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Moving the Goalposts: Why Congress Should Consider Extending the NFL's Antitrust Exemption to the DirecTV Sunday Ticket Package

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MOVING THE GOALPOSTS: WHY CONGRESS SHOULD CONSIDER EXTENDING THE NFL’S ANTITRUST EXEMPTION TO THE DIRECTV SUNDAY TICKET PACKAGE

*Jack Milligan**

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I. INTRODUCTION

TELEVISION is the lifeblood of the National Football League (NFL), generating billions of dollars in annual revenue and ensuring the league remains America’s most watched sport. The league’s television deals also play a major role in promoting on-field parity between the teams; half of the revenue gained from the sale of broadcasting rights is distributed equally among the league’s thirty-two teams.¹ In the absence of the NFL’s pooled broadcasting agreements, teams would individually negotiate their broadcasting deals, which could significantly impact small-market teams and, ultimately, the NFL itself. A recent case out of the Ninth Circuit has made this a possibility by opening the door to an antitrust challenge against the NFL and DirecTV’s Sunday Ticket package.² On appeal from a dismissal for failure to state a claim,

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1. Darren Rovell, *NFL Teams Share \$8.78 Billion in Revenue*, ACTION NETWORK (July 13, 2019, 10:00 PM), <https://www.actionnetwork.com/nfl/nfl-2018-19-revenue> [https://perma.cc/4BBL-3WLX].

2. See Nat’l Football League’s Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136, 1143–44 (9th Cir. 2019).

the Ninth Circuit reversed the decision, holding that the plaintiffs had adequately alleged causes of action under both §§ 1 and 2 of the Sherman Act.³

Since 1961, the NFL has been exempt from antitrust liability for “sponsored telecasting” under the Sports Broadcasting Act of 1961 (SBA), allowing the teams to collectively sell their rights through a joint agreement for sponsored telecasts.⁴ However, a number of courts have held that this exemption does not apply to telecasts for which subscribers are charged a fee, which includes DirecTV’s Sunday Ticket.⁵ Rather than disputing judicial interpretations of the SBA, this casenote will argue that Congress should consider simply amending the SBA to provide an antitrust exemption for subscription-based telecasts in order to maintain the NFL’s competitive parity. This casenote will use the Ninth Circuit’s recent decision as a springboard for the discussion.

II. FACTUAL BACKGROUND

A. THE NFL’S BROADCASTING AGREEMENTS

Three agreements govern the NFL’s broadcasting system: (1) the NFL-Network Agreement for local broadcasts; (2) the NFL-DirecTV Agreement for out-of-market broadcasts; and (3) the Teams-NFL Agreement, which pools the teams’ broadcasting rights and gives the NFL exclusive authority to exercise those rights.⁶ The NFL-Network Agreement permits CBS and Fox to broadcast a limited number of local games over cable television.⁷ With the exception of a few nationally televised games, most games are only available on cable within the respective teams’ geographic area.⁸ Under the NFL-DirecTV Agreement, DirecTV obtains all of CBS’s and Fox’s live telecasts and delivers them in a bundled package to its Sunday Ticket subscribers.⁹ In order to watch every game, a consumer must both subscribe to DirecTV and purchase the Sunday Ticket package—an annual cost of over \$250.¹⁰

B. THE NFL’S ANTITRUST EXEMPTION

The NFL’s history of antitrust litigation regarding its broadcasting practices began in 1953 with *United States v. National Football League (NFL I)*,¹¹ in which the court enjoined the league from restricting the sale of telecasts. After *NFL I*, teams competed against each other both on the

3. *Id.* at 1144.

4. 15 U.S.C. § 1291 (1961).

5. *See, e.g.*, *Shaw v. Dall. Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999); *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667, 671 (7th Cir. 1992).

