televises the AFC; and (3) ABC televises prime time games. If each network carried games from both conferences, and both day and night games, then the monopolizing of the networks would be more apparent.

112. See *supra* note 11 and accompanying text.

113. *USFL v. NFL*, No. 84-7484, opinion 2, at 3.

114. Janofsky, *CBS Feared Loss of NFL*, N.Y. Times, June 13, 1986 at A32, col. 5.

115. Heisler, *3-Year, \$1.4 Billion TV Deal Is Approved*, L.A. Times, March 16, 1987, 3, at 2, col. 1.

116. Goodwin, *Networks Save Cash, Gain a Competitor*, N.Y. Times, March 17, 1987, 4, at 30, col. 3. These agreements call for a fixed payment schedule as opposed to the escalating agreements under the 1982 contracts. See also note 105 and accompanying text.

will now be televised on ESPN.¹¹⁷ Under the new contract, ESPN will televise eight Sunday night games as well as five prime time specials.¹¹⁸ Facing the possibility of a drastic reduction in income,¹¹⁹ the NFL accepted a 3.3 percent cut in revenues. Each team will still earn approximately \$17 million per year for the term of the contracts.

The most significant recent development, however, is a Federal Trade Commission inquiry into the NFL's television contracts.¹²⁰ The FTC examined the television contracts in an effort to determine whether the three major networks and the league illegally conspired to keep "Monday Night Football" off of the new Fox Broadcasting Network or any other networks that had not previously broadcast NFL games.¹²¹ During the preliminary investigation, the FTC contacted Fox, ESPN and Home Box Office.¹²² The FTC probe demonstrates an effort on the part of the government to evaluate the lock that has been placed on professional football broadcasting by the major networks and the league. If its investigation determines that the league and networks have acted improperly and are violating the antitrust laws, the government has the power to nullify the new contracts.¹²³ Such a consequence will force the league and the networks to rethink their relationship, and indicates that Congress might want to do the same.

V. ANTITRUST CASE LAW

In order to fully appreciate the significance of the television contracts, antitrust law and how it is typically applied must be examined. This Comment attempts to evaluate some of the antitrust cases concerning the NFL in order to determine where the courts stand and how competitors of the NFL may be able to effectuate competition through the use of television. Courts have held that the NFL has violated the law. Logic and consistency demand that the television contracts enjoyed by the NFL also be held to violate

117. Heisler, *supra* note 115. See also Ross, *Sports Broadcasting, Antitrust, and Public Policy*, 7 SPORTS LAW. 2 (Spring 1988) (discussion of the applicability of the Sports Broadcasting Act and antitrust law to the NFL-ESPN contract).

118. Goodwin, *supra* note 214.

119. The networks argued that the NFL's lower ratings after the 1982 strike and the softer market for advertising reduced the value of the contracts. Heisler, *supra* note 115.

120. N.Y. Times, May 16, 1987, 1, p. 53, col. 5.

121. *Id.*

122. N.Y. Times, May 16, 1987, 1, p. 53, col. 5.

123. Goodwin, *FTC Probes NFL's Network Television Contracts*, Miami News, July 7, 1987, § 5, at 1, col. 2.

the law.

Antitrust law is generally understood to encompass the laws relating to monopoly and to restraints or trade limitations on commercial competition, as well as unfair competitive practices.¹²⁴ Section one of the Sherman Act generally requires some combination or common action by two or more actors or legal entities.¹²⁵ Section two of the Sherman Act is violated by the unilateral action of a single entity.¹²⁶ Overall, the Sherman Act attempts to preserve the free action of competition.¹²⁷

Generally, two evaluative standards of liability exist under the Sherman Act. One standard is a per se violation. Certain conduct may be found unreasonable per se and thus illegal.¹²⁸ The second is a rule of reason test which looks to the legality or illegality of the conduct in relation to the economic circumstances in which it takes place.¹²⁹ The rule of reason, a more liberal standard, permits justification of the challenged action, whereas the per se doctrine permits no inquiry into the considerations or reasons behind the alleged restraints.¹³⁰

Antitrust cases involving the NFL have repeatedly rejected the per se doctrine and have applied the rule of reason test.¹³¹ The goal of sports teams is to compete on the field and cooperate off the field.¹³² The National Football League structure requires cooperation between its teams. Thus, "a certain deviation from the ideal of free competition . . . is justified because it makes possible a product which unlimited competition could not produce."¹³³

124. See generally *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

125. *Id.* See also *supra* note 15 and accompanying text.

