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The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era

Thane N. Rosenbaum

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The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*

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I. INTRODUCTION

In a nation where sports entertainment is such a vital part of the American experience, it is somewhat surprising that the precise law governing the relationship between professional sports leagues and the Sherman Act is so noticeably confused and unsettled. Those who have sought uniformity in this area of law and scholarship had hoped to achieve some level of consistency between the highly developed principles embodied in traditional antitrust law, and that which seems to have evolved in the sports entertainment industry. What has remained from this academic if not athletic exercise is certainly not coherence, but rather a series of vague assumptions about the nature of sports league economic organization. Without offering meaningful guidance as to the potential liability of various trade practices, these assumptions only serve to highlight the inability of courts to apply the antitrust laws in a reasoned and consistent way that recognizes the considerable consumer welfare implications that sports league entertainment provides.

For years, courts and commentators alike have struggled over the antitrust implications of professional sports leagues. The decision whether to apply the Sherman Act to the operation and business of professional sports is one that courts have made in virtually all areas of league conduct, ranging from restraints upon franchise relocation,¹

1. See, e.g., *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 999 (1984); *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974). For a historical breakdown of some of the restraints that sports leagues have imposed on franchise owners, see Weistart, *League*

league expansion or denied transfers of ownership,² player mobility,³ league rule enforcement,⁴ and the prevention of rival league competition.⁵ The challenge has taken many forms, and the players in these controversies are not always the same as those appearing on the field. Indeed, courts have provided the backdrop for some of the more interesting contests in sports history, involving all the drama and romance of a game-ending touchdown or game-saving catch. Through it all, however, courts, commentators, the leagues themselves, and those who have challenged league practices have all in some way attempted to give content to the proper scope and applica-

Controls of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry, 1984 DUKE L.J. 1013, 1024-25 & nn.35-37.

2. See, e.g., *Mid-South Grizzlies v. National Football League*, 550 F. Supp. 558 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Levin v. National Basketball Ass'n*, 385 F. Supp. 149 (S.D.N.Y. 1974); see also Comment, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418, 426-30 (1967) (discussing the various potential restraints that sports leagues place on owners).

3. See, e.g., *Radovich v. National Football League*, 352 U.S. 445 (1957); *Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987), *aff'g* 602 F. Supp. 525 (S.D.N.Y. 1984); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Kapp v. National Football League*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

4. Self-regulatory rule enforcement applies to both professional sports leagues as well as to sports associations that govern and supervise the operation of nonleague affiliated professional sports activities. Compare, e.g., *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977) (enjoining a rule that prohibited players under the age of twenty from playing in the league) and *Bowman v. National Football League*, 402 F. Supp. 754 (D. Minn. 1975) (striking down a roster limitation rule that prevented franchises from signing former players of the defunct World Football League) and *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) (finding that the NBA's "four year rule," which prevented a college player from entering the league until four years had passed since his high school graduation, was an unlawful group boycott) with *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, 511 F. Supp. 1103 (D. Neb.), *aff'd per curiam*, 665 F.2d 222 (8th Cir. 1981) (upholding tennis association rule that prevented the use of "double-strung" rackets) and *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781 (7th Cir. 1981) (challenging race track affiliation rules).

For further commentary on the interaction between the antitrust laws and the rule enforcement procedures of sports leagues and associations, see J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 5.10, at 121-25 (Supp. 1985); Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 43-49 & nn.199-223 (1983); Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws: Los Angeles Memorial Coliseum Commission v. National Football League*, 15 CONN. L. REV. 183, 195 (1983); Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157, 202-04 (1984).

5. See, e.g., *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972); *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

tion of the antitrust laws to the various forms of professional sports league organization and activity.

The reader will discover that this is an overview article. It does not dissect any one particular issue exhaustively, but rather explores several aspects of the antitrust implications of professional sports league conduct. It is mainly concerned with the presence of rival league competition, and whether the antitrust laws are equipped to deal with this issue in light of the economics and structure of professional sports league play. An examination of this issue will necessarily require a discussion of the recent district court opinion in *United States Football League v. National Football League (USFL v. NFL)*,⁶ a case that involves an antitrust challenge by an upstart league against its established rival.⁷ *USFL v. NFL* is important because it comes at a time in professional sports and antitrust history when courts are more likely to realize that the economics of certain industries necessitate a more complete and thoughtful consideration of otherwise questionable trade practices.⁸ The significance of the case also lies in the fact that it offers a pure test of the enforcement powers of section 2 of the Sherman Act.⁹ It involves one of the few instances in antitrust history

6. The court published seventeen opinions dealing with various aspects of both pre- and post-trial motions; two of the most significant are: *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986); *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986).

7. The NFL, established in 1920, is one of the truly great American success stories. See D. HARRIS, *THE LEAGUE: THE RISE AND DECLINE OF THE NFL* 3 (1986) (observing that the audience level for even the earlier years of the Super Bowl exceeded the number of people voting in this nation's presidential elections). It is arguably the premier sports league in the world measured by its financial success and popularity both in this nation, and more recently, worldwide. See Telander, *Go Down Pitch and Buttonhook Smartly*, *SPORTS ILLUSTRATED*, Aug. 11, 1986, at 22 (reporting on a well received exhibition game played between the Chicago Bears and the Dallas Cowboys in London, England). The USFL, founded in 1982, at first did not intend to compete with the NFL. USFL franchises, for the most part, were located in cities in which the NFL did not already exist. Moreover, the league intended to and did play its games during the springtime so as not to oppose the NFL's historical hold on the fall season schedule.

Although the USFL, in its first few years of existence, proved quite successful at acquiring many of the great collegiate players, in its third season, the American Broadcasting Company (ABC) decided not to renew its contract with the new league. At about the same time, the USFL decided to play its games during the fall season, placing itself in direct competition with the NFL, and making itself even less attractive to all the major networks. Taaffe, *The Networks' Cupboards Were Bare*, *SPORTS ILLUSTRATED*, Feb. 25, 1985, at 28 ("The networks have told the league to drop dead if it insists on moving its '86 season to the Fall."). Without a major television network contract, the USFL was unable to operate and lost many franchises in the process. See generally Johnson, *Can the USFL Cut the Mustard?*, *SPORTS ILLUSTRATED*, Jan. 16, 1984, at 76.

8. See *infra* text accompanying notes 243-72.

9. Although the case presents both section 1 and 2 issues, the heart of the matter involves the USFL's monopoly claim under section 2, and whether the NFL has acquired and unlawfully maintained monopoly power in several relevant submarkets within the industry.

where rival professional sports leagues sought to apply the Sherman Act as a means of entering the relevant market.¹⁰

The importance of this article, however, lies in its consideration of several points of antitrust law that courts have yet to explore. Its basic focus is in questioning the continued viability of the Sherman Act when applied to the ordinary business transactions of professional sports leagues.¹¹ These ordinary business transactions typically involve a league's relationship with its players and franchise owners, and at times, the possibility of rival competition. More specifically, this article takes the position that regardless of how one feels about the existence of only one professional league in each sport,¹² this fact alone does not necessarily lead to the conclusion that the league has violated the Sherman Act, or that its very existence somehow lies contrary to the worthy antitrust goal of ensuring a healthy and competitive free market economy.¹³ Indeed, although the average sports fan, or antitrust law professor for that matter, may believe without equivocation that single league domination in each sport necessarily compels a finding of unlawful monopoly power under section 2 of the Sherman Act,¹⁴ or conspiracies in restraint of trade under section 1,¹⁵ a careful

See *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986); see also *infra* text accompanying notes 286-332 (discussing submarket categories within which to define the relevant product market for evaluating section 2).

10. Most of the case law involving the antitrust implications of professional sports leagues deal with player challenges against league rules that restrict mobility. Very few cases involve antitrust challenges by rival leagues. See *supra* note 5.

11. Professional sports leagues impose various restraints on players, owners, and would be owners, all of which have the intended effect of creating a better entertainment product. These ordinary business transactions range from regulating the scheduling of games, imposing roster limitations, setting the dimensions of the playing field, prohibiting players from betting on games, supervising the draft of college players, restricting the mobility of existing players to change teams, and regulating the ability of existing franchise owners to move their franchises to other cities.

12. As of this writing, one league services and dominates each professional sport.

13. The modern theory supporting the enforcement of the antitrust laws against anticompetitive trade practices is based on the notion that by promoting free trade and unrestricted competition, consumer welfare ultimately is enhanced. Such antitrust enforcement leads to lower prices and expanded output. See R. BORK, *THE ANTITRUST PARADOX* 7 (1978) (stating that "[t]he only legitimate goal of antitrust is the maximization of consumer welfare"), cited in Comment, *The Substantive Test for Sherman Act Plurality: Application for the Professional Sports Leagues*, 52 U. CHI. L. REV. 999, 1021 (1985).

14. Section 2 of the Sherman Act provides in relevant 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 the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and upon conviction thereof, shall be punished

15 U.S.C. § 2 (1982).

15. Section 1 of the Sherman Act provides in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in

review of the economic realities existing within this complex market should leave one with a different impression. The unique aspects of the sports industry, coupled with the changing characteristics and economics of sports league organization, call out for a more enlightened approach to antitrust liability, one that recognizes that behind every Steel Curtain that falsely points to monopoly, there is often the presence of other factors that militate against such rigid applications of the Sherman Act.

Along with focusing on whether sports leagues are in fact monopolies under section 2 of the Sherman Act, this article also addresses other potentially unlawful league practices in the context of section 1, and whether courts should continue to consider sports league franchises as a collection of separate legal entities. In doing so, the article assembles a brief history of professional sports league antitrust litigation, and discusses previous attempts to immunize from Sherman Act liability certain trade practices that are justified in the context of broader social and industry objectives. The article then examines some of the assumptions that the early case law has made about the characteristics and structure of professional sports leagues. The basic premise is that the modern era of professional sports has seen vast changes in the way that sports entertainment is produced. As courts have done in other evolving industries, courts in this context should similarly begin to reexamine some of the earlier assumptions about the relationship between sports league trade practices and the antitrust laws. A new approach in response to these circumstances is inevitable, and will assist courts to better understand this relationship in the hope of arriving at more creative and predictable ways of resolving antitrust claims in this area of the law. Finally, this article suggests that when courts are confronted with future clashes between professional sports leagues and those who wish to apply the Sherman Act to league practices, they would do well to think twice before so easily finding liability.

A. *The Antitrust Implications of Professional Sports Leagues in General*

1. SECTION 1 AND THE FEAR OF CONCERTED ACTIVITY

The Sherman Act offers the antitrust plaintiff two roads to recov-

the restraint of trade or commerce among the several states . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished

15 U.S.C. § 1 (1982).

ery. Section 1 seeks to prohibit conspiracies or coordinated group activity designed to restrain trade among those who would otherwise be competitors or sellers at different levels of the distribution chain.¹⁶ Indeed, a typical section 1 claim against a professional sports league alleges the existence of a conspiracy among franchise owners to restrict competition. The cases allege various league abuses, including rules that restrict player movement,¹⁷ limitations on the rights of team owners to move existing franchises to potentially more lucrative locations,¹⁸ and insurmountable barriers to entry imposed by the established league.¹⁹

a. Per Se Invalidity or a Rule of Reason Approach

The first level of analysis concerning the section 1 implications of a questionable trade practice is to decide which test to apply in determining the lawfulness of a given restraint of trade. When evaluating concerted group activity that may rise to the level of an antitrust violation, courts have examined the possible section 1 implications under two competing standards. The first test involves a per se category that treats certain kinds of coordinated business practices that restrain trade as unlawful under section 1 without further investigation into the possible business justification for their use,²⁰ or their potential procompetitive features. Unlawful trade practices that fall within the category of requiring the application of the per se rule include the following: group boycotts,²¹ price fixing,²² horizontal market divi-

16. Section 1 focuses itself solely on concerted anticompetitive conduct even if such conduct does not give rise to a finding of monopoly power. It is not overly important for section 1 purposes that the combined activities have given either one or all of the participants monopoly power within a relevant market. See Comment, *The Substantive Test for Sherman Act Plurality: Application for the Professional Sports Leagues*, 52 U. CHI. L. REV. 999, 1002 & nn.11-12 (1985).

17. See *supra* note 3.

18. See *supra* note 1.

19. See *supra* notes 5 & 6.

20. Upon a finding that a certain trade practice directly restrains trade, there is a conclusive presumption of invalidity under the per se rule. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 342-57 (1982); *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1911); see also *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (ruling that certain restraints are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use").

21. See *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941).

22. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); see *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-402 (1927); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898), *aff'd and modified*, 175 U.S. 211 (1899).

sion,²³ tying arrangements,²⁴ and concerted refusals to deal.²⁵ When an activity exhibits some or all of the characteristics of these prohibited trade practices, a court will look no further and will deem the challenged practice an unlawful restraint of trade in violation of section 1 of the Sherman Act.²⁶

The second test under which courts may evaluate section 1 claims allows for a more thorough inquiry into the reasonableness of the challenged restraint. The rule of reason test, as it is called, has the advantage of avoiding an impulsive judgment of invalidity simply because a challenged industry practice appears, at least facially, to restrain competition.²⁷ This inquiry allows an antitrust defendant an opportunity to provide evidence of procompetitive justifications in support of a challenged activity.²⁸ Particularly in circumstances

23. See *United States v. Topco Assocs.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

24. *International Salt Co. v. United States*, 332 U.S. 392 (1947); see *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-9 (1958).

25. See *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930).

26. The rigid application of per se treatment is not without merit as a means to avoid the unnecessary expenditure of valuable court time reviewing trade practices that the Sherman Act so clearly intended to eliminate. Justice Black, writing for the Supreme Court in *Northern Pacific Railway Co. v. United States*, pointed out that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 356 U.S. 1, 5 (1958).

27. The test first emerged in *Standard Oil Co. v. United States*, where Justice Taft ruled that because the Sherman Act is only concerned with *unreasonable* restraints, the Court should inquire into the nature of the industry structure to determine if any factors are present that would justify the imposition of an otherwise restrictive trade practice. 221 U.S. 1, 58 (1911). Similarly, in *Chicago Board of Trade v. United States*, the Supreme Court defined the proper scope of the rule of reason inquiry in the following manner:

The true test of legality is whether the restraint imposed is such as *merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition*. To determine that question the court must ordinarily *consider the facts peculiar to the business* to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all the relevant facts.

246 U.S. 231, 238 (1918) (emphasis added).

28. In fact, the modern test in applying the rule of reason contemplates that a court not only identify the procompetitive effects of a given restraint, but that it also balance these procompetitive features against any discoverable anticompetitive effects to determine the net competitive significance of the challenged industry practice. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 690 (1978); see L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 72, at 196 (1977); Comment, *Application of Antitrust Laws to Professional Sports' Eligibility and Draft Rules*, 46 MO. L. REV. 797, 815 n.143 (1981); see also *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978) (stating that the "'anticompetitive evils'

where the industry is genuinely dissimilar from other business enterprises, the rule of reason test contemplates that a defending party will point out these differences in economic organization and show that the challenged practice is ancillary to a more central purpose,²⁹ or that the procompetitive features that arise from the restraint outweigh the anticompetitive harms being asserted.³⁰ By showing that the challenged activity has procompetitive features, the defendant places a court in a position of having to balance these positive economic results against the alleged decrease in competition that inspired the lawsuit in the first instance.³¹

This balancing test, as offered in *National Society of Professional Engineers v. United States*,³² is not the only method that courts might use in judging the reasonableness of a particular sports league restraint. Another available approach in applying the rule of reason to a challenged trade practice allows a court to restore life into the common law ancillary restraint doctrine.³³ This test is derived from

of the challenged practice must be carefully balanced against its 'procompetitive virtues' to ascertain whether the former outweigh the latter"). The *Smith* court further added that "[a] restraint is unreasonable if it has the 'net effect' of substantially impeding competition." 593 F.2d at 1183.

29. See Glick, *Professional Sports Franchise Movements and the Sherman Act: When and Where Teams Should Be Able to Move*, 23 SANTA CLARA L. REV. 55, 71 (1983) (citing *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd and modified*, 175 U.S. 211 (1899)). Some commentators have argued that the ancillary restraint doctrine is a more appropriate way of applying the rule of reason to professional sports league trade practices. See, e.g., Lazaroff, *supra* note 4, at 204-07. For a further discussion concerning the role of the ancillary restraint doctrine as an alternative to the *Professional Engineers* balancing criteria, see *infra* notes 33-37 and accompanying text.

30. Sports leagues have not done well in convincing courts that their industry trade practices are more procompetitive than they are anticompetitive. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186-87 (D.C. Cir. 1978) (finding that the NFL draft did not have sufficient offsetting procompetitive virtues to compensate for the obvious anticompetitive economic effects that result); *Mackey v. National Football League*, 543 F.2d 606, 622 (8th Cir. 1976) (holding that the Rozelle Rule is more restrictive than necessary to justify its otherwise legitimate objectives), *cert. dismissed*, 434 U.S. 801 (1977); *Kapp v. National Football League*, 390 F. Supp. 73, 82 (N.D. Cal. 1974) (striking down the NFL reserve system), *aff'd in part, dismissed as moot in part*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

31. This is not so easily accomplished in the professional sports league area. Because the *Professional Engineers* balancing test views competition in economic terms only, it is often very difficult to know how to balance the asserted pro and anticompetitive features of any given restraint. See, e.g., Lazaroff, *supra* note 4, at 216 & n.379.

32. 435 U.S. 679, 690 (1978).

33. This common law doctrine upheld agreements not to compete so long as the restraint was "subordinate or collateral to another transaction and necessary to make that transaction effective." Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. SEC. ANTITRUST L. REP. 211, 211 (1959); see *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279-84 (6th Cir. 1898), *aff'd and modified*, 175 U.S. 211 (1899), *cited in* Glick, *supra* note 29, at 70 n.87; see also Note, *The N.F.L.'s Final Victory Over Smith v. Pro Football, Inc.: Single Entity—*

the early covenant-not-to-compete case, *Mitchell v. Reynolds*.³⁴ This doctrine takes into consideration that certain businesses are fundamentally unique. When these conditions are present, antitrust enforcement simply cannot ignore the surrounding circumstances that led to the adoption of the challenged practice, including the history of the industry, its peculiar business conditions, and the purpose or business justification that makes the restraint necessary.³⁵ If the restraint is merely ancillary to some other legitimate business purpose and is not intended to either harm the market or the field of competition, the court can then feel satisfied that the restraint is merely a function of a unique business arrangement where certain practices are recognized as harmless to the workings of a free market economy.³⁶ Under this doctrine, courts can accept the business justification for a challenged practice even though it arguably falls into a per se category, or has too great of an anticompetitive effect on the industry to meet the rule of reason balancing criteria. It is entirely possible that a restraint is necessary to accomplish some other lawful business objective that cannot be measured simply by the fact that some reduction in competition has occurred.

The ancillary restraint doctrine is essentially noncommercial based.³⁷ Unlike both the per se rule and the recent attempts at giving further content to the rule of reason, the ancillary restraint doctrine

Interleague Economic Analysis, 27 CLEV. ST. L. REV. 541, 553-54 & n.72 (1978) (showing the relationship between the rule of reason and the ancillary restraint doctrine).

34. 1 P. Wms. 181, 24 Eng. Rep. 346 (Ch. 1711), cited in *National Soc'y of Professional Eng'rs, v. United States*, 435 U.S. 679, 688-89 (1978). More recently, Justice Rehnquist, dissenting from a denial of certiorari in *National Football League v. North American Soccer League*, referred to the use of the ancillary restraint doctrine as a proper way of evaluating the lawfulness of a challenged NFL rule. 459 U.S. 1074, 1077-78 (1982) (affirming a Second Circuit decision that invalidated an NFL rule that prohibited the cross-ownership of franchises among different leagues).

35. See Bork, *supra* note 33, at 232-34. Judge Bork, then a professor at Yale Law School, examined the sports league industry and its relationship to the antitrust laws. He wrote that because sports leagues are unique and unlike other businesses, various restraints and agreements not to compete that would otherwise violate the Sherman Act should instead be thought of as incidents of joint enterprises that create a product not otherwise available to the public. Although it is true that these sports league restraints may impede "business competition" between franchises, they are in most instances ancillary to the main purpose of creating a product that will compete in the larger market for entertainment goods. *Id.*; cf. Grauer, *supra* note 4, at 33 (examining the *Smith* opinion and the legality of the NFL's draft of college players, and writing that "any restraint on the player market caused by the draft was ancillary to the overall legal agreement of the teams to act together to produce high-quality football").

36. See J. WEISTART & C. LOWELL, *supra* note 4, § 5.10, at 129; Lazaroff, *supra* note 4, at 196, 201 & n.279.

37. The whole notion of ancillarity turns on factors that support the legitimate competitive needs of an industry at any given time. See, e.g., *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1374-75 (5th Cir. 1980) (requiring that a restraint be justified by legitimate

looks more to achieving an accommodation of market realities, and less to the fostering of competition at all cost. Very often a business entity chooses to pursue noncommercial objectives. In the professional sports context, these noneconomic goals can come in the form of activities designed to increase the marketability of the league product by improving competitive balance on the playing field.³⁸ A league may employ certain business tactics that are not necessarily designed to prevent a rival league from entering the market. Similarly, rules that restrict player movement are often justified as devices used to equalize competition and the betterment of the league product. These rules are not necessarily designed to restrain trade. On the contrary, the challenged practice may be only ancillary to the legitimate objective of increasing the attractiveness of the league's overall product.³⁹ In this way, a court can accept the noncommercial as well as economic realities of a given industry, particularly one that is unique and self-regulating.⁴⁰

When examining the possible section 1 implications of league

competitive needs, reasonably necessary to the attainment of legitimate competitive goals, and drawn narrowly to accomplish these specified goals), *noted in* Glick, *supra* note 29, at 71.

In contrast, the *Professional Engineers* balancing test is completely commercial or economics based. *Cf.* Lazaroff, *supra* note 4, at 204 (explaining that the "modern rule of reason analysis is confined to economic considerations, and only the enhancement of competition is relevant"). Because economics is the relevant criteria for establishing competitive impact, the test has a difficult time in balancing procompetitive features that are not easily measurable in economic terms. The balancing test merely looks at whether the overall intent or effect of the restraint serves to enhance rivalry among market participants. In the sports league context, noneconomic considerations, such as the improvement of competition on the playing field, will not offset the decrease in competition that arises when franchise owners impose league rules that restrict competition among themselves for players, geographic locations, and sources of revenue. *See, e.g.,* Smith v. Pro Football, Inc., 593 F.2d 1173, 1186 (D.C. Cir. 1978) (citing *Professional Engineers* for the proposition that the NFL draft has both anticompetitive and procompetitive effects that are not comparable because one deals with competition on the playing field while the other concerns economic competition off the field); *see also* Note, *supra* note 33, at 550 ("[S]ince the procompetitive aspects of the player draft do not foster or promote competition between the teams, the draft is an unreasonable restraint of trade.").

38. As an example, the NFL, in Smith v. Pro Football, Inc., argued that its draft of college players has a legitimate business purpose of promoting competitive equality on the playing field and thereby resulting in a better entertainment product. 593 F.2d 1173, 1188 (D.C. Cir. 1978). The court rejected this argument and found that, in economic terms, the NFL college draft is inherently anticompetitive, because it does not enhance rivalry within the football industry. A league rule is in one sense deemed anticompetitive unless it encourages others to enter the market or, as a result of an expanded number of suppliers, the league is forced to offer its product at a lower cost. *Smith*, 593 F.2d at 1186.

39. Most league restraints are justified on the grounds that they promote competition in the larger sense by making the league product more attractive to consumers. *See generally* J. WEISTART & C. LOWELL, *supra* note 4, § 5.10, at 116-17, 127.

40. For a discussion of the plausible acceptance of professional sports leagues as a unique economic business arrangement, *see infra* text accompanying notes 211-12.

conduct, courts have struggled over which is the proper test to apply.⁴¹ The question is an important one. Courts may reach a consensus that the unique qualities inherent in the business structure of professional sports, at the very least, necessitate the use of the rule of reason in testing the reasonableness and competitive justifications behind a league imposed restraint.⁴² If so, courts still may conclude that regardless of the particular test used, league actions should be heavily scrutinized under section 1 and ultimately ruled invalid once the court finds that the free market, measured by the degree of competition among participants, is in some way restrained.⁴³

b. The Single Entity Defense

A great deal of scholarship has concerned itself with whether sports leagues can properly assert the "single entity defense" to a section 1 challenge against a league imposed restraint.⁴⁴ The single

41. Generally, the district courts have relied on the per se rule, while the courts of appeals have performed the rule of reason analysis. See generally Note, *Application of the Labor Exemption After the Expiration of Collective Bargaining Agreements in Professional Sports*, 57 N.Y.U. L. REV. 164, 165 n.6, 166 n.8 (1985) (listing the relevant cases).

42. The rule of reason appears to have won out as the proper test in evaluating the section 1 implications of sports league conduct. See, e.g., *Smith*, 593 F.2d at 1179-82; *Mackey v. National Football League*, 543 F.2d 606, 618-20 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); accord Note, *NCAA v. Board of Regents: Supreme Court Intercepts Per Se Rule and Rule of Reason*, 39 U. MIAMI L. REV. 529, 531 & nn.13-17 (1985). Courts have decided to reserve per se invalidity for naked restraints of trade that can further no purpose other than to stifle competition. See *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 100 (1984). The use of the rule of reason is especially appropriate when a court is confronted with a joint venture, such as a professional sports league, that creates a unique industry requiring cooperation among its membership in order to compete in the marketplace. See *infra* notes 211-13. Courts have preferred the rule of reason in sports association cases as well. *National Collegiate Athletic Ass'n*, 468 U.S. at 100-01; *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781, 787 (7th Cir. 1981) (quoting *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57, 59 (1977), for the proposition that "the rule of reason [is] the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act"); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 652 (5th Cir. 1977); *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, 511 F. Supp. 1103, 1116 (D. Neb. 1981), *aff'd per curiam*, 665 F.2d 222 (8th Cir. 1981).

43. Cf. *infra* notes 69-82 and accompanying text (reviewing an alternative way of measuring the off-the-field competitiveness of a professional sports league).

44. See generally R. BORK, *supra* note 13; Grauer, *supra* note 4; Kempf, *The Misapplication of Antitrust Law to Professional Sports Leagues*, 32 DE PAUL L. REV. 625, 631 (1983) (pointing out that joint cooperation makes possible an enterprise that would not otherwise exist); Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 251-52 (1984) (suggesting that sports leagues are not natural economic competitors because they are not capable of independent production); Comment, *supra* note 16 (arguing in favor of single entity status for limited league activities, but not a wholesale exemption). But cf. Blecher & Daniels, *Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act*, 4 WHITTIER L. REV. 191 (1982) (concluding that the single entity defense is inappropriate because sports leagues compete economically on some levels).

entity defense normally operates in situations where the party against whom a section 1 claim is asserted appears to resemble a group of separate actors capable of independent and conspiratorial conduct, but in reality, the entity is one integrated unit without the capacity to conspire with itself.

A recent Supreme Court decision has extended this defense even further than originally contemplated. The Court in *Copperweld Corp. v. Independence Tube Corp.*,⁴⁵ held that a parent corporation is incapable of conspiring with one of its subsidiary operations because, in essence, both the subsidiary and the parent, although separately incorporated, share a commonality of interests derived from the same management structure and corporate affiliation.⁴⁶ Sports leagues have asserted this defense with limited success.⁴⁷ The single entity defense, in this context, begins with the proposition that the league itself is an indivisible product, and that without its structure and governing rules of enforcement leading to the creation of a marketable enterprise, the consumer would have little if any interest in the outcome of any given contest between two independent teams unaffiliated with league play.⁴⁸ Commentators who have noted the relevance of the single

45. 467 U.S. 752, 777 (1984).

46. The Court observed the "basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit." *Copperweld Corp.*, 467 U.S. at 772 n.18, cited in Roberts, *supra* note 44, at 267 n.166.

