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SPORTS ON THE SUPERSTATIONS: THE LEGAL AND ECONOMIC EFFECTS

THOMAS JOSEPH CRYAN* and JAMES S. CRANE**

As the sports industries continue to grow during the next century, television will be the force which will drive this growth. The television industry has been a dynamic, evolving, and flexible institution during its short, fifty year history. Constantly thirsting for the new technology which will broaden its market, the television industry is constantly creating new levels of marketing in an attempt to generate additional revenue. Some of the developments within the industry which have ushered in this new era are cable television, pay television, and video cassettes.

In the process of providing the consumer with desirable entertainment, the television industry has found that the American public has a seemingly insatiable desire for sports programming. Correspondingly, as the demand for sporting events on television increases, with the supply remaining relatively constant,¹ the price the television industry is willing to pay for sports programming has skyrocketed.²

As an outgrowth of the large sums of money involved in the television packaging of sporting events, many legal battles have surfaced. These battles often turn on the intricacies of an ever ad-

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1. In recent years there have been many attempts to increase the supply of available sport programming through the creation of the World Football League, the United States Football League, and now even the United States Basketball League. However, it remains to be seen what is the consumer's limit to sports programming.

2. In 1962, the Columbia Broadcasting System (CBS) paid the National Football League (NFL) \$4.6 million for the year and the American Broadcasting Company (ABC) paid the American Football League (AFL) \$1.9 million. During that year, the National Broadcasting Company (NBC) did not have a professional football contract. In 1985, it was estimated that each team in the NFL received \$16 million from television revenues. Additionally, with the breakup of the NCAA's exclusive right to bargain for all member colleges, independent institutions like the University of Miami have been able to separately contract with the networks for approximately \$2.5 million a year. See Hochberg and Horowitz, *Broadcasting and CATV: The Beauty and the Bane of Major College Football*, 38 LAW & CONTEMPORARY PROBLEMS 112 (1975) [hereinafter cited as *Broadcasting and CATV*]. See also *Cablesports*, Vol. 3 No. 36, Nov. 4, 1985.

vancing audiovisual technology, which must be governed by an inherently slow-to-change legal system.³ In the wake of this uncertainty, several fundamental questions arise concerning the property rights of owners in the sporting events they produce. These questions include the following: (1) What authority do the leagues have in granting television rights to their games, both in the national and/or the local marketplace? and (2) What are the rights of the *superstations*⁴ to ultimately distribute games?

In an attempt to resolve these questions, focusing specifically upon the *superstation* issue as it effects professional baseball, it is necessary to explore the nature of these property rights from the following perspectives: (1) the broadcasting rights and the copyrights which surround sports programming; (2) the technology which allows sports programming to reach its different markets; (3) the specific problems entangled with superstation broadcasts and their relationship to the Copyright Royalty Tribunal; and (4) how the future of the television and sports industries will evolve.

I. DEVELOPMENT OF CABLE COPYRIGHT IN THE SPORTS INDUSTRIES

The first sporting event ever televised was a college baseball game between Columbia and Princeton in 1939.⁵ From these simple beginnings have emerged such intricate and complex technologies as the world wide closed circuit satellite distribution of major sporting events. In the intervening years it has become very unclear as to who owns exactly what rights when dealing with the broadcast of a sporting event. Traditionally, the law has granted certain property rights both in the sporting event itself and in the public performance or broadcast of that event via radio, television, satellite, and cable. Only through a clear establishment of these bundles of rights is it possible to sell the programs on the open market.

3. Over the years, Congress has passed several pieces of legislation governing the sports broadcasting industry, including: The Sports Broadcasting Act of 1962, 15 U.S.C. §§ 1291-95 (1962), the Copyright Act of 1976, 17 USC § 1, and the Communications Policy Act of 1984, 47 U.S.C. §§ 601-05 (1984). Beyond these statutes, it is important to realize that sports broadcasting is governed by a complex mixture of governmental bodies including the Federal Communication Commission (FCC), the Copyright Office, the Copyright Royalty Tribunal (CRT), the Federal Trade Commission (FTC) and the Justice Department.

4. "Superstation" is a term of art used to describe a "local" independent over-the-air broadcast television station which has its signal transmitted via satellite to cable operators across the country, thus creating a national audience for a local station (with a technologically "super-powerful signal").

5. See Garrett and Hochberg, *Sports Broadcasting and the Law*, 59 IND. L. J. 155 (1984).

From as early as 1938, the courts have explained that the owners of sports franchises have a property right in the games they promote. The owners may legally restrict dissemination of news (play-by-play commentary) from those games, since they have created the ball games and are in control of the parks they are played in either by ownership or lease.⁶ Since the 1930's, many courts have reinforced this property broadcast right or the right of publicity vested in the creator of a sporting event,⁷ balanced always by the media's constitutional right to free speech.⁸

A) Copyright Protection

As the right of publicity slowly evolved out of the common law, it became apparent that something more specific was needed to adequately protect these intangible pieces of property. As a result, the courts began to recognize the presence of a copyright in sporting events and the broadcasts.⁹ Copyright is most simply defined as a legal monopoly over a creative work, of limited scope and duration, under the terms of which the creator may control the exploitation of the work.¹⁰

This limited monopoly has its origin in our most fundamental legal doctrine, the United States Constitution, which empowers Congress "[t]o promote the Progress of Science and the Useful Arts, by securing for limited times to Authors and Inventors the Exclusive Right to their respective writings and Discoveries."¹¹

Pursuant to this power, Congress passed a federal statute¹² governing copyright. Under the federal statute, any original work of authorship fixed in a tangible medium of expression, (recorded for a suitable duration), is copyrightable.¹³ A copyright may be granted for literary works, musical works, dramatic works, pic-

6. *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1983).

7. *See e.g., Radio Corp. v. Chicago Bears Football Club, Inc.*, 97 F. 2d 223 (7th Cir. 1938).

8. Under the courts' interpretation of the United States Constitution, the media has a constitutional right to report newsworthy aspects (limited clips or highlights) of a sporting event to the public once the event is finished. The media has tried to expand this right to access, but the courts have continually supported the owners' absolute right of publicity in a sporting event. *See Post Newsweek Stations, Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81 (D. Conn. 1981).