6. *Nat’l Football League*, 933 F.3d at 1148.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. 116 F. Supp. 319 (E.D. Pa. 1953).

field and in the market for broadcasting rights.¹² However, the competing American Football League (AFL) was not restricted from pooling broadcasting rights and entered into an agreement with ABC to pool its broadcasting rights and revenues.¹³ The NFL attempted to enter a similar agreement with CBS in 1961, with Commissioner Pete Rozelle arguing that the league's competitive balance would be destroyed if teams continued to sell their broadcasting rights individually.¹⁴ After being enjoined once again, the NFL successfully lobbied Congress into passing the SBA, which insulated league-wide pooling agreements for sponsored telecasting from antitrust challenges and established parity between the NFL and AFL.¹⁵ The next three decades saw significant improvements in broadcasting technology, prompting professional sports leagues to explore new methods of broadcasting and setting the stage for the NFL-DirecTV Agreement in 1994.¹⁶

C. PROCEDURAL HISTORY

The Ninth Circuit case in question—*National Football League's Sunday Ticket Antitrust Litigation v. DirecTV, LLC*—was initiated when four plaintiffs filed a consolidated complaint against the NFL, each NFL team, and DirecTV on behalf of a putative class of NFL Sunday Ticket subscribers.¹⁷ The complaint alleged that the defendants' interlocking agreements violated §§ 1 and 2 of the Sherman Act by suppressing competition for the sale of professional football telecasts.¹⁸ Specifically, the complaint alleged that in the absence of the Teams-NFL and NFL-DirecTV Agreements, individual teams would compete for the distribution of their telecasts, thereby increasing output and decreasing the price of telecasts.¹⁹ The Central District of California dismissed the complaint for failure to state a claim under either § 1 or 2 of the Sherman Act.²⁰

III. LEGAL BACKGROUND

Significantly, the SBA's antitrust exemption does not apply to collegiate sports telecasts. As a result, when a group of college football programs tried to enter a pooled broadcasting agreement similar to the NFL's, they were held liable for a contract in restraint of trade under § 1 of the Sherman Act.²¹ The Supreme Court determined that the agree-

12. H.R. REP. NO. 93-483, at 2034 (1973).

13. *Id.*

14. U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1346 (2d Cir. 1988).

15. See 15 U.S.C. § 1291 (1961); see also H.R. REP. NO. 93-483, at 2036.

16. See Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136, 1147 (9th Cir. 2019).

17. *Id.* at 1148.

18. *Id.* at 1149.

19. *Id.*

20. See *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, No. ML 15-02668-BRO, 2017 WL 3084276, at *21 (C.D. Cal. June 30, 2017).

21. See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla. (NCAA), 468 U.S. 85, 88 (1984).

ment constituted a horizontal restraint that limited competition for broadcasting rights between the universities, which would decrease the number of telecasts and increase the price of broadcasting rights for college football games.²² Similarly, the NFL has been held liable under § 1 for horizontal agreements to pool teams' property rights in other markets where the NFL is not afforded the protection of the SBA.²³ For example, an agreement between the NFL and the teams to form a separate entity that jointly licensed each team's intellectual property constituted concerted action in violation of § 1.²⁴ Even though the agreement formed a single entity, the Supreme Court held that because the teams had separate business interests as competitors, collectively licensing their intellectual property deprived the marketplace of independent decision-making and, thus, competition.²⁵

While proving harm to competition is relatively easy in cases of horizontal restraints, proving injury from the harm to competition can be more difficult. In order to have standing, plaintiffs must allege that their harm was caused directly by the antitrust violator.²⁶ This is further complicated in cases of multi-level agreements like the NFL-DirecTV Agreement, where the NFL "manufactures" the product that is distributed to consumers by DirecTV. Under *Illinois Brick*, indirect purchasers who are two or more steps removed from the alleged violator in a distribution chain do not have standing to bring antitrust claims.²⁷ As always, there is an exception: when co-conspirators jointly commit an antitrust violation, a plaintiff who is the immediate purchaser from any of the conspirators is directly injured by the antitrust violation.²⁸

A. NATIONAL FOOTBALL LEAGUE'S SUNDAY TICKET ANTITRUST
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On appeal, the defendants argued that the § 1 complaint both failed to allege harm to competition and failed to establish antitrust standing.²⁹ Because the defendants did not argue that the SBA applied to satellite broadcasting, the court assumed it did not apply and *NCAA* controlled the analysis.³⁰ The complaint alleged that the NFL's interlocking agreements imposed similar restraints on competition to those found in *NCAA*: output restrictions on teams' telecasts, a horizontal agreement among competitors, and a restriction on the number of telecasts available to broadcasters and consumers.³¹ The complaint's similarity to *NCAA*

22. See *id.* at 106.

23. See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 202–03 (2010).

24. See *id.* at 197.

25. *Id.*

26. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

27. See *id.* at 730.

28. See *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 750 (9th Cir. 2012).

29. *Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC*, 933 F.3d 1136, 1150 (9th Cir. 2019).