47. Two cases in particular focused on the possibility that the single entity defense might be available to protect professional sports leagues from section 1 liability. See, e.g., Levin v. National Basketball Ass'n, 385 F. Supp. 149, 152 (S.D.N.Y. 1974); San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966, 969-70 (C.D. Cal. 1974). The great majority of cases, however, have rejected the use of the defense in this context. See, e.g., Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1387-90 (9th Cir.), cert. denied, 469 U.S. 999 (1984); North Am. Soccer League v. National Football League, 670 F.2d 1249, 1256-58 (2d Cir.), cert. denied, 459 U.S. 1074 (1982); Smith v. Pro Football League, 593 F.2d 1173, 1177 & n.11 (D.C. Cir. 1978); Mackey v. National Football League, 543 F.2d 606, 616 & n.19 (8th Cir. 1976), cert. denied, 434 U.S. 801 (1977); McCourt v. California Sports, Inc., 460 F. Supp. 904, 907 (E.D. Mich.), vacated on other grounds, 600 F.2d 1193 (6th Cir. 1979); Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 892-93 (S.D.N.Y. 1975); Kapp v. National Football League, 390 F. Supp. 73, 79-82 (N.D. Cal. 1974), aff'd and cross appeal dismissed as moot, 586 F.2d 644 (9th Cir. 1978); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 503-04 (E.D. Pa. 1972); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

48. The emphasis here is placed on the economic realities of the situation. Sports leagues may appear to be comprised of a number of separately incorporated entities all of which are managed and owned individually. The fact remains, however, that the league itself is the only meaningful productive enterprise. No single team can offer the league product without the complete integration of franchises and manpower. See Blecher & Daniels, *supra* note 44, at 233-34; Roberts, *supra* note 44, at 253 (citing *Copperweld*, 467 U.S. at 769, 772); Note, *supra* note 33, at 562.

Sports league franchises may be separately incorporated in order to achieve certain legal advantages, such as to limit liability in tort and to reduce their overall tax obligations. This characterization, however, should not extend for all legal purposes. See Roberts, *supra* note

entity defense as a means of insulating league governance procedures from section 1 liability have repeatedly voiced the idea that no individual team is capable of producing what the consuming public really wants, the thrilling climax of a championship season for which many teams were contenders, but where only one survived.⁴⁹

Even when an antitrust defendant successfully offers the single entity defense, such action does not forever immunize a league from the application of the antitrust laws. The single entity defense only applies to section 1 claims, because the defense is geared toward negating any inference of concerted activity.⁵⁰ More specifically, when properly applied, the single entity defense only gives rise to a finding that the defendant did not behave in a conspiratorial fashion, because as a single entity it was incapable of acting in concert with itself. Although the league must ultimately rely on coordinated action to create a marketable product, this group dynamic is always subject to the governance of a single entity, the league itself, which enforces rules and sets policy for the league as a whole. Just as no single team can successfully stimulate audience appeal without a worthy opponent,⁵¹ with both teams participating in the overall league contest, so too is it impossible for a single team to conspire with

44; cf. *Copperweld*, 467 U.S. at 772-73 & n.20 (suggesting that "[t]he economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition").

49. At least one commentator has suggested that the tendency for single league domination in each sport is related to the fact that "only a single league can produce that most useful of all products joint, the World Champion." Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1, 6 (1964); see also Weistart, *supra* note 1, at 1033-34, 1041, 1070 (arguing that cooperative league activity creates a new product that begins with a league race and culminates in a league championship); Comment, *supra* note 16, at 1009 & n.36 (citing J. MARKHAM & P. TEPLITZ, *BASEBALL ECONOMICS AND PUBLIC POLICY* 72-73 (1981), for the proposition that a team's standing in the championship race, along with the population size of its natural geographic area, will in large part determine its expected level of fan attendance during the regular season); Comment, *supra* note 2, at 419 ("Interest is thus created not only for the action of the particular game, but for its impact on the championship race.").

50. For section 2 purposes, it does not matter that there is a potential conspiracy in restraint of trade. Indeed, in classifying section 1 conduct as plural, and section 2 as unitary, Congress decided to treat the former more sternly because "[c]oncerted activity . . . is fraught with anticompetitive risk." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984), cited in Comment, *supra* note 16, at 1002-03. Congress is much more concerned with conspiratorial behavior designed to restrain trade than with a single firm's natural attempt to compete more successfully in the marketplace.

51. In the context of intraleague rivalry, one court observed:

[B]y the nature of a sports contest, there must always be an adversary. By analogy, who would enjoy Vida Blue blazing strikes across home plate when the batter's box was empty, or Mark Spitz' triumphs, if he were the only one in the pool. Sports teams need competition, and if there are more than two teams, some type of league is probably desirable.

others independent of the league's overall authority and involvement. As competitive as teams appear and perform on the field, off the field they are part of a much larger universe, one where each team realizes that the league contest itself is what captures the attention of the fans and the consuming public. It is for this reason that some consider the league itself to be the smallest indivisible unit capable of committing an antitrust violation.⁵²

This argument finds support in many characteristics of league organization. In most professional sports leagues, teams share revenues from national television contracts and local gate receipts.⁵³ In a real sense, teams also share player talent through the use of a draft system designed to assure the existence of competitive balance on the playing field.⁵⁴ The draft prevents team owners located in the more lucrative and popular geographic markets from hoarding the best available players. Balancing competitive player strength is not all that leagues offer as justification for their reliance upon the single entity defense. Sports leagues, through a variety of creative devices, often subsidize the weaker franchises among league participants.⁵⁵ This

Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 503-04 (E.D. Pa. 1972).

52. See *supra* note 48 and accompanying text.

53. See Horowitz, *Sports Broadcasting*, in GOVERNMENT AND THE SPORTS BUSINESS 275, 289, 291 (R. Noll ed. 1974); Noll, *Major League Team Sports*, in THE STRUCTURE OF AMERICAN INDUSTRY 365, 378 (W. Adams ed. 1977). The degree of intraleague sharing varies among all professional sports. See J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 5.11, at 700 n.140 (1979). For instance, the NFL, which divides its national television contract equally among member franchises and shares revenue from gate receipts in a way that allocates 60% to the home team and the remainder to the visitor, shares approximately 97% of all league generated revenues. See *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 776 & n.3 (3d Cir. 1983); *Professional Sports Antitrust Immunity: Hearings Before the Senate Comm. on the Judiciary on S. 2784 and S. 2821*, 97th Cong., 2d Sess. 34 (1982) (statement of NFL Commissioner Pete Rozelle), cited in Comment, *supra* note 16, at 1013 n.52. Major League Baseball franchises share among themselves approximately 12.5% of league generated yearly revenues. J. MARKHAM & P. TEPLITZ, BASEBALL ECONOMICS AND PUBLIC POLICY 46 (1981). Baseball divides its gate receipts with an 85-15% split, allowing the home team to keep the larger share. Neither basketball nor hockey share gate receipts. See *Antitrust Policy and Professional Sports: Oversight Hearings on H.R. 823, H.R. 3287 and H.R. 6467 Before the Subcomm. on Monopolies & Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 666 (1982) (statement of NHL President John Ziegler), cited in Comment, *supra* note 16, at 1003 n.51. The National Basketball Association and the National Hockey League each rely almost exclusively on home ticket sales, local cable television, and radio contracts as the primary sources of league revenue. Comment, *supra* note 16, at 1003 n.49.

54. See J. WEISTART & C. LOWELL, *supra* note 53, § 5.04, at 504-05, 513; Comment, *supra* note 28, at 823-27.

55. See Kurlantzick, *supra* note 4, at 190 (referring to this practice as a "bail out" of failing franchises in the interest of the league as an entertainment product). Perhaps one of the more interesting examples of this practice occurred when the twelve franchise owners of the then recently formed World Hockey Association (WHA), in an effort to lure a big name talent

effort to equalize competition on the field is in the best interests of league marketing and promotion.⁵⁶ It is precisely these collective league activities, all designed to promote a superior product, that favor a single entity approach to the Sherman Act.⁵⁷

The common interest that owners have in preserving the financial stability of the entire league is not the only reason that a court could properly find that the league is a single entity incapable of conspiring with itself. Another argument in support of the single entity defense surfaces when one considers that sports leagues present a unique form of industrial organization that bears little resemblance to other industries, particularly those that are more frequently the target of antitrust review.⁵⁸ Once franchise owners join a league, there is no longer the capacity for meaningful individual action because in doing so, the league is empowered to make decisions and exercise rule-making authority on behalf of its member franchises. For this reason, proponents of the single entity defense urge that section 1 can never be an appropriate method under which to evaluate the antitrust implications of league conduct.⁵⁹

The real significance of relying on a league's single entity status is not simply as a theoretical means of avoiding section 1 liability. Although it may be true that a single entity is incapable of engaging in collective conspiratorial conduct with its own constituent members, perhaps more important is the idea that when a league is thought of as a single entity, and not as a group of independent actors, it justifies various league rules that otherwise would not survive antitrust scrutiny. In this way, reliance on a single entity theory can overcome not only section 1 liability, but may overcome a finding of improper monopoly behavior under section 2 as well.⁶⁰

away from the established NHL but realizing that no single team could manage his high asking price, decided to share the cost of the bonus that ultimately brought Bobby Hull to the Winnipeg Jets. See Weistart, *supra* note 1, at 1025 n.40 (citing other forms of subsidization along with the Hull incident).

56. In *Reynolds v. National Football League*, the court suggested that "[s]ome leveling and balancing rules appear necessary to keep the various teams on a competitive basis, without which public interest in any sport quickly fades." 584 F.2d 280, 287 (8th Cir. 1978).

57. Cf. *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 21-22 (1979) (suggesting that an entirely new product, removed from section 1 liability, can be created through collective efforts).

58. See *Blecher & Daniels*, *supra* note 44, at 233.

59. This is not to suggest that the law or the critical commentary has reached anything approximating a consensus. Only two cases have sounded a favorable battle cry in support of the single entity defense in the context of professional sports leagues. *Levin v. National Basketball Ass'n*, 385 F. Supp. 149 (S.D.N.Y. 1974); *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974). The vast majority of legal scholarship, however, seems to favor this approach to section 1 analysis. See *supra* note 44.

60. The appropriateness of the single entity defense for professional sports leagues hinges

The rule of reason inquiry under *National Society of Professional Engineers v. United States*⁶¹ calls for a balancing test in which a court determines the lawfulness of a particular trade practice by evaluating whether that practice has procompetitive effects that outweigh its anticompetitive tendencies.⁶² The result is an examination of the challenged restraint according to its overall net competitive significance, meaning that a court looks at the industry after the smoke has cleared and determines whether the industry is, in economic terms, more or less competitive after the practice has had time to influence the market than it was before the restraint surfaced.⁶³ If the restraint has lessened the amount of competition within the industry, then the challenged practice is unlawful and violative of section 1 regardless of whether it is reasonable in other ways.⁶⁴

Although this balancing test now appears to be the prevailing method for examining an alleged restraint under the rule of reason, commentators have criticized this test because in many ways it is as inflexible as the rule it was designed to replace.⁶⁵ Admittedly, courts and commentators alike have abandoned the use of per se invalidity when confronted with unique industries.⁶⁶ Upon realizing that the

on a finding that the league as an indivisible product competes against other forms of entertainment. Cf. Note, *supra* note 33, at 557-59 & n.98 (arguing that when viewed as a single entity, league restraints are economically procompetitive because they enable the league to improve its product and thereby compete more effectively against other leagues and other entertainment products); *infra* note 285 (suggesting that sports leagues do in fact compete against a vast array of entertainment offerings). Joint cooperation among franchise owners creates a product that otherwise would not exist, and which is just one among many in the highly competitive entertainment industry. See Note, *The Legality of Sports Leagues' Restrictive Admissions Practices*, 60 N.Y.U. L. REV. 925, 929 & n.22, 931 & n.47 (1985). Once a court accepts a professional sports league as a single integrated unit, it becomes much easier to adopt the view that they compete against many other forms of entertainment. See *infra* text accompanying notes 61-82.

61. 435 U.S. 679, 690 (1978).

62. See authorities cited *supra* note 28.

63. See *supra* notes 30-31 and accompanying text.

64. Justice White, writing a strong dissent in *National Collegiate Athletic Association v. Board of Regents*, argued that because "noneconomic values like the promotion of amateurism and fundamental educational objectives" do not fit neatly within the economics based *Professional Engineers* criteria, the Court must take a more enlightened view in assessing these trade practices in the context of broader Sherman Act objectives. 468 U.S. 85, 134-36 (1984) (White, J., dissenting).

65. Any test in law that relies on quantifiable and objective criteria will inevitably suffer from complaints that it is unresponsive to special circumstances. Because the balancing test is concerned primarily with the competitive significance of a given restraint, a court will invalidate a trade practice as soon as it discovers a reduction in intrabrand competition within the industry. By doing so, the test ultimately ignores certain procompetitive aspects of the restraint that allows the challenged entity to compete more effectively in the interbrand market. See Note, *Rethinking the Rule of Reason: From Professional Engineers to NCAA*, 1984 DUKE L.J. 1297, 1301-09, 1313-17.

66. See cases cited *supra* note 42.

rigid application of per se treatment is not always appropriate, it is both interesting and useful to note that the balancing test adopted in *Professional Engineers* similarly fails to take into consideration that certain industries are deserving of special antitrust review. Although various sports league practices restrain trade to some degree, it does not necessarily follow that these industry conditions are so harmfully pernicious as to be totally lacking in any redeeming virtue.

The *Professional Engineers* test is inherently motivated by economic criteria, with the emphasis placed on examining the competitive conditions that exist within a particular industry before and after a trade practice is imposed.⁶⁷ By doing so, it lacks any appreciation of noncommercial or noneconomic motives that may underlie a particular industry practice.⁶⁸ Among unique business enterprises, perhaps best exemplified by professional sports leagues, certain league practices may not have the overall effect of enhancing intraleague competition, but they nonetheless may possess redeeming virtues from a noncommercial standpoint that should withstand antitrust scrutiny.

In *Continental T.V., Inc. v. GTE Sylvania, Inc.*,⁶⁹ the Supreme Court of the United States recognized that certain vertical restraints do not so obviously lead to per se illegality under section 1.⁷⁰ While certain agreements may in fact *lessen* the amount of intrabrand competition that would ordinarily take place within a given industry, the overall effect of the challenged practice may actually *stimulate* interbrand competition among other products competing for a share of the relevant market.⁷¹ Professional sports leagues ultimately benefit from

67. See *supra* note 37.

68. What is meant by noneconomic or noncommercial motives is that while certain league restraints are anticompetitive in the sense that they do nothing to enhance or promote competition off the field, these rules are uniquely procompetitive because they ultimately make for a better league product on the field. See *infra* notes 69-82.

69. 433 U.S. 36 (1977).

70. Vertical restraints refer to restrictions that manufacturers place upon their distributors. In *GTE Sylvania*, a franchisee challenged a manufacturer's alleged right to determine how many dealers in any one particular market could sell its product; and for that matter, whether a franchisee could decide on its own to sell the product at another one of its locations without the manufacturer's consent. 433 U.S. at 39. The Supreme Court of the United States determined that although this vertical restraint resulted in a decrease in intrabrand competition, it had the simultaneous effect of stimulating interbrand competition. *Id.* at 51-52 & n.19 (pointing out that "[i]nterbrand competition . . . is the primary concern of antitrust law").

GTE Sylvania is a significant case in providing a renewed insight into the workings of the rule of reason and its relationship to the *Professional Engineers* balancing test. The case inevitably gives rise to the implication that an increase in interbrand, as opposed to intrabrand, competition is precisely the kind of procompetitive "redeeming virtue" that can overcome what would otherwise appear to be an obvious restraint of trade under section 1.

71. See Note, *supra* note 33, at 562-64 (suggesting that courts should focus on the economic realities of the situation and conclude that the NFL's activities are inherently

this enlightened approach to section 1 analysis. The NFL, as an example, is often forced to defend itself against the allegation that all of its league rules, particularly those effecting the market for player services, violate the rule of reason because they tend to restrict the amount of intraleague competition for player services that would ordinarily arise absent such restraints on player mobility.⁷² But under the *GTE Sylvania* inter/intrabrand view of competition, the NFL can argue that its intrabrand activities are inherently procompetitive because they make for a better entertainment product.

Under the *Professional Engineers* balancing approach, a professional sports league, by creating restraints that ensure league balance and equality, will never be able to demonstrate that the challenged rules have a net procompetitive effect that results in more competition among league participants. In fact, under this analysis, these league rules are inherently anticompetitive because the goal of achieving relative parity among all franchises ultimately prevents unrestricted competition from taking place. League rules prevent owners from acquiring the best talent available. Without such restraints, some individual franchises, if left to their own natural resources of wealth and geography, could aspire to league domination.⁷³ The history of professional sports league economic organization influences league officials to avoid such displays of one-sided domination.⁷⁴ The costs of league parity are willingly absorbed by team owners who realize that the true value of each franchise is maximized when all teams are of relative equal strength so that the outcome of any given contest is unpredictable and elusive.⁷⁵ While intraleague competition, measured by the competitiveness among teams off the field, is in truth lessened;

procompetitive because as a single entity using league rules to restrain intrabrand competition, the league ultimately makes itself better able to compete against other entertainment products). *But cf.* Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1399 (9th Cir. 1984) (implying the impropriety of a jury instruction that took into consideration the potential of the NFL to compete with all forms of entertainment).

72. Many of the earlier cases featured this argument. *See, e.g.,* Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Kapp v. National Football League, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

73. When instances of single team domination occur, the demise of the league is an event soon to follow. *See infra* note 180.

74. *Id.*

75. *See* J. WEISTART & C. LOWELL, *supra* note 53, § 5.07, at 595-96; Quirk, *An Economic Analysis of Team Movements in Professional Sports*, 38 LAW & CONTEMP. PROBS. 42, 43 (1973); Kurlantzick, *supra* note 4, at 193 n.51; Note, *supra* note 60, at 932 & n.48, 948; *cf.* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 504 (E.D. Pa. 1972) (suggesting that a team's opponent must be at least moderately competent because "customers will not spend their dollars for tickets to view . . . games when the contest seems to present no more of a challenge than an ant confronting an elephant").

the league product itself, measured as the entertainment value of a league's output to the viewing and buying public, is enhanced because the demand for sports entertainment is directly related to the fierceness of the league contest and the race to be the ultimate champion.⁷⁶ Leagues marked by single team domination are destined to financial ruin.⁷⁷ When either the knowledgeable or casual sports observer can easily predict the outcome of league contests, fan interest will decline in favor of alternative forms of entertainment.⁷⁸

A league will show a net procompetitive effect according to the *Professional Engineers* criteria for evaluating section 1 claims under the rule of reason whenever it is treated as one indivisible product competing against the vast array of alluring entertainment attractions that appear on television, at theaters, or in any number of places where Americans spend their leisure time and dollars.⁷⁹ In contrast, when viewed as individual teams rather than as a single entity, a league will not be able to overcome a balancing test that emphasizes the net competitive significance of an industry trade practice. The league is rendered less competitive, from an economics standpoint, when the league adopts rules with a view toward achieving team equality and divisional balance. A careful look at the amount of inter-brand competition among competing products within the entertainment industry, however, reveals that professional sports leagues may in fact face a glut of competition from alternative forms of entertainment.⁸⁰ For this reason, in an effort to meet this industry challenge, competition on the playing field must become more evenly balanced. When sports leagues create parity among member franchises, they are better able to justify rules that stimulate the attractiveness of the league product within the highly competitive market for entertainment goods.⁸¹ In light of the intensity of competition within which

76. See *supra* text accompanying notes 61-82.

77. See *infra* note 180.

78. It is the contention of this article that because professional sports compete in the wider entertainment market, which includes but is not limited to the market for the specific product created and then sold, any time the product itself no longer captures the imagination of the American sports fan, consumer preferences will shift to other displays of entertainment with outcomes not so predictable, and where the excitement level remains fever pitched. See *supra* notes 73 & 75; *infra* note 285.

79. For several interesting discussions concerning the *GTE Sylvania* view of intra/interbrand competition and its relationship to professional sports league participation in the entertainment market, see Kurlantzick, *supra* note 4, at 197; Lazaroff, *supra* note 4, at 191-93; Roberts, *supra* note 44, at 282-83 & n.215.

80. See *infra* note 285 and accompanying text.

81. Cf. Comment, *supra* note 16, at 1014 (suggesting that the achievement of competitive balance reduces the predictability of games and thus increases revenues).

sports leagues compete, courts should sustain most league devices aimed at enhancing the quality of its product.

This formula of interbrand competition is critical in reviving scholarly and judicial interest in the single entity defense as a means of overcoming section 1 liability. Only when a court regards a sports league as a single product will most league restraints survive section 1 scrutiny under the rule of reason.⁸² Any other view of league organization gives rise to the unmistakable conclusion that the restraints are anticompetitive because they are without the necessary accompanying effect of stimulating competition within the league and improving the "on the field" performance of its teams.

2. SECTION 2 MONOPOLY POWER AND ITS THREATENED MISUSE

Section 2 of the Sherman Act,⁸³ focusing as it does on monopoly power, presents an entirely different set of circumstances that trigger its violation. Regardless of how professional sports leagues fare in the context of section 1, section 2 is still an available means by which to challenge the market power of a sports league and its causes, if any, of market imperfection. Unlike section 1 and its purpose of eliminating

82. The single entity defense has had virtually no success in insulating professional sports leagues from Sherman Act liability. See *supra* note 47 and accompanying text. Courts have examined the structure of professional sports leagues, and concluded that while cooperation is necessary to create the league product, the fact remains that the individual franchises are sufficiently independent for other legal and structural purposes. See *supra* notes 47 & 53 and accompanying text; see also Note, *supra* note 60, at 929 (citing *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1390 (9th Cir. 1984), in recognizing that NFL franchises maintain separate accounting books, do not share profits and losses, are managed independently, make certain decisions individually (such as player acquisitions, stadium leases, and ticket prices), and finally, those teams located in the same home territories compete for gate attendance and local broadcast revenues). Each of these cases, however, preceded the recent Supreme Court decision in *Copperweld*, and virtually none of the prior cases properly evaluated the significance of the *GTE Sylvania* decision in the broader context of professional sports league interbrand competition with other entertainment products. Both of these Supreme Court opinions are relevant to any discussion of section 1 liability with respect to sports league trade practices. Even if courts continue to reject the single entity defense as a legal basis upon which to analyze Sherman Act liability, the view of a sports league as a single entity is still important, because it is arguably the only way that a league can satisfy the modern rule of reason with its emphasis on the net competitive significance of a challenged trade practice. It is only as a single integrated unit that a league can safely argue that its activities are procompetitive because they stimulate interbrand competition within the wider entertainment market. See *supra* notes 69-81 and accompanying text; see also Note, *supra* note 65, at 1302 n.136 (suggesting that cooperative business arrangements such as professional sports leagues offer a middle range alternative between the existence of complete free market competition among diverse groups and legitimate single entities); cf. *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966, 969 (C.D. Cal. 1974) (characterizing the NHL as "one single business enterprise, competing against other similarly organized professional sports leagues" (emphasis added)).

83. See *supra* note 14.

conspiracies designed to restrain trade, section 2, which seeks to prevent one firm's ability to raise prices and restrict output, is more concerned with monopoly activity in general, regardless of whether the objectionable conduct involves a plurality of actors.⁸⁴ The distinction between the two phases of Sherman Act liability can be simplified by saying that section 1 seeks to outlaw restraints on trade while the sole purpose of section 2 is to eliminate harmful monopolies. In fact, section 2 is primarily concerned with the unlawful acquisition or maintenance of monopoly power that one single firm has managed to acquire.⁸⁵ Even in situations where an entity can prove that it achieved its market position without resort to anticompetitive conduct, the Sherman Act, under section 2, still provides a remedy when either entry barriers, predatory conduct, or other forms of exclusionary behavior has prevented an emerging competitor from entering the market.⁸⁶ With this in mind, a legal monopoly, one acquired through superior skill or business acumen,⁸⁷ congressionally authorized,⁸⁸ or simply one that arises "naturally" out of economic necessity,⁸⁹ is at once subject to antitrust liability if found to have misused its market position, however lawfully acquired but nonetheless illegally maintained.⁹⁰

84. J. WEISTART & C. LOWELL, *supra* note 53, § 5.10, at 689-93; Comment, *supra* note 16, at 1001 n.9.

85. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272-74 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

86. *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

87. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), *cited in* Wentz, *Monopoly Power in Completed and Attempted Monopolization Litigation: The Convergence of Law and Economics*, 90 DICK. L. REV. 261, 264 (1985).

88. *See, e.g., Football Merger Act of 1966*, 15 U.S.C. § 1293 (1982); *Sports Broadcasting Act of 1961*, 15 U.S.C. § 1291 (1982). For professional sports league cases addressing the congressionally authorized grant of monopoly power, *see Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 781-84 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *United States Football League v. National Football League*, 634 F. Supp. 1155, 1160-65 (S.D.N.Y. 1986).

89. A natural monopoly is a situation where "the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more." Posner, *Natural Monopoly and its Regulation*, 21 STAN. L. REV. 548, 548 (1969), *quoted in* Hamilton & Caulfield, *The Defense of Natural Monopoly in Sherman Act Monopolization Cases*, 33 DE PAUL L. REV. 465, 465 n.1 (1984). For a further discussion concerning the relationship between natural monopoly theory and professional sports league industrial organization, *see infra* text accompanying notes 273-85.

90. *See, e.g., J. WEISTART & C. LOWELL, supra* note 53, § 5.11, at 691 & n.81; *cf. Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 784 (3d Cir. 1983) (questioning whether the NFL may have abused its congressionally authorized grant of monopoly power), *cert. denied*, 467 U.S. 1215 (1984).

In order to succeed in proving a section 2 violation, the antitrust plaintiff must show that the monopolist has gained a disproportionate share of the market,⁹¹ either through unlawful means, or if lawful, as a result of anticompetitive behavior related to the illegal exercise of its market position.⁹² The policy behind section 2 is based on two free market ideals; first, that the greater the range of competitive economic activity within a given market, the greater the likelihood that this ongoing competitive process will maximize consumer welfare and result in the lowering of prices and an increase in output; and second, the improvement of overall industrial efficiency.⁹³ Legal scholars in this area have observed that the monopolist, as the sole or primary supplier of consumer wants in a particular industry, is able to ignore market forces and economic signals that in a model of perfect competition, would normally guide the supplier's output and pricing decisions.⁹⁴ Rather than responding to the market, the monopolist, free from the competitive pressures faced in other industries, is able to acquire and maintain its position and resulting monopoly profits without operating at the point where society's demand for a given

91. Courts have attempted to isolate the actual percentage of market domination that gives rise to automatic section 2 liability. *See, e.g.*, *International Boxing Club, Inc. v. United States*, 358 U.S. 242, 249 (1959) (concluding that 81% of championship boxing contests constituted an impermissible market share); *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) (finding unlawful monopoly power with over 80% of the market for cigarette manufacturing); *International Distrib. Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2d Cir. 1987) (finding less than a 50% market share to exhibit little antitrust concern); *Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1204 (9th Cir. 1975) (suggesting that anywhere between 45% to 75% of the market for unconcentrated juice is unlawful), *cert. denied*, 425 U.S. 959 (1976); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (concluding that a 90% market share of the aluminum industry constitutes a monopoly, but doubting whether 64% is unlawful). For a general discussion concerning the standards that courts have set in determining monopoly power and market share, see Wentz, *Monopoly Power in Completed and Attempted Monopolization Litigation: The Convergence of Law and Economics*, 90 DICK. L. REV. 261, 265-67 & nn. 26-52 (1985).

92. Early cases that examined the more traditional antitrust issues identified the elements necessary in proving a section 2 violation.

The offense of monopoly power under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966), *quoted in* *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 505 (E.D. Pa. 1972).

93. For authorities suggesting that consumer welfare is the only proper goal of the antitrust laws, see Grauer, *supra* note 4, at 7-9 and accompanying notes; Roberts, *supra* note 44, at 220 n.4, 232-33 & n.30. *But cf.* Note, *supra* note 65, at 1300, 1302 n.36 (citing *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695 (1978), for the proposition that the Sherman Act is premised on the belief that *competition* is the preferred method of allocating resources).

94. *See* Posner, *supra* note 89, at 550.

resource is harmonized with a pricing schedule that reflects the supplier's most efficient level of output.⁹⁵

On a separate matter, the Sherman Act seeks to prevent displays of anticompetitive behavior that allow a monopolist to maintain its position to the exclusion of others wishing to either surface, or if already present, survive in the market. Regardless of the industry's particular form of economic organization, it is not easy to determine whether the alleged monopolist has in fact achieved a disproportionately high market share. In the professional sports league context, the unique characteristics of league organization make it especially difficult to perform the kind of market and economic analysis that section 2 monopoly questions demand. Indeed, antitrust litigation in industries other than professional sports leagues, which has in general been more prevalent and where courts have examined antitrust issues more exhaustively, has long proven the difficulties inherent in defining the particular market in a way that accurately profiles the alleged monopolist's market power.⁹⁶

Market definition is determined at two different levels, each independently significant in determining the existence of market power and its possible misuse. As a secondary, and essentially noncontroversial matter when dealing with professional sports, courts seek to identify the geographic market for the industry.⁹⁷ This entails an analysis of the geographic locations in which the industry competes.⁹⁸

95. See J. HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 332-48 (2d ed. 1980); cf. Roberts, *supra* note 44, at 232-33 n.40 (showing the relationship between consumer welfare and economic efficiency in the sports league context); Comment, *supra* note 16, at 1006 n.30 (addressing the economic theory that profit-maximizing output is achieved where marginal revenue (MR) equals marginal cost (MC)) (citing R. LEFTWICH & R. ECKERT, *THE PRICE SYSTEM AND RESOURCE ALLOCATION* 289 (8th ed. 1984)).