9. *Radio Corp.*, 97 F.2d at 223.

10. *See Ladd, Schrader, Leibowitz and Oler, Copyright, Cable, The Compulsory License: A Second Chance*, COMM. AND L. 7 (1981).

11. U.S. CONST. art. I, § 8.

12. 17 U.S.C. § 1 (1976) (first passed in 1905 and revised in 1976).

13. 17 U.S.C. § 102 (1976).

tures, sound recording, motion pictures and other audiovisual works.¹⁴ Once a copyright is established, the owner has the exclusive right to authorize any reproduction of the work, to distribute copies of the work, and control any new works which are born out of or derived from the original piece.¹⁵ Furthermore, in terms of motion pictures or audiovisual works, such as television, the copyright owner has the right to control any public performance of that work, including any broadcast transmission.¹⁶

In terms of application to the sports industries, a sporting event is fixed when it is recorded. The recording, including both audio and video, may occur simultaneously with transmission, and is at that time protected.¹⁷ Therefore, when an owner creates a game or event, the copyright is vested exclusively therein,¹⁸ and any public performance or broadcast of the game from the stadium to the viewer is within the complete control of the copyright owner.

In the establishment and growth of any professional sports league, it is the pooling by the separate franchise owners of these rights which forms the league's internal framework. Major League Baseball (MLB), like many other professional leagues, is composed of an agreement whereby the owners have decided to pool their copyrights to every game played and then collectively, through their commissioner, sell those rights in the marketplace.¹⁹

Currently, the MLB owner's collective copyright or broadcast policy is to market the rights to the national distribution of MLB games as a complete package, while each independent franchise retains the copyright in, and therefore the right to sell, the local distribution to the home market or area of dominant influence (ADI), for every game that the club plays.²⁰ Under the MLB owner's

14. *Id.*

15. *Id.* at § 106 (1976).

16. *Id.* at § 106(4) (1976).

17. *Id.* at § 102 (1976).

18. *Id.* at § 106 (1976). It is interesting to note that the players have tried to assert that they have property rights in the games and broadcasts. Their argument is very weak, and no court has yet supported it. See *Baltimore Orioles, Inc. v. Major League Baseball Players Association*, No. 82 C 3710 (N.D. Ill. filed June 14, 1982). For a more detailed discussion, see Garrett and Hochberg, *supra* note 5, at 165.

19. Though this article will focus specifically on the problems surrounding cable copyright as it applies to Major League Baseball, these issues and arguments are directly analogous to all the professional sports leagues.

20. See *Copyright Royalty Fees For Cable Systems, Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary House of Representatives*, 98th Cong., 1st and 2d Sess. 394 (1984). (Written Memorandum of Robert W. Ross, General Counsel for Turner Broadcasting Systems) [hereinafter cited as *Copyright Royalty Fees*]. The national broadcast contract for MLB is with

agreement, this broadcast policy can only change by fifty percent of the owners in each league.²¹

There are several technological avenues by which a league may distribute its copyrights into the television marketplace. Basically there are five means of locally distributing television signals beyond the traditional over-the-air broadcasts: Community Antenna Television (CATV or Cable), Subscription Television (STV), Multipoint Distribution Service (MDS), Direct Broadcast Satellites (DBS), and Home-Television Receive Only (TVRO's or Earth Stations).²² These local distributors of television signals are supplied programs by four different types of technologies. First, there are national satellite networks like USA or ESPN, which are usually found on basic cable service.²³ Second, a growing number of regional satellite networks have developed, such as the Sports Channel, Dodgervision, and New England Sports Channel, which require a special fee called expanded basic.²⁴ Next, there are premium channels, like HBO and ON-TV, where a special fee is charged for each network subscribed to by the viewer.²⁵ And finally, there are *superstations*, a network which combines an independent over-the-air station's broadcasts with national satellite

two networks, American Broadcasting Company and National Broadcasting Company, and includes national satellite-to-cable coverage of any MLB games. The six year contract (1984-89) is worth a total of 1.21 billion dollars, with payments rising on an annual basis from \$160 million in 1984 to \$240 million in 1989. Additionally, the sum of individual franchise sales of local broadcast rights adds up to over \$100 million annually. QV PUBLISHING, INC., *TELEVISION SPORTS RIGHTS II* at 13-33 (1986).

21. This may turn out to be very significant since up until last year the owners required a 75% vote before the broadcast policy could change.

22. For a more detailed explanation of these technologies, see Crane and Cryan, *Telecommunication Pirates - America's Newest Criminals?*, 2 ENT. SP. L. J. 167, 167-70 (1985) and Miller, *Satellite Transmissions: The Laws and Policies That Affect the Programmers, Individual Earth Stations and SMATV (Private Cable) Owners*, 2 ENT. SP. L. J. 33, 33-37 (1984).

23. Television signals today are most economically transmitted via a satellite in geosynchronous or geo-stationary orbit 22,300 miles above the earth. The program supplier transmits a narrow signal up to the satellite, known as the up-link, the signal is received by the satellite and redirected back to earth, literally spraying it across the country. The area of coverage of this spray is known as the footprint. The local cable franchise, or down-link, picks up the signal with a dish antenna and distributes it to the community. For more details see, Cryan and Crane, *International Telecommunications Pirates: Protecting American Satellite Signals Abroad*, 17 N.Y.U. J. INT'L L. AND POL. 851 (1985). Basic Cable is a collection of national satellite program suppliers which a cable customer receives for a flat monthly fee, usually consisting of CNN, USA, ESPN, and a superstation.

24. Expanded basic requires an additional fee above the monthly charge for basic and usually includes a regional sports network.

25. Pay television is a term of art, including basic, expanded basic, and premium channels used to describe the service where the consumer pays a fee to receive special satellite programs no matter what form the local distribution takes.

distribution of that local signal.

B) *Cable Copyright and the Superstations*

When a traditional national satellite distributor of programming, like ESPN, puts its property in the marketplace, it gets paid directly from the local distributor for its shows. When a superstation, however, has its programming delivered via satellite nationally, there is no payment made by the local distributor for the right to publicly broadcast the station locally.²⁶ There is no direct payment to the superstation because it is not responsible for the national distribution of the programming.²⁷ The local independent over-the-air station, or first half of the superstation matrix, broadcasts the event publicly over-the-air in their ADI; then another company completely independent of the superstation, picks up the over-the-air signal, transmits it up to a satellite which in turn re-distributes the signal nationally; local satellite distributors pick up the signal and offer it as part of their basic package to their subscribers, thereby making up the second half of the superstation enterprise.