126. See generally *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

127. See, e.g., *Redwing Carriers, Inc., v. McKenzie Tank Lines*, 443 F. Supp. 639, 642-43 (N.D. Fla. 1977).

128. *Id.* at 640. See also 24 AM. JUR. 2D *Trials Defending Antitrust Lawsuits* § 4 (1977). Per se violations include price-fixing, commercial boycotts, and division of market territories among competitors.

129. See *Redwing*, 443 F. Supp. at 641, 642. See also 24 AM. JUR. 2D *Trials Defending Antitrust Lawsuits* § 4 (1977).

130. See *Redwing*, 443 F. Supp. at 641, 642-43. See also 24 AM. JUR. 2D *Trials Defending Antitrust Lawsuits* § 4 (1977).

131. See *supra* notes 3-6 (cases cited therein all apply the rule of reason test).

132. See *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953). See also Comment, *Antitrust and Professional Sports: Does Anyone Play by the Rules of the Game?* 22 CATH. U.L. REV. 403 (1977).

133. *United States v. NFL*, 116 F. Supp. 319, 327 (E.D. Pa. 1953).

A. *The Sherman Act and Professional Football*

In *United States v. NFL*,¹³⁴ the United States District Court for the Eastern District of Pennsylvania looked at intra-league activity and held that the antitrust laws apply to professional football. The court further held that Article X of the NFL's constitution and bylaws violated the Sherman Act as an unreasonable restraint of trade.¹³⁵ To avoid application of the Sherman Act, the NFL initially argued that professional football is not commerce or interstate commerce.¹³⁶ This proposition was soundly rejected by the court.¹³⁷ The court stated that "[r]adio and television clearly are in interstate commerce, . . . [t]he restrictions by professional football on the sale of radio and television rights impose substantial restraints on the television and radio industry."¹³⁸

In *Radovich v. NFL*,¹³⁹ the Supreme Court of the United States expressly held that professional football is subject to the Sherman Act.¹⁴⁰ The Court noted that the volume of interstate business involved in professional football places it within the provisions of the Sherman Act.¹⁴¹ The Court further held that "black-listing" of players by the NFL was the result of a conspiracy.¹⁴² The purpose of this conspiracy was to regulate the terms upon which professional football would be played.¹⁴³

The NFL's player draft was held to be an unreasonable restraint on trade in *Smith v. Pro Football, Inc.*¹⁴⁴ The United States Court of Appeals for the District of Columbia analyzed the NFL clubs' participation in the draft and noted that it eliminated competition among the clubs for players' services.¹⁴⁵ In *Mackey v. NFL*,¹⁴⁶ the issue was the "Rozelle Rule."¹⁴⁷ This rule restricted

134. 116 F. Supp 319 (E.D. Pa. 1953).

135. *Id.* at 327. This specifically suggests intra-league competition between teams conspiring among themselves as opposed to interleague competition.

136. *Id.*

137. *Id.* (citing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) and *Allen B. Dumont Laboratories v. Carroll*, 184 F.2d 153 (3d Cir. 1950)).

138. *Id.*

139. 352 U.S. 445 (1957).

140. *Id.* at 452. The United States Supreme Court further held that professional baseball is not subject to federal antitrust laws. See, e.g., *Federal Baseball Club of Baltimore, Inc. v. National League of Prof. Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

141. *Radovich*, 352 U.S. at 452.

142. *Id.* at 448.

143. *Id.*

144. 593 F.2d 1173 (D.C. Cir. 1978).

145. *Id.* at 1185.

146. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 430 U.S. 801 (1977).

the movement of free agents between the teams. This restriction was held to be unreasonable.¹⁴⁸ In *Kapp v. NFL*,¹⁴⁹ the "no tampering rule" and the player draft were also held to unreasonably restrain trade.¹⁵⁰ The *Kapp* plaintiffs argued that the NFL's actions, in relation to their alleged boycott of NFL players, constituted an illegal boycott and an unjustified exercise of monopoly power.¹⁵¹

These cases illustrate that the NFL is not only subject to the antitrust laws but that some of its past business activities have violated antitrust laws. The NFL has been repeatedly confronted with different antitrust law theories. Analysis of these cases indicates their relevancy to the NFL's position concerning its television contracts. Based on the various theories and existing case law, it is evident that the NFL is violating the present antitrust laws with its present three network contracts.

B. *Essential Facilities*

Of all the theories regarding the NFL and antitrust law, the most relevant and helpful to the analysis of the validity of the network contracts is the doctrine of "essential facilities." One definition of this doctrine states:

If a group of competitors, acting in concert, operate a common facility and if due to natural advantage, custom or restrictions of scale, it is not feasible for excluded competitors to duplicate the facility, the competitors who operate the facility must give access to the excluded competitors on reasonable, nondiscriminatory terms.¹⁵²

In *Hecht v. Pro Football, Inc.*,¹⁵³ the Circuit Court of Appeals for the District of Columbia stated that "to be essential a facility

147. The "Rozelle Rule" allowed the Commissioner to be the final arbitrator in all trades. The Commissioner exercised his power by granting monetary reimbursement to teams losing a player who did not play out the option year on his contract. *Id.* at 620-21.

148. *Mackey*, 543 F.2d at 622.

149. 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd in part and appeal dismissed in part as moot*, 586 F.2d 644 (9th Cir. 1978).

150. *Id.* Similar restraints have been held to violate antitrust law in other sports. See *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975) (suggesting in dictum that NBA player draft and reserve clause may violate antitrust law); *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F. Supp. 462 (E.D. Pa. 1972) (denying preliminary injunction on per se theory but suggesting that the NHL reserve clause may violate the Rule of Reason).

151. *Kapp*, 390 F. Supp. at 81-82.

152. L. SULLIVAN, *ANTITRUST* 131 (1977).

153. 570 F.2d 982 (D.C. Cir. 1977).

need not be indispensable."¹⁵⁴ "If duplication of a facility is economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants,"¹⁵⁵ then it is an illegal restraint of trade to foreclose the facility from competitors. Network television coverage is an essential facility to potential leagues seeking to enter the professional football market. Duplication of network coverage and the substantial monetary value afforded the NFL is economically infeasible for a rival league.

In *Mid-South Grizzlies v. NFL*¹⁵⁶ it was held that the doctrine is applicable only where a party is being denied access to the means necessary to engage in a business which is controlled by his competitors.¹⁵⁷ Major network coverage cannot be duplicated elsewhere. The coverage which the NFL enjoys exceeds its needs and sharing of this "essential ingredient" is necessary to establish a viable league. Without the essential facility of television coverage, a league is doomed to failure.

In *American Football League v. NFL*¹⁵⁸ the AFL alleged, among other things, that successful operation of a major professional football league requires the sale of television rights.¹⁵⁹ The Sherman Act allegations failed because the AFL had secured television coverage of its games.¹⁶⁰ The rival league had entered into a contract similar to the one negotiated by the NFL. The United States District Court in Maryland did, however, agree that access to television coverage was necessary to the viability of a sports league.¹⁶¹

As exemplified by the holding in *American Football League*, television coverage is essential to the establishment of a new league. Duplication of major network broadcasting is economically and physically unfeasible.¹⁶² The resources and experience of any one of the major networks make them essential. At the very least,

154. *Id.* at 985.

155. *Id.* at 992.

156. 550 F. Supp. 558 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1982).

157. *Id.* at 569. The court also noted that under the authority of *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 450 U.S. 611 (1982), a licensing contract could be subject to this doctrine.