30. *Id.* at 1151.

31. *Id.*

convinced the majority, which rejected a number of the defendants' arguments in turn.³² The most interesting argument raised was that the telecasts required joint action, making the restrictions procompetitive.³³ Here, the defendants tried to distinguish *American Needle*, arguing that the telecasts "could only be created through cooperation between competitors,"³⁴ while *American Needle* "concerned separately owned intellectual property."³⁵ The court responded that the telecasts contained each team's intellectual property and that teams would be able to coordinate their own telecasts in the absence of such an agreement—the exact result Commissioner Rozelle wanted to avoid.³⁶ Additionally, the court compared the NFL's arrangements to those of the other major professional sports leagues, where some, but not all, telecast rights are pooled for distribution.³⁷

The next major issue was whether the plaintiffs had adequately alleged antitrust standing.³⁸ Naturally, the defendants pointed to *Illinois Brick*, but the majority applied the co-conspirator exception from *In re ATM Fee Antitrust Litigation*.³⁹ Because the complaint alleged the plaintiffs' resulting injury was caused by a conspiracy between DirecTV, the NFL, and the NFL teams to limit output, the complaint adequately alleged a cause of action under § 1.⁴⁰ The co-conspirator exception in *ATM Fee* was limited "to cases where an indirect purchaser 'establishes a price-fixing conspiracy between the manufacturer and the [distributor]';"⁴¹ yet, the majority seemed unfazed in applying the exception here, even though the plaintiffs' complaint alleged output restrictions, not a price-fixing conspiracy.⁴² It was on this ground that Judge N. Randy Smith (who authored the *ATM Fee* opinion) dissented, arguing that the plaintiffs' challenge was clearly based on a "pass-on" theory of injury through the distributor, exactly what the *Illinois Brick* rule was designed to prevent.⁴³ According to Smith, the co-conspirator exception applies only "when the co-conspirators fix the price paid by the plaintiff," which the plaintiffs did not allege.⁴⁴ Finally, the court quickly determined the plaintiffs had alleged a cause of action under § 2, which hinged on similar issues.⁴⁵

32. *See id.*

33. *Id.* at 1153.

34. *Id.*

35. *Id.* (citing *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 187 (2010)).

36. *Id.* at 1154.

37. *Id.*

38. *Id.* at 1156.

39. *Id.*

40. *Id.* at 1158.

41. *Id.* at 1157 (quoting *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 749 (1977)).

42. *See id.* at 1158.

43. *Id.* at 1160 (Smith, J., dissenting in part).

44. *Id.* at 1162 (quoting *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 752 (9th Cir. 2012)).

45. *Id.* at 1159 (majority opinion).

IV. ANALYSIS

Thus far, *NFL's Sunday Ticket Antitrust Litigation* only opens the door to an antitrust challenge, allowing the plaintiffs to survive the pleadings stage. The court was correct to apply *NCAA*, given that the SBA applies only to sponsored telecasts. However, the court seems somewhat uninformed about the Sunday Ticket package—and the NFL's broadcasting arrangements in general—which warrants consideration of whether the SBA should apply to subscription-based telecasts, rather than continually subjecting such agreements to antitrust challenges.⁴⁶

As the Ninth Circuit mentioned, the alternative arrangement to the Sunday Ticket package would be for teams to compete with each other in the market for broadcasting rights, like they did in the 1950s.⁴⁷ This has the potential to significantly impair the NFL's signature competitive parity. In the absence of the Sunday Ticket package, the less successful small-market teams would be unable to compete with the major-market teams for the sale of telecast rights nationwide. While the league's salary cap is designed to protect on-field parity, financially disadvantaged teams are still less likely to be competitive on the field.⁴⁸ The NFL's primary method of promoting economic parity is through revenue sharing; the league distributes about 60% of its revenue equally among the teams, with much of the revenue generated from television deals.⁴⁹ The DirecTV deal alone accounts for \$1.5 billion in annual revenue, making up a sizable portion of each team's share.⁵⁰ Ensuring that teams share most of their revenue—rather than compete for it—allows the NFL to better achieve competitive balance, which attracts both fan interest and dollars to the league.⁵¹

The majority also seems to ignore the NFL's role in producing telecasts. In holding that the telecasts were the separately owned intellectual property of each team, Judge Sandra S. Ikuta cited the rule that “the party who actually creates the work, . . . [who] translates an idea into a fixed, tangible expression” owns the copyright.⁵² How this excludes the NFL itself is perplexing when the NFL promotes, schedules, and officiates each and every game—not to mention its role in producing the telecasts. The court's comparison of the NFL's broadcasting arrangements to

46. *See id.* at 1147. Subscription-based telecasts include cable or satellite television contracts for which subscribers are charged a fee. *See id.*

47. *Id.* at 1149.