The problem begins to emerge when it is debated what constitutes a public performance of the underlying copyrighted work, for example a baseball game. As a local over-the-air television station, the superstation pays a copyright fee to publicly perform the work in their local ADI, which reflects the size of the viewing audience in that city. When the copyrighted work is distributed nationally into several million television homes without the control or consent of the independent station, that station cannot be legally responsible for the copyright infringement which occurs when more people than contracted for are viewing the re-publication of the protected work. In fact, it is the copyright statute which allows this to happen. The statute stipulates that a secondary transmission (the satellite up-link of the over-the-air signal in the superstation example) of a primary transmission (the local television over-the-air broadcast of the programs) is exempt from copyright liability if the secondary transmission is simply a relaying of the signal in its entirety by one with no direct or indirect control or influence upon the over-the-air signal.²⁸

Because the law allows the signal to be distributed nationally with the copyright fee only reflective of the local ADI distribution,

26. See *Copyright Royalty Fees*, *supra* note 19, at 395.

27. *Id.* at 397.

28. 17 U.S.C. § 111(a) (1976).

the statute provides for the copyright holder to be compensated for this unsanctioned national distribution.²⁹ The statute stipulates that when a local over-the-air television signal is distributed nationally via satellite, the local cable distributor who receives and distributes to its customers this "distant signal,"³⁰ must pay a statutory compulsory license fee.³¹ The copyright act grants these responsibilities to an independent body, not a part of the copyright office, called the Copyright Royalty Tribunal (CRT).³² The CRT collects the fees and decides what copyright holders have had their works distributed nationally via these superstations and, in turn, pays those copyright holders for the national exposure of their product. The manner in which the fee is calculated is very complicated. Originally, a cable system would pay a small percentage (.675%) of gross receipts for every secondary transmission (pumping down the cable to the viewer) of any non-network (i.e. non-ABC, NBC, and CBS) distant signal program.³³

In 1982, approximately 6,200 cable systems paid a total of forty million dollars in compulsory licensing royalty for an average of about \$6,500 per cable system.³⁴ Of the forty million dollars received by the CRT, the greatest share, almost seventy-five percent, was distributed to the Motion Picture Association and other program syndicates.³⁵ The next largest share, fifteen percent or about six million dollars, went to the sports industries.³⁶

Because the original fee was relatively low, many of the copyright holders sought adequate compensation for their copyrighted work. Ultimately, that vehicle became the courts.

The landmark case covering the issue is *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*³⁷ Doubleday, as the owner of the New York Mets, had the right to the local broadcast of all Mets games in New York City. Doubleday contracted with a local independent station in New York, WOR-TV, to broadcast the Mets

29. 17 U.S.C. § 111 (1976).

30. Distant signal is a term which refers to the local distribution of programming networks which do not originate locally. The Federal Communications Commission (FCC) and the copyright office directly and indirectly regulate the number of distant signals allowed to be distributed by local cable companies in an effort to ensure the accessibility of local programming to the community.

31. 17 U.S.C. § 111 (1976).

32. *Id.*

33. *Id.*

34. See *Copyright Royalty Fees*, *supra* note 19, at 284.

35. See Ladd, *supra* note 10, at 17.

36. See *Copyright Royalty Fees*, *supra* note 19, at 292.

37. 691 F. 2d. 125 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1232 (1983).

games locally. During the term of the contract, Eastern Microwave, Inc. (EMI), a satellite relay carrier, began picking up WOR's signal off-the-air and distributing it via satellite across the nation without WOR's permission. EMI would then sell the signal to local cable companies for a moderate fee (never more than \$3,000 per year). The local cable company could then pump WOR's signal down the cable and, in addition to the fee paid to EMI, only pay the inexpensive compulsory license fee to the CRT. This would allow local cable companies to give their subscribers over 100 Mets games a year for a cost far less than the money that they were receiving from subscriber revenues. Therefore, the Mets games were being distributed nationally, and Doubleday was receiving only a copyright royalty from WOR which reflected WOR's over-the-air broadcast in New York City, plus the CRT disbursement. This fee was supposed to compensate for the additional national cable distribution, but in reality, was far short of what the national cable market exposure was worth.

Doubleday made several arguments in the case, asking that EMI be stopped from distributing Mets games nationally, but the court found that EMI was within the scope of the statute and that the system, theoretically, justly compensated Doubleday for its copyright. The superstition was legally placed into a loophole which allowed them to reap the benefits of national distribution (the ability to sell national advertising time) while paying the copyright cost for programming based solely on the over-the-air exposure in its local market.³⁸

Because the dollar value of the compulsory license was a relatively low figure for the amount of programming being exposed to a national audience, the CRT increased the fee. The new rate established was 3.75 percent of basic receipts for each superstition carried.³⁹

This rate increase took place on March 15, 1983, and was known as "Black Thursday" for it increased by four to sixteen times the existing copyright royalty fees cable systems were required to pay for the right to locally distribute those distant signals.⁴⁰ In response, many cable franchises felt that the fee was too much to pay to the copyright office, so many franchises took one or more of the superstitions off their basic service and replaced it with cheaper programming. The National Cable Television Associ-

38. 691 F.2d at 126-27.

39. 17 U.S.C. § 801(b)(2) (1976).

40. See *Copyright Royalty Fees*, *supra* note 19, at 259.

ation (NCTA) found that as many as nineteen million Americans may have lost service as a result of the CRT's rate increase.⁴¹ Nevertheless, many sides are now upset. The copyright holders, even with the rate increase, still feel that their compensation is substantially less than adequate for the national distribution of a protected work. The cable distributors feel that the fee is too high for the programming they receive, and the fans are angry because they have either lost their access to the games, or now must pay more for the games they receive. These are just the surface problems. Beyond these issues, however, it is necessary to address some of the industry arguments and their repercussions.