158. 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

159. *Id.* at 62.

160. *Id.* at 65. See also *supra* notes 68-71 and accompanying text.

161. *American Football League v. NFL*, 204 F. Supp. at 62.

162. See *Hecht v. Pro Football, Inc.*, 444 F.2d 931 (4th Cir. 1969). The new Fox Broadcasting Network and Turner Broadcasting should be considered. A professional football league needs the massive exposure that these two "stations" currently are unable to provide. As these stations develop, however, they may become a viable alternative to a fledgling league.

one network should be available to other leagues. In sum, mandatory access is necessary and other professional football leagues should be free in practice as well as theory to contract with at least one network.

C. Group Boycott

Another theory of antitrust law that brings the NFL's network contracts into question is group boycott. A group boycott was defined in *Smith v. Pro Football, Inc.*¹⁶³ as a "concerted attempt by a group of competitors at one level to protect themselves from competition from nongroup members who seek to compete at that level."¹⁶⁴ The boycotting group typically deprives the competition from gaining access to the trade relationship which is needed to enter and survive in the same group or business.¹⁶⁵ The *Smith* court stated that the NFL draft constituted an unreasonable restraint of trade under the rule of reason because it virtually eliminated economic competition among the buyers for services of the sellers.¹⁶⁶

The NFL's three major network television contracts should be viewed as a group boycott.¹⁶⁷ There is a concerted attempt (all the teams pool their contract rights and sell them to the networks) to insulate themselves (the league members) from competition. From an economic standpoint, the teams conspire in order to increase their benefits which, in effect, creates a group boycott.¹⁶⁸ The twenty-eight NFL teams, by employing a pooled-rights agreement, are able to derive great economic benefits from the sale of the contracts.¹⁶⁹ Overall, by contracting with the three networks, the NFL

163. 593 F.2d 1173 (D.C. Cir. 1979). It is interesting to note that if there are allegations of an antitrust violation, courts are bound to apply either the *per se* test or the rule of reason test. See *Mid-South Grizzlies v. NFL*, 550 F. Supp. 558 (E.D. Pa. 1982). In this case the court stated that "[b]ecause of the unique character of professional sports, then, courts have rejected the *per se* test and have routinely applied the Rule of Reason in deciding antitrust suits concerning league practices." *Id.* at 566.

164. *Smith*, 593 F.2d at 1178.

165. *Id.*

166. *Id.* at 1186. The buyers were the teams and the sellers were the players. In order to justify the NFL draft, however, the court looked at factors such as higher salaries for the players and increased financial security for the clubs. *Id.*

167. Whether or not the allegation is to withstand the scrutiny of the rule of reason test will be decided by the courts.

168. See *supra* note 25 and accompanying text. Pooled rights contracts are more valuable to the NFL because it can demand a higher price for the product. The NFL can sell more games than individual teams and it has the ability to monitor scheduling conflicts and structure the seasons.

169. See *supra* note 18 and accompanying text.

is provided with extensive revenue and publicity while depriving rival leagues access to television coverage on a major network. It is a small consolation that new and smaller networks are interested in televising professional football games.¹⁷⁰ If the NFL limited itself to a single network, as was originally contemplated by the Sports Broadcasting Act,¹⁷¹ the other networks would be free to contract with other leagues.¹⁷²

D. *The Single Entity Defense*

Application of section one of the Sherman Act is usually limited to a plurality of actors.¹⁷³ The single entity defense, often asserted by the NFL, entails conduct which neither implicates nor impinges upon competition between member clubs.¹⁷⁴ The teams, as individual business organizations, group together and pool their rights to the television broadcasts of their games.¹⁷⁵ Under this scenario, the league is regarded as a single economic entity and the Sherman Act does not apply.¹⁷⁶