96. The process of defining the relevant market has no independent legal significance apart from allowing a court to conclude that monopoly power exists in contravention of section 2. When an entity has a disproportionately large share of the relevant market, it is plainly assumed that it has the power to control prices and exclude competition, two aspects of section 2 analysis that trigger its violation. See *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

97. See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 328 (1962); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *Standard Oil Co. v. United States*, 337 U.S. 293, 299 n.5 (1949). For cases discussing the geographic market in the context of professional sports leagues, see *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1393 (9th Cir. 1984); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 988-89 (D.C. Cir. 1977); *Fishman v. Wirtz*, 1981-2 Trade Cas. (CCH) ¶ 64,378, at 74,764-65 (N.D. Ill. 1981); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 502 (E.D. Pa. 1972).

98. The geographic market is generally defined according to commercial realities. See *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 362 (1970). In order to determine the area of competitive overlap, a court seeks out the "area of effective competition in the known line of commerce . . . by careful selection of the market area in which the seller

The geographic market can be either national, regional, or local in scope; meaning that for antitrust purposes, the industry under investigation has a definable geographic boundary.⁹⁹

The more important inquiry, however, focuses on an evaluation of the product market for the industry as a whole, and for the alleged monopolist in particular.¹⁰⁰ The product market is the output, or the end result of the monopolist's productive efforts. Although arriving at a precise definition of the market in which the accused entity competes does not appear to be a difficult or complicated undertaking; in reality, such attempts at defining the relevant product market have proven to be formidable tasks, regardless of the form of industrial activity under antitrust review.¹⁰¹

For each level of analysis, the party raising the antitrust challenge seeks to show that both the product and geographic market in the industry is small, such that whatever share of the market the monopolist may actually have, it is unreasonably large compared to that which its competitors have been able to achieve.¹⁰² This lethal

operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (emphasis added), *cited in both Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. at 362 and *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963).

99. For instance, in professional sports, the geographic market consists of either all cities where league franchises already exist, or all those cities capable of supporting a local team, but for economic reasons, no existing league has chosen to expand into this territory, nor has a new league emerged willing to capture this geographic resource. *See cases cited infra* note 104.

100. *See National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 111-12 (1984); *United States v. Grinnell Corp.*, 384 U.S. 563, 571-76 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n.31 (1953). Market definition in the product area is particularly difficult with professional sports leagues. *See United States Football League v. National Football League*, 644 F. Supp. 1040, 1056-57 (S.D.N.Y. 1986); *Fishman v. Wirtz*, 1981-2 Trade Cas. (CCH) ¶ 64,378, at 74,762-64 (N.D. Ill. 1981); *San Francisco Seals, LTD. v. National Hockey League*, 379 F. Supp. 966, 968-69 (C.D. Cal. 1974). *See generally* Glick, *supra* note 29, at 74-77, 79 & nn.102-18, 122-24 (discussing both the geographic and product markets in which sports leagues compete).

101. Market definition in the product area is difficult because the question turns on whether consumer preferences shift when factors such as price, use, and quality change. *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395-96 (1956); *Broadway Delivery Corp. v. United Parcel Serv., Inc.*, 651 F.2d 122, 129 (2d Cir.), *cert. denied*, 454 U.S. 969 (1981). The product market for any particular industry is defined by whether there is reasonable interchangeability between competing products such that consumers would find themselves indifferent to a choice between them. *Cf. Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (stating that "[t]he outer boundaries of the product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it").

102. In *United States Football League v. National Football League*, the plaintiffs sought to show that the NFL controlled approximately 95% of all revenues generated in the market for professional football, which includes revenue from gate attendance and network broadcasting

combination of industry behavior, a relevant market that is defined as small coupled with a monopolist's disproportionately large individual share, allows a court to conclude that the actual experience of the market is not consistent with the competitive conditions that could exist if unrestrained economic forces were truly at work.¹⁰³ These two critical features, a narrow overall market picture with a broadened view of the monopolist's actual share, provides evidence that the anti-trust defendant's market power is excessive. Professional sports leagues provide interesting examples of the elements of proof necessary to establish unlawful monopoly power. For example, section 2 liability is difficult to overcome once evidence shows that the geographic market consists only of those cities in which the teams in the more established leagues play. A court will then find the existence of one hundred percent market power in the relevant areas in which the industry competes.¹⁰⁴ Naturally, the established league would be better off if it could show that the market geography included not only the cities in which the league already had existing franchises, but also included any other potential cities scattered throughout the United

contracts. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict at 3, 14 & n.*, *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986); *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986) (No. 84-Civ. 7484 (PKC)); accord *United States Football League*, 644 F. Supp. at 1057.

103. In a perfectly competitive market, where there are no barriers to entry and where no supplier has acquired an excessive share of the relevant market, all competitors will respond to supply and demand pressures so that the level of output for any particular good will have a strong economic relationship to consumer tastes, with prices reflecting the ability of a supplier to produce at a given cost. When an industry is dominated by a single firm, however, the monopolist has the ability to decrease output and manipulate prices so as to discourage entry and obtain monopoly profits. These conditions, manifested by a single firm's ability to command higher prices and restrict output, are inconsistent with the competitive model that is responsive to consumer preferences. What society is left with is a corresponding loss of output, known as consumer surplus, which represents the additional amount of supply that the economy would otherwise experience under circumstances without monopoly pricing. See generally J. HIRSHLEIFER, *supra* note 95, at 332-48; Posner, *supra* note 89, at 552 n.6.

104. Courts typically have not taken this view in defining the relevant geographic market for professional sports. Most cases have found that the geographic market is national. See *American Football League v. National Football League*, 205 F. Supp. 60, 76 (D. Md. 1962), *aff'd*, 323 F.2d 124, 130 (4th Cir. 1963). But cf. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 988-89 (D.C. Cir. 1977) (observing that "[i]t is well settled that the relevant [geographic] market 'need not be nationwide,' " because the parties may be competing within a small area) (quoting *Standard Oil Co. v. United States*, 337 U.S. 293, 299 n.5 (1949)). In *Hecht*, the antitrust challenge concerned the use of RFK Stadium in Washington, D.C. The court did not allow the defendant to show that the plaintiff could have taken his team to any available stadium site in the nation. 570 F.2d at 989; see also *Fishman v. Wirtz*, 1981-2 Trade Cas. (CCH) ¶ 64,378, at 74,764 (N.D. Ill. 1981) (defining the relevant geographic market as local because that is the effective area of competition, where the seller operates, and "where the purchaser can practicably turn for supplies") (citations omitted). But see *Shayne v. National Football League*, 504 F. Supp. 1023, 1031 (E.D.N.Y. 1980).

States capable of supporting a local team.¹⁰⁵

Similarly, in defining the relevant product market, a section 2 challenge will succeed in demonstrating excessive market power, or its equally objectionable unlawful misuse, if the court finds that consumers are interested in a particular product, and that the monopolist is the sole or primary supplier of that product within the relevant market.¹⁰⁶ When the evidence compels a finding of excessive market power in the product area, and there are no perceived entry barriers blocking the emergence of rival competitive forces, it becomes obvious that the market is highly price inelastic¹⁰⁷ as far as the consuming public is concerned. When a product is deemed price inelastic, it suggests that there is relatively little if any interchangeability between competing forms of entertainment that consumers will accept as a reasonable substitute for the drama that, for instance, the NFL provides each fall Sunday afternoon.¹⁰⁸ When there is an elastic demand

105. A great deal of scholarship has focused on the minimum population base needed to support a local sports franchise. See Glick, *supra* note 29, at 92; Kurlantzick, *supra* note 4, at 206; Weistart, *supra* note 1, at 1029 n.52; see also *American Football League v. National Football League*, 205 F. Supp. 60, 76 (D. Md. 1962), *aff'd*, 323 F.2d 124, 130 (4th Cir. 1963) (finding that the NFL did not have monopoly power in the relevant geographic market because the market was national and the NFL occupied only 11 of the 31 cities potentially capable of supporting a local team).

106. The Supreme Court of the United States, in *Brown Shoe Co. v. United States*, articulated the scope of market definition in the product area as follows:

The outer boundaries of a product market are determined by the reasonable interchangeability of use or cross-elasticity of demand between the product itself and the substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of each submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

370 U.S. 294, 325 (1962) (citations omitted); accord Glick, *supra* note 29, at 76-77 & nn.112-17. For a further discussion of submarkets and their relationship to professional sports leagues, see *infra* text accompanying notes 286-332.

107. Elasticity of demand refers to the responsiveness of consumer buying preferences to changes in price. See 2 P. AREEDA & D. TURNER, *ANTITRUST LAWS* ¶ 519a, at 349 (1978); L. SULLIVAN, *supra* note 28, § 12, at 41; Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 940 n.8 (1981); Wentz, *supra* note 91, at 265 & nn.29-31.

108. This is precisely what all rival leagues and challengers against established sports leagues and associations seek to prove. See, e.g., *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 112 & n.49 (1984); *International Boxing Club, Inc. v. United States*, 358 U.S. 242, 249-52 (1959); *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 784 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 988 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Smith v. Pro Football, Inc.*, 420 F. Supp. 738, 741 n.1 (D.D.C. 1976), *aff'd in part, rev'd in part on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978); cf. *Coniglio v. Highwood Serv.*, 495 F.2d 1286, 1291-92 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 471, 501 (E.D. Pa. 1972); *American Football League v. National*

for a particular product, the industry should not be characterized as one exhibiting pure monopoly, or natural monopoly conditions; but rather one that operates in a free market economy. The NFL, in order to avoid the unmistakable conclusion that it operates as a monopoly, must come forward and show that the product market is much broader than originally assumed, and that it includes the play of other professional sports leagues and alternative forms of entertainment as well.¹⁰⁹ If able to make such a showing, the league could dispel the notion that its market share is extraordinarily high. In fact, if successful, the league could shift the discussion away from any anti-trust implications from its activities by proving not only that its market share is actually very low, but that this phenomenon is traceable to an abundance of competition in the product market for which the NFL is but one competitor among many challengers for the consuming public's entertainment dollar.¹¹⁰ All professional sports leagues, similar to other industries faced with section 2 antitrust liability, have a singular purpose in reducing the appearance of disproportionate and

Football League, 205 F. Supp. 60, 65 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). Interestingly, however, while established leagues such as the NFL continually remind courts that they are unique industries and beyond the capacity for plural conduct under section 1, sports leagues repeatedly deny that they are unique for section 2 purposes, because to do so suggests that there are no reasonable substitutes for big league sports. See *United States Football League v. National Football League*, 644 F. Supp. 1040, 1057 (S.D.N.Y. 1986) (citing *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1393 (9th Cir. 1984)).

109. *Contra Fishman v. Wirtz*, 1981-2 Trade Cas. (CCH) ¶ 64,378, at 74,741, 74,756 (N.D. Ill. 1981). In *Fishman*, the court ruled:

[T]he presentation of professional basketball exhibitions . . . does not directly compete with any other product or service. It is a form of entertainment which is unique in the eyes of the consumer and is without any close substitute. It has its own fans for whom other products and services are not reasonably interchangeable. Furthermore, the demand for professional basketball is not effected [sic] in any significant way by the existence of other amateur or professional sports or other forms of entertainment.

. . . The sport is recognized by the public, the players, and the owners as a separate economic market whose product is unique and distinctive. It has its own season, league, and championships, and its prices are not directly competitive with the prices charged for any other product or service.

Id.; accord *Lazaroff*, *supra* note 4, at 209-10; Note, *supra* note 60, at 934-35; cf. J. WEISTART & C. LOWELL, *supra* note 53, § 5.11, at 709-10 ("[P]rofessional football generates a following of fans who are not indifferent as to whether their sports dollars are spent on football or some other form of entertainment."). But see *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 132 (1984) (White, J., dissenting); *National Football League v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from a denial of certiorari); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1393 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1252 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); *infra* note 285.

110. See *infra* note 285.

unlawful monopoly power. The problem with defining the relevant market so that it favorably supports an entity's denial of monopoly power is not new to the professional sports league experience with antitrust litigation.¹¹¹ All leagues are inevitably forced to overcome the confusion surrounding the complexities of market definition. The road to success requires a market participant trying to avoid section 2 liability to show that both the product and geographic markets existing within the industry are tailored much broader than those bringing antitrust challenges believe.

B. *United States Football League v. National Football League*

Most recently, the United States Football League (USFL) brought an antitrust suit against the more established National Football League (NFL) in the Southern District of New York, claiming that the older league had conspired to restrain trade and did in fact monopolize the market for professional football by, among other things, jeopardizing the USFL's broadcasting contract with the major television networks.¹¹² The jury ultimately found that the NFL had indeed acquired an unlawful monopoly.¹¹³ Curiously, the jury also found that the NFL's anticompetitive conduct caused no damage to the USFL traceable to either an NFL conspiracy under section 1 of the Sherman Act, or the misuse of monopoly power under section 2.¹¹⁴ The jury specifically found that the NFL had not created any entry barriers or engaged in predatory practices that prevented the USFL from obtaining a national television contract with the major networks.¹¹⁵ Similarly, the court found that the NFL at no time possessed monopoly power over the "essential facilities"¹¹⁶ of league play, such as stadia, or the other necessary raw materials that make up a successful sports league operation, i.e., coaches, players, game officials, and opportunities for capital investment.¹¹⁷

The trial between the USFL and NFL possessed all of the drama

111. See cases cited *supra* notes 100-01, 104-05 and accompanying text.

112. *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986); *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986).

113. *United States Football League*, 644 F. Supp. at 1042.

114. *Id.*

115. *Id.* at 1042, 1046-48.

116. See *infra* text accompanying notes 305-18.

117. *United States Football League*, 644 F. Supp. at 1042; *United States Football League*, 634 F. Supp. at 1184-88. But cf. *United States Football League*, 644 F. Supp. at 1056-57 (suggesting that an analysis of submarkets may not be the appropriate way of characterizing the product market within which professional football competes). For a discussion of these submarket categories, see *infra* text accompanying notes 297-332.

of the game of football itself. On one side stood the owners of the fledgling and embattled USFL, a group of men who had succeeded in various other business enterprises, and who brought to the league enormous financial stability and the hope that the American public would respond favorably to professional football played in the spring. The USFL's opponents in the courtroom consisted of the establishment, the NFL's twenty-eight owners, some of whom had experienced the lean years of professional football before the league had captured the hearts and pockets of the consuming public. These pioneers remembered a time when the NFL actually played second string behind Major League Baseball for the attention of the American sports fan. In this, its most recent brush with possible antitrust liability, the NFL was once again neither immune nor invulnerable to a finding of unlawful conspiratorial activity or predatory monopoly conduct.¹¹⁸ Earlier, this article observed that there have been many prior challenges against league practices, its structure, and governing rules. In fact the league, as a defendant, already had compiled some healthy statistics in its own historical battle against the Sherman Act and those who sought its enforcement against professional sports leagues in general, and the NFL in particular.¹¹⁹

The case is significant apart from its theatrical value,¹²⁰ however,

118. The NFL's statistical performance in antitrust litigation so far would not qualify the league for any post-season accolades, although its won/loss percentage is far better than the record the New Orleans Saints have managed to achieve on the field over a similar period. Actually, in all fairness to the NFL, its record in antitrust litigation from 1966 through 1981 was forty-six wins and only five losses; in contrast, the record of the Saints, better known as the "Ain'ts," was no better than fifty-nine wins, one hundred and fifty-four losses and four ties. See Glick, *supra* note 33, at 270 n.177; see also THE OFFICIAL 1983 NATIONAL FOOTBALL LEAGUE RECORD & FACT BOOK 225-26 (P. Abitante & C. Garrity, Jr. ed. 1986) (providing the records of all NFL teams, some displaying prouder moments of glory than that already described).

119. See, e.g., cases cited *supra* notes 1-6; Glick, *supra* note 33, at 270 n.177.

120. Even if the result of the case had very little precedential value, all those who observed its daily media coverage realized that the case was at least good for solid amusement during those few months before the opening of the NFL's summer training camp. Al Davis, the owner of the Los Angeles Raiders, testified against his fellow NFL franchise owners claiming that he was aware of a conscious effort on behalf of the NFL to eliminate the presence of the USFL and return to the days of single league domination. At one point Davis testified:

I wouldn't go along with it [a plan that would get rid of the Oakland Invaders so that the Raiders, Davis' team, would remain the only team in Oakland]. I thought it was wrong, and what they had done and that they just ought to do something about it. Because we are headed down a very dangerous path, we are headed into this courtroom, and it had to be taken care of before we got here.

Janofsky, *Davis Tells of 'Collaboration'*, N.Y. Times, June 25, 1986, at D25, 27, col. 2. The feud between Davis and NFL Commissioner Pete Rozelle is well documented, and came to a most dramatic confrontation when Davis successfully moved his team from Oakland to Los Angeles. See D. HARRIS, *supra* note 7, at 431 (providing anecdotal information about this long running feud). Perhaps even more stirring was testimony from another USFL witness,

because it brings into focus some of the economic and structural issues that arise in the modern era of professional sports league play. Most of these issues did not exist in the pioneer days of sports league antitrust litigation, when in the 1960's and 1970's, the American Football League, World Hockey Association, and players on behalf of the American Basketball Association brought similar antitrust challenges against their more established competitors.¹²¹ In these earlier cases, rival leagues claimed that years of entrenched and deliberate exercises of market power had prevented any form of meaningful market penetration to take place.¹²² Players who felt victimized and denied of their right to freedom of contract argued that intraleague conspiracies and monopoly activity precluded the existence of enlightened player rules that would allow unrestrained mobility within leagues. Rival leagues and players under contract contended that either through conspiracies designed to restrain trade, or by the careful and deliberate acquisition of unlawful monopoly power and the calculated misuse of that power, the establishment prevented any form of meaningful competition to exist within the market for professional sports. These cases, and the scholarship that naturally followed in this area of antitrust law, all shared similar assumptions about the nature of professional sports league conduct, and the conditions that exist within its organizational structure that make for interesting antitrust issues. Courts and commentators have given a considerable amount of thought, evidenced by many published opinions and voluminous law review commentary, about the relevance of the antitrust laws to the "business" of professional sports as compared with other industries that already had experienced a much longer history and exposure to vigorous antitrust enforcement policy.

While the goals of enhancing consumer welfare continue to guide popular thought regarding the enforcement of the Sherman Act,¹²³ the last twenty years have seen significant changes in the structure of professional sports, and the economics of how each league operates.

famed broadcaster/commentator Howard Cosell. The USFL offered Cosell's testimony in order to establish the NFL's intention to monopolize the major broadcasting networks. Cosell was arguably more entertaining than informative. At one point, after NFL attorney Frank Rothman asked Cosell if he understood the question, Cosell quipped, "If you ask a question I don't understand, you will have the biggest story of the century." Janofsky, *Cosell Contradicts 2 Former ABC Bosses*, N.Y. Times, June 26, 1986, at B13, col. 3.

121. *American Football League v. National Football League*, 323 F.2d 124 (4th Cir. 1963), *aff'd* 205 F. Supp. 60 (D. Md. 1962); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

122. See *supra* notes 5-6.

123. See *supra* notes 13 & 98.

Without bringing harm to the primary goals of antitrust policy, these modern conditions have made it necessary to review the earlier cases and literature, and possibly reach new and separate conclusions about the application of the antitrust laws in this context. The concern over ensuring the existence of a healthy free market economy, unrestrained by illegal barriers to competition, often requires courts and commentators to conduct fresh inquiries into the changing economic forces operating within and behind a particular market structure. The challenge to assess the evolving characteristics of professional sports leagues in hope of gaining some insight into the continued viability of the antitrust laws has yet to take place. Perhaps the Court of Appeals for the Second Circuit, once confronted with the issues raised in *USFL v. NFL*, will consider some of the dynamic changes that have occurred in all professional sports leagues and find that earlier precedent and popular thinking about the reach and propriety of antitrust litigation in this area is no longer valid. These new developments may force a fresh look at trade practices that were once thought to be beyond any hope of escaping Sherman Act liability. Indeed, the modern era of sports competition has given rise to a new, but as of yet, unrecognized and unappreciated insight into the proper role that the antitrust laws should play in the business of athletic competition. Perhaps the real value of *USFL v. NFL* is not in the result of the district court decision,¹²⁴ but rather, in forcing those who pay attention to changing developments in antitrust law to think about the circumstances under which a professional sports league can violate the Sherman Act.

II. ANTITRUST HISTORY OF PROFESSIONAL SPORTS LEAGUES

If there is a common theme that runs throughout any discussion concerning the antitrust implications of professional sports leagues, it is that the operation of professional sports is a highly unique organizational process that is not easily adaptable to traditional forms of Sherman Act enforcement.¹²⁵ The history of professional sports

124. The district court decision is plagued with poor field conditions as a result of the alleged juror confusion in reaching a verdict. The USFL argues that it is grossly inconsistent for the jury to have specifically found that the NFL had attained an unlawful monopoly in the product market of major league professional football, while at the same time awarding damages of only \$1, trebled to \$3, to the injured and since abandoned USFL. See Plaintiff's Memorandum of Law in Support of Motions for New Trial and for Judgment Notwithstanding the Verdict on Certain Claims, *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986); *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986) (No. 84-Civ. 7484 (PKC)).

125. See, e.g., Berry & Gould, *The Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CASE W. RES. 685, 737 & n.60 (1981). For a more complete

league antitrust litigation is filled with cases in which courts, from the outset, had difficulty in properly applying the antitrust laws to situations not involving traditional aspects of monopoly behavior. This section will highlight some of the areas of league conduct in which antitrust litigation has arisen over the years. There is in fact a history of questionable league trade activity that has puzzled courts hoping to find a consistent and reasoned way to apply the Sherman Act to professional sports league operating rules and practices.

A. *Types of Questionable Practices*

Professional sports leagues have imposed an assortment of operating rules that are justified as a means of equalizing the competitive strengths among franchises. Over this history of antitrust review, leagues have argued that these self-regulating efforts at creating parity among participating franchises are not intended to violate the antitrust laws.¹²⁶ Rather, each is designed to make the league product more competitive as against other franchises within the league as well as competing industries within an entertainment market in which a professional sports league is but one contender among many.¹²⁷ These potentially unlawful trade practices include restraints upon player mobility, rules prohibiting franchise relocation or league expansion, and activities intended to block the entry of rival league competition.

1. PLAYER RESTRAINTS

All leagues have employed operating rules that limit in some way the mobility of players to seek employment with other franchises within the league. The effect of these rules is that no team, regardless of wealth, is able to acquire the best players and thereby the league championship without meaningful intraleague competition. Perhaps

discussion concerning the unique aspects of professional sports league industrial organization, see cases and authorities cited *supra* notes 211-12.

126. See, e.g., *North Am. Soccer League v. National Football League*, 505 F. Supp. 659, 674 (S.D.N.Y. 1980), *aff'd in part, rev'd in part*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); *Kapp v. National Football League*, 390 F. Supp. 73, 79-81, 88-89 (N.D. Cal. 1974); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 504 (E.D. Pa. 1972); *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 243-44 (S.D.N.Y. 1961). For a general list of scholarship expressing this same sentiment, see J. WEISTART & C. LOWELL, *supra* note 4, § 5.07, at 112; J. WEISTART & C. LOWELL, *supra* note 53, § 5.03, at 512; Panel Discussion, *Professional Sports: Has Antitrust Killed the Goose that Laid the Golden Egg*, 45 ANTITRUST L.J. 290, 312 (1976); Note, *The True Story of What Happens When the Big Kids Say, "It's my football, and you'll either play by my rules or you won't play at all."*, *Kapp v. National Football League*, 55 NEB. L. REV. 335, 335 n.1 (1976).

127. Few courts to date have ever really accepted this analysis. See *supra* notes 60, 68, 71 & 79.

the best known of these player restraints was the "reserve clause," a device used in professional baseball that enabled a team to reserve the rights to players' services even after their contractual arrangement had ended.¹²⁸ Essentially, a team owner could renew a player's contract at will, preventing his possible negotiation with competing teams. This practice clearly restricted a player's right to seek gainful employment, presenting obvious section 1 implications as being either a group boycott or a concerted refusal to deal.

The reserve clause served as a primary focus of litigation when the Supreme Court of the United States examined the landmark case of *Flood v. Kuhn*.¹²⁹ Although the *Flood* Court freely acknowledged that the reserve clause presented some of the classic features of an illegal group boycott or a concerted refusal to deal, the Court exempted Major League Baseball from antitrust scrutiny because earlier precedent had found league practices invulnerable to antitrust attack.¹³⁰ Congress, for the time being, chose to remain silent rather than legislate the grant of immunity or force the application of the Sherman Act to professional baseball.¹³¹

Professional football's version of the reserve clause is better known as the option clause, but was also originally combined with an added feature—the "Rozelle Rule."¹³² The option clause binds a player to his team until his contract expires, at which time, should he decide not to renew, he can effectively sit out one full season and then become a free agent.¹³³ Free agency is not exactly free, however, because upon signing with a different club, the new team is still required to compensate the former by either giving up a combination of the rights to existing players, future players by way of draft rights, or simply money in return for the right to acquire a player testing the free agency waters. Perhaps the most interesting aspect of the NFL's version of the reserve clause was a somewhat unique twist to this compensation scheme. Under the Rozelle Rule, if the teams were unable to agree on an appropriate and fair exchange of talent, franchise owners then authorized the commissioner of the league to select the combination of active players or future draft choices that

128. See Leavell & Millard, *Trade Regulation and Professional Sports*, 26 MERCER L. REV. 603, 605-10 (1974).

129. 407 U.S. 258 (1972).

130. *Flood*, 407 U.S. at 285; see *infra* notes 162-73 and accompanying text.

131. *Flood*, 407 U.S. at 283-85; see Rivkin, *Sports Leagues and the Federal Antitrust Laws*, in GOVERNMENT AND THE SPORTS BUSINESS 387, 389-95 (R. Noll ed. 1974).

132. Named after the then and current commissioner of the National Football League, Pete Rozelle.

133. See Grauer, *supra* note 4, at 3 n.16.

would fairly compensate the former team.¹³⁴ Naturally, the challenge to this practice is that the promise of any meaningful bargaining opportunities is severely compromised when a franchise owner must relinquish existing or future talent in order to acquire a free agent.¹³⁵

In *Smith v. Pro Football, Inc.*,¹³⁶ the Court of Appeals for the District of Columbia declared that the NFL player draft violated the Sherman Act by producing extreme anticompetitive effects in the market for player services.¹³⁷ Other cases have reached similar results. In *Kapp v. National Football League*¹³⁸ and *Mackey v. National Football League*,¹³⁹ courts further examined the antitrust implications of various player restraints on mobility, including the Rozelle Rule, and found that once tested under the rule of reason, these trade practices could not withstand section 1 scrutiny. With the advent of collective bargaining and the blending of labor law rules in an antitrust context, however, these league practices are removed from the courts and left in the able hands of union representation.¹⁴⁰

2. FRANCHISE RELOCATIONS

All professional sports leagues impose certain rules preventing existing franchise owners from abandoning their host cities in favor of potentially more lucrative markets.¹⁴¹ Leagues vary in the opportunities available to franchise owners to relocate an existing franchise. Often what concerns league officials the most is that franchise relocations have the very real potential of damaging the entire league prod-

134. See J. WEISTART & C. LOWELL, *supra* note 53, § 5.03, at 502-03.

135. Compare *Mackey v. National Football League*, 407 F. Supp. 1000, 1006 (D. Minn.), modified, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977) with H. DEMMERT, *THE ECONOMICS OF PROFESSIONAL TEAM SPORTS* 38 (1973) and Noll, *The U.S. Team Sports Industry: An Introduction*, in *GOVERNMENT AND THE SPORTS BUSINESS* 1, 3-4 (R. Noll, ed. 1974) and Comment, *Antitrust and Professional Sport: Does Anyone Play by the Rules of the Game?*, 22 CATH. U.L. REV. 403, 406-13, 415 (1973).