48. *See* Michael Ozanian et al., *The NFL's Most Valuable Teams 2019: Cowboys Lead League at \$5.5 Billion*, *FORBES* (Sept. 4, 2019, 7:25 AM), <https://www.forbes.com/sites/mikeozanian/2019/09/04/the-nfls-most-valuable-teams-2019-cowboys-lead-league-at-55-billion/#239701382f1b> [<https://perma.cc/FB3A-FKK2>].

49. *See* Howard Bloom, *NFL Revenue-Sharing Model Good for Business*, *SPORTING NEWS* (Sept. 5, 2014), <https://sportingnews.com/us/nfl/news/nfl-revenue-sharing-television-contracts-2014-season-business-model-nba-nhl-mlb-comparison-salary-cap/gu0xok7mphu01x3vu875oeaq6> [<https://perma.cc/4Z3W-8N4V>].

50. *See* Rovell, *supra* note 1.

51. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 *YALE L.J.* 726, 752 (2010).

52. *NFL's Sunday Ticket Antitrust Litig.*, 933 F.3d at 1154.

those of Major League Baseball (MLB) and the National Hockey League (NHL) is also unconvincing.⁵³ The MLB and the NHL both allow teams to compete in the market for telecasts largely out of necessity; the leagues' longer seasons and less uniform schedules would make exclusive pooling arrangements impractical. The Sunday Ticket package, on the other hand, offers procompetitive efficiencies both to NFL teams and consumers.

While the Ninth Circuit was content to characterize the Sunday Ticket package as a restriction on output of telecasts, a better label would be a consumer choice restriction. The broadcast networks still televise each game, but only a few are nationally televised and available without a Sunday Ticket subscription. Because teams are allowed to restrict other teams' telecasts within their geographic territory under the SBA, competition between teams for out-of-market telecasts would not necessarily increase the number of telecasts available nationally. While the Supreme Court in *NCAA* found that the output of telecasts would increase absent the agreement,⁵⁴ this is mainly attributable to the fact that National Collegiate Athletic Association teams are prohibited from restricting other teams' telecasts, unlike the NFL.

The Sunday Ticket package is comparable to a blanket license for musical copyrights challenged in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, in which the Supreme Court held that the sellers of these blanket licenses were not in violation of the Sherman Act.⁵⁵ Although the blanket license involved a one-time purchase for the license of each composer's music, this did not constitute price fixing because the blanket license was more like an entirely new product that the composers themselves could not collectively sell, making it procompetitive.⁵⁶ The Sunday Ticket package could be seen as a blanket license to view every NFL telecast by packaging every game into a single interface to make a new product with lower transaction costs than the cost of purchasing individual telecasts. Further, the Sunday Ticket's Red Zone channel, which shows real-time highlights from every game, is also comparable because the individual teams would be unable to collectively produce such a product. While the composers in *Broadcast Music* were not restricted from individually marketing their copyrights like NFL teams are, it was commercially impracticable to do so, putting them in essentially the same category.⁵⁷

V. CONCLUSION

Although there are some facially anticompetitive aspects to the NFL and DirecTV's Sunday Ticket package, there are also compelling reasons

53. *See id.*

54. *See NCAA*, 468 U.S. 85, 94 (1984).

55. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24 (1979).

56. *Id.* at 22.

57. *See id.* at 20.

for protecting it from antitrust liability. The Sunday Ticket package is a unique product that both decreases transaction costs and helps maintain competitive parity within the NFL. The proposed alternative arrangement shows little promise in promoting competition within the telecast market and poses a danger to the league's weaker teams. While the Ninth Circuit's analysis was mostly correct from a legal standpoint, it was slightly misguided in other areas, suggesting that congressional intervention may be a viable option.