II. INDUSTRY PROBLEMS WITH THE SUPERSTATIONS

Having discussed issues that surround superstation delivery of distant signals into local markets, it is important to now examine the economic and practical by-products of this intricate anomaly. Realizing that the owners in MLB have collectively retained the right to the local broadcasts of their teams' games, and that they freely sell those rights on the open market in their respective cities, it is understandable that a team would choose to sell its local game rights to a local station which though beyond their control, broadcasts those games nationally. From a pure economic point of view, even if the team owner is not getting a better contract in terms of dollars from the station itself, at least theoretically the owner should be indemnified by the CRT. Moreover, the national exposure can only increase the value of the team.⁴² Ultimately, there is nothing to stop an MLB team from going to the bargaining table with their flagship superstation and demanding more dollars for its copyrighted games. Logically these games are distributed nationally by the superstation, and regardless of the nominal monies they may receive from the CRT, the team is entitled to a larger fee which should be in accordance with the financial benefits the superstations are receiving, via their advertisers, for the national distribution of their signal.⁴³

41. *See id.* at 353.

42. Currently there are five superstations: WOR, WGN, WTBS, WPIX and KMGE, with another four already licensed for operation. Of the five in existence, all are flagship stations for an MLB team and two have cross-ownership interests. Of the four to come on line in the future, all are flagship stations for an MLB team with two having cross-ownership.

43. This issue has been complicated by the argument that there are two types of superstations: active and passive. An active superstation is a local independent, like WTBS, which vigorously pursues the marketing of its signal on a national scale, always pressing for

Even though the five franchises affiliated with superstations have received criticism from other MLB owners for undermining their home marketplaces, the owners have willfully entered into contracts with their flagship-superstations. In addition, four additional teams will shortly be on a flagship superstation voluntarily. Therefore, it now becomes important to examine the arguments the league itself has made through its commissioner concerning the superstation issues.

The commissioner's office has opposed the compulsory licensing provisions of the Copyright Act since its inception.⁴⁴ In opposition to superstations, the commissioner's office has put forth several arguments, including that the importation of distant signals into a local cable market, which is the home of another MLB franchise, erodes fan loyalty to that home team. This erosion has two aspects. First, that home attendance has dropped and second, that local viewership of the home franchise on its local channel also drops. As a result, those flagship stations, theoretically, lose advertising dollars and accordingly would pay less to the local franchise owner for the local distribution rights. Another argument put forth by the commissioner is a purely legal one, which simply asserts that the entire cable copyright process, including the establishment of the CRT, constitutes an outright taking or expropriation of MLB's property or copyright.

A) Superstation Effect on Attendance

Since the beginning of superstation broadcasts, the commissioner has argued that superstation penetration into distant markets has negatively affected gate attendance at local franchise games. The problem with this argument lies in the lack of supporting evidence. The yearly gate attendance of any MLB club is a function of a number of variable elements, including the existence of a popular superstar, the availability of other competing leisure time activities to compete for the limited entertainment dollar in the city, the size and quality of the team's marketing program and, probably most importantly, the team's performance. Just which

greater and greater national advertisements. A passive superstation, like WGN, accepts the position that it has no control of the fact that its signal is distributed nationally, and therefore it looks to sell only local advertisements and considers itself a victim of circumstance.

44. See *Copyright Royalty Fees*, *supra* note 19, at 378. Note that beyond the copyright issue the commission has requested that a fifty mile blackout of retransmissions of broadcast sporting events by cable systems located in a professional sports franchise local market be added to the local cable transmission as well as its existing restrictions for over-the-air broadcasts.

factor is most responsible for a drop in attendance at any given point in time is almost impossible to say. To make the assertion that superstition penetration is an over-riding influence is unsupportable.

In attempting to determine just how influential a superstition is upon a home team's attendance, it is important to first decide how much attendance is predicated upon team performance. Table 1 below, includes each team's average standing in its division over a five year period along with its average attendance for the same period. The only two teams which did not follow the standard of the better the performance, the better the attendance, were the Baltimore Orioles and the Pittsburgh Pirates, who ranked first and second in the standings respectively, while each placed fifth in attendance in its division during the same period.⁴⁵ Overall, the teams with the best records were on top for attendance, teams with poor records were on the bottom, and all others were in the middle for attendance.⁴⁶

TABLE 1⁴⁷

| <u>TEAM</u> | <u>COL. 1</u> Average Standing | <u>COL. 2</u> Rank | <u>COL. 3</u> Average Attendance | <u>COL. 4</u> Rank |
|-----------------------|--------------------------------------|-----------------------|--|-----------------------|
| NATIONAL LEAGUE EAST | | | | |
| Philadelphia Phillies | 1.8 | 1 | 2,502,957 | 1 |
| Pittsburgh Pirates | 2.4 | 2 | 1,259,268 | 5 |
| Montreal Expos | 2.8 | 3 | 2,075,260 | 2 |
| St. Louis Cardinals | 3.4 | 4 | 1,744,088 | 3 |
| Chicago Cubs | 4.8 | 5 | 1,421,934 | 4 |
| New York Mets | 5.8 | 6 | 1,084,823 | 6 |
| NATIONAL LEAGUE WEST | | | | |
| Los Angeles Dodgers | 1.8 | 1 | 3,315,456 | 1 |
| Houston Astros | 3.2 | 2 | 1,643,038 | 3 |
| Cincinnati Reds | 3.6 | 3 | 1,885,765 | 2 |
| Atlanta Braves | 3.8 | 4 | 1,328,858 | 6 |
| San Francisco Giants | 4.0 | 5 | 1,349,094 | 5 |
| San Diego Padres | 4.6 | 6 | 1,482,686 | 4 |

45. See *Copyright Royalty Fees*, *supra* note 19, at 380. Note, the low attendance even with the good performance by Baltimore and Pittsburgh may have been caused by stadium location, ticket price, weather, or availability of parking, in addition to the possible reasons mentioned above.