The United States Court of Appeals for the Second Circuit

170. Recently, Fox Broadcasting Company announced that it wants to televise NFL games on its network. The significant disadvantage of Fox is its relative youth and unfamiliarity with the business. Although Fox has approximately 100 affiliates, the exposure it could grant to a new league would be limited. Presently, no comparison can be made between what Fox can offer a professional football league and what one of the major networks can offer. See L.A. Times, Jan. 12, 1987, at § 3, p.5, col. 1. The same can be said of cable networks and superstations. The publicity and notoriety obtainable with these television agents is limited due to limited cable access. Nearly 87 million American households have television sets, but only 41 million (47%) of these homes subscribe to cable television. See Video Week, Sept. 15, 1986 at 5; Video Week, May 5, 1986 at 3. See also Affidavit of Edward Einhorn at 5, USFL v. NFL, No. 84-7484 (S.D.N.Y. 1986).

171. See *supra* notes 51-60 and accompanying text.

172. With the development of the NFL and its merger with the AFL, this is practically impossible. But see Moore, *It's 4th & 10—The NFL Needs The Long Bomb*, *FORTUNE*, Aug. 4, 1986, at 160, 166: "The N.F.L. could also have sold its games to only 2 networks and sold a third package to pay T.V., syndication, or one of the budding 'fourth networks'—a move it is considering if one of the networks doesn't cough up enough money next year. So long as one network remains open, a would-be competitor cannot blame its problems on an N.F.L. television monopoly." *Id.*

173. *North Am. Soccer League v. NFL*, 670 F.2d at 1256 (2d Cir.), *cert denied*, 459 U.S. 1074 (1982).

174. *Id.*

175. See *supra* note 36 and accompanying text. The NFL is comprised of 21 corporations and 7 limited partnerships.

176. However, in some circumstances courts will find a combination sufficient to satisfy the statutory requirement by looking at action of corporate affiliates, or even at an agreement among corporate officers. *North Am. Soccer League v. NFL*, 505 F. Supp. 659, 677 (S.D.N.Y. 1980), *modified*, 670 F.2d 256 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982). If this is so, then surely agreements among the 28 NFL teams may be considered a combination and could not be covered by the single entity defense.

held in *North American Soccer League v. National Football League*¹⁷⁷ that:

The characterization of the NFL as a single economic entity does not exempt from the Sherman Act an agreement between its members to restrain competition. To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that could benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anti-competitive effects.¹⁷⁸

This case eliminated the NFL's single entity claim.¹⁷⁹ The court looked to the teams themselves to make its ruling.¹⁸⁰ It is probable that the court reasoned that the league is comprised of various business organizations in the form of teams and because the teams conspire amongst themselves, the antitrust laws should be applied.¹⁸¹

The NFL's television contracts violate the spirit of the law, if not its letter. Congress must realize that the NFL has effectively eliminated competition from rival professional football leagues through the use of its three television contracts. The Sports Broadcasting Act contemplated the sale of contract rights to one network.¹⁸² However, the NFL-AFL merger approved by Congress enabled one league to control television access.¹⁸³ It seems that the courts are now reluctant to limit the NFL's powers. It is up to Congress to correct the situation and undo what it started in 1961.

VI. UNITED STATES FOOTBALL LEAGUE V. NATIONAL FOOTBALL LEAGUE

The most recent antitrust suit brought against the NFL is *USFL v. NFL*.¹⁸⁴ Attention focused on this case because, in large part, the USFL alleged that the NFL's network television contracts violated antitrust law. The USFL argued that the network contracts effectively precluded the USFL from having its games televised and denied the USFL the exposure necessary to compete

177. 670 F.2d 1256 (2d Cir. 1982).

178. *Id.* at 1257.

179. *Id.*

180. *Id.*

181. *Id.*

182. See *supra* notes 11 and 51-60 and accompanying text.

183. Congressional approval for the merger was reflected by the enactment of the Sports Broadcasting Act, 15 U.S.C. §§ 1291-95 (1982).