136. 593 F.2d 1173 (D.C. Cir. 1978).

137. *Id.* at 1188-89 ("Because the NFL draft . . . had severe anticompetitive effects and no demonstrated procompetitive virtues, we hold that it unreasonably restrained trade in violation of § 1 of The Sherman Act.").

138. 390 F. Supp. 73, 82 (N.D. Cal. 1974) (striking down NFL reserve system); *aff'd in part, dismissed as moot in part*, 586 F.2d 644 (9th Cir. 1978), cert. denied, 441 U.S. 907 (1979).

139. 543 F.2d 606, 622 (8th Cir. 1976) (holding that the Rozelle Rule is more restrictive than necessary to justify its otherwise legitimate objectives), cert. dismissed, 434 U.S. 801 (1977).

140. Collective bargaining agreements since the time of these early decisions have given rise to new rules regulating player movement and negotiation rights. See Riga, *Professional Sports and the Public Interest: A Kick in the Grass*, 7 WHITTIER L. REV. 551, 563-66 (1985). For a discussion concerning the role of collective bargaining in the modern setting of professional sports leagues, see *infra* text accompanying notes 191-210.

141. See *supra* note 1; cf. *infra* note 151 and accompanying text.

uct.¹⁴² There is an inherent value in franchise stability where local fans maintain an identification with their home team.¹⁴³ The maintenance of league goodwill is important because an abandoned city inevitably will harbor hostility against the entire league, which may lead to a noticeable decrease in television ratings.¹⁴⁴

Several cases have tested league rules preventing the relocation of existing franchises. The most recent case to discuss this question ruled that the NFL's attempt at preventing the Oakland Raiders from moving to Los Angeles violated section 1 of the Sherman Act. In *Los Angeles Memorial Coliseum Commission v. National Football League*,¹⁴⁵ the Ninth Circuit rejected the NFL's contention that it was a single entity incapable of engaging in conspiratorial conduct.¹⁴⁶ Moreover, in judging NFL Rule 4.3 under the rule of reason, the court found that there were less restrictive alternatives available to accomplish the same purpose, and that a "jury could have reasonably concluded that the NFL should have designed its 'ancillary restraint' in a manner that served its needs but did not foreclose competition."¹⁴⁷

3. LEAGUE EXPANSION: THE PROBLEM WITH RIVAL LEAGUES

In recent years, critics of league franchising policies have engaged in repeated attempts at forcing league officials to expand league membership from within, along with isolated efforts by rival league competitors to enter the market.¹⁴⁸ More and more, those who follow the industry of professional sports complain that leagues deliberately keep the number of teams at present levels in order to maximize the share of revenues allocated among existing franchises.¹⁴⁹

142. See Riga, *supra* note 140, at 573, 578; Roberts, *supra* note 44, at 280 & nn.209-10; Weistart, *supra* note 1, at 1021.

143. See Glick, *supra* note 29, at 68, 84; Kurlantzick, *supra* note 4, at 206-07 & n.83.

144. *But see* Lazaroff, *supra* note 4, at 214 (suggesting that while some fans may be devastated by a franchise departure, "[i]t is not inconceivable that fans in the city losing a team will continue to follow that club").

145. 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 999 (1984).

146. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1387-90.

147. *Id.* at 1396. *But see id.* (pointing out, however, that the NFL arguably has a legitimate interest in preventing franchise relocations because of the potential erosion in public confidence that may result).

148. These situations have occurred in all sports. See *supra* notes 2 & 6; *infra* text accompanying notes 337-41.

149. See R. Noll, *Attendance and Price Setting*, in GOVERNMENT AND THE SPORTS BUSINESS 115, 141-46, 154 (R. Noll ed. 1974), cited in Weistart, *supra* note 1, at 1035 & n.67 ("[T]he objection still remains that the NFL has not provided football fans with as many local franchises as they might be willing to support."); accord Comment, *supra* note 2, at 427. For a

Sports leagues are vulnerable to this allegation because many cities now qualify as major urban population centers capable of supporting a sports franchise.¹⁵⁰ Moreover, in the wake of recent professional sports team departures from their original locales,¹⁵¹ and the growing impact of the Ninth Circuit's *Los Angeles Memorial Coliseum Commission* decision, Congress has now seen fit to examine the possible legislative solutions that it may use to prevent abrupt team movements and the attendant economic and civic disruptions that follow.¹⁵²

Leagues often can assert compelling reasons for keeping membership at current levels. The more teams, the more confusion and added administrative burdens that go into the scheduling of games and the host of other operating responsibilities.¹⁵³ Moreover, from the television revenue side, the existence of additional teams may influence networks to renegotiate existing contracts in an effort to absorb the costs of broadcasting more teams over wider geographic areas.¹⁵⁴ Finally, more teams require the spreading of existing talent among the various league franchises, possibly damaging the entertainment value of the league product to consumers.¹⁵⁵ The greatest concern, of course, is in

discussion concerning the implications of this alleged franchising policy, compare *infra* text accompanying notes 337-38 & 341.

150. One early decision found that it would take a population of at least 700,000 to support a local franchise, and that in 1962, 31 metropolitan areas satisfied this criterion. *American Football League v. National Football League*, 205 F. Supp. 60, 76 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963); see also Gorton, *Professional Sports Franchise Relocation: Introductory Views from the Hill*, 9 SETON HALL LEGIS. J. 1, 3 (1985) (arguing that cities such as Phoenix, Arizona and Birmingham, Alabama are desirous and capable of supporting an NFL franchise, but are repeatedly denied the opportunity). *But cf.* Glick, *supra* note 29, at 92-93 & nn.168-69 (suggesting that population is not always the most important ingredient in determining the success of a local franchise).

151. The Baltimore Colts moved abruptly from their host city to Indianapolis; the Oakland Raiders moved to Los Angeles; the New York Jets have not changed their name, but do however now play in New Jersey; and the city of Philadelphia almost lost their Eagles to Phoenix. See generally Wong, *Of Franchise Relocation, Expansion and Competition in Professional Team Sports: The Ultimate Political Football?*, 9 SETON HALL LEGIS. J. 7 (1985) (discussing the effect and some possible solutions to the problem of disruptive franchise relocations).

152. See, e.g., The Professional Football Stabilization Act of 1985, S. 172, 99th Cong., 1st Sess., 131 CONG. REC. S282 (daily ed. Jan. 3, 1985); The Professional Sports Team Community Protection Act, S. 2505, 98th Cong., 2d Sess., 130 CONG. REC. S3458-59 (daily ed. March 29, 1984) (reintroduced as S. 287, 99th Cong., 1st Sess., 131 CONG. REC. S633 (daily ed. Jan. 24, 1985)); The Professional Sports Stabilization Act of 1982, H.R. 6467, 97th Cong., 2d Sess., 128 CONG. REC. 11,166 (May 21, 1982); The Sports Franchise Stabilization Act, H.R. 823, 97th Cong., 1st Sess. (1981). For discussions highlighting these legislative proposals, see Kurlantzick, *supra* note 4, at 192 n.47, 204 n.78; Lazaroff, *supra* note 4, at 217-19 & nn.382, 388-95; Wong, *supra* note 151, at 8-11 & nn.8-16, 55-71 & nn.195-256.

153. See Roberts, *supra* note 44, at 280-81 n.210.

154. *Id.*

155. *Id.* (discussing the dilution effect of creating low quality teams and lopsided games).

lowering the revenue potential of the league as a whole, with each individual owner forced to accept a smaller share of the total amounts generated.

Competition from rival leagues is an entirely different matter. As will be discussed later in this article, the history of rival league competition has led to either ruinous consequences for the least established challenger, or the ultimate merger between the two leagues.¹⁵⁶ Most professional sports leagues have, in their history, faced a challenge from rival competition.¹⁵⁷ In most cases, the predominant league absorbed all or part of its rival.¹⁵⁸ Several reasons account for this phenomenon. Perhaps the best explanation for the ultimate supremacy of one league in each sport is that this is precisely what the market demands, and what the sponsors and television networks seek to satisfy. Fans wish to see the crowning of a league champion. Two leagues complicate the picture because only one league, the one with the best talent and accessibility to the fans, can provide that most enduring and often elusive of American cultural phenomena—the need to know the ultimate winner of a competitive struggle.

It is also significant that when rival leagues, frustrated by their lack of financial and popular success, challenge the established league under the antitrust laws, courts have been unwilling to find antitrust liability.¹⁵⁹ Although some of the cases have highlighted questionable practices,¹⁶⁰ while others have focused on areas of competition that players as well as rival leagues could assert,¹⁶¹ the fact remains that most intraleague challenges have not proven successful as a means of clearing the way for dual league competition.

156. See *infra* note 180 and text accompanying notes 273-75.

157. The American Basketball Association, American Football League, World Hockey Association, World Football League, and the United States Football League are the most recent examples of serious challenges to established leagues in each of these sports.

158. This occurred with the American Basketball Association and the American Football League. See *infra* note 180 and accompanying text.

159. The United States Football League is only the most recent challenge to the National Football League, joining an ever growing list of rival league miscues and fumbles in the courtroom. See *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

160. See, e.g., *American Football League v. National Football League*, 323 F.2d 124 (4th Cir. 1963), *aff'g* 205 F. Supp. 60 (D. Md. 1962); *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986); *United States Football League v. National Football League*, 638 F. Supp. 66 (S.D.N.Y. 1986).

161. See, e.g., *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

B. Baseball's Antitrust Immunity

Professional baseball has enjoyed a curious and somewhat anomalous immunity from the reach of the Sherman Act.¹⁶² Baseball has escaped antitrust liability since 1920, when Justice Holmes wrote for a unanimous Court in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.¹⁶³ Originally, the Court reasoned that professional baseball involved a seemingly local enterprise and thereby did not concern interstate commerce within the meaning of the Sherman Act.¹⁶⁴ Since that time the Court has considered various other cases and arrived at the same result, but for different reasons.¹⁶⁵ The modern rationale for the special treatment that professional baseball has received vis-a-vis other sports leagues is based primarily on the failure of Congress to correct this obvious defect in the law of antitrust.¹⁶⁶ Scholarly criticism has frequently derided this unfortunate grant of immunity,¹⁶⁷ and courts have acknowledged this curious state of affairs of allowing baseball to remain essentially immune while other professional sports leagues face repeated Sherman Act scrutiny.¹⁶⁸ Neither courts nor Congress, however, has decided to do anything about overruling this body of

162. See generally J. WEISTART & C. LOWELL, *supra* note 53, § 5.02, at 480-500.

163. 259 U.S. 200 (1922), *aff'g* 269 F. 681 (D.C. Cir. 1920).

164. *Federal Baseball Club of Baltimore, Inc.*, 259 U.S. at 208-09.

165. See *Flood v. Kuhn*, 407 U.S. 258 (1972), *aff'g* 443 F.2d 264 (2d Cir. 1971), *aff'g* 316 F. Supp. 271 (S.D.N.Y. 1970); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), *aff'g per curiam* 200 F.2d 198 (9th Cir. 1952), *aff'g per curiam* 101 F. Supp. 93 (S.D. Cal. 1951). But see *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949), *rev'g* 79 F. Supp. 260 (S.D.N.Y. 1948).

166. *Flood*, 407 U.S. at 285. Justice Blackmun, writing for the Court, observed:

We continue to be loathe, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and . . . has clearly evinced a desire not to disapprove them legislatively.

Id. at 283-84, quoted in Comment, *supra* note 135, at 422-25; see *supra* text accompanying notes 129-31.

167. See, e.g., Berry & Gould, *supra* note 125, at 729 n.128; Note, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. INDUS. & COM. L. REV. 737, 746 (1971); Comment, *supra* note 135, at 424-25. For an interesting and thorough discussion of this and other issues involved in professional baseball in the pre-*Flood* days, see Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576 (1953).

168. See, e.g., *Salerno v. American League*, 429 F.2d 1003 (2d Cir.), *cert. denied*, 400 U.S. 1001 (1970). In *Salerno*, Judge Friendly wrote:

We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is "unrealistic," "inconsistent" and "illogical."

429 F.2d at 1005 (citing *Radovich v. National Football League*, 352 U.S. 445, 452 (1957)).

case law that condones baseball immunity from both section 1 and section 2 liability.

In *Flood v. Kuhn*,¹⁶⁹ the Supreme Court sent its most recent signal that professional baseball is immune from the antitrust laws until Congress decides otherwise. The Court based its decision on a combination of factors. The reasons for treating baseball differently from other professional sports include one based on history and the other based on congressional silence. On one level, the Court concluded that Congress's silence in this area of antitrust law has both led and contributed to this unfortunate result.¹⁷⁰ The Court justified this congressional inaction by pointing out that baseball may deserve special treatment because of its historical place in history as a "uniquely" American game.¹⁷¹ Nevertheless, the Court openly criticized this curious anomaly within this area of Sherman Act enforcement. In acknowledging that a court will always have trouble distinguishing professional baseball from other sports vulnerable to antitrust review, Justice Blackmun wrote that:

[i]t is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and acceptance of baseball's unique characteristics and needs.¹⁷²

The *Flood* opinion continues to stand for the proposition that at least with respect to professional baseball, courts should adhere to precedent, while recognizing that though there may be "inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by the Court."¹⁷³

There is a long standing question as to whether this logical inconsistency can survive in light of modern antitrust conditions where no sports league can claim wholesale immunity from the Sher-

169. 407 U.S. 258 (1972).

170. See *supra* note 166.

171. *Flood*, 407 U.S. at 266 (pointing to the district court opinion in which Judge Cooper stated that "[b]aseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. . . . The game is on higher ground; it behooves every one to keep it there." 309 F. Supp. 793, 797 (S.D.N.Y. 1970)).

172. *Flood*, 407 U.S. at 282, quoted in *Berry & Gould*, *supra* note 125, at 731. While the Sherman Act does not apply to baseball, courts have declared all other sports vulnerable to antitrust liability. See *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971); *Radovich v. National Football League*, 352 U.S. 445 (1957); *United States v. International Boxing Club*, 348 U.S. 236 (1955); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972); cf. *United States v. Shubert*, 348 U.S. 222 (1955) (theatrical productions).

173. 407 U.S. at 284.

man Act.¹⁷⁴ Baseball may have its historical place in the general scheme of this nation's cultural history and in the legacy it can claim as the first American professional sports league; this by itself, however, cannot guarantee its continued insulation from the laws governing restrictive trade practices. While it may be true that baseball does offer unique business qualities that set it apart from other industrial enterprises, this same justification applies to most other forms of professional sports league organization. Either the Supreme Court or Congress inevitably will have to confront this anomalous situation. To do otherwise only compounds what is already the most visibly unprincipled and inconsistent fact of professional sports and its relationship to the Sherman Act. There is an unfortunate and uneven gap in the law of antitrust that allows lower courts to apply the Sherman Act to unlawful trade practices that take place in football, basketball, hockey, and individual sports governed by rule enforcing associations, while at the same time ignoring similar practices in baseball. Relying on congressional silence and respect for a time honored game will never lead to a proper and useful resolution of this problem.

C. *Attempts by Other Leagues to Gain Immunity*

Although baseball has taken advantage of a blanket immunity from the Sherman Act, other professional sports leagues have attempted to gain a limited form of immunity with respect to certain league activities necessary to promote the league product without damaging consumer welfare. The following is a list of attempts at immunizing professional sports league trade practices from the antitrust laws. Some of these attempts were met with moderate success, others failed to insulate otherwise unlawful practices from Sherman Act scrutiny.

1. POOLING TELEVISION RIGHTS: THE SPORTS BROADCASTING ACT

Today, most television viewers take regular sports programming for granted. There was a time, however, when television contracts between major networks and league front offices were scrutinized heavily under the Sherman Act. In fact, in 1953, Judge Allen K. Grim of the United States District Court for the Eastern District of Pennsylvania, in *United States v. National Football League*,¹⁷⁵ struck down article 10 of the NFL bylaws as an unreasonable restraint of trade. Article 10 prevented the telecasting of a competing game into a

174. See *supra* note 172.

175. 116 F. Supp. 319 (E.D. Pa. 1953).

territory where the home team was playing in another city, but where the home city was still receiving the broadcast of its local team.¹⁷⁶ Eight years later, Congress intervened and enacted the Sports Broadcasting Act,¹⁷⁷ which exempts from antitrust review all agreements between professional sports leagues and broadcasting enterprises that involve the telecasting and transmission of league games. Sports leagues have been able to use this exemption to reach agreements with all three major networks without violating section 1 of the Sherman Act. The Sports Broadcasting Act literally allows a league to act as a single entity in contracting with network officials.¹⁷⁸ The consequence of this arrangement is that instead of negotiating with each individual team, the major networks purchase the right to telecast the entire league product as one package. This ensures that even the weaker teams will participate in and profit from the resulting contract. Without such a "pooling" of rights among existing franchises, it is likely that network sponsors would show interest only in the very best of league offerings.¹⁷⁹

2. NFL/AFL MERGER: THE FOOTBALL MERGER ACT

In 1960, with the creation of the American Football League, professional football renewed its collision course with destiny. As the history of professional sports leagues has repeatedly shown, the dual

176. *National Football League*, 116 F. Supp. at 326-27, 330.

177. 15 U.S.C. §§ 1291-1295 (1982). Section 1291 provides in part:

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 [these sports].

15 U.S.C. § 1291.

178. In *United States Football League v. National Football League*, the plaintiffs took issue with this congressionally authorized grant of monopoly power. The USFL argued that the Sports Broadcasting Act only permitted the pooling of rights for the purposes of contracting with one network, and that the NFL's contract with all three major networks went beyond this specific exemption. *United States Football League v. National Football League*, 634 F. Supp. 1155, 1158-65 (S.D.N.Y. 1986). The court found that because these network contracts are nonexclusive, and because nothing in the legislative history suggests that the statute contemplated the "pooling" of rights for a single network only, "the mere existence of the three NFL-network contracts does not exceed the scope of the antitrust exemption." *United States Football League*, 634 F. Supp. at 1163.

179. See *Telecasting of Professional Sports Contests: Hearings on H.R. 8757 Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 67 (1961) (arguing that legislation is necessary to prevent what would otherwise create a disparity in television income, because larger markets would typically receive more generous contracts), noted in *United States Football League*, 634 F. Supp. at 1161 n.2.

existence of two leagues leads either to merger or ruination.¹⁸⁰ As salaries escalated for the top player talents, both leagues realized that only a merger could avert an impending financial disaster. By 1966, Congress once again had intervened in the professional football situation, granting a statutory exemption with the Football Merger Act¹⁸¹ that allowed the two leagues to merge.

This congressionally authorized grant of monopoly power is not unlawful. Indeed, Congress intended both the Sports Broadcasting Act and the Football Merger Act to help professional sports leagues run more efficiently and avoid ruinous competition. Neither statute

180. See generally Roberts, *supra* note 44, at 257 n.134. All sports have shared in this history of failing leagues and ultimate mergers. From 1917 to 1971, the National Hockey League (NHL) operated alone until the World Hockey Association emerged, only to partly disband and merge with the NHL eight years later.

From 1949 to 1959, the National Basketball Association (NBA) served as the only professional league until the American Basketball League took the court. The league fell apart, however, only one-and-one-half years later due to increasing financial losses. See L. SOBEL, *PROFESSIONAL SPORTS AND THE LAW* 393 (1977). In 1966, another challenger to the NBA emerged, the American Basketball Association, which operated for ten years, only to merge some of its franchises with the NBA after a heavily litigated settlement agreement. See *ABA Players Ass'n v. National Basketball Ass'n*, 72 F.R.D. 594 (S.D.N.Y. 1976); *Robertson v. National Basketball Ass'n*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

In professional football, the NFL faced its first competition in 1946 against the All American Conference. The Conference collapsed after three years, partly because the Cleveland Browns dominated all three seasons. Three franchises ultimately merged with the NFL. See L. SOBEL, *supra*, at 381. The American Football League then formed in 1960. Six years later, the two leagues experienced financial difficulties as a result of frequent bidding wars for the most promising college players. See *id.* at 383-84; cf. *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963) (antitrust litigation arising from this conflict). In an effort to head off the possibility of financial ruin, Congress authorized a merger between the two leagues that would bypass antitrust scrutiny. 15 U.S.C. § 1291 (1982) (originally enacted as Act of Nov. 8, 1966, Pub. L. No. 89-800, 80 Stat. 1515); see *Proposed Legislation to Authorize the Merger of Two or More Professional Football Leagues: Hearings on S. 3817 Before the Subcomm. on Antitrust of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966). In 1974, still another challenger to the NFL surfaced: the World Football League (WFL). The WFL never became a serious contender, and in fact, went bankrupt approximately one year after its formation. See *Mid-South Grizzlies v. National Football League*, 550 F. Supp. 558, 562 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772, 776 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). Finally, the United States Football League (USFL) is at this time still without a television contract and has not planned to resume operations at least until it resolves its existing litigation against the National Football League. It is doubtful, however, short of a possible merger of some of its teams with the older league, that the USFL will be able to achieve what its predecessors in all leagues historically have found so elusive: the existence and success of two leagues in the same sport.

For articles dealing with this historical phenomenon of failing leagues and resultant mergers in the professional sports industry, see J. WEISTART & C. LOWELL, *supra* note 53, § 5.11, at 726-27 & n.281; Berry & Gould, *supra* note 125, at 696 n.18, 714 n.72; Quirk, *supra* note 77, at 64; Wong, *supra* note 151, at 22-24 nn.61-67; Comment, *supra* note 2, at 432-33; Comment, *supra* note 167, at 604 & nn.145-47.

181. 15 U.S.C. § 1291 (1982) (amended 1966).

implicates Sherman Act liability because "[f]or the purposes of rule of reason analysis . . . [the existence of these statutory exemptions] are legally irrelevant. It would take a court bolder than this to claim that the congressionally authorized acquisition of market power, even market power amounting to monopoly power, was unlawful under Section 1 of the Sherman Act."¹⁸²

3. IS FOOTBALL A NATURAL MONOPOLY?

Both the Sports Broadcasting Act and the Football Merger Act succeeded in immunizing from Sherman Act liability certain sports league trade practices. The pooling of rights among the member clubs of the NFL has resulted in a series of generous television broadcasting contracts.¹⁸³ Similarly, allowing the NFL and AFL to merge in 1970, free from antitrust concerns, has led to the creation of a better quality entertainment product.¹⁸⁴ While these mechanisms for avoiding Sherman Act liability have succeeded, another such attempt has had mixed results. NFL Commissioner Alvin "Pete" Rozelle has, for many years, argued in favor of a farther reaching theory, one that would completely immunize league conduct from antitrust attention. In essence, Rozelle argues that the NFL is by definition a natural monopoly.¹⁸⁵

Commissioner Rozelle's position has been well documented.¹⁸⁶ In fact, in *USFL v. NFL*, the attorneys for the USFL repeatedly reminded the jury that the Commissioner, for many years, advocated

182. *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 784 (3d Cir. 1983), cert. denied, 467 U.S. 1215 (1984), quoted in *United States Football League v. National Football League*, 634 F. Supp. 1155, 1170 (S.D.N.Y. 1986).

183. See *infra* note 251.

184. Few would doubt that the merger has had positive results, because in doing so, the league has achieved relative parity among all franchises, expanded the number of cities that are home to NFL franchises, and avoided escalating salary wars that probably would have resulted in the loss of at least several franchises, if not one of the leagues.

185. The traditional explanation for the existence of natural monopolies is that there are some products or industries where it is simply more efficient for there to be only one supplier. Theoretically, a single firm will experience declining unit costs as output increases. See Cirace, *An Economic Analysis of Antitrust Law's Natural Monopoly Cases*, 88 W. VA. L. REV. 677, 684 (1986). The idea is that one firm is better able to capture the economies of scale that exist within the industry, meaning that the larger the firm, the cheaper the cost per unit. Cf. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (suggesting that "[a] market may . . . be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand"). See generally J. WEISTART & C. LOWELL, *supra* note 53, § 5.11, at 725-26.

186. See, e.g., *Professional Sports Team Protection Act: Hearings on S. 2505 Before the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 2d Sess. 59 (1984); cf. Kurlantzick, *supra* note 4, at 194 n.53 (discussing Rozelle's congressional testimony where he stated that the application of the antitrust laws to professional sports leagues is confused and unsettled).

that leagues are natural monopolies incapable of unlawful trade conduct.¹⁸⁷ Others have similarly raised this issue.¹⁸⁸ Behind this vision of sports entertainment lies the theory that only one league is capable of providing what the public really wants, an ultimate champion. Where two competing sports leagues exist, the end result will be either merger or the demise of the least financed and patronized of the two. It follows historically that one established league is the only "natural" form of industry behavior that sports leagues undertake.

There is some validity to this approach. While it is generally true that only one competitor will survive the aftermath of an interleague struggle, survival alone should not necessarily expose the winner to Sherman Act liability. At least in Commissioner Rozelle's view, there is a natural reason, based on an observed historical phenomenon, why sports entertainment tends to be dominated by a single league. On another level, sports league monopolies are natural, and beyond the reach of Sherman Act enforcement, because this type of economic arrangement is more efficient.¹⁸⁹ These circumstances, whether examined individually or taken together compel a strong inference of a monopoly in the market for player services, because the inexorable result of solo league dominance is that players have but one employer with whom to deal.¹⁹⁰

187. The attorneys for the USFL attempted to develop Rozelle's position at trial by asking:

Q. Commissioner, haven't you stated of your own volition that the National Football League is a natural monopoly?

ROZELLE. Yes.

Q. When did you first take that position?

ROZELLE. I use it on occasion over the years, probably maybe as far back as the 60's. . . .

. . . .

ROZELLE. In the long run, I feel that all professional sports leagues on the basis of history are or will be a natural monopoly.

. . . .

ROZELLE. [after discussing a brief history of professional sports league failures and mergers] So when I have used the term monopoly, I do it from a perspective of history in all sports, not from a legal standpoint. . . . [H]istory shows that professional sports leagues are or will become eventually natural monopolies, they will be one, in other words. Two have tried, but they always become one in baseball, basketball, hockey and football.

Transcript of the Testimony of NFL Commissioner Pete Rozelle at 234-35, 237, United States Football League v. National Football League, 644 F. Supp. 1040 (S.D.N.Y. 1986); United States Football League v. National Football League, 634 F. Supp. 1155 (S.D.N.Y. 1986) (No. 84-Civ. 7484 (PKC)).

188. See, e.g., Neale, *supra* note 49, at 4, 7, 13-14.

189. See Comment, *supra* note 167, at 576 n.3 (showing the power of a monopsonist to suppress prices and output as a buyer of a service, and not as a supplier of goods); cf. Neale, *supra* note 49, at 4 (suggesting that "each professional sport is a natural monopoly").

190. See *infra* text accompanying note 297.

4. COLLECTIVE BARGAINING

Finally, sports leagues, seeking to discover additional ways of avoiding antitrust liability, have profited from developments in an area of labor law that has considerable antitrust implications. Congress has expressed a preference for ordering the employment relationship in a way that encourages employees to act together to pool their economic resources.¹⁹¹ By doing so, labor interests confront management groups from a position of collective bargaining strength, and not simply as individuals motivated by self interests. In order to encourage labor negotiations in a collective bargaining setting, courts have interpreted these developments in a way that allows participating unions to escape section 1 liability.¹⁹² The nonstatutory labor exemption accommodates labor law's interest in encouraging collective bargaining and the equally compelling antitrust concerns with preserving unrestrained competition.¹⁹³ The effect of this labor exemption, however, is to protect from antitrust review not only

191. Cf. Note, *The National Basketball Association's Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 169 (1985) ("National labor policy encourages collective bargaining as the best means to promote industrial peace."). The labor exemption from the antitrust laws is derived from two relevant congressional statutes. See Clayton Act § 6, 15 U.S.C. § 17 (1982); Norris-LaGuardia Act § 4, 29 U.S.C. §§ 101-115 (1982) (original version at 47 Stat. 70 (1932)). These statutes created an exemption protecting unions from the reach of the antitrust laws as applied to concerted union activities. See Note, *supra* note 41, at 172-73 n.23. The purpose of the exemption is to protect and further the collective bargaining process. See, e.g., *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738, 742 (D.D.C. 1976) (stating that the policy of the exemption is to allow "the collective bargaining process, proceeding unfettered by antitrust restraints, to determine wages, hours, and terms and conditions of employment"), *aff'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); cf. *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 698-735 (1965) (Goldberg, J., dissenting in part) (observing that the exemption is designed to protect the collective bargaining process from judicial intervention).