46. *Id.*

47. *Id.*

| TEAM | COL. 1 | COL. 2 | COL. 3 | COL. 4 |
|----------------------|---------------------|--------|-----------------------|--------|
| | Average Standing | Rank | Average Attendance | Rank |
| AMERICAN LEAGUE EAST | | | | |
| Baltimore Orioles | 2.0 | 1 | 1,637,050 | 5 |
| New York Yankees | 2.8 | 2 | 2,360,050 | 1 |
| Milwaukee Brewers | 2.8 | 2 | 1,950,637 | 3 |
| Boston Red Sox | 3.6 | 4 | 2,072,452 | 2 |
| Detroit Tigers | 4.2 | 5 | 1,719,362 | 4 |
| Toronto Bluejays | 6.2 | 6 | 1,520,167 | 6 |
| Cleveland Indians | 6.2 | 7 | 931,808 | 7 |
| AMERICAN LEAGUE WEST | | | | |
| Kansas City Royals | 1.6 | 1 | 2,210,878 | 2 |
| California Angels | 3.2 | 2 | 2,387,733 | 1 |
| Texas Rangers | 3.6 | 3 | 1,336,743 | 4 |
| Chicago White Sox | 3.8 | 4 | 1,534,555 | 3 |
| Minnesota Twins | 4.6 | 5 | 881,546 | 7 |
| Oakland A's | 4.8 | 6 | 941,290 | 5 |
| Seattle Mariners | 6.2 | 7 | 888,406 | 6 |

After discussing the effect that performance has on gate attendance, it is important to analyze the fluctuation in attendance that occurs at home games during the importation by cable systems of distant games via superstation signals. Table 2 below, compares total attendance for a two month period in 1983 for home games played by MLB clubs⁴⁸ simultaneously with WTBS-Atlanta Braves broadcasts into those distant markets, and for home games played at a time when no simultaneous Braves games were broadcast into the local market. The statistics show that gate attendance was actually slightly higher when Braves games were simultaneously available on cable in the local market.⁴⁹ In reading the table, it is important to note that these statistics are league-wide and that some teams' attendance for the period was lower when Braves games were simultaneously broadcast.⁵⁰ Whether this was caused by the importation of Braves games or any combination of factors is difficult to say, but an examination of the league-wide statistics demonstrates that if there is any negative effect at all, it appears relatively minor.

48. See *Copyright Royalty Fees*, *supra* note 19, at 380. Note, this data was compiled by Turner Broadcasting System, the owners of the Atlanta Braves. The data reflects home gate attendance during June and July of 1983 for 23 major league clubs. The Expos and the Blue Jays were left off because they served Canadian markets; the Braves were omitted because WTBS is their flagship station. June and July were selected to minimize the effect of the pennant race and the standings upon attendance.

49. *Id.* at 382.

50. *Id.* at 383.

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TABLE 2

| | Simultaneous WTBS/Braves Broadcast | | | No Simultaneous WTBS/Braves Broadcast | | |
|---|--|--------|------------|---|--------|------------|
| | COL. 1 | COL. 2 | COL. 3 | COL. 4 | COL. 5 | COL. 6 |
| | Total | # | Average | Total | # | Average |
| | Attendance | Games | Attendance | Attendance | Games | Attendance |
| American League | 4,717,763 | 196 | 24,070 | 3,925,018 | 166 | 23,645 |
| National League | 4,771,828 | 186 | 25,655 | 2,281,841 | 96 | 23,769 |
| Both Leagues | 9,489,591 | 382 | 24,842 | 6,206,859 | 262 | 23,690 |
| 12 Bottom Teams | 4,465,894 | 205 | 21,785 | 3,012,261 | 142 | 21,213 |
| 10 Smallest Metro Areas | 3,729,698 | 172 | 21,684 | 2,172,449 | 109 | 19,931 |
| Intersection of Bottom Teams and Smallest Areas | 2,515,243 | 125 | 20,122 | 1,490,965 | 81 | 18,407 |

B) Superstation Effect on Local Television Revenues

The next component of the commissioner's argument is that superstation distant signal importation adversely impacts an MLB club's revenue derived from the sale of team copyrights in the local broadcast of club games. Again, it is difficult to prove that any single variable has a substantial impact on a local broadcast rights contract, which may be influenced by any number of variables, including team performance or superstars. An examination of the overall trend in television packages for MLB over the past five years indicates that there has been an enormous rise in television revenue for MLB, far surpassing the rate of inflation. Thus, it would be difficult to establish that MLB television contracts have suffered from superstations.

TABLE 3⁵¹

| | TOTAL TV | % | NET- WORK ^[52] | % | LOCAL TV | % |
|------|-------------|------|------------------------------|------|-------------|------|
| YEAR | REVENUE | INC. | REVENUE | INC. | REVENUE | INC. |
| 1984 | 268,000,000 | 75% | 160,000,000 | 193% | 104,950,000 | 11% |
| 1983 | 152,710,000 | 29% | 54,500,000 | 9% | 94,710,000 | 46% |
| 1982 | 118,350,000 | 32% | 50,000,000 | 59% | 64,950,000 | 34% |
| 1981 | 89,525,000 | 12% | 31,500,000 | | 48,400,000 | 25% |
| 1980 | 80,275,000 | 11% | | | 38,700,000 | 24% |
| 1979 | 54,500,000 | 47% | | | 31,225,000 | |

Table 3 above shows the annual increase in revenue from the sale of both national and local television rights. In the recorded time period, local television income has averaged a twenty-eight percent increase yearly.

In order to place these dollar figures in perspective with the league and the team totals, it is necessary to realize that in 1985 MLB received a total television package of over \$275 million.⁵³ Of the approximately \$105 million received for local broadcast rights, the dollar figures vary greatly from team to team.⁵⁴ For example, the Seattle Mariners receive \$1,400,000 a year for their local broadcast rights while the Philadelphia Phillies receive \$8,000,000, and neither of these two teams are affiliated with a superstation. Teams that were affiliated with superstations, for the most part, had larger local rights contracts than teams which were not. The best examples are the New York Yankees and the New York Mets;

51. *Id.* at 384.

52. This excludes pay television, radio revenues, etc.

53. See Sobel, *Baseball Rights Fees in 1985 to Remain at \$275 million*, *Television/Radio Age*, Vol. 22, No. 16, Feb. 18, 1985 at 31.

54.