184. 644 F. Supp. 1040 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988).

with the NFL.¹⁸⁵ Harry Usher, the Commissioner of the USFL, felt that a league needs star players to compete with the NFL, and only revenues from a lucrative television contract could provide the necessary funds to pay these players.¹⁸⁶ Counsel for the USFL asserted that "television is at the heart of this case." A competitor with a network contract (like the AFL prior to its merger with the NFL) is a threat to the NFL. A competitor denied a network contract (like the WFL and the USFL) cannot survive or prosper.¹⁸⁷

The USFL sought injunctive relief as well as damages for the alleged violations of Sections one and two of the Sherman Act.¹⁸⁸ Specifically, injunctive relief was sought to enjoin the further performance of the contracts.¹⁸⁹ The USFL asked that the NFL be directed to maintain a contract with no more than one television network.¹⁹⁰ The District Court for the Southern District of New York denied the USFL's preliminary motion for summary judgment, explaining that the three NFL network contracts did not by themselves constitute a per se violation.¹⁹¹

The USFL alleged that the NFL network television contracts exceeded the scope of the antitrust exemption.¹⁹² The USFL also claimed that it decided to play football in the spring because the NFL's three contracts had enabled it to monopolize the network television coverage of professional football played in the fall.¹⁹³

185. *USFL v. NFL*, No. 84-7484, 634 F. Supp. 1155, 1986-1 Trade Cas. (CCH) ¶ 67,075 (S.D.N.Y. 1986) (opinion 3).

186. Janofsky, *Usher Places Blame on NFL*, N.Y. Times, June 4, 1986, at B8, col. 1.

187. See Memorandum in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion in Limine, *USFL v. NFL*, No. 84-7484 (S.D.N.Y. 1986), at 10.

188. First Amended Complaint, at ¶ 14-75 and 76-86 of Counts I and II, *USFL v. NFL*, No. 84-7484.

189. See Memorandum in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion in Limine, *USFL v. NFL*, No. 84-7484 (S.D.N.Y. 1986), at 66.

190. *Id.*

191. *USFL v. NFL* 634 F. Supp. 1155 (1986). The USFL contended that the NFL's three television network contracts should be deemed a per se antitrust violation. The trial court issued a pre-trial order rejecting the USFL's contention that the three NFL network contracts did not per se violate the antitrust laws. The court also stated, "Whether the intent or effect of such arrangements are to exclude a competing league, such as the USFL, from selling any of its television rights presents material questions of fact that cannot be decided on a summary judgment motion." *USFL v. NFL*, No. 84-7484, 634 F. Supp. 1155, 1986-1 Trade Cas. (CCH) ¶ 67,076. See also *supra* note 168 and accompanying text.

192. *Id.*

193. It is "monopolization" in violation of the Sherman Antitrust Act for persons to combine or conspire to acquire or maintain power to exclude competitors from any part of trade or commerce. They must also have such power that they are able as a group to exclude actual or potential competition. They must intend to exercise that power. *USFL v. NFL*,

The NFL contended that the USFL product was not good enough for major network broadcasting.¹⁹⁴ The NFL further asserted that the networks would be willing to negotiate with the USFL for a fall 1987 contract because the NFL's current contracts would expire by then.¹⁹⁵

The jury in the case reached a verdict after being given instructions on monopolization, restraint of trade, essential facilities, and antitrust damages.¹⁹⁶ Among its findings, the jury concluded that: (1) the NFL had monopoly power, (2) the monopoly caused injury to the USFL, (3) there was a contract to exclude competition; (4) the NFL's 1982-1986 television contracts did not constitute an unreasonable restraint of trade; (5) a national broadcast contract with at least one of the three major networks was essential to the ability of a major professional football league to compete successfully, and (6) potential competitors could not duplicate the benefits of a network contract.¹⁹⁷ Notwithstanding these findings, the jury awarded the USFL \$1.¹⁹⁸

The USFL filed a motion for a new trial on the ground that the jury's determination of liability was inconsistent with itself and inconsistent with the damage award.¹⁹⁹ The District Court denied the motion²⁰⁰ and explained that while the defendant's actions in their entirety constituted a violation of the Sherman Act,²⁰¹ the

No. 84-7484, 634 F. Supp. 1155, 1986-1 Trade Civ. Cas. (CCH) ¶ 67,084 (order #7).