192. The labor exemption that insulates the results of collective bargaining from antitrust review is nonstatutory. Courts have interpreted the relevant statutory labor laws as requiring a proper accommodation between labor and antitrust law that can only be accomplished by granting immunity for assorted agreements and activities traceable to collective action. See *Mackey v. National Football League*, 543 F.2d 606, 611-12 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

193. In *Mackey v. National Football League*, the court observed that "in order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining . . . certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions." 543 F.2d at 611-12 (citing *Connell Constr. Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 621-22 (1975); *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965)); accord *Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 5 (1971); Riga, *supra* note 140, at 559 & nn.39-40, 561; see also *Roberts, Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 86-88 (1986) (describing the tension between labor law's interest in stimulating the collective bargaining process, and the preservation of a free market economy unrestrained by anticompetitive activity).

union organization, but also terms or conditions of employment that are incorporated into a collective bargaining agreement.

Initially, only labor unions availed themselves of the nonstatutory labor exemption. Because Congress sought to encourage collective bargaining, courts believed that increased union activity and the pooling together of centers of labor strength necessitated that resulting contracts be free from rigid antitrust consideration. As the accommodation and blending of labor and antitrust law matured, it became clear that all parties to the collective bargaining agreement should have the opportunity to assert this exemption.¹⁹⁴ Courts soon recognized that although the relevant labor law legislation did not even implicitly contemplate protecting nonlabor groups from antitrust liability, future case decisions saw the illogic in denying similar protection to management upon its participation in the collective bargaining process.¹⁹⁵

Two cases in particular have shaped the nonstatutory labor exemption in the context of professional sports league operating rules. In *Mackey v. National Football League*,¹⁹⁶ the Court of Appeals for the Eighth Circuit developed a test for determining when a restraint is properly incorporated into a collective bargaining agreement, immunizing league officials from the Sherman Act. The case presented a section 1 challenge by current and former players against the effect of the "Rozelle Rule," which created an insurmountable barrier to free agency.¹⁹⁷ The league argued that because two prior collective bargaining agreements included this rule as a binding condition of employment, the restraint fell within the nonstatutory labor exemption to the Sherman Act.¹⁹⁸ The court ruled that in order to avail itself of the exemption, management must show that the restraint primarily affects only the parties to the collective bargaining relationship; that the challenged term concerned a mandatory subject of collective bargaining; and that the restraint was the product of bona fide arms length negotiation.¹⁹⁹ The court ultimately found the

194. See, e.g., *Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 499 (E.D. Pa. 1972); *accord Closius, Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C.L. REV. 341, 361-62 & nn.149-50; Note, *supra* note 41, at 174 & nn.27-28.

195. See *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 886 (S.D.N.Y. 1975); *supra* note 194; *accord Berry & Gould, supra* note 125, at 760.

196. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

197. See *Mackey*, 543 F.2d at 609; *cf. supra* text accompanying notes 132-39.

198. *Mackey*, 543 F.2d at 612.

199. *Id.* at 614-15. The Court of Appeals for the Eighth Circuit, in *Mackey*, articulated a three-prong test for determining the application of the nonstatutory labor law exemption to insulate the results of collective bargaining:

Rozelle Rule invalid. While the restraint affected only the parties to the collective bargaining agreement, and the restricted mobility of players constituted a mandatory subject of bargaining, the court observed that the NFL had unilaterally imposed this restraint on a weak and inexperienced union, and that the restraint was at no time exposed to vigorous and intensive arm's length negotiation.²⁰⁰

Soon thereafter, the Sixth Circuit addressed this same question, but in the context of the National Hockey League (NHL). In *McCourt v. California Sports, Inc.*,²⁰¹ the NHL faced an antitrust challenge against its "equalization payment" provision of its bylaws, which served much the same purpose as the Rozelle Rule.²⁰² The court applied the *Mackey* test, and discovered that unlike in *Mackey*, the hockey players association did not bargain from a position of weakness.²⁰³ Indeed, the court found that while the NHL remained intractable in its intention to maintain a reserve system, the league yielded significantly on other issues.²⁰⁴ Moreover, the union vigorously opposed the inclusion of this restraint in the collective bargaining agreement.²⁰⁵ In the final analysis, there was little doubt that the league had not unilaterally imposed this restraint on a weak and unsophisticated union without the benefit of arm's length negotiation. More importantly, the court signaled a new direction in the application of the *Mackey* test, allowing management to meet the third prong simply by showing that the union fully participated in the negotiations leading up to the collective bargaining agreement without having to demonstrate that the union received reciprocal compensation in

First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. . . . Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. . . . Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

Mackey, 543 F.2d at 614. For a group of articles discussing the *Mackey* test, see Berry & Gould, *supra* note 125, at 769; Closius, *supra* note 194, at 370-71; Comment, *Sport in Court: The Legality of Professional Football's System of Reserve and Compensation*, 28 UCLA L. REV. 252, 281-83 (1980); cf. Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 884-86 (S.D.N.Y. 1975) (suggesting an earlier test aimed at discovering whether the challenged restraints apply to nonparties of the collective bargaining relationship and whether the disputed terms were mandatory subjects of bargaining), cited in Roberts, *supra* note 193, at 70, 72 n.245.

200. *Mackey*, 543 F.2d at 616.

201. 600 F.2d 1193 (6th Cir. 1979).

202. *McCourt*, 600 F.2d at 1195.

203. *Id.* at 1201-03.

204. *Id.* at 1202.

205. *Id.*

return for its own concessions.²⁰⁶

In addition, a recent Second Circuit decision concerning a challenge against the National Basketball Association's (NBA) college draft and salary cap also applied the nonstatutory labor exemption to protect the league from the reach of the Sherman Act. In *Wood v. National Basketball Association*,²⁰⁷ a promising college draftee failed to convince the court that the collective bargaining agreement should not insulate the NBA from the antitrust laws when the affected player was not a party to the earlier agreement.²⁰⁸ The court ruled that player associations reach agreements with league officials on behalf of all existing *and* future players.²⁰⁹ Because there was no issue as to whether these restraints and the union's participation in its adoption satisfied the *Mackey* test, the court saw no basis upon which to grant Mr. Wood's claim for relief.²¹⁰

Professional sports leagues have thus far had only moderate success convincing courts that antitrust challenges in the player service area are immune from antitrust review if the challenged trade practices are incorporated into a collective bargaining agreement and are

206. The court found:

[I]t is apparent that the inclusion of the reserve system in the collective bargaining agreement was the product of good faith, arm's length bargaining, and that what the trial court saw as a failure to negotiate was in fact simply the failure to succeed, after the most intensive negotiations, in keeping an unwanted provision out of the contract.

Id. at 1203. The interaction between the *Mackey/McCourt* tests and how they apply to collective bargaining in the sports industry has been the subject of a significant amount of legal scholarship. See J. WEISTART & C. LOWELL, *supra* note 4, § 5.06, at 93-99; Closius, *supra* note 194, at 371-77; Roberts, *supra* note 193, at 90-96; Weistart, *Judicial Review of Labor Agreements: Lessons From the Sports Industry*, LAW & CONTEMP. PROBS., Autumn 1981, at 109, 125; Note, *supra* note 41, at 184-91; see also *Zimmerman v. National Football League*, 632 F. Supp. 399, 403-04, 406-08 (D.D.C. 1986) (finding that union representatives bargained extensively on disputed terms, ultimately agreeing to a "supplemental draft" of college players).

207. 809 F.2d 954 (2d Cir. 1987), *aff'g* 602 F. Supp. 525 (S.D.N.Y. 1984); see J. WEISTART & C. LOWELL, *supra* note 4, § 5.06, at 92-93 (discussing the district court opinion).

208. *Wood*, 809 F.2d at 960-61; see also *Zimmerman v. National Football League*, 632 F. Supp. 398, 405-06 (D.D.C. 1986) (involving a challenge by players alleging to be outside the bargaining unit and therefore, claiming that the league should not be able to meet the first prong of the *Mackey* test).

209. The plaintiff argued that as a college player at the time the NBA players association negotiated the collective bargaining agreement, he was outside the bargaining unit. The court reminded the plaintiff that the National Labor Relations Act specifically calls for collective negotiation and that no "employee dissatisfied with his salary relative to those of other workers [could] insist upon individual bargaining contrary to explicit federal labor policy." *Wood*, 809 F.2d at 960.

210. The court deferred to the district court decision, which applied the *Mackey* test to these facts, and found that the nonstatutory labor law exemption protected the league from Sherman Act liability. *Id.* at 958 (citing *Wood v. National Basketball Ass'n*, 602 F. Supp. 525, 528 (S.D.N.Y. 1986)).

subject to intensive arm's length negotiation. Perhaps the Second Circuit's recent decision in *Wood* signals a new direction in this area of antitrust enforcement, one that will allow leagues to more successfully rely on the nonstatutory labor exemption as a means of immunizing future league conduct. By introducing labor law concepts into an antitrust context, sports leagues are given an additional and highly effective method by which to seek protection from the Sherman Act.

D. *The Early Assumptions About Sports League Conduct*

The majority of professional sports league cases that involve antitrust issues are well over a decade old and should be sent to the showers. Some of the more significant legal scholarship is similarly out of step with the changing economic realities of professional sports league organization. This article seeks to put into perspective some of the early and most enduring assumptions that courts and commentators have made in these early opinions. With the passage of time and the heightened complexity of sports league economics, some of these assumptions no longer provide viable reasons for applying the Sherman Act to certain league practices.

1. PROFESSIONAL SPORTS AS A UNIQUE PRODUCT

Courts and commentators alike have agreed that professional sports leagues present a unique form of economic organization.²¹¹ Indeed, all of the assumptions about sports leagues are in some way traceable to the notion that this is a special industry, deserving of special antitrust consideration. Much of the case law and accompanying literature have pointed out that the business of sports entertainment cannot be thought of in the same way as other more traditional

211. The most widely cited language for this proposition appears in *United States v. National Football League*:

Professional football is a unique type of business. Like other professional sports which are organized on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of the business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.

Professional teams in a league, however, must not compete too well with each other in a business way. . . . If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.

116 F. Supp. 319, 323 (E.D. Pa. 1953), *quoted in* Berry & Gould, *supra* note 125, at 737 n.160.

forms of industrial organization.²¹² The characteristics of professional sports leagues are sufficiently distinct from other industries. Certain league practices that would fail any test of Sherman Act liability in other contexts might be justified here because of the peculiar and unique qualities that professional sports leagues present.²¹³ In fact, the modern era of professional sports has given rise to a continued understanding that league rules often walk a fine line between procompetitive business necessity and unlawful anticompetitive or predatory conduct. At the very least, the recognition that professional sports leagues offer a unique brand of industrial organization ensures that until a principled and uniform theory about its relationship to the antitrust laws is developed, courts should continue to take a more careful look at trade practices that emanate from these league operations. In doing so, courts have developed a series of assumptions about how to apply the Sherman Act to this "unique" form of economic organization. Each of these assumptions shows that, for the most part, declaring this industry unique does not insulate sports leagues from the antitrust laws. On the contrary, rather than making sports leagues impervious to antitrust review, these assumptions seem to create an affirmative obligation on the part of the entire industry to supervise its activities more carefully.

a. Rule of Reason Versus Per Se Treatment

The early cases recognized that professional sports leagues present unique economic circumstances that make per se invalidity an inappropriate method by which to analyze questionable trade practices. Although certain league practices tread dangerously close to some of the unlawful characteristics common among group boycotts or concerted refusals to deal, courts have determined that the economic realities inherent in the business of professional sports leagues nonetheless result in a preference for rule of reason scrutiny and not

212. This notion is traceable to the fact that unlike other industries, the professional sports league is a joint venture that requires "essential" agreement among franchise owners before any product can be created and ultimately marketed. See Glick, *supra* note 29, at 67-68; Kempf, *supra* note 44, at 628-30; Lazaroff, *supra* note 4, at 182-83, 198, 201; cf. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1408 (9th Cir.) ("Without the league, professional football becomes a pursuit no more substantial than a group of finely-tuned athletes traveling haphazardly about, in search of playing competition." (Williams, J., dissenting)), *cert. denied*, 469 U.S. 999 (1984). But cf. *id.* at 1389 ("It is true that cooperation is necessary to produce a football game . . . [But] this does not mean, 'that each club can produce football games only as an NFL member.'") (quoting district court opinion, 519 F. Supp. 581, 584 (C.D. Cal. 1981)).

213. See, e.g., Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); see Kurlantzick, *supra* note 4, at 193.

per se invalidity.²¹⁴ The latter approach would effectively ignore the unique business qualities that set professional sports leagues apart from other industries.²¹⁵ While per se treatment is a considerable time saving approach to antitrust enforcement, it is highly questionable how useful it is when dealing with unique industries that demand a more thoughtful review of their potential unlawfulness. The rule of reason allows a court to discover that behind a given trade practice may lie the achievement of an otherwise valid business purpose with redeeming virtues intended to promote rather than to destroy competition.²¹⁶

For the most part, however, the fact that courts prefer a rule of reason approach over strict per se treatment provides no real measure of comfort to a professional sports league attempting to avoid section 1 liability. As a practical matter, courts have done nothing more than simply recognize that the business of professional sports is sufficiently unique. Most everyone agrees that teams do not compete with each other economically, and that without a competitively balanced league "product," each individual team would have little commercial value on its own.²¹⁷ While courts seem to appreciate that these unique qualities warrant a more detailed review of questionable trade practices, these same jurists have made little if any effort to apply the rule of reason in a way that would help a league limit its liability. The better view is that professional sports leagues have received only a reprieve from per se treatment. In the aftermath of judicial rule-making, most courts have found that while the rigidity of per se rules may be inappropriate to unique industries, any objectionable trade practices that emanate from league activities nonetheless violate section 1 under the rule of reason.²¹⁸

While some courts have recognized certain trade practices as necessary to achieve a better league product, these same courts have been relentless in enforcing the antitrust laws against anything that

214. See *supra* note 42 and accompanying text.

215. See *supra* text accompanying notes 211-12.

216. See *supra* text accompanying notes 32-43.

217. *Contra* H. DEMMERT, *supra* note 135, at 38-39; Closius, *supra* note 194, at 384 (arguing that competitive equality is illusory because historically, a single team dominated most leagues); Quirk & El-Hodiri, *The Economic Theory of a Sports League*, in GOVERNMENT AND THE SPORTS BUSINESS 33, 58 (R. Noll ed. 1974) (disputing the competitive balance theory); Note, *supra* note 41, at 167 n.9 (citing a contrast of authorities on the theory of competitive balance); Comment, *supra* note 199, at 285 n.216 (same); M. El-Hodiri & J. Quirk, *An Economic Model of a Professional Sports League* 1, 24 (Aug. 1970) (unpublished research paper in theoretical and applied economics; Department of Economics, University of Kansas). *But see* Jacobs & Winter, *supra* note 193, at 5 (arguing that evenly matched contests stimulate fan interest and result in efficiencies not otherwise attainable).

218. See cases cited *supra* note 47.

walks, jumps, or runs in the sports industry, provided that it resembles, even remotely, an anticompetitive restraint. Characterizing a sports league as a unique business arrangement would appear to be a useful way of distinguishing this industry from others more prone to antitrust enforcement, but does not work in practice. The harsh reality is that increased recognition of the uniqueness of this industry has had an insignificant effect on protecting sports leagues from the Sherman Act. Courts have done nothing but prolong the amount of time it would otherwise take to ultimately find certain league practices unlawful under the rule of reason. The early case law implies the unmistakable and unfortunate conclusion that the unique qualities of professional sports leagues are relevant only in so far as avoiding a per se approach to section 1 analysis. While courts take longer to apply the rule of reason, the end result in most of the early sports league cases found the challenged trade practices unlawful even after the benefit of elaborate inquiries into the reasonableness of the restraints.

The rule of reason is indeed the proper test in analyzing league restraints under section 1. A true appreciation of the economic realities within this industry, however, requires a more imaginative leap from traditional antitrust principles. Not only should these characteristics²¹⁹ provide a sufficient basis to avoid per se invalidity, they should also be enough to overcome liability under the rule of reason. There is no point in recognizing that certain industries ought to be treated differently if in fact these genuine reasons for granting special treatment are ultimately ignored.

b. No Single Entity Status

The Ninth Circuit Court of Appeals in *Los Angeles Memorial Coliseum Commission v. National Football League*²²⁰ sounded the most recent rejection of the single entity defense in the context of professional sports leagues. The court in that case addressed a challenge to a league rule that restricted the ability of team owners to relocate member franchises.²²¹ Other cases in various professional sports contexts have addressed the appropriateness of treating a league as a single entity, and thereby immunizing from section 1 liability otherwise unlawful trade practices.²²² The primary objection to the defense is that in some ways sports leagues appear to resemble large corpora-

219. See *supra* text accompanying notes 44-59.

220. 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 999 (1984).

221. Rule 4.3 of article IV of the NFL Constitution requires the unanimous approval of all twenty-eight owners in order to relocate an existing franchise into another owner's territory. See *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1384-85.

222. See *supra* note 47 and accompanying text.

tions with subsidiary units intimately connected to the fortunes of the larger parent. While this relationship may justify the sharing of revenues and other forms of subsidization,²²³ the fact remains that the leagues have the opportunity to so incorporate, and chose instead not to do so.²²⁴ Similarly, while revenues are often shared, profits and losses remain the responsibility of the individual teams.²²⁵ This latter point further highlights the difference between a corporation, which could be characterized as a single entity, and a professional sports league, which arguably cannot.

The rationale behind this judicial reluctance to apply the single entity defense to section 1 claims involving professional sports leagues is fatally flawed. Courts have rejected the single entity defense despite the fact that a great deal of scholarship in this area of antitrust law has focused the debate on the similarities between professional sports leagues and other joint venture enterprises,²²⁶ and the absurdities that naturally would follow if these business arrangements suddenly fell vulnerable to antitrust review. Professor Grauer, for instance, has compared sports leagues to law partnerships, with each lawyer in the partnership standing in very much the same situation as a franchise owner affiliated with an established league.²²⁷

Nonetheless, courts have been unwilling to recognize that the need to cooperate, the single most important requirement in developing a successful sports product, does not later manifest itself in unlawful conspiratorial behavior once the league is established. Joint action takes place because the nature of this peculiar industry requires

223. See *supra* note 78.

224. There are those who argue that sports leagues choose not to incorporate, despite the fact that it would formalize their single entity claims, because to do so results in the appearance that there is no real competitive rivalry among franchises. See Blecher & Daniels, *supra* note 44, at 225-26; Grauer, *supra* note 4, at 33 n.151; Roberts, *supra* note 44, at 252, 261-64.

225. See Weistart, *supra* note 1, at 1048 (observing that in the NFL, "[a]lthough a large portion of league revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared") (quoting *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1390); accord Lazaroff, *supra* note 4, at 172 n.80 (citing *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1251-52 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982), for the same proposition).

226. See Kempf, *supra* note 44, at 627 n.11; Lazaroff, *supra* note 4, at 198; Comment, *supra* note 16, at 1000, 1008 n.34; Comment, *supra* note 2, at 426.

227. Grauer, *supra* note 4, at 23-35 & nn.104-58. In looking at the system of shared and unshared revenues that the NFL has created, and analogizing it to partnership compensation plans that law firms often use, Professor Grauer observes that "it is difficult to distinguish the financial reward system of the NFL from that of a major law firm." *Id.* at 29. But see Roberts, *supra* note 44, at 255-56 (arguing that unlike a lawyer who has joined a law firm, a sports team is unable to operate on its own without first cooperating with other franchises in the hope of creating a salable product).

that the league resort to cooperation rather than discord in order to create a marketable product. Concerted activity at this level, and for this purpose only, should not be confused with the kind of harmful anticompetitive conspiracies in restraint of trade that necessitates the existence of section 1 enforcement powers. Once the league is established, the very same cooperation that brings team owners together in creating a league cannot be used to prove that a conspiracy exists for section 1 purposes. The whole notion of concerted activity drops out of the calculus once the league is in place and is governed by a self-regulating set of bylaws that speaks with one internal voice on behalf of all franchises. Without early cooperation, everything about a sports league that is attractive to the consuming public will be forever lost.²²⁸ In other industries, the joining together of actors at the same or different levels of the distribution scale leads to the suspicion of a conspiracy in restraint of trade. In professional sports leagues, without this initial joining together of men and resources, there is no promise of a league or marketable product. Once created, however, there is no further potential for coordinated activity, only conduct that is derived from league rules and policies. Similarly, unlike other industries where independent entities are capable of surviving alone, the same cannot be said of the multitude of team franchises that exist as part of a larger league structure. These individual teams depend upon the showcasing of a league championship as the stimulating force behind winning the approval and acceptance of a wide audience. It is only as a league, and not as individual teams, that the professional sports industry can compete as a meaningful entertainment form.²²⁹

c. There Are No Interchangeable Substitutes
for Sports Entertainment

The section 2 inquiry into monopoly power hinges on a finding

228. The various aspects of sports league operation, similar to other industries that integrate diverse skills and resources, take on the characteristics of a business arrangement where "the whole is truly greater than the sum of its parts; it is, to some extent, a different product." *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 21-22 (1970) (upholding a blanket licensing agreement where broadcasting companies purchased a catalog of copyrights as one unit and thereby avoided separate negotiations with each individual composer). This "new" product is precisely what the buying sports public wants, not a series of random games unaffiliated with league standings or a championship race. See Roberts, *supra* note 44, at 226-38 & nn.22-31; *supra* note 49 and accompanying text.

229. Compare *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1393 (9th Cir.) (describing the Superbowl as "the ultimate NFL product"), *cert. denied*, 469 U.S. 990 (1984) with Roberts, *supra* note 44, at 232-33 n.40 (suggesting that "[b]ecause no single team is capable of production, and no two teams are capable of producing anything but single isolated games, the enormous utility created by the modern-day league product can only be produced by a league").

that the defendant has captured a share of the relevant market that is disproportionate in size to that which it could obtain in a world of ideal competitive conditions.²³⁰ A widely accepted economic assumption is that when an industry is exposed to vigorous and intense competition, the resulting market for a particular good will experience lower prices and greater output.²³¹ These desirable supply and demand performance indicators will continue so long as there are no artificially created entry barriers or the existence of otherwise predatory conduct. If monopoly conditions are present, however, the economic picture within the relevant market changes, with prices likely to be higher, and output decreased.²³² It is difficult to determine whether a competitor has monopoly power within a relevant market. The court defines the relevant market by determining the market share that the defendant has in each of two definitional categories—the product and geographic markets.²³³ By and large, if a monopoly defendant's market share is over eighty percent in either or both categories, the defendant is deemed to possess market power that is disproportionate in size to that which would occur under true competitive conditions.²³⁴

Popular thinking in this area assumes that the product market of professional football, for instance, is so unique, that there are no reasonably interchangeable substitutes that consumers will accept as an alternative for Sunday afternoon games.²³⁵ This assumption is

230. See *supra* text accompanying notes 91-92.

231. See *supra* notes 83-95 and accompanying text.

232. A related argument in this context is that professional sports leagues take advantage of monopoly output and pricing control by creating scarcities in the market for professional sports teams. The notion is that there are many cities capable of supporting franchises, but sports leagues have an incentive to create artificial scarcities by limiting expansion and sharing revenues among a smaller group of owners. See Noll, *Alternatives in Sports Policy*, in *GOVERNMENT AND THE SPORTS BUSINESS* 411, 412 (R. Noll ed. 1974); Weistart, *supra* note 1, at 1036 & n.69; Note, *supra* note 60, at 942 & n.102; *infra* Section IV; cf. Kurlantzick, *supra* note 4, at 188 & n.30 (arguing that economic inefficiency results when pricing and output decisions are not responsive to market forces).

233. See *supra* text accompanying note 84.

234. See *supra* note 91.

235. Most courts have taken this view as well. In *Los Angeles Memorial Coliseum Commission v. National Football League*, the court noted that "NFL football has limited substitutes from a consumer standpoint, [and] a different set of fans than college football." 726 F.2d 1381, 1393 (9th Cir. 1984) (referring in part to testimony by Miami Dolphin Coach Don Shula); see also *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 112 n.49 (1984) (observing that "[i]t is also apparent that the unique appeal of NCAA football telecasts for viewers means that 'from the standpoint of the consumer' . . . there can be no doubt that college football constitutes a separate market for which there is no reasonable substitute") (citation omitted); cf. Lazaroff, *supra* note 4, at 209 ("Both fans and stadium operators view NFL football as a unique and separate product."); Riga, *supra* note 140, at 573 (suggesting that "[t]he NFL almost has a monopoly from September to January, and there are really no

based on economic theory and is related to what all first year microeconomics students know to be the cross-elasticities of demand.²³⁶ The formula allows for an economic and mathematical way of characterizing consumer items as either necessity or luxury goods. In the former category are consumer items for which there are no close substitutes, meaning that the buying public will still purchase the good even if prices rise dramatically. Luxury items, on the other hand, operate in a market where there are a great number of competing alternative consumer products, such that the demand for any particular item will depend in large part upon the price and quality that the market supplies on any given day. For this reason, luxury items are thought to be price elastic, because with every marginal increase in price there is a corresponding decrease in demand.²³⁷ The opposite is true of necessity items, which are generally regarded as having an inelastic demand schedule. An inelastic demand suggests that consumer buying preferences are characteristically insensitive to price fluctuations operating within the market for a particular product.

This economic theory posits that consumers tend to be very sensitive to fluctuations in price whenever purchasing a product that is nonessential and that operates in a competitive industry where there are many interchangeable substitutes. Similarly, necessity items are regarded as price inelastic because demand very often remains unaffected even though consumers may have to pay more for the same purchase. Mathematical evidence supports this theory, because observed consumer preferences do not appear to shift for alternative goods even when there is an increase in price.

Courts that have examined the section 2 implications of professional sports leagues have determined that sports do not necessarily compete with other forms of entertainment.²³⁸ By showing that the

good substitutes for this product during this vital time frame"). *But see Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1393 (acknowledging that there was evidence from which a jury could have found the existence of a broad product market where sports leagues with overlapping schedules compete against one another along with other television or local entertainment offerings).

236. See, e.g., J. HIRSHLEIFER, *supra* note 95, at 132-50; L. SULLIVAN, *supra* note 28, § 12, at 53-57; accord Note, *supra* note 60, at 934.

237. See J. HIRSHLEIFER, *supra* note 95, at 148.

238. See, e.g., *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 783 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 988-89 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Fishman v. Wirtz*, 1981-2 Trade Cas. (CCH) ¶ 64,378, at 74,764 (N.D. Ill. 1981); *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966, 969 (C.D. Cal. 1974); *American Football League v. National Football League*, 205 F. Supp. 60, 65 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963); cf. authorities cited *infra* note 298. *But cf.*, e.g., *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1252 (2d Cir.) (finding that both professional football and soccer

demand for a particular sport is price inelastic, meaning that what consumers really want is professional football played on Sunday afternoons, and that neither other sports nor alternative forms of entertainment are sufficient replacements for the game itself, price, use, and quality considered,²³⁹ a court can then conclude that the product market for the industry consists only of professional football. If, however, consumers accept some reasonable interchangeability between professional football and arguably, first run movies or cable television, then the actual share of the product market that professional football enjoys may be too low to merit serious monopoly consideration.²⁴⁰

Despite the few cases that have addressed the section 2 issues that arise in the professional sports league context, courts have routinely assumed that sports leagues possess extreme market power in the relevant product market,²⁴¹ which in the case of the NFL for example, includes only professional football played during the fall season and located in the twenty-six cities that are home to NFL franchises. For the most part, few commentators and still fewer courts have considered the possibility that professional football may in fact compete with other forms of entertainment, and that the relevant product market includes these and other entertainment options.

2. DO THESE ASSUMPTIONS MAKE FOR GOOD PRECEDENT?

As already discussed, early case law determined that the three

compete with each other economically because they are similar games with overlapping schedules; and with "soccer[s] . . . accelerated growth in fan interest, media following, paid attendance, number of franchises and geographic scope," it is likely that it now presents a legitimate threat to the NFL's share of broadcast, marketing, and local gate attendance revenues), *cert. denied*, 459 U.S. 1074 (1982).

239. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395-96 (1956); *Broadway Delivery Corp. v. United Parcel Serv.*, 651 F.2d 122, 129 (2d Cir.), *cert. denied*, 454 U.S. 969 (1981).