LOCAL TV REVENUES IN MLB

| TEAM | 1984 RIGHTS |
|----------------------------|--------------|
| <hr/> American League East | |
| Baltimore Orioles | \$ 3,500,000 |
| Boston Red Sox | 3,400,000 |
| Cleveland Indians | 3,400,000 |
| Detroit Tigers | 2,700,000 |
| Milwaukee Brewers | 3,250,000 |
| New York Yankees | 11,700,000 |
| Toronto Blue Jays | 5,000,000 |

these teams received \$11,700,000 and \$10,900,000 respectively, for their local copyrights.⁵⁵ Maybe the most interesting statistic is the royalty fee the Atlanta Braves received for the sale of their local right to WTBS, which amounted to only \$2,100,000 lowest of any superstation affiliated club. This relationship is simply an academic note of interest because Ted Turner is the owner of both WTBS and the Braves, and thus, the royalty fee may not represent a fair market price.

In the final analysis, the argument that superstations negatively impact local television revenues is difficult to support and, even if true, would be difficult to justify changing the existing structure. If superstations are legal, then let those who can create a

American League West

| | |
|--------------------|-----------|
| California Angels | 4,000,000 |
| Chicago White Sox | 4,000,000 |
| Kansas City Royals | 1,800,000 |
| Minnesota Twins | 1,500,000 |
| Oakland A's | 2,000,000 |
| Seattle Mariners | 1,400,000 |
| Texas Rangers | 5,500,000 |

National League East

| | |
|-----------------------|------------|
| Chicago Cubs | 3,600,000 |
| Montreal Expos | 7,500,000 |
| New York Mets | 10,900,000 |
| Philadelphia Phillies | 8,000,000 |
| Pittsburgh Pirates | 3,000,000 |
| St. Louis Cardinals | 2,600,000 |

National League West

| | |
|----------------------|-----------|
| Atlanta Braves | 2,100,000 |
| Cincinnati Reds | 2,300,000 |
| Houston Astros | 3,100,000 |
| Los Angeles Dodgers | 3,500,000 |
| San Diego Padres | 2,400,000 |
| San Francisco Giants | 2,500,000 |

| | |
|--------------|---------------|
| AL total | \$53,150,000 |
| NL total | \$51,800,000 |
| Majors total | \$104,950,000 |

Not included in the table are network payments for nationally broadcast games that total about \$163 million: ABC-TV, \$85 million; NBC-TV, \$75 million; and CBS Radio, about \$3 million.

See *Broadcasting*, Feb. 27, 1984, at 47.

55. Even though the franchises affiliated with superstations are generally receiving the largest dollar contracts, they are still asserting that for national distribution of their product, they are underpaid.

contract in their best interest flourish.⁵⁶ However, this tension is complicated by the many owners who are convinced that superstations do in fact erode their marketplace, and if all the owners are financially forced to affiliate with a superstation, the saturation of baseball games into the national market would be so great that the game's aggregate value would plummet.

C) Superstations — A Taking of Property

In the past, the commissioner has put forth the argument that superstations, by their very nature, legally steal MLB property, and that this taking must be rectified.⁵⁷ Unquestionably, the courts, including an implied affirmation by the United States Supreme Court,⁵⁸ have found the cable copyright provisions valid as they apply to superstations. Therefore, the statute is valid until Congress sees fit to change it. The MLB owners, having exhausted their remedies in the courts, have tried to persuade Congress to change the law in a manner more protective of baseball's rights.⁵⁹ As of today, the law has not changed, and MLB's argument that there has been a taking of property is still without legal foundation. Assessing this situation, MLB's new commissioner, Peter Ueberroth, has looked for other solutions to these many faceted problems facing the league.

D) Ueberroth's Business Solution

As the commissioner's office began to assess the superstation dilemma, several key issues became clear. First, the courts were not going to offer any relief under the existing law. Second, Congress appears to be open to change, but traditionally the legislature is not quick to take action. So, the commissioner had to look elsewhere, and the only avenue left was to go to the marketplace.⁶⁰

It appeared that MLB had two alternatives to get appropriate

56. Beyond these statistics, the FCC did a three year study and published a report in 1980 on the issue of whether importation of superstation distant signals fractionalized local television audiences and revenues. See Reports in 71 F.C.C. 2d 632; 71 F.C.C. 2d 951 (1979); Report and Order Docket 79 F.C.C. 2d 663 (1980). Basically these reports rejected the argument that superstations negatively affect local television. In fact the study asserts that weather and team performance are the major influences upon attendance and that television has no appreciable impact.

57. See *Copyright Royalty Fees*, *supra* note 19, at 393.

58. See *supra* note 35.

59. See *Copyright Royalty Fees*, *supra* note 19, at 393 (former Commissioner Bowie Kuhn's statement).

60. *Id.*

revenue: either to continue to lobby Congress for a change in the statute and/or to lobby the owners to change their broadcast policy which grants local broadcast rights to each franchise. The possibility existed that the commissioner's office could force a new broadcast policy, one that would either pool all local broadcast rights in addition to the national rights,⁶¹ and/or one which would limit the number of games each team may sell for local distribution.⁶² Assuming that these were the bargaining chips taken to the table, MLB was able to sign an agreement with all five operating superstations to additionally compensate the league for the inadequate copyright royalties which it was receiving from the CRT under the statutory compulsory license, and to pay for the damage caused by the importation of superstation distant signals to club franchise home markets (the decline in attendance and local television revenues). The total package to MLB from the five superstations is estimated at approximately fifteen million dollars per year for the next five years or about an additional \$575,000 dollars to each team per year.⁶³ The manner in which the additional fees were derived between MLB and the superstations is a complex formula which includes taking into account the number of games broadcast and the number of homes the superstation was wired to outside its local market. In simple terms, it might be expressed as each superstation paying approximately fifteen to twenty cents per subscriber per year⁶⁴ in exchange for the following: (1) The right to locally broadcast MLB games which will be distributed via satellite; (2) To be contractually free from future lobbying by MLB for a legislative change in the Copyright Act; (3) To be free from a change in

61. See *infra* notes 73 and 74 and accompanying text.

62. See Craig, *TV Superstation Crisis Is Unresolved*, *The Sporting News*, February 11, 1985, at 14. The National Basketball Association, faced with the same superstation problems as MLB, by owner's agreement, put a ceiling on the number of local telecasts each franchise could sell; ultimately reducing the number of basketball games seen nationally. To clearly see the potential damage of such action to a superstation, consider WTBS's situation: WTBS receives approximately \$225,000 in advertising revenue per game and currently broadcasts 143 MLB games per year. If the owners reduced that to 100 games per year, WTBS could lose \$9.7 million. This is far more than the additional fees (five million dollars) which Turner ultimately agreed to pay MLB. See Taaffe, *He Spent A Lot to Save A Lot More*, *SPORTS ILLUSTRATED*, Feb. 11, 1985, at 168.