194. *Id.* at ¶ 67,124 (opinion #12).

195. Janofsky, *Final Stages Near in U.S.F.L. Trial*, N.Y. Times, July 21, 1986, at C11, col. 1.

196. USFL v. NFL, No. 84-7484, 634 F. Supp. 1155, 1986-1 Trade Cas. (CCH) ¶ 67,218.

197. After the trial, the jury found in total that: (1) there was a relevant market consisting of major league professional football; (2) the NFL had monopoly power; (3) such monopoly power was willfully acquired or maintained; (4) the monopoly caused injury to the USFL; (5) the NFL and its member teams conspired to monopolize professional football; (6) no overt action was taken by any member of the conspiracy to try to acquire or maintain the monopoly; (7) there was a contract to exclude competition; (9) the restraint was not unreasonable; (10) the NFL's 1982-1986 television contracts did not constitute an unreasonable restraint of trade; (11) a national broadcast contract with at least one of the three major networks was essential to the ability of a major professional football league to compete successfully; (12) potential competitors could not duplicate the benefits of a network contract; and (13) the NFL and its members lacked the ability to deny actual or potential competitor access to a national broadcast television contract. USFL v. NFL, No. 84-7484, 634 F. Supp. 1155, 1986-1 Trade Cas. (CCH) ¶ 67,218.

198. *Id.* A Sherman Act violation results in an award of treble damages. The USFL therefore was awarded \$3.

199. *Id.* at ¶ 67,075.

200. *Id.*

201. Jury findings (1), (2), (3), (4), and (5) were specifically indicate that the NFL violated the Sherman Act. *Id.*

specific network contracts claim may be found lawful without creating an inconsistency.²⁰² The finding that the three network contracts were not unreasonable restraints on trade was deemed consistent with the overall verdict rendered by the jury.²⁰³

Inherent in the jury's determination is a great paradox. The NFL was a monopoly²⁰⁴ and the teams in the league conspired to exclude competition,²⁰⁵ yet the objects of the conspiracy, the television contracts, were found not to be unreasonable restraints on trade. While this decision seems reasonable on the surface, in reality, it should not be permitted to stand. Congress must act to clarify the law so that any inconsistencies will be eliminated.

One attempt to change the existing structure of the NFL was recently thwarted. Based on the jury's finding that the NFL was a monopoly, the USFL moved to have the league's two conferences²⁰⁶ split into separate entities, each to run itself and negotiate its own contracts.²⁰⁷ The District Court denied the USFL's motion because the jury found the NFL had not monopolized the television market.²⁰⁸

The Second Circuit was unsympathetic to the USFL's claim that the jury findings and verdict were inconsistent²⁰⁹ in affirming the trial court.²¹⁰ The court declined to give the USFL "the success it failed to gain among football fans."²¹¹ Upon hearing the appellate outcome, USFL Commissioner Harry Usher remarked "I guess we died today."²¹²

In looking to the future, one cannot help but notice Chief Justice Rehnquist's dissent from the denial of certiorari in *National*

202. *Id.* at ¶ 67,074.

203. *Id.*

204. *Id.* at jury finding (2).

205. *Id.* at jury finding (8).

206. The NFL is composed of two conferences: the National Football Conference and the American Football Conference. Each conference consists of 14 teams the with each conference further broken down into three divisions. *See* NFL Const. art. IV, § 4.4. *See also* L.A. Times, Oct. 17, 1986, at C2, col. 1.

207. L.A. Times, Oct. 17, 1986, at C2, col. 1.

208. Ruling on the USFL's motion to divide the NFL, the court stated: "When a firm which has committed myriad blunders in the marketplace seeks to gain benefits through injunctive relief that it could not acquire through fair competition, courts should not be condemned for obstructing such an effort." L.A. Times, Dec. 18, 1986, at III 8, col. 1.

209. The USFL fared similarly in the trial court: in denying the USFL's motion for a new trial, Judge Leisure suggested that there was no evident inconsistency in the findings and verdict. *See* L.A. Times, Jan. 1, 1987, at C3, col. 1.