240. *Contra Coniglio v. Highwood Serv.*, 495 F.2d 1286, 1291-92 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974). In *Coniglio*, the Court of Appeals for the Second Circuit, in a case involving a challenge against a package sale of regular season and exhibition tickets to the Buffalo Bills, observed:

[The] claim that plays, movies, and musicals are all within the boundaries of the same product market as exhibition football amounts to nothing more than the boundless contention that, by extracting extra dollars from season ticket holders, the Bills leave less in their pockets to spend on any other form of diversion, from a trip to the zoo to a night at the opera. Suffice to say that the extraordinary breadth of the market encompassing such diverse yet assertedly competitive products is far beyond that ever contemplated for a *relevant* product market.

495 F.2d at 1292. *But cf. infra* note 285 (arguing against such a narrow approach to market definition in professional sports).

241. See authorities cited *supra* note 238.

primary assumptions about the relationship between professional sports leagues and the antitrust laws relate to the notion that the leagues are unique industries deserving of special consideration. The irony, of course, is that in each of these instances of specially crafted antitrust analysis, the courts for the most part, have ruled that league practices violate section 1. Courts similarly have found that sports leagues are dominant industries that possess substantial market influence.

The past twenty years have seen a series of cases dealing with the antitrust implications of professional sports leagues. The common theme that runs throughout these opinions is that sports leagues are unique, often complex and very difficult to define as a relevant market. Nonetheless, they are more often than not guilty of antitrust violations. The vitality of these opinions is uncertain, as is the degree to which they will endure as meaningful precedent in the continuing relationship between sports league trade practices and the Sherman Act. As a practical matter, courts decided these early opinions during a completely different era of modern professional sports. The difference is not so much that the quarterbacks of today are arguably better than those who played with and against Joe Kapp.²⁴² The real difference that separates the early cases from those that ultimately will face Sherman Act review is based on the economic realities existing within the present environment of professional sports league entertainment. The early assumptions mentioned in the previous sections may have been justified as necessary features of an era in professional sports where the process of constructing the actual event was subject to far less complicated market conditions, and where each sport actually maintained an impenetrable stronghold on diehard fanatics eager for only a particular brand of sports entertainment. While these early opinions remain as an historical record affirming the unique characteristics of professional sports leagues, they provide dubious precedent at best in resolving future conflicts in this area of antitrust law. At the very heart of the problem lies the fact that these antiquated assumptions are based to some degree on an erroneous view of consumer buying preferences. There is also the very real presence of a changed economic environment in which sports leagues now operate.

242. Joe Kapp came to the National Football League after a distinguished career as quarterback for the University of California. As a professional, he led the Minnesota Vikings in a losing effort against the Kansas City Chiefs in Superbowl III. Despite these more than modest athletic credentials, Kapp, because of the frequency with which others have cited his litigation against his former employer, is probably better remembered and celebrated as a plaintiff than as a signal caller.

III. THAT WAS THEN, THIS IS NOW: THE CHANGING COMPLEXION OF PROFESSIONAL SPORTS LEAGUE ENTERTAINMENT

The modern era of professional sports leagues has seen vast changes in the development of this industry as a viable entertainment form. This next section will address some of the new features of modern sports league entertainment. These new features will eventually require courts to develop a new approach in the ongoing effort at reconciling the Sherman Act with this unique industry.

A. *Features of the Modern Era*

There is truly a modern era in professional sports league organization. Not only are the athletes swifter, stronger, and larger in size than at any other time in the history of sporting contests, but the business and commercial side of professional sports entertainment has reached a level of economic sophistication that remains unmatched for its time, even by more mature industries.²⁴³ Because of these new developments in both the financial and structural aspects of sports league organization, it is unlikely that many of the early cases will be of much use in the modern era. These new developments are significant, and each signals a definite need for courts and commentators alike to adopt a new approach toward the antitrust implications of sports league entertainment.

1. INCREASED NUMBER OF SCHEDULED GAMES

During the last twenty years, all major professional sports leagues have increased the number of games played during both the regular and post-season.²⁴⁴ The leagues obviously made this decision in the hope of generating higher revenues from both expanded televi-

243. See, e.g., D. HARRIS, *supra* note 7; Bosc & Sherer, *Hype Cash for Super Bowl Cities*, U.S. NEWS & WORLD REP., Jan. 27, 1986, at 23; *Impact of the Baseball Strike*, U.S. NEWS & WORLD REP., June 29, 1981, at 64; *Why Basketball Is Having a Championship Season*, BUS. WK., Mar. 4, 1985, at 75; *Take Me Out to the . . .*, Wall St. J., Sept. 2, 1986, at 29, col. 2 (citing Simmons Market Research Bureau, Inc. for the estimated number of people who attended at least one live sporting event among all sports attractions).

244. In professional football, the regular season schedule has increased from twelve games in 1960 to sixteen games in 1978. During that same period, the number of teams qualifying for playoff competition expanded from four to ten. NATIONAL FOOTBALL LEAGUE, 1981 OFFICIAL RECORD MANUAL 135-44 (1981). The Stanley Cup Playoff series is perhaps the best known post-season tournament when it comes to allowing the greatest number of teams to join in on the playoff excitement. During the 1930's and through the early 1940's, six of the seven professional hockey teams were eligible for the race for the Cup. In 1983, sixteen of the twenty-one teams participated in the post-season tournament. S. FISCHLER & S.W. FISCHLER, THE HOCKEY ENCYCLOPEDIA 635 (1983).

sion coverage and larger gate attendance. This is significant because most leagues complete their seasons and determine a league champion at about the same time as a different sports league is fast reaching the one-quarter point in its own regular season schedule.²⁴⁵ In large metropolitan markets such as New York, Chicago, and Los Angeles, where there are as many as two teams competing in each league, there is a certain ambivalence among sports fans in deciding on which team, in which sport, at any given point during the sports' calendar, to patronize. There is also considerable competition from the college ranks. Indeed, there is little doubt that particularly in cities where there are no professional sports teams, but where there is a major college sports program, fan loyalty may in fact prefer this form of sports entertainment to anything that professional sports can provide through television network broadcasting.²⁴⁶ With competition for the sports dollar becoming more fierce, it is no wonder that the increased number of games played by each professional sports team, including the expanded number of teams now qualifying for post-season play,²⁴⁷ has left each league with the difficult task of winning the patronage of a discriminating sports public. When and if successful, a sports league's ability to attract fan loyalty may come at the expense of other sports league entertainment.²⁴⁸

The extended scheduling of games is an important feature of modern professional sports. Because of this blending of sports entertainment played throughout the year, major league sports are all competing with each other. Included within this calculus also is the growing popularity of major college sports over the past decade. The

245. See, e.g., Wallace, *New Baseball Format to Force Schedule Conflict With Football in Fall*, N.Y. Times, April 13, 1969, at 4s, col. 2 (including a graphic of the overlap of the four major team sports' seasons, from the training camp period through the post-season).

246. But see authorities cited *supra* note 235.

247. All sports fans know that depending on the sport, the fact that a team has an uneventful year will not necessarily eliminate it from playoff competition. See *supra* note 244.

248. Several decisions, two of which in dissent, took the position that professional sports leagues as well as college football participate in the broader market for entertainment goods, where, because of either overlapping schedules or simply the fact that the demand for the product is elastic and thus very price and quality conscious, they face competition from other sporting leagues for gate receipts and revenues from marketing and broadcasting. See, e.g., *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 132 (1984) (White, J., dissenting); *National Football League v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from a denial of certiorari); see also *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1393 (9th Cir.), *cert. denied*, 469 U.S. 999 (1984) (acknowledging that the jury heard evidence showing that professional football competes with other sports leagues and other forms of entertainment); *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1252 (2d Cir.) (suggesting that sports leagues with overlapping schedules compete against one another for fans and revenues), *cert. denied*, 459 U.S. 1074 (1982).

college football bowl season, played at approximately the same time as the post-season playoff games of professional football and at roughly the one-quarter point of both professional basketball and hockey, has become a formidable entertainment offering, attracting substantial revenues from the major broadcasting networks.²⁴⁹ Similarly, college basketball and its playoff season, the NCAA Tournament, has repeatedly commanded a larger television audience for the tournament's final weekend, "The Final Four," than the NBA does for any of the games in its best of seven championship series.²⁵⁰ Perhaps the real competition that exists among professional sports leagues is not necessarily the competitive activity that takes place on the field, but rather that which requires the selling of professional sports to the consumer.

The significance of this reasoning is that with respect to almost any section 2 inquiry, it is difficult to find that a sports league has acquired, or does now possess, too large a market share. Market definition is rendered no less complicated even with the discovery that major sports leagues have increased their collective playing schedules. What has changed, however, is a greater awareness that there may be significant interleague competition among all sports for gate receipts and television revenues. While team success is one thing, the primary concern in the minds of all franchise owners is league financial stability, which is achieved only through the patronage of a viewing audience, whether cheering in the stands or seated in the arm chair. Courts and commentators have assumed repeatedly that the product market for any particular sport is comprised only of that sport, played in the designated geographical areas in which existing franchises are already located. A court that takes into account the

249. See Frank, *Block that Kick*, FORBES, Nov. 4, 1985, at 112; Pacey & Wickham, *College Football Telecasts: Where are they going?*, 23 ECON. INQUIRY 93 (1985). Recently, corporate sponsors have entered the college post-season bowl picture, assisting certain cities in attracting the most consequential of bowl games. See, e.g., *College Bowls, Corporate Cash*, FORTUNE, Jan. 20, 1986, at 9; *Selling the Name of the Game*, N.Y. Times, Jan. 3, 1987, at 22, col. 1.

250. The NCAA championship game has consistently outperformed the NBA Championship series in terms of generating television ratings and revenue. For example, for the years 1981-85, the percentage of American television households that watched these contests are:

	NBA CHAMPIONSHIP	NCAA CHAMPIONSHIP
YEAR	SERIES	GAME
1981	6.7	20.7
1982	13.0	21.6
1983	12.3	22.3
1984	12.1	19.7
1985	13.5	23.3

Telephone interview with Emily Angelides, A.C. Nielsen Co. (April 1, 1987).

expanded scheduling of league seasons, and the limited financial resources available to a consumer for leisure activities, should gain a renewed understanding that the product market in the sports entertainment industry is really much broader than at first perceived.

2. ADVENT OF TELEVISION REVENUES AND EXPANDED GATE RECEIPTS

The financial package that the major networks and their affiliates offer for the right to broadcast regular and post-season NFL football games is impressive.²⁵¹ The popularity of professional football has reached a point where it undoubtedly would have amazed those who earlier had thought that the game never would attract the same following as did baseball during its first sixty years of existence. The last television contract between the three major networks and the NFL was for \$2.1 billion over five years.²⁵² The NFL shares these revenues equally among member franchises.²⁵³ Each team uses a substantial portion of its allocated share to pay player salaries. In fact, recent figures indicate that while television revenues remained constant for the past five years, salaries have escalated to the point where the collective payout for player salaries from all teams had reached \$1.6 billion per year.²⁵⁴ With television revenues all but absorbed by player

251. In fact, the size of the television contract has increased dramatically since 1970. For instance, the contract for 1970-73 was for \$185,632,000; for 1974-77, \$268,000,000; for 1978-81, \$646,000,000 and for 1982-86, \$2,100,000,000. Pretrial Order, Undisputed Facts at ¶ 20, noted in Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict at 12, *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986); *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986) (No. 84-Civ. 7484 (PKC)). Cf. Note, *supra* note 60, at 932 n.53. Not all leagues have achieved this kind of success. See J. WEISTART & C. LOWELL, *supra* note 53, § 5.11, at 723 & n.263.

252. See *supra* note 251; see also Kurlantzick, *supra* note 4, at 193 n.49, 199 & nn.63-64 (discussing the significance of television broadcasts and revenues to the success of the NFL).

253. See *supra* note 53; Berry & Gould, *supra* note 125, at 697 & n.19; Closius, *supra* note 194, at 381 n.311 (citing NFL Constitution and By-Laws § 10.3).

254. Testimony at the *United States Football League v. National Football League* trial revealed that the 1982 Collective Bargaining Agreement between the NFL Owners' Management Council and the players' union (NFLPA) called for a minimum \$1.6 billion payout to the players during the five-year life of the league's \$2.1 billion contract with the major broadcasting networks. Transcript of the Testimony of Jack Donlan, Head of the Management Council for the NFL Owners (during the 1982 collective bargaining negotiations with the NFLPA) at 1174-76, *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986); *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986) (No. 84-Civ. 7484 (PKC)) (testifying also that in 1982, the league received \$500 million in television revenues and paid out \$493 million in player salaries).

Interestingly, the USFL shared the same type of operating experiences, according to testimony by USFL Commissioner Chet Simmons. In 1984, the USFL's first year in existence, the league collectively paid \$24 million in player salaries, but generated only \$13 million in

salaries, professional football franchises have sought other ways to cover operating expenses. These often include: increased pressure to derive more revenues from gate attendance, parking fees, merchandising receipts from concessions at the stadium, and the relatively new advent of sky boxes sold to corporate entities headquartered in the franchise city.²⁵⁵

Interestingly, the amount of television revenues the NFL is likely to generate during any contract period is a tenuous and uncertain phenomenon. At best, it certainly is not a meaningful indicator of monopoly power. The NFL's contract with the major broadcasting networks expired in the early part of 1987.²⁵⁶ At one time, the five year package worth over \$2 billion appeared so elusive for competing leagues, but yet such a permanent fixture of NFL marketing power. The television contract has since been subject to a new round of negotiations to determine its value over the next five years. Recent television ratings indicate that the popularity and therefore market for professional football is actually declining.²⁵⁷ Indeed as expected, the new contract did not increase at a level commensurate with that of its predecessor.²⁵⁸

The reasons for this loss of television audience is far from clear. Perhaps the games themselves have lost some of their earlier magic and allure. It is also possible that sports fans have turned to other sports for enjoyment; or perhaps viewing preferences have even

television revenues between ABC and the cable sports network, ESPN. Transcript of the Testimony of USFL Commissioner Chet Simmons at 4681, *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986); *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986) (No. 84-Civ. 7484 (PKC)).

255. These revenues are not shared. See *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1251-52 (2d Cir. 1982), cited in Grauer, *supra* note 4, at 28 n.127.

256. See Lancaster, *Despite Court Victory, NFL Faces Major Obstacles in Months Ahead*, Wall St. J., Aug. 6, 1986, at 19. The league announced its new contract on March 15, 1987. The total value of the new contract has declined from \$2.1 billion to \$1.4 billion. Moreover, cable networks, most notably ESPN, are now a feature of the NFL broadcasting package, partially making up for the loss of revenues at the hands of the major networks. Cf. *supra* note 7 (discussing the USFL's failed attempt to secure a lucrative television contract). The net decline in revenues amounts to a loss of approximately \$500,000 each year for each team. This aspect of the contract is notable because it represents the first time in the NFL's ongoing relationship with the major broadcasting networks that revenues have declined. See *supra* note 251. See generally Janofsky, *N.F.L. Faces a New Economy*, N.Y. Times, Mar. 17, 1987, at D30, col. 4; Janofsky, *\$1.4 Billion Deal Adds Cable to N.F.L. Picture*, N.Y. Times, Mar. 16, 1987, at A1, col. 1.

257. See Wong, *supra* note 151, at 18 n.51.

258. See *supra* note 256. The arrival of cable is not new to the sports industry, where on the local level, teams from large metropolitan markets have for years exploited the potential for lucrative contracts. Indeed, the Raiders' desire to garner a cable network contract is cited as one major reason for its departure from Oakland. See Note, *supra* note 60, at 939 n.90 (citing Closius, *supra* note 194, at 394 n.418).

shifted to competing forms of entertainment.²⁵⁹ In either event, the fact that the American Broadcasting Company (ABC) has even considered canceling Monday Night Football, at one point, one of the network's most enduring and consistent success stories, proves that the NFL's once believed stranglehold on the fascination of sports fans nationwide is no longer assured.²⁶⁰ In fact, the NFL, depending upon the size of the contract it ultimately does sign with the three major networks, must consider new ways to recapture some of its old audience whose attentions have been diverted by the allure of new entertainment offerings.

On a different level, the advent of tremendous salary increases paid to professional athletes, even those directly out of college without any professional level experience, suggests that owners of sports franchises are faced with the same dilemma as that which movie studio executives at one time unwillingly faced when confronted by demands to pay a rising star a percentage of ticket revenues, or foreign or cable royalties.²⁶¹ The movie mogul and the professional sports league franchise owner know full well that the box office or stadium draw for any given performance or game will be severely compromised without the availability of a popular and promising young talent. The entire season, or the financial success of the picture, may be held in the balance if the player or actor decides to jump to another team or abandon the film. There is little doubt that both forms of entertainment face similar problems in first creating, and then successfully marketing its particular "product." These are problems endemic to mature enterprises that face competition from rival entertainment offerings.

Professional sports are indeed big business, with big business

259. See Harris, *New Troubles in the N.F.L.*, N.Y. Times, Sept. 7, 1986 (Magazine), at 31, 79-80 (suggesting that player strikes, poor performance, and the changing demographics of television audiences have all contributed to this decline in popularity); Raissman, *Third and Two: Can Rozelle Save TV Deal?*, ADVERTISING AGE, Jan. 21, 1986, at 1, 82 (suggesting that with the emergence of working women and the saturation of sports programming in general, traditional football advertisers such as breweries and automobile companies are shifting their advertising dollars to other audiences and other forms of television programming); Sanoff, *Not All is Super for Pro Football*, U.S. NEWS & WORLD REP., Jan. 21, 1986, at 75 (suggesting that a glut of sports programming on network and cable television, at both the college and professional levels, along with games that take too long to complete, all contribute to this falloff in interest).

260. See *ABC Said to Shake Up TV Football Coverage*, N.Y. Times, Mar. 25, 1986, at B9, col. 5 (speculating that ABC was considering such a change in its programming).

261. Actress Mary Pickford often is regarded as the first beneficiary of a "star system" industry, where salaries increase geometrically for those whose talent substantially adds to the employers' revenue. See Berry & Gould, *supra* note 125, at 734 n.144 (citing J. FELL, A HISTORY OF FILMS 87 (1979)).

problems. It is simply not enough to look at a professional sports league and assume that a single league is highly vulnerable to a finding of conspiratorial or monopoly activity. Unlike other industries that are dominated by a single firm, professional sports leagues do not have the power to control the majority of their revenues. Because the size of these revenues ultimately depend on favorable television ratings, and the contracts themselves are subject to periodic renegotiation by the major broadcasting networks, they are poor indicators of monopoly power. Indeed, these circumstances confirm that professional sports leagues do not dominate the market in which they compete. Such lucrative but indefinite television arrangements suggest that sports entertainment is in fact highly competitive with other forms of leisure activity. For every dollar spent on creating this summer's movie blockbuster, there is a television executive and franchise owner thinking about ways to make summer baseball more entertaining for those who may prefer to spend Saturday in a major league ball park rather than in an air conditioned theater.

3. COLLECTIVE BARGAINING REVISITED

What were once thought to be unlawful trade practices may now qualify as negotiable deal points if incorporated into an arms length collective bargaining agreement.²⁶² In many of the early cases, a player sued a professional sports league on a section 1 theory, arguing that certain league rules restricting player mobility were in fact unlawful restraints of trade.²⁶³ The leagues, as a defense, asserted their participation in collective bargaining negotiations with player unions as a defense, claiming that player representatives discussed and agreed to some of these practices. The leagues theorized that the non-statutory labor exemption protected both the unions and management from Sherman Act liability.²⁶⁴ While this defense in most instances failed to immunize those league rules that were not products of meaningful and vigorous arms length negotiation, courts left open the pos-

262. See *supra* text accompanying notes 191-210. There is little question that absent this blending of labor law into an antitrust context, very few if any restraints imposed upon players would survive scrutiny under the Sherman Act. See cases cited *supra* note 3. Recently, the Second Circuit in *Wood v. National Basketball Association*, observed that "were these arrangements [college draft and salary cap] agreed upon by the NBA teams in the absence of a collective bargaining relationship with a union representing the players, they would be illegal and plaintiff would be entitled to relief." 809 F.2d 954, 959 (2d Cir. 1987), *aff'g* 602 F. Supp. 525 (S.D.N.Y. 1984).

263. See cases cited *supra* note 3.

264. See *supra* text accompanying note 194; see also Roberts, *supra* note 193, at 62-63 (suggesting that "the nonstatutory exemption should protect all conduct by *any* party to the bargaining relationship" (emphasis added)).

sibility that future agreements between management and labor may show that these restraints are no longer unilaterally imposed, and that the player associations have matured to a point where it is clear that they have fully participated in the bargaining process.²⁶⁵

Some of the early case law in this area did not expressly disallow professional sports leagues from availing themselves of the so-called nonstatutory labor law exemption from Sherman Act liability. These courts did find, however, that while reserve clauses, compensation rules, and eligibility requirements are mandatory subjects of bargaining, they were often unilaterally imposed by league management without the benefit of arms length negotiation.²⁶⁶ Indeed, in most cases, the players associations for each respective league were in existence for only a short time.²⁶⁷ In some cases, the union ratified restraints that existed in earlier standard player contracts, which were imposed at a time before the advent of collective bargaining. For this reason, many restraints eventually found their way into more recent player contracts without the requisite arms length negotiation.

The implications drawn from early case law suggest that so long as a league rule is incorporated into a collective bargaining agreement, after being subject to meaningful arms length negotiation between the relevant parties, the nonstatutory labor exemption should immunize a league from antitrust liability. This remains the case even though the union may have conceded too much by way of bargained for restraints without receiving commensurate benefits.²⁶⁸ Courts generally will not interfere with the bargaining relationship that takes place between player associations and league officials because the purpose behind the nonstatutory labor exemption is not necessarily to protect unions, but rather to encourage the use of collective bargaining to

265. See cases cited *supra* notes 200, 203, 206 and accompanying text.

266. See *supra* note 200 and accompanying text.

267. See, e.g., *Mackey v. National Football League*, 543 F.2d 606, 615-16 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). But cf. *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979) (presenting a mature union with a proven history of bargaining strength such that there is little question that the restraints were subject to intensive arm's length negotiation); *Zimmerman v. National Football League*, 632 F. Supp. 398, 406-08 (D.D.C. 1986) (observing that the players union "appears to be more powerful now than at the time of *Mackey* or *Smith*").

268. Compare *McCourt*, 600 F.2d at 1203 (ruling that it is not necessary that the union prove successful in its bargaining relationship with league officials; all that is required is that management not be in a dominant position whereby it can unilaterally impose the terms of negotiation upon a weak and inexperienced union) with *Zimmerman*, 632 F. Supp. at 408 (stating that "[b]ecause the owners gave up something they were already prepared to grant does not mean that there was an absence of bargaining or that it was conducted in bad faith"). The court in *Zimmerman* further added that "nothing in either *Mackey* or *McCourt* requires that a *quid pro quo* be contained in the agreement under consideration." *Zimmerman*, 632 F. Supp. at 407 & n.10.

achieve a more participatory agreement on essential terms of employment.²⁶⁹ This is particularly true in these more modern times of professional sports league unionization, where player associations have proven themselves to be a formidable bargaining force capable of butting heads not only with the very best offensive linemen, but with some of the most shrewd management negotiators as well.

The future bargaining relationship between player associations and league management is likely to reduce the situations under which a union can claim that the nonstatutory labor exemption is unavailable to shield otherwise unlawful player restraints from antitrust liability. As the bargaining history between the respective parties further matures, it will become more difficult for courts to find that leagues forcefully and unilaterally imposed restrictive league rules upon player bargaining representatives. Indeed, it is already becoming apparent that player associations, when put to the test, are tenacious spokesmen for their membership, and recent displays of union heroism indicate that these associations are not passive listeners to league demands.²⁷⁰ The most recent case history documenting the bargaining relationship between the respective parties indicates that the unions have exacted not only substantial concessions from league management, but that the level of bargaining has already reached a degree of maturity sufficient to compel a finding that mandatory subjects relating to terms or conditions of employment were exposed to intensive arms length negotiation. Only on those matters that are not mandatory subjects, or in those situations where a league has unilaterally incorporated into the collective bargaining agreement restrictive practices that were not subject to arms length negotiation, will player groups be able to overcome management's reliance on the nonstatutory labor exemption.²⁷¹

269. See *supra* note 191.

270. All professional sports leagues have experienced player strikes, or threats of walk-outs, in the modern era of professional sports. Baseball has experienced two strikes over the past fifteen years. See Axthelm, *Half a Cheer for Baseball*, NEWSWEEK, Aug. 24, 1981, at 64-65 (discussing the 1981 players strike); Leggett, *Digging in at Crooked Creek*, SPORTS ILLUSTRATED, Apr. 10, 1972, at 44 (discussing the 1972 players strike). Football faced a seven week strike during its 1982 season. See *Its Fourth Down in the NFL's Labor Bowl*, BUS. WK., Sept. 27, 1982, at 26; *NFL Strike Throws Both Sides for Loss*, U.S. NEWS & WORLD REP., Nov. 29, 1982, at 14.

271. See *supra* note 191-206 and accompanying text; see also Note, *The Eighth Circuit Suggests a Labor Exemption from Antitrust Laws for Collectively Bargained Labor Agreements in Professional Sports*, 21 ST. LOUIS U.L.J. 565 (1977) (examining the propriety of applying the rule of reason analysis in *Mackey*, as well as tracing the history of the nonstatutory labor exemption from antitrust laws). The first prong of the *Mackey* test, concerning the role of nonparties in the collective bargaining relationship, is less of an issue in the sports league context after *Wood*, where the Second Circuit determined that even college players are a part of the bargaining unit. See *supra* notes 207-10 and accompanying text.

B. *New Assumptions to Match the Modern Era*

The existence of expanded game schedules and the significance of television revenues are features of the modern era of sports entertainment that relate directly to potential section 2 claims. These questions refer specifically to the degree of market power that a sports league may actually possess. As pointed out earlier, in order to show unlawful monopoly power, either in its acquisition or its misuse, a plaintiff will inevitably have to define the market in a way that maximizes the degree of market penetration that a sports league has enjoyed in both the product and geographic markets for the industry.²⁷² In order to succeed in establishing a section 2 monopoly claim, the plaintiff must convince the court to define the market in a way that broadens the antitrust defendant's individual share within a relevant market. The entity facing monopoly liability must prove that its share of the market is not nearly as large as the plaintiff alleges. The defendant makes this showing by proving that it actually faces considerable competition from other industries. With this expanded view of market definition, the individual defendant's actual market share is perceived as too low to give rise to serious antitrust consideration.

1. NATURAL MONOPOLIES

The history of professional sports leagues has proven that the existence of two leagues in the same sport ultimately leads to ruinous competition of some form—either the merger between the two leagues or the demise of the one that has had the least amount of success.²⁷³ Bidding wars and attendant salary increases historically are the causes of this phenomenon, as each league faces the prospect of losing “big name” players to its rival.²⁷⁴ Commissioner Rozelle, an obvious fan of historical accidents that benefit his league, testified numerous times on this subject, most recently in the *USFL v. NFL* case.²⁷⁵ The Commissioner suggests that sports leagues are in essence “natural monopolies,” meaning that it is best for society that only one producer supply the demand for league sports because the economics of the industry dictate that any other method of resource allocation will result in inefficiencies and waste.²⁷⁶ The natural monopoly theory is a tempting approach for commentators, and a desirable result for the leagues, because it represents a permanent way of avoiding Sherman

272. See *supra* text accompanying notes 96-101.

273. See *supra* note 180 and accompanying text.

274. See Note, *supra* note 60, at 941 n.100.

275. See *supra* notes 186-87.

276. *Id.*

Act liability. It is the position of this article, however, that the entire notion of the league as both a purchaser of needed inputs, those raw materials that go into the creation of a marketable product, and as a seller of outputs, the final product itself, is completely inconsistent with a finding of natural monopoly.²⁷⁷

Although natural monopoly theory is a desirable way to characterize a league and immunize its activities from Sherman Act liability, for the most part, professional sports leagues do not behave in the same way as do the more traditional examples of natural monopoly industries.²⁷⁸ Sizeable entry barriers mark many of these industries; most especially, expensive start up costs that keep many out of the market.²⁷⁹ Arguably, these conditions do not exist in the professional sports league context.²⁸⁰ There are, however, compelling arguments

277. See *infra* text accompanying notes 292-96.

278. A public utility is often considered the best example of a traditional natural monopoly industry. With public utilities, start up costs are very high, and a great deal of inefficiency would result from the needless duplication of a complex technology that arguably only one supplier should produce. Cf. Neale, *supra* note 49, at 4 (defining a natural monopoly as one where "a single firm can satisfy demand at a lower long-run average total cost than can be achieved if two or more supply the industry's product"). For recent articles discussing the effect of natural monopoly conditions on an industry, and those economic arrangements that are best suited to receive an exemption from the antitrust laws, see generally Coursey, Isaac & Smith, *Natural Monopoly and Contested Markets: Some Experimental Results*, 27 J.L. & ECON. 91 (1984); Daniel, *The New Theory of Public Utilities: The Case of the Natural Monopoly*, 26 ANTITRUST BULL. 133 (1981); Hamilton & Caulfield, *The Defense of Natural Monopoly in Sherman Act Monopolization Cases*, 33 DE PAUL L. REV. 465 (1984); Posner, *supra* note 89; Primeaux, *Some Problems with Natural Monopoly*, 24 ANTITRUST BULL. 63 (1979).

279. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 436-39 (2d Cir. 1945); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 301, 325-29 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954); cf. *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920) (reminding that "the law does not make mere size an offense, or the existence of unexerted power an offense"); 3 P. AREEDA & D. TURNER, *supra* note 107, ¶ 409e, at 303-09 (discussing the types of capital costs that create barriers to entry).

280. The very fact that over the years, leagues have emerged to challenge the existence of single league domination in each sport suggests that the barriers to entry in the professional sports league setting are low. While it is true that most of these joint business ventures ultimately failed, this may have had more to do with the lack of popular appeal of these leagues than with any artificial constraints barring entry. For instance, in most areas of competition where the league acts as a buyer of supplies and services, it is difficult to show any sign of monopoly power in favor of the established leagues caused by aggressive displays of predatory conduct. See *infra* text accompanying notes 297-332. Moreover, if there is one area in which high entry barriers possibly exist, it is in the competition for television revenues. On this matter, however, this article concludes that there are many potential television time slots that could feature more professional football if the networks considered an alternative league to be an attractive programming option. Cf. *infra* Section IV. In addition, in light of the nonexclusivity of the NFL's contractual arrangement with the major broadcasting networks, there is little cause for concern that the league is in control of a potentially insurmountable entry barrier. See *infra* note 290 and accompanying text. Because of these conditions, it is

on behalf of characterizing some aspects of professional sports league behavior as natural monopolies. For instance, later in this article, the discussion will turn to the possibility that the league may be a natural monopoly in so far as it acts as an employer of player services.²⁸¹

Among professional sports leagues, the economies of scale are such that it may be far more efficient to have one league rather than two, because it requires fewer resources to market and produce one league. Moreover, increases in player salaries, which inevitably result from the existence of competing leagues, only enrich the fortunes of player personnel, while adding little to the game itself.²⁸² In fact, according to Commissioner Rozelle, the very existence of ruinous competition between rival leagues suggests that if the ultimate consequence of dual league competition is single league domination, then perhaps Congress should reexamine sports leagues in the context of natural monopoly theory. The economic realities of the industry structure simply may not tolerate two competitive leagues in the same sport. Similarly, it is entirely possible that certain dominating leagues have achieved their position through superior skill or business acumen, and thereby fall into the category of legal monopolies of a "pristine origin."²⁸³

What complicates this natural monopoly analysis is that from the

difficult, if not improper, to characterize a professional sports league as an industry where there are high barriers to entry. For many owners, the operating costs of a sports team are willingly absorbed as an extravagant hobby. Moreover, absent the introduction of artificially created entry barriers, there is no reason that a rival league could not enter the market for sports entertainment because the start-up costs are low relative to other more capital intensive industries. Because there are no observable entry barriers, the failure of rival leagues is, at least in part, due to a lack of sufficient audience appeal. *Contra* Kurlantzick, *supra* note 4, at 197 (suggesting that investment in a professional football team is both a large and uncertain business venture that is likely to experience significant start-up losses); Note, *supra* note 60, at 951 (same).

281. See *infra* text accompanying notes 333-35.

282. During the brief existence of the USFL, Herschel Walker and Jim Kelley, just two among many examples, signed contracts worth more than \$1 million to play in the USFL. See, e.g., *Fourth and Long, But the USFL Goes for It*, BUS. WK., Feb. 27, 1984, at 108 ("The USFL's splashiest attempts to grab media and fan attention have come from its costly drive to lure star college and NFL players away from the NFL by offering huge contracts."). Interestingly, the NFL did not participate in a bidding war with the new league, which partially explains why the USFL did so well in attracting both new and old talent over to its spring version of professional football. See Johnson, *supra* note 7, at 78. Despite these higher salaries, the quality of play in each league did not improve; in fact, the demise of the USFL and the decline in television audiences for NFL football offers some evidence that bidding wars do nothing to improve the game.

283. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 296 (2d Cir. 1979) ("But there can be no unfairness in preventing a monopolist that has established its dominant position by unlawful conduct. . . . After all, it is only a pristine 'origin,' that may save a monopoly.") (citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945)), *cert. denied*, 444 U.S. 1093 (1980).

standpoint of the league product, sold to network broadcasting companies and then to an endearing public, there is tremendous competition from other sports leagues, particularly in a large metropolitan city where there may be as many as two teams represented in each sport.²⁸⁴ There is also significant competition from alternative forms of entertainment.²⁸⁵ Even if one argues that the NFL has simply cre-

284. Large metropolitan markets typically have more than one team in each sport. The New York metropolitan area has the Mets and Yankees in baseball; the Jets and Giants in football; the Rangers and Islanders in hockey; and the Knicks and Nets in basketball. In Los Angeles, there is some competition for fan support and local revenue between the Dodgers and Angels in baseball; the Raiders and Rams in football; and the Clippers and Lakers in basketball. Cities such as Chicago, San Francisco, Philadelphia, and Boston face similar problems. Although they do not have two teams represented in each of these sports, as sports seasons continue to overlap, all sports are to some degree a threat to each league's market share. See Lazaroff, *supra* note 4, at 183 & n.153.

285. See *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1252 (2d Cir. 1982) (suggesting that soccer and football compete against each other for the same audiences and broadcast revenues and, on another level, each also competes in the wider entertainment market), *noted in* Glick, *supra* note 29, at 77. Compare Grauer, *supra* note 4, at 34 n.156 (arguing that the relevant product market for the NFL is the "entertainment" market because a decrease in quality or an increase in price would cause some fans to "turn to another form of entertainment, whether that be college football, professional basketball, John Wayne westerns, classical music, or something else") (reviewing Justice Rehnquist's dissenting opinion in *National Football League v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982)) with Roberts, *supra* note 44, at 257 n.135 (suggesting that Professor Grauer's speculation about broad categories of market definition in the professional sports context "proves little [because] [e]ven total monopolies never have a totally inelastic demand for their products"). Professor Roberts argues that it is not so easy to make assumptions about the scope of market definition in the product area because the elasticity of demand and the utility functions of consumer tastes must be subject to empirical observation. See *id.*; see also Kurlantzick, *supra* note 4, at 198 ("Absent another football league, alternative forms of athletic and entertainment events provide the most likely substitutes for football."); Note, *supra* note 33, at 557-58 & nn.90 & 97 (arguing that the single entity defense is consistent with the notion that the NFL competes in the wider arena of entertainment attractions, where, for instance, a sports fan in Cleveland, governed by an elastic demand curve for leisure activities, must decide whether to patronize the football Browns, basketball Cavaliers, baseball Indians, or soccer Cobras). But see Lazaroff, *supra* note 4, at 209 (doubting whether a season ticket holder of the Los Angeles Raiders would regard a showing of *Heidi* as a reasonable substitute for professional football, or whether an increase in ticket prices by twenty percent would result in NFL fan defections to other sports or other entertainment offerings).

Professor Lazaroff's view of a narrow relevant product market for each professional sport contrasts with the idea that the demand for professional sports, similar to all entertainment products, is price and quality elastic, such that a consumer is likely to change his buying preference when faced with a decrease in quality or an increase in price. While it may be *unlikely* that a diehard Pittsburgh Steeler fan will trade in her game tickets for seats to a season at the Pittsburgh Ballet, the fact that both ballet and professional football perform in the same entertainment industry, and are each attractions that the consumer, if necessary, can do without, suggests that our football fan could potentially shift her buying preferences from paydirt to pirouettes. The point is that in defining the relevant product market for professional sports, courts and some commentators have incorrectly attributed too much significance to the loyalties of sports fanatics while ignoring the buying habits of the casual purchaser of entertainment. This article takes the position that most consumers, realizing the limitations of both financial resources and time within which to enjoy those precious moments of leisure, are

ated a superior product through skill or business acumen, it is still doubtful that the NFL is a monopoly; be it either natural and therefore lawful, or that which is subject to section 2 liability. When there is but one league, there is some truth to the force of a natural monopoly in the player area, because the league is the only natural and most efficient purchaser of player services. In all other cases, however, the league is inundated with competition from sister sports and other entertainment forms, so that labeling the league a natural monopoly, although desirable from a league's point of view, is as incorrect as a finding of monopoly in general.

2. INPUT/OUTPUT SUBMARKETS

Although sports leagues present a unique form of economic organization, they have an input market similar to all industries, with the league as a purchaser of personnel, coaches, game officials, and capital facilities. Each of these yearly expenditures are designed to make the league product more attractive to the consumer and thus more commercially successful. When these inputs are properly assimilated and packaged, the end product, the game itself, participates in an output market, where league play competes against other entertainment forms. This inexorable segregation of inputs from outputs is an essential feature of all business entities. Surprisingly, when reviewing the antitrust implications of industry trade practices, courts rarely if ever examine the bifurcated role that an entity assumes as a purchaser and seller of products: the inputs and outputs of economic organization.²⁸⁶

much more open minded about the availability of the various entertainment attractions from which to choose. While most are not indifferent to a choice between a book and a baseball bat, few are so parochial in consumer tastes as to insist upon only one form of leisure activity to the exclusion of all others. *But cf.* Roberts, *supra* note 44, at 257 n.135 (pointing out that to this date no court or commentator has conducted a serious empirical analysis of the relevant product market for each sport).

286. Judge Williams, dissenting in *Los Angeles Memorial Coliseum Commission v. National Football League*, distinguished "upstream flow," which includes products and services such as players and coaches, television services, and potential investors; from "downstream output," which includes the final product of professional football itself. 726 F.2d 1381, 1406 (9th Cir. 1984) (Williams, J., dissenting), *noted in* Riga, *supra* note 140, at 576; Weistart, *supra* note 1, at 1061. Judge Williams discussed this distinction in the context of the single entity defense, and concluded that a league should not be able to assert the defense for all of its activities. In doing so, he seemed to suggest that most upstream aspects of a member club's operations are vulnerable to section 1 attack, but that downstream activities designed to create a better league product should receive the benefit of the single entity defense. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1409; *cf.* H. DEMMERT, *supra* note 135, at 20 (suggesting that there is an input market for player personnel where "each club is established as a potential discriminating monopsonist with respect to the purchase of athletic talent"). Although this article contends that the input/output distinction is more appropriate

Sports leagues participate in the input market by purchasing the components necessary to develop the final product, the game itself. When all of these preliminary arrangements are finalized and the kickoff grows near, the league then readies its product for an entirely different level of competition, one removed from the grunts and groans of the sports contest. As a participant in the output market of completed goods, the league joins the fray with other forms of competing entertainment products all eager to outmatch the other in capturing a share of this lucrative industry. The significance of this distinction between input and output markets is not that one is more important than the other. It is just as predatory and violative of section 2 to maintain a monopoly position as a seller of a product as it is to monopolize the inputs of a given industry. The acquisition of monopoly power in a relevant market is a violation of the Sherman Act. The point, however, is that a relevant market can be divided into various submarkets, making it possible for a business entity to have too high a market share in only one particular submarket, but in no other aspect of competition.²⁸⁷ One way to characterize these submarkets is to divide the industry into its inputs and outputs and dis-

to a section 2 analysis, it is useful that at least one judge, albeit in a dissenting opinion, and arguably one commentator in considering the antitrust implications of a professional sports league, have broken down the operation of professional sports into submarket categories, even if only to evaluate the single entity defense, or some other aspect of competition.

287. The argument can be further explained this way. Professional football, for example, is not a product in itself that is bought and sold in the ordinary course of business. Professional sports are similar to other complex industries that integrate a wide variety of materials in creating a finished product. Thus, in order to produce a football game, a league must engage in a preliminary process of buying and selling raw materials. It purchases *inputs* or raw materials from suppliers, such as the services of players, coaches, and game officials, fixed assets such as stadia, and capital goods from equipment suppliers. Once it completes this process, the league then becomes a seller of an *output* to various buyers. A league sells broadcast rights to network broadcasting companies, game tickets to local fans, food and beverages at the stadium, league marketing items that display its logo, parking concessions, and sky boxes to corporate patrons. Instead of a definable market for professional football, there is instead a discrete number of smaller markets, known as submarkets, comprised of the inputs and outputs of industrial organization. *See, e.g.,* Mid-South Grizzlies v. National Football League, 720 F.2d 772, 787 (3d Cir. 1983) (defining the relevant submarkets in which the league competes to include the markets "for ticket buyers, for local broadcast revenue, and for sale of the concession items like food and beverages and team paraphernalia"), *cert. denied*, 467 U.S. 1215 (1984); American Football League v. National Football League, 323 F.2d 124, 128 (4th Cir. 1963) (suggesting that two rival leagues compete with each other in several ways, "and that the relevant market with respect to one aspect of their competition would not necessarily be the relevant market with respect to another"). *But cf., e.g.,* United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 361 (1970) (observing that the whole of a business is often greater than the sum of its parts, and that depending on the commercial realities of the situation, "*the cluster of products and services . . . has economic significance well beyond the various products and services involved*" (emphasis added)), *quoted in* United States Football League v. National Football League, 644 F. Supp. 1040, 1057 (S.D.N.Y. 1986).

cover which if any of these categories the challenged entity has abused. By breaking down the relevant criteria into their input and output components, a court is better able to determine whether market power actually exists, and if it does, whether it has any independent legal significance.

a. Output Market

Television and gate attendance are the most important features indicating success in the output market. Without the availability of live broadcasts, the league would be unable to market itself. Similarly, without the ability to sell tickets to local fans, and the willingness of these spectators to fill otherwise empty stadia, the value of the league product as a form of public entertainment would be severely undermined. Indeed, *USFL v. NFL* often is described as the "television" case, because the heart of the antitrust issues revolves around whether one league prevented the other from obtaining a television contract, perhaps the most critical measure of success in the highly competitive sports industry. There is little doubt that television revenue is the most important feature behind the NFL's rise as an enormously successful business venture. The significance of television revenues in the modern era of professional sports entertainment, and the inevitable fact that among rival leagues, one league will benefit from a television contract while the other relies almost exclusively on gate receipts, leads to a disparity in the ability of sports leagues to succeed. This disparity threatens meaningful competition and invites predatory and anticompetitive behavior.

The jury in *USFL v. NFL* found that the NFL had not possessed monopoly power in this area of competition.²⁸⁸ The facts showed that one major network refused to renew an earlier contract with the USFL and the other networks shied away from any contractual commitment to broadcast USFL regular season games.²⁸⁹ The league simply had failed to generate any fan support that would warrant the commitment of broadcasting time, particularly once the USFL had decided to play its games during the fall season and compete directly against the NFL. Without this essential commitment of network broadcasting time, the USFL was destined to fail. No league can survive in the modern era of escalating player costs without a substantial base of revenues from which to field and market its product. A net-

288. *United States Football League*, 644 F. Supp. at 1042, 1057.

289. ABC contracted to present the first two years of the USFL's brand of spring football, but later decided not to renew its contract due to poor television ratings and the USFL's decision to move to a fall playing schedule. See *supra* note 7.

work or cable television contract is essential to support the massive operating expenses that are the unavoidable features of modern sports league organization.

In addition, there is some doubt as to whether the NFL's role in the television submarket has even the slightest potential for section 2 abuse because the existing contract between the networks and the NFL allows the former a right of first refusal before renegotiating any further contractual obligations.²⁹⁰ This kind of arrangement places sports leagues in a unique situation, one that few, if any true monopolist would ever find itself defending. In the normal antitrust context, purchasers are not given the right of first refusal to continue servicing a monopolist. Purchasers are rarely given any leverage at all when conducting business with a much larger supplier. In fact, the ability of large suppliers to dictate the terms of any given contract is precisely the kind of behavior that is often heavily scrutinized for potential Sherman Act abuses. One of the concerns that courts have with unlawful predatory behavior is that an entity may be in such a dominant position that it can dictate the terms of a contract and exercise unrestrained freedom in the pressure it places upon the purchasers of its product.

In this case, the broadcasting networks are the buyers. A typical antitrust situation arises where a seller imposes restrictions on the buyer in order to preserve its existing market strength. A true monopolist, in such a case, would require the networks to televise a certain number of games regardless of other economic considerations, or demand that the contract be automatically renewable at the league's insistence. The situation that the NFL finds itself in, however, is entirely different. The existing contract not only creates a right of first refusal in favor of the networks, but also allows a competing network and its local affiliates to televise a competing game into a market where the local team is blacked out.²⁹¹

290. *United States Football League v. National Football League*, 634 F. Supp. 1155, 1159 (S.D.N.Y. 1986). The district court described these contracts as follows:

Each of the NFL contracts with ABC, CBS, and NBC is non-exclusive. None of the three networks is precluded from telecasting USFL games. When the contracts terminate, each of the networks can choose to bid, or not to bid, for the rights to continue to telecast NFL games. Each contract is of limited duration and provides the network with the right of first negotiation and the right of first refusal with respect to contract renewals. Each contract provides the network with exclusive bargaining rights for a prescribed period of time.

United States Football League, 634 F. Supp. at 1159.

291. In Miami, Florida, when the Dolphins failed to sell out the Orange Bowl, the local NBC affiliate did not broadcast a competing game. The CBS affiliation, however, did and routinely does offer an alternative game. If the league does in fact possess monopoly power over the broadcasting networks, it should be able to prohibit the showing of any competing

Even if professional sports leagues maintained the ability to control television revenues, there is still the matter of market share. Because professional sports leagues face stiff competition in this modern era of appealing entertainment alternatives, it becomes increasingly difficult for a court to find the existence of unlawful market power when the field of competition is so vast that under almost any calculus for defining the relevant market, the entity's individual share is too small to justify serious Sherman Act consideration. All levels of market definition must consider the competition that leagues face from other sports league operations. Justice (now Chief Justice) Rehnquist, dissenting from a denial of certiorari in *National Football League v. North American Soccer League*,²⁹² wrote:

[T]he NFL owners are joint venturers who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market. Although individual NFL teams compete with one another on the playing field, they rarely compete in the market place. The NFL negotiates its television contracts, for example, in a single block. The revenues from broadcast rights are pooled. . . . [T]he league competes as a unit against other forms of entertainment.

. . . All of these [collective marketing arrangements] are at least arguably necessary to permit the league to create an appealing product in the entertainment market.²⁹³

Justice Rehnquist's recent dissent may signal a new orientation for courts in dealing with professional sports leagues as competitors in the output market of finished products. Those who have sought section 2 antitrust liability against sports leagues have characterized the league product as a monopoly with enormous market power.²⁹⁴ The better view, which Justice Rehnquist adopted, is to recognize that sports leagues face a glut of competition from all sorts of products within the general entertainment industry. On a more narrow level, all sports leagues compete against one another because the modern era of professional sports has experienced a blending of regular and post-season schedules.²⁹⁵ Even if these games are played on separate

game in a territory where the home team is playing before a non-sellout crowd. Cf. *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953) (discussing those situations where a network can televise competing games in a territory where the home team is playing away, or where the home city is blacked out because its team is playing locally but did not sell a sufficient number of game tickets).

292. 459 U.S. 1074 (1982).

293. *North Am. Soccer League*, 459 U.S. at 1077 (Rehnquist, J., dissenting from a denial of certiorari).

294. See *supra* notes 97, 100, 102, 108-09 and accompanying text.

295. See *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1393 (9th Cir.) (speculating that the relevant product market may include other sports

days, there is a question as to whether even the most highly charged sports fan is able to patronize all of the various sports contests competing for his attention. When leisure time is divided among a whole variety of pastimes, including reading, watching network or cable television, taking in a movie, or a simple visit to the zoo,²⁹⁶ there is a saturation point for even the most ardent sports enthusiast. It is highly probable that, with the limited amount of time and disposable income that a working person has to spend on leisure activities, sports fans are distracted by not only other sports leagues, but also by other offerings that the multi-billion dollar entertainment industry presents.

b. Input Market

If there is a monopoly problem with professional sports leagues, it surfaces only in the input market, that grouping of essential ingredients that go into the development of a commercial end product. When the league acts as a purchaser of player services, coaches and game officials, there is the potential that it can abuse its position as a sole employer. The technical term for a market participant who is the only available buyer for a particular service or product is a monopsonist.²⁹⁷ This situation arises when the alleged restraint of trade surfaces not from the seller's side of the market equation, but rather from the buyer's side. Sports leagues are by definition the only buyers for the services of professional athletes.

In the standard cases that present a monopoly question, a plaintiff complains that an entity has either conspired with others to restrain trade, or behaved in such a predatory fashion as to eliminate all potential competition. Monopoly power is feared because of the potential that the monopolist has, as a seller of a product, to restrict output and raise prices in a way that harms consumer welfare. Professional sports leagues, as noted, possess very little power to raise prices, because in an economic sense, they are faced with a horizontal demand curve, suggesting that they operate in a world of perfect com-

leagues, particularly when there is an overlap in season schedules), *cert. denied*, 469 U.S. 990 (1984), *noted in* Note, *supra* note 60, at 935 n.65; *see also* Neale, *supra* note 49, at 11 (noting that "[p]rofessional football has crept back into the late baseball season and forward into the basketball-hockey season"). For a general discussion as to the significance of this merging of regular and post-season playing schedules, *see supra* text accompanying notes 244-50.

296. When the author refers to zoo in this context, he hopes that the reader will not confuse this form of leisure activity with "The Bronx Zoo" of New York Yankee fame. S. LYLE, *THE BRONX ZOO* (1979).

297. *See* H. DEMMERT, *supra* note 135, at 20; Grauer, *supra* note 4, at 41; Roberts, *supra* note 44, at 357 n.135; Comment, *supra* note 16, at 1022 n.81; Comment, *supra* note 167, at 576 & n.3; *cf.* Note, *supra* note 191, at 171 (characterizing the NBA's salary cap as a "monopsony price-fixing" economic arrangement).

petition where prices adjust to changing consumer preferences.²⁹⁸ It is precisely because sports entertainment competes against all other forms of leisure activity in the output market of finished goods that courts can safely conclude that the demand for sports entertainment is highly price sensitive or elastic.

In professional sports, however, most trade practices that appear unlawful are components of the input market, where the league acts as a buyer of raw materials. League participation as a purchaser in the input market has inevitable antitrust implications. An entity can monopolize the inputs of a market in a way that prevents competition from ever taking place. In the output market, the concern is with market share, and whether the maker of the finished product is the primary or dominant supplier in the relevant market. When considering inputs, however, the question is much more refined because it turns on whether the challenged entity has restrained trade by preventing competitors from entering the smaller purchaser markets, or from competing once there by monopolizing these submarkets, the inputs necessary to complete a salable product. Most antitrust challenges against sports league operations come not from the actual playing of the game, the output market, but rather arise in the context of inputs, where leagues process raw materials in developing the game itself.²⁹⁹ It is as a purchaser of inputs, and not as a seller of a finished product, that causes the most visible antitrust concerns in the complex legal environment of professional sports.

This article contends that if professional sports leagues are vulnerable to antitrust liability, then it is only as purchasers of raw materials, and not as the promoters of the actual game. The district court opinion in *USFL v. NFL* offers some insight into the soundness of this premise by analyzing section 2 according to the degree to which the leagues have monopolized the submarkets of league play; those components necessary to assemble the league product. In each of these areas, there is the potential for monopoly behavior and abuse. A league successful in monopolizing inputs will deny potential competitors meaningful access to essential markets, and through such

298. See *supra* note 103 and accompanying text.

299. Competition in the output market causes no antitrust concern if a court defines the relevant product market to include other sports leagues and alternative forms of entertainment. Market definition at this level will show no market power, because a sports league is forced to compete against any number of equally attractive entertainment options where the supply is endless and the demand subject to economic forces. In contrast, the submarket for inputs is fraught with the potential for antitrust abuse, because it is in this area that the league acts as a buyer of many raw materials, and where in most cases, the league can dictate the terms of purchase because it is the only possible buyer of these resources.

predatory tactics, increase its relevant market share beyond permissible levels.

There are four key areas of operation that an established league can potentially monopolize to preclude competing sports leagues from emerging, and if that, surviving.

i. Players

As a practical matter, there is a glut of qualified players for most professional sports. The parties in *USFL v. NFL* agreed that there is a surplus in the player market and that the NFL had not displayed any monopoly power in this area of competition.³⁰⁰ Indeed, those who have followed the rise and fall of the USFL can all attest to the fact that particularly early on in the league's existence, the USFL had out-dueled the NFL in signing the most promising college football players to lucrative long-term contracts.³⁰¹ Obviously from the players' point of view, competition at this level was highly desirable because not uncharacteristically, two competing leagues tend to drive salaries higher, but with predictable ruinous consequences.

In a period where there is only one league in existence, however, there is the potential for monopolization over the player service market, because as a monopsony, the league is the only real employer of player services. While it is true that players may have no where else to turn when only one league is bidding for player services, that in itself does not necessarily suggest that the league is an unlawful monopoly. Indeed, the existence of collective bargaining ensures that mandatory terms of employment are subject to arm's length negotiation. If league rules are found not to have gone through this process, they are then suspect and beyond the assistance of labor law immunity. Generally, however, players will not be exposed to restrictive trade practices without their consent, so that the nonexistence of com-

300. The USFL took the position at trial that there was a glut of talented players from which to choose. Even if it had taken an alternative position, the league would have had a difficult time explaining its own success in fielding twelve teams, and showcasing some of the very best college talent, Heisman Trophy winners and the like, and professionals who had defected from the NFL or whose careers the USFL had revived. Moreover, the owner of the USFL's New Jersey Generals, Donald Trump, testified that the NFL did not attempt to get into a bidding war with the USFL in escalating player salaries, arguably because enough talented players existed to field two leagues. Transcript of the Testimony of Donald Trump at 4140 and Nina Cornell (witness for USFL) at 3570, 3934-35, cited in Memorandum in Support of Defendants' Motion for Judgment Notwithstanding the Verdict on Monopolization of "Professional Football" at 14, *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986); *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986) (No. 84-Civ. 7484 (PKC)); see *supra* note 282.

301. Indeed, the USFL was far more successful at attracting the best available college talent to the new league. See *supra* note 282 and accompanying text.

petitive bidding between two leagues should not be dispositive in proving section 1 type behavior or section 2 monopoly power.

Moreover, the NFL does not force union representatives to accept long-term uniform player contracts. In *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*,³⁰² the district court found that the National Hockey League had imposed mobility restricting contracts on existing players and also exerted inordinate control over minor league operations.³⁰³ This was not the case in *USFL v. NFL*. Yet, in this modern era of professional sports competition with collective bargaining agreements negotiated between capable representatives from each side, it is arguable whether the nonstatutory labor exemption from the Sherman Act may not already absorb the vice of long-term uniform player contracts.³⁰⁴

ii. Stadia as "Essential Facilities"

A critical section 2 problem arises when an entity excludes a competitor from the use of an "essential facility." In general, courts regard stadia as essential facilities,³⁰⁵ the absence of which can effectively eliminate meaningful competition in the market. This is a recognizable monopoly problem in the context of professional sports leagues, because without the availability of facilities in which to stage league contests, other preparations that go into the marketing of a league schedule become meaningless. This problem most likely will arise when there are two leagues in the same sport each seeking to contract for the use of the best available sports facilities.³⁰⁶ Section 2

302. 351 F. Supp. 462 (E.D. Pa. 1972).

303. *Id.*

304. See *supra* text accompanying notes 262-70.

305. The concept of an "essential facility" or the bottleneck doctrine arises from the notion that "where facilities cannot practically be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms." A. NEALE & D. GOYDER, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 62 (3d ed. 1980), *quoted in* *Cirace*, *supra* note 185, at 677 n.5 ("[A] business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it." (citation omitted)); see also L. SULLIVAN, *supra* note 28, § 48, at 131 (suggesting that if "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, non-discriminatory terms"); cf. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir.) (setting forth the elements necessary to prove an essential facilities claim), *cert. denied*, 464 U.S. 891 (1983). For a discussion of how this doctrine applies to stadia in the professional sports league context, see J. WEISTART & C. LOWELL, *supra* note 4, § 5.11, at 166-70.