63. Note that by adding all television and radio monies together, each MLB team averages about \$11 million a year in broadcast revenues, not including pay television, gate attendance or concessions. With the average MLB player salary at \$289,194 per year this means that a team's salary costs are approximately \$5,800,000 per year, thus leaving a fair profit margin once all the revenue and costs are computed in. See *Copyright Royalty Fees*, *supra* note 19, at 343.

64. See *TV Superstation Crisis*, *supra* note 59, at 14.

the owner's broadcast agreement which would affect the number of games to be locally televised; and (4) To be free from the pursuit of judicial remedies by the commissioner (all for five years).⁶⁵

III. TOWARDS THE FUTURE

As MLB and the entire sports industry look to the future, it becomes increasingly apparent that the interrelationship between sports and broadcasting can only grow more intertwined. In terms of a long range solution to the superstition problem, the most dominant proposal heard throughout the industry is to abandon the CRT. If the CRT is dissolved, then the superstitions and the copyrighted holders, including MLB and its individual owners, will be able to openly contract for a royalty fee which will reflect the fact that the superstition signal is distributing the copyrighted work nationally.⁶⁶ Though Congress is currently considering two bills to change the CRT and there is also talk about removing the CRT, no action has yet been taken.⁶⁷

Another alternative to the copyright problems with superstitions is, rather than abolishing the CRT and allowing for a pure marketplace solution, to form a private collection society to negotiate a free market fee with the cable systems for the retransmission of copyrighted works on the superstitions. Just such a collection organization has emerged in Europe as an answer to this tricky problem of copyright liability due to retransmission of distant sig-

65. It is interesting to note that Turner might have had other considerations weighing upon him which helped promote an accord with MLB. Specifically, Turner Broadcasting Systems is a communications giant which is involved in many financial pursuits of which the Atlanta Braves are a small part. In order for Turner to fund his company's growth, it is necessary for him to raise investment capital, and to do this he must seek funds on the open market. In fact in 1986, Turner is raising \$200 million for his company through a stock option plan and if WTBS was not on solid ground with MLB it would have become much more difficult for him to raise that money. Therefore, the price Turner paid to MLB may have indeed been less than it originally appeared. See *Copyright Royalty Fees*, *supra* note 19, at 99; *TV Superstation Crisis*, *supra* note 59, at 14.

66. See *Copyright Royalty Fees*, *supra* note 19, at 257. Most curious of all is the fact that both sides of this issue would like a market place solution: (1) Sports copyright holders want to negotiate with superstitions without them asserting that they should pay a copyright fee only for local over-the-air distribution because the CRT will compensate the holder for national distribution; and (2) the superstitions want the CRT removed or changed because the compulsory license rate increase instituted by the CRT has theoretically forced many cable systems to no longer carry their signals, thereby reducing their number of subscribers, and in turn reducing the fees they can charge advertisers. Ultimately, it appears that many superstitions are being forced to pay copyright licensing fees that more closely resemble national distribution, and thus, copyright holders are in essence, being paid double.

67. See *Copyright Royalty Fees*, *supra* note 19.

nals by cable systems.⁶⁸ The Association de Gestion Internationale Collective des Oeuvres Audiovisuelles, (AGICOA)⁶⁹ is a collective management organization created to serve the needs of copyright owners in the face of the demands of modern communications technology. Specifically, AGICOA administers the representation of rights from copyright owners (such as MLB) to users (cable systems) and the flow of royalty fees back to copyright holders where, due to multitude of users and owners, it is very difficult to arrange for individual licensing in advance of use.⁷⁰ Essentially, AGICOA operates as a private CRT. The major distinction, however, is that AGICOA is not shackled by a fixed statutory licensing rate (for the CRT it is 3.75% of gross cable revenues), but rather it is free to negotiate in the marketplace any fee it can contractually secure.⁷¹ In fact, AGICOA's first agreement came with the Belgian Cable Operators and was negotiated at a royalty fee of fifteen percent of the cable systems gross revenues.⁷²

If the copyright holders in the United States would pool their simultaneous cable retransmission rights in such a manner, a similarly created organization could supply the answer to the need for compensation in a free market for valuable property. The system would be unsuppressed by the artificial constraints of a compulsory license scheme, while simultaneously managing the enormous numbers of copyrighted works exposed to liability.⁷³

Beyond these possible alternatives to the cable copyright dilemma, MLB has taken certain steps towards improving its bargaining position within the broadcast industry. It is clear that the commissioner has the authority to sell the television rights to the World Series, the League Championship Series, the All-Star game

68. See Firestone, *International Satellite and Cable Television*, UCLA Communication Law Program 1985, at 393.

69. AGICOA, or Association for the International Collective Management of Audiovisual Works, is a non-profit corporation through which copyright holders are compensated for certain limited rights, enabling end users to negotiate for the use of copyrighted works with one central clearinghouse. See *AGICOA: Collective Management For Film Producers*, 3 INT'L MEDIA LAW 106 (1985).

70. *Id.*

71. *Id.*

72. *Id.* at 107. Note, the mechanism by which the royalty fees collected by AGICOA are in turn redistributed back to the copyright holders is a weighting formula based on the length and category of each program, the time of day of the broadcast, and the broadcasting source; the factors are computed to allocate the revenues equitably.

73. For a more detailed analysis of this issue, see Cryan, Crane, and Marcil, *The Future of Sports Broadcasting: An International Question*, 10 SETON HALL LEG. J. —, (1986).

and the national distribution of regular season games.⁷⁴ Moreover, it is equally as clear that the sale of local broadcast rights is governed by the agreement among the franchise owners, wherein each club is authorized to permit the telecast of its games over a broadcast station in its home market and to retain all proceeds from the sale of these "open circuit" broadcast television rights. Furthermore, the agreement now provides that revenue derived from the sale of games to "closed circuit" pay television must be pooled and equally divided.⁷⁵ This has led to the recent formation of MLB's National Pay Television "Pooling" System.