210. 842 F.2d 1335 (2d Cir. 1988).

211. Miami Herald, April 11, 1988, at E10, col. 3.

212. *Id.*

*Football League v. North American Soccer League.*²¹³

The antitrust laws do not require the NFL to operate so as to make it easier for another league to compete against it. I fear that, under the decisions below, the maxim that the antitrust laws exist to protect competition, not competitors, may be reduced to a dead letter.²¹⁴

Chief Justice Rehnquist seems anxious to voice his opinion on the NFL antitrust issue. In addition, Justice Scalia has written extensively on antitrust law.²¹⁵ Eventually, the Supreme Court may have an opportunity to decide an antitrust case in the professional sports league setting.

When the doctrines of essential facilities and group boycott theories are applied to sports league cases, it is evident that antitrust law is being contravened. Violation of these theories without attaching liability is erroneous. The ball has been handed off; hopefully, Congress can take it in for the score.

VII. CONCLUSION

Even if the Supreme Court does not review this case, Congress must act. The NFL has violated the antitrust laws, yet the courts to date have ignored its actions. Professional sports leagues occupy a special niche in one interpretation of competition as well as in our society in general.²¹⁶ Blatant violations are ignored because of our affinity for professional sports.

In *USFL v. NFL*, the USFL's attorney, in closing argument, stated, "Without minimum damages, the league is dead and it's a signal to every other sports league that wants to compete that they are dead, too."²¹⁷

Congress could expressly amend the Sports Broadcasting Act to limit NFL broadcasts to one or two networks.²¹⁸ In this manner, a new professional football league could negotiate a contract with networks not televising the NFL. Action along these lines would promote competition consistent with the Sherman Act because the

213. 459 U.S. 1074 (1982).

214. *Id.* at 1080.

215. See, e.g., *Panel Discussion*, 55 ANTITRUST L.J. 205-212 (1986).

216. The league has By-Laws that establish the rules of play on the field and off the field among the owners. By definition, such an association constitutes a cartel among competitors that in the business world would generally be regarded as illegal under antitrust law. Moore, *supra* note 172, at 166.

217. See Pomerantz, *Final Points made in USFL Suit*, Wash. Post, July 24, 1986, at D4 col. 5.

218. See *supra* note 20 and accompanying text.

networks would compete with each other to provide the best coverage for NFL games. This system would also allow new leagues to compete with the NFL by giving them the national exposure and major network revenues that are essential to their success. If Congress does not act to encourage competition, the NFL will forever be everyone's favorite football league because there will be no other league which will be able to compete. The existence of a three network contract alone does not appear to, and has in fact been held not to, violate the law.²¹⁹ However, because of the amounts of money committed to the broadcasting of NFL games, the networks will not consider major broadcasting packages for other leagues. It is in this respect that Congress must act, even though the FTC inquiry may change the way the league and the networks conduct their dealings. The limited exemption from antitrust law granted to professional sports leagues has been applied in a manner not originally contemplated. It has allowed the NFL to corner the entire network broadcasting market. It appears that the courts cannot take action, therefore, Congress must act so that competition may occur.

Whatever course Congress should choose to take, a reevaluation of the NFL's antitrust position is necessary. Whether limiting network availability is a viable alternative is a significant question. It is clear, however, that in progressing from a limited exemption from the antitrust law in 1961²²⁰ to the multibillion dollar agreements of today, changes have occurred which must be addressed. The purpose and ideology of the antitrust laws are being laid to waste.

*Philip A. Garubo, Jr.**

219. See *supra* note 11 and accompanying text.

220. See *supra* note 178 and accompanying text. Throughout the hearings on the NFL-AFL merger, (15 U.S.C. § 1291 as amended Pub. L. no. 89-800, 6(b)(1), 80 Stat. 1515), the NFL requested that they be allowed to broadcast over two networks due to the size of the merged league and the insufficient broadcast capabilities of a single network.

* This article is dedicated to Philip and Johanna Garubo, who have shown me that all things are possible, too.