306. Compare *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) (involving an action brought by unsuccessful promoters who sought to place a rival football team in Washington, D.C., the home of the NFL's Washington Redskins, but where they were unable to lease RFK Stadium because the Redskins possessed an exclusive leasing arrangement) and *Fishman v. Wirtz*, 1981-2 Trade Cas. (CCH) ¶ 64,378, at 74,764 (N.D. Ill. 1981) (denying a potential purchaser of the Chicago Bulls the right to lease Chicago Stadium, resulting in the

is implicated when a franchise from the more established league behaves in a way that jeopardizes its competitor's use of the stadium.

Two sports league cases directly confronted the essential facilities issue where potential team owners brought suit after being denied the opportunity to contract for the use of a suitable stadium in which to field their teams. In *Hecht v. Pro-Football, Inc.*,³⁰⁷ a potential owner of an AFL franchise in Washington, D.C. challenged a restrictive covenant in a contract between the Washington Redskins and the government entity that leased RFK Stadium for the District of Columbia. The contract prohibited any football team other than the Redskins from leasing the stadium. The Court of Appeals for the District of Columbia Circuit agreed that RFK stadium was an essential facility³⁰⁸ because absent the availability of a stadium, a sports franchise cannot operate. Moreover, there was no economically feasible way, as an alternative, to duplicate what the plaintiff really needed, nor would his intended use in any way have interfered with the Redskins' existing use of the stadium.³⁰⁹

Similarly, in *Fishman v. Wirtz*,³¹⁰ the owner of Chicago Stadium refused to lease his facility to a potential buyer of an NBA franchise. Without a lease, the league vetoed the sale of the Chicago Bulls.³¹¹ The court ruled that because there was no suitable alternative to Chicago Stadium, and because the stadium had no basis upon which to

NBA's denial of the sale because of the failure to secure a place in which to take the court) with *United States Football League v. National Football League*, 634 F. Supp. 1155, 1175-82 (S.D.N.Y. 1986) (challenging the established league's hold on key stadia in essential markets on the theory that the NFL deliberately forced the cities in which they play to deny the USFL the similar use of essential facilities) and *Shayne v. National Hockey League*, 504 F. Supp. 1023, 1031 (E.D.N.Y. 1980) (rejecting a claim that the established league had prevented an expectant rival franchise owner from leasing a stadium and attracting a local following).

There is also some question, as the USFL argued in trial and through its post-trial motions, as to whether the availability of television revenues is itself an essential facility, the denial of which is violative of section 2. Plaintiffs' Memorandum of Law in Support of Motions for New Trial and for Judgment Notwithstanding the Verdict on Certain Claims at 18-20, 85-87, *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986); *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986) (No. 84-Civ. 7484 (PKC)); cf. *Mid-South Grizzlies v. National Football League*, 550 F. Supp. 558, 569-70 (E.D. Pa. 1982) (observing that an essential facilities claim has a specific content and application, and can *only* be asserted when an established league has denied a competitor access to a facility for which there are no substitutes), *aff'd*, 720 F.2d 772, 787 (3d Cir. 1983).

307. 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). For a discussion of the legal significance of the *Hecht* opinion, see Glick, *supra* note 29, at 75 & nn.104-09 (concerning market definition); Rivkin, *supra* note 131, at 403; cf. Note, *supra* note 60, at 945 & nn.13-24, 947 & nn.131-32.

308. *Hecht*, 570 F.2d at 993.

309. *Id.*

310. 1981-2 Trade Cas. (CCH) ¶ 64,378, at 74,764 (N.D. Ill. 1981).

311. *Fishman*, 1981-2 Trade Cas. (CCH) ¶ 64,378, at 74,754-56.

deny its use, the failure to lease the facility violated both sections 1 and 2 of the Sherman Act.³¹² The point behind the decisions in both *Hecht* and *Fishman* is that when the geographic market is drawn narrowly, and where there are no other alternative facilities that are both available and suitable in which to play, a court will deem a facility essential, the denial of which will violate the Sherman Act.

The essential facilities doctrine surfaced once more in *USFL v. NFL*.³¹³ The USFL argued that its member franchises were denied meaningful access to stadia facilities because NFL franchise owners, hoping to close off the availability of these essential "inputs," pressured their home cities not to negotiate with the rival league.³¹⁴ Essentially, the USFL alleged that NFL franchises threatened to move to alternate facilities unless they remained as the sole tenant.³¹⁵ The NFL countered that the geographic market for stadia is nationwide, giving the USFL suitable and undisputed access to any number of facilities around the country.³¹⁶ In negating the forcefulness of the essential facilities claim, the court applied the *Noerr-Pennington* doctrine, which stands for the proposition that "mere solicitation of governmental action through legislative processes, even though the sole purpose of the defendants is to restrain competition, is an activity which is fully protected by the First Amendment and is immune from Sherman Act liability."³¹⁷ Although the court acknowledged that "franchise-dangling" may be anticompetitive, the fact remained that the NFL's business relationship with cities in which they play and contract for stadia use is immune from antitrust attack.³¹⁸

iii. Game Officials and Coaches

Clearly an emerging league must rely on an adequate supply of coaches and game officials to ensure consistent and quality league play. The district court in *USFL v. NFL* granted summary judgment in favor of the NFL on this issue.³¹⁹ Coaches are considered as plenti-

312. *Id.* at 74,771-79.

313. 634 F. Supp. 1155, 1175-82 (S.D.N.Y. 1986).

314. *United States Football League*, 634 F. Supp. at 1176 & n.4, 1177 & n.5.

315. *Id.* at 1177-78.

316. *Id.* at 1176 n.4; see J. WEISTART & C. LOWELL, *supra* note 53, § 5.11, at 713.

317. *United States Football League*, 634 F. Supp. at 1178 (quoting *Miracle Mile Assoc. v. City of Rochester*, 617 F.2d 18, 20 (2d Cir. 1980)).

318. *Id.* at 1179. The *Noerr-Pennington* doctrine is important because it encourages open communication between lawmakers and the polity, and also protects the first amendment right to petition government. *Id.* at 1178 & n.8 (citations omitted). The approach taken in *United States Football League*, however, is a novel one because it has no application in situations where stadia are privately owned. Moreover, only time will tell whether this defense against the application of the essential facilities doctrine will work in other circumstances.

319. *Id.* at 1189.

ful as players. The USFL, however, argued that the NFL violated section 2 of the Sherman Act by preventing their 107 game officials under contract from officiating USFL games during the rival league's spring regular season schedule.³²⁰ The court adopted the NFL's market definition in the product area, which classified qualified game officials as those who had ten years of officiating experience, five of which were at the major college level.³²¹ The court also found that the relevant geographic market in this area of competition was nationwide.³²² The court found that there are well over 1,000 qualified game officials currently in the United States who satisfy the NFL's five-and-ten criteria.³²³ The NFL's slightly more than 10% share of the market does not give it monopoly power under any test to date.³²⁴

The court also rejected the idea that the NFL's refusal to lend game officials to the new league constituted predatory or anticompetitive conduct within the reach of the Sherman Act.³²⁵ Even if the court could characterize the prohibition on off-season officiating as a covenant not to compete, it doubted whether an antitrust problem existed when dealing with a contract, only one year in duration, that:

relates to the ability of the NFL's game officials to seek football-related employment *during the term of their employment*. It strains credulity to suggest that the antitrust laws should be construed so as to punish a business for requiring its employees to remain loyal to their employer while they remain employed.³²⁶

iv. Preemptive Expansion and Available Franchise Sites

Leagues have the ability to expand their operations to other cities. Some of these locations may or may not already have a professional sports league franchise. Cities that do have teams become easy targets for established leagues looking to expand and drive rival league competition out of business.³²⁷ In this way, leagues function as

320. *Id.* at 1184-85.

321. *Id.* at 1185-89.

322. *Id.* at 1185-89 & n.26.

323. *Id.* at 1187.

324. *Id.*; see *supra* note 91.

325. *United States Football League*, 634 F. Supp. at 1188.

326. *Id.*

327. The question most often arises in the more familiar antitrust context where a monopoly defendant is accused of taking aggressive anticompetitive actions designed to frustrate the efforts of potential competitors. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). In *Alcoa*, the Court of Appeals for the Second Circuit observed that the defendant was not a passive recipient of market dominance, but rather, it consciously expanded its capacity beyond what the market would otherwise require. 148 F.2d at 430-31. Market domination may be an unavoidable consequence of the defendant's participation in the competitive process, due to some natural advantage that only it can claim. See *United States*

buyers of a key input, geographical locations in which to field teams.

In *American Football League v. National Football League*,³²⁸ the NFL, the dominant league, sought to expand its existing franchises into cities in which the competing AFL had already located.³²⁹ The AFL argued that such displays of preemptive expansion are clear examples of predatory anticompetitive conduct. Both the district and circuit courts ruled that the NFL's expansion plans antedated the formation of the AFL, and therefore, did not present a legitimate Sherman Act concern.³³⁰

The district court in *USFL v. NFL* did not need to address this problem, because the NFL had not attempted expansion into USFL cities. In fact, the USFL had strategically set out to play in relatively small cities and avoid direct clashes with the NFL except in a few very large metropolitan markets.³³¹ Moreover, there is little question that there are a great number of cities in which to locate a franchise. Based on the economics of television revenue potential, however, the NFL has chosen to limit the number of teams sharing this finite resource,³³² and has failed to exercise monopoly power in the submarket for franchise locations. There are any number of cities throughout the nation that could economically support a local team. Not only did the NFL avoid competing with the USFL in the more

v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956). Preemptive expansion, therefore, is an example of the pursuit of a business practice that is intended to maintain existing market dominance by excluding competition in those areas in which the industry competes. Cf. *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 510-13 (E.D. Pa. 1972). For a discussion of the relevance of preemptive expansion in the context of section 2 as a sign of "unfair [trade] conduct designed to further a monopoly," see J. WEISTART & C. LOWELL, *supra* note 53, § 5.11, at 719-20. But cf. *International Distrib. Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2d Cir. 1987) (adhering "to the traditional rule that an action under Section 2 . . . for attempting to monopolize a market will lie only where there is anticompetitive conduct, a specific intent to monopolize and a dangerous probability that monopoly will be achieved").

328. 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

329. *American Football League v. National Football League*, 323 F.2d 124, 126-28 (4th Cir. 1963); see J. WEISTART & C. LOWELL, *supra* note 53, § 5.11, at 708 & n.186, 721-22, 731; Comment, *supra* note 2, at 431.

330. *American Football League*, 323 F.2d at 131-34.

331. See *supra* note 7 and accompanying text. The USFL did claim, however, that NFL teams already located in USFL markets engaged in anticompetitive predatory conduct designed to jeopardize the USFL's relationship with its home fans, government agencies entrusted with leasing the local stadium, and its overall marketing efforts. See Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict at 24-25 & n.**; *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986); *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986) (No. 84-Civ. 7484 (PKC)) (discussing the so-called Oakland Conspiracy). These claims, however, do not implicate the same type of conduct as that which appears in the more familiar submarket input category of preemptive expansion.

332. See *infra* text accompanying notes 336-42.

remote cities, the fact that the USFL placed teams in these less populated regions suggests that the geographic market for professional football is much broader than rival league competitors had earlier hoped that courts would believe.

These four submarkets all represent the key areas of competition within which an established sports league can effectively prevent the emergence and success of a known rival. An analysis of each of these "input" categories has the potential to reveal the existence of monopoly behavior and market power abuse. The *USFL v. NFL* decision is important because it shows the difficulty in proving an established league's capacity to engage in predatory conduct and erect substantial barriers to entry. While this article takes the position that professional sports leagues compete in the wider entertainment market and thus have little if any market power as a finished product, this last section shows that a rival league will have an equally difficult time proving the existence of monopoly power when challenging an established league's conduct as a buyer of those critical inputs from which the game itself is produced.

IV. A REVIVED LOOK AT RIVAL LEAGUE COMPETITION

The recent district court decision in *USFL v. NFL* is of great significance because it presents a renewed look at the problem of rival league competition in the modern setting of professional sports. Regardless of how the case finally is resolved, its real strength lies in the inevitable comparison that courts must make between the conditions that existed in professional sports league organization years ago and the complex industrial and financial structure that exists today. This article argues that these disparities are so vast and numerous that courts cannot help but consider the economic realities at work in this area of antitrust jurisprudence. Anything less than a fresh look at the antitrust implications of professional sports leagues in general, and that of rival league competition in particular, will result in a lasting disservice to those who attempted nobly to define these difficult questions, but failed to convince courts that these unique industries require imaginative antitrust reform.

When dealing with rival league competition, there are realistically only two areas of effective competition that give rise to antitrust concerns. On the one level there is the competition for players—the most significant of "input" categories; on the other, lies the seductive trappings of television revenues and the likelihood that two leagues will compete for the limited availability of network broadcasting time—the most significant aspect of "output" competition. The com-

petition for talented players raises the possibility of one league exhibiting natural monopoly conditions. Leagues are in effect the only employers of player talent. Without the presence of a second league, there is no bargaining tool for players to exert. This article earlier pointed out, however, that the potential for a monopoly in the market for player services was offset by the very real threat of collective bargaining as a means of voicing the entrepreneurial instincts of player personnel.³³³ On the other hand, as Commissioner Rozelle insists, natural monopoly in the market for player services may be an unavoidable consequence of industry economics. If the Commissioner is correct, no section 2 concerns should be implicated. The Commissioner, however, is really addressing the issue of natural monopoly in terms of an "historical accident," which over the years has proven that two leagues in the same sport cannot survive. There is another aspect to natural monopoly theory that concerns the possibility that similar to other more familiar natural monopoly industries, the simultaneous operation of two professional sports leagues may be an inefficient use of economic resources because the economies of scale can be best captured only by one league.

The natural monopoly concept, however, involves an area of economic thinking that has a specific content and application. These situations are not normally thought of in the sports league context. Sports leagues are really no different from other forms of competing entertainment enterprises, and the entertainment industry has never received an exemption from the antitrust laws on the theory that it is natural for there to be only one supplier for a particular entertainment attraction. The question is almost always the same: how do prices reflect the demand for a specific consumer good? Sports leagues are different from public utilities, where the economies of scale are such that the use of a single supplier is the preferred method of allocating resources.³³⁴ With professional sports leagues, the economic calculus is responsive to market signals.³³⁵ Moreover, sports leagues operate

333. See *supra* text accompanying notes 262-70.

334. See *supra* note 278 and accompanying text.

335. See *supra* text accompanying notes 284-85. One court described the consumer's influence over the supply and quality of professional sports as follows:

[The consumer] can withdraw his support when the level of performance becomes so outrageously low that he feels the admission price does not justify the quality of performance observed. There is a point where even avid fans will not support minor league performances for major league prices. [There is a] residuum of discretion in the sports fan to refrain from paying high prices for low performance

Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 501 (E.D. Pa. 1972).

in a much broader market, and are not the sole suppliers of entertainment goods. While a single league may dominate each sport, the market for entertainment products in general consists of many competitors. In the public utility scenario, increasing economies of scale make it more efficient to have only one supplier. Conversely, the entertainment industry has an endless list of available suppliers and there is little support for the notion that society would be better off if there were only one. The price elasticities of demand are such that no entertainment product should receive the benefit of a natural monopoly exemption from the antitrust laws.

The second area of competition between rival leagues brings to light the significance of television revenues in the economics of this complex industry. Section 2 questions that arise in the context of a league's participation in the "output" market of finished goods are easily disposed of even upon the most conservative attempts at market definition. The modern era of professional sports is characterized as one in which sports entertainment competes among a vast array of equally attractive leisure activities. Competition in this area is no different from other industries; it merely reflects what the product is and the demand generated for its ready availability. There is widespread competition among any given set of products in the entertainment industry, each involving their own set of dynamic economic variables.

The most important question that the *USFL v. NFL* case presents is whether there can ever be two competing leagues that thrive simultaneously, or is the ultimate result of rival league competition either one league's demise or the eventual merger of the two? The economics of this situation is of such a complex and yet finite dimension that what one is really left with is either no monopoly, because the league's participation in the entertainment market shows that it has little market power; or a natural monopoly, where the economics dictate that only one league can efficiently service the market for a particular sport.

Economic necessity forces the merger of competing leagues. When two leagues compete for the most talented players, the pressure to offer the widest range of salary options and to bend to player demands is enormous. The escalating costs that go into the bidding wars for great players is inevitably destabilizing and leads to either the downfall of one of the leagues or merger. Moreover, there are the difficulties that one of the leagues will have in contracting with local and national broadcasting companies and in leasing an arena in which to play. When the two leagues cannot agree to merge, the demise of the less established league grows imminent. What prevents this failure to respond to economic forces and merge league operations is a

market externality that operates in favor of the league with the greatest revenue potential. The NFL, for instance, shares among its member teams a very lucrative television broadcasting contract. There is a point of optimality that is reached on this revenue side, because the contract predetermines the amount of annual revenue received from major television networks. Each team is aware of its proportionate share. Franchises often seek new ways to increase revenues from local and independent sources that do not carry an obligation to divide among the league membership.³³⁶ Yet, the member franchises share the primary sources of revenue, derived from broadcasting networks and gate receipts. When a league merges with its rival or expands the number of teams that share in this revenue base, it reduces each team's proportionate share without necessarily increasing the size of the revenue pie.³³⁷ This is the dilemma that professional sports leagues face, which often has led to criticism that leagues have taken advantage of their monopoly position by restricting output. This argument is supported by the charge that many cities are capable of supporting a local franchise, but that the leagues have chosen instead to limit the number of its member teams, thereby increasing the allocated share of revenues among the existing franchise owners.³³⁸ Expansion or forced merger does not yield more television revenue to individual teams, because advertising rents are unlikely to be any more generous simply by adding more teams to the league. Only if the rival has emerged as a significant competitor will the established league derive any benefit from a merger, or what can best be described as a forced expansion. If the established league can expand its revenue base by adding new teams that already have achieved a local and national following, merger will then become a desirable and economically rational business arrangement.³³⁹

336. See *supra* note 255.

337. Compare Cirace, *supra* note 185, at 706 n.182 (discussing how expansion increases unit costs due to extended distance and travel times as leagues add more teams, thus making it an unattractive business venture for franchise owners already sharing in the profits of the league) with Note, *supra* note 60, at 942 n.102, 952 & n.164 (observing that the fewer the number of teams, the greater the share that each franchise owner retains from allocated revenues, which also increases the value of each team because they become a limited financially successful resource).

338. Cf. Wong, *supra* note 151, at 16 & n.42 (reviewing testimony by NFL Commissioner Pete Rozelle regarding the Sports Team Protection Act in which he discusses the issues that franchise owners take into account when considering expansion).

339. The NFL/AFL was the most comprehensive of all sports mergers, because the AFL proved to be the most successful rival league challenger to date, producing such stars as Lance Alworth, Joe Namath, and Len Dawson, and such great teams as the Raiders, Jets, Bills, and Chiefs. In fact, many believe that the AFL's pass oriented offenses were far more popular to gridiron fans than the ground control attacks developed and featured in the older league.

The existence of the limited exemption granted to the NFL and AFL allowing the 1966 merger between the two leagues reflects Congress's concern that without the pooling of drafts, one of the leagues would have faced its untimely demise. Only the players benefit from interleague competition; consumers are unlikely to receive a better entertainment product simply because two leagues are competing for the best talent available among the college ranks.³⁴⁰ Indeed, the loss of the AFL would have resulted in destructive economic hardships, with players and coaches losing their jobs only to await the unlikely emergence of a new league. Many would have had to accept the disquieting reality of a semi-pro existence, or worse still, early retirement.

This last point raises another significant aspect of dual league rivalry, one that any court reviewing a *USFL v. NFL* type situation should not dismiss. While it is true that there is little incentive on the part of existing franchise owners to share the wealth from television revenues, there is some social value³⁴¹ that is achieved whenever more of a desired product is offered to a wider audience. The USFL was very successful in bringing football to those cities not included among the major entertainment markets. Indeed, the promise that the USFL once had as a viable entertainment alternative to the NFL was that of two leagues playing the same sport, but yet not really competing against one another. The leagues scheduled their seasons at different times of the year, and for the most part, the cities represented in the USFL were not in direct competition with the more established NFL teams. If the new league succeeded, this business venture would have confirmed a long held NFL belief that many cities throughout the United States were capable of supporting professional sports league franchises and therefore the geographic market for professional sports

340. In fact, the likelihood is that the quality of the product will lessen when the best talent is dispersed over two leagues.

341. Interestingly, after the district court denied each of the USFL's post-trial motions, the league changed its litigation strategy and argued in a motion seeking injunctive relief that the NFL's market power had created artificial scarcities for professional football, and that those who are affected by these scarcities include football fans and cities, prospective football players, prospective advertisers, and prospective networks. The court ruled that even if there are such scarcities in the supply of professional football, this condition is desirable because it ultimately should invite the formation of a competing professional league. *United States Football League v. National Football League*, No. 84-Civ. 7484, slip. op. at 6-9 (S.D.N.Y. Oct. 1986) (opinion No. 17). This failed strategy seems to be based on the notion that there is a social good that is achieved when there are more teams operating at the same time, providing jobs to talented athletes, expanding the supply of professional sports, and generally contributing to the flow of commercial activity in the entertainment market. *Cf.* Note, *supra* note 60, at 941 ("[E]ven if a rival league dies, its formation has usually helped to satisfy consumer demand by increasing the number of operating franchises.").

entertainment was indeed national in scope. Furthermore, there is a social utility at work whenever a desired product is made available to different sectors of the economy and spread over various regions. A related social advantage is that with a wealth of talented players and knowledgeable coaches around the country, more teams spell more jobs for those who otherwise would enter other segments of the work force, or perhaps opt out entirely.

One must balance the utility of reaching wider audiences, however, against the economics governing professional sports organization where it is apparent that no city is really without the benefit of sports entertainment. As a practical matter, lucrative television contracts ensure the availability of professional sports broadcasting throughout different regions of the country. While the networks broadcast "away games" to local markets, the local affiliates assure that all cities are given a regional team to support. A court reviewing *USFL v. NFL* may have to consider whether a league such as the USFL provided a worthwhile social good in bringing professional football to the Sunbelt, and in creating more jobs for those in the industry.

Hopefully, the Second Circuit will realize that the market should dictate these circumstances, and that the decision not to expand NFL franchises into many southern and western cities is based on market realities that should similarly guide future antitrust decisions. An abiding concern over consumer welfare is not in any way enhanced by forcing leagues to expand franchises, or requiring networks to televise a new league into cities already receiving professional football by way of the NFL's sale of broadcast rights. It is simply not within the economic interests of networks and their advertisers to broadcast and sponsor a new league when football is already made available to the entire nation. While the NFL, in granting franchises, has chosen to ignore many Sunbelt cities, these locations are not without the product itself. Sports leagues, the networks, and advertisers have undoubtedly concluded that the marginal increase in viewership achieved by the addition of new franchises, either by the expansion of an established league or the patronage of a new one, is not worth the commitment of broadcasting time that a new league or more teams within an existing league requires. This is particularly the case if a new league is not greeted with a substantial following. Courts may be forced to balance the social benefits derived from the expanded franchising of established leagues, or the creation of new ones, against the economic costs that increased sports entertainment inevitably brings. The economics of this industry reveals that all cities have access to professional sports, and that in fact, the largest population

centers comprise the greatest share of the television viewing population.³⁴²

Finally, while it is conceivable that a league can perpetrate any number of anticompetitive acts that suggest that it has abused its lawfully acquired market power, those circumstances may not be so easy to prove. In addition, few such instances of anticompetitive or predatory acts have arisen over the years despite the number of sports league and association antitrust cases. Although many courts have stopped short of imposing Sherman Act liability against the various types of sports league trade practices, one would be hard pressed to credit courts with fully understanding the true uniqueness of this industry. Absent a clear showing of predatory anticompetitive behavior, courts should allow the market itself to determine the number of participants in the business of supplying sports entertainment. Courts should not make single league dominance the relevant inquiry in triggering section 2, but rather, whether a particular league found itself without competition because of its own excellence, or as a result of its designedly anticompetitive policies. Regardless of which theory is academically most promising; that is, monopoly power gained through the exercise of superior skill or business acumen, the fortuity of historical accident, or natural monopoly due to increasing economies of scale, the fact remains that any one of these theories, together with the absence of anticompetitive acts, is a far more persuasive way of characterizing the relationship between the antitrust laws and professional sports leagues than are any other theories of liability that fail to consider these unique circumstances.

V. CONCLUSION

This article is not the first to highlight some of the unique aspects

342. The top five metropolitan areas in terms of U.S. television households make up 21.6% of the viewing audience. For example:

<u>CITY</u>	<u>%</u>
New York	7.7
Los Angeles	5.1
Chicago	3.5
Philadelphia	2.9
San Francisco/Oakland	2.4

Telephone interview with Emily Angelides, A.C. Nielsen Co. (April 1, 1987). Not only does network television beam football to cities that are currently without sports franchises, but it is actually drowning the viewers in a "glut" of football programming. See Taaffe, *The Networks' Cupboards Were Bare*, SPORTS ILLUSTRATED, Feb. 25, 1985, at 28 ("[T]here's already too much football on the tube in the fall. An additional football package, the network executives felt, would depress the market even more, drive down advertising rates and erode their revenue bases.").

of antitrust liability that professional sports leagues present. On the contrary, a vast array of legal commentary recently has tracked the antitrust history of professional sports leagues. This article hopefully provides an historical blueprint of the many issues that courts must confront in this area of antitrust law. The modern era of professional sports leagues suggests that both courts and commentators need to readjust some of the earlier thinking on this subject in light of the changing characteristics of league organization. In fact, a more thoughtful look at these modern circumstances reveals that perhaps courts should think again before so easily applying the Sherman Act to the trade practices of professional sports leagues.

On the section 1 side, courts should apply the *Copperweld* decision in the context of professional sports leagues, and find that sports leagues are single entities incapable of engaging in anticompetitive conspiratorial activity that is in restraint of trade. The single entity defense is tied in with the whole notion of interbrand competition. Taken together, leagues are viewed as one competitor among many in the entertainment industry. Even without the availability of the single entity defense, the modern era of professional sports organization militates against a finding of either section 1 or 2 liability. The advent of collective bargaining insulates otherwise unlawful self-regulatory league rules designed to promote league equality. While these trade practices give rise to a strong inference of impropriety, leagues can make use of the nonstatutory labor exemption so long as the restraints qualify as mandatory subjects of bargaining and products of intensive arms length negotiation. The modern era of sports also makes it difficult to seek comfort in section 2's monopoly enforcement powers. Market definition inevitably becomes an exercise in identifying a sports league's market share among the vast array of competing entertainment alternatives available to the buying public. When the relevant market includes these other sectors of the economy, it cannot implicate monopoly power. By comparing the input/output sub-market categories, at least with respect to professional football, it appears that the output market for finished products is saturated with various options of equivalent attractiveness, while the input market is characterized as a situation ripe for monopoly abuse, but where the NFL is without the requisite market power to violate the Sherman Act.

Finally, courts should address three critical inconsistencies in the law. These unprincipled barriers to reasoned antitrust enforcement in the sports league context prevent the achievement of consistent rules and meaningful precedent. First, the Supreme Court should place professional baseball on the same turf with other professional sports

so that it too can become vulnerable to the grass stains of the Sherman Act. Second, courts should begin to appreciate the true uniqueness of professional sports leagues and do more than simply remove these cases from per se treatment. By doing so, there may be a meaningful opportunity to escape invalidity under the rule of reason as well. Lastly, courts need to reconcile the dual aspects of this uniqueness. Under section 1, courts consider sports leagues unique for the purposes of avoiding the per se rule, but not the rule of reason. When it comes to section 2, sports leagues themselves deny that they are unique, because such an admission suggests that they are governed by an inelastic demand curve and that there are no close substitutes that consumers will accept as a replacement for sports entertainment. Courts have found, however, that the product market for sports entertainment consists of the sport itself, suggesting that the leagues are in fact unique and not reasonably interchangeable with other forms of entertainment. On this last point courts have remained consistent, but this article questions whether sports leagues are in fact sufficiently unique for purposes of section 2. As television ratings continue to decline for sports entertainment and consumer preferences shift to other leisure time activities, courts may be forced to readjust their thinking in this area. Arguably, courts should concede that because of the complexities involved in the business structure of professional sports leagues, the trade practices of these entities can be characterized as unique for one aspect of Sherman Act enforcement, while not for the other. Until these complex and unanswered issues are finally resolved, we simply await the excitement of ever more games and the promise of future court battles that are certain to follow.