A) MLB's Pay TV "Pooling" System

In December of 1983, MLB decided to pool the rights to the pay television distribution of MLB games. Under the terms of the owners' agreement, only an MLB club, in conjunction with its pay television industry partner, usually a regional sports network (Dodgervision), may import into its regional pay television cable system telecasts of games of other MLB clubs. All local telecasts of MLB games will be available in this pool and any game chosen must be shown live or within twenty-four hours of its conclusion. In order to use the pool, however, each club must offer their service at a price tiered above basic cable. Therefore, the regional sports channel must be on expanded basic or a premium channel. This is necessary to insure that baseball games are not seen over-the-air, thus protecting a flood of that marketplace.

This pooling mechanism allows the regional sports networks which carry, for example, the Orioles, to show an Angels or White Sox game when its pay service might otherwise be dark.⁷⁶ This type of owner's agreement is a direct force which advantageously positions each individual franchise to enter the regional sports network business. As a result, in 1986, nineteen of MLB's twenty-six teams will have their games viewed on some form of a regional pay television network.⁷⁷ The amount of each club's investment in the regional sports networks within its franchise area is unclear, but

74. It is interesting to note that MLB at one time sold national cable rights to the USA Network for a number of games, but upon completion of that contract, it did not renew with USA and rather sold those rights as part of the \$163 million package to ABC and NBC.

75. Because superstations are over-the-air broadcasters and they generate no revenue from cable systems for receiving their signal, they are not obligated to share their proceeds with the other clubs in the league. See *Copyright Royalty Fees*, *supra* note 19, at 396.

76. See Taaffe, *The Dawn of A New Era*, *SPORTS ILLUSTRATED*, April 2, 1984, at 78.

77. See *Copyright Royalty Fees*, *supra* note 19, at 380.

undoubtedly for MLB owners, the regional Pay television network provides their newest source of revenue. Correspondingly, when an owner has an interest in a pay television regional network and gate attendance is down, it may not be as important because the gate attendance in living room seats will be up and overall revenues will theoretically continue to rise.

B) *Pay-Per-View*

All of these developments lead to one increasingly recurring thought: If some regular season games are on pay television today, tomorrow there will be an increased number of regular season games on pay television, and soon the championship games will be seen only on pay television. Evidence of this development is the current shift of Yankee games from WPIX, a superstation, to Sports Channel, a regional pay television network.⁷⁸

Theoretically, as this process evolves, only the away games of a club will be on over-the-air television, because these broadcasts will not adversely affect gate attendance. Later, the home games will be placed on pay television under the assumption that the franchise has now expanded its gate potential into living rooms throughout its region of the country.⁷⁹ Just how quickly this process will develop is difficult to say. With the MLB contract expiring in 1989, it is not too farfetched to imagine an entire network of over-the-air and pay television broadcasts owned and operated by MLB.⁸⁰ Furthermore, with the National Football League (NFL) contract coming due in 1988, a similar form of pay television distribution for football is possible.

The next level of pay television above expanded basic is an innovative concept known as Pay-Per-View (PPV). PPV allows a subscriber hooked up to a cable system to independently contract to view a particular event, like a World Series game, a boxing match or even a regular season game. Using computer electronics, the subscriber transmits a request to see the game via what is called a two-way addressable cable system. The game is allowed to flow along the cable to the subscriber's home and the event is billed on the subscriber's monthly charge. This might very well be the wave of the future, but PPV's downfall lies in the fact that only twenty percent of all cable homes have two-way addressable

78. *Id.* at 391.

79. *Id.* at 291.

80. See Leavy, *Baseball Making Plans For Pay-Cable TV Networks*, Washington Post, April 13, 1983, Section D, at 1.

capability.⁸¹

IV. CONCLUSION

Regardless of the manner in which the superstition issues are resolved, be it by modifying or dissolving the CRT or implementing a private collection agency, the inexorable merger of sports and broadcasting will not be slowed. While MLB continues to cry financial woes in the wake of possible strikes by the players association, the future for expanded revenues through regional sports networks and PPV systems appears likely.⁸² In fact, MLB might look to the pooling of all television rights, national and local, as the NFL does, and in turn equally distribute those funds to all teams as a means of giving greater financial stability to all franchises and to the league as a whole.⁸³ It might even be fair to say that soon all television rights in MLB, both national and local, will be pooled and a new network will appear on the scene.⁸⁴ Until such time, however, MLB and all professional sports must continue to solve the problems surrounding broadcast rights and realize that the argument over the CRT and distant signals may soon fall away under the possible development of a total sports television system.

81. See Klein, *Sport Teams That Are Losing Their Bet That Fans Will Pay For TV Events*, *The Wall Street Journal*, February 19, 1985, at 37. However, a classic example of the potential of this type of service occurred at the end of the 1985 baseball season as the pennant races were heating up. The Mets were playing the Dodgers in Los Angeles, and Dwight Gooden was facing Fernando Valenzuela in a pitchers duel. Dodger stadium was sold out, but Dodgervision offered the game on its PPV system, where 14,000 homes had the game tuned in.

82. See *Pay-Per-View Update*, Vol. 1, No. 16, Oct. 4, 1985, at 5.

83. In an effort to maintain greater financial stability the NFL shares almost 90% of the leagues \$720 million of annual revenue. This is done by: (1) Sharing all national television income and all playoff revenues equally among the franchises; (2) Dividing all regular season gate income by 60% to the home club and 40% to the visitors; and (3) Splitting pre-season gate receipts 50-50. Possibly MLB could follow the NFL's system with some success. See *CABLESPORTS*, Vol. 3, No. 36, Nov. 4, 1985, at 2.

84. If such an event did happen there might be antitrust problems which would have to be addressed. See Hoffman, *Pooling Of Local Broadcasting Income In The American Baseball League - Antitrust and Constitutional Issues*, 32 *SYRACUSE LAW REV.* 841 (